

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 15-M-0388 - Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements.

ORDER DENYING CHARTER COMMUNICATIONS, INC.'S RESPONSE TO ORDER TO SHOW CAUSE AND DENYING GOOD CAUSE JUSTIFICATIONS

Issued and Effective: June 14, 2018

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 14, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman
James S. Alesi

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(Issued and Effective June 14, 2018)

INTRODUCTION

On January 8, 2016, the Commission approved the merger of Time Warner Cable, Inc. (Time Warner) and Charter Communications, Inc. (Charter or the Company) subject to specific conditions.¹ One such condition involved an expansion of the Company's network to "pass" an additional 145,000 "unserved" (download speeds of 0-24.9 Megabits per second (Mbps)) and "underserved" (download speeds of 25-99.9 Mbps) residential and/or business units (the Network Expansion Condition).² On

¹ Case 15-M-0388, Charter Communications and Time Warner Cable - Transfer of Control, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016) (Approval Order).

² Id., p. 53 and Appendix A §I.B.1.

January 8, 2018, Charter submitted its "Buildout Compliance Report," which provided the Commission with the Company's purported number of new "passings" as of December 16, 2017, and an update of its 145,000 buildout plan. This filing was submitted in accordance with the terms of a Settlement Agreement,³ which addressed Charter's failure to extend its network to pass 36,250 residential and/or business units between May 18, 2016 and May 18, 2017, and the Commission's Approval Order in the above-referenced case. As a result of Charter's filing, the Commission initiated a review, through the Show Cause Order, of 14,552 addresses contained in the Company's compliance report that it claimed were new passings.⁴ The review of Charter's claimed passings, most notably those in the largest cities in New York State, continued following the issuance of the Show Cause Order and culminates here.

Through this Order, the Commission now determines that Charter has failed to provide sufficient evidence as to why the Commission should not (1) disqualify 18,363⁵ passings from its December 16, 2017 buildout report filed on January 8, 2018, thereby causing Charter to fail to satisfy the required 36,771

³ Id., Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (issued September 14, 2017) (Settlement Order). On September 14, 2017, the Commission adopted the Settlement Agreement, filed on June 19, 2017.

⁴ Id., Order to Show Cause (issued March 19, 2018) (Show Cause Order). The Show Cause Order was adopted by the Commission on April 20, 2018.

⁵ This number includes residential and business units that (1) are located in NYC; (2) Charter provided to the BPO as part of a Negative Space list; (3) already have service available at 100 Mbps from another provider; (4) were otherwise part of the BPO's programs (including Broadband 4 All and Connect New York); or (5) were already capable of being served by Charter throughout its Upstate New York footprint, based on field and desktop auditing.

new passings target pursuant to the Settlement Agreement; (2) remove 6,612 "Negative Space"⁶ addresses from Charter's current 145,000 buildout plan and preclude any future Negative Space addresses awarded by the Broadband Program Office (BPO) from Charter's 145,000 buildout plan; and, (3) remove 5,323 not-yet-completed addresses in Charter's current 145,000 buildout plan that are not in the Negative Space list, but are co-located in the BPO's Broadband 4 All Phases 1-3 awarded census blocks and preclude any future addresses that are not in the Negative Space list, but are co-located in the BPO's awarded census blocks from Charter's 145,000 buildout plan.

The Commission further determines through this Order that Charter has not provided sufficient justification to establish an independent showing of "Good Cause"⁷ for failing to meet the December 16, 2017 buildout target and will draw down \$1,000,000 on the Letter of Credit in accordance with the Settlement Agreement. Finally, through this Order, the Commission determines that Charter failed to remedy its missed December target by the Settlement Agreement's March 16, 2018 "cure" deadline and failed to make a sufficient Good Cause justification in this regard. Therefore, Charter has forfeited its right to earn back an additional \$1,000,000 in accordance with the Settlement Agreement and the Letter of Credit will be drawn down accordingly.

For the reasons discussed in more detail below, the actions the Commission is taking here are consistent with the

⁶ The Negative Space is defined as addresses previously identified by Charter which would not be included in its 145,000 buildout plan.

⁷ The Settlement Agreement provides Charter an opportunity to establish an independent showing of Good Cause, a process under which it could be relieved of a portion of the financial forfeitures under the Settlement Agreement.

Commission's January 8, 2016 Approval Order and Appendix A thereto and the September 14, 2017 Settlement Order in this case.

BACKGROUND

In approving the merger, the Commission stated that, for the transaction to meet the enumerated statutory "public interest" standard, it must yield positive net benefits, after balancing the expected benefits properly attributable to the transaction offset by any risks or detriments that would remain after applying reasonable mitigation measures.⁸

The Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the "net benefits test" otherwise the merger should be denied.⁹ Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York.¹⁰ Among those established conditions, was the Network Expansion Condition wherein the Commission noted its "significant concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas."¹¹ To mitigate this concern, the Commission required the extension of Charter's network to pass an additional 145,000 homes and businesses across the State. Charter was initially required to complete this buildout in four

⁸ Approval Order, p. 19.

⁹ Id., p. 41.

¹⁰ Id., p. 49.

¹¹ Id., pp. 52-53. This condition was particularly important to the Commission's ultimate decision to conditionally approve the transaction, accounting for approximately \$290 million of the estimated \$435 million in incremental net benefits that the transaction was expected to accrue for the benefit of New York customers.

phases, 25%, or 36,250 premises per year from the date of the close of the transaction,¹² and file quarterly reports on the status of its network build. Under the Approval Order, any excess in a given year could be rolled into the next year and for "good cause" the Company could petition the Commission for an extension of the four-year buildout time period. The Approval Order, therefore, required Charter to complete an initial buildout of 36,350 premises by May 18, 2017.

In addition to the Network Expansion Condition at issue here, the Company was also required to, among other things, "...consult with Staff and the BPO to identify municipalities that will not be the focus of this expansion condition in order to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program."¹³ This consultation was required to occur within 45 days of the issuance of the Approval Order and, Charter was to "... notify the Secretary to the Commission where it will complete this network expansion (on a census block and street level basis) within 45 days of the close of the transaction, and updated as necessary on a quarterly basis thereafter."¹⁴

As a threshold requirement, the Approval Order was conditioned upon receipt by the Commission within seven days of the issuance of the Approval Order, a certification by Charter that Charter and its successors in interest "unconditionally accept and agree to comply with the commitments set forth in the body of the Approval Order and Appendix A." On January 19, 2016, Charter submitted a certification letter accepting the imposed commitments, stating:

¹² The transaction closed on May 18, 2016.

¹³ Approval Order, pp. 54-55; Appendix A §I.B.1.a.

¹⁴ Id., Appendix A §I.B.1.b.

In accordance with the Commission's Order Granting Joint Petition by Time Warner Cable Inc. ("Time Warner Cable") and Charter Communications, Inc. ("Charter") dated January 8, 2016, Charter hereby accepts the Order Conditions for Approval contained in Appendix A, subject to applicable law and without waiver of any legal rights.¹⁵

In an effort to monitor and enforce the Network Expansion Condition, as well as the other conditions, the Commission explicitly incorporated the penalty provisions of the Public Service Law (PSL) into the Approval Order.¹⁶ Under PSL §§24 and 25(2), the Commission could seek a court ordered penalty for each day that Charter is out of compliance with its conditional obligations, including the obligation to extend its network to pass an additional 36,250 unserved or underserved premises each year for four years from the date of the close of the transaction.

Following consultations in early July 2016 with Department of Public Service Staff (DPS Staff) and the BPO regarding the scope of the unserved and underserved premises in the Company's New York State footprint, Charter's 145,000 four-year buildout plan was filed with the Commission on July 26, 2016. Significantly, this initial report did not contain any

¹⁵ See, Letters to the Secretary of the Commission (filed January 20, 2016).

¹⁶ Approval Order, p. 67; PSL §25(2).

addresses in New York City (NYC).¹⁷. Additional updates were provided on November 18, 2016, February 17, 2017 and May 18, 2017.¹⁸ In its initial November 18, 2016, quarterly update, Charter reported that it had completed a total of just 7,265 passings.¹⁹ Charter acknowledged that while the buildout pace was slow, it was attributable to the significant ramp-up work, data preparation and analysis and mobilization of resources that would not need to be repeated in subsequent years. As such, Charter stated that the number of completed passings was "expected to substantially increase with time" and that it anticipated "major areas of new network construction ... to ramp up significantly in the second six months between November 18, 2016 and May 18, 2017."²⁰ In its February 17, 2017 quarterly update, however, Charter reported that it had only completed an additional 2,860 passings.²¹

¹⁷ This July 26, 2016 filing included the Negative Space list of addresses within various franchise areas of the Company's service footprint and identified address locations where it did not intend to construct as part of its 145,000 buildout per the Approval Order condition. Charter provided this list, which included granular location addresses with associated census blocks and longitude/latitude coordinates, to the BPO for inclusion in BPO's Broadband 4 All auction processes.

¹⁸ In fact, it was not until Charter's February 17, 2017 update where NYC addresses (865) were first reported. The Company added only a few NYC addresses thereafter on May 18, 2017 (995) and more on August 18, 2017 (3,880). Then on December 1, 2017, right before the Settlement Order's December 16, 2017 target deadline, the Company added a significant number of NYC addresses (6,568) and on in its January 8, 2018 filing pursuant to the Settlement Order reported a material increase in NYC addresses (12,467).

¹⁹ See, Network Expansion Plan Update filed November 18, 2016.

²⁰ Id., pp. 5-6.

²¹ See, Network Expansion Plan Update filed February 17, 2017.

On February 8, 2017, DPS Staff further requested Charter provide "a detailed schedule showing the activities that need to be completed each month, including the anticipated number of line extensions that will be completed each month, in order for Charter to meet its obligation to extend its network to at least 36,250 unserved premises by May 18, 2017. This detailed schedule should describe any externalities that Charter identifies as actual or potential impediments to its satisfaction of this obligation, and all efforts Charter is taking to resolve these external impediments."

Charter's February 14, 2017 response stated that "intensive walk-out verification" of premises to be passed did not begin until September 2016. Charter also provided a list of issues associated with the pole attachment process that it claimed had slowed its deployment, including an inability of the pole owners to process pole attachment applications in bulk and whether the use of subcontractor labor for various make-ready tasks or special attachment procedures would be acceptable.²² DPS Staff has since coordinated a substantial effort to ensure that Charter's pole applications are timely processed by the various pole owners in New York State.

On May 18, 2017, Charter filed an update regarding its buildout progress. This update stated that Charter had passed a total of only 15,164 premises, or 41.8% of the initial Year One

²² See, Letters from Department Staff to Charter dated February 8, 2017 and Response from Charter to Department Staff dated February 14, 2017.

Approval Order target. Charter alleged that pole owner delay was a major factor in its buildout progress.²³

Subsequently, discussions were initiated in anticipation of Charter not meeting the requirement to complete 25% of the required extension of its network to pass an additional 145,000 unserved and/or underserved residential housing units or businesses (36,250) by May 18, 2017. The culmination of those discussions resulted in the filing of the Settlement Agreement on June 19, 2017.

The Commission adopted the Settlement Agreement on September 14, 2017. Among other things, Charter agreed to pay \$1,000,000 into an escrow account within 30 days of the adoption of the Settlement Agreement by the Commission. Within six months of the adoption of the Settlement Agreement by the Commission, Charter was also required to pay the \$1,000,000 from the escrow account to third-party beneficiaries unaffiliated with Charter in the form of grants to pay for equipment to provide computer and Internet access to low-income users. Charter also agreed to a series of interim targets for its buildout going forward with the ultimate completion date remaining May 18, 2020. The Settlement Agreement modified Charter's buildout obligations between December 2017 and May 2020, which now requires that Charter pass the following number of premises: 36,771 by 12/16/17; 58,417 by 6/18/18; 80,063 by 12/16/18; 101,708 by 5/18/19; 123,354 by 11/16/19; and, 145,000

²³ The Company filed complaints for failure to provide lawful access to utility poles against Verizon New York Inc. (June 26, 2017); against National Grid USA Service Company, Inc. (July 3, 2017); against New York State Electric and Gas Corporation and its parent Avangrid, Inc. (July 11, 2017); and, against Frontier Communications, Inc. (July 17, 2017). On August 4, 2017, the Company requested that these complaints be held in abeyance. See, Letter from Charter filed August 4, 2017.

by 5/18/20. The Settlement Agreement also required the filing of a Letter of Credit in the amount of \$12 million to secure Charter's obligations, subject to draw down if Charter misses these interim buildout targets.

According to the Settlement Agreement, for each and every six-month target not met, and where Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back \$1,000,000. The Settlement Agreement also established that if Charter misses any six-month target, within three months and 21 days of the six-month target date, or if such 21st day is not a business day, upon the next business day following, Charter will report its actual passings for the three-month period after the six-month target date. If three months after any six-month target date Charter has still not met the target and wishes to make a Good Cause Shown justification, it may file its claim on the same date as the report. A Good Cause justification requires that Charter "provide a sufficient showing for the Commission to determine that Good Cause Shown has been established" and requires that "such a demonstration include, but need not be limited to, affidavits of witnesses, detailed descriptions of the events that led to the delay(s), and supporting documentation for any factual claims."²⁴

Notwithstanding the foregoing, on October 12, 2017, the Chairman of the Department sent a letter to Thomas Rutledge, Chairman and CEO of Charter, communicating concerns over the Company's ability and intent to comply with the terms and conditions of the Approval Order.²⁵ The letter indicated that "... further investigation into Charter's compliance with the

²⁴ Settlement Agreement Order, Appendix A.

