STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

CHARTER COMMUNICATIONS, INC.'S
MOTION FOR REHEARING AND RECONSIDERATION
OF ORDER ON COMPLIANCE

Charter Communications, Inc. ("Charter") hereby submits this Motion for Rehearing and Reconsideration of the New York Public Service Commission's ("Commission") order requiring Charter to submit a revised letter accepting the conditions described in the Commission's order approving the merger of Charter and Time Warner Cable Inc. ("Time Warner Cable") and set forth in Appendix A thereto (hereinafter "*Compliance Order*").[1]

The Commission should reconsider its decision and grant Charter a rehearing for three reasons.[2] *First*, the *Compliance Order* is a solution in search of a problem. Charter's 2016 acceptance of its commitments under the Commission's 2016 order granting the applications of

[1] Case 15-M-0388, Order On Compliance (June 14, 2018).

[2] Certain subjects discussed in this filing pertain to non-jurisdictional products and services. Discussion of non-jurisdictional products and services is not intended as a waiver or concession of the Commission's jurisdiction beyond the scope of Charter's regulated telecommunications and cable video services. Charter respectfully reserves all rights relating to the inclusion of or reference to such information, including without limitation Charter's legal and equitable rights relating to jurisdiction, compliance, filing, disclosure, relevancy, due process, review, and appeal. The inclusion of or reference to non-jurisdictional information or other statements in the *Compliance Order* shall not be construed as a waiver of any rights or objections otherwise available to Charter in this or any other proceeding, and may not be deemed an admission of relevancy, materiality, or admissibility generally.

Charter and Time Warner Cable to transfer control over Time Warner Cable's New York telecommunications affiliates and cable franchises to Charter (hereinafter "*Merger Order*"),[3] complied with that order's requirements.

Charter's 2016 letter accepting those commitments (hereinafter the "Charter 2016 Acceptance Letter")[4] used phrasing that communicated Charter's understanding as to the conditions that it had negotiated with the New York Department of Public Service ("Department"), but did not purport to change them. Charter's understanding was based, at least partially, upon communication with the Department shortly before its acceptance. While the Commission may disagree as to how those commitments should be interpreted and applied now, that disagreement will persist, irrespective of how Charter's acceptance letter is phrased, until it has been resolved by a reviewing court. Because the *Compliance Order* addresses a perceived deficiency in Charter's 2016 Acceptance Letter that does not exist, the Commission should withdraw it.

The *Compliance Order*'s belief otherwise stems from a misapprehension of arguments that Charter has recently made in response to the Commission's order requiring Charter to show cause why the Commission should not disqualify a significant number of Charter's already built passings (hereinafter "*Expansion Show Cause Order*").[5] Charter has not, as the *Compliance Order* contends, attempted to use its "qualified" acceptance of the merger conditions as a basis for "lessening its obligations" under the *Merger Order*,[6] or "to bootstrap its defective acceptance into

[3] Case 15-M-0388, Order Granting Joint Petition Subject to Conditions (Jan. 8, 2016).

[4] Case 15-M-0388, Letter from Adam E. Falk, Senior Vice President, State Government Affairs, Charter Communications, Inc. to Secretary Kathleen Burgess New York State Public Service Commission (Jan. 19, 2016) ("Charter 2016 Acceptance Letter").

[5] Case 15-M-0388, Order to Show Cause (Mar. 19, 2018).

[6] *Compliance Order* at 6.

an excuse for its faulty performance."[7] Indeed, Charter's network expansion efforts continue apace, even as the Commission has compelled Charter to divert significant resources to defending those efforts in response to an ever-growing list of orders and investigative demands. Rather, Charter has disagreed with the Commission's *interpretation* of the Expansion Condition and challenged the Commission's authority to modify it through that new interpretation.

Second, although it is unclear from the *Compliance Order* whether the Commission also takes issue with this feature of Charter's 2016 Acceptance Letter, the fact that Charter accepted its commitments subject to "applicable law" and without "waiver of its legal rights" is not a limitation or "condition" on Charter's acceptance of its commitments and therefore not a deficiency in its letter. Rather, it is an accurate statement as to the legal effect of accepting the Commission's conditions. The Commission is a body of limited authority and is constrained by the specific terms of its authorizing statute as well as by federal statutes and pertinent FCC orders. The Commission can no more arrogate additional authority to itself by compelling Charter to "accept" its authority to regulate matters outside of the Commission's jurisdiction than a court can require parties appearing before it to grant the court additional subject matter jurisdiction.

