

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 Consent to Assign or Transfer Control of
Licenses and Authorizations
MB Docket No. 15-149

ORDER ON RECONSIDERATION

Adopted: March 31, 2017

Released: April 3, 2017

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements;
Commissioner Clyburn concurring and issuing a statement.

I. INTRODUCTION

1. On May 5, 2016, the Commission adopted a Memorandum Opinion and Order approving, subject to conditions, the applications of Charter Communications, Inc. (Charter), Time Warner Cable Inc., and Advance/Newhouse Partnership for consent to transfer various licenses and other authorizations from the transacting parties to a new company, New Charter.1 As a condition to its approval, the Commission required New Charter to “pass, deploy and offer” Broadband Internet Access Service (BIAS) of at least 60 Mbps to “at least 2 million additional mass market customer locations” within five years (Residential Build-Out Condition).2 The Commission also required that one million of these new build-outs be “overbuilds”—that is, the construction of facilities and offering of service in locations that already have an existing high-speed BIAS provider.3 The American Cable Association (ACA) and NTCA-The Rural Broadband Association (NTCA) (collectively, the Petitioners) have filed petitions for reconsideration, contending that the Commission erred in imposing a requirement that New Charter overbuild competitors.4

1 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, Memorandum Opinion and Order, 31 FCC Rcd 6327 (2016) (Charter/Time Warner Cable Order or Order). The capitalized word “Transaction” as used herein refers to the transfer approved by the Charter/Time Warner Cable Order.

2 Charter/Time Warner Cable Order, 31 FCC Rcd at 6544-6547, Appendix B, Section V.

3 See id. at 6544-45, Appendix B, Sections V.2.b., V.2.d., V.2.g.

4 Petition for Reconsideration, American Cable Association, MB Docket No. 15-149 (filed June 9, 2016), https://www.fcc.gov/ecfs/filing/60002004307 (ACA Petition); Petition for Reconsideration of a Merger Condition of NTCA-The Rural Broadband Association, MB Docket No. 15-149 (filed June 9, 2016), https://www.fcc.gov/ecfs/filing/60002004272 (NTCA Petition) (collectively, the Petitions). NTCA states that it is filing its Petition pursuant to Section 1.429 of the Commission’s rules, the rule governing petitions for reconsideration in rulemaking proceedings. NTCA Petition at 1. This appears to be a technical error as later in its Petition NTCA properly cites 47 CFR § 1.106, the rule governing petitions for reconsideration in non-rulemaking proceedings, as the basis for requesting reconsideration of the Residential Build-Out Condition. Id. at 2; see also id. at 3 (citing 47 CFR § 1.106 to justify NTCA’s standing and NTCA’s argument that good cause exists for

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2. Upon reconsideration, we agree. Among other things, we believe that building out to locations that currently lack any high-speed broadband access is more important than overbuilding locations that already enjoy high-speed broadband access. We therefore grant the Petitions as discussed herein and eliminate the overbuild provisions from the conditions adopted in the *Charter/Time Warner Cable Order*.⁵

II. BACKGROUND

3. The *Charter/Time Warner Cable Order* approved the Transaction subject to six conditions intended to “address the potential harms posed and confirm certain benefits offered by the transaction and the Applicants.”⁶ The Petitioners ask the Commission to reconsider aspects of only one of the imposed conditions, the Residential Build-Out Condition.⁷

4. The Residential Build-Out Condition requires that within 5 years of the closing date of the transaction, New Charter “pass, deploy and offer” Broadband Internet Access Service (BIAS) of at least 60 Mbps to “at least 2 million additional mass market customer locations.”⁸ Twelve months after closing, New Charter must deploy to at least 150,000 new locations. By December 31, 2017, it must deploy to at least 400,000 new locations, with the total number of new locations to be added increasing by an additional 400,000 each year through 2021.⁹