²⁵ See, Letter from Chairman Rhodes (issued October 12, 2017).

Commission's Approval Order's conditions is warranted. These other factors include, but are not limited to, the continued receipt of numerous customer service complaints related to broadband and cable services received by the Department of Public Service Staff (Staff) since the close of the transaction, including complaints about broadband speeds, service outages, billing issues, and rate increases; Charter's recognized failure to meet its obligation to extend its network to pass 36,250 new premises between May 2016 and May 2017; the Broadband Program Office's inquiries over the scope and nature of Charter's bid relative to the Commission's Approval Order and, Staff's inability to independently verify, among other things, that Charter continues to offer Time Warner Cable's "Everyday Low Price" service to new customers." The letter further required Charter to provide information, data and other resources to determine compliance with the Commission's Approval Order.

On December 28, 2017, the Acting Director (at the time) of the Office of Telecommunications, sent a letter to Charter setting forth some of DPS Staff's initial concerns and expectations regarding Charter's required filings under the Settlement Agreement and Approval Order.²⁶ This letter outlined some of DPS Staff's preliminary observations and concerns regarding Charter's claimed passings based on field and desktop reviews beginning in January 2017. Initial concerns were raised "... regarding whether these purported "passings" comply with the Commission's Approval Order and Appendix A thereof. These concerns relate to the following observations: addresses with 100 Megabits per second (Mbps) or higher (FiOS, or similar service provider HSD) service already available; addresses that were already serviceable by pre-existing Charter/ Time Warner

²⁶ See, Letter from Debra A. LaBelle, Director of the Office of Telecommunications, (issued December 28, 2018).

Cable, Inc's. (or its subsidiaries) feeder plant; duplicate addresses; incomplete address information; addresses that could not be verified; and, addresses for which gated entry prevented DPS Staff inspections." Department Staff also requested, among other things, that the Company "... discuss whether any addresses Charter includes are within any Primary Service Area under any cable television franchise held by Charter and/or Time Warner."

Additionally, DPS Staff also stated that it had "... been made aware that numerous Broadband Program Office (BPO) Grantees have expressed concern with Charter's network deployment in BPO grant areas." As a result, DPS Staff requested that the January 8, 2018 filing quantify the number of "passings" included toward the December 16, 2017 target that were also included in Appendix C of Charter's Revised Network Expansion Implementation Plan 45 Day Report filed on July 26, 2016 wherein Charter identified 105,296 addresses that it did not intend to extend its network.

On January 8, 2018, Charter filed its report on its buildout progress pursuant to the Settlement Agreement's December 16, 2017 target. In that filing, Charter stated that it had passed 42,889 premises by December 16, 2017, and provided a revised update to its overall 145,000 premises buildout plan. In response to Charter's filing, the Commission issued the Show Cause Order requiring the Company to provide evidence as to why all current addresses that are listed in its January 8, 2018 report that are (1) located within the Metropolitan NYC region (12,467); (2) located where network already existed (1,762); (3) included in Charter's July 2016 Negative Space List (249), or (4) located within any full or partial census blocks awarded by the BPO to other service providers in Phases 1, 2 or 3 (except those subset of locations that Charter claims as already completed which are located in the January 31, 2018 BPO Phase 3

census block award areas) of the Broadband 4 All program (44), should not be disqualified from consideration of the Settlement Agreement's December 16, 2017 target, and why all such other similarly situated addresses should not be precluded from any future Charter 145,000 buildout plan filings and as to why the Chair of the Commission or his or her designee should not draw down on the Letter of Credit established through the Settlement Order in the appropriate amount.

The Show Cause Order also directed Charter to provide additional information regarding its reporting under the Network Expansion Condition, specifically, "what criteria Charter used to determine whether a given address constituted a passing," the "most up-to-date number of passings it has completed," the number of days it will take Charter to meet the December 2017 target "assuming the passings discussed herein remain disqualified," and Charter's plan "to come into compliance" with the Show Cause Order.

On April 5, 2018, the General Counsel for the Department of Public Service sent a letter to Charter indicating that "14,552 potentially disqualified passings result in Charter being below the December 16, 2017 target. If that holds true, Charter will be obligated under the Commission's Ordering Clause 16 and Sections 5 and 6 of the Settlement Agreement to provide an update by April 6, 2018, stating whether it has met the December 16, 2017 target by March 16, 2018 or, if not whether it has good cause for such a failure. [And] Charter should make the follow-up filing even if it disagrees with the DPS Staff audit to preserve its rights as to any follow-up forfeiture."²⁷

²⁷ See, Letter from Paul Agresta, General Counsel (issued April 5, 2018).

On April 6, 2018, Charter requested an extension to file its Good Cause showing.²⁸

In a separate but related proceeding, the Commission also initiated an investigation into whether Charter and its subsidiaries providing service under the trade name "Spectrum"²⁹ had materially breached their NYC cable franchise agreements, with particular focus on whether the Company was meeting basic requirements to pay the appropriate level of franchise fees to NYC and to deploy its network within NYC pursuant to the franchise agreements' terms and the Commission's cable regulations.

With regard to the network deployment aspect of this investigation, the Commission noted that "... Charter recently filed its first-year buildout target under the Commission's Approval Order and Settlement Agreement claiming to have passed 42,889 residential and/or business units of which 12,467 were located in NYC, despite the fact that the NYC franchise agreements include [separate] network deployment requirements ... Specifically, based on this representation, DPS Staff has identified concerns as to whether Charter's network did in fact pass all buildings in its NYC footprint as required by Section 5 of its franchise renewal agreements [and the Commission's cable regulations]."³⁰

²⁸ See, Letter from Maureen Helmer, Counsel for Charter dated April 6, 2018.

²⁹ Television, Internet and Voice services are now provided by Charter in New York under the name Spectrum.

³⁰ Case 18-M-0178, Proceeding to Investigate Whether Charter Communications, Inc. and its Subsidiaries Providing Service Under the Trade Name "Spectrum" Have Materially Breached Their New York City Franchises, Order to Show Cause (issued March 19, 2018) (NYC Franchise Order).

The Show Cause Order and the NYC Franchise Order each had return dates of April 9, 2018. On March 30, 2018, the Company requested a 45-day extension to respond to both Orders. On April 4, 2018, the Secretary to the Commission granted an extension until May 9, 2018 to respond to both Orders.³¹ Finally, as indicated on April 6, 2018, the Company requested an additional extension until 30 days after final court decisions on the disqualified passings to provide a Good Cause justification for its December 2017 (36,771 passings target) and March 2018 (three-month cure date passing target) contained in the Settlement Agreement. That request was also denied and the Company was directed to provide its Good Cause justification, if any, by May 9, 2018 as well.³²

CHARTER'S RESPONSE

Charter filed its response to the Commission's show Cause Order on May 9, 2018. In addition, the Company also filed a "Good Cause Showing" on the same date. The following is a description of the legal and operational arguments raised in those respective filings.³³

Order to Show Cause

Initially, the Company provides an explanation for how it goes about identifying passing that it believes would satisfy the Commission's criteria establish in the Approval Order. According to Charter, it may report addresses provided first, those reported homes and businesses must represent instances in which Charter "extend[ed] its network to pass additional" locations (i.e., locations not previously serviceable by

³¹ See, Letter from Secretary Burgess (issued April 4, 2018).

³² See, Letter from Secretary Burgess (issued April 9, 2018).

³³ The Commission will address the Company's response to the NYC Franchise Order in Case 18-M-0178 at a later time.

Charter); second, those residential housing units and/or businesses must be either “‘unserved’ (download speeds of 0-24.9 Mbps)” or “‘underserved’ (download speeds of 25-99.9 Mbps)” at the time Charter extends its network (i.e., competitors must not already serve or offer service to those locations at 100 Mbps+ speeds); third, network extensions to those addresses must be “exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs” (i.e., Charter must use its own funds to complete the passings and may not count its own state-subsidized network extensions towards that goal); and, fourth, Charter may “not require the payment of a line extension fee” to serve any of these additional premises.³⁴

Charter submits that “[i]t is well understood that a household or business is “passed” by a wireline provider’s network when the provider is capable of extending service to the household or business within a standard business interval and without an inordinate expenditure of resources.”³⁵ Where Charter performs only so-called “installation” projects, which it defines as the connection of additional residences or businesses to existing Charter plant in the “regular course of business,” such installations are not eligible for inclusion in Charter’s reports. Construction projects, on the other hand, according to the Company, require significantly greater time, effort, and investment and should, therefore, be eligible for inclusion in its buildout plan.

Once the Company identifies “construction projects,” it states that it investigates each address to determine whether other providers are already offering broadband service to the

³⁴ Charter’s Response, p. 11.

³⁵ Id., p. 14.

location at 100 Mbps speeds or above. According to Charter, it first geolocates each address and matches it to a census block. It then reviews the Federal Communications Commission (FCC) broadband availability report (Form 477 data). If the FCC's Form 477 data indicates that no provider is offering Internet access at speeds of 100 Mbps or above within the census block during the relevant reporting period, Charter considers the address eligible for reporting. If other providers have reported the census block containing the address as serviceable for high-speed broadband as part of the FCC's Form 477 reporting process, Charter states it investigates whether those competitors offer such service to the specific address at issue. Charter further states that it does not report addresses built with State funds. Finally, Charter states it does not report network extensions for which it has received a customer contribution-in-aid-of-construction (CIAC).

Turning to Charter's legal arguments, the Company claims that the Commission may not subsequently modify the Network Expansion Condition by adding additional requirements. The Company argues that each reported address satisfies the Network Expansion Condition requirements which are only limited to (1) an extension of Charter's network, (2) to a previously unserved or underserved home or business, (3) constructed without State grant funding, and (4) without a CIAC from the customer. Charter states that the Show Cause Order proposes not to "allow" it to count many of its addresses based upon the fact that they are: (1) in NYC; (2) within a primary service area under one of Charter's cable franchises; (3) in the vicinity of Charter feeder cable (irrespective of whether they were actually serviceable from that cable within 7-10 business days and without a significant resource commitment); (4) in census blocks the BPO has bid out for subsidies; and (5) in Negative Space

locations to which Charter had previously indicated during the initial round of consultation with the BPO that it did not anticipate expanding its network.

Charter claims that the Commission is limited to its specific terms in the Network Expansion Condition as adopted and that none of the new criteria cited above are set forth therein and adding them after the fact would violate the plain text of the Approval Order. According to the Company, "[o]n its face, the Merger Order unambiguously sets forth the four exclusive criteria under which Charter's network extensions to pass new addresses will satisfy its terms. The Order does not claim that those criteria are ambiguous, and those criteria reference and incorporate well-understood technical terms with accepted meanings in the industry."³⁶

Charter further claims that the Commission's interpretive authority to add additional burdens after the fact is limited. The merger closed nearly two years ago and the Company states that the Commission cannot now modify its terms retroactively.

Charter argues that the Network Expansion Condition involves unique jurisdictional limitations. The Commission, according to the Company, does not have the authority to compel broadband providers to offer service to particular customers at particular speeds or at particular locations, or to establish any other obligations in a cable television and telecommunication service merger related to the provision of broadband services. Charter submits that Internet access services are interstate, and accordingly subject to exclusive federal jurisdiction. In addition to the limits on State regulation of broadband Internet services generally, the Company

³⁶ Id., p. 23.

claims that the Commission's authority to regulate cable operators is delegated by federal law and constrained by the terms of that delegation. Specifically, according to Charter, the Federal Cable Act does not delegate to franchising authorities any authority to dictate the terms on which cable operators offer services other than cable video services.

Because of those limitations, to the extent that the Network Expansion Condition has any legal force at all, the Company claims that force derives entirely from the fact that Charter accepted it subject to applicable law and, according to the Company, without waiver of any of its legal rights. Here, Charter states that the terms of Charter's acceptance were limited to the plain language set forth in Appendix A of the Approval Order only and not any of the new requirements in the Show Cause Order.

Notwithstanding the foregoing, Charter submits that even if the Commission could add new requirements to the Network Expansion Condition, it would be unlawful to use those requirements as a basis for disqualifying addresses to which Charter has already completed and reported network extensions without notice of those new requirements. Charter argues that an agency may not give retroactive effect to a new rule created through adjudicatory action. According to the Company, the new retroactive requirements would functionally add to Charter's obligations under the Approval Order and represent an abrupt departure from past practice, given that it has been reporting such addresses since nearly the beginning of its compliance efforts.

Regarding the disqualification of certain addresses, Charter first claims that the proposition that every location in Metropolitan NYC is necessarily already serviceable with a high-speed connection is false. According to Charter, the Show Cause

Order relies exclusively upon data collected and reported by the FCC as part of its Form 477 process. The Company argues that Form 477 data cannot be used for address-by-address determinations, and submits that it is possible that additional unserved or underserved units are located in [census blocks] currently classified as "Served" by the 477 data because the data collected is not sufficiently granular for that purpose.

The Company further claims that the Show Cause Order's reliance on the presence of Verizon New York Inc. (Verizon) and other cable providers is misplaced. Charter argues that NYC is currently suing Verizon, the only other broadband provider with authority to offer service throughout Charter's NYC footprint, based upon allegations that Verizon has failed to build out its FiOS network to "pass all households" in accordance with its NYC franchise agreement.

