Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	
Charter Communications, Inc.,	)	
Time Warner Cable, Inc., and	)	
Advance/Newhouse Partnership For	)	MB Docket No. 15-149
Consent to Assign or Transfer	)	
Control of Licenses and	)	
Authorizations	)	

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE, THE INTERNATIONAL CENTER FOR LAW & ECONOMICS, AND TECHFREEDOM

October 13, 2015

Introduction and Summary

On behalf of the Competitive Enterprise Institute (CEI), the International Center for Law & Economics (ICLE), and TechFreedom, we respectfully submit these comments in response to the Federal Communications Commission's public notice seeking comment in the matter of the joint applications submitted by Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership to transfer control of various Commission licenses and authorizations pursuant to Sections 214 and 310(d) of the Communications Act of 1934.[1] CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise.[2] ICLE is a global think tank aimed at building an international network of scholars and institutions devoted to methodologies and research agendas supportive of the regulatory underpinnings that enable businesses to flourish.[3] TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition.[4] Our organizations frequently participate in FCC proceedings involving broadband, media, and telecommunications mergers.

In this proceeding, the Commission is reviewing two proposed transactions: first, Charter and Time Warner Cable seek to merge; second, Charter seeks to purchase Bright House Networks, a cable television and broadband provider, from its parent company, Advance/Newhouse.[5] We respectfully urge the Commission to promptly and unconditionally approve these applications, as the proposed merger is likely to serve the public interest by enhancing consumer welfare and facilitating robust competition in the already dynamic markets for broadband Internet access service and multichannel video programming distribution. Although we cannot predict with certainty whether this merger, if consummated, will deliver the benefits suggested by

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1. Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, *Public Notice*, DA 15-1010, MB Docket No. 15-149 (rel. Sept. 11, 2015), *available at* http://goo.gl/uqB3Xw.
2. *About CEI*, COMPETITIVE ENTER. INST., https://goo.gl/NS6bNe (last visited Oct. 13, 2015).
3. *About ICLE*, INT'L CTR. FOR LAW & ECON., http://goo.gl/bzGIuS (last visited Oct. 13, 2015).
4. *About TechFreedom*, TECHFREEDOM, http://goo.gl/NBcM8x (last visited Oct. 13, 2015).
5. Commission Opens Docket for Proposed Transfer of Control of Time Warner Cable, Inc. and Charter Communications Inc. and Proposed Transfer of Control of Bright House Networks from Advance/Newhouse Partnership to Charter Communications Inc., Public Notice, DA 15-733, MB Docket No. 15-149 (rel. June 23, 2015), *available at* https://goo.gl/nn5KfH.

both empirical evidence and economic theory, the Commission can best serve consumers by allowing Charter, Time Warner Cable, and Bright House Networks to join forces.

I. The broadband market is already competitive—and the proposed merger will make it even more so

The proposed transaction will have essentially no effect on head-to-head broadband competition, given that "significantly less than 1% of the census blocks that make up the merged company's footprint contain broadband customers of more than one of the merging companies."[6] Indeed, even this measurement likely overstates the degree of direct competition among Charter, Time Warner Cable, and Bright House Networks today: "because franchise areas do not track census block boundaries and cable companies frequently serve different portions of a census block," the actual degree of direct competition among the three companies is even lower.[7] Nevertheless, the merger will indirectly enhance broadband competition by enabling many consumers to access better broadband services.

Currently, Time Warner Cable's most popular broadband tier offers 15 Mbps downstream throughput.[8] Charter, by contrast, currently offers comparably priced broadband plans with a minimum downstream throughput of either 60 Mbps or 100 Mbps, depending on the area.[9] After the three companies merge, the combined entity—referred to by the applicants as the "New Charter"—intends to offer at least 60 Mbps downstream throughput to over 99% of the households it serves.[10] If these ambitions are realized, many of the 11.7 million Americans who subscribe to Time Warner Cable's broadband service[11] will enjoy faster broadband Internet access at lower prices.

