STATEMENT OF
COMMISSIONER MICHAEL P. O'RIELLY
APPROVING IN PART, CONCURRING IN PART, AND DISSENTING IN PART

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.

The item before us approves the applications of Charter Communications, Time Warner Communications, and Advance/Newhouse Partnership (also known as Bright House) to transfer Commission licenses and authorizations, subject to conditions. After reading the item, conducting ex parte meetings, and reviewing the record, I vote to approve the transfer of control. This notwithstanding, I concur on certain conditions imposed on the combined entity and reject others that either exceed the Commission's authority or the bounds of the applications before us.

At its core, the idea to merge two or more firms is generally a business decision. A company that has been risking shareholder or private capital to produce a good or a service to the American people may determine that economies of scale, strategic synergies or market realities justify or necessitate it pursuing the acquisition of another company or companies. After reaching a meeting of the minds among differing company leaders, the entities may be required to seek approval from regulators to complete the transaction. At the FCC, the "hook" is the requirement to obtain our consent to transfer licenses. That's when the real fun begins.

One would hope that, as stewards of the public trust, all federal regulators that oversee different aspects of American commerce would be held to certain standards and required to engage in reasoned decision making. Sadly, that is not always the case, as the application-specific review process envisioned by Congress bears little resemblance to the all-encompassing merger review now employed by the Commission in its never-ending attempt to gain concessions from the applicants in order to promote certain overarching social policies and set "precedent" whenever presented with such an opportunity. And the larger the size and profile of a merger, the bigger the opportunity.

In this specific case, the Commission has certain responsibilities under the statute. In particular, we are charged with reviewing the transfer of wireless licenses (i.e., cable television relay service licenses, satellite communications licenses, and private wireless licenses) and section 214 authorizations to ensure that the transfer is in the "public interest, convenience, and necessity."[1] This review may include, under section 310(d), whether the combined entity has the citizenship, character, technical, financial, and other qualifications to operate the licenses.[2] Here, the transfer of licenses and authorizations would not violate our rules and the new licensee, New Charter, seems adequately qualified to hold them under section 310 and other provisions.[3]

Over the years, however, the Commission has considered the potential impact of a merger on the local marketplace, and more specifically, competition within specified geographic and product markets, to determine whether a transaction serves the public interest. Others argue that this function should be left

[1] 47 U.S.C. § 310(d); *see also id.* § 214(a) (stating that the Commission must determine whether the acquisition is in the "public convenience and necessity.").

[2] *Id.* § 308(b).

[3] The amount of debt the merged company will maintain is a legitimate concern given the past experience with cable companies over-leveraging and allowing company plant to deteriorate. This concern, however, is not significant enough in this case to warrant the denial of these applications.

to the Department of Justice as part of its antitrust review.[4] Despite this legitimate debate, it would seem irrelevant, in this instance, because the three companies do not operate in the same markets today for video, telephony or broadband. In fact, there is de minimis overlap in service territories or local franchise footprints. As acknowledged in the item, "[a]s an initial matter, we note that because there is almost no overlap in the local competition distribution footprints of Charter, Time Warner, and Bright House, the proposed transaction does not result in any direct reduction in local competition for video or BIAS."[5]

Having found no issues yet, the Commission turns to a questionable and non-statutorily-driven approach, examining the potential influence or future hypothetical incentives of New Charter based on the combined size, facilities owned or relationships held, and imposing conditions to "remedy" perceived "harms." This approach is typically reserved for the largest or most controversial transactions, highlighting that it is not a process required by law, but rather a Commission-driven exercise to use transactions as vehicles to accomplish policy goals that it could not achieve through rulemakings alone.

To achieve the desired results, the Commission determines that the combined company would have the ability to dictate favorable outcomes against other entities because of the merged company's leverage. Under almost every measurement, the entities that will combine to form New Charter would seem hard pressed to influence anything, especially considering the ever-changing services which they offer and markets in which they operate. However, for various reasons, the applicants offered a bevy of conditions to counter any potential "harm" from the merger. Rejecting most of the applicants' arguments on the benefits of the merger itself, the staff recommendation rests mostly on these additional conditions, as modified by staff, and their enforcement going forward as justification for approving the applications. Indeed, some of the conditions are not even merger-specific, much less license-specific.