Charter also disputes the Show Cause Order's finding for disqualifying the Company's reported NYC addresses on the basis that Charter itself already has facilities throughout NYC. In sum, Charter suggests that its five New York City franchise agreements recognize that not all street-level deployment is sufficient to enable a broadband provider to complete installations within a regular business interval and without a significant resource commitment and, therefore, that address should not be disqualified. Such construction projects according to the Company are properly eligible for reporting under the Network Expansion Condition because service cannot be provided without an extraordinary commitment of resources due to the particular construction requirements of the urban environment and it is not yet passed for purposes of the Approval Order, even if there is already pre-existing Charter infrastructure fronting the structure.

According to Charter, its FCC-imposed national expansion condition likewise defines a location as "passed" if "the Company does, or could, within a typical service interval (7 to 10 business days), without an extraordinary commitment of resources, provision two-way data transmission to and from the Internet capable of a download speed of at least 60 Mbps."³⁷

Charter further claims that while the Approval Order stated that it build only in "less densely populated and/or line extension areas," it did not contain any such "requirement." According to the Company, the Commission's statement that it is adopting the condition "in order to ensure the expansion of service to customers in less densely populated and/or line extension areas" is prefatory language explaining its reasoning, but nothing in the Approval Order requires that every additional address to which Charter extends its network must be in "less densely populated and/or line extension areas" or precludes Charter from reporting addresses that are not. Moreover, Charter adds that the Approval Order's Appendix A contains no such requirement, stating only that the "residential housing units and/or businesses" be "unserved" or "underserved," not that they also be located in low-density areas.

Charter also states that reading the Network Expansion Condition to import an additional requirement limiting Charter's extensions of its network to low-density areas would also be inconsistent with the Matter of Luyster Creek, LLC v. New York State Public Service Commission, 18 N.Y.3d 977 (2012) (Luyster Creek decision). Charter argues that the Commission's contention that the Network Expansion Condition can be satisfied only by network extensions in "less densely populated and/or line extension areas" is nowhere to be found among the express

³⁷ See, FCC Merger Order, 31 FCC Rcd. at 6545, Appendix B §V.2.c.

approval conditions enumerated in Appendix A. According to the Company, had the Commission intended for this to be a condition of approval, as opposed to an expectation, it could have included it in Appendix A's approval conditions, but since it did not the Commission cannot now include it as a requirement.

The Company states that the Approval Order is inconsistent with any limitation of the Network Expansion Condition to low-density areas insofar as it estimates that Charter will need to incur approximately "\$2,000 per premises passed" in order to satisfy it. According to the Company, given the costs of expanding broadband networks into low-density areas, this figure would be "implausibly low" if Charter's network expansion were to consist exclusively of such network buildout efforts.

Charter claims it formally accepted the Approval Order's Appendix A in its acceptance letter on the basis of certain DPS Staff assurances that the Network Expansion Condition was based upon the unserved or underserved status of individual addresses because "... it was of material importance to Charter that the Expansion Condition reflected in Appendix A of the Merger Order focused on whether individual addresses were unserved or underserved instead of containing a geographical limitation."³⁸ On that basis, Charter claims it formally accepted the Approval Order's Appendix A in its acceptance letter. It claims the Company reasonably relied upon the fact that the Network Expansion Condition was based upon the unserved or underserved status of individual addresses, and DPS Staff confirmed Charter's understanding as to the effect of the text in the body of the Order, as opposed to the Approval Order's Appendix A.

³⁸ Charter's Response, p. 43.

Charter asserts that there are additional "miscellaneous" reasons why the NYC addresses should not be disqualified. First, the absence of pole attachment applications is not relevant where network extensions are done in dense urban areas where facilities are underground and/or must be constructed into the risers of buildings. Second, that Charter did not include any NYC addresses in its Negative Space list does not mean it had no unpassed locations in those franchise areas. Third, unlike Upstate, where Charter can rely to a greater extent on Form 477 data to identify unserved and underserved addresses, its NYC reported passings rely to a much greater extent on address-by-address identification. Fourth, at no point did the Commission give Charter reason to believe that it viewed network extension activities to pass addresses in NYC as per se improper. To the contrary, the Company submits that the Commission accepted Charter's previous updates without disqualifying its NYC addresses or otherwise indicating that those addresses were improper.

Charter argues that the Show Cause Order wrongly disqualifies Upstate passings³⁹ as well based on the following. First, it wrongly assumes that the mere presence of Charter cable plant in the general vicinity of a structure means that the structure is already serviceable, and disregards the variety of construction projects and accompanying outlays of effort, time, and resources that can sometimes still be necessary to extend service to such locations. Second, it misconstrues the

³⁹ Although the Company does agree that some of the Upstate addresses should not qualify as a passing and concedes that those addresses were wrongly reported to the Commission; 265 based on FCC Form 477 data, 43 already served by another provider, and 16 duplicate addresses (total of 324). Additionally, the Company admitted that 733 addresses were included in the January 8 filing in Grafton, New York in error.

state-law obligation to extend cable video networks to reach new customers in certain areas to include a state-law obligation to extend broadband Internet access service to those same customers. 16 NYCRR §895.5 is inapplicable, according to the Company, because it is a legally distinct obligation from the Network Expansion Condition and its operative provision requires "cable television companies operating in the State of New York [to] make cable television service available" upon request within their primary service areas.⁴⁰ Thus, the Company states that it is not an obligation to provide broadband service at all. Finally, the Company submits that the majority of the 20 addresses claimed as "duplicates" in the Department's audit are unique and properly reportable addresses.

Charter further submits that the Network Expansion Condition does not preclude Charter from building connections to pass addresses that are unserved or underserved today, but may in the future become serviceable by subsidized third-parties (e.g., the BPO). According to Charter it was required only to "consult" with the BPO and Department Staff, and to do so once within 45 days of the issuance of the Approval Order. This qualification, Charter states, makes clear that the "Consultation Requirement" envisions only a one-time exchange of information at the outset of the process. It does not impose upon Charter a continuing obligation to coordinate its ongoing planning and construction activities against each of the BPO's future tranches of bids. Charter states that even if the Consultation Requirement somehow limited or modified the Network Expansion Condition it would be unreasonable to disqualify Charter from counting otherwise-eligible addresses that were

⁴⁰ 16 NYCRR §895.5(c).

disclosed to the BPO and the Department, based upon the BPO's subsequent choices about which areas to subsidize.

Similarly, Charter argues that it was not required by either the Network Expansion Condition or the Consultation Requirement with the BPO and DPS Staff to provide the Negative Space list and did so voluntarily. But, according to Charter, it specifically contemplated and reserved that its voluntary decision to provide such a significant level of detail about its then-current network expansion plans should not be used against it in the future, by precluding Charter from claiming addresses in particular areas or by forcing it to disavow expansion opportunities that later became technically or economically viable.⁴¹ Charter states that it expanded service to a number of these locations based on proximity to existing plant and in response to requests for serviceability.⁴²

Finally, the Company alleges, without any evidence whatsoever, that some may question whether the Commission's actions are compelled by additional purposes unrelated to the its legitimate oversight responsibility, especially in light of public statements made by some public officials. Charter warns that "[a]ny effort by the Commission to initiate proceedings to

⁴¹ Negative Space Filing, p. 9.

⁴² Charter further indicates its objection on the basis that it would be premature to comply with the Show Cause Order's third ordering clause requiring the Company to "... report regarding the most up-to-date number of passings it has completed, the number of days it will take for Charter Communications, Inc. to come into compliance with the December 18, 2017 deadline assuming the passings discussed herein remain disqualified, and all relevant details regarding its plan to come into compliance with the discussion in this Order for the remainder of the buildout period."

pressure Charter to resolve its labor disputes would violate both state law and federal labor law.”⁴³

Good Cause Filing

Charter claims that it “... would have exceeded the December 16, 2017 target, as well as the 3-Month Cure Period, by substantially larger margins than it did, but for three circumstances outside its control. Absent those circumstances, any passings potentially subject to disqualification by the Expansion Show Cause Order or removal of completed passings in the ordinary course of reporting quality controls would affect only the margin by which Charter exceeded those targets.”⁴⁴

Charter initially argues that the Good Cause filing is premature and reserves its right to supplement in the future. Charter states that requiring it to demonstrate Good Cause prior to any Commission finding that it has missed a target, and prior to any order setting forth the Commission’s rationale for any such ultimate decision, undermines the Settlement Agreement and the Good Cause Shown procedure it bargained for, and further deprives it of due process by subjecting it to substantial financial forfeitures without adequate notice.

As for Charter’s Good Cause justification, the Company specifically states that “... due process considerations prohibit the Commission from its new interpretations of the Expansion Condition retroactively to disqualify passings Charter has already completed and reported in reasonable reliance upon the plain text of the Expansion Condition.” And, “[o]n that basis alone the company should be deemed to have established Good Cause Shown both for the December 2017 target and the 3-Month

⁴³ Charter’s Response, p. 66.

⁴⁴ Charter’s Good Cause Showing, p. 2.

Cure period.”⁴⁵ The Company claims that it should not be penalized for action it took in good faith reliance on the Commission’s prior positions.

According to the Company, the 2017-18 storms caused extensive damage to telecommunications and electrical infrastructure which impacted multiple regions of the country, diverting substantial numbers of make-ready and construction crews to recovery efforts between September 2017 and March 2018. The resulting unavailability in New York of technicians to perform regular network extension activities, during time periods critical to Charter’s network expansion plans, delayed its ability to complete planned make-ready and construction projects.

Specifically, Charter estimates that fully one half of the construction resources it would have otherwise retained in New York were diverted for hurricane recovery from September 2017 through January 2018, with a smaller reduction in available crews in March 2018 due to the nor’easters that occurred in that month. During that period, Charter submits that there were sufficient poles ready for make-ready and construction work for the anticipated crews to complete, had sufficient personnel been available.

Lastly, Charter states it can independently establish Good Cause justification based on delays caused by the pole owners, which according to the Company prevented it from completing additional incremental passings. Charter claims it completed verification and design for an adequate number of projects, representing numerous individual passings, that were either designed and verified 230 days before the December 2017 target; approved for construction sufficient incremental passing

⁴⁵ Id., p. 14.

to meet the December 2017 target as least 210 days in advance; notified pole owners of all new applications for pole attachments in advance of submitting pole applications; submitted applications to pole owners for sufficient incremental passings to meet the December 2017 target at least 200 days in advance; paid all fees and other payments required by pole owners in order to effectuate pole attachments; hired a contractor to conduct survey work; requested permission to use temporary attachments; and, completed construction and verification of all necessary passings within 45 days of receiving licenses from respective pole owners.

With respect to the verification process, the Company claims that no project actually meets this criterion because it has not obtained any completed licenses from any pole owner to date given its reliance on temporary attachments and partial construction. Moreover, since the Settlement Agreement was not adopted until June 19, 2017, applying its requirements retroactively to require Charter to have complied with it before it existed, would, according to the Company, be unreasonable given the proximity in time between the December 16, 2017 target and the Settlement Agreement.

In sum, notwithstanding the reasons set forth in its response to the Commission's Show Cause Order, the Company claims that Good Cause exists for missing the December 16, 2017 and March 16, 2018 (three-month cure date) targets.

LEGAL AUTHORITY

The Commission approved Charter's acquisition of Time Warner Cable on January 8, 2016 pursuant to PSL §§99, 100, 101 and 222(3). In granting its approval, the Commission determined that the proposed transaction was in (or otherwise is consistent with) the public interest, provided that the benefits of the

transaction outweighed any detriments, after mitigating identified harm. The Commission also noted in its Approval Order that it had the broad authority provided through the public interest test to determine what constitutes the public interest, and that the applicable definition is reasonably related to the Commission's general regulatory authority, the nature of the transaction, and its potential impact on New Yorkers. In order to ensure these benefits were actually obtained by New York customers, the Commission established concrete, enforceable conditions, including the Network Expansion Condition at issue here.⁴⁶

This Order enforces the Approval Order and §I(B)(1)(a-b) of Appendix A thereof. That section states in relevant part that "Charter is required to extend its network to pass, within their statewide service territory, an additional 145,000 'unserved' (download speeds of 0-24.9 Mbps) and 'underserved' (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction, exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs. If at any time during this four-year period, New Charter is able to demonstrate that there are fewer

⁴⁶ The Network Expansion Condition is consistent with federal law. 47 U.S.C. §1302(a) states in relevant part that "each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

than 145,000 premises unserved and underserved as defined above, New Charter may petition the Commission for relief of any of the remaining obligation under this condition." This section also states among other things that Charter is "required to consult with Staff and the BPO to identify municipalities that will not be the focus of this expansion condition in order to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program."

The Commission is empowered to issue Orders regarding regulated telephone and cable companies doing business in the State of New York and to interpret its Orders pursuant to PSL §5 and Articles 5 and 11.⁴⁷ Charter is a regulated telephone and cable company and also acquiesced to the Commission's jurisdiction under the Commissions' merger approval authority.⁴⁸ The Commission determined that its public interest review is as broad as its statutory obligations and related policies concerning cable and telecommunication services and that "... in reviewing the proposed transaction and its impact on the markets and consumer interests in New York, the Commission must consider the impact it will have on the ability of consumers to gain access to, and rely on broadband networks to exercise effective communication choices."⁴⁹ New York courts have further

⁴⁷ Charter incorrectly, and prematurely, characterizes the Commission's action as an enforcement proceeding under PSL §26. Charter's Response, pp. 9-10. The action being taken here is being done under the Commission's general authority to regulate telephone and cable companies and involves a question of whether or not there is a rational basis for the Commission's interpretation of its Approval Order, which there is.

⁴⁸ See, Case 15-M-0388, Charter Letter Accepting Conditions filed January 9, 2016.

