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

PETITION OF CHARTER COMMUNICATIONS, INC. FOR REHEARING AND FOR RECONSIDERATION OF JUNE 14, 2018 ORDER

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INTRODUCTION

Charter Communications, Inc. ("Charter") hereby submits this Motion for Rehearing and Reconsideration of the Commission's June 14, 2018 order denying Charter's response to the Commission's March 19, 2018 order to show cause and denying Charter's Good Cause claims (hereinafter "*Disqualification Order*" or "*Order*").[1]

For the reasons stated herein, the Commission should reconsider its decision to disqualify 18,363 addresses from Charter's January 8, 2018 Buildout Compliance Report[2] and should find that Charter has successfully met the December 16, 2017 target under the Commission's September 14, 2017 *Expansion Settlement Order*.[3] In the alternative, it should at minimum reconsider its decision declining to find "Good Cause Shown" with respect to any alleged shortfall by Charter in meeting that target, as well as for the three-month cure period thereafter, under the same order.

First, Charter has submitted evidence establishing that the addresses in its *January Buildout Compliance Report* (with a small number of minor exceptions) satisfy each criterion of the Expansion Condition as the condition is set forth in Appendix A to the Commission's *Merger Order*.[4] The *Disqualification Order* does not cite any credible evidence to the contrary.

Second, the *Disqualification Order*'s decision to disqualify the 18,363 disputed addresses depends entirely upon interpretations of the Expansion Condition that are legally erroneous. The

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[1] Case 15-M-0388, Order Denying Charter Communications, Inc.'s Response to Show Cause and Denying Good Cause Justifications (June 14, 2018) ("*Disqualification Order*").

[2] Case 15-M-0388, Charter Communications, Inc. Build-Out Compliance Report (Jan. 8, 2018) ("*January Buildout Compliance Report*").

[3] Case 15-M-0388, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (Sept. 14, 2017) ("*Expansion Settlement Order*").

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

Disqualification Order, in essence, disqualifies thousands of addresses from Charter's buildout compliance reports because they fail to meet several *additional* restrictions that do not appear on the face of the *Merger Order* or its Appendix A, and cannot plausibly be supported by its text. Unable to ground these restrictions in the text of the Expansion Condition itself, the *Disqualification Order* instead repeatedly falls back upon generalized policy rationales for holding Charter to a different set of rules than the ones the *Merger Order* actually imposed and Charter actually agreed to. This logic would be impermissible in any case; it is particularly improper in a case such as this one, where there are substantial reliance interests in the terms of the original *Merger Order* as adopted in 2016, where the Expansion Condition's legal effect derives from Charter's voluntary commitment to abide by it, and where the *Disqualification Order*'s newfound restrictions on the condition were never part of that voluntary commitment.

Third, even if the Commission had the authority to *de facto* modify the Expansion Condition to add the restrictions set forth in the *Disqualification Order* (which it does not), it would be arbitrary and capricious to subject Charter to penalties for expanding its network in reliance upon the more straightforward interpretation of the Expansion Condition that Charter has been using in its reporting to date, which the Commission had been accepting without challenge for over a year. Whatever can be said for the *Disqualification Order*'s restrictive interpretation of the Expansion Condition, it is far from the most obvious interpretation and Charter's contrary reading was reasonable.

Finally, with respect to Charter's claim for Good Cause Shown, application of penalties in this instance would be particularly arbitrary and capricious due to the *nature* of the alleged shortfall in Charter's broadband expansion efforts. Indeed, this issue should be deferred entirely until after a court has had an opportunity to review the *Disqualification Order*. But if the Commission

adheres to its decision to reach the question of Good Cause Shown—which it should not—it should find that Charter has shown it. It is undisputed that Charter did, in fact, expand broadband service to substantially more than the required number of unserved and underserved New Yorkers within the reporting period. If any shortfall exists relative to the *Expansion Settlement Order*'s December 16, 2017 target, it derives exclusively from the Commission's disagreement about whether all of the previously unserved and underserved New Yorkers to which Charter expanded broadband access *count* towards the Expansion Condition. And virtually all of this alleged shortfall derives from the fact that the Commission is refusing to count instances in which Charter brought broadband to unserved and underserved New Yorkers whom it could reach using construction methods less dependent upon utility pole access—during Charter time that it lacked adequate access to utility poles necessary to construct horizontal extensions of its feeder cable due to systematic delays by pole owners.

While Charter's expansion of its network to bring broadband services to unserved and underserved New Yorkers may have included additional addresses not pre-planned in the original buildout projections it first shared with the Commission, Charter made extraordinary and good faith efforts during the same time period to expand broadband access in the face of initial challenges. Charter in fact during the relevant time period extended its network to connect tens of thousands of previously-unconnected New York homes and businesses to high-speed broadband. Whether the Commission ultimately allows Charter to count such expansions of its network towards the Expansion Condition or not, it would be patently unfair and unreasonable to penalize Charter for doing so. Accordingly, if the Commission denies rehearing as to the disqualifications

in the *Disqualification Order*—which it should not—it should at minimum grant rehearing and find Good Cause Shown.[5]

BACKGROUND AND PROCEDURAL HISTORY

A. Charter's Network Expansion Obligations under the 2016 *Merger Order*.

As part of its 2016 *Merger Order* granting the applications of Charter and Time Warner Cable Inc. ("Time Warner Cable") to transfer control over Time Warner Cable's New York telecommunications affiliates and cable franchises to Charter, 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* that were set forth in its Appendix A.

The Commission's *Merger Order* conditioned its approval upon Charter's agreement to direct a significant portion of its national expansion of its high-speed broadband network specifically to locations in New York. The full text of the condition is set forth as follows:

> New 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.

[5] 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 to the ordering clauses or other requirements of the *Merger Order* as obligations or commitments to provide non-jurisdictional services 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.

Merger Order, App'x A, § I.B.1 (hereinafter "Expansion Condition"). The *Merger Order* also separately required Charter to consult with the New York Broadband Program Office ("BPO") in order to enable Charter and the BPO to better coordinate network expansion efforts between the two entities. Specifically, Condition B.1(a) states:

> New Charter and Time Warner are 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. This consultation is required to occur within 45 days of the issuance of this Order.

Merger Order, App'x A, § I.B.1(a) (hereinafter the "Consultation Requirement").

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."[6] It also initiated and participated in an extensive consultation and coordination process with the BPO (going well beyond what the *Merger Order* required) in order to improve the joint success of Charter's and the BPO's respective broadband deployment programs.

Due to initial challenges Charter faced in meeting the Expansion Condition's targets, Charter on June 18, 2017, reached a settlement with Department of Public Service ("Department") staff, adopted by the Commission on September 14, 2017, which revised Charter's network expansion targets. The *Expansion Settlement Order*, as relevant here, required Charter to pass 36,771 additional locations by December 16, 2017. Charter had already submitted several reports

[6] 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"). Simultaneously with this petition, Charter is petitioning for rehearing and reconsideration of the Commission's June 14, 2018 order calling into question the sufficiency of the Charter 2016 Acceptance Letter. *See* Case 15-M-0388, Order on Compliance (June 14, 2016).

on its progress under the Expansion Condition prior to the June 2017 settlement with the Department and the Commission's adoption of the settlement in *the Expansion Settlement Order*, including two reports that indicted that Charter was counting, as reportable, addresses within New York City.[7] Yet at no point during the extensive deliberations between Charter and the Department that surrounded the settlement agreement or its adoption by the Commission did anyone raise any concerns that Charter had been interpreting the Expansion Condition improperly or reporting impermissible categories of completed addresses.

B. The March 19, 2018 *Expansion Show Cause Order*.

On January 8, 2018, Charter submitted its *January Buildout Compliance Report* confirming that it had constructed network extensions to 42,889 addresses during the relevant reporting period, thereby comfortably satisfying the Expansion Condition as revised by the *Expansion Settlement Order*. If Charter had "missed" the December 16, 2017 target, the *Expansion Settlement Order* would have given it another three months, until March 16, 2018, to "cure" the miss to avoid the imposition of additional financial forfeitures.[8] However, on March 19, 2018—more than three months after the December 16, 2017 buildout target and three days after Charter would have been able to cure any missed target—Chair Rhodes issued a one-Commissioner Order ("*Expansion Show Cause Order*"), proposing to "disqualify" network extensions for various reasons to 14,522 addresses that Charter had reported, thereby causing Charter retroactively to have "missed" the target.[9] In particular, the *Expansion Show Cause Order* proposed to disqualify three broad categories of addresses: (1) every address in New York City to

[7] *See* n.17, *infra*.

[8] *See Expansion Show Cause Order* at 16.

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

which Charter had reported extending its network; (2) an itemized list of 1,762 specific addresses in Upstate New York that had been questioned by a Department audit; and (3) addresses in census blocks that the BPO had bid out to third-party grantees for subsidized network expansion efforts.[10]

The *Expansion Show Cause Order* directed Charter to show cause why the Commission should not disqualify these addresses, and further directed Charter to provide additional information regarding its reporting under the 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 2016 target "assuming the passings discussed herein remain disqualified," and Charter's plan "to come into compliance" with the *Expansion Show Cause Order*.[11]

C. Charter's May 9, 2018 *Expansion Show Cause Response* and Claims for Good Cause Shown.

Charter filed its response to the *Expansion Show Cause Order* on May 9, 2018 (the "*Expansion Show Cause Response*").[12] In Charter's *Expansion Show Cause Response*, it explained its process for identifying and validating addresses eligible to be reported in accordance with the Expansion Condition.[13]

Charter's description of its reporting process, of course, was not new information to the Commission. Charter representatives had repeatedly explained to Department Staff how Charter identified and reported addresses under the Expansion Condition, including a meeting in which

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[10] *See Expansion Show Cause Order* at 11-12; 13-15; and 15-18.

[11] *Id*. at 19.

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

[13] *See Expansion Show Cause Response* at Part I & accompanying Declaration of Larry Kaschinske ("Kaschinske Decl.").

Charter representatives traveled to Albany on November 17, 2017 to walk through its process with the Department and provide Staff with opportunities to ask questions. Charter's *Expansion Show Cause Response*, accordingly, merely summarized information that had already been in the Department's hands for at least half a year, if not longer. Indeed, the Department had long been on notice of the addresses that Charter considered eligible for reporting under the Expansion Condition through Charter's regular reports throughout 2017, had been involved in extensive negotiations with Charter personnel regarding the *Expansion Settlement Order*, and had engaged in limited audits of Charter's reported addresses in the second half of 2017, during which Department Staff had asked (and Charter had answered) targeted questions regarding specific reported addresses.

In the *Expansion Show Cause Response*, Charter also pointed out that it had been reporting extensions of its network to pass additional homes and businesses in New York City since at least February 2017, several months before the *Expansion Settlement Order*.[14] This fact, of course, was not new information to the Commission either. Charter's February 17, 2017 Network Expansion Plan Update, for example, included 865 addresses in New York City,[15] its May 18, 2017 Annual Update included 994,[16] and its December 1, 2017 Network Expansion Plan Update included 6,568.[17] Neither the Commission nor the Department of Public Service Staff objected to Charter's

[14] *Expansion Show Cause Response* at 7 & n.15.

[15] *See* Case 15-M-0388, Charter Communications, Inc. Network Expansion Plan Update (Feb. 17, 2017).

[16] *See* Charter Communications, Inc. Annual Update (May 18, 2017).

[17] *See* Charter Communications, Inc. Network Expansion Plan Update and Bulk Address Update (Dec. 1, 2017); *see also* Charter Communications, Inc. Network Expansion Plan Update and Communications Plan Compliance Filing (Aug. 18, 2017) (994 reported addresses in NYC); Charter Communications, Inc. Build-out Compliance Report (Jan. 8, 2018) (14,522 reported addresses in NYC).

inclusion of those New York City addresses at the time or during the extensive discussions regarding the *Expansion Settlement Order*.

