DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149.

It is quite clear the Commission's majority does not believe that the merger of Charter, Time Warner Cable, and Bright House is in the public interest. This *Order* spends over 100 pages detailing the harms that would allegedly result from the transaction. And when the discussion turns to the merger's purported benefits, the words "modest" and "minimal" are used over and over again.

So why is the Commission approving this merger? Because it has turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy. Today, the Commission forbids Charter from adopting any usage-based pricing, even forbidding the company from providing discounts to customers who use little data. It mandates settlement-free interconnection and actually goes so far as to adopt a four-page document setting forth the details of Charter's interconnection requirements. It embraces rate regulation, ordering Charter to offer a 30/4 Mbps broadband service to certain customers for $14.99 a month and even details how many households must purchase this service. Notwithstanding its alleged concern about Charter's post-merger size, it requires the company to become even bigger by conscripting Charter to build out to two million additional locations (overbuilding one of those two million). It requires Charter to report to the Commission the latitude, longitude, address, and 15-digit census block code of every one of those two million locations, along with the date the company passes each location and begins to offer service with 60 Mbps download speed. It installs an independent monitor within the company to ensure compliance with these onerous conditions. And it imposes many of these conditions for the better part of a decade.

To be sure, one might ask: If Charter is willing to comply with these regulatory decrees as the price of getting this transaction approved, why should an FCC Commissioner object? In the AT&T/DirecTV merger, for example, I voted to approve in part, notwithstanding my opposition to numerous conditions that had nothing to do with that transaction. But at a certain point, a difference in degree becomes a difference in kind.

In this case, we have reached that point.

In particular, this *Order* sets the stage for the Commission to target paid peering and usage-based pricing on an industry-wide basis. The *Order* makes clear the Commission's view that paid peering and usage-based pricing are inherent threats to online video distributors. For example, the Commission finds "that *by their very nature*, data caps and [usage-based pricing] in use by wired [broadband Internet access service] providers currently significantly and chiefly affect online video traffic."[1] And if these practices are so harmful that Charter must not be allowed to engage in them, it is only a matter of time before no ISP will be permitted to do so.[2]

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[1] *Order* at para. 85 (emphasis added).

[2] The writing is on the wall. *See*, *e.g*., John Eggerton, Wheeler: Charter Conditions Create Competition Zone, *Multichannel News* (Apr. 28, 2016) (stating, pre-adoption, that with full range of non-merger-specific conditions, "we created a seven-year innovation and competition zone"), *available at* http://www.multichannel.com/news/finance/wheeler-charter-conditions-create-competition-zone/404539. Recall, too, that in this area the agency has dutifully changed its tune when special interests have demanded FCC intervention. *Compare*, *e.g*., Statement of Tom Wheeler, November 2015 Open Commission Meeting Press Conference, http://fcc.us/1XhtV4X at 47:27-47:42 (stating, with respect to T-Mobile's Binge On offering, that "we said that we were pro-competition and pro-innovation. Clearly this meets both of those criteria. It's highly innovative and highly competitive"), *with* Letter from Roger Sherman, Bureau Chief, Wireless Telecommunications Bureau, to Kathleen Ham, Senior Vice

(continued….)

And consider just how radical the Commission's approach is. Paid interconnection arrangements have long been commonplace in the Internet economy. And without government regulation, prices have fallen dramatically. Indeed, transit rates have fallen by more than 99% over the past two decades.

Or consider usage-based pricing. A fundamental tenet of our free-market economy is that you will often have to pay more to purchase more of a good or service. Not every restaurant is an all-you-can-eat buffet. The more clothes you buy at a department store, the more that you have to pay. And this is even true with respect to basic necessities. The more water or electricity that you use at home, the higher your monthly bill will be.

But today, the Commission signals the beginning of the end of this concept in the online world. And I suppose it has a populist appeal. At first, many consumers are happy to learn that they can use as much data as they want without paying more. Indeed, I suspect that people would be excited at first if they were told that the government was mandating that grocery stores charge customers a single fee and allow them to leave with as much as they could carry away. But soon, many would feel the burn once they saw the significantly higher price of admission—especially those who didn't want to buy much food.

And the same is true with respect to broadband. When the government forbids usage-based pricing, it is requiring Americans who use less data to subsidize those who use more data. The elderly woman on a fixed income who uses the Internet to exchange e-mail messages with her grandchildren must pay more so that an affluent family watching online HD video for many hours each day can pay less. This isn't fair, and it certainly isn't progressive.