⁴⁹ Approval Order, pp. 22-24.

recognized that the Commission has the same authority to interpret its orders as it does to interpret the PSL and its implementing regulations.⁵⁰ In determining whether the Approval Order and Appendix A thereof are legally sustainable, the Commission must demonstrate that it had a "rational basis" to act.⁵¹

Finally, Charter executed the Settlement Agreement on June 19, 2017, which was adopted by the Commission on September 14, 2017. As part of the fully executed Settlement Agreement, Appendix A thereof sets out the process for making a Good Cause Shown justification. It requires that Charter "provide a sufficient showing for the Commission to determine that Good Cause Shown has been established" and requires that "such a demonstration include, but need not be limited to, affidavits of witnesses, detailed descriptions of the events that led to the

⁵⁰ The Commission's "interpretation and application of its prior determination[s] is entitled to no less deference than the courts give to the PSC's interpretation or application of a statute which involves knowledge and understanding of operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." (Matter of N.Y. State Cable Television Ass'n v N.Y. State Pub. Serv. Comm'n, 125 A.D.2d 3, 6 [3d Dep't 1987] [citing Matter of Cent. Hudson Gas & Elec. Corp. v Pub. Serv. Comm'n, 108 A.D.2d 266, 269-70 [3d Dep't 1985]]).

⁵¹ Matter of Indeck-Yerkes Energy v. Pub. Serv. Comm'n, 164 AD2d 618, 621 (3rd Dept. 1991) ["The issue in this proceeding is not one of pure interpretation of the language of the agreement between [an on-site generator and a utility] by application of common-law principles of contract. Rather, it is whether there was a rational basis to the PSC's determination of the scope of its prior approval of the parties' agreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output of approximately 49 MW."]

delay(s), and supporting documentation for any factual claims.”⁵² Appendix A of the Settlement Agreement further provides that “Charter may provide any other information with respect to Acts of God or other conditions beyond its or other pole owners’ control with respect to delays in meeting the targets contained in the Agreement.”⁵³ Finally, Appendix A of the Settlement Agreement establishes eight “objective metrics” that Charter must meet to make a Good Cause Shown justification based on pole owner delay.⁵⁴

DISCUSSION

As explained in detail below, the Commission determines that Charter has failed to provide sufficient evidence in response to the Show Cause Order demonstrating that thousands of purportedly completed new passings (and planned new passings) comport with the plain language in the Approval Order’s Appendix A and the Approval Order itself. Therefore, through this Order the Commission will disqualify a portion of Charter’s reported passings in: (1) locations in NYC; (2) locations with pre-existing Charter network in Upstate New York; (3) locations in the Negative Space awarded by the BPO as part of the Broadband 4 All program; (4) locations awarded by BPO as part of the Broadband 4 All program, but not otherwise in the Negative Space list; and (5) locations in areas where Time Warner Cable was awarded Connect NY funds.

In total, this Order disqualifies (1) 14,508 (12,467 NYC and 2,041 Upstate New York) addresses previously identified by the Commission in the Show Cause Order on Charter’s December

⁵² Settlement Agreement, Appendix A.

⁵³ Id.

⁵⁴ Id.

16, 2017 buildout report, (2) 725 Grafton, New York area addresses self-identified by Charter as disqualified passes in its response to the Show Cause Order, (3) 86 additional addresses in the Grafton area associated with Charter's removed addresses that have yet to be constructed, and (4) 3,044 newly identified addresses in more densely populated Upstate New York cities that are presumed to have Charter network already available, bringing Charter's number of passings to be counted toward the December 16, 2017 target down to 24,526.

Additionally, this Order removes (1) 6,612 Negative Space addresses from Charter's current 145,000 buildout plan as well as precludes any future Negative Space addresses from Charter's 145,000 buildout plan; and, (2) 5,323 not-yet-completed addresses in Charter's current 145,000 buildout plan that are not in the Negative Space list, but are co-located in the BPO Broadband 4 All Phases 1-3 awarded census blocks, as well as precludes any future addresses not in the Negative Space list, but co-located in the BPO's awarded census blocks from Charter's 145,000 buildout plan.

Through this Order and discussed in detail below the Commission determines that Charter has not provided sufficient justification to establish an independent showing of Good Cause for either its December 2017 or March 2018 (e.g., "cure") targets, a process under which Charter could be relieved of a portion of the financial forfeitures under the Settlement Agreement. As a result, Charter will be required to forfeit its right to earn back \$1,000,000 for missing the December 16, 2017 target and \$1,000,000 for failing to remedy the December 2017 miss by March 16, 2018.⁵⁵

⁵⁵ Settlement Agreement, ¶7.

Charter's Response to the Order to Show Cause

In general, Charter states that the Show Cause Order disqualifies many of its addresses based upon the fact that they are located: (1) in NYC; (2) within a primary service area under one of Charter's cable franchises; (3) in the vicinity of Charter feeder cable (irrespective of whether they were actually "serviceable" from that cable within 7-10 business days and without a significant resource commitment); (4) in census blocks the BPO has bid out for subsidies; and (5) in Negative Space locations to which Charter had previously indicated that it did not anticipate expanding its network. Charter claims that the Commission is limited to the specific terms in the Network Expansion Condition as adopted, and that none of the new criteria it cites above are set forth therein. Adding them after the fact, according to the Company, would violate the plain text of the Approval Order.

NYC Addresses

Charter states that each of its reported NYC addresses satisfy the Network Expansion Condition in the Approval Order's Appendix A which is only limited to: (1) an extension of Charter's network, (2) a previously unserved or underserved home or business, (3) those constructed without State grant funding, and (4) those without a financial contribution from a customer. The Company asserts that it satisfies the requirement that it "pass" residences or businesses where (1) it extends new lines and (2) allows "existing facilities to reach and serve homes or businesses they could not reach or serve before..."⁵⁶ Charter submits that the Commission is acting beyond the scope of its authority under the Approval Order and more specifically Appendix A thereto.

⁵⁶ Charter's Response, p. 14.

The Approval Order's Ordering Clause 1 states in part that the Joint Petition of Charter and Time Warner "... is granted pursuant to Public Service Law §§99, 100, 101 and 222, subject to the conditions discussed in the body of this Order and Appendix A..." In determining whether Charter violated the Network Expansion Condition, the Commission will first look at the plain meaning of the language in the Approval Order's Appendix A, since there is no dispute regarding the Company's commitment to comply with that condition (only its meaning).⁵⁷ Moreover, as discussed as follows, contrary to the Company's position, the language in the discussion in the body of the Approval Order only bolsters the Commission's interpretation of Appendix A. Charter inappropriately relies on external sources (i.e., the NYC franchises and the FCC's merger order) to support its arguments, when in fact, these documents further support the Commission's interpretation of Appendix A and how it should be applied. Finally, the Company's reliance on the conduct of other parties in this matter is equally unavailing.

Based on the plain meaning of the Approval Order's Appendix A, the Company would be precluded from including any

⁵⁷ The Plain meaning rule is a type of construction by which statutes, rules or orders are to be interpreted using the ordinary meaning of the language contained therein. This applies when there is no ambiguity. In such a situation, the courts should refuse admission of extrinsic evidence to overturn the plain meaning. Courts reviewing an agency's interpretations of its own authorizing statutes, rules or orders should first look to the terms of the statute, rule or order. Where the terms are "clear and unambiguous," the court's job is simply to determine whether the agency's determination is consistent with those terms and the statutory or regulatory intent embodied therein. Matter of Lewis Family Farm, Inc. v. N.Y. State Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dep't 2009).

NYC addresses in its 145,000 buildout plan or various reports. The Approval Order's Appendix A states in relevant part that:

Charter is required to extend its network to pass, within their statewide service territory, an additional 145,000 "unserved" (download speeds of 0-24.9 Mbps) and "underserved" (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction, exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs.⁵⁸

The criteria established by the Commission for the expansion of Charter's network to pass an additional 145,000 homes or businesses is simple. First, Charter is required to pass an additional 145,000 homes or business units within its existing service territory. Second, the passings cannot be in areas where 100+ Mbps broadband service is already available from any other provider. Third, the passings must be in areas where Charter has not received State grant monies or in areas where State grant monies have been awarded to other providers.⁵⁹ Fourth, Charter cannot require the payment of line extension fees to serve any of these 145,000 premises.⁶⁰ Finally, the Approval Order conditions were included to ensure that the merger resulted in *net benefits* to the public that, absent such conditional approval, would not have materialized; thus when evaluating whether or not a passing is eligible to satisfy the network expansion condition, the Commission should review whether the passing would otherwise be required by law, regulation or franchise agreement.

⁵⁸ Approval Order, Appendix A §I.B.1.

⁵⁹ Id., §I.B.1.a.

⁶⁰ Id., §I.B.1.d.

The Company claims that the above criteria includes homes or business locations not "previously serviceable by Charter."⁶¹ But as explained in detail below, the Approval Order's Appendix A contains no such allowance. The Approval Order's Appendix A states that Charter must "pass" "unserved" or "underserved" premises. Nowhere does it require the Company to provide "serviceability" to those premises. Charter distorts the plain reading of Appendix A by introducing the concept of "serviceability" as a means to justify its ends.

Nor is there any merit to the Company's claim that the Network Extension Condition only precludes addresses where Charter uses its own State-subsidized network extensions towards the 145,000 buildout goal. To the contrary, the Approval Order's Appendix A specifically requires the Company to:

[C]onsult with Staff and the BPO to identify municipalities that will not be the focus of this expansion condition in order to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program. This consultation is required to occur within 45 days of the issuance of this Order.⁶²

And to:

[N]otify the Secretary to the Commission where it will complete this network expansion (on a census block and street level basis) within 45 days of the close of the transaction, and updated as necessary on a quarterly basis thereafter.⁶³

There would have been no reason for the Commission to include such requirements if Charter were allowed to simply

⁶¹ Charter's Response, p. 12.

⁶² Approval Order, Appendix A §I.B.1.a.

⁶³ Id., §I.B.1.b.

count these passings that would otherwise be capable of being served by another provider through State grant monies. Requiring Charter to consult with the BPO to identify municipalities that would be the focus of its network expansion and to go so far as to provide street level data (to be updated as necessary) on where it would complete its network expansion would be duplicative and only serve to undermine the Commission's effort to encourage broadband deployment in unserved and underserved areas. The purpose of conditioning the merger in the first instance was to encourage the deployment of high speed broadband throughout areas of New York State that did not have network deployed.

The discussion in the body of the Approval Order addressing the Network Expansion condition, only bolsters the language in Appendix A. A review of the Approval Order demonstrates that the Commission repeatedly sought conditions that would expand broadband into rural areas of the State rather than densely populated urban areas like metropolitan NYC and avoid duplicative network expansion efforts in rural communities.⁶⁴ The Commission explicitly stated that:

[It] ... must also consider that, in today's market, many New Yorkers lack adequate access to communication choices and that the public interest is not well served if we approve this merger without addressing that deficit. In addition, it is crucial to consider whether the proposed transaction would harm or benefit New Yorkers who,

⁶⁴ In 2015 Governor Andrew M. Cuomo established the \$500 million New NY Broadband Program through the BPO. The initiative provides State grant funding to deliver high-speed broadband to unserved and underserved areas at 100 Mbps. In establishing the Network Expansion Condition, the Commission stated its expectation that the balance of the unserved and underserved premises in Charter's footprint would be eligible for the BPO's Broadband 4 All Program. Approval Order, p. 55.

because of their level of income, have difficulties affording broadband Internet access. The Commission also recognizes that many residential and business customers in rural areas of the State lack access to such services at speeds or levels that provide real value from the competitive communications market. Therefore, just as in the case of affordability, the public interest inquiry necessarily requires an assessment on how the transaction will harm or benefit the State's interest in rural and business customer broadband expansion.⁶⁵

In explaining its rationale for the Network Expansion Condition, the Commission noted that:

[It] ... also has a significant concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas. Business and residential customers located in those areas often are not able to exercise the same level of communication choice as others absent an agreement to pay high connection fees through contributions-in-aid-of-construction (CIAC). Expanding the reach of the cable and telecommunication network services to unserved and underserved areas of the State is an important public interest. The Petitioners have made general, but not firm, commitments in this regard beyond stating that they will expand New Charter's network to one million additional customers nationwide.⁶⁶

The Commission further explained that:

⁶⁵ Approval Order, pp. 26-27.

⁶⁶ Id., p. 52.

In order to ensure the expansion of service to customers in less densely populated and/or line extension areas within the combined company's footprint, [] the Commission will require New Charter to extend its network to pass, within its statewide service territory, an additional 145,000 "unserved" (download speeds of 0-24.9 Mbps) and underserved" (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction. [Footnotes omitted]⁶⁷

Charter ignores the Approval Order's clear language, and instead, at the last minute, opts to include 12,467 NYC addresses in its December 2017 report. The Company argues that it had been including such addresses in its updates to the DPS Staff and the Commission all along, but in its preliminary July 2016 145,000 buildout plan there were no such addresses and it was not until Charter's February 17, 2017 update that a small number of NYC addresses (865) first appeared. The Company added only a few NYC addresses, thereafter, on May 18, 2017 (995) with a larger uptick on August 18, 2017 (3880). Then suddenly on December 1, 2017, immediately before the December 16, 2017 target deadline, the Company added a significant number of NYC addresses (6,568) and in its January 8, 2018 filing reported a material increase in NYC addresses (12,467).

For every ineligible address added by Charter, an eligible passing (i.e., a home or business that is truly unserved or underserved) is removed from the 145,000 buildout plan and will not be part of the critical network expansion. Thus, Charter's attempt to add more than 12,000 NYC addresses to its network expansion would deprive more than 12,000 New York

⁶⁷ Id., p. 53.