Charter's *Expansion Show Cause Response* acknowledged that a *de minimis* number of addresses identified in the *Expansion Show Cause Order* had been reported in error and withdrew them. This included a small number of duplicate addresses as well as certain addresses (not specifically identified in the *Expansion Show Cause Order*) around Grafton, New York that Charter discovered had been mistakenly recorded in its construction database with incorrect construction dates.[18] With respect to the majority of the contested addresses, however, Charter otherwise explained that the proposed disqualifications in the *Expansion Show Cause Order* were inconsistent with the Expansion Condition. In particular, Charter explained that its reported addresses in New York City, the addresses questioned by the Department in upstate New York, and the addresses in BPO-bid areas each satisfied the Expansion Condition.[19]

Contemporaneously with its *Expansion Show Cause Response*, Charter was required to submit (or waive) a claim for Good Cause Shown under the *Expansion Settlement Agreement*, both with respect to the December 16, 2017 buildout target as well as the three-month cure period thereafter.[20] Charter emphasized that a Good Cause Filing would be required only if Charter were determined to have missed the December 16, 2017 target, and that no such determination yet existed, and accordingly requested that such a showing should not be due until after 30 days after any final decision that Charter had failed to satisfy the target.[21] The Secretary, however, rejected

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[18] *Expansion Show Cause Response* at 19-20.

[19] *See generally id*. at Parts III, IV, and V.

[20] Case No. 15-M-0388, Charter's Good Cause Showing (May 9, 2018) ("*Good Cause Filing*").

[21] Case No. 15-M-0388, Statement of March 2018 Compliance with the December 2017 Passings Requirement and Request to Extend Deadline for any Subsequently Necessary Good Cause Shown Filings (April 6, 2018).

the company's request to hold any Good Cause determination in abeyance pending the Commission's review of Charter's *Expansion Show Cause Response,* and required Charter to file any showing of good cause concurrently.[22]

Charter's *Good Cause Filing* explained that Charter had met the December 16, 2017 buildout target, but was submitting a claim for Good Cause Shown in the alternative. While Charter pointed out that it was premature to make a determination of Good Cause Shown before there had been a final decision on whether Charter had met the target, it explained that numerous factors, including Charter's good-faith reliance upon its understanding of the Expansion Condition, delays in work crew availability due to storm recovery efforts during an unusually destructive hurricane and nor'easter season, and pole owner delay in granting access to utility poles each encumbered Charter's network expansion efforts during the relevant timeframe.[23]

D. The *Disqualification Order*.

On June 14, 2018, the Commission issued its *Disqualification Order*, which largely adhered to the proposals set forth in the *Expansion Show Cause Order* notwithstanding Charter's showing in the *Expansion Show Cause Response*. Purporting to rely upon the "plain meaning" of the *Merger Order*, the *Disqualification Order* ruled that Charter is "precluded from including any NYC addresses in its 145,000[] buildout plan or various reports," reasoning that Charter had not expanded its network to those addresses and that they were already served, both due to Charter's obligations under its cable video franchises as well as service available from other providers.[24] It

[22] Case No. 15-M-0388, Ruling on Extension Request (April 9, 2018).

[23] *See Id*. Charter initiated complaints against several pole owners related to these delays, which have been placed in abeyance pending Department Staff's assistance with accelerating the pace at which utility pole applications are processed and approved.

[24] *Disqualification Order* at 35-36; *see also id.* at 34-54.

further held that New York City did not include any "less densely populated and/or line extension areas," and that the Expansion Condition can be satisfied only by extending Charter's network in such areas.[25]

The *Disqualification Order* further confirmed the *Expansion Show Cause Order*'s proposal to disqualify the vast majority of Charter's reported passings in upstate New York that had been included on the itemized list of passings questioned by the Department, reasoning that whenever Charter already has cable "at the street level, that address is passed and Charter may not count it" irrespective of whether Charter must engage in additional construction activity to make the address broadband-serviceable.[26] In addition, the *Disqualification Order* also disqualified 3,044 further upstate addresses, in "Other Upstate Cities," that had not been proposed for disqualification by the *Expansion Show Cause Order*.[27] The *Disqualification Order* acknowledged that the Department had not audited these addresses, but reasoned that they "are likely located in densely populated areas that already have network passing at the street level" and that Charter "has no active pole applications" in the relevant cities.[28]

The *Disqualification Order* also disqualified 89 addresses in Grafton, New York from Charter's future buildout plan on the theory that those passings were "interspersed" among other addresses that Charter had inadvertently reported to the Commission and withdrawn when it

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[25] *Id*. at 47.

[26] *Id*. at 56. With respect to a small number of addresses for which Charter had demonstrated that the address was not a duplicate and/or was not already served by another provider, the *Disqualification Order* withdrew the *Expansion Show Cause Order*'s proposal to disqualify the addresses and allowed Charter to count them. *Id*. at 59-60.

[27] *Id*. at 57-58.

[28] *Id.* at 58. Charter was not provided a list identifying these additional 3,044 addresses until Friday, July 6, 2018.

discovered the error.[29] It also ruled that Charter may not count 249 passings because the addresses had appeared on Charter's so-called "Negative Space List" (a list of addresses that Charter had identified to the BPO as ones to which Charter, at the time and subject to numerous caveats, did not anticipate expanding its network), and that Charter would be precluded going forward from counting addresses in *any* areas in which the BPO has awarded publicly-subsidized broadband grants—irrespective of whether those addresses had been in Charter's Negative Space list, had not been in Charter's Negative Space List, or had been part of Charter's original buildout plan shared with the BPO and with the Commission.[30]

Finally, the *Disqualification Order* rejected Charter's Good Cause Showing. First, it rejected Charter's claim that it was improper to compel Charter to make such a showing in advance of a final determination as to whether it had satisfied or missed the December 16, 2017 buildout target. It reasoned that, since Charter had filed a Good Cause Shown claim on May 9, the mere existence of Charter's filing constituted "proof that due process has been provided."[31] Second, in response to Charter's contention that it would be unfair to penalize it for failing to anticipate the *Expansion Show Cause Order*'s reading of the Expansion Condition, the *Disqualification Order* reasoned that Charter had "incorrectly relied upon its own assumptions and interpretations, without asking the Commission to clarify" the *Merger Order*, and that Charter's failure to do so defeated any claim of Good Cause predicated upon Charter's good-faith reliance upon its belief that the passings it had been reporting under the condition were eligible.[32]

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[29] *Id.* at 61.

[30] *Id.* at 60-61.

[31] *Id.* at 63.

[32] *Id.* at 62-63. The *Disqualification Order* also dismissed Charter's explanation that a historically destructive hurricane season in 2017 and subsequent severe winter storms adversely impacted the

As to the specific criteria for establishing Good Cause based upon delays by pole owners in granting access to utility poles (which are set forth in Appendix A of the *Expansion Settlement Order*), the *Disqualification Order* agreed that Charter had satisfied most of those criteria.[33] However, the *Disqualification Order* denied a finding of Good Cause Shown, both with respect to the December 16, 2017 target and the subsequent three-month cure period, based on two alleged deficiencies: Charter's supposedly late payments to pole owners and Charter's alleged incomplete applications.[34]

As a result of the above determinations, the *Disqualification Order* directs the Chair of the Commission or his designee to draw upon Charter's Letter of Credit in the amounts of $1,000,000 each in connection with the December 16, 2017 buildout target and with respect to the three-month cure period thereafter.[35] The *Disqualification Order* also orders Charter to remove 18,363 completed passings from its December 16, 2017 report and an additional 11,979 addresses from its future buildout plan, and to submit a revised plan within 21 days.[36]

In a request for an extension of time to submit its 21-day report in accordance with the *Disqualification Order*, Charter explained that the directed updates to its reports and future buildout plans were "far too large an undertaking to be accomplished with the necessary care and diligence required within the 21-day timeframe," as Charter would need to, *inter alia*, walkout and

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availability of make-ready construction crews and thus hindered Charter's efforts to complete even more expansions of its network than it did. *Id.* at 63-67.

[33] *Id.* at 70-76.

[34] *Id.* at 71-73, 76.

[35] *Id.* at 78. Charter notes that under the clear terms of the *Expansion Settlement Order*, the Commission may not draw upon this letter of credit until appeals have been exhausted. *See Expansion Settlement Order* at 18 ("no drawdown shall occur as to any disputed amount until such dispute has been finally resolved, including any rehearing or judicial review")/

[36] *Id.* at 79.

validate additional addresses for potential future construction as well as identify individual pole attachment and conduit applications/licenses and associate them with specific reported addresses, each of which would require several weeks of effort.[37] Accordingly, Charter requested that the Secretary extend this deadline either until an appeal from the *Disqualification Order* can be resolved or, in the alternative, by 60 days.[38]

Minutes before the close of business on July 5, 2018, the date on which the updated report was due, the Secretary of the Commission denied Charter's extension request.[39] Even though the *Disqualification Order* expressly stated that "in the Secretary's sole discretion, the deadline set forth in this Order may be extended," the Secretary's letter's inexplicably denied the extension request by stating that it was "not a matter for the Secretary."[40] Contrary to past practice, the Secretary did not offer Charter a shorter extension than requested, but issued a flat denial, effectively forcing Charter to make its submission immediately. Charter submitted a revised buildout plan and update on the status of its network expansion efforts that same evening, explaining that it had "worked extensively to collect" information in response to the *Disqualification Order* and is making further efforts to gather the requested additional information "as expeditiously as possible."[41]

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[37] Case 15-M-0388, Request for Extension of Deadline to File a Revised Buildout Plan (July 3, 2018).

[38] *Id*. at 2.

[39] Case 15-M-0388, Ruling on Extension Request (July 5, 2018).

[40] *Id*.

[41] Case 15-M-0388, Charter Communications, Inc. 21 Day Report in Response to the Commission's Order Denying Charter Communications, Inc.'s Response to Order to Show Cause and Denying Good Cause Justifications (July 5, 2018).

LEGAL STANDARD

Rehearing is appropriate where (as here) "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 17-W-0288, *Petition of New Rochelle Home Owners Association 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) (grounds for rehearing include "an error of fact or law, or a change in circumstances necessitating a different outcome").

The Commission has granted rehearing in a variety of circumstances, including where the Commission misunderstands relevant facts, *see* Case 16-W-0121, *Minor Rate Filing of Rolling Meadows Water Corporation to Increase its Annual Revenues by About $169,841 or 34.05%*, Order Granting Rehearing, In Part, 2017 WL 3437457 (Aug. 7, 2017); Case 14-V-0089, *Petition of Verizon New York 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), misstates the law, *see* Case 15-G-0244, *Proceeding on Motion of the Commission to Develop Implementation Protocols for Complying with Inspection Requirements Pertaining to Gas Service Lines Inside Buildings*, Order Granting In Part Petitions for Rehearing, Reconsideration, and Clarification, 2017 WL 3437453, at *2 (Aug. 3, 2017), or issues an order that was later shown to have an "adverse[] impact [on] recipients of" the regulated service, Case 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 14-M-0224, *Proceeding on Motion of the Commission to Enable Community 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 12-M-0476, *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Granting Requests for Rehearing and Issuing a Stay, 2014 WL 1713077, at *4 (Apr. 25, 2014); Case 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 identified by 16 N.Y.C.R.R. § 3.7 are not present, the Commission has discretion to grant reconsideration of a prior order. *See, e.g.*, Case 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 07-V-1523, *Petition of Verizon New York 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. CHARTER'S REPORTED PASSINGS SATISFY EACH EXPANSION CONDITION CRITERION SET FORTH IN THE *MERGER ORDER*'S APPENDIX A.

At the outset, it is important to recognize what the *Disqualification Order* does *not* say. With rare exceptions, it does not dispute the *accuracy* of Charter's *January Buildout Compliance Report*, which identified the addresses to which Charter had extended its network as of December 16, 2017.[42] Although the *Disqualification Order* determines that many of those addresses are not *eligible* under its interpretation of the Expansion Condition (discussed in Part II, *infra*),[43] it proffers no facts contradicting the evidence and records that led Charter to identify these addresses as reportable toward the Expansion Condition in the first place.

A. Charter's Reporting Process.

To begin, the *Disqualification Order* does not dispute the accuracy and reliability of Charter's process for identifying and reporting addresses. As Charter's *Expansion Show Cause Response* explained, Charter invested substantial resources in developing and deploying a rigorous process for identifying extensions of its network, and, after entering into the settlement agreement in June of 2017, applied that process to identify addresses that satisfy the Expansion Condition and thus may be included in its subsequent buildout reports.[44] That process consists of verifying that (1) each project involves the expansion of Charter's broadband network to a location not previously serviceable by Charter, (2) each individual reported household or business was either unserved or underserved (as defined by the *Merger Order*) before Charter expanded its network

[42] *See Disqualification Order* 1-2.