In most circumstances, I find it difficult to argue against merger conditions that a company seeks to have imposed on itself. While it can be debated as to whether voluntary commitments are truly voluntary in light of the Commission's process, if a company is willing to constrain itself, and even if the Commission makes modifications that the company finds agreeable, I am hard pressed to see a need to stop these from going forward, even if I strenuously disagree with the reasoning, arguments, legal justification, wording, substantive direction or outcome. To put it more simply, if a company wants to shoot itself in the metaphorical foot, who am I to stop it from doing so? As such, I concur with the conditions contained in the item to the extent that they are agreed upon by the applicants, except as outlined in the subsequent paragraphs.

Where I disagree and cannot acquiesce are those circumstances when conditions impact a merged company in a way that harms or undermines its ability to serve subscribers, or the Commission seeks to establish new precedent that is broader in scope than the application before it. Moreover, I cannot support conditions that are not transaction-related. Using the same metaphor, a company shooting its own foot becomes extremely problematic to me if it leads to the Commission taking the gun and inflicting similar wounds on other companies.

Examining the proposed conditions in detail and reading the corresponding reasoning for each condition reveals some very disturbing directions. First, the item conjures up the threat that New Charter could impose data caps and usage-based pricing to harm online video distributors, more commonly referred to as over-the-top video providers. While the validity and length of the outright prohibition of

[4] It is fairly surprising and disappointing to see the Commission represent that it has worked hand and glove with the Department of Justice on the merger application. Such a "partnership" is nowhere to be found in law. In fact, the creation of the Commission as an independent agency allows it to act outside of the bureaucratic entanglement of any current Administration. To coordinate the review process in order to divide up the bounty of concessions from the applicant is not proper or appropriate. Perhaps this should be expected when the personnel used by the Commission to head its merger review team is on loan from the Justice Department.

[5] *See supra* ¶72.

data caps and usage based pricing for seven years is highly dubious, I disagree with the notion and verbiage that these pricing mechanisms should be deemed problematic in other circumstances. And yet, the item repeatedly condemns such practices for the industry as a whole.[6] The Commission has scant evidence that New Charter could or would implement data caps or usage-based pricing, especially since none of the applicants utilize them now. The bigger issue is that the Commission seems to suggest that any large cable company should be prevented from doing the same, an answer to a question which the record was not designed to resolve. Therefore, any statements or conclusions to that effect are overblown and inappropriate. Whether one likes data caps and usage-based pricing in theory is irrelevant, and the Commission's dicta has no place in this proceeding.

Turning to the creation of New Charter's "Low-Income Broadband Offerings," the item is refreshingly honest in admitting that this condition has nothing to do with the transaction itself. In fact, the item states, "We find that Charter's proposed low-income broadband program is not a transaction-specific benefit. We agree with DISH that any of the Applicants could offer a low-income broadband program absent the transaction. Indeed, Bright House already offers such a program."[7] Nonetheless, the item then ups the ante by increasing the enrollment targets and enforcement mechanisms. Ultimately, it is added as a condition for the merger approval on the theory that it is a counterweight to the public interest harms of the transaction. But these changes don't make the program any more relevant to the transaction than it was when the applicants made the initial offer, nor does the item even attempt to justify this as a remedy to any transaction-specific "harm." As such, it is merely the price of getting a merger approved and a giveaway to satisfy a political goal of some people at the expense of everyone else.[8]

It is highly inappropriate for the Commission to include items or conditions that are not part of the transaction itself as a price for approval. In fact, the Commission has made a point of avoiding the practice in some prior transactions, even appearing critical of outside parties that sought unrelated concessions.[9] I truly hope that this is an aberration – perhaps an attempt to make the most of the last major transaction to come before the current Commission.

But if such brazen politics are going to rule the day, why not just ask for cold hard cash? Would $300 million act as a sufficient counterweight? Can we establish a special bank account for the Commission to collect such payoffs? If a company offered to build homeless shelters or donate fire trucks to every local franchise authority, would such offers count as counterweights too? Is there any

[6] Examples of such broadly applicable language include: "BIAS providers such as New Charter can hinder third-party online video competition through practices such as data caps, usage-based pricing (UBP), and discriminatory stand-alone residential BIAS pricing." (*see supra* ¶ 48); "We find that the record in this proceeding demonstrates that data caps and UBP can harm online video completion." (*see supra* ¶ 84); "We find that by their very nature, the data caps and UBP in use by wired BIAS providers currently significantly and chiefly affect online video traffic." (*see supra* ¶ 85).