State homes and businesses that were once part of Charter's buildout plan from receiving high speed broadband in contravention of the Commission's express intentions. As noted above, there were no NYC addresses included in Charter's initial two work plan filings, but as of December 18, 2017, Charter reported that NYC addresses ballooned to nearly 30 percent of its reported passings. This trend shows how the inclusion of NYC addresses would undermine the Network Expansion Condition. There are potentially tens of thousands of NYC addresses that Charter will likely service through business-as-usual activities in the coming years. If allowed to count towards the Network Expansion Condition, the inclusion of NYC addresses would gut the value of the condition and seriously erode the net benefits the Commission assumed would result from its conditional approval of the merger.

Nevertheless, these NYC addresses were never eligible to be included as part of Charter's December 2017 report. As discussed, the Approval Order (and Appendix A thereof) make clear that only unserved and underserved residential and business units could be considered eligible for inclusion in Charter's 145,000 buildout plan and subsequent reports. For the reasons provided in the Show Cause Order and here - that essentially 100% of NYC is served by one or more 100 Mbps wireline providers - these NYC addresses do not constitute "unserved" or "underserved" premises as defined by the Approval Order (and Appendix A), and are, therefore, not eligible.⁶⁸

The Company's reliance on the definition of what constitutes a passing in the NYC franchise agreements and the

⁶⁸ Under Appendix A §I.B.1, "unserved" is defined as download speeds of 0-24.9 Mbps and "underserved" is defined as download speeds of 25-99.9 Mbps. Identical language is contained in the Approval Order, p. 53.

FCC's merger order are misplaced. The Company would otherwise be required to extend its network to pass all premises in NYC under the Commission's buildout rules in 16 NYCRR §895.5 or separately through its NYC cable franchise agreements.

Under the Commission's cable rules, where a cable television franchise is awarded, renewed or amended, the Commission will only approve it, if the franchise contains the following additional minimum franchise standards: (1) that, within five years after receipt of all necessary operating authorizations, cable television service will be offered throughout the authorized area to all subscribers requesting service in any "primary service" area;⁶⁹ and (2) that cable television service will not be denied to potential subscribers located in "line extension" areas who are willing to contribute to the cost of construction.

Charter, through its predecessor Time Warner Cable and its operating subsidiaries has been providing cable service in NYC under five separate franchise agreements for decades. Most recently, on or about October 6, 2011, Time Warner Entertainment Company L.P. and Time Warner NY Cable LLC separately submitted five applications for Commission approval of the renewals of their respective cable television franchises with NYC covering Northern Manhattan, Southern Manhattan, Brooklyn, Staten Island

⁶⁹ Under 16 NYCRR §895.5(a), a primary service is (i) areas where cable plant has been built without a CIAC; (ii) areas where the company is obligated to provide cable service; (iii) any area adjoining an area described in (i) or (ii) and which contains dwelling units at a minimum rate of 35 dwelling units per linear mile of aerial cable; and, (iv) any area adjoining an area described in subparagraphs (i) and (ii) and which contains at least the same number of dwelling units per linear mile of aerial cable as is the average number of dwelling units per linear mile of cable in areas described in (i) and (ii).

and Queens, Counties. Those franchise renewals were subsequently approved by the Commission through five separate Orders on or about November 30, 2011.⁷⁰ Essentially all of Charter's NYC footprint is a primary service area under the Commission's rules and through those franchise agreements the Company would already be required to deploy its network to pass all premises in its NYC footprint.

Similarly, the NYC franchise agreements also contain language on the deployment of cable service as follows. Under §5.1 "Residential Deployment" Charter is required to have passed all households that exist as of the effective date of the franchise with only certain exceptions limited to "non-standard" installations. But, as explained below, these exceptions are not relevant to the Company's obligation under the Network Expansion Condition. For purposes of the NYC franchise agreements, a "household is passed when functioning System facilities have been installed in the street fronting the building in which such household is located such that Service could be provided to such building..."⁷¹ Thus, even under the terms of the NYC franchise agreements, the Company would be separately obligated to pass all households in its NYC footprint and those premises would be eligible to be served by either pre-existing Charter network, 100 Mbps service from another provider, or a combination of both. These NYC addresses would already be passed by Charter's network which, as of the time of the Approval Order, was capable of providing at least 100 Mbps

⁷⁰ See e.g., Case 11-V-0553, Application of Time Warner NY Cable LLC for Approval of the Renewal of its Cable Television Franchise for Northern Manhattan, New York County, Order Approving Renewal (issued November 30, 2011).

⁷¹ See, e.g., NYC Cable Franchise (Northern Manhattan), §5.1.

broadband service,⁷² and would not otherwise be considered unserved or underserved.

While there is no legal obligation to provide broadband service under the Commission's cable rules, as a practical matter, the Company must buildout its cable network in order to provide broadband service to any premises. Hence, there is no legitimate reason to include any NYC addresses in its 145,000 buildout or related reports because Charter's broadband service would already be available by virtue of its cable network deployment.

Similarly, Verizon as a competitive broadband provider, also claims to have passed its entire NYC footprint with a network capable of delivering 100 Mbps of broadband service.⁷³ Under either scenario Charter would be precluded from including any NYC addresses in its reporting under the Commission's Approval Order and Appendix A which were expressly limited to unserved or underserved passings.

Charter's claim that neither DPS Staff nor the Commission made it aware that NYC addresses would be precluded from its report is not accurate. As discussed above, DPS Staff raised concerns regarding the inclusion of addresses located within primary service areas with network capable of delivering 100 Mbps of broadband service, through its preliminary review of

⁷² In fact, even before this condition, Time Warner's Maxx offerings were currently available in NYC and offered speeds up to 100, 200 or 300 Mbps. Approval Order, p. 39.

⁷³ See, Verizon Response to NYC DoITT on Cable Television Franchise (March 10, 2017), <https://cdn.arstechnica.net/wp-content/uploads/2017/03/Verizon-Response-to-City-Letter-of-170203.pdf>.

Charter's buildout plan, since the beginning of January 2017.⁷⁴ In addition, on at least one occasion DPS Staff verbally advised Charter that no addresses in a primary service area (e.g., NYC) would be eligible for reporting purposes because either its network or Verizon's or both were capable of delivering 100 Mbps service to those addresses. Moreover, on December 28, 2017, DPS Staff stated in part that it had serious concerns related "... to the following observations: addresses with 100 Megabits per second (Mbps) or higher (FiOS, or similar service provider HSD) service already available..."⁷⁵

Charter attempts, however, to avoid its obligations under the Network Expansion Condition by claiming that these NYC addresses should be eligible because they required "non-standard" installations as defined by its NYC cable franchises and the FCC, and cannot be provided "without an extraordinary commitment of resources due to the particular construction requirements of the urban environment..."⁷⁶ Charter argues that a premise is "passed" when a provider is capable of extending service within a standard business interval and without an inordinate expenditure of resources. If, however, the Company cannot provide service to an address within the standard business interval and must commit certain expenditures and resources, it claims that address should be eligible for reporting purposes under the Commission's Approval Order and the

⁷⁴ DPS Staff began auditing Charter's purported completed passings in early 2017. At that time some NYC addresses had been included and DPS Staff informed Charter that those passings in NYC that had been audited should not be included because either Charter's network was already passing the location, Verizon's FiOS network was passing the location (in some cases both) or they were in a primary service area.

⁷⁵ See, Letter from Debra A. LaBelle, Director, Office of Telecommunications dated December 28, 2017.

⁷⁶ Charter's Response, p. 13 (internal quotations omitted).

Settlement Agreement given the Company's effort to make that location "serviceable."

Charter's explanation as to why these NYC addresses should be eligible is not persuasive for several reasons. First, Charter is required to "extend its network to pass, within its statewide service territory, an additional 145,000 "unserved" ... and "underserved" ... residential housing units and/or businesses..." Nowhere does it state that the Company is required to provide service to a specific location. Similarly, Appendix A states that "Charter is required to extend its network to pass, within their statewide service territory, an additional 145,000 "unserved" ... and "underserved" residential housing units and/or businesses..." Again, there is no reference to service at a particular location. All that is required under the Network Expansion Condition is for Charter to pass (i.e., have facilities available in the right-of-way or on the street fronting a premise),⁷⁷ not to provide service to a premise.

Even under Charter's NYC franchise agreements, a household is passed when functioning facilities have been installed in the street fronting the building in which such household can be serviced through a standard installation. While the NYC franchise agreements allow for additional time to provide service under nonstandard installations, it does not, however, remove the Company's obligation to pass.⁷⁸

Charter's NYC footprint, by its own argument, is fully in compliance with the requirements of its NYC franchise

⁷⁷ The term "fronting" in this case includes any type of presence in an easement either in front of, behind, or on the side of a given address.

⁷⁸ See e.g., Case 11-V-0553, Application of Time Warner NY Cable LLC for Approval of the Renewal of its Cable Television Franchise for Northern Manhattan, New York County, Order Approving Renewal (issued November 30, 2011).

obligations on network deployment for existing buildout. Where new construction is required, Charter would otherwise be obligated to buildout to those premises in accordance with the time intervals established in the NYC franchise agreements and the Commission's cable regulations under 16 NYCRR §895.5. Under the terms of its NYC franchises, Charter is required to pass all premises within specific timeframes (i.e., either by standard or non-standard installations). The obligation to pass those premises is not in dispute.⁷⁹ In order for the Network Expansion Condition to satisfy the standard of net benefits, such expansion must be in addition to any commitments required under franchise agreements. Furthermore, the Commission explicitly stated its intent that Charter pass premises in "less densely populated and/or line extension areas" and under the terms of the NYC franchises, no such areas exist.

Charter's reliance on the FCC's purported definition of a passing is also unavailing. Notwithstanding the fact that the Commission's Approval Order was issued well before the FCC's decision, and, thus, unavailable for Commission review, the FCC's buildout requirement fundamentally differs from that imposed by the Commission in both scale and scope. The FCC required that Charter "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 of those two million, "must build to at least one million new customer locations outside of its footprint where any provider other than

⁷⁹ Verizon uses a nearly identical definition of a passing in determining whether it has completed fiber rollout in various markets, including NYC. A household is "passed" when system facilities are installed in the street fronting the building, not when service is actually provided to any given household.

New Charter offers 25 Mbps or faster [broadband service].”⁸⁰ The FCC’s condition is designed principally to encourage competition in the broadband market, not, as the Commission’s Network Expansion Condition was intended, to promote deployment to rural, unserved, and underserved areas of New York State. Moreover, the FCC’s condition includes the requirement to “pass, deploy, and offer,” whereas the Commission’s condition only requires that premises be passed.

In any event, the Company never requested that the Commission rehear or provide clarification on the language at issue in the Approval Order and Appendix A. The time in which to seek such relief has expired. Under PSL §22, “[a]fter an order has been made by the commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, but any such application must be made within thirty days after the service of such order, unless the commission for good cause shown shall otherwise direct...”⁸¹ Similarly, Charter never requested a clarification from the Commission although it had ample opportunity to do so prior to accepting the Commission’s conditions, as well as prior to filing its various compliance reports, and most importantly prior to its January 2018 report filing on its December 2017 passings target.

⁸⁰ See, f.n. 34, supra.

⁸¹ See, Matter of Gross v State of N Y. Pub. Serv. Commn., 195 AD2d 866, 867 [3d Dept 1993] [untimely request for reconsideration does not toll the statute of limitations, so Article 78 proceeding commenced within four months after denial of reconsideration was untimely]; See also, Matter of MCI Telecom. Corp. v Public Serv. Commn., 231 AD2d 284, 289 [3d Dept 1997] [untimely request to join untimely petition for rehearing does not toll statute of limitations].

Based on equitable estoppel principles, Charter should not now be allowed to raise these arguments after acquiescing to the Approval Order's Network Expansion Condition while at the same time receiving the benefits of the Commission's conditional approval.⁸² It was within the Commission's statutory mandate to decide the issues addressed in the Approval Order; issues that were fully briefed by the parties under a notice and comment process pursuant to the State Administrative Procedures Act. Charter should be precluded from challenging the Commission's determination given the fact that the Company failed to pursue its administrative remedies in a timely manner. Nevertheless, it was free to accept or reject the conditions established in the Approval Order and Appendix A and ultimately opted to accept those obligations.

Charter's suggestion that it relied upon alleged assurances made by DPS Staff that the Network Expansion Condition was based upon the unserved or underserved status of individual addresses as opposed to the geographic demarcation of "less densely populated and/or line extension areas" also fails. DPS Staff is not empowered to provide any such assurances or to speak on behalf of the Commission. While the Approval Order and Appendix A are unambiguous, to the extent necessary, the Commission, through the Show Cause Order, and here, has now provided additional clarity on the Network Expansion Condition as it relates to these NYC addresses. Moreover, Sections I.B.1.a and b of Appendix A required that Charter affirmatively "identify municipalities that [would] not be the focus of this expansion condition in order to facilitate coordination" with the BPO. In making this presentation, Charter was required to indicate "where it [would] complete this network expansion (on a

⁸² Synergy saving will typically accrue in the early stages of a merger transaction of this type.

census block and street level basis).” Yet Charter did not include NYC addresses in its initial presentations. The plain text of Appendix A belies Charter’s position.