[43] *See id.* at 2-3.

[44] *See Expansion Show Cause Response* at 10-11.

to reach it, (3) each of Charter's network extensions was not funded by State subsidies, and (4) Charter did not require the payment of a line extension fee to service any of the new premises.[45] Each of the 42,889 addresses reported in Charter's January 8, 2018 report had been validated by this process, and, with the exception of minimal errors (which Charter withdrew upon discovery), that validation process was effective and accurate.[46] The *Disqualification Order* nowhere claims or cites any evidence that Charter's process improperly identified locations that satisfy each of the four criteria listed above.

B. Expansion of Broadband Access to Previously-Unserviceable Homes and Businesses.

The *Disqualification Order* does not dispute that the locations Charter reported were not broadband-serviceable prior to Charter's network extension activity.[47] The *Disqualification Order*'s reasoning is instead predicated upon the notion that, as a *legal* matter, some extensions of Charter's network count towards the Expansion Condition and others do not.[48] In particular, the *Disqualification Order* takes the position that construction activity to make a previously-unserviceable location broadband-serviceable is insufficient under the Expansion Condition unless it also involves the addition of new feeder cable (and unless the new feeder cable runs horizontally along utility poles or conduits instead of vertically through risers).[49] *See* Part II.A.1, *infra*. But as a *factual* matter, the *Disqualification Order* does not contest that Charter constructed the facilities necessary to expand broadband serviceability to the specific addresses identified by

[45] *Id.* at 11; Kaschinske Decl. ¶¶ 4-15.

[46] *Expansion Show Cause Response* at 10; Kaschinske Decl. ¶ 19.

[47] *See Disqualification Order* at 37, 41-48.

[48] *See id.* at 32-62.

[49] *See id.* at 45-48.

Charter in its *January Buildout Compliance Report*, and that doing so required a level of time, effort, and/or expenditure of resources above and beyond conventional installation work.

Additionally, the *Disqualification Order* does not dispute that each individual address reported by Charter lacked access to broadband at the requisite speeds prior to Charter's construction activity. Specifically, Charter submitted evidence regarding its process for determining the served or underserved status of each individual address included in its build-out report.[50] With respect to addresses in New York City, Charter itemized, for every individual address reported, the specific evidence on which Charter relied to reach the conclusion that the address lacked access to broadband at the requisite speeds prior to Charter's construction activity.[51] The *Disqualification Order* contains no findings to the contrary and disputes none of this evidence. Its reasoning is rather that, as a *legal* matter, some addresses that lacked access at the requisite speeds prior to Charter's construction activity count towards the Expansion Condition and other addresses that lacked such access prior to Charter's construction do not. *See* Part II.A.2, *infra.* As a *factual* matter, however, the *Disqualification Order* does not take issue with any of the detailed, address-by-address serviceability evidence that Charter submitted.

C. Expansion of Broadband Access with Charter's Own Capital and without State, Federal, or Customer Financial Support.

Finally, and with only one exception, the *Disqualification Order* does not dispute that Charter built the facilities identified in its January 8, 2018 Buildout Report with its own capital and without public subsidies or customer contributions in aid of construction.[52]

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[50] *See Expansion Show Cause Response* at 10; Kaschinske Decl. ¶¶ 4-15, 19.

[51] *Expansion Show Cause Response* at 32 n.37; Kaschinske Decl. ¶ 24 & Ex. B.

[52] *See Disqualification Order* at 37-40, 60-61.

The one exception is a set of 86 not-yet-completed addresses in Grafton, New York.[53] The *Disqualification Order* requires Charter to remove these addresses from its future plans because they are located in the same areas as addresses to which Time Warner Cable had previously extended its network with the support of public grants, and states that they must be disqualified "for the same reasons" as the withdrawn addresses.[54] This directive, however, lacks any nexus to the Expansion Condition. Charter voluntarily removed 733 addresses in Grafton, New York from its reports because Charter discovered it had reported them in error.[55] But the fact that Time Warner Cable had previously constructed extensions of its network to *other* addresses in the same area, *outside* of the reporting period and with the aid of public grants, is completely irrelevant to whether Charter's *future* construction in the area, *within* the reporting period and funded by Charter's *own capital*, is eligible to count towards the Expansion Condition. Accordingly, the Commission should grant rehearing and withdraw its directive for Charter to remove the 86 Grafton, New York addresses from its Buildout Plan.

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In short, the *Disqualification Order* does not dispute any of the evidence that Charter has submitted to show that the addresses it reported to the Commission satisfy each of the four Expansion Condition criteria set forth in Appendix A to the *Merger Order*, much less set forth any

[53] These 86 addresses are not identified in the *Order* and cannot be identified by Charter from its reports, as it is not obvious which addresses the Commission considers "interspersed" with Charter's existing passings in the area. Charter has asked the Commission to identify the addresses at issue, but it has yet to respond to Charter's request.

[54] *See id.* at 61 ("These 86 additional addresses . . . 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.").

[55] *See Expansion Show Cause Response* at 19-20.

evidence or facts contradicting Charter's showing. Rather, as explained below, it rests entirely on *legal* conclusions that some of those addresses do not count because they do not satisfy *additional* restrictions not stated on the face of the Expansion Condition as set forth Appendix A. Accordingly, assuming that Charter's interpretation of the Expansion Condition governs—which, as set forth in Part II, it does—the disqualifications set forth in the *Disqualification Order* must be reconsidered.

II. THE *DISQUALIFICATION ORDER*'S ADDITIONAL RESTRICTIONS ON THE EXPANSION CONDITION ARE INCONSISTENT WITH THE *MERGER ORDER* AND EXCEED THE COMMISSION'S AUTHORITY.

As set forth in Part I, *supra*, the text of the Expansion Condition as set forth in Appendix A to the *Merger Order* requires that (1) each project involves the expansion of Charter's broadband network to a location not previously serviceable by Charter, (2) each individual reported household or business was either unserved or underserved (as defined by the *Merger Order*) before Charter expanded its network to reach it, (3) each network extension was not funded by State subsidies, and (4) Charter did not require the payment of a line extension fee to service any of the new premises.

The *Disqualification Order*, like the *Expansion Show Cause Order*, impermissibly adds additional restrictions to these requirements. Relying primarily on generalized policy reasoning rather than any ordering language in the *Merger Order*, the *Disqualification Order* adds the restrictions that addresses may not be reported towards satisfaction of the Expansion Condition (1) if Charter had network facilities "at the street level" prior to conducting construction work to expand serviceability to the location;[56] (2) if, irrespective of whether the *individual* "residential housing units and/or businesses" were "unserved" or "underserved" prior to Charter's

[56] *Disqualification Order* at 56.

construction, they were located "in *areas* where 100+ Mbps broadband service is already available from any other provider";[57] (3) if the addresses are located in "densely populated" areas (which areas the *Disqualification Order* does not define);[58] (4) if the addresses are located within an area to which Charter is required by a cable video franchise agreement to offer cable video service;[59] or (5) if they are "located in areas the BPO has bid out for subsidized builds by third-party providers."[60]

As Charter previously explained in its *Expansion Show Cause Response*, and as discussed further below, none of these restrictions are elements of the Expansion Condition and none can be supported by the *Merger Order*. Moreover, the specific circumstances here—including the fact that the *Merger Order* approved a transaction that has already closed in reliance upon its plain text; the fact that the Expansion Condition could not be ordered by the Commission and derives any legal effect from Charter's voluntary commitment to do what the plain text of the 2016 *Merger Order* required; and the fact that the prior course of conduct among the Department, the Commission, and Charter all establish reasonable reliance and a pattern of practice that preclude the addition of these new restrictions—all weigh in favor of Charter's plain-text interpretation of the condition and against the more restrictive one adopted in the *Disqualification Order*. Accordingly, the *Disqualification Order*'s reliance upon these restrictions for disqualifying

[57] *Id*. at 36 (emphasis added).

[58] *Id*. at 47.

[59] *Id*. at 43.

[60] *Id*. at 37-38. Notwithstanding the *Disqualification Order*'s occasional reference areas "bid out" by the BPO, its reasoning and ordering clauses appear to be limited to areas in which the BPO has actually *awarded* grants, and this Petition accordingly presumes that the *Disqualification Order* would not reach any area in which the BPO has not actually awarded funds to another provider.

addresses both from Charter's completed buildout reports and from its future buildout plans is an error of law as to which the Commission should grant either rehearing or reconsideration.

A. The Plain Text of the Expansion Condition Does Not Permit the Commission's Novel Modifications.

The *Disqualification Order* correctly recognizes that "[i]n determining whether Charter violated the [Expansion Condition]," the Commission must "first look at the plain meaning of the language in the Approval Order's Appendix A."[61] Not one of the additional restrictions that the *Disqualification Order* places onto the Expansion Condition, however, can plausibly be rooted in the text of the *Merger Order*, whether as set forth in Appendix A or as described in the body of the order.

Indeed, as set forth below, the *Disqualification Order* conspicuously avoids the ordering text of the order the Commission actually issued, and instead repeatedly falls back upon generalized policy arguments—as though the Commission were drafting a new merger approval order from scratch, instead of applying the terms of the *Merger Order* that it actually enacted, that Charter actually accepted, and on which Charter and the market relied in closing its transaction with Time Warner Cable, and that has governed the conduct of the parties for over two years.

1. The *Disqualification Order* Impermissibly Excludes a Wide Range of Network Expansion Activities.

Many of the addresses that the *Disqualification Order* deems ineligible rest upon the *Order*'s conclusion that the Expansion Condition's requirement that Charter "extend its network to pass" an additional 145,000 unserved and underserved residential housing units and/or businesses requires Charter to do so only in one specific way: by creating new "facilities available

[61] *Disqualification Order* at 35.

in the right-of-way or on the street fronting a premises."[62] By this logic, the *Disqualification Order* reasons, only *some* construction projects to expand broadband availability to additional homes and businesses count; specifically, those that involve the horizontal extension of feeder cable attached to utility poles or underground conduits—whereas other types of network deployment that expand broadband availability to new homes and businesses, such as vertical extensions of feeder cable by constructing risers from the street up into urban structures, do not.

Nothing on the face of the *Disqualification Order* supports this restrictive definition of "passing" a home or business, and the *Disqualification Order* does not cite any past Commission orders or authority from the FCC to support it. And there is no way any reasonable regulated entity or observer could have possibly thought that this is what the Commission meant in the *Merger Order*, given that this restrictive definition of a broadband "passing" would be significantly out of sync with the more expansive way a broadband "passing" is defined throughout the industry and by the FCC.

As Charter explained in its response to the *Expansion Show Cause Order*, under well-established definitions of broadband availability that pervade various FCC programs addressing broadband deployment, broadband is available from a wireline provider's network only when the provider is capable of extending service to the household or business within a standard business interval and without extraordinary expense.[63] That is the definition that the FCC employed in

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[62] *Disqualification Order* at 46.

[63] *See Wireline Competition Bureau Releases Data Specification for Form 477 Data Collection*, Public Notice, 28 FCC Rcd 12,665, 12,669, Appendix (2013). *Wireline Competition Bureau Publishes Preliminary Determination of Rate-of-Return Study Areas 100 Percent Overlapped by Unsubsidized Competitors*, Public Notice, 30 FCC Rcd 8179, 8187 ¶ 20 (WCB 2015) (employing a standard of whether unsubsidized providers have voice and broadband-capable physical assets in or adjacent to the relevant area and can "provide service to a requesting customer within seven to ten business days without an extraordinary commitment of resources" to evaluate whether an area is served by those providers); *State Broadband Data and Development Grant Program*, 74

defining what it means to "pass" a location in establishing its national buildout condition governing the Charter-Time Warner Cable transaction, and the one commonly accepted in the industry.[64]

The *Disqualification Order* provides no reason why a different interpretation should be imported after the fact into the *Merger Order*, and its attempts to distinguish the FCC's merger order, and to explain why its more restrictive definition of a "passing" should prevail over its commonly industry meaning, are unpersuasive. For instance, the *Disqualification Order* contends that the New York *Merger Order* predates the FCC's merger order, and was accordingly "unavailable for Commission review" at the time of the *Merger Order*.[65] While true, the Commission's reliance on this fact is misplaced. The FCC's order is actually further evidence of the prevailing understanding in the industry, and it is a basic rule of construction that words, and particularly technical terms, are given their accepted meaning in the absence of a specific definition to the contrary.[66] Nor is there any weight to the *Disqualification Order*'s contention that the

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Fed. Reg. 32,545, 34,557 (July 8, 2009) (designating "broadband service" as "available" at any address "if the provider does, or could, within a typical service interval (7 to 10 business days) without an extraordinary commitment of resources, provision two-way data transmission" at designated speeds).