[7] *See supra* ¶ 452.

[8] *Id*. ("Nevertheless, we find that the public would benefit from programs designed to bridge the digital divide.").

[9] *Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion & Order, 30 FCC Rcd 9131, 9203 ¶ 191 (2015) (stating, in response to allegations of potential harms, that "[t]o the extent that there potentially is an industry-wide public interest harm associated with volume discounts as such, it has not been established on the record before us, and it would be beyond the scope of this proceeding in any event as it is not transaction specific."); *id*. at 9229 ¶ 253 (finding that concerns about the set-top box market "raise broader regulatory policy questions that are more appropriately addressed in the rulemaking context" and that, "[g]iven the lack of a transaction-related harm, . . . [the Commission] decline[d] to adopt the conditions requested by the commenters or to take other action in this context."). Similarly, the Commission went out of its way to argue that an offer made by an applicant to deploy fixed wireless local loop service to 13 million households in mostly rural areas within four years was not shown to be transaction specific. *See id*. at 9272-9273 ¶¶ 370-375.

limitation to the counterweight calculation? Once delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption.

Moreover, non-transaction-specific conditions such as these actually cause harm to the applicant's existing subscribers. Specifically, this new program will result in increases in the cost of cable and broadband service for every current cable subscriber of the three companies, especially impactful for those living just above the poverty line. What an amazing result: the item actually makes service more expensive for those that tend to rely on certain services, such as video services, to the greatest degree. I object.

Similarly, the build-out requirement conditions are equally objectionable under the same premise. This requirement harms the existing subscribers of both New Charter and the other provider(s) to be overbuilt. In particular, the item would force the merged company to initiate service for at least one million residents in areas where another broadband provider already exists and is offering broadband service above a certain speed. There are so many problems with this concocted "remedy" but I will focus on just a few.

First, it diverts capital that the merged company could use to improve service to their existing customers or expand service to households without advanced services, harming these consumers. In effect, current subscribers are going to be forced to pay for the social experiment of government-ordered competition.

Second, it artificially introduces competition into a nearby market of another provider at the expense of that other provider's customers. Absent this mandated condition, the market conditions would determine whether the merged company entered those markets, meaning that the condition will force the existing provider to divert capital from deployment and other pursuits in order to fight a governmentally-mandated competitor through such things as increased marketing costs.

Third, it burdens New Charter with greater leverage and debt costs, potentially threatening the viability of the company, to pay for building out facilities to these areas. Unless this expansion is a smashing success, it unnecessarily puts at risk the capital of company shareholders, which tend to be pension holders and average consumers through one investment vehicle or another.

Having had the audacity to add so many unnecessary, harmful and/or unrelated conditions to the approval of the merger, the Commission does a further injustice by delegating decisions about the length of certain conditions to staff. Specifically, the Wireline Competition Bureau would be authorized to determine whether the interconnection regime and the data cap and usage-based pricing conditions can be sunset after five years, instead of the designated seven. If these conditions are so vital – to the degree that without them the merger can't be approved – how can the decision whether to maintain them be delegated to staff as if it were a commonplace waiver request or license modification? It is not the proper role of the staff of any bureau to decide major policy outcomes such as this.

Further, this Commission's excessive abuse of delegated authority undermines our credibility and circumvents the intention of Congress. At the same time, it weakens the legitimacy of the conditions and places even more power in the hands of the Chairman, who effectively oversees each and every bureau decision. Why does the current FCC leadership find it necessary to usurp the duly appointed rights of Commissioners that will preside here five years from now? It should be no surprise that I object to this illogical and unwise delegation.

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Under the conditions imposed by this Order, New Charter will be carrying a daunting regulatory load from its inception. In an ostensibly free-market economy, no enterprise should ever be hamstrung at the starting line in such a manner, but it is my hope that the company will be able to overcome the onerous burden laid on by a command-and-control Commission and deliver innovative new offerings to Americans. I look forward to seeing what develops.