

# Competitive Enterprise Institute v. Federal Communications Commission

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970 F.3d 372 (D.C. Cir. 2020)

In *Competitive Enterprise Institute v. Federal Communications Commission*, the D.C. Circuit partially vacated the FCC's New Charter Order.<sup>1</sup> The court found that consumers had proper standing to challenge the first and third conditions<sup>2</sup> imposed on the merger, and subsequently vacated these conditions considering the FCC's refusal to defend on the merits.<sup>3</sup> The court dismissed the remainder of the appeal for lack of standing.<sup>4</sup>

## I. BACKGROUND

This case involved the Competitive Enterprise Institute's (CEI) challenge of merger conditions imposed by the FCC in its New Charter Order.<sup>5</sup> The New Charter Order approved the merger of Charter Communications Inc, Time Warner Cable, and Bright House Networks, which created New Charter, subject to specified conditions.<sup>6</sup> CEI, along with a handful of New Charter customers, challenged four of the conditions on New Charter in this case.<sup>7</sup>

## II. ANALYSIS

### A. Jurisdiction

Per the Communications Act, any individuals "aggrieved" or "adversely affected" are permitted to appeal an FCC order to the D.C. Circuit.<sup>8</sup> Under the Communications Act, a petition for reconsideration is only required for judicial review in cases where the party seeking review 1) was not party to the proceedings or 2) "relies on law which the commission has

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1. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 388–89 (D.C. Cir. 2020); Applications of Charter Commc'ns, Inc., Time Warner Cable, Inc., and Advance/Newhouse P'ship, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327 (2016) [hereinafter *New Charter Order*].

2. The FCC imposed six total conditions on the New Charter merger. Four of the six were challenged in this appeal by CEI. *Competitive Enter. Inst.*, 970 F.3d at 387.

3. *Competitive Enter. Inst.*, 970 F.3d at 388.

4. *Id.*

5. *Id.* at 376; *New Charter Order*, 31 FCC Rcd. 6327.

6. *Competitive Enter. Inst.*, 970 F.3d at 378.

7. *Id.* at 376.

8. *Id.* at 380.

been afforded no opportunity to pass.”<sup>9</sup> The FCC argued that appellants forfeited rights to seek reconsideration when they failed to file comments earlier in the proceeding.<sup>10</sup> Still, the court has held that the FCC may have such “opportunity to pass” even if a party seeking review never raised the issue. Here, the court found that the FCC had sufficient “opportunity to pass,” citing CEI’s initial filings of comments and objections made by dissenters to the New Charter Order.<sup>11</sup>

### B. Constitutional Standing: Causation and Redressability

To establish constitutional standing necessary for Article III’s case or controversy requirement, a party must demonstrate both causation and redressability.<sup>12</sup> This is more difficult to establish in cases concerning the conduct of a third party not before the court.<sup>13</sup> In these cases, a third party must act in a manner to produce causation and permit redressability.<sup>14</sup> Permissible theories of standing for third parties must demonstrate that they are not based on “mere speculation.”<sup>15</sup> The nature of the relationship between causation and redressability was also a particular point of contention between the majority and the dissent.<sup>16</sup> The majority relied on economic arguments suggesting that market incentives will induce New Charter to adjust business practices in a manner beneficial to the appellant-consumers once FCC-imposed conditions are removed.<sup>17</sup> In contrast, the dissent remained unconvinced that economic theory will translate to business reality, making redressability unlikely for four contested conditions.<sup>18</sup>

#### 1. The First Condition: Network “Interconnection”

The first contested condition concerns the agreements made between New Charter and “edge providers.”<sup>19</sup> These agreements allow broadband providers to collect payment in exchange for allowing edge providers to reach their subscribers.<sup>20</sup> The New Charter Order prohibited these agreements, causing New Charter to forego revenue.<sup>21</sup> The court found that this prohibition harmed New Charter consumers by increasing broadband prices.<sup>22</sup> Plaintiffs also offered related claims alleging harm to broadband quality.<sup>23</sup> Although the court deemed the quality-based claims too speculative, plaintiffs

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9. *Id.*

10. *Id.*

11. *Competitive Enter. Inst.*, 970 F.3d at 381.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Competitive Enter. Inst.*, 970 F.3d at 381–82, *id.* at 389 (Sentell, J., dissenting).

17. *Competitive Enter. Inst.*, 970 F.3d at 382–85.

18. *Id.* at 389 (Sentell, J., dissenting).

19. *Id.* at 382–85.

20. *Id.* at 382.

21. *Competitive Enter. Inst.*, 970 F.3d at 382–83.