Charter’s reliance on Luyster Creek is misplaced. In Luyster Creek, the Court of Appeals held that “[a]lthough the Commission, in its declaration approving the transfer, noted that Luyster Creek intended to build an envelope factory, it did not expressly make the construction of said factory a necessary condition of the approval or a condition precedent to the transfer.”⁸³ In that case, the Commission approved the sale of utility property to a non-regulated entity that indicated it planned to build an envelope factory on the site. The Commission did not condition its approval on any such development actually occurring. The instant situation is distinguishable, as the Commission clearly conditioned its approval of the transaction on, among other things, a Network Expansion Condition and there is no conflict between the Approval Order, the Ordering Clauses contained therein, and Appendix A thereto. Ordering Clause 1 states that the Commission’s approval is granted “subject to the conditions discussed in the body of this Order and Appendix A.” The body of the Approval Order explains, in great detail, the Network Expansion Condition that is summarized in Appendix A. The Ordering Clause encompasses the language in both locations, and while the body of the Order contains some additional language, there is no inconsistency.

Charter’s contention that the Approval Order is inconsistent with any limitation of the Network Expansion Condition to low-density areas insofar as it estimates that Charter will need to incur approximately “\$2,000 per premises

⁸³ Matter of Luyster Creek, LLC v. New York State Public Service Commission, 18 N.Y.3d 977 (2012).

passed" in order to satisfy it is a red herring. The Commission included this figure in the Approval Order as a means of estimating the value of the net positive benefit conditions to New York State, not as a mandatory benchmark for Charter in terms of its required investments. The Approval Order stated that this was an estimated value only. In other words, it was illustrative and based on historic data.

Charter states that the Commission does not have the authority to compel broadband providers to offer service to particular customers at particular speeds or at particular locations, or to establish any other obligations in a cable television and telecommunication service merger related to the provision of broadband services. The Commission has consistently recognized federal jurisdiction over broadband as an interstate service. Charter's argument, however, misunderstands the Commission's application of the PSL's public interest standard in a merger proceeding. The Commission, through the Approval Order, required that Charter expand its network as a whole; a network that provides cable television, telephone, and broadband, services that inherently compete against each other. This was a significant reason why the Commission felt compelled to consider broadband availability at length, in relation to network buildout in the first instance in unserved and underserved areas of the State, and repeatedly stated that such a review is as broad as its public policy objectives.

In any event, Charter cannot, at this stage, argue that the condition was beyond the authority of the Commission to implement. By accepting the Network Expansion Condition, as well as the other conditions put forward by the Commission, and subsequently attempting to satisfy them rather than pursuing judicial remedies available at the at time, Charter has

forfeited its right to pursue subject matter jurisdiction challenges.⁸⁴

Charter's argument that the Commission may not give retroactive effect to a new rule created through adjudicatory action is also irrelevant. The Commission does not seek to undertake a new rulemaking here and as discussed in detail above relies strictly upon the plain reading and intent of the Approval Order and Appendix A. No new retroactive requirements have been imposed and the Company continues to be required to adhere to, among other things, the Network Extension Condition as described therein.⁸⁵

With respect to Charter's argument that the Show Cause Order's reliance on the presence of Verizon and other cable providers does not equate to 100% passings in NYC, Charter again misreads the Commission's Network Expansion Condition. Without restating the Commission's previous arguments, in sum, the Commission's condition requires only that Charter's network pass an address at the street level, not that an address be made serviceable, and that eligible passings are in areas that are

⁸⁴ See, United States ex rel. Fallon v. Accudyne, 97 F.3d 937, 941 (1996); Swift & Co. v. United States, 276 U.S. 311, 326, 48 S.Ct. 311, 315, 72 L.Ed. 587 (1928) (holding that a jurisdictional issue resolved by a consent decree is not open to collateral attack).; Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 2104 n. 9, 72 L.Ed.2d 492 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment.").

⁸⁵ Thus, contrary to Charter's argument, the Commission is not attempting to inject new criteria into the Network Expansion Condition, it is simply requiring Charter to fulfill the commitments it made to the people of New York when it accepted the terms of the Commission's conditional approval of the merger.

unserved or underserved based on broadband speeds. In areas where another provider passes a location with a network capable of providing broadband speeds of 100 Mbps, those locations do not by definition qualify under the Network Expansion Condition.

The Approval Order's Ordering Clause 1 explicitly states in part that "Charter and its successors in interest unconditionally accept and agree to comply with the commitments set forth in the body of this Order and Appendix A."⁸⁶ Charter argues that its letter acceptance, filed on January 20, 2016, applied only to Appendix A and that the language of the Approval Order itself does not control the Company's compliance with the Network Expansion Condition. Charter's acceptance letter was based on an unconditional acceptance because the Order and Appendix A do not conflict. If, however, the Commission were to accept Charter's argument that it accepted only Appendix A, then Charter did not fulfill its obligations and the Approval Order would serve as a denial of the merger and a possible revocation of the Commission's approval. This compliance concern is being addressed in a companion Order issued concurrently with this Order. Accepting, arguendo, Charter's arguments with respect to accepting only Appendix A, as stated above, however, the plain language of Appendix A precludes the inclusion of NYC addresses.

Charter's remaining "miscellaneous" arguments as to why the NYC addresses should be eligible are also without merit. First, Charter argues that the lack of pole attachment, or conduit occupancy applications in NYC is not evidence that it is not expanding its network. In the Show Cause Order, the Commission presented the fact that Charter did not appear to have received or sought any pole attachment permits in NYC as one piece of evidence that Charter was not in fact expanding its

⁸⁶ Approval Order, p. 69.

network, but rather simply providing service to buildings that it did not previously provide. Charter's argument confirms the Commission's suspicion that the Company did indeed pass all premises. Second, the Company argues that the lack of addresses in NYC in its initial buildout plan and Negative Space list does not mean that there were no unserved premises in NYC. This argument is another red herring. The Commission never denied that there are addresses in NYC that may not have service at present, those addresses, however, as described herein are passed as that term is intended by the Approval Order. Third, Charter argues that FCC 477 data is not a good metric by which to judge whether an area is served. Again, Charter is mistaken. That its predecessor Time Warner consistently claimed all of its NYC territory as served (under FCC data) is evidence that there were no unpassed homes in NYC.

Upstate New York Addresses

Department Staff commenced active auditing of Charter's alleged passings in January 2017.⁸⁷ As discussed in more detail in the Show Cause Order, DPS Staff's audit process involved field inspections of targeted address locations identified by Charter as completed. Department Staff used GPS and other mapping tools to identify addresses, cross roads, and landmarks in the periphery of the target inspection addresses. When an address was positively identified, DPS Staff made observations at the claimed completed location to determine if cable network (either aerial or underground) was present, and if so, was the cable newer or older vintage, and whether or not

⁸⁷ DPS Staff began conducting desktop and field audits of Charter's claimed completed passings in January 2017, and forwarded the results of those passing audits to Charter on a monthly basis for over six months, including photographs and descriptive text identifying locations that appeared to not comply with the Commission's Approval Order.

cable was already present and passing the location prior to January 2016.

With respect to Charter's December 2017 buildout list, DPS Staff audited 6,389 Upstate addresses included in the 42,889 purported completed passings. Of the 6,389 audit attempts made, 465 audit attempts were unverifiable or undetermined;⁸⁸ of the remaining 5,924 passings that were successfully audited, Staff recommended that 1,762 of these be disqualified - 1,726 because there was pre-existing cable network, 16 because there was 100 Mbps service already available from another provider, and 20 duplicate pre-existing/100 Mbps service addresses. These categories will be discussed in turn below.

Addresses with Pre-Existing Network

As an initial matter, in its response, Charter has concluded that a significant number of the addresses identified as disqualified are moot. As described in the Kaschinske Declaration, Charter as part of its regular review process re-assesses reported passings whenever the FCC releases new Form 477 Data to determine whether those addresses became serviceable by a competitor (at 100 Mbps+ speeds) prior to Charter's construction. As such, Charter has withdrawn 265 of the 1,726 identified addresses. Of the remaining 1,461 addresses, Charter concurs that a further 43 of them should likewise be disqualified as pre-existing. As for the balance of the passings, Charter claims it has reviewed the work performed at

⁸⁸ Examples of unverifiable or undetermined audit attempts include those claimed new passings whose address information (such as a residence house number, street name, municipality name) that could not physically be located by DPS Staff, or, locations that could be located, but cable feeder network claimed as passing the location could not be observed, or the location was within a gated community preventing DPS Staff access at the time of the audit.

those locations, and continues to believe that 1,418 of the 1,461 passings are properly reportable as new passings.

The Commission has reviewed Charter's justification for the remaining 1,418 addresses recommended for removal. Charter generally claims that for those addresses, it needed to expend financial and construction resources in order to provide service. As stated above, Charter has conflated passing an address with making an address serviceable. Where Charter already has existing network passing an address, at the street level, that address is passed and Charter may not count it towards the 145,000 buildout target. Based on a review of the evidence provided by Charter, with respect to the remaining 1,418 passings, the Commission has not found any new evidence sufficient to justify including any of the 1,418 addresses.⁸⁹

The plain text of the Approval Order and Appendix A requires Charter to pass 145,000 new locations with network, where network did not previously exist. There is no doubt that locations "passed" by both new and older vintage network may require additional construction and/or installation work in order to make a location serviceable. For example, a standard installation typically refers to a subscriber dropwire to

⁸⁹ The 1,418 challenged locations that were found by DPS Staff's review to be passed by pre-existing network included many locations that Charter identified as involving tap cut-ins to existing cable network; locations where buildings were renovated or reconstructed, or where the building classification changed (i.e. from warehouse to residential), but the location was already passed by the cable network; where the Company installed riser cable and interior distribution cables into buildings that were already passed by cable network; locations where a pre-existing coaxial subscriber drop was replaced with a fiber optic subscriber drop. In all of these instances, Charter performed upgrades or modifications to the pre-existing cable network that was already passing the locations, and therefore, none of these pre-existing network passings count as new passings.

residential premise that is located within 150 feet of the aerial distribution cable, installation of which should be completed within seven days. But there are circumstances that would prevent such a standard installation even if the premise is located closer than 150 feet from the cable plant including inability to gain access to a given property, or other technical considerations, such as equipment problems (i.e., a subscriber tap without enough ports to serve the location, or a tap that is damaged, or a tap that is altogether missing); inadequate signal levels at the pole, necessary to provide reliable service to the location, which might also require new cabling, either dropwire or hardline cable, to correct the signal deficiency. None of these serviceability problems would constitute a new passing. Charter has continuously confused network passings, with its service work associated with installations. Therefore, these 1,418 addresses remain disqualified.

Addresses in Other Upstate Cities

Through the course of its review, the Commission also determined that Charter sought to include some 4,096 addresses in the Cities of Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady; some of the most densely populated cities served by Charter outside of NYC, in its January 8 filing (1,052 of these addresses were recommended for disqualification in the Show Cause Order). The Commission chose these cities because they are the largest served by Charter outside NYC and because U.S. Census Bureau data indicates that the average density in all of these municipalities is in excess of 35 homes per mile.

Through this Order, the Commission finds that the remaining 3,044 addresses in these six cities claimed as new passings by Charter are not eligible for several reasons. Through a review of online mapping, field audits, and the

Charter franchise agreements with these municipalities, it was determined that all these addresses are likely located in densely populated areas that already have network passing at the street level. While not all of these addresses have been field audited, they are in locations where pre-existing network exists, or, as in the case of NYC, where Charter is already obligated to have network facilities in place in accordance with local franchise cable obligations. Further, based on Staff review of available pole application data, Charter has no active pole applications for network expansion in any of these cities, indicating that no new passings have in fact been constructed and only new premises made serviceable.

This is consistent with our approach to field audited Upstate addresses (including many in these cities) and those in NYC. Charter may, however, rebut the presumption that these addresses should not be counted with specific evidence (including a recent pole application, municipal permit for underground installations, or other documentation of required work to pass a given address if applicable) that it did not have network at the street level of these addresses when it claimed them as passings. In addition, 1,190 addresses in these six cities that Charter has included in the buildout plan in the future should be removed consistent with this discussion.

In sum, any location Charter plant passed prior to the Approval Order is presumed to have access to cable and broadband network services (and as a separate Approval Order condition the Company was required to upgrade to 100 Mbps and 300 Mbps by the end of 2018 and 2019, respectively), even if it required some system investment, upgrades or modifications on Charter's part to make an address potentially serviceable. Therefore, these locations should not count toward the Network Expansion Condition.

Duplicate Addresses

Charter has agreed to remove eight of the 20 duplicate addresses from its buildout report that were identified in the Show Cause Order. The Commission has reviewed Charter's justification for the remaining 12 addresses. Charter responded that 12 of the 20 duplicate addresses correspond to unique, reportable housing units. Six were from a job on a single street in Dutchess County, where 11 unique new passings were created, four were created to service units 4-7 in a building with eight units total in Sullivan County, and two were created to service one of two units at new residential buildings - one in Sullivan County, and one in Rensselaer County.

The six addresses in Dutchess County qualify as new passings because they were not passed with existing network. The four addresses in Sullivan County, the one new residential building in Sullivan County, and the one new residential building in Rensselaer County remain disqualified because they were already passed by Charter's network.

100 Mbps Service Available

With respect to the 16 addresses identified by the Show Cause Order as being served by another provider at speeds of 100 Mbps, Charter has agreed that eight of these addresses should not have been included in its buildout report for technical reasons. With respect to the remaining eight addresses, Charter argues that at the time it built those passings, it could not determine that another provider was capable of providing service at those speeds.