5. Of concern to the Petitioners, the Residential Build-Out Condition also requires New Charter to overbuild other BIAS providers and includes compliance provisions implementing the overbuild requirement (collectively, the “overbuild provisions”). Specifically, one million of the two million required new deployments must be to locations where another BIAS provider offers at least 25 Mbps or faster advertised service before or within 12 months of New Charter deploying to the location.¹⁰

6. ACA and NTCA both filed timely petitions for reconsideration.¹¹ ACA requests specifically that the Commission strike the “overbuild condition,” which we understand to mean the overbuild

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reconsideration of the Residential Build-Out Condition). We will consider NTCA’s Petition as filed under Section 1.106 of our rules.

⁵ As discussed below, we grant the ACA Petition in its entirety, and we grant the NTCA Petition to the extent that it seeks elimination of the overbuild provisions of the Residential Build-Out Condition and otherwise deny the NTCA Petition.

⁶ *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6539, Appendix B, Section I. The *Order* also established a compliance program, including the appointment of an Independent Compliance Officer to monitor New Charter’s compliance with the conditions. *See id.* at 6553-57, Appendix B, Section IX.

⁷ ACA Petition at 13; NTCA Petition at 11.

⁸ *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6544, Appendix B, Section V.2.a.

⁹ *Id.*

¹⁰ *Id.* at 6544-45, Appendix B, Section V.2.b.; *see also id.* at 6545, Appendix B, Section V.2.d. (defining when a mass market customer location is not in an area where New Charter has existing facilities for the purposes of evaluating whether the location counts towards the overbuild requirement); *id.* at 6546, Appendix B, Section V.2.g. (explaining that the Commission will credit up to 250,000 locations towards the overbuild requirement if New Charter acquires those locations through the acquisition of another BIAS provider or providers if certain requirements are met).

¹¹ Zoom Telephonics and Competitive Enterprise Institute also filed petitions for reconsideration to the *Charter/Time Warner Cable Order*. Petition for Reconsideration, Zoom Telephonics, MB Docket No. 15-149 (filed June 8, 2016), <https://www.fcc.gov/ecfs/filing/60001990650>; Petition for Reconsideration, Competitive Enterprise Institute, MB Docket No. 15-149 (filed June 9, 2016), <https://www.fcc.gov/ecfs/filing/60002004309>. Those are not the subject of this Order on Reconsideration.

provisions within the Residential Build-Out Condition,¹² while NTCA requests generally that the Residential Build-Out Condition be rescinded or modified.¹³ ACA claims that the overbuild provisions did not remedy a transaction-specific harm and thus were unlawful,¹⁴ and both ACA and NTCA claim that the overbuild provisions are not in the public interest.¹⁵ The Petitions are unopposed. Unitel filed comments in support of the NTCA petition,¹⁶ and ACA filed a Reply.¹⁷ Charter has not taken a position on the ACA or NTCA Petitions, but it asked the Commission to “make clear that the Transaction remains in the public interest” in the event the petitions were granted.¹⁸

III. DISCUSSION

7. Petitioners claim the Commission should overturn the overbuild provisions of the *Order* because they do not remedy a transaction-specific harm and are not in the public interest.¹⁹ We agree on both counts.

8. *First*, we find that the overbuild provisions were not targeted to remedy any transaction-specific harm or to confirm a transaction-specific benefit.²⁰ The Commission’s transactional review is not an opportunity for the Commission to advance unrelated policy objectives by extracting commitments from the transacting parties in exchange for regulatory approval. Whatever the intention, the imposition of conditions in this fashion subverts the purpose of a transaction review.²¹

¹² ACA Petition at 13.

¹³ NTCA Petition at 11.

¹⁴ ACA Petition at 3-7.