Third, even if Charter's revised acceptance letter were material to the meaning and interpretation of the Expansion Condition—which it is not—the time for the Commission to request that Charter make material changes to its commitments under the *Merger Order* has long passed. The Commission acquiesced in the phrasing of Charter's 2016 commitment to abide by the *Merger Order*'s conditions when it declined to interpose any objection for nearly two and a half years. During that time, substantial reliance interests, including the closing of Charter's merger with Time Warner Cable and integration of the companies' operations, have been

[7] *Id.* at 9.

predicated upon the *Merger Order* in the form in which it was adopted and accepted. The Commission long ago waived any alleged defect in the form of Charter's voluntary commitments and is estopped from revisiting them now.

FACTUAL BACKGROUND

As part of its 2016 *Merger Order*, the Commission held that it would approve Charter's acquisition of control over Time Warner Cable's regulated New York affiliates provided that Charter accepted certain conditions described in the *Merger Order* and set forth in its Appendix A.[8]

The precise text of those conditions is set forth in Appendix A to the *Merger Order*, which is titled "Conditions of Approval" and which was the result of substantial and extensive negotiations between Charter and the Department prior to the adoption of the *Merger Order*. At issue in recent Commission orders has been the condition requiring 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," and to do so without accepting any "State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs" (hereinafter "Expansion Condition").[9]

In Charter's evaluation of whether the *Merger Order*'s requirements were acceptable, it was of material importance that the Expansion Condition reflected in Appendix A of the *Merger*

[8] *Merger Order* at 50, 68-69; *see also* Case 15-M-0388, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement at 9 (Sept. 14, 2017) ("*Expansion Settlement Order*") (revising buildout targets).

[9] *Id.*, App'x A, § I.B.1 Charter expressly preserves any arguments as to the enforceability of the Expansion Condition itself, including, without limitation, under the Commerce Clause to the United States Constitution.

Order focused on whether individual "residential housing units and/or businesses" were unserved or underserved, as defined by the broadband speeds available to the home or business in question, and was not limited geographically to particular regions of the State.[10] These features were important to Charter because they provided Charter's business with necessary flexibility as to the manner in which it would be able to satisfy the condition.[11]

On January 19, 2016, Charter filed with the Commission a letter indicating that it "accepts the Order Conditions for Approval contained in Appendix A, subject to applicable law and without waiver of any legal rights."[12] As Charter has explained, it used this phrasing to communicate its understanding that Appendix A, due to its negotiating history predating the body of the *Merger Order* itself, collected and contained its commitments. Charter's 2016 Acceptance Letter was accepted for filing by the Commission and publicly listed on its docket, and has been for nearly two and a half years. At no point prior to the *Compliance Order* did the Commission, to Charter's knowledge, ever express or communicate any belief that the Charter 2016 Acceptance Letter was deficient.

Since the Commission's approval of the transaction, Charter has undertaken efforts to extend its broadband network to the 145,000 required addresses. Chair Rhodes' March 19, 2018 *Expansion Show Cause Order*, however, proposed to "disqualify" network extensions to 14,522 addresses that Charter had reported as completed, thereby causing Charter retroactively to have

[10] Case 15-M-0388, Declaration of Adam Falk, Charter's Senior Vice President of Government Affairs ¶ 4 (May 9, 2018).

[11] *Id.* ¶ 5.

[12] Case 15-M-0388, Letter from Adam E. Falk, Senior Vice President, State Government Affairs, Charter Communications, Inc. to Secretary Kathleen Burgess New York State Public Service Commission (Jan. 19, 2016) ("Charter 2016 Acceptance Letter").