Specifically, as to four of the addresses, the FCC's then-current Form 477 data indicated that the census block was not serviceable at 100 Mbps by any competitor. For three of the addresses, Charter reviewed the online serviceability tools of providers who reported offering 100 Mbps broadband in the

pertinent census block which indicated that no competitor held itself out as offering such service at the relevant time. Finally, one address in Albany County was confirmed to be lacking service by a contemporary site visit executed by Charter Field Operations personnel.

Of the four locations Charter stated that then-current FCC Form 477 data indicated the census block was not serviceable at 100 Mbps by any provider, the Commission finds that Charter will be allowed to count all four of the passings as qualifying. Upon further review, it cannot conclusively be determined that 100 Mbps service was available at all four locations prior to Charter network passing the locations, as Charter likewise claims. Of the three addresses that Charter claims serviceability tools of other broadband providers indicated that none held themselves out as offering 100 Mbps broadband service, and the single address in Albany County that Charter claims a company field staff visit to the site confirmed a lack of broadband service, the Commission finds that Charter will be allowed to count all four of the passings as qualifying as well.

In sum, eight of the 16 addresses identified in the Show Cause Order as being served by another provider at speeds of 100 Mbps shall be disqualified, by Charter's admission, and eight shall be eligible toward the December target.

Connect NY - Grafton

In the Show Cause Order, the Commission asked Charter to clarify whether any addresses claimed as passings were passed with money awarded by New York State through the Connect NY Program. Charter found that 733 passings in Grafton, New York, should not have been included. The Commission reviewed those addresses and determined that 725 of them should actually be removed, the remaining eight addresses are in Schoharie County, New York, not Grafton and are eligible to be included.

Additionally, DPS Staff reviewed the remainder of the addresses in Grafton included in the buildout report and determined, that an additional 86 addresses should be removed from future 145,000 buildout plan years. These 86 additional addresses, associated with Plan Year 3 buildout, should be removed because the 86 addresses are interspersed between and among many of the 725 already-completed addresses that Charter has voluntarily removed in association with its BPO Connect New York funded expansion project. In other words, since Charter has agreed to remove the completed passings associated with Connect New York buildout, it must also remove the not-yet-completed passings that are interspersed between the completed passings the for the same reason.

Negative Space Locations Awarded by the Broadband Program Office

As stated in the Show Cause Order, Charter included a total of 249 claimed completed passings toward its December 2017 target that were also on the Negative Space list. Similarly, Charter included approximately 6,600 addresses over the remainder of its 145,000 buildout plan that were on the Negative Space list and are also in BPO awarded census blocks.⁹⁰ The inclusion of these addresses violates both the letter and the spirit of the Approval Order. Charter previously indicated it would not be building to these addresses and the Approval Order required the Company to work cooperatively with the BPO. Charter claims that these 249 addresses should not be removed because they were (1) geographically proximate to other areas in which Charter was expanding its network, (2) part of expanded service because a specific customer or Government entity

⁹⁰ While Charter indicated in its January 8, 2018 response that it could not complete its review of the January 8, 2018 and July 26, 2016 filing data to determine passings that may overlap between the two datasets, DPS and BPO Staffs were able to do so with the information provided in both filings.

requested that Charter do so, (3) extensions made in the normal course of business, or (4) mistakenly included the in the Negative Space list.

Charter will not be allowed to count any of the 249 challenged addresses as eligible. As stated in the Show Cause Order and this Order, the Commission's intent was for Charter to consult with the BPO to avoid the duplication of buildout efforts and ensure that the maximum number of New Yorkers received access to advanced communications networks. While Charter's decision to build into these areas is laudable, and will increase competition for these areas, they cannot count these addresses toward the Network Expansion Condition.

Locations in BPO Awarded Census Blocks Not in The Negative Space List

The Show Cause Order allowed Charter to provide a demonstration that any particular address within a BPO awarded census block remains unserved or underserved despite the award of a grant. Charter did not provide any response to this request.

Charter's Good Cause Justifications

Charter claims that it "... would have exceeded the December 16, 2017 target, as well as the 3-Month Cure Period, by substantially larger margins than it did, but for three circumstances outside its control."⁹¹

Premature/Due Process

Charter initially argues that the Good Cause filing is premature and reserves its right to supplement in the future should the Commission finally determine that it missed the December target. Charter's due process argument is not persuasive. The Show Cause Order made a preliminary finding

⁹¹ Good Cause Showing, p. 2.

that Charter had missed the December target. Following the issuance of that Order, Charter was separately informed in writing on April 5, 2018 by the Commission's General Counsel, that it should include any arguments it wished to make regarding Good Cause in its responsive filing. That Charter did in fact include a Good Cause filing as part of its May 9, 2018 responses is proof that due process has been provided. Charter may not reserve the right to provide supplemental information while at the same time making a responsive filing. Such a reservation would frustrate the process and needlessly prolong the Commission's objectives of network deployment.

Charter next claims that "... due process considerations prohibit the Commission from its new interpretations of the Expansion Condition retroactively to disqualify passings Charter has already completed and reported in reasonable reliance upon the plain text of the Expansion Condition."⁹² And, "[o]n that basis alone the company should be deemed to have established Good Cause Shown both for the December 2017 target and the 3-Month Cure period."⁹³

That Charter incorrectly relied upon its own assumptions and interpretations, without asking the Commission to clarify its Approval Order does not establish good cause. As stated above, Charter had ample opportunities to ask the Commission to rehear and/or clarify the Network Expansion Condition and did not do so; reliance on a faulty interpretation is no excuse for a failure to perform.

Impact of Storms

Charter also states that the 2017-18 storms, specifically Hurricanes Harvey and Maria, and Winter Storms

⁹² Id., p. 14.

⁹³ Id.

Quinn and Riley, diverted substantial numbers of make-ready and construction crews to recovery efforts between September 2017 and March 2018.⁹⁴ Charter claims that recovery efforts in connection with numerous, record-shattering storms significantly impacted the availability of make-ready and construction crews during key time periods in Charter's network expansion efforts (September 2017 to March 2018) that materially delayed Charter's ability to complete numerous construction projects and reduced the number of addresses to which it was able to extend its network relative to normal and foreseeable operating conditions.

Charter estimates that there were sufficient poles ready for make-ready and construction work for the anticipated crews to complete, had sufficient personnel been available.⁹⁵ Charter claims that based on its reasonable estimates of throughput rates under ideal working conditions, it estimated that the make-ready crew shortages beginning in September 2017 had the effect of delaying make-ready work on approximately 3,200 poles by the December 16, 2017 target date, and an additional approximately 3,232 poles before the end of the three month cure period. Charter adds that the shortage of construction crews, using historical throughput data, delayed the completion of an estimated additional 5,947 additional passings by the December 16, 2017 target, and another approximately 4,471 passings between that target and the end of the three-month cure period.

Charter further states that the Settlement Agreement specifically contemplates that events of this kind could constitute a cognizable basis for Good Cause Shown – it

⁹⁴ Id., p. 3

⁹⁵ Charter states approximately 120,000 poles were available for make-ready (30,000 likely needed) and approximately 27,000 passings were available for completion as of December 2017.

specifies that "Acts of God" such as natural disasters may form the basis of such a claim.

The Commission understands that these storms resulted in a decline in crews available to Charter during the aftermath of those storms. However, the mere occurrence of extreme weather events does not excuse Charter's failure to meet its obligations. Utilities and telecom providers alike anticipate such events, and execute Emergency Plans and Business Continuity Plans, to respond to such events.⁹⁶ Make-ready and construction crew shortages during and after storm events are an expected challenge that all companies plan for well ahead of such storm events actually taking place.

Charter states that such crew shortages materially delayed its ability to complete numerous construction projects, thereby reducing the number of addresses to which it was able to extend its network. Charter has not made a showing that it was so materially impacted by these events that it can demonstrate Good Cause. According to DPS Staff, Charter's construction reports do not bear this out. With respect to Hurricanes Harvey, Irma, and Maria, Charter's completed plant miles were inconsistent. While in the week prior to Hurricane Harvey, Charter completed more miles of construction, than it did during the event and after the event, with respect to Hurricane Maria, Charter completed substantially fewer miles of plant in the two weeks prior to the event than it did during the 16-day event. This inconsistency was also the case during the winter storms, as Charter completed fewer miles of construction in the two weeks prior to Riley, than it did during the event; but with

⁹⁶ See, e.g., Case 17-E-0758, In the Matter of the December 15, 2017 Electric Emergency Plan Review, Order Approving Electric Emergency Plans on an Interim Basis (issued April 19, 2018); 16 NYCRR Part 105, Electric Utility Emergency Plans.

respect to Quinn, Charter completed more miles in the two weeks prior to the event than it did during the event. In short, while the storms did likely effect crew availability during and after these events, Charter's construction figures do not show a decline for all events, and actually show inconsistent construction numbers throughout the fall and winter of 2017-2018. In fact, cumulatively, more miles were actually completed during the five events (including Hurricanes Harvey, Irma, and Maria, as well as Winter Storms Riley and Quinn) than in the comparable time periods immediately preceding these events.

Throughout the period of time that DPS Staff has been facilitating pole application activity between Charter and the various pole owners, the subject of work crew resources had been a continuous concern. Department Staff raised this issue on a weekly basis month-over-month because of the scale of the network construction plan. Additionally, DPS Staff advises that National Grid provided Charter, with a list of nine contractors that were qualified to perform make-ready construction work. It is the Commission's understanding that during these events Charter established contract work with only two of the available contractors on the National Grid list. Had Charter established more make-ready contractor relationships early on in its planning process, despite inclement weather conditions, the Company would have had a larger pool of workers to draw from, which would have helped it compensate for crews that did depart the area to assist in storm recovery efforts.

Charter's conclusory statement that the Settlement Agreement specifically contemplates that storm events of this kind could constitute a cognizable basis for Good Cause justification is accurate, however as stated above, the storm events unto themselves do not trigger a finding of Good Cause. The Company must demonstrate that it did everything reasonably

within its control to mitigate the effects of adverse events, whether "Acts of God" or not, and in this instance, Charter has not shown that it properly planned for any adverse weather events that are typical and expected to occur throughout the year, by developing any cogent plan to include work crew supplementation to help ameliorate crew shortages that might have resulted from storm restoration activities. Simply pointing to the contemplation of adverse weather as "Good Cause" does not warrant a justification for Good Cause.

In view of Charter's inability to provide data to support its claims, the available data, contradicting Charter's statement and the Company's lack of contingency planning to address likely anticipated work crew shortages for any number of reasons throughout the course of the year, the Commission finds that Charter has not demonstrated that crew shortages constitute Good Cause justifications.

Pole Owner Delay

Charter further argues that it can independently establish Good Cause based on delays caused by the pole owners, which, the Company states, prevented it from completing additional incremental passings. The Commission has reviewed Charter's arguments and finds that while the various pole owners did have difficulty in handling the volume of applications presented to them initially, Charter often frustrated the pole licensing process through the submission of incomplete applications and failure to timely pay fees.

As an initial matter, since mid-July 2017, Department Staff has facilitated weekly meetings between Charter and the pole owners, including electric utilities and telephone companies, to assist in the processing of pole applications and ancillary work related to Charter's four-year buildout plan. As part of the facilitation process, Staff created a comprehensive

pole application tracking spreadsheet, that included all aspects of pole application process, from the applicant's submission to a pole owner, all the way through the process until the application and associated poles were licensed or released to Charter for network construction. The Department required all pole owners and Charter to submit weekly application tracking spreadsheets back to Staff, who reviewed, analyzed, reconciled, or questioned, as appropriate, all application data within the spreadsheets. Part of the detailed Staff process included comparative analysis of all Charter applications submitted to pole owners, with all applications identified as received by the pole owners. In this way, Staff was able to identify application discrepancies, points of backlog within the various applications processing stages, and re-focus all companies to correct those deficiencies to expedite application completions, and ultimately, utility pole availability to Charter for its network construction.

Prior to Staff engagement in July 2017, the pole owners had licensed less than 8,000 utility poles to Charter. Pole owner and Charter weekly updates indicate that commencing shortly after Staff intervention, there was an immediate and sustained overall increase in the number of utility poles available to Charter, month-over-month, from July 2017 through May 2018. Aggregated pole owner reports indicate that in the 27-week period between August 18, 2017 and February 7, 2018, which is inclusive of hurricane season, during which time Charter states crews were diverted for storm recovery, nearly 91,000 utility poles were made available to Charter for network construction.

The Settlement Agreement lays out the criteria by which to determine whether pole owner delay resulted in a valid Good Cause justification. This test includes the following:

- a. That Charter completed the verification and design of sufficient incremental passings to meet the target at least 230 days in advance of the target deadline;
- b. That Charter approved for construction sufficient incremental passings to meet the target at least 210 days in advance of the target deadline;
- c. That Charter notified pole owners of all new applications for pole attachments to pole owners in advance of submitting pole applications.
 - i. This shall include where each build-out project is located, when Charter intends to file pole applications, when it expects to begin construction, and the order in which pole applications should be prioritized.
 - ii. This shall include all information required by pole owners in order for an application to be deemed complete and processed and the keeping of records as to when Charter filed such complete applications.
- d. That Charter submitted applications for pole attachments for sufficient incremental passings to meet the target at least 200 days in advance of the target deadline;
- e. That Charter paid all fees and other payments required by pole owners in order to effectuate a pole attachment, including:
 - i. Payments for any additional resources required by the pole owner in order to satisfy permitting of the poles related to the project.
 - ii. Payments of any application fees and/or survey fees at the time it submitted the pole applications.
 - iii. Make ready fees in the 14-day timeframes established by the Pole Order.
- f. That Charter hired a contractor to conduct survey work (as allowed by the Pole Order) if necessary to avoid delay in meeting the targets.
- g. That Charter requested permission to use temporary attachments if doing so would avoid delay in meeting its obligations. To the extent Charter pursues temporary attachments or other solution to avoid delays, the status of any proposed solution must be reported.