¹⁵ ACA Petition at 7-13; NTCA Petition at 7-10. NTCA’s public interest argument appears centered only on the overbuild provisions. *See* NTCA Petition at 7-10 (arguing that the “artificial” competition mandated by the overbuild provisions will harm the public interest). NTCA also claims more generally that the Commission must reconsider the *Order* because the Commission failed to provide sufficient notice for the entirety of the Residential Build-Out Condition. *See id.* at 4-6. We find NTCA’s notice argument lacks merit. NTCA’s argument incorrectly conflates the notice requirements for rulemakings and adjudications. Neither the Administrative Procedure Act nor Commission precedent requires the Commission to provide notice of conditions to a transaction (which constitutes an adjudication for purposes of administrative law). ACA contends that the Commission may as a threshold matter entertain its petition because parties had “virtually no opportunity” to present arguments in opposition the overbuild condition. *See* ACA Petition at 3; *see also* 47 CFR § 1.106(b)(2), (c)(1). Because we find that reconsideration of the overbuild condition is required in the public interest, we need not make a determination with respect to ACA’s argument. *See* 47 CFR § 1.106(c)(2).

¹⁶ Unitel, Inc., Comments in Support of Petition for Reconsideration Filed by NTCA-The Rural Broadband Association (June 14, 2016). Unitel also indicated that it “shares many of the concerns raised in the Petition for Reconsideration of the American Cable Association.” *Id.* at 1 n.1.

¹⁷ American Cable Association Reply (June 27, 2016).

¹⁸ Opposition of Charter Communications, Inc. to Zoom Telephonics, Inc.’s Petition for Reconsideration, MB Docket No. 15-149, at 1-2 n.6, <https://www.fcc.gov/ecfs/filing/10620429001760>.

¹⁹ *See* ACA Petition at 5-7 (claiming the condition is not transaction-specific); *see also* ACA Petition at 11-12 (arguing that it is more efficient for New Charter to build out to consumers who do not yet have access to broadband service rather than attempt to overbuild and compete with other providers); NTCA Petition at 9 (observing that the overbuild condition “would force New Charter to use resources that might be better used to improve service to existing customers or expand service to households without advanced services”).

²⁰ *See* ACA Petition at 5-7.

²¹ *See, e.g., Applications of AT&T and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9217, para. 220 (2015) (refusing to impose conditions where there are no transaction-specific harms); *News Corp. and DIRECTV Group*,

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9. The *Charter/Time Warner Cable Order* failed to explain how or why the overbuild provisions related to any transaction-specific harm or benefit. The *Order* relied instead on the conclusory statement that “[o]verbuilding in areas served by only one firm providing high-speed BIAS will spur competition, leading to lower prices and greater choice for consumers.”²² But it offered no analysis explaining why this purported benefit was transaction-specific or how requiring overbuilding would remedy a transaction-specific harm. We agree with ACA that the *Order* “does not suggest the merger might limit New Charter’s willingness to *overbuild* competitors [as] there is no decrease in overbuilding for the *Order* to remedy.”²³ Furthermore, the Commission “did not find that the transaction would make overbuilding by the Applicants into another MVPD’s territories less likely.”²⁴ In the absence of a requirement to overbuild, New Charter faces substantially the same market incentives regarding overbuilding as the Applicants faced prior to the merger.

10. *Second*, we find that the overbuild provisions do not further the public interest. The Communications Act of 1934, as amended (the Act), recognizes—and the Commission has repeatedly concluded—that expanding broadband access to unserved areas is a compelling public interest goal.²⁵ One of our “central missions is to make ‘available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.’”²⁶ And the Act charges us with ensuring “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.”²⁷

11. According to the *Order*, the goal of the overbuild provisions was to “spur competition, leading to lower prices and greater choice for consumers.”²⁸ But since the overbuild requirement would be credited against the total new customer locations requirement, it would probably have the effect of reducing substantially the foregoing commitment to buildout to unserved areas. Yet the *Order* advanced no basis for concluding that overbuilding would yield greater benefits than buildout to unserved areas, and the record before the Commission at the time suggested that the contrary might well be the case.²⁹ In

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Inc. and Liberty Media Corp. for Authority to Transfer Control, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3332, para. 137 (2008) (same).