[64] *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6544-45, Appendix B § V.2.c (2016).

[65] *Disqualification Order* at 47.

[66] *See, e.g.*, *Katz v. Am. Mayflower Life Ins. Co. of N.Y.*, 14 A.D.3d 195, 206 (1st Dep't 2004) ("Where a term has acquired a technical meaning, the technical construction is preferred over the common meaning except when another intention is established . . . ." (internal quotation marks omitted)), *aff'd sub nom.*, *Goldman v Metropolitan Life Insurance Co.*, 5 N.Y.3d 561 (2005); *Chauca v. Abraham*, 30 N.Y.3d 325, 330-31 (2017) (explaining that the "starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" and that "words of technical or special meaning" should be interpreted "not loosely, but with regard for their established legal significance" (internal quotation marks omitted)); N.Y. Stat. Law § 94 (indicating that statutory language is "generally construed according to its natural and most obvious sense").

"FCC's buildout requirement fundamentally differs from that imposed by the Commission" because the FCC required Charter to "pass, deploy and offer" broadband service, whereas the *Merger Order* uses only the word "pass."[67] The *Disqualification Order* does not meaningfully attempt to explain how the additional language used by the FCC would make the FCC condition more expansive than the New York condition. Nor could it: if relevant at all, the FCC's requirement that Charter "pass, deploy and offer" service to additional locations in order to meet its obligations would imply a *greater* obligation, not a lesser one, than the Commission's requirement that Charter merely "pass" locations.

The *Disqualification Order*'s newly restrictive definition of what it means to "pass" a home or business is completely decoupled from the *Merger Order* itself and not backed by any meaningful analysis of its text. Instead, it relies on a policy argument: that if Charter is limited under the Expansion Condition to reporting only the deployment of new feeder cable in the right-of-way, that restriction would best advance the *Merger Order*'s general policy objective of extending broadband availability to more New Yorkers. *See, e.g.*, *Disqualification Order* at 37-38 (relying on the "purpose of conditioning the merger in the first instance"); *id.* at 38-39 (citing the Commission's broad policy goals of "expanding broadband into rural areas of the State").

Key terms, however, cannot be flexibly modified to accommodate generalized policy reasoning when the text is otherwise clear. And even if the Commission's generalized policy logic were somehow relevant to interpreting which types of construction activities are reportable as extensions of Charter's network under the *Expansion Condition* (which it is not), it would not support the *Disqualification Order*'s conclusion. If (as the *Disqualification Order* reasons) a location were "passed" as soon as (and only when) there is cable in the right-of-way fronting the

[67] *Disqualification Order* at 48.

structure,[68] and that the *Expansion Condition* accordingly does not require Charter "to provide service to a premise," the *Merger Order* would not impose any requirement on Charter to make broadband service available to anyone at all. As Charter has explained, merely having facilities in the street fronting a building is often insufficient to make broadband services available to homes or businesses inside it.[69] Indeed, substantial and costly additional construction work is often necessary to extend Charter's network to individual residential units and/or businesses even after there is cable plant fronting a structure.[70] By the logic of the *Disqualification Order*, Charter could satisfy the Expansion Condition without ever actually expanding broadband availability to a single home or business, or ever undertaking any work to make those homes or businesses serviceable.

To be sure, were the Commission crafting a new condition out of whole cloth, it would have wide berth to decide what requirements it would consider to advance its preferred policy goals. But here, it is purporting to interpret an order that has been in effect for over two years, and seeking to override (based on purported policy reasoning) the plain meaning of a technical term widely used and understood in the relevant industry and unchallenged by the Commission prior to the *Expansion Show Cause Order*. Such an effort may not rest on policy reasoning so inconsistent with the stated objectives of the order that the Commission is purporting to interpret.

Finally, the *Disqualification Order* also attempts to fault Charter for failing to seek clarification from the Commission regarding the scope of the Expansion Condition and the meaning of the term "passing," and reasons that since Charter did not seek clarification, it is now estopped from challenging the Commission's interpretation.[71] However, there is no ambiguity in

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[68] *Disqualification Order* at 46.

[69] *See Expansion Show Cause Order Response* at 38-39.

[70] *Id.*

[71] *Disqualification Order* at 47-49.

the Expansion Condition on this point and Charter was not required to anticipate that the Commission might reinterpret, over two years later, an interpretation of the requirement contrary to its technical meaning.

2. Whether Homes and Businesses That Are Underserved and Unserved Exist Is An Address-by-Address Determination.

The *Disqualification Order* also takes the position that Charter may not report passings located "in *areas* where 100+ Mbps broadband service is already available from any other provider."[72] That is not the rule. The Expansion Condition makes addresses eligible for reporting if the *specific home or business* is under- or unserved and defines them by the internet speeds to which *they* have access; it does not contain an additional restriction that the home or business also be located in a region in which broadband service is unavailable to *other* homes and businesses:

> 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, . . .

Merger Order, App. A, § I.B.1 (emphasis added). The focus is on whether the "residential housing unit[]" or "business" itself is unserved or underserved,[73] not whether the home or business is located in a region that meets this criteria. Nothing in this language prohibits Charter from expanding service to unserved or underserved addresses that happen to be located in the same municipality as other homes and businesses that *do* have access to broadband service. In fact, it does the opposite: it expressly allows such addresses to be located anywhere in Charter's "statewide service territory" as long as they are "unserved" or "underserved."

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[72] *Id*. at 36 (emphasis added).

[73] *Merger Order*, App'x A, § I.B.1.

3. The *Merger Order* Does Not Geographically Limit the Expansion Condition Based upon Population Density.

Closely related to the above, the *Disqualification Order* also legally errs in applying a newly created restriction that Charter may only report addresses in "less densely populated and/or line extension areas."[74] This restriction is equally untethered to the actual language of the *Merger Order*. As Charter has already explained, the text of the *Merger Order* is unambiguous: expanding coverage to "less densely populated and/or line extension areas" is on its face merely prefatory language explaining that the Commission believed that the expansion of service to unserved and underserved homes and businesses would yield benefits to such areas because that is where many such homes and businesses are located (as evidenced by the *Merger Order*'s use of the words "in order to"), not an *element* of the Expansion Condition.[75] And the *Merger Order* is perfectly logical and coherent on this point. Many unserved and underserved homes and businesses in New York are located in lower density areas. Accordingly, the Expansion Condition's requirement to expand broadband availability to unserved and underserved homes and businesses will predominantly benefit homes and businesses in lower density areas, as they are far more likely to be unserved or underserved and thus eligible for reporting under the Expansion Condition.[76]

What the *Merger Order* does not do—either in its body or in the statement of the Expansion Condition in Appendix A—is restrict the Expansion Condition exclusively to "less densely

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[74] *Disqualification Order* at 47.

[75] *See Expansion Show Cause Response* at 39-42.

[76] This is confirmed by the evidence Charter submitted in connection with its *Expansion Show Cause Response*: that very little of the broadband expansion work that Charter performs in New York City counts towards the Expansion Condition because most of the addresses in New York City already have broadband service options available from another provider, whereas most of the addresses to which Charter extends service in upstate New York do not. *See* Kaschinske Decl. ¶ 23.

populated" or "line extension areas." This is apparent from numerous features of the *Merger Order*. First, the *Merger Order* contains no ordering language to this effect. Second, if the *Merger Order had* contained a geographical limitation, one would expect it to actually *define* the limitation. For instance, one would expect it to define a population density cutoff below which an area would be considered "less densely populated" as well as to define the geographical unit by which such a determination would be made (such as a zip code, census block, census tract, county, municipality, or other metric). Third, given that Appendix A collects every condition described in the body of the *Merger Order*, if the body of the order contained a geographical limitation, one would expect the Expansion Condition as set forth in Appendix A to restate, summarize, or at least reference it. The fact that the *Merger Order* does none of these three things makes clear that the Expansion Condition is not geographically restricted.[77] Rather, it is defined by expanding Charter's network to homes and businesses that are "unserved" or "underserved"—which will usually, but not necessarily, be located in lower-density parts of the State. Indeed, as a matter of policy, an explicit geographical limitation would have prioritized some unserved and underserved New Yorkers over others, suggesting that New Yorkers in urban environments who lack access to high-speed broadband services are somehow less deserving of the Commission's concern.

[77] Charter also pointed out that the *Merger Order*'s estimated of $2,000 per passing is inconsistent with a low-density geographical restriction. The *Disqualification Order* dismisses this concern by explaining that this figure was merely an estimate, not a cap on Charter's obligations. *Id*. at 50-51. But this figure would have been implausibly low if the *Merger Order* were restricted to lower-density areas, given the much higher costs of construction in those areas—and is therefore evidence that no such requirement was intended. And in any event, contrary to the *Disqualification Order*'s attempt to dismiss this estimate as legally meaningless, the Commission's "net benefits" standard was expressly predicated around a quantification of the value of the various *Merger Order* commitments, including the Expansion Condition, calling into serious question the rationality and lawfulness of now applying condition in a manner that would force Charter to incur costs wildly out of sync with that quanitifcation. *Merger Order* at 55, 68.

The *Disqualification Order* attempts to dance around this issue by selectively quoting the *Merger Order* using evasive formulations to avoid the fact that the *Merger Order* never geographically restricts the Expansion Condition. *See, e.g.*, *Disqualification Order* at 21 ("the Approval Order *stated* that [Charter] build only in 'less densely populated and/or line extension areas'" (emphasis added)); *id.* at 47 ("the Commission explicitly *stated its intent* that Charter pass premises in 'less densely populated and/or line extension areas'" (emphasis added)). A common theme to these selective quotations is that they omit the full sentence from which the text is drawn—which, in context, makes it unambiguous that the Commission is predicting the ultimate effect of requiring Charter to pass "unserved" and "underserved" addresses, not adding a new restriction that only some such addresses count. *See Merger Order* at 56 ("*In order to* ensure the expansion of service to customers in less densely populated and/or line extension areas … the *Commission* will require" Charter to commit to the Expansion Condition (emphasis added)).

The *Disqualification Order*'s attempt to distinguish the case notwithstanding, *Matter of Luyster Creek, LLC v. New York State Public Service Commission*, 18 N.Y.3d 977 (2012), is squarely on point. The key holding of *Luyster Creek* is that what the Commission order actually orders, *i.e.* the "express condition of the Commission's approval or a condition precedent to [a] transfer," is what governs the conduct of parties subject to its orders, and that mere expectations that the Commission expresses in its orders are not binding unless ordered.

In *Luyster Creek*, the Commission indicated in its declaration approving a proposed land transfer that the purchaser intended to build an envelope factory on the property, but did not make the construction of the factory as "express condition" of its approval. Here, the Commission observed in the *Merger Order* that it was conditioning its approval of the merger on Charter's agreement to expand its network to reach 145,000 additional households and/or businesses "[i]n

order to ensure the expansion of service to customers in less densely populated and/or line extension areas," but did not expressly condition its approval on Charter's agreeing to build only in these geographic regions, as indicated both by the prefatory nature of the Commission's language and the fact that such language nowhere appears in the carefully negotiated text of Appendix A.

The *Disqualification Order*'s attempt to distinguish *Luyster Creek* on the theory that the *Merger Order*'s ordering clause here included "the conditions discussed in the body of this Order" merely begs the question. What matters is not that the *Merger Order* ordered Charter to commit to the Expansion Condition, but rather what Expansion Condition *terms* the *Merger Order* ordered Charter to commit to. And as stated above, here neither Appendix A *nor* the "body of th[e] order" contains any "express condition" limiting the Expansion Condition to specific geographical regions.[78]

Had the Commission wished to restrict Charter's buildout to "less densely populated and/or line extension areas," it easily could have said that Charter was required to build only in such areas. It did not.

4. Charter's Cable Video Service Obligations under Its Franchise Agreements Are Irrelevant to Its Broadband Deployment Obligations under the Expansion Condition.