"missed" the December 16, 2018 target set forth in the Commission's *Expansion Settlement Order*.[13]

Charter filed its response to the *Expansion Show Cause Order* on May 9, 2018 (hereinafter "*Expansion Show Cause Response*") explaining why its passings met each criterion set forth in the Expansion Condition and therefore should be counted.[14] At the same time, Charter contested the *Expansion Show Cause Order*'s proposed interpretation of the Expansion Condition, which would, *inter alia*, restrict Charter to building only "in less densely populated" or "line extension" areas, as inconsistent with the text of the *Merger Order* and Appendix A as well as with the history of Charter's discussions with the Department.[15]

On June 14, 2018, the Commission issued an order denying Charter's *Expansion Show Cause Response* and disqualifying 18,363 passings.[16] It also adopted the *Compliance Order* that is the subject of this petition, which deemed Charter's 2016 Acceptance Letter "defective" and directed it to file a revised acceptance letter agreeing to the commitments in the *Merger Order*.

Faced with the prospect of the Commission initiating steps to "rescind, modify or amend" the *Merger Order* unless Charter revised its acceptance letter within 14 days, Charter filed a revised letter on June 28, 2018 (the "Charter 2018 Acceptance Letter").[17] The Charter 2018 Acceptance

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[13] *See Expansion Show Cause Order* at 10.

[14] Case 15-M-0388, Response of Charter Communications, Inc. to Order to Show Cause (May 9, 2018) at 11-21.

[15] *Id.* at 24-25, 41-44 (internal quotation marks omitted).

[16] Case 15-M-0388, Order Denying Charter Communications, Inc.'s Response to Order to Show Cause and Denying Good Cause Justifications (June 14, 2018) (the "*Disqualification Order*"). Simultaneously with this petition, Charter is also filing a petition for rehearing of the *Disqualification Order*.

[17] Letter from Adam Falk, Senior Vice President, State Government Affairs, Charter Communications, to Kathleen Burgess, Secretary, New York State Public Service Commission (June 28, 2018) ("Charter 2018 Acceptance Letter").

Letter clarified that Charter "unconditionally accept[s] and agree[s] to comply with the commitments set forth in the body of [the *Merger Order*] and Appendix A," and explained that the phrasing Charter used in the Charter 2016 Acceptance Letter "did not state, and was not intended to suggest, that Charter did not accept every 'commitment.'"[18] The Charter 2018 Acceptance Letter continued to note that such acceptance did not operate to "waive [Charter's] positions as to the meaning or proper interpretation of its commitments" or "any of its legal rights including its right to seek review" of the *Disqualification Order*, the *Compliance Order*, or the Commission's "interpretation and application" of the *Merger Order*.[19]

LEGAL STANDARD

Rehearing is appropriate where "the Commission committed an error of law or fact or that new circumstances warrant a different determination." 16 N.Y.C.R.R. § 3.7; *see also* Case No. 17-W-0288, *Petition of New Rochelle Home Owners Ass'n for a Declaratory Ruling Regarding the Cost That Suez Water Westchester Inc. Charges For Private Hydrants*, Order Denying Petition for Rehearing, 2018 WL 1168951, at *3 (Feb. 27, 2018).

The Commission has granted rehearing in a variety of circumstances, including where the Commission misunderstands relevant facts, *see* Case No. 16-W-0121, *Minor Rate Filing of Rolling Meadows Water Corp. to Increase its Annual Revenues by About $169,841 or 34.05%*, Order Granting Rehearing, In Part, 2017 WL 3437457 (Aug. 7, 2017); Case No. 14-V-0089, *Petition of Verizon N.Y. Inc. for a Certificate of Confirmation for its Franchise with the City of Glen Cove, Nassau County*, Order Granting Rehearing In Part, Denying Rehearing In Part and Denying Objection To Compliance Filing, 2015 WL 891030 (Feb. 27, 2015); where the Commission

[18] *Id.*

[19] *Id.* The Charter 2018 Acceptance Letter also noted that the acceptance "remains subject to applicable law."

misstates the law, *see* Case No. 15-G-0244, *Proceeding on Motion of the Commission to Develop Implementation Protocols for Complying with Inspection Requirements Pertaining to Gas Serv. Lines Inside Buildings*, Order Granting In Part Petitions for Rehearing, Reconsideration, and Clarification, 2017 WL 3437453, at *2 (Aug. 3, 2017); or where the Commission issues an order that is later shown to have an "adverse[] impact [on] recipients of" the regulated service, Case No. 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility*, Order Granting In Part and Denying In Part Requests for Reconsideration and Petitions for Rehearing, 2017 WL 713130, at *13 (Feb. 17, 2017). Overall, rehearing is appropriate where it "would serve the public interest." Case No. 14-M-0224, *Proceeding on Mot. of the Comm'n to Enable Cmty Choice Aggregation Programs*, Order On Request for Reconsideration and Petition for Rehearing, 2016 WL 6137467, at *5 (Oct. 13, 2016); *see also, e.g.*, Case No. 12-M-0476, *Proceeding on Mot. of Comm'n to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in N.Y. State*, Order Granting Requests for Rehearing and Issuing A Stay, 2014 WL 1713077, at *4 (Apr. 25, 2014); Case No. 02-M-0741, *Petition of Consolidated Edison Company of New York, Inc. for Approval of the Transfer of Approximately 21.3 Acres of Land Located in Its Astoria Complex, Borough of Queens, New York City, to Luyster Creek, LLC*, Declaratory Ruling On Order Authorizing Transfer of Real Property, 2007 WL 1213672, at *6 (Apr. 24, 2007).

Even where the conditions for rehearing are not present, the Commission has discretion to grant reconsideration of a prior order. *See, e.g.*, Case No. 09-V-0266, *Petition of the CSC Acquisition-MA, Inc. for Approval of the Renewal of its Franchise with the Town of Harrison, Westchester County*, Order Denying Rehearing and Granting Reconsideration and Clarification, 2010 WL 4808139, at *1 n.2 (Nov. 23, 2010) ("While the petition does not comply with the

requirements for a petition for rehearing under Public Service Law (PSL) § 22 and 16 NYCRR § 3.7, we exercise our discretion to consider the petition as one for reconsideration."). Indeed, the Commission can grant a petition for reconsideration whenever it deems such action appropriate. *See, e.g., id.*, at *5; Case No. 07-V-1523, *Petition of Verizon N.Y. Inc. for a Certificate of Confirmation for its Franchise with the Town of Ossining, Westchester County. Petition for Rehearing or, in the Alternative, Clarification of Orders Issued in Cases 07-V-1523, 07-V-1524, 07-V-1525 and 08-V-0005*, Order Granting Reconsideration and Amending Orders, 2008 WL 4725761, at *4 (Oct. 23, 2008).

ARGUMENT

I. THE COMPLIANCE ORDER IS UNNECESSARY AND IRRELEVANT TO CHARTER'S COMPLIANCE WITH THE EXPANSION CONDITION.

The *Compliance Order* is a solution in search of a problem. The purported basis for ordering Charter to provide a new letter accepting the commitments set forth in the *Merger Order* and Appendix A set forth in the *Compliance Order* is that Charter, in responding to the *Expansion Show Cause Order*, had attempted to use its "qualified" acceptance of the *Merger Order* and Appendix A to limit or disavow its obligations under the Expansion Condition.[20] This misapprehends Charter's arguments; absent this misunderstanding the *Compliance Order* is unnecessary.

Charter has not disavowed its commitment to the Expansion Condition, nor is it currently challenging the Commission's authority to enforce the Expansion Condition *itself*, as entered in January of 2016. Rather, Charter has disagreed with the Commission's *interpretation* of the Expansion Condition and challenged the Commission's authority to modify it through that new

[20] *Compliance Order* at 6, 9.

interpretation. These arguments are grounded in basic principles of administrative law, and are not predicated upon a theory that the phrasing used by the Charter 2016 Acceptance Letter declined to accept every commitment set forth in the body of the *Merger Order* and Appendix A.

To start, Charter and the Commission (insofar as the Commission's position is reflected in the *Expansion Show Cause Order* and the *Disqualification Order*) both agree that the body of the *Merger Order* and its Appendix A are not in conflict with respect to what the commitments in the Expansion Condition entail. They simply disagree as to what the Expansion Condition requires. The *Compliance Order*, however, seizes upon Charter's observations that if there were any tension between the body of the *Merger Order* and its Appendix, "[i]t is Appendix A" that "Charter explicitly accepted" and it is therefore "Appendix A that contains the specific text of the requirements with which Charter is ordered to comply."[21] The *Compliance Order* misconstrues this argument as evidence of Charter's alleged intent to use its "qualified" acceptance of the *Merger Order* to limit the scope of the Expansion Condition.[22] However, it is not.

First, as explained in Charter's 2018 Acceptance Letter, Charter's reference to the conditions set forth in Append A was merely a reference, for clarity, to the "negotiating history" of those commitments and to the fact that Appendix A "where the commitments were collected."[23] It reflects the negotiating history and discussions between Department Staff and Charter prior to its acceptance, which discussions, at least in part, confirmed Charter's understanding that the *Merger Order* did not purport to alter the commitments set forth in Appendix A (with Staff further confirming that, as a matter of law, the logic of the *Luyster Creek* decision would prevent such

[21] *Expansion Show Cause Response* at 41.

[22] *Compliance Order* at 6.

[23] Charter 2018 Acceptance Letter at 1.

alteration in any event). Thus, it expressed Charter's contemporaneous understanding of what the *Merger Order* required rather than purporting to modify those requirements.

Second, as explained in Charter's *Expansion Show Cause Response*, it is a statement of what the law is: that to the extent there is any tension between Appendix A and the body of the *Merger Order*, the Appendix controls because that is where the requirements are actually collected:

> The text of the *Merger Order* is unambiguous: expanding coverage to low density areas is a reason explaining *why* the Commission adopted the Expansion Condition, not an *element* of the Expansion Condition…. Even if the *Merger Order* could somehow be construed … as limiting the Expansion Condition exclusively to "less densely populated and/or line extension areas" (which it cannot), the *Merger Order*'s Appendix A … contains no such requirement, requiring only that the "residential housing units and/or businesses" be "unserved" or "underserved," not that they also be located in low-density areas. *See Merger Order*, App'x A, § I.B.1. Accordingly, even though there is no conflict as between the body of the *Merger Order* and Appendix A, Appendix A would control in the event of any such conflict. It is Appendix A that Charter explicitly accepted, and it is Appendix A that contains the specific text of the requirements with which Charter is ordered to comply.

Expansion Show Cause Response at 40-41.

These arguments sound in administrative law and do not depend upon the specific phrasing of the Charter 2016 Acceptance Letter. As the Court of Appeals explained in *Matter of Luyster Creek, LLC v. New York State Public Service Commission*, 18 N.Y.3d 977 (2012), where there is a conflict between the express conditions of an order approving a transaction and the Commission's stated purposes for granting approval, the express conditions govern. Here, Appendix A in the *Merger Order* is entitled "Conditions of Approval" indicating its intention for this section to set forth the Commission's conditions for approving the merger. Charter's argument, as well as the original phrasing of its 2016 Acceptance Letter, is not that there are ordering clauses or merger commitments set forth in the body of the *Merger Order* Charter has disavowed, but rather that Appendix A is where the *Merger Order* locates those commitments and

that the body of the order, while providing context and background for those commitments, does not contain any additional or different requirements directing otherwise. The source of disagreement is that the Commission evidently now improperly seeks to reinterpret this context and background as imposing additional commitments or conditions.

The *Compliance Order* also focuses upon Charter's observation that the *Expansion Condition* "derives any legal force … from Charter's (qualified) acceptance," which the Commission similarly reads as an attempt by Charter to disavow its obligations under the Expansion Condition.[24] Here, again, Charter has not sought to use the particular phrasing of the Charter 2016 Acceptance Letter to disavow Charter's commitments. Rather, Charter was stating another rule of administrative law: that due to the voluntary nature of Charter's commitment, "courts will hold the Commission strictly to the terms of that agreement and will not afford the Commission's legal interpretations or factual findings" deference in the same manner as they would if the Commission were interpreting a direct order on a matter the Commission could otherwise regulate in the normal course.[25]

To be sure, the Commission may not share Charter's view of what the law is, and these questions may ultimately need to be resolved by a reviewing court. But they do not indicate any refusal by Charter to accept the *Merger Order*'s commitments or any deficiency in its 2016 Acceptance Letter. Accordingly, there is no basis for the stated concerns on which the *Compliance Order* is predicated, and the Commission should grant rehearing and vacate it as unnecessary.

[24] *Compliance Order* at 6-7 (quoting *Expansion Show Cause Response* at 26).

[25] *Id.* (citing cases).

II. CHARTER'S ACCEPTANCE LETTER IS IRRELEVANT TO THE COMMISSION'S JURISDICTION.

It is unclear on the face of the *Compliance Order* whether its objection to the Charter 2016 Acceptance Letter was the letter's reference to the commitments in Appendix A in lieu of also referencing the body of the *Merger Order*, or whether it also takes issue with the fact that Charter's acceptance was "subject to applicable law and without waiver of any legal rights."[26] If the Commission intended the latter in addition to the former, the *Compliance Order* is predicated upon a legal error.

Charter's 2018 Acceptance Letter, although Charter did not believe it necessary or warranted for the reasons stated in this Petition, made clear that Charter "unconditionally" accepts the commitment set forth in the Expansion Condition and that Charter has not purported to disavow or limit its commitments under the *Merger Order* as adopted in 2016. The generic reservation of rights in Charter's 2016 Acceptance Letter does not "condition" Charter's acceptance of its commitments either; it simply restates the rule of law that a party's acquiescence to an agency order cannot confer jurisdiction on the agency if it otherwise lacks it. Merely stating what the law is, is not a deficiency in Charter's acceptance letter that requires correction.

The jurisdiction of state administrative agencies, like that of courts, is limited. As a "creature of statute," a state agency has jurisdiction only to regulate those matters that have been expressly or impliedly delegated to it by the state legislature, *Abiele Contracting, Inc. v. New York City School Construction Authority*, 91 N.Y.2d 1, 10 (1997), and that have not been preempted by federal law, *Matter of Consolidated Edison Co. of New York v. Public Service Commission*, 98 A.D.2d 377, 381-82 (3d Dep't 1983) (recognizing that federal preemption is a basis for challenging

[26] *Compliance Order* at 9.

an agency's subject matter jurisdiction), *aff'd as modified*, 63 N.Y.2d 424 (1984). Parties to an administrative proceeding accordingly cannot agree or consent to give an agency additional regulatory powers any more than private parties can contract to give a court subject matter jurisdiction over a matter that it has not been assigned by statute. 2 N.Y. Jur. 2d Administrative Law § 206, Westlaw (May 2018 update) ("An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon an agency by the parties before it; therefore, the fact that an agency deviates from its statutorily established sphere of action cannot be upheld because it was based upon agreement, contract, or the consent of the parties.").

Charter has repeatedly explained that the Commission's authority does not include jurisdiction over broadband services or authority to order compulsory broadband buildout.[27] While the Commission may disagree with Charter's position, whether or not the Commission has such jurisdiction is a question of law. If the Commission lacks such jurisdiction (as Charter believes), Charter's acquiescence in the Expansion Condition is irrelevant to the Commission's jurisdiction because jurisdictional objections are not waivable.[28] And if the Commission does have such jurisdiction (as the Commission's recent orders contend), then Charter's statement that its acceptance of its commitments is "subject to applicable law" would not limit such authority in any event. Moreover, as Charter is currently only challenging the Commissions' right to alter the Expansion Condition and not the condition itself, there is currently no live dispute on this issue.

Because Charter's generic reservation of rights in the Charter 2016 Acceptance Letter was consistent with the law, was consistent with the *Merger Order*'s requirement to accept the *Merger Order* conditions, and would be outside the Commission's authority to compel Charter to waive

[27] *See Expansion Show Cause Response* Part II.B.2.

[28] *See id.* at 26 n.30 (collecting cases).

in any event, there would not be either any reason nor any lawful basis to require Charter to modify its 2016 Acceptance Letter. Accordingly, if this was the intent of the *Compliance Order*, the Commission should reconsider and withdraw it.

III. RELIANCE INTERESTS AND THE PASSAGE OF TIME NEGATE ANY CLAIM THAT CHARTER'S 2016 ACCEPTANCE LETTER WAS DEFICIENT.

As set forth above, the specific phrasing used in Charter's 2016 Acceptance Letter complied with the *Merger Order* and there is no basis or reason to require Charter to change it. But if there were any legal distinction as between the acceptance that the Commission thought it was requiring in the *Merger Order* and the acceptance that Charter provided, the time to demand that Charter change the terms of its acceptance has long passed. The Commission accepted Charter's letter for filing on January 19, 2016 and it had been listed on the Commission's public docket for nearly two-and-a-half years before the Commission issued the *Compliance Order*. Charter and Time Warner Cable closed their merger in reliance upon the justified belief that their transaction had received the Commission's approval (as evidenced by the fact that the Commission had at no point prior to the *Compliance Order* objected to the acceptance letter that Charter provided, and has been consistently and without exception interacting with the company as a merged entity across a wide range of regulatory matters for over two years) and in undertaking subsequent integration efforts. The passage of time and reliance interests invested by Charter based upon the Commission's approval of the merger, and its failure to indicate that Charter's acceptance letter was insufficient for almost two and a half years, both estop the Commission from demanding that Charter revise that acceptance now and also make it arbitrary and capricious to issue such a demand.

The *Compliance Order*, attempting to cover for the untimely nature of its action with respect to a letter accepted for filing in early 2016, dismisses this concern based upon the general

rule that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties."[29] This is a *non sequitur*. The Commission was not under any statutory duty to require Charter's acceptance of the *Merger Order* conditions to be set forth in any particular form or to use any particular phrasing. The general rule that the government does not waive statutory requirements by allowing them to go unenforced does not support the *Compliance Order*'s holding, because the Commission violated no laws or duties by accepting and acquiescing to the Charter 2016 Acceptance Letter in the form in which Charter filed it.

Moreover, estoppel doctrines do run against the government where, as here, a government agency is acting in a contractual rather than governmental capacity. *See, e.g., Allen v. Bd. of Educ. of Union Free Sch. Dist. No. 20*, 168 A.D.2d 403 (2d Dep't 1990). A "governmental agency may be subject to estoppel" arising out of "actions taken in its proprietary or contractual capacity," including where" it has "induced justifiable reliance." *Id*. at 404. To be sure, the Commission's consideration and issuance of the *Merger Order in general* was a governmental action, and estoppel might not apply if the Commission had, for instance, forgotten to apply a required statutory provision or regulation and then belatedly remembered to do so. But its acceptance from Charter of voluntary commitments *beyond* the Commission's direct authority to compel (such as the Expansion Condition), in exchange for granting its approval, was purely contractual in nature—and thus subject to the same rules that normally govern any other contracting party.

Indeed, even above and beyond the rules of contract law, doctrines of administrative law would make it arbitrary and capricious to upset settled expectations after so long a time period. Courts have found it arbitrary and capricious where an agency tries to use its powers as a "pretext for the correction of perceived problems which existed and should have been addressed earlier"

[29] *Compliance Order* at 6.

and where reliance interests have formed in the interim—such as by seeking to modify an agency's conditions for approval of a project that a petitioner has already substantially completed in reliance upon the approval. *Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 373 (1988) (holding that, where agency approved a construction plan and petitioner had undertaken substantial construction in reliance upon approval, agency could not lawfully force after-the-fact modifications to the plan).

Here, Charter and Time Warner Cable long ago completed their merger and integrated their operations, and did so in reasonable reliance upon the fact that their merger was approved and the terms on which they had accepted the approval were legally effective. It would be arbitrary and capricious for the Commission to upset those expectations years after the fact, particularly where (as here) no statutory duty requires it and the Commission appears to be making the demand not for any genuine statutory or regulatory purpose but rather in order to obtain a perceived advantage in ongoing litigation. For that reason, although there is no difference (in terms of Charter's commitment to the Expansion Condition) as between its 2016 Acceptance Letter and the revised acceptance compelled by the *Compliance Order*, if there *were* any such difference, doctrines of contract and administrative law would prohibit the Commission from compelling Charter to change it now.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and/or reconsider the *Compliance Order* and withdraw it.

Respectfully Submitted,

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/s/ Maureen O. Helmer

Maureen O. Helmer
Ekin Senlet
BARCLAY DAMON LLP
80 State Street
Albany, NY 12207
(518) 429-4220
mhelmer@barclaydamon.com

Samuel L. Feder
Howard J. Symons
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
lplatzer@jenner.com

Counsel for Charter Communications, Inc.