²² See *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6504, para. 382.

²³ ACA Petition at 5 (emphasis in original); see also NTCA Petition at 6 (“The Commission fully recognized that the proffered build-out commitment was not a transaction-specific benefit[.]”).

²⁴ *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6399, para. 155.

²⁵ See *Connect America Fund, ETC Annual Reports and Certifications, Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket Nos. 10-90, 14-58, 14-192, Report and Order, 29 FCC Rcd 15644, 15649, para. 15 (2014) (discussing the goal “of ensuring that consumers in rural and high-cost areas of the country have access to advanced telecommunications and information services that are reasonably comparable to those services in urban areas, at reasonably comparable rates”).

²⁶ 47 U.S.C. § 151; see also *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17667, para. 2 (2011), *aff’d sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

²⁷ 47 U.S.C. § 254(b)(2).

²⁸ *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6504, para. 382.

²⁹ See *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6442-43, para. 237 n. 811 (“Charter offers uniform pricing across its footprint for its services and touts that there are no early termination, E911, and modem rental fees.”) (citation omitted). Therefore, the record evidence suggested that New Charter would not price differently in response to competitors, which indicates that consumers in overbuilt areas would not necessarily receive the benefit of a price decrease. By contrast, consumers in areas newly built out will benefit from the full value of obtaining broadband access for the first time in exchange for New Charter’s price of the service.

short, we do not believe that it is in the public interest to require New Charter to overbuild to one million locations *in lieu of* building out to one million locations that currently lack high-speed broadband access.³⁰ These public interest considerations provide a separate and independent ground for eliminating the overbuild requirement.

12. In short, we conclude that the overbuild provisions are not transaction-specific and lack a sufficient public interest justification. Consequently, we revise the Residential Build-Out Condition to strike the overbuild provisions.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to sections 1, 4(i), 214, 310, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 214, 310, 405, and sections 1.1 and 1.106 of the Commission's rules, 47 CFR §§ 1.1, 1.106, that this Order on Reconsideration **IS ADOPTED**.

14. **IT IS FURTHER ORDERED** that Section V. of Appendix B of the *Charter/Time Warner Cable Order*, 31 FCC Rcd 6327, **IS AMENDED** as set forth in this Order on Reconsideration, and that such amendments **SHALL BE EFFECTIVE** upon release of this Order.

15. **IT IS FURTHER ORDERED** that the Petition for Reconsideration of the American Cable Association **IS GRANTED** and that the Petition for Reconsideration of and NTCA-The Rural Broadband Association **IS GRANTED IN PART AND DENIED IN PART** to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ See ACA Petition at 11-12 (arguing that it is more efficient for New Charter to build out to consumers who do not yet have access to broadband service rather than attempt to overbuild and compete with other providers); NTCA Petition at 9 (observing that the overbuild condition “would force New Charter to use resources that might be better used to improve service to existing customers or expand service to households without advanced services”).

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

My top priority is making sure that any American who wants high-speed Internet access is able to get it. Today, we take another step toward achieving that goal.

Last year, Charter Communications agreed to build broadband out to two million new customers as part of its merger with Time Warner Cable and Bright House Networks. Unfortunately, the FCC appended an “overbuild” condition to the order, requiring that half of those new locations be already served by another provider. Since these one million overbuilt deployments would be credited against the total, it would substantially reduce buildout to unserved areas. This is like telling two people you will buy them dinner, ordering two entrées, and then sending both to just one of your companions.

This condition was not and is not in the public interest, and it runs directly against the goal of promoting greater Internet access for all Americans.

Following our decision today, Charter Communications is still obligated to build out to two million new locations. The difference now is that the beneficiaries will be consumers currently on the wrong side of the digital divide. That’s a major difference, and one that will go a long way toward helping deliver online opportunity to all Americans.

**CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

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.

First and foremost, my goal has and always will be to bring fast, affordable broadband to all Americans. In that vein, less than one year ago, as part of the Commission's approval of the Charter, Time Warner Cable, and Bright House Networks merger, I stated that I wished the Commission would have gone further, by requiring New Charter to build-out broadband to more locations. Regrettably, that ship has sailed. But by preserving New Charter's condition to bring broadband to two million new locations, this Order addresses another one of my concerns: namely, that among those locations, we allow New Charter to serve more unserved homes.

It is unfortunate that because we did not push New Charter to go further, in this Order we must decide either that competition must suffer or unserved Americans should go without broadband. And, that in making that choice, we need to say either that the condition in the underlying Order is either not merger-specific or that it is not in the public interest.

But, make no mistake, my commitment to greater broadband competition should never be questioned, and I vow to continue the fight to bring choice to more consumers. At the same time, it has become clear that forcing New Charter into competing with another carrier, incentivizes the company to overbuild where the weakest potential competition currently exists. Given our conclusions about competition in the broadband market, I am concerned that years from now, we will simply end up with still only one entity—New Charter—serving those “overbuilt” areas. By removing the overbuild condition, we at least give New Charter the freedom to serve more unserved communities. Delivering broadband to one million additional homes at 25/3 Mbps in the manner proposed in this docket, could mean that almost three percent of our nation's unserved areas will at least have one option.

For these reasons, I will concur.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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 Doc. No. 15-149.

I fully support eliminating the harmful “overbuilding” mandate imposed on Charter Communications by the last Commission as part of the Charter/Time Warner Cable/Bright House Networks transaction. Although this item isn’t exactly what I would have written, it does the immediate job as requested by petitioners. Furthermore, it rightfully opens the door to the Commission scrutinizing other objectionable or questionable conditions in this transaction and others as well. I thank Chairman Pai and his team for bringing this item to a vote quickly and accommodating my requests to remove inappropriate verbiage and policy conclusions contained in earlier versions.

As I outlined in my partial dissent on the overall transaction last May, the overbuilding requirement represents extremely harmful public policy. To be clear, I have spent most of my career trying to remove barriers that may be preventing competition in communications markets. This highly repugnant overbuilding merger condition, however, is nothing of the sort. Instead, it functions as a misguided effort to install the government as Charter’s network deployment decision making team. Had it become effective, it would have forced existing and future Charter subscribers to pay higher rates for Charter’s expansion into markets that may have been economically unwise to enter, but were necessary in order for the company to meet the Commission’s dictate.

At the same, this policy would have harmed parties that were mere bystanders to the transaction. Specifically, Charter would have been forced to enter markets where the existing providers, including those represented by the petitioners, may not have been able to make the economic case for greater investments. These companies would have had to divert resources away from expanding their networks or improving overall quality of service to pay for additional marketing and advertising to avoid customer losses to Charter. In some cases, these would have been the very same markets in which the Commission is providing universal service high-cost support, because we determined that government subsidies were needed in order to be able to bring broadband to consumers. In other cases, the policy would have favored Charter cherry-picking the profitable portions of a market, leaving the rest to the existing provider with even more difficult economics and perhaps threatening its overall survival. Either way, private small companies would be harmed for the sake of somebody’s make-believe remedy to a nonexistent problem.

Beyond the likely negative impacts of the overbuilding requirement, the entire process used by the Commission in the original review did not comport with an acceptable mechanism to consider a merger transaction. While I plan to write separately on this point, I reject the notion prevalent in the original May item and hinted at in the remaining item today that there is some type of scale, and as long as there are enough “good” things that can be tossed aboard they can balance out any “bad” things. There is not.

Similarly, I strongly object to the notion that so-called “remedies” unrelated to the transaction itself or any supposed harms created by it, if any, can or should be permitted. To do so would turn the merger review process into a feeding frenzy. Surely, Congress did not expect the phrase “public interest, convenience and necessity” to turn into whatever unrelated commitments can be extorted from applicants.