There is also no basis in the *Merger Order* for the *Disqualification Order*'s restriction that Charter may not count towards the Expansion Condition any locations that fall within a primary service area of one of the company's cable video franchises.[79] Here again, the *Disqualification*

[78] *Disqualification Order* at 50.

[79] *See Disqualification Order* at 42-44.

Order conflates the generalized policy purposes that animated the Expansion Condition with what the Expansion Condition actually requires.

The *Disqualification Order* admits, as it must, that cable franchises do *not* legally require Charter to expand broadband availability to any location because they pertain exclusively to an obligation to offer cable video service.[80] Its conclusion that addresses in this category are ineligible under the Expansion Condition rests instead on a policy rationale: that since "as a practical matter" Charter expands its broadband network to the same locations as it expands its cable video network, Charter "would already" expand broadband to such locations and the compulsion of the Expansion Condition would thus not be required to cause Charter to build additional facilities.[81] Also as a policy rationale, the *Order* states that the reason the Expansion Condition was adopted was "to ensure that that merger resulted in net benefits to the public that, absent such conditional approval, would not have materialized."[82] From those two policy rationales, the *Disqualification Order* leaps to the conclusion that "there is no legitimate reason" for Charter to report expansions of its network to locations within New York City, since those addresses fall within Charter's primary service areas under its cable video franchises.[83]

This practical point might have been a relevant policy consideration when the Commission was designing in the first instance what sort of broadband buildout requirements it might want to impose on the transaction. But as a legal matter under the Expansion Condition set forth in the *Merger Order*, it is irrelevant. Nothing in the *Merger Order* prohibits Charter from satisfying the Expansion Condition with extensions of its network that it would have constructed for market-

[80] *See Disqualification Order* at 44.

[81] *Id*. at 44.

[82] *Id*. at 36.

[83] *Id*.

driven reasons in the absence of regulatory compulsion, nor does anything in the Expansion Condition require Charter to demonstrate for every reported address that Charter would not have expanded broadband service to the address based on market forces.[84] Instead of letting the market solely drive the expansion of its network, the company agreed to accomplish the build of connections to 145,000 additional homes and businesses in an accelerated four-year time frame.

Nor, for that matter, would any requirement that Charter's passings under the Expansion Condition be incremental to its market-driven network expansion efforts be meaningfully administrable. Charter's business practice of offering broadband over its cable systems does not define its legal obligations and does not import new requirements into the *Merger Order*.

5. BPO Grants to Third Parties Are Irrelevant to the Expansion Condition if Those Grantees Do Not Actually Offer Service to the Pertinent Addresses.

The *Disqualification Order* also holds that addresses are not eligible to be reported under the Expansion Condition if they are located "in areas where State grant monies have been awarded to other providers."[85] These addresses fall into three categories: (1) addresses that had always been in Charter's buildout plan reported to the Commission but the BPO subsequently awarded to third parties anyway; (2) addresses that Charter had originally included on its "Negative Space" list of addresses to which Charter did not initially anticipate expanding its network (but which

[84] Insofar as the *Disqualification Order* further takes the position that passings are not reportable if they "would otherwise be required by law, regulation or franchise agreement," *Disqualification Order* at 36, it again imagines a requirement nowhere on the face of the *Merger Order* or its Appendix A itself, which does *not* prohibit Charter from counting the same completed extensions of its network to satisfy separate legal obligations. With respect to addresses within the primary service areas of Charter's cable franchises, however, this reasoning is irrelevant, because expansion of broadband is not legally required (and cannot, under federal law, be required) by a cable franchise, and Charter expands broadband to the same customers and premises solely due to *market* forces.

[85] *Disqualification Order* at 36.

anticipation Charter disclosed to the BPO subject numerous express qualifications); and (3) addresses that were not in Charter's Negative Space list but had not been included in the initial iteration of Charter's buildout plan. The legal reasoning used by the *Disqualification Order* to disqualify all of these addresses is identical, and erroneous.

Unlike the other new restrictions that the *Disqualification Order* adds to the Expansion Condition, the *Disqualification Order* at least *tries* to ground this requirement in the text of the *Merger Order*. Specifically, it contends that areas in which the BPO has awarded grants to third parties for subsidized broadband deployment are ineligible because Charter's extensions of its network under the Expansion Condition must be "exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs."[86] This text, however, cannot support the *Disqualification Order*'s new reading of the *Merger Order*.

The first reason is grammatical. The phrase "exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs" modifies the statement that "New Charter is required to extend its network to pass … 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 …"[87] A requirement for Charter to "extend its network to pass…exclusive of any available State grant monies" is on its face a restriction that prohibits *Charter* from counting towards the Expansion Condition extensions of Charter's network funded by "State grant monies," ensuring that Charter could not obtain state grants and then use those funds to build the extensions of its network required by the Expansion Condition. It says nothing at all to prohibit addresses where a *third party* has received or been chosen to receive

[86] *Id*. (quoting *Merger Order* Appendix A at I.B.1).

[87] *Merger Order*, Appendix A § I.B.1.

"State grant monies" to the area. To be sure, if such a third party had actually built out its network to offer service at speeds greater than 100 Mbps to addresses using "state grant monies," the particular addresses would no longer be "unserved" or "underserved" and thus ineligible. But nothing on the face of the condition renders such addresses automatically ineligible for Charter's network expansion efforts where, as here, they do *not* in fact have access to broadband service at the requisite speeds even though a third party might have accepted "state grant monies" to serve them but has not actually done so at the time Charter expands broadband to those locations.

The second reason is structural. The phrase "exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs" in the top-level Section I.B.1 is then further expanded upon in subsection I.B.1.e, which requires Charter to bid for certain state broadband grants to serve "unserved and underserved premises in its New York service territory"—and then uses the same formulation to state that this construction must be "exclusive of the 145,000 premises that will be built out pursuant to this Order."[88] Read together, Section I.B.1 and I.B.1.e say the same thing: that Charter must extend its network to new locations, and must bid for state broadband expansion grants to build to further additional locations, but cannot count any construction funded by the latter towards it targets for the former. It has nothing to do with third-party grant recipients at all.

Stripped of its one tenuous hook to the text of the *Merger Order*, the *Disqualification Order*'s reading of this condition into the Expansion Condition consists of nothing more than generalized policy contentions that New Yorkers would be better served if Charter were not allowed to count extensions of its network to areas slated for potential future BPO-funded buildout. *See, e.g.*, *Disqualification Order* at 37 ("there would have been no reason" to include the

[88] *Merger Order*, Appendix A § I.B.1.e.

coordination requirement if addresses in BPO-awarded areas were allowed to count towards the Expansion Condition); at 61 (reporting such addresses "violates both the letter *and the spirit* of the Approval Order" (emphasis added)); *id.* at 62 ("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" (emphasis added)). What these citations lack is any reference to any language in the *Merger Order* that prohibits Charter from counting network extensions to areas as well as specific addresses included within the BPO's grants, because no such text exists.[89]

The practical effect of disqualifying any address in a BPO-awarded area is to deter Charter from expanding its network to such addresses when it is in a position to serve them, thereby delaying the delivery of advanced services to locations with a present need for such services who might not actually see options from a BPO grantee until significantly later. Indeed, even though generalized policy analysis is not a proper basis for interpreting an ordering clause whose terms are otherwise clear, the policy considerations relied upon by the *Disqualification Order* do not even, on their own terms, compel its reading of the *Merger Order.* Moreover, the *Merger Order*, through its Consultation Requirement, already addresses separately the policy objective of reducing avoidable overlap between Charter's network extension efforts and those of BPO grantees. There is not plausible contention that Charter did not coordinate with the BPO; indeed, as the *Expansion Show Cause Response* makes clear, Charter went above and beyond its

[89] To be sure, the *Merger Order*'s Consultation Requirement required Charter to engage in a one-time consultation with the BPO. But nothing in the language of that requirement imposes upon Charter a continuous obligation to keep changing its own plans in response to whatever future actions the BPO takes—particularly where, as here, the BPO declined to structure its bid programs to avoid overlapping with Charter's known network expansion plans as the Consultation Requirement contemplated. *See Expansion Show Cause Response* Part V & Joint Declaration of Noel Dempsey and Charlie Williams ("Dempsey-Williams Declaration").

obligations under the Consultation Requirement to assist the BPO with its development of the grant program, and that coordination has been substantially effective in steering the respective programs towards different areas of the State.[90] Although there has been some overlap between Charter's thus-far-completed network expansion and the BPO's grants, that overlap has been modest, particularly in light of the overall scope of the respective buildout programs. Moreover, the *Disqualification Order* recognized that it was "laudable" that Charter has brought broadband service to the small number of completed addresses in its *January Buildout Compliance Report* that overlap with BPO areas and does not question that Charter had good reasons to build to them and that New Yorkers at those addresses are benefitting from the extension of Charter's services.[91] Although there is greater overlap between Charter's buildout plans and the BPO's grant programs in future years, that overlap does not arise from Charter's failure to coordinate with the BPO, but rather in significant part from the BPO's failure to coordinate with Charter by conforming its grants to Charter's known plans, as Charter has explained.[92]

Finally, the *Disqualification Order* mistakenly asserts that Charter "did not provide any response" to the *Expansion Show Cause Order*'s request that "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."[93] Charter's *Expansion Show Cause Response* contained an expansive explanation, backed with testimony, explaining how Charter investigates *every* address it reports pursuant to the Expansion Condition to confirm that it is unserved or

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[90] *See Expansion Show Cause Response* Part V.

[91] *Disqualification Order* at 62.

[92] *See Expansion Show Cause Response* Part V & Dempsey-Williams Declaration (detailing history of Charter's coordination with BPO and BPO's knowing encroachment upon Charter's plans by bidding out areas to which it knew Charter intended to expand its network).

[93] *Disqualification Order* at 62.

underserved, along with a description of the methods used.[94] Accordingly, Charter *has* submitted evidence that every address it reports as completed that is located in a BPO-awarded area is an address that was not actually served by the BPO grantee or was otherwise underserved or unserved due to lower maximum broadband speeds being offered.

For that reason, it is illogical for the Commission preemptively to disqualify Charter from including addresses in BPO-awarded areas in its *future* buildout plan, as the *Disqualification Order* directs. These addresses are not served yet, unless a BPO grantee has already completed its network buildout. If a BPO grantee actually expands broadband service to an address in Charter's buildout plan with broadband speeds of 100 Mbps or higher, then the address will no longer be eligible for reporting. But if a BPO grantee expands broadband access only at slower speeds,[95] or does not expand broadband access at all due to a failure to timely build out its network, the address will not be served and will be eligible for Charter to report. The determination of whether or not an address is served, accordingly, cannot be made until such time as Charter actually expands its network to the location and assesses whether a competing provider was offering broadband service at the same location at the pertinent time. Indeed, the only time it makes sense to ascertain the served or unserved status of an address that advances the objective of expanding broadband access to unserved and underserved New Yorkers is when Charter expands its network to the address. Otherwise, New Yorkers in those areas would be deprived of the benefit of Charter's network

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[94] *See Expansion Show Cause Response* Part I.B & Declarations of Larry Kaschinske and Matthew Kardos.

[95] This issue is not merely theoretical. The BPO's New NY Broadband program includes grants to expand service to some regions of the state at download speeds of only 25 Mbps, and significant areas in the latest grant round have been awarded to satellite-based providers expected to offer service only at these lower speeds. *See* Phase 3 Awards, New York Broadband Program Office, https://nysbroadband.ny.gov/new-ny-broadband-program/phase-3-awards. Such addresses will remain underserved within the meaning of the Expansion Condition even once served by the BPO grantee.

expansion whenever a BPO grantee has been unable to follow through with the timely deployment of broadband service. Accordingly, the Commission should grant rehearing and allow Charter to retain such addresses in its future buildout plans—understanding that Charter will not be allowed ultimately to count such future expansions of its network when completed towards the Expansion Condition if a BPO grantee actually makes service available to them at the requisite speeds.