22. *Id.*

23. *Id.*

prevailed upon their theory of price harm.<sup>24</sup> Evidence demonstrated that the loss of these agreements resulted in lost revenue, and that consumer bills increased following the merger.<sup>25</sup> Expert witnesses connected the increased prices to the merger condition.<sup>26</sup> The court also considered the unique pricing dynamics of two-sided markets—accepting New Charter’s assertion that it operates in a two-sided market, citing *Ohio v. American Express* as persuasive support for consideration of indirect network effects on consumer pricing.<sup>27</sup> The court held that the same evidence proved redressability. Per economic principles, the removal of the interconnection prohibition would allow New Charter to reenter contracts with edge providers, re-balancing the two-sided market to result in a price decrease.<sup>28</sup>

## 2. The Third Condition: Discounted Service

The third condition required New Charter to provide discounted Internet services to a set number of low-income individuals.<sup>29</sup> Specifically, the plan required New Charter to offer 30 mbps broadband service at the cost of \$14.99 per month.<sup>30</sup> Given the lack of similar programs at each company prior to the merger, the court concluded that this policy would not have existed but for the mandatory merger condition.<sup>31</sup> In light of the theoretical economic impact coupled with the actual higher cost to consumers post-merger, the court held that petitioners sufficiently demonstrated causation.<sup>32</sup> The court also held that this harm was redressable—finding that New Charter was “unlikely to retain the program voluntarily.”<sup>33</sup> The majority opined that there was a “substantial likelihood” that if permitted, New Charter would restrict the low-income assistance program, and that after doing so, firms would have ability and motive to reduce pricing for other consumers.<sup>34</sup>

## 3. The Second Condition: User Based Pricing

The second New Charter condition prohibited usage-based pricing.<sup>35</sup> The arguments made by the consumers articulated how this policy effectually used some low-frequency users to subsidize the costs of providing service for others.<sup>36</sup> However, presented with a dearth of evidence that any of the three merged entities offered usage-based pricing plans before merging, the court was uninclined to see how the lack thereof was directly tied to the merger.<sup>37</sup>

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24. *Id.* at 382–83.

25. *Id.*

26. *Competitive Enter. Inst.*, 970 F.3d at 382–83.

27. *Id.* at 383 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018)).

28. *Id.*

29. *Id.* at 385–86.

30. *Id.* at 386.

31. *Competitive Enter. Inst.*, 970 F.3d at 385–86.

32. *Id.* at 386–87.

33. *Id.* at 387.

34. *Id.*

35. *Id.* at 385–87.

36. *Competitive Enter. Inst.*, 970 F.3d at 385–87.

37. *Id.*

The court held that petitioners lacked standing to challenge this condition having failed to show causation or redressability.<sup>38</sup>

#### 4. The Fourth Condition: Infrastructure Buildout

The court rejected standing for the consumers challenging the infrastructure provision of the New Charter Order on the grounds that the issue lacked redressability. Since the merged entity already took substantial steps in enacting this program, the court did not believe that the removal of the condition would change the course of action already set in motion. Without the guaranteed abolition of the program or the revenue regained from it, the petitioners failed to articulate how they could directly benefit from removal of the provision.

#### 5. Dissent

Judge Sentelle dissented and concurred in part—dissenting from the majority holding as to the first and third conditions and concurring with the majority finding that CEI did not have standing to challenge the second and fourth conditions.<sup>39</sup> The dissent would find that CEI lacked standing to challenge all of the proposed conditions in dispute.<sup>40</sup> Having opined that CEI lacks standing to challenge any of the contested conditions, the dissent offered no further thoughts on the merits of the case,<sup>41</sup> discussed hereafter.

#### C. Merits

Subsequent discussion of the merits of the case was comparatively brief.<sup>42</sup> The court declined to offer a full substantive review on the merits in light of the fact that the FCC argued only the issue of standing and made no arguments in the alternative.<sup>43</sup> Objections raised by appellants included: concerns over whether statutory authority to consider the public interest implications of granting “individual licenses” extends to mergers in their entirety; whether conditions could be imposed on *all* licenses, including wireless licenses, although broadband Internet provision is not (directly) covered by Title II; and the imposition of merger conditions that advance consumer benefits that are non-specific to the transaction under review.<sup>44</sup> Although the court declined to resolve these “troubling” questions, its discussion suggests the court found them to be compelling.<sup>45</sup> This approach invites future challenges to FCC-imposed merger conditions and suggests that there may be potential for such a claim to succeed on the grounds that they extend beyond the statutory authority of the FCC. Furthermore, although

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38. *Id.*

39. *Id.* at 389 (Sentell, J., dissenting).

40. *Id.* (Sentell, J., dissenting).

41. *Competitive Enter. Inst.*, 970 F.3d at 389 (Sentell, J., dissenting).

42. *See id.* at 388.

43. *Id.*

44. *Id.*

45. *Id.*

based purely upon standing, the resolution adopted by the court, in effect, struck the provisions with the strongest connection to the merit-based objections.