For many consumers, however, these improvements in broadband connectivity may occur much more slowly if the merger is not consummated. Larger firms are generally better-positioned to make costly long-term investments in their broadband networks,

6. Application of Charter Communications, Inc. Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, *Public Interest Statement*, MB Docket No. 15-149, at 42 (June 25, 2015) [hereinafter *Public Interest Statement*], *available at* https://goo.gl/1O3flg.

7. *Id*.

8. *Id.* at 21, n.51.

9. *Id.* at 21.

10. *Id.* at 19.

11. *See id.* at 10.

enabling their customers to enjoy faster Internet connectivity. When broadband providers merge, as the Commission has noted, they enjoy a "greater ability to spread … fixed costs across a larger customer base."[12] Here, the proposed transaction will "generate cost savings in a number of areas," in part due to the significantly enhanced scale of the combined entity.[13] These savings, in turn, will increase the return on investment in infrastructure upgrades, incentivizing the New Charter to spend more in the aggregate on building better broadband networks.[14] Indeed, the merging companies plan to do just that, investing significant sums to not only improve residential services, but also expand the company's geographic footprint in the enterprise broadband market.[15]

This investment will also deliver indirect benefits to consumers by fueling competition in the broadband marketplace. Despite the Commission's repeated determinations that broadband deployment has not been reasonable and timely, real-world developments belie such pessimism. Indeed, looking at the relevant metrics, such as availability, pricing, and performance, the good news is undeniable: the U.S. broadband market is better than ever. As the applicants observe in their public interest statement,[16] and as other commenters have explained to the Commission in recent proceedings,[17] the highly dynamic broadband market is characterized by upgrade cycles in which competitors take turns leaping past one another. Thus, although cable operators have recently held an edge over telcos in high-speed broadband—after years of DSL dominance—the gap between the two is rapidly disappearing as telcos upgrade their broadband networks by pushing fiber optical deeper into their footprints, whether with very-high-bit-rate digital subscriber line (VDSL) technology or fiber-to-the-node (FTTN) or fiber-to-the-premises (FTTP) solutions.

Several telcos have deployed VDSL, relying on a mix of fiber and copper facilities to deliver downstream speeds of 75 Mbps to consumers—as AT&T is already doing in

12. Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd 23246, 23317 para. 184 (2002).

13. *Public Interest Statement*, *supra* note 6, at 31.

14. *See id.* at 32–33.

15. *Id.* at 37.

16. *Id.* at 59–60.

17. *See, e.g.*, Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, *Comments of International Center for Law & Economics*, MB Docket No. 14-57 (Aug. 25, 2014), *available at* http://goo.gl/BWTjZm; Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, *Comments of TechFreedom*, MB Docket No. 14-57 (Dec. 23, 2014), *available at* http://goo.gl/BYSdFd.

eleven markets[18]—while competing vigorously against cable operators for the vast majority of consumers.[19] Meanwhile, some telcos have deployed FTTP, enabling them to deliver gigabit speeds to satisfy the demands of heavy users—as CenturyLink has done in 16 cities,[20] as Verizon has done in 20 cities with its FiOS service,[21] and as AT&T is doing in up to 100 cities.[22] Additionally, new entrants like Google Fiber and Sonic.net have succeeded in deploying fiber-based "third pipes" that provide added competition for incumbent cable and telco ISPs in key markets, while advances in satellite and terrestrial wireless technologies have made wireless broadband an increasingly viable alternative to wireline.

2. The new Charter will provide healthy competition to improving DSL-based broadband offerings

This merger will promote vigorous intra-modal competition between cable and telco broadband providers. As mentioned above, telco DSL-based broadband has recently made tremendous strides in upgrading speeds to compete head-to-head with cable. In late 2012, AT&T, the largest telco provider, announced that it had achieved its goal of upgrading its traditional DSL service to VDSL for 57 million customer locations, or 75% of its wireline broadband footprint.[23] Moreover, these upgraded services have been very popular among consumers, with AT&T's U-verse recording net-subscriber gains exceeding 600,000 per quarter in six of the seven quarters up through Q3 2014.[24] To put those numbers into perspective, from Q2 2013 to Q3 2014, AT&T grew its U-

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18. Sean Buckley, *AT&T Serves up 75 Mbps U-verse Broadband Speed Tier*, FIERCETELECOM (Dec. 18, 2014), *available at* http://goo.gl/9n1Zur; Sean Buckley, *AT&T Extends 75 Mbps U-verse Option to 7 New Markets*, FIERCETELECOM (Feb. 9, 2015), *available at* http://goo.gl/2JqZVS.

19. *See Public Interest Statement*, Exhibit C, *Declaration of Christopher L. Winfrey*, para. 8, n.2 ("Time Warner Cable's most popular speed tier, however, remains 15 Mbps.").

20. *See CenturyLink Expands its Gigabit Service to 16 Cities, Delivering Broadband Speeds up to 1 Gigabit per Second*, CENTURYLINK (Aug. 5, 2014), *available at* http://goo.gl/lqaDsW.

21. *See FiOS Availability*, VERIZON, http://goo.gl/Ofel18 (last visited Oct. 13, 2015).

22. Sean Buckley, *AT&T Says it Can Reach its FTTP Goals Even with Reduced CapEx Budget*, FIERCETELECOM (Mar. 5, 2015), available at http://goo.gl/xgYYjU.

23. *See AT&T to Invest $14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services*, AT&T (Nov. 7, 2012), *available at* http://goo.gl/ZrhyXF.

24. *See AT&T Reports Strong Results in First Quarter While Investing in Growth Transformation*, AT&T (Apr. 22, 2014), *available at* http://goo.gl/WpFwTZ (AT&T gained 634,000 U-verse subscribers in Q1 2014, which "marks seven consecutive quarters with U-verse broadband net adds of more than 600,000").

verse broadband subscriber base by roughly 25%[25]—about 2.6 million net additional subscribers—while Time Warner Cable's broadband subscriber base grew just 4%—or about 430,000 net additional subscribers.[26]

Similarly, Verizon's FiOS service has proven to be extremely popular with users, boasting an enviable penetration rate of 40.6% (meaning that almost half of all consumers with access to FiOS have chosen to subscribe to it),[27] and Verizon intends to continue building out FiOS to eventually cover 70% of its wireline footprint.[28] And CenturyLink, the third largest telco, is keeping pace with AT&T and Verizon, deploying FTTN VDSL service with 10+ Mbps speeds to 65% of its footprint,[29] and deploying ultra-high-speed FTTP service to residents in eleven major cities and to businesses in five additional cities.[30]

If the merged entity succeeds in significantly upgrading its nationwide broadband infrastructure and offering faster broadband without higher prices,[31] many customers who currently reside in areas covered by Time Warner Cable but subscribe to VDSL broadband services may reconsider their choice of provider. This competitive pressure will, in turn, push many VDSL-based broadband services to improve their service offerings as well. This intensifying competition will thus benefit broadband consumers throughout the merged entity's footprint, whether or not they subscribe to the New Charter. This will be competition at its best.

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25. U-verse grew from approximately 9.4 million subscribers in Q2 2013 to 12 million subscribers in Q3 2014. *See AT&T Reports Solid Revenue Growth on Strong Wireless Gains Driven by Quality Network Performance and Continued U-verse Growth*, AT&T (July 23, 2013), *available at* http://goo.gl/I1Lp6U; *AT&T Reports 2 Million Wireless Net Adds, Record-Low Third-Quarter Postpaid Churn and Solid U-verse Subscriber Gains in Third-Quarter Results*, AT&T (Oct. 22, 2014), *available at* http://goo.gl/ay8lAA.
26. *Compare id. with Time Warner Cable Reports 2014 Fourth-Quarter and Full-Year Results,* TIME WARNER CABLE (Jan. 29, 2015), *available at* http://goo.gl/86u5ce *and Time Warner Cable Reports 2013 Second-Quarter Results*, TIME WARNER CABLE (Aug. 1, 2013), *available at* http://goo.gl/r0hZRp.
27. *Edited Transcript: VZ — Q3 2014 Verizon Earnings Conference Call*, THOMSON REUTERS STREETEVENS, at 7 (Oct. 21, 2014), *available at* http://goo.gl/SYkjDd.
28. Jacob Siegal, *Verizon Just Killed Your Dreams of Getting FiOS in Your Neighborhood*, BGR (May 14, 2014), *available at* http://goo.gl/pp3GaZ (Verizon CFO quoted as stating that FiOS will soon pass 19 million homes, or 70% of the company's legacy footprint, but will not cover the remaining 30%).
29. *See* CenturyLink, *Ex Parte In re Connect America Fund: CenturyLink Rural Broadband Experiment Expression of Interest*, WC Docket No. 10-90 (Mar. 7, 2014), *available at* http://goo.gl/vthM47.
30. *CenturyLink Expands its Gigabit Service to 16 Cities, Delivering Broadband Speeds Up to 1 Gigabit Per Second*, CENTURYLINK (Aug. 5, 2014), *available at* http://goo.gl/lqaDsW.
31. *See supra* notes 8–11 and accompanying text.

3. The Commission should approve the proposed transfers without imposing conditions on the merging parties

In many recent merger proceedings, the FCC has insisted that firms seeking to merge agree to a panoply of "voluntary" conditions, often made binding upon the merged entity through administrative consent decrees. Here, we urge the Commission to refrain from demanding that the New Charter abide by specific conditions, and instead approve the proposed merger outright. If, however, the FCC elects to condition its approval of this merger on the applicants agreeing to certain conditions, the Commission should ensure such conditions are relevant to the particular transfers at issue—not the merger as a whole—and that they are grounded in concrete, specific harms unique to the applications before the Commission.

The Commission is empowered by the Communications Act of 1934, as amended,[32] to review a proposed transaction if it involves the transfer of telecommunications facilities or radio spectrum licenses. Under Section 214(a) of the Act, "[n]o carrier … shall acquire or operate any [telecommunications] line" without first obtaining from the Commission a certificate of public convenience and necessity.[33] Similarly, under Section 310(d), no "station license … shall be transferred, assigned, or disposed of … except … upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[34] Based on these statutory provisions, the Commission effectively reviews proposed mergers in their entirety if they entail the transfer of telecommunications facilities or radio spectrum licenses, regardless of the centrality of such transfers to the merger.[35]

In justifying its transaction reviews, the Commission has pointed to Section 303(r) of the Communications Act, which authorizes the agency to "prescribe … restrictions

32. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–720 (2012 & Supp. 2013)), *available at* http://goo.gl/EQvLXP.

33. 47 U.S.C. § 214(a).

34. 47 U.S.C. § 310(d).

35. *See* Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd 3160, 3238 (Furchtgott-Roth, Comm'r, concurring) ("[T]he transfer of the licenses … is simply not the same thing [as the merger]. … [A]sking whether the particularized transactions … would serve the public interest … entails a significantly more limited focus than contemplating the industry-wide effects of a merger … ."), *available at* https://goo.gl/wu4jPC.

or conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."[36] The Commission has also referenced Section 214(c) of the Act, which authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[37] Therefore, the Commission argues, its public interest authority gives it greater ability to impose conditions than if it were just a competition authority.[38]

The Commission uses its power to review transactions to extract from merging parties "voluntary" concessions that are either unrelated to the competition review at issue or that would exceed the Commission's legal or constitutional authority if imposed through ordinary rulemaking or adjudication. Increasingly, transaction approvals come with comically long lists of conditions, including divestitures of some customers and/or spectrum, as well as other wildly unrelated remedies.[39] For instance, in the Comcast-NBCUniversal merger, approved in 2011, the conditions ran nearly thirty pages, including (1) a requirement that Comcast adhere to the Commission's 2010 Open Internet Order regardless of whether it survived judicial review (it did not),[40] (2) rate regulation of Comcast's broadband service, and (3) specific requirements on the channels Comcast offered in its cable packages.[41] Similarly, when the Commission approved the SpectrumCo transaction in 2012, one of the conditions was a data roaming rule.[42] Such conditions create a patchwork of rules and obligations, coerced without sound economic justification, in a fashion largely unreviewable by courts, and in contravention of limits placed on the Commission's authority by Congress and the

36. 47 U.S.C. § 303(r); *see also, e.g.*, Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations, *Order*, 26 FCC Rcd 17589, 17600 para. 26 (2011).

37. 47 U.S.C. § 214(c); *see also, e.g.*, Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, 13929 para. 30 (2009).

38. *See, e.g.*, 24 FCC Rcd at 13929 para. 30.

39. For an extensive discussion of FCC conditions on media and telecommunications mergers, see T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC* 14–31 (Phoenix Ctr. for Advanced Legal & Econ. Pub. Policy Studies, Phoenix Center Policy Paper No. 49 2015), *available at* http://goo.gl/JMZ42w.

40. Verizon v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014).

41. *See generally* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, Appendices F–H, 26 FCC Rcd 4238, 4430–4509 (2011), *available at* https://goo.gl/R4aiH1.

42. *See* Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, *Memorandum Opinion and Order*, 27 FCC Rcd 10698, 10742–743 para. 120 (2012), *available at* https://goo.gl/8P8m3f.

courts. Consumers cannot be expected to understand why different rules apply to different products and services. Future transactions are needlessly complicated, with the industry experiencing increased regulatory uncertainty.

In each case where the Commission has imposed conditions, even though they frequently bear little or no relationship to the competitive issues created by the license transfer under review, the Commission has claimed that, absent the commitments, the proposed transactions would have resulted in significant public interest harms, leading the agency to reject the transaction. Because the Commission's standard of review is so broad, transacting parties bear the burden of proving the benefits of their case before the agency itself, and the Commission's decision receives substantial deference in court, this threat is enormously powerful, and the Commission is able to extract a wide range of "voluntary" concessions.

In effect, the agency uses transaction reviews to impose the kinds of regulations that would otherwise require a formal rulemaking. In addition to side-stepping notice-and-comment requirements, this regulation-by-merger-condition creates a crazy quilt where different rules apply to different companies, sometimes in different markets. In addition to these costs, the Commission's process and its interpretation and exercise of its authority to impose conditions leads to harmful rent seeking. As economist Hal Singer has noted, "the FCC's discretion to hold up telecom mergers in return for behavioral remedies invites 'rent seeking' activity by competitors, who use the FCC's merger review as a basis to lobby for welfare-reducing obligations on their rivals."[43]

The Communications Act, however, contemplates clear limitations on the Commission's scope of transaction review. Section 310(d) states that the Commission "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license *to a person other than* the proposed transferee or assignee."[44] Unfortunately, on several occasions, opponents of mergers and acquisitions involving license transfers have successfully encouraged the Commission to do exactly this.

The Commission claims that its use of conditions has generally been aimed at remedying specific harms likely to arise from proposed transactions, or to ensure that promised potential benefits are realized.[45] It has also stated that it generally will not impose

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43. Hal Singer, *Which Way Will Tom Wheeler Take the FCC: Follow the Blog Trail*, FORBES (May 6, 2013), *available at* http://goo.gl/xwMHL.

44. 47 U.S.C. § 310(d) (emphasis added).

45. 47 U.S.C. § 303(r); *see also, e.g.*, *AT&T-Qualcomm Order*, *supra* note 36, 26 FCC Rcd at 17600 para. 26.

conditions to remedy pre-existing harms or harms that are unrelated to the transaction.[46] We agree, and believe that the law requires that position. We urge the Commission in the strongest terms to put its rhetoric into practice and approve the proposed merger without conditions.

Respectfully Submitted,

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46. *See, e.g.*, *AT&T-Centennial Order*, *supra* note 37, 24 FCC Rcd at 13929 para. 30.