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Because, as set forth above, the plain text of the *Merger Order* (both in its body and in Appendix A) is clear and does not support the *Disqualification Order*'s addition of new restrictions onto the Expansion Condition, no further analysis is required. Where terms are "clear and unambiguous," an agency's determination must be 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) (quotation marks omitted). The agency's interpretation is afforded no deference, because "there is little or no need to rely on any special expertise on the agency's part." *Id*.; *see also Matter of Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102-03 (1997) ("Where 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required'" (quoting *Toys R Us v. Silva*, 89 N.Y.2d 411, 419 (1996)); *Kennedy v. Novello*, 299 A.D.2d 605, 607 (3d Dep't 2002) ("a question of 'pure legal interpretation' of clear and unambiguous statutory terms requires no deference to an agency's interpretation." (quoting *Toys R Us*, 89 N.Y.2d at 419)). As the *Disqualification Order* itself acknowledges, the "Plain meaning rule" requires statutes, rules, and orders to be "interpreted using the ordinary meaning of the language contained therein."[96] Here, that rule compels the conclusion

[96] *Disqualification Order* at 35 n.57.

that the additional restrictions to the Expansion Condition added by the *Disqualification Order* each represent errors of law and should be reconsidered and withdrawn.

B. The Commission's Authority to Change the Text through *Ex Post Facto* Interpretation Is Sharply Limited.

Because the plain text of the *Merger Order* controls, consideration of the additional particularized circumstances of the *Merger Order* and *Expansion Settlement Agreement* is not necessary to require rehearing of the *Disqualification Order*. Even if there were any ambiguity in the *Merger Order* that required those factors to be considered, however—which there is not—those circumstances would weigh against the addition of the new Expansion Condition restrictions that the Commission has adopted.[97]

1. Substantial Reliance Interests Have Been Placed in the *Merger Order* as Adopted in 2016.

To begin with, general principles of administrative law prohibit public agencies, including the Commission, from unsettling past orders or decisions once those actions are final. As the Court of Appeals explained almost a hundred years ago in *People ex rel. Finnegan*, "[p]ublic officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made…" 226 N.Y. 252, 259 (1919). This rule recognizes and protects the substantial reliance interests that regulated parties have in the finality of agency decisions. Companies, including Charter here, often make significant investments of time and money based on their understanding that such transactions have received the agency's blessing. If agency officials could revoke or change the conditions of

[97] The *Disqualification Order* cites the usual rule that the Commission receives "deference" in interpreting its orders. *See Disqualification Order* at 31 n.50. Of course, no deference is required where, as here, the plain meaning of an order is controlling. But for the several reasons set forth in this Section, the usual deference afforded to the Commission is sharply constrained.

their approval, companies would be much less willing to engage in transactions requiring regulatory approval, with severe consequences for economic growth and development. Yet that is exactly what the Commission has done here. More than two years have passed since the Commission approved the merger, which has long since been consummated based upon the *Merger Order*'s terms. The Commission may not go back and modify those terms now.

2. The Commission Cannot, through Creative Interpretation, Add Merger Conditions It Could Not Have Ordered Directly.

Jurisdictional limitations further restrict the Commission's authority to *de facto* amend the *Merger Order* under the guise of interpreting it. Because federal law would prohibit the Commission from ordering the Expansion Condition anew, the Expansion Condition must be strictly interpreted in the form in which Charter voluntarily agreed to it.

As Charter explained in its *Expansion Show Cause Response*, the FCC has consistently found that broadband Internet access services are interstate and therefore subject to exclusive federal jurisdiction. The FCC has exercised its exclusive jurisdiction to expressly preempt "any state or local requirements that are inconsistent with the federal deregulatory approach" adopted in the FCC's *Restoring Internet Freedom Order*, including "any so-called 'economic' or 'public-utility-type' regulations" on broadband services.[98] *See In re Restoring Internet Freedom*,

[98] The *RIF Order* also classified broadband services as information services, which are exempt from public utility requirements entirely. *RIF Order*, 33 FCC Rcd at 318 ¶ 20. The federal prohibition on state regulation of broadband services, however, precedes the *RIF Order*'s classification of those services as "information services" and was already in effect at the time of the *Merger Order*. *See In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 (2015) (reiterating the FCC's "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme" adopted by the FCC), *petition for review denied sub nom. U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, 86 U.S.L.W. 3195 (U.S. Sept. 17, 2017) (No. 17-498).

Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 427-28 ¶ 195 (2018) ("*RIF Order*"). The Expansion Condition is a quintessential public utility obligation because it requires Charter to expand the geographical range in which it offers broadband services and to offer it at specific speeds.

Moreover, the Commission cannot require Charter to comply with the Expansion Condition under its limited authority to regulate cable operators in the state. As Charter explained in its *Expansion Show Cause Response*, that authority is delegated to the Commission by the federal Cable Act and, as such, is constrained by the terms of that delegation. *See* 47 U.S.C. § 544(a) (stating that a "franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the Cable Act itself). Critically, the 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, much less to do what the Expansion Condition does: dictate the speeds and locations at which a provider must make broadband *Internet access* service available.

Two conclusions follow. First, since the Commission lacks authority to tell Charter where and how to deploy broadband service, to the extent that the Expansion Condition has any legal force at all, that force derives entirely from the fact that Charter made a voluntary commitment to abide by it. Second, because the Expansion Condition derives any legal force it has from Charter's voluntary 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 in instances where the Commission is engaged in considerations of matters more broadly within its authority. *See* Part II.B.3, *infra.*

The *Disqualification Order* seeks to avoid this difficulty by theorizing other sources for the Commission's authority to re-interpret and apply the *Merger Order*. None, however, hold water. First, the *Disqualification Order* asserts that the Expansion Condition requires Charter to "expand its network as a whole" and therefore could be imposed under the Commission's general jurisdiction over cable operators and telephone companies.[99] But this formulation is clearly inconsistent with what the Expansion Condition actually does. It does not compel Charter to expand cable or telecommunications services; it compels Charter to expand its network to increase access to Charter's *broadband* services. It defines "unserved" and "underserved" residential housing units and/or businesses in terms of the minimum broadband download speeds available, and requires Charter to consult with the BPO "to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program."[100] If Charter had merely expanded cable and telecommunications services (by building one-way video cable alongside telephone wire) instead of broadband, it clearly would not satisfy the condition.[101]

Second, the *Disqualification Order* also claims authority to require Charter to comply with the Expansion Condition under 47 U.S.C. § 1302(a).[102] This assertion is somewhat striking, seeing as how the FCC has unambiguously rejected the proposition that this section of the Communications Act "constitutes an affirmative grant of regulatory authority" and concluded that

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[99] *Disqualification Order* at 51.

[100] *Merger Order* at 54.

[101] Charter reserves all rights with respect to whether a network expansion condition exclusively applicable to cable video service would be a lawful condition on the transfer of a cable franchise under the federal Cable Act. *See, e.g.*, 47 U.S.C. § 544(f) (prohibiting franchising authorities from regulating the provision of cable video services other than as set forth in the Cable Act). Since the Expansion Condition clearly applies to broadband internet access service as well, however, this issue is not presented by this case.

[102] *See Disqualification Order* at 29 n.46 ("The Network Expansion Condition is consistent with federal law").

it "simply provides guidance to this Commission and the state commissions on how to use any authority conferred by *other* provisions of federal and state law."[103] And, in any event, Section 1302(a) speaks only to using *deregulation* to encourage broadband deployment, not to affirmative regulatory obligations such as compelling providers to construct broadband facilities.[104]

3. Charter's Voluntary Commitments under the *Merger Order* Extend Only to the Order as Adopted in 2016, Not as Re-Interpreted in 2018.

Because the Expansion Condition represents a requirement that the Commission could not impose directly, it derives any legal force from Charter's voluntary commitment. And the Commission does not have interpretive authority over the scope of Charter's voluntary commitment, which is a matter of contract law, not a regulatory matter within the Commission's jurisdiction. Accordingly, the Expansion Condition is bounded by the *Merger Order* as it existed and would reasonably have been interpreted in 2016.

Where agencies act in a contractual capacity—as the Commission did here in accepting a voluntary commitment by Charter to abide by an Expansion Condition that could not have been imposed without Charter's voluntary agreement—they do not receive the same degree of deference in interpreting the scope of contractual commitments. *See Meadow Green–Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604-605 (1st Cir. 1991) (Breyer, C.J.) (declining to apply *Chevron* deference to "agency's interpretation of a contract that it makes with an outside party"); *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that deference to an agency's interpretation of a statute incorporated into a contract may be inappropriate where the

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[103] *RIF Order*, 33 FCC Rcd at 428 ¶ 195 n.731 (emphasis added).

[104] *See* 47 U.S.C. § 1302(a) ("[E]ach State commission … shall encourage the deployment … of advanced telecommunications capability … 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." (emphasis added)).

agency itself is a party to the contract).[105] Accordingly, the meaning and import of Charter's voluntary acceptance of the condition is governed by the condition's terms as reasonable contracting parties would have understood them. *Matter of Sciame Constr. LLC v. Re:Source N.J., Inc.*, 157 A.D.3d 627, 67 N.Y.S.3d 462, 463 (1st Dep't 2018) (holding that to construe an unambiguous contract provision other than by its plain terms "would impermissibly rewrite the provision under the guise of contract construction").

The *Disqualification Order* tries to avoid this limitation with the theory that "Charter cannot, at this stage, argue that the condition was beyond the authority of the Commission to implement."[106] As an initial matter, however, the legal proposition on which the *Disqualification Order* bases this reasoning—that a party cannot collaterally attack an agency order as beyond the agency's jurisdiction if it did not take a direct appeal when the order issued—is contrary to well-established New York law. A regulatory agency cannot arrogate to itself powers beyond its jurisdiction simply because a regulated party acquiesces in the agency's claim to exercise such authority.[107] As pertinent here, federal limitations on state regulatory authority over broadband

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[105] *See also* Statement of Gorsuch, J. Respecting Denial of Certiorari, *Scenic America, Inc. v. Department of Transportation*, 138 S. Ct. 2, 2-3 (2017) (Mem.) (questioning the logic of deferring to an agency's interpretation of a contract, especially where the agency is self-interested (citing Timothy K. Armstrong, Chevron *Deference and Agency Self–Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004)).

[106] *Disqualification Order* at 51.

[107] Although Charter is not challenging the lawfulness of the Expansion Condition here, Charter continues to reserve all rights with respect to its legality and enforceability—although, as set forth above, no reservation of such rights is required because their jurisdictional nature makes them non-waivable in any event. *See, e.g.*, *Matter of Lockport Light, Heat & Power Co. v. Maltbie*, 257 A.D. 11, 14 (3d Dep't 1939) (company's assent to Commission-imposed condition in connection with approval of asset transfer did not waive defect that condition was unlawful); *People ex rel. N.Y. Century R.R. Co. v. Pub. Serv. Comm'n*, 231 N.Y. 1, 5-6 (1921) (same); *Pub. Serv. Comm'n v. Rochester Tel. Corp.*, 55 N.Y.2d 320, 325-26 (1982) (confirming that *Lockport* remains good law as to conditions imposed by the Commission exceeding its jurisdiction).

services implicate federalism concerns, the Commerce Clause, and the Supremacy Clause, and do not exist solely for the benefit of broadband providers. A broadband provider's acceptance of a state regulatory agency's assertion of jurisdiction cannot waive the federal-law limits on that jurisdiction because such constitutional and jurisdictional limitations are non-waivable.[108]

But the Commission's reasoning in any event mischaracterizes and fails to respond to the argument Charter set forth in its *Expansion Show Cause Response*. Charter is not invoking federal preemption to argue that the Expansion Condition *itself* was unlawful. Rather, it has explained that since the Commission *could not have* ordered the Expansion Condition without Charter's voluntary commitment to abide by it, the meaning of the Expansion Condition is necessarily bounded by the scope of what Charter actually agreed to. Charter has every right to challenge the Commission's subsequent interpretation and application of the *Merger Order* on the theory that it is inconsistent with, and exceeds, the scope of Charter's voluntary commitment.[109]

As a procedural matter, moreover, Charter has every right to challenge the Commission's novel *interpretations* of the Expansion Condition irrespective of whether it appealed the *Merger*

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[108] *Id*. Insofar as the *Disqualification Order* claims that "Charter has forfeited its right to pursue subject matter jurisdiction challenges" by accepting the merger conditions, it misstates the law and the cases the *Order* cites do not support this proposition. *Disqualification Order* at 51-52 n.84. Rather, those cases stand only for the general rule of *res judicata* that "[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." *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). Here, however, Charter has not yet litigated the question of the Commission's jurisdiction to impose or enforce the Expansion Condition; no court has yet ruled upon it; and the Commission's *own* assertion of jurisdiction does not have *res judicata* effect. The issue thus remains very much open in the event of any potential litigation arising out of the Commission's application of the condition.