- h. That Charter completed construction and verification of all necessary passings within 45 days of receiving licenses for pole attachments.⁹⁷

The Commission has reviewed Charter's arguments with respect to each of these criteria, and, based on the analysis below, determines that Charter has not substantially complied with each part sufficient to determine that pole owner delay can be found.

A. Verification

Charter states that it implemented a process to meet the 230-day provision after entering into the Settlement Agreement. However, because the Settlement Agreement was not adopted until June 19, 2017, this requirement was not yet known 230 days in advance of the December 16, 2017 target date itself. Charter states that it had previously verified sufficient passings to meet the December target and completed verification and design for 31 projects, representing 11,798 individual passings, that were either designed and verified 230 days before the December 16, 2017 target or for which such date fell before the Good Cause test was established, but for which the necessary verification and design were completed in short order.

Based on these representations, the Commission agrees that Charter verified sufficient passings to meet the December 16, 2017 target in advance of 230 days before that date.

B. Construction Approval

Charter states that it prepares and approves a budget for all of the construction projects that it plans to undertake during the upcoming calendar year, including projects needed to meet the Network Expansion Condition. Thus, Charter's internal budget approval process did not delay any projects needed to meet the December 16, 2017 target by December 31, 2016, more than 210 days in advance of the target deadline, as required.

⁹⁷ Settlement Agreement, Appendix A.

The Commission does not dispute this argument.

C. Notification to Pole Owners

The notice required provides the pole owner with a variety of information, including: (i) the approximate date on which Charter intends to file the new application, (ii) the approximate number of poles in the application, (iii) the town or city in which the poles are located, and (iv) the date Charter intends to begin construction on the poles. It also should refer the pole owner to Charter's plan of record, which provides the pole owner with a list of pole applications (by permit number and project/DID#) in order of priority by month, to assist the pole owner in prioritizing Charter's outstanding applications.

Prior to entering into the Settlement Agreement, Charter states that it had not sent pole owners formal notice letters in advance of submitting pole applications. Charter's local and regional construction managers did, however, meet regularly with their counterparts at the public utilities in each management area to discuss forthcoming and outstanding pole applications to ensure that submitted applications were being timely processed and to keep the utilities generally apprised of upcoming projects in each region requiring poles. Charter argues it satisfied this criterion with respect to all of the poles for which it is claiming Good Cause due to pole owner delay.

The Commission agrees that Charter satisfied this criterion as well.

D. Submission of Pole Applications

Charter states that it began tracking whether applications were submitted 200 days in advance of the target deadlines as soon as the parties executed the June 19, 2017 Settlement Agreement. In the applicable reporting period

Charter states that it properly submitted 950 separate pole applications that were either 200 days in advance of the December 16, 2017 target or for which the application date predated the Settlement Agreement. Thus, Charter argues it has established that it has met Good Cause for this criterion.

While the Commission does not dispute that Charter has properly filed many pole applications, based on a review of the myriad records regarding pole attachments in this case, Charter often provided incomplete applications or applications that the pole owners could not process for one reason or another. Examples of such delaying factors include, but are not limited to, applications with missing strand maps; poles in a single application overlapping utility service territories and county boundary lines; pole counts in applications in excess of the poles owners' application limits; applications submitted to the wrong pole owner; and, mismatched co-applications. These delaying factors were all able to be remedied, but each delayed pole owners in processing the applications, and ultimately delayed completion timelines.

The identified delays could have been avoided with proper administration and management of the application process and overall plan development. Charter should have reviewed its Pole Attachment Agreements and policies with the pole owners through the regular contact discussed above to ensure that such delaying factors would be avoided before submitting applications. As a result, Charter has failed to show that it has met this criterion and, therefore, it has not made a sufficient Good Cause justification for pole owner delay. However, the Commission will analyze the remaining criteria.

E. Payment of Fees

Charter states that is has paid all required fees and costs to pole owners in a timely manner. It claims that is has

worked to transition pole owners from an invoice-based billing process to one in which pole owners receive payments on a direct deposit basis, and most pole owners have now opted for that method of payment. Charter further claims that it is unaware of any payment disputes between Charter and pole owners that resulted in any material effect on any pertinent pole approval or make-ready timelines. Accordingly, Charter argues it has met the requirements of this criterion.

Review of the record in this case, however, shows that Charter's claims are inaccurate. The Company showed inconsistency in paying fees and other payments required by pole owners in order to effectuate pole attachments. Make ready payments, for example, were made beyond the timelines in the Commission's Pole Order as required by the Settlement Agreement;⁹⁸ and the Company was responsible for delays in approving make-ready packages as it decided if certain make-ready costs were too high, or as it contemplated alternative construction paths. These are both examples of Company initiated delays, and not reflective of pole owner delays.

Based on DPS Staff analysis of the pole application weekly tracking information, it appears that approximately 77% of the payments for make-ready fees fell outside of the 14-day timeframe established by the Pole Order, according to DPS Staff's analysis using the Pole Owner's March 15, 2018, filings.⁹⁹ As a result, Charter has failed to show that is has

⁹⁸ See, Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments (issued August 6, 2004) (Pole Order).

⁹⁹ Due to the on-going corrections and adjustments to spreadsheets since July of 2017, the most current spreadsheets are more reliable in terms of accuracy and completeness. The March 15, 2018 filings were filtered to yield only those applications that were current to November 27, 2017 filing.

met this criterion and therefore it has not made a sufficient Good Cause justification for pole owner delay.

F. Hiring of Contractors

Charter states that in June 2017 it hired the contractor Osmose to conduct surveys for poles jointly-owned by Verizon and National Grid as part of a Charter-managed single vendor make ready process. It also requested permission to hire an outside contractor to perform survey and make ready work prior to June 2017. However, as detailed in Charter's Pole Attachment Complaints, the pole owners generally declined Charter's repeated requests for authorization to hire an outside contractor to conduct survey and make-ready work. As result of the pole owners' refusals, Charter's contractor Osmose was not in a position to begin conducting survey work and processing applications for Verizon and National Grid poles until October 2017.

As an initial matter, Charter has met this criterion. Through the pole attachment collaborative effort Charter has used Osmose where possible to effectuate survey work. However, the Commission is concerned that this process has not been seamless and has led to new challenges. Over a period of months between July 2017 and April 2018, Osmose contractors were hired by Charter to work on applications associated with National Grid, Verizon, Frontier, and most recently, FairPoint. The effort to bring on Osmose to help expedite pole application work is laudable; however, it took months for the process to move from the concept stage to implementation, and even months later, still has significant technical problems affecting workflow to certain pole owners. Additionally, DPS Staff has informed the Commission that data and system inconsistencies between the various parties has led to additional delays.

G. Temporary Attachments

Charter requested permission to use temporary attachment to help expedite its construction and deployment of network. This is not in dispute. Several pole owners signed agreements with Charter, including National Grid, Verizon, and others. Charter has therefore met its burden under this criterion.

However, subsequent agreements were re-signed by some pole owners, with reluctance, because, in part, some pole owners found that Charter construction work in some locations was incorrect, resulting in code and safety violations. These violations were significant enough for some pole owners to demand Charter stop working until the violations were reviewed, corrected and verified as properly completed, to the satisfaction of the pole owners. The improper construction practices identified with Charter's own contract workers resulted in self-imposed delays in Charter's buildout plan. The identified contractor construction problems gave pole owners and DPS Staff legitimate reason to be concerned with the general practice of temporary attachments on a large scale. Charter is cautioned on a going forward basis to consider safety matters of the utmost importance and the Commission will not condone substandard construction in the name of expediency.

H. Completed Construction After Receiving Licenses

This section requires that Charter has completed construction and verification of all necessary passings within 45 days of receiving licenses for pole attachments. Charter argues that because it has not received complete licenses from the pole owners, and has been forced to use temporary attachments (as discussed above). Charter further states that where it has obtained partial access to poles, it has made every

effort to start partial construction where the specific network configuration and arrangement of the approved poles so allows.

The Commission agrees that this requirement only applies where Charter has received a license. Based on a review of the record, it appears that where Charter has received licenses, it has in fact worked to complete construction within the 45-day timeframe and satisfies this criterion.

March 2018 "Cure" Target

The December 16, 2017 number of completed passings is revised down to 24,526 as a result of the adjustments contained in this Order. In order to come into compliance with the Settlement Agreement, Charter must have completed an additional 12,245 passings by March 16, 2018 thereby satisfying the Settlement Agreement's "cure" period. While Charter did not provide a filing stating a number of passings completed by March 16, 2018, it did provide its Good Cause justifications for both the December 16, 2017 and March 16, 2018 targets, relying ostensibly on the same arguments for both projected misses. The Commission could conclude that because the Company did not file a revised number of passing for its March target that it failed to satisfy its passings obligation. But, Charter did provide an official update on May 18, 2018. The Commission understands that this update (filed confidentially) indicates that, without the 18,363 passings disqualified here, Charter's total number of passings as of May 18, 2018 would result in Charter not having cured its December 2017 passing target failure.

The review of the Good Cause justification provided by Charter applies to both the December target and the March cure date. As discussed above, the Company failed to demonstrate Good Cause. As a result, Charter has failed to "cure" the December 16, 2018 miss by March 16, 2018 in accordance with the Settlement Agreement.

Draws from Letter of Credit

By virtue of the December miss, by 33.3%, the failure to cure this miss by March 16, 2018 deadline, and the failure to establish Good Cause, as discussed in this Order, the Commission hereby acknowledges that the Chair or his and/or her designee may immediately draw down \$2,000,000 from Charter's Letter of Credit pursuant to the terms of the Settlement Agreement.

Future Targets, Reconciliations, and Other Matters

This Order serves to reduce Charter's number of qualified passings for the December Target to 24,526. In presenting its passings report for the June 18, 2018 target of 58,417 passings (to be filed on July 9, 2018), Charter must use this as a baseline, meaning it will be required to show that it has completed 33,891 additional passings between December 16, 2017 and June 18, 2018, consistent with the discussion in this Order. In its review of information filed for June and future targets, the Commission will continue to analyze all passings presented as completed and will reconcile any previous passing found to be ineligible for inclusion in future passing targets in accordance with the Approval Order and the Settlement Order.

Finally, the Commission is also aware that Charter has engaged in a public relations initiative regarding the Network Expansion Condition. Through advertising, social media, and on its own website Charter has made representations regarding the investments it has made to expand its network. For example, its website includes the statement: "Charter has invested millions of dollars to build out its network to more than 42,000 New York homes and businesses since January 2016, *exceeding its mid-December 2017 commitment made to New York state by more than 6,000 locations.* We're on track to extend the reach of our advanced broadband network to 145,000 unserved or underserved

locations by May 2020.”¹⁰⁰ Following the issuance of this Order, Charter is advised that it should modify its messaging to reflect the Commission’s decision regarding eligible passings.

CONCLUSION

For the reasons stated herein, it is determined that 18,363 of the passings claimed by Charter as completed should be disqualified from its December 16, 2017 target and that an additional 11,979 addresses should be removed from Charter’s 145,000 buildout plan consistent with the discussion in the body of this Order. Charter has failed to establish “Good Cause” justifications for its failure and, as such, the Company will forfeit its right to earn back \$1,000,000 for missing the Settlement Agreement’s December 16, 2017 target. In addition, Charter failed to show that it had cured this failure by March 16, 2018, and has forfeited its right to earn back an additional \$1,000,000 for missing the Settlement Agreement’s March 16, 2018 three-month cure target.

The Commission orders:

1. Charter Communications, Inc.’s response to the March 19, 2018 Order to Show Cause and its Good Cause filing are denied consistent with the discussion in the body of this Order. The Chair of the Commission or his/her designee will draw upon the Letter of Credit posted by Charter Communications, Inc. in the amount of \$1,000,000 in connection with the December 16, 2017 buildout target.

¹⁰⁰ See, Charter, Bringing a New, True Broadband Choice to Over 42,000 New Yorkers, <https://newsroom.charter.com/news-views/bringing-new-true-broadband-choice-over-42000-new-yorkers/> (emphasis added) (January 8, 2018).

2. Charter Communications, Inc. shall remove 18,363 passings from its December 16, 2017 report consistent with the discussion in the body of this Order.

3. Charter Communications, Inc., shall remove 11,979 addresses from its 145,000 buildout plan consistent with the discussion in the body of this Order and be precluded from including any similarly situated addresses.

4. Charter Communications, Inc. shall revise its 145,000 buildout plan to remove any additional addresses in accordance with the discussion in the body of this Order and file a revised buildout plan within 21 days of the issuance of this Order with the Secretary to the Commission and provide Department of Public Service Staff a complete list of the revised addresses. This revised plan shall include an associated pole or conduit license application for any passing deemed completed.

5. Charter Communications, Inc. shall include with its responsive filing a report regarding the most up-to-date number of passings it has completed and all relevant details regarding its plan to come into compliance with the discussion in this Order for the remainder of the buildout period.

6. Charter Communications, Inc.'s Good Cause justification for its failure to cure the December 2017 failure by March 16, 2018 is denied and the Chair of the Commission or his/her designee will draw upon the Letter of Credit posted by Charter Communications, Inc. in the amount of \$1,000,000 for failing to satisfy the December 16, 2017 target within three months (i.e., March 16, 2018).

7. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

8. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary