ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

July 22, 2020
Marlene Dortch, Secretary
Federal Communications Commission
445 12th St SW
Washington, DC 20554

RE: Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order
WC Docket No. 16-197

Charter Communications has petitioned the Federal Communications Commission (FCC or Commission) to sunset certain merger conditions related to usage-based pricing and interconnection.[1] The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on this petition.[2] ITIF writes in general support of Charter's petition with the belief that flexibility in usage-based pricing and interconnection agreements are efficient mechanisms to recoup the high-costs of building and maintaining network infrastructure. ITIF also urges the Commission to consider a separate proceeding to attain light-touch oversight over broadband providers' usage-based pricing and interconnection practices.

BROADBAND PROVIDERS SHOULD HAVE PRICING FLEXIBLITY

In order to see continued innovation in business models and efficient means to allocate scarce resources, companies should have the flexibility to adapt their pricing practices. Broadband pricing at both "sides" of the network—practices for consumers and for interconnection—needs to be able to recoup the large costs of complex broadband networks.

Data Caps and Usage-Based Pricing are Not Necessarily Problematic

Some press outlets that often write about data caps wrongly frame them as "unnecessary" because they are not

[1] Petition of Charter Communications, Inc., WC Docket No. 16-197, (June 2020), https://ecfsapi.fcc.gov/file/10617776920059/Charter%20Merger%20Conditions%20Sunset%20Petition%20(6-17-20).pdf.

[2] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. *See* About ITIF: A Champion for Innovation, https://itif.org/about.

needed to control for network congestion.[3] This has contributed to significant popular distrust of usage-based pricing in wired broadband, with some commenters appearing to believe data caps and usage-based pricing in the broadband context are intrinsically harmful. This is incorrect. Some degree of price discrimination will always be an efficient way to recoup the high cost of network infrastructure.

Usage-based pricing and data caps were perhaps once needed to prevent over-use of the network when network capacity was more limited, but this has not been the case for years. Network operators are quite open about the fact that usage-based pricing is now not about preventing congestion. Caps and usage-based pricing, when implemented appropriately, is simply a fairer, and often more socially progressive, way to price the use of network resources. Usage-based pricing also has the advantage of giving operators better tools to plan for and manage the most extreme data-using subscribers. In fact, a stronger curve of price discrimination would be fairer to those light Internet users who use their broadband only occasionally and get their entertainment elsewhere. This kind of price discrimination could help reduce the digital divide by enabling lower income users to pay less for Internet access than they would in the absence of these tools.

As Frank Ramsey demonstrated, even under monopoly conditions the greatest surplus is created when consumers with less elastic demand are charged a higher price.[4] Perhaps the minority of vocally anti-cap intensive Internet users (who are no doubt weighing in on this proceeding) know this implicitly: It is their ox to be gored under a more efficient pricing scheme.

That said, ITIF would be concerned if usage-based pricing for wired broadband emerged that significantly curtailed the average user's enjoyment of broadband or were designed to an anti-competitive effect. Poorly designed usage-based pricing could conceivably require users to carefully ration their use of allotted data, which would reduce the use and growth of innovative online offerings. ITIF believes this is unlikely to develop in today's dynamic Internet ecosystem, as evidenced by the data pricing schemes offered by other entities not subject to the merger conditions.

The common pricing model of a flat broadband subscription fee with a relatively large soft cap, after which usage-based pricing is implemented, begins to approach the price discrimination that would more effectively support the cost of infrastructure, while minimizing the risks of rationing use. Under this model the distribution of online video via over-the-top streaming services (online video distributors or OVD) is by all

[3] *See* e.g., Jon Brodkin, "Comcast waiving data caps hasn't hurt its network—why not make it permanent?" Ars Technica (May 2020), https://arstechnica.com/tech-policy/2020/03/comcast-waiving-data-cap-hasnt-hurt-its-network-why-not-make-it-permanent/.

[4] Frank P. Ramsey "A Contribution to the Theory of Taxation," The Economic Journal. **37**: 47–61 (1927) doi*:*10.2307/2222721

accounts flourishing. This is a great transition to more efficient and innovative distribution of entertainment and should be encouraged. Charter gaining expanded flexibility in its pricing, as requested by the petition, is unlikely to threaten OVD success.

Paid Interconnection is Likewise Efficient

Even where network infrastructure is already built, there are costs to augmenting access networks to accommodate increasing amounts of traffic. More importantly, policymakers should not fall prey to the marginal cost fallacy: Especially in industries like broadband where the up-front fixed costs are steep, but delivering each additional bit is cheap, prices cannot be tied to marginal cost. Again, this applies to pricing both for the consumer and for those looking to interconnect with access networks.

As we pointed out in our comments supporting the Charter-TWC merger, terminating traffic on an access network is not without costs, and, like any normal bargaining process, parties close to the transaction are well-positioned to discover the best way to efficiently allocate those costs.[5] Market-driven pricing of interconnection has generally worked well, with the vast majority of peering agreements going forward without difficulty. A handful of prominent breakdowns in bilateral negotiations should not distract from the general effectiveness of market mechanisms driving the price for interconnection.

The risk of harm from paid interconnection is generally small. There are numerous points for content to flow onto an access network other than paid interconnection, giving any content provider options for how to efficiently serve customers that subscribe to any access network. In addition to content delivery networks, the highly competitive transit market functionally provides a price ceiling to delivering data to a last-mile network.[6] Where settlement-free peering doesn't make sense for both parties, those seeking paid interconnection will always have alternatives with transit providers and CDNs.

THE FCC SHOULD CONSIDER ASSERTING OVERSIGHT OVER THESE PRACTICES

There are tremendous economies of scale on both sides of some interconnection negotiations—large regional or national access networks are negotiating with global OVD providers. Should negotiations break down, there is potential for considerable consumer harm. Ideally the expert regulator would have a fair process for resolving disputes even if they are unlikely to arise. The FCC should consider opportunities for relatively

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[5] Comments of ITIF, Application of Charter Communications, Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149 (October 2015), *available at* http://www2.itif.org/2015-twc-charter.pdf.

[6] *See* David Clark et al., "Interconnection in the Internet: the policy challenge," 39th Research Conference on Communication, Information and Internet Policy, (Aug. 2011).

quick dispute resolution by means other than protracted rulemaking, such as through administrative law judges.

Similarly, the FCC should retain some authority should it become clear usage-based pricing and zero rating are being used anticompetitively, especially against OVD competitors. Putting in place a clear process and established expectations around these tools, while generally blessing them as efficient, market-based tools, reduces the risk of over-reaction from a future administration that may seek to ban them altogether. ITIF urges the Commission to open a separate proceeding to consider how best to assert jurisdiction over these practices.

CONCLUSION

Usage-based pricing and paid interconnection, if well designed, are efficient means to recoup the high cost of building and maintaining networks that Charter should be free to explore. The FCC should sunset these merger conditions as contemplated. However, these tools come with an unlikely potential for unfair practices or harmful breakdowns in negotiation—the FCC should consider how it can address these problems without banning these beneficial practices outright.

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