[109] Charter's revised acceptance letter submitted to comply with the directive in the Commission's June 14, 2018 order made clear that Charter did not "waive its positions as to the meaning or proper interpretation of its commitments" or as to the "the Commission's interpretation and application" of the *Merger Order*. Case No. 15-M-0388, Charter's Revised Unconditional Acceptance Letter (June 28, 2018).

Order itself.[110] It is black-letter law that a party may challenge an agency's unreasonable application or interpretation of a past order irrespective of whether the party also directly appealed the initial order.[111]

The *Disqualification Order*, by invoking the doctrine of equitable estoppel as a theory for why Charter cannot challenge the Commission's current interpretation of the Expansion Condition, further conflates challenges to the application of a prior order with collateral attacks upon that order.[112] That doctrine is inapposite and, if anything, cuts the other way. "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted." *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006). Here, Charter's acquiescence to the Expansion Condition could not reasonably have led the Commission to believe that Charter would abide by the Commission's new and restrictive interpretation of the condition, for several reasons. First, as set forth in Part II.A above, the plain text of the Expansion Condition as Charter agreed to it does not contain the new restrictions that the *Disqualification Order* imposes, such that Charter's voluntary agreement to the Expansion Condition could not have created such expectation. Second, as detailed in Part II.B.4, *infra*, an extensive course of conduct between the parties confirms Charter's interpretation. Thus, to the extent principles of equitable

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[110] *Disqualification Order* at 48-49, 51-52.

[111] *See, e.g.*, N.Y.C.P.L.R. §§ 7803-04 (authorizing proceedings to be brought in Supreme Court challenging an agency's determination on the grounds that it "was made in violation of lawful procedures, was affected by an error of law or was arbitrary and capricious or abuse of discretion"); *Matter of N.Y. State Cable Television Ass'n v. N.Y. State Pub. Serv. Comm'n*, 125 A.D.2d 3, 6-7 (3d Dep't 1987) (permitting challenge to agency's interpretation of its prior determination as arbitrary and capricious).

[112] *Disqualification Order* at 49.

estoppel are relevant to the interpretation of the Expansion Condition at all, they cut against the *Disqualification Order*, not in its favor.

4. The New Restrictions on the Expansion Condition Contradict the Parties' Course of Conduct.

As Charter set forth in the *Expansion Show Cause Response*, interpreting the Expansion Condition to impose the additional restrictions described in Part II.A, *supra* would disregard the course of conduct between Charter, the Department, and the Commission over the course of the more than two years preceding the *Expansion Show Cause Order*. This course of conduct included, *inter alia*, (1) Charter's discussions with Department Staff regarding the *Merger Order* and its Appendix A, including immediately prior to formally accepting the *Merger Order* conditions; (2) Charter's ongoing and regular reports of completed addresses to the Commission throughout 2017, which made clear that Charter was including addresses in New York City; (3) Charter's negotiations with Department Staff regarding the *Expansion Settlement Order*, during which Department Staff at no point indicated any belief on the behalf of the Department or the Commission that Charter's inclusion of certain address categories was impermissible under the Expansion Condition; and (4) Charter's communications with Department Staff throughout the second half of 2017, including walking through Charter's reporting process and responding to targeted Department audits that did not raise the systematic and wide-sweeping restrictions proposed by the *Expansion Show Cause Order* several months later.[113]

The *Disqualification Order* barely grapples with this substantial pattern of conduct, which makes it apparent that the restrictive interpretation of the Expansion Condition set forth in the *Disqualification Order* was developed only recently. It ignores entirely the absence of any

[113] *See Expansion Show Cause Response* at Part III.C.3 & Declaration of Adam Falk.

objection from the Department during the negotiation of the June 19, 2017 settlement agreement adopted as the Expansion Settlement Order. With respect to Charter's communications with Department Staff surrounding the terms of Appendix A, including immediately following the *Merger Order*, the *Order* does not deny that the Department's General Counsel, via its Solicitor, confirmed Charter's understanding of the Expansion Condition. Instead, it disavows that confirmation on the grounds that "DPS Staff is not empowered to provide any such assurances or to speak on behalf of the Commission."[114] But this misses the point. Whether Department Staff's contemporaneous representations to Charter legally bind the Commission or not,[115] they evidence what everyone understood the Expansion Condition to mean at the time it was adopted and demonstrate that the Commission and Department have long understood Charter's interpretation of the condition and did not see any reason to contradict it. Although the *Disqualification Order* implies that Department Staff gave Charter inaccurate and unauthorized advice on which Charter was foolish to rely, there is a far simpler explanation: that Department Staff merely confirmed what everyone in 2016 understood.

The *Disqualification Order*'s other responses to the Commission's and Department's course of conduct are no more persuasive. For instance, it points to a December 28, 2017 letter in which Department Staff raised concerns about addresses in Charter's buildout reports that the

[114] *Order* at 49.

[115] The General Counsel serves in that role for both the Department and the Commission, calling into significant question the order's implication that the separation between the Commission and the Department is pertinent. The *Disqualification Order* also takes selective and inconsistent positions as to the legal effect of Charter's communications with Department Staff. Where Department Staff communicated positions with which the Commission now agrees, it concludes that those communications informed Charter of how the *Commission* understood the Expansion Condition. *See Disqualification Order* 11-12. But where Department Staff communicated positions with which the Commission now disagrees, it disavows them. *See id.* at 22, 49-50.

Department had reviewed.[116] The December 28, 2017 letter, however, proves the exact opposite of what the *Order* cites it for. The Department did not issue it until almost two weeks after the December 16, 2017 buildout target date had already come and gone.[117] And the letter's expressed "concerns" included advising Charter not to report, *inter alia*, "addresses with 100 Megabits per second (Mbps) or higher (FiOS, or similar service provider HSD) *service already available*" and "addresses that were *already serviceable* by pre-existing Charter … feeder plant."[118] This aligns precisely with Charter's positions set forth in Part II.A, *supra*: that the Expansion condition focuses on whether *individual addresses* (not areas) had access to service, and that whether Charter had passed a new address turns on whether the address had been "*serviceable*" by Charter prior to its construction efforts. Thus, even as late as December 2017, the Department's expressed views did not match the restrictive positions now adopted by the *Disqualification Order*.[119]

5. Retroactive Application of the Order to Passings Already Completed Is Arbitrary and Capricious.

As Charter explained in its *Expansion Show Cause Response*, even if the Commission had the authority to interpret the *Merger Order* in such a way as to amend its requirements (which it does not), due process considerations prohibit the Commission from applying those amended

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[116] *Disqualification Order* at 11.

[117] The *Order* also cites "one occasion" in which Department Staff "verbally advised" Charter that it could not count addresses in a primary service area, but provides no indication that this verbal advisement took place at any point close in time to the *Merger Order*, as opposed to much later into Charter's expansion efforts. *Id*. at 45. Indeed, as the *Order* admits, the Department's 2017 objections to Charter's reported passings in New York City, through its ongoing audit process, were limited to questioning whether specific reported passings lacked access to broadband service prior to Charter's construction, rather than telling Charter that those addresses were categorically impermissible. *Id*. at 45 n.74.

[118] *Id*. at 11-12 (quoting December 28, 2017 letter) (emphasis added).

[119] Although the letter inquired regarding overlap with BPO-bid areas and primary service areas under Charter's cable video franchises, it did not express the view that such addresses were ineligible—only asked for Charter to "discuss" and identify addresses in those categories.

requirements retroactively to disqualify Charter's already built passings.[120] The *Disqualification Order* responds to this argument only in a cursory manner and fails to meaningfully address the argument that Charter presented.

The *Disqualification Order* dismisses retroactivity as a concern because the Commission is applying an order it already issued rather than engaged in a "rulemaking."[121] But that is a distinction without a difference. The restrictions on retroactive applications of an agency's interpretations of are not limited to new rulemaking proceedings, but include instances where (as here) an agency changes the interpretation of existing requirements in the context of specific adjudicatory proceedings. *See, e.g.*, *Mut. Redevelopment Houses, Inc. v. New York City Water Bd.*, 279 A.D.2d 300, 301 (1st Dep't 2001); *Hilton Hotels Corp. v. Comm'r of Fin. of City of New York*, 219 A.D.2d 470, 476 (1st Dep't 1995). Charter's argument is that the Commission's revised interpretation of the Expansion Condition is not obvious on the face of the *Merger Order*; was not clearly communicated to Charter prior to the *Show Cause Order*; represents an abrupt departure from past practice; and would impose a significant burden on Charter.[122] Moreover, that revised interpretation operates and functions as an amendment to the *Merger Order*. Thus, separate and apart from whether the Commission can impose such new interpretations at all, it would be arbitrary and capricious and an abuse of discretion to apply them retroactively instead of only prospectively. *See, e.g.*, *Heckler v. Cmty. Health Servs. Of Crawford Cty., Inc.*, 467 U.S. 51, 60 n.12 (1984); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007).

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[120] *Expansion Show Cause Response* at 27-30.

[121] *Disqualification Order* at 52.

[122] *Expansion Show Cause Response* at 28-29.

With regard to New York City specifically, even if discounting New York City passings were within the scope of the Commission's legal interpretive authority (which it is not), exercising such authority to disqualify those passings retroactively would be particularly arbitrary and capricious. It would disregard Charter's good faith reliance on the plain text of the Expansion Condition and the course of conduct. *See* Parts II.A & II.B.4, *supra*. Moreover, the policy rationale on which the *Disqualification Order* relies—the purported desire to prevent Charter's construction in New York City from undermining the Expansion Condition—does not apply equally to retrospective reporting of buildout work already completed. Although Charter continues to maintain that disqualifying New York City addresses is impermissible as a matter of law, doing so retroactively would be arbitrary and capricious even above and beyond that legal defect.[123]

III. THE ORDER'S SPECIFIC DISQUALIFICATIONS OF CHARTER'S REPORTED AND FUTURE PLANNED NETWORK EXPANSIONS IS CONTRARY TO LAW, ARBITRARY, AND CAPRICIOUS.

Because (1) Charter has provided evidence verifying that the challenged passings reported in its *January Buildout Compliance Report* satisfy the requirements of the Expansion Condition (*see* Part I, *supra*), and (2) the *Merger Order* places no other restrictions on the Expansion Condition (*see* Part II, *supra*), Charter is legally entitled to count them. To the extent that the *Disqualification Order* disqualifies those addresses from Charter's current and future reports, its decisions accordingly derive from errors of law and are arbitrary and capricious.

A. Addresses in New York City.

First, with respect to the addresses in New York City, the *Disqualification Order* is based primarily upon the two legal errors detailed above: (1) its newly-restrictive and legally erroneous

[123] *Id*. at Part IV.E.

definition of a "passing," *see* Part II.A.1, *supra*;[124] and (2) its erroneous position that homes and businesses are not "unserved" or "underserved" if they are located in areas whether *other* homes and businesses have access to broadband service, even if they themselves do not. *See* Part II.A.2, *supra*. Once these two legal errors are removed, there is no lawful reason to disallow Charter from counting specific network expansion and construction activities in New York City towards the Expansion Condition if they otherwise qualify under the condition's terms.[125]

Although the *Disqualification Order* provides a handful of additional reasons to disqualify the entirety of Charter's New York City construction efforts, none of these miscellaneous considerations change this conclusion. *First*, the *Disqualification Order* repeats the *Expansion Show Cause Order*'s remarkable and demonstrably false assertion that there are no under- or unserved homes or businesses in New York City because various providers offer service in the City.[126] But this is simply a variation on the *Disqualification Order*'s erroneous conflation of unserved and underserved homes and businesses with unserved and underserved regions.

As a factual matter, it is certainly not the case that every address in New York City already has access to high-speed broadband service. The City is currently suing Verizon, for this exact reason.[127] The only response the Commission gives in the *Disqualification Order* is that Verizon

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[124] *See Disqualification Order* 37, 41-44.

[125] As Charter set forth in the *Expansion Show Cause Response*, most of its network expansion activities in New York City do *not* qualify, and have not been reported to the Commission, because they involve addresses otherwise capable of receiving broadband service. *See* Kaschinske Decl. ¶ 23.