Indeed, the record makes clear that online video places enormous demands upon the networks of Charter and Time Warner Cable and increases their capital costs. Who should bear those costs? The Commission's view is now that all customers must do so equally. As a result, the natural response of ISPs will be to increase prices on *all* consumers in order to amortize the cost of serving a bandwidth-hungry few. This is the paradigmatic case of the 99% subsidizing the 1%.

My view is that decisions like this are best made by the private sector. Some companies may choose to offer usage-based pricing; others may not. But the government shouldn't rule out all but one business model. It is certainly not *per se* unreasonable for an ISP to ask high-bandwidth users to shoulder more of the burden than low-bandwidth users.

Turning to other conditions set forth in the *Order*, the Commission doesn't bother to make any effort to explain how its regulatory grab-bag has anything to do with addressing any transaction-specific harms. In fact, it virtually revels in the disconnect. For example, in one paragraph, the Commission dismisses Charter's proposed low-income broadband program as not being "a transaction-specific benefit."[3] But in the very next paragraph, the Commission proposes to impose its own low-income broadband as a condition of the transaction![4]

And what about the program's specifics? The Commission requires Charter to offer a 30 Mbps service for $14.99 a month to qualifying low-income households. But just last year, the Commission required AT&T to offer a 10 Mbps service for $10.00 a month. And earlier this year, the Commission decided that our Lifeline program should only support 10 Mbps services. Where do these numbers come

(Continued from previous page)
President, Government Affairs, T-Mobile (Dec. 16, 2015) (stating that "concerns have been expressed about the Binge On program" and initiating FCC investigation into Binge On in order "to understand how this service relates to the Commission's" net neutrality rules), *available at* https://assets.documentcloud.org/documents/2648554/Letter-to-Kathleen-Ham.pdf.

[3] *Order* at para. 452.

[4] *Order* at para. 453.

from? Who knows? There is no rhyme or reason. They just reflect whatever tribute a Commissioner (or three) is inclined to demand at a particular point in time for approving a merger.

And what about the build-out requirements? What do they have to do with the transaction? Nothing. The Commission simply finds that "the public would benefit from increased residential buildout, post transaction" and decrees that Charter shall "pass, deploy, and offer" broadband service "capable of providing at least a 60 Mbps download speed to at least two million additional mass market customer locations within five years of closing" and that at least one million of these new customer locations must be "outside of its footprint where any provider other than New Charter offers 25 Mbps or faster" broadband service.[5]

Where do these numbers come from? Why two million new locations, as opposed to one million or three million? Again, there is no explanation. But that isn't surprising, for there is none—at least nothing that has any rational connection with the merits of this transaction or public policy. Rather, the figures simply constitute the most that the Commission could demand of Charter before the company would walk away from this merger.

Moreover, the build-out requirements highlight the *Order*'s incoherence. On the one hand, the Commission imposes a number of conditions supposedly due to concerns about harms that will result from Charter's post-merger size. But on the other hand, the Commission imposes build-out requirements that will have the inevitable effect of making Charter larger than it otherwise would be! And unless Charter chooses to exclusively overbuild areas served by Comcast, which I find highly unlikely, Charter's increased broadband market share will come at the expense of smaller competitors. So one of the Commission's answers to the harms caused by increased concentration is . . . to further increase concentration? It is as if the Commission's left hand doesn't know what its far-left hand is doing.

To be clear, I don't blame Charter for agreeing to all of these conditions. The Commission had the company over a barrel, and Charter decided that it was in its interest to accede to the Commission's demands. As a Commissioner, it's not my place to second-guess a company's assessment of its self-interest.

But it *is* my job to safeguard the public interest. And the fallout from this *Order* will not be limited to Charter alone. Indeed, the negative externalities of this *Order* are the primary reason why the Commission is adopting it.

This *Order* moves the Commission one step closer to an across-the-board ban on usage-based pricing. This *Order* moves the Commission one step closer to an across-the-board ban on paid peering. This *Order* moves the Commission one more step down the path of micromanaging where, when, and how ISPs deploy infrastructure. And this *Order* is another significant step away from the free-market policies that Democrat- and Republican-led FCCs alike applied for decades—policies that made our Internet economy the envy of the world.

Some might say that all of this couldn't possibly happen. But these are the same people who confidently predicted that the Commission wouldn't classify broadband Internet access service as a Title II, common-carrier service. These are the same people who said, after the *Title II Order* was adopted, that zero-rating plans would be safe from Commission attack. And these are the same people who assured us that the Commission had no interest in regulating broadband rates. In short, recent history has shown that when it comes to Internet regulation, the conventional wisdom and agency assurances have been quite wrong.

So for me, this *Order* is a bridge too far. The Commission is not approving this merger because it believes that the merger is in the public interest—that is, because the inherent benefits outweigh the

[5] *Order* at paras. 387–88.

harms. Rather, it is approving the merger because it presents an opportunity for the Commission to check more items off its regulatory wish list.

This brings me to a final point, one I've pondered for some time. The brazenness of this *Order* raises a serious question: What should be the FCC's role in reviewing transactions? This is how I currently see it, informed by years of experience both at the U.S. Department of Justice's Antitrust Division (where I worked on mergers and acquisitions) and at the Federal Communications Commission.

Here's how things work at the Department of Justice. Parties submit pre-merger notification documents pursuant to the Hart-Scott-Rodino (HSR) Act. Of particular importance, they submit what are known in the antitrust world as "4(c)" and "4(d)" documents—materials that shed light on how the merging parties themselves see the effects of the proposed deal. The Division staff review the HSR documents, especially the 4(c) and 4(d) documents, and determine whether more searching scrutiny is required. If it is, the Division issues what is known as a "second request," a more detailed request for documents. Ultimately, the Division staff analyze all the evidence and soberly detail the aspects of a transaction. What is the product or service market? What is the geographic market? Who are the competitors? What are their market shares? What effect would consummation of the transaction have on competition? What are the competitive harms? Are there efficiencies that might be recognized? Could the combined entity engage in vertical restraints of trade? Are any divestitures necessary in instances of horizontal overlap? And so on. The career staff determine what the resolution should be and make a recommendation to the Assistant Attorney General of the Antitrust Division. Based on that recommendation, the Assistant Attorney General then decides upon the Justice Department's approach to the deal. And the Justice Department is accountable to the courts should it seek to block a merger or impose conditions. This professional process has been well-established for decades.

Here's how things work at the Federal Communications Commission. Parties file the requisite notification papers. Then, they wait for the FCC to start the 180-day "shot clock," which kicks off the agency's review and sets the aspirational deadline for decision. (Sometimes, the parties feel compelled to hire a politically connected insider to help get that clock started.[6]) Once the shot clock starts, the staff's review begins. Unlike at the Department of Justice, the process is politicized from the beginning; the FCC staff report to the Chairman's Office and are often overseen directly by someone loyal to the Chairman's Office. Separately, and more significantly, the parties are required to negotiate behind closed doors with the Chairman's Office or Office of General Counsel (which, again, reports directly to the Chairman's Office) on conditions to be attached to the deal. Months can go by without any transparency, internal or external, regarding the ornaments that the Chairman's Office is seeking to place on the Christmas tree. Even Commissioners have no insight as a matter of right, and parties have told me that they are explicitly warned not to tell anyone else at the Commission about the conditions the Chairman's Office is seeking. And when it comes to those conditions, there is no need for them to be relevant to the merger ("merger-specific," in antitrust parlance). Indeed, that's often why the Commission blows so far past the ill-named "shot clock"; it takes time to get the parties to "voluntarily" submit to the forced extraction of every ounce of extraneous "value." Once the Chairman's Office agrees with the parties on what the resolution will be, FCC staff write an order implementing the Chairman's deal. That order is then sent to other Commissioners' offices, with the Chairman's favorable vote sending the unmistakable message that the order is a *fait accompli*—take it or leave it, with perhaps a little latitude to accommodate a few more goodies requested by a member of the majority.

Given how badly broken the current merger review process has become at the FCC—how rife it is with fact-free, dilatory, politically motivated, non-transparent decision-making—I believe Congress should implement major reforms of the procedural and/or substantive rules governing the Commission's assessment of transactions. Either the FCC should employ something akin to the Antitrust Division's

[6] *See*, *e.g.*, http://apps.fcc.gov/ecfs/document/view?id=60001120867.

process and standard of review (which, of course, could yield an objection of redundancy) or its authority in this area should be significantly restricted (no serious, knowledgeable observer will maintain that the professional staff at the Justice Department or Federal Trade Commission do not or cannot adequately protect the public interest). Whatever the legislature's preferred approach, the status quo at the FCC when it comes to transactional review cannot continue. The ideologically inspired extortion has to end.

In sum, I do not believe that the adoption of this *Order* is in the interest of the American people. I therefore dissent.