[126] *See Disqualification Order* at 41 (concluding that, because "essentially 100% of NYC is served by one or more 100 Mbps wireline providers," no New York City property can constitute an "unserved" or "underserved" address within the meaning of the *Merger Order*).

[127] *See Expansion Show Cause Response* at 35-36 (citing Complaint, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. Mar. 13, 2017); Memorandum of Law in Support of Plaintiff the City of New York's Motion for Summary Judgment at 1, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. July 19, 2017)). Moreover,

has disputed the charges, as it claims to have passed its entire New York City footprint with a network capable of delivering 100 Mbps of broadband service.[128] But these generic assertions do not contravene Charter's specific, address-by-address evidence as to which New York City addresses had available broadband service from other providers and which did not.[129]

Nor is there any merit to the *Disqualification Order*'s assertion that Charter's New York City franchise agreements already require Charter to have "pass[ed] all households in its NYC footprint."[130] As Charter has explained in its *Expansion Show Cause Response*, its network deployment obligations in the City do not require it to have network facilities fronting commercial or industrial buildings, nor residential buildings constructed after November 30, 2011.[131] Rather, Charter is only required to extend its network to those areas when there are requests for service.[132] The Expansion Condition accordingly encourages Charter to accelerate its deployment in New York City above and beyond what the franchise agreements have required, as well as (as stated above) to accelerate work to make structures broadband-serviceable, as opposed to merely fronting them in the street.

The *Disqualification Order*'s other basis for refusing to count Charter's reported New York City passings is, again, rooted in policy rather than the text of the *Merger Order*: that this refusal is necessary to prevent such construction activities from undermining the Commission's expectation that the Expansion Condition will drive Charter to expand its network in upstate New

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according to the City's summary judgment filings, Verizon is in a position to serve only 2.2 million of the City's 3.1 million households. *See id.* at 35.

[128] *Disqualification Order* at 44 & n.73.

[129] *See Expansion Show Cause Response* Part I.B & Kaschinske Decl. ¶ 25 & Ex. C.

[130] *Disqualification Order* at 43.

[131] *See Expansion Show Cause Response* at 37-39.

[132] Franchise Response 34.

York.[133] As evidenced by the fact that New York City has represented only a modest portion of Charter's overall network expansion target under the condition (and is inherently limited by the fact that the vast majority of addresses in New York City already have access to broadband services and are thus not eligible for reporting in the first place), this policy concern is not warranted on the record before the Commission. However, even if this policy rationale could supply a basis for modifying the terms of the condition to disqualify New York City addresses prospectively (which it does not), it does not supply a reasonable basis for disqualifying these addresses *retroactively* as well, with the accompanying imposition of significant financial forfeitures. The *Expansion Show Cause Response* explained that retroactive application of any decision to New York City would be particularly inappropriate here,[134] and the *Disqualification Order*'s continued adherence to that proposal decision is arbitrary and capricious.

Finally, the *Disqualification Order* calls out the fact that, notwithstanding Charter's regular inclusion of New York City addresses in its routine reports to the Commission, Charter had not included New York City addresses within the initial iteration of its buildout plan filed with the Commission or in its first amendment to that plan.[135] It is true that the very initial plans that Charter shared with the BPO and Commission had focused on other areas of the state and did not (indeed, could not) pre-plan for extensions of Charter's network to additional construction and re-purposing of structures elsewhere within Charter's footprint, as with much of its New York City buildout during the relevant reporting period. Charter's construction during the initial period captured by the *January 2018 Buildout Compliance Report*, however, has expanded broadband

[133] *See Disqualification Order* at 37-40.

[134] *See Expansion Show Cause Response* Part IV.E.

[135] *Disqualification Order* at 49-50.

availability to unserved and underserved New Yorkers. While these construction projects may not have been included by Charter in the initial plans that it shared with the Commission and the BPO at the very beginning of the process, they advance the *Merger Order*'s goal of expanding broadband availability to additional New Yorkers—and, more importantly, they satisfy the Expansion Condition. Charter should not be penalized for those efforts.

At bottom, the *Disqualification Order* attempts to retroactively add to the *Merger Order* a prohibition against Charter's counting passings in New York City. Had the Commission wanted to exclude New York City addresses from the condition, it could have done so *ex ante* in the *Merger Order*. It may not do so after-the-fact.

B. Addresses in Upstate New York.

The *Disqualification Order*'s decision to disqualify the 1,461 remaining upstate New York addresses in the Department's audit[136] derives from the same error of law as its disqualification of Charter's New York City network expansions: its restrictive definition of a "passing" to exclude all network construction that does not involve attaching feeder cable to a utility pole. As with the challenged City addresses, the *Disqualification Order* does not dispute that Charter completed design and construction work to render these previously unserved locations serviceable, but holds that the construction techniques used do not satisfy its definition of a "passing." *Id.* at 56-57. With this legal error removed, there is no reason not to count these addresses.

The *Disqualification Order* also disqualifies an additional 3,044 addresses in the cities of Buffalo, Rochester, Syracuse, Albany, Mount Vernon, and Schenectady on the basis that "these addresses are likely located in densely populated areas that already have network passing at the

[136] *Disqualification Order* at 55-58.

street level."[137] For the same reasons provided above, *see* Part II.A.1, *supra*, this is not a lawful basis for disallowing Charter from counting an address to which it has completed construction work to expand its broadband service.

The *Disqualification Order* does state that Charter may "rebut the presumption that these addresses should not be counted with specific evidence" of the work it performed to expand service to these addresses.[138] Because the specific construction techniques used are not legally pertinent to whether Charter has passed these addresses, this supplemental submission should not be necessary. However, Charter received from the Commission a list of these 3,044 addresses on July 6, 2018, and has begun reviewing its construction records with respect to those addresses. Although the *Disqualification Order* does not specify a date by which Charter is to make such a showing, it is reviewing its records and will endeavor to submit any supplemental information to the Commission expeditiously.

Charter notes, however, that the *Disqualification Order* is incorrect to assume that the addresses that Charter has reported in these cities necessarily represent construction in higher-density areas. The *Order*'s statement that the Commission selected these addresses because "Census Bureau data indicates that the average density in all of these municipalities is in excess of 35 homes per mile" conflates the average overall population density for those municipalities with the density of the specific areas in which the challenged addresses are located.[139] To the contrary: of the 4,096 addresses in these municipalities that the Commission has disqualified in the *Disqualification Order*, more than 30%, are in census blocks where the population density is lower

[137] *Id*. at 57-58.

[138] *Disqualification Order* at 58.

[139] *Id*. at 57.

than the 35 homes per street mile metric called out in the *Order*, and approximately 32% of the addresses newly identified by the *Disqualification Order* and not previously proposed for disqualification by the *Expansion Show Cause Order* are in such census blocks.[140] Accordingly, even if the Expansion Condition were limited to construction in areas with lower population density (which it is not), Charter's expansion of its network to these addresses advances the objective of expanding broadband availability to such areas. Accordingly, the Commission at minimum should grant rehearing with respect to this subset of the upstate addresses disqualified in its *Order*.

C. Addresses in BPO-Awarded Census Blocks.

Finally, the *Disqualification Order*'s removal of both completed passings and future passings from Charter's reports where they are located in census blocks where the BPO has awarded grants to third parties (including addresses in Charter's original buildout plan, addresses in Charter's Negative Space List, and addresses on neither) is derivative of its erroneous reading of the Expansion Condition to preclude network expansion in areas where third parties, as opposed to Charter itself, has received State grant monies. *See* Part II.A.5, *supra*. Once this legal error is removed, there is no lawful basis not to count these addresses.

Moreover, even if the Commission had interpretive authority to exclude such addresses, the decision to do so would be unreasonable, particularly with respect to two categories. First, with respect to addresses that Charter has already built to, the *Disqualification Order* acknowledges that it was "laudable" for Charter to build into these areas, the number of implicated passings is not large, and Charter built to those locations in good faith before knowing that the

[140] *See* Declaration of Larry Kaschinske in Support of Charter's Motion for Rehearing (July 16, 2018) at ¶ 5 & Ex. A.

Commission would adopt an interpretation of the condition prohibiting such efforts from counting towards the Expansion Condition.[141] Because those addresses were, in fact, unserved and underserved (as evidenced by the failure of BPO grantees to actually offer service to them), Charter's build to those areas has served the objectives of expanding broadband access to additional New Yorkers and should be credited towards Charter's commitments.

Second, with respect to addresses that have been part of Charter's buildout plan all along (as shared with the BPO and filed with the Commission), it would be particularly arbitrary and capricious to prohibit Charter from counting those addresses towards its Expansion Condition commitments merely because the BPO subsequently decided to award public subsidies to third parties for those same areas. As Charter has explained, it complied in full with the Consultation Requirement by sharing these addresses with the BPO—the BPO simply disregarded Charter's plans and encroached upon them, presumably in order to create more attractive packages of census blocks to offer to other bidders.[142] The *Disqualification Order* fails to address at all Charter's arguments and testimony that it complied with the Consultation Requirement in full, including extensive coordination and deliberation with the BPO well above what the Merger Order required, and cannot be penalized because the BPO declined to coordinate its grants with Charter's plans. It would be fundamentally unjust and unfair to allow one agency of the New York State government to frustrate Charter's ability to satisfy its commitments to another.[143]

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[141] *Disqualification Order* at 62.

[142] *See Expansion Show Cause Response* Part V & Dempsey-Williams Declaration.

[143] As Charter has set forth in its *Expansion Show Cause Response*, numerous recent developments could cause reasonable persons to question whether the *Disqualification Order*, among other recent Commission orders, have been influenced or animated, in whole or in part, by purposes outside the Commission's legitimate oversight responsibilities—particularly with respect to an ongoing labor dispute between Charter and certain striking workers in New York City that has attracted the attention of numerous political officials. *See Expansion Show Cause Response* Part VII. Although the *Disqualification Order* does not discuss this issue, Charter continues to reserve

IV. GOOD CAUSE EXISTED FOR ANY DELAY IN SATISFYING THE BUILDOUT TARGETS.

A. Any Determination That Good Cause Shown Has Not Been Established Is Premature.

In its May 9, 2018 Good Cause Shown filing, Charter explained that it was premature and a violation of due process for the Commission to require Charter to demonstrate Good Cause Shown why it had failed to meet the December 16, 2017 buildout target, or the three-month cure period deadline, because the Commission at that point had not yet made a finding that Charter had actually failed to meet either deadline.[144] Forcing Charter to demonstrate Good Cause Shown before the Commission had actually made a finding as to whether Charter had missed the buildout target deprived Charter of notice of which specific passings the Commission would disqualify, as well as the reasoning the Commission would ultimately adopt in support of that determination.[145] Without such information, Charter was forced to guess how many "missed" addresses it needed to make up through a claim for Good Cause Shown, as well as which criteria would ultimately govern the Commission's decision about eligible addresses.[146] Charter also explained that the Commission's premature actions undermined the *Expansion Settlement Order*, which contemplated that Charter would have access to all of this information at the time a Good Cause claim would be submitted.[147]

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all rights with respect to the Commission's Orders, including the *Disqualification Order*, insofar as they are designed to advance, or have been improperly influenced by, any purpose outside the scope of the Commission's (or the State of New York's) jurisdiction, including but not limited to Charter's rights under federal labor law.

[144] Good Cause Shown filing at 11.

[145] *Id.*

[146] *Id*.

[147] *Id.* at 12.

The *Disqualification Order* does not meaningfully address this unfair deprivation of Charter's right to make a Good Cause Shown claim only once there has been a final determination of whether Charter has, in fact, satisfied the pertinent buildout target. Instead, it takes the position that the mere fact that Charter submitted a Good Cause Shown claim at all proves that Charter was not deprived of due process.[148] This misses the point. Charter's argument is not that the Commission's actions deprived Charter of the opportunity to file a response altogether. Rather, it is that the Commission's actions have hamstrung Charter's ability to make an effective claim of Good Cause Shown by forcing it to make such a showing without knowing how many passings the Commission would disqualify, which passings count, and why. Indeed, until the Commission's order is final and has been subject to judicial review, Charter still lacks this information.

The *Disqualification Order* itself confirms the very concerns that Charter articulated in its Good Cause Shown filing. In addition to disqualifying the 14,508 addresses that the Commission had proposed to disqualify in the *Expansion Show Cause Order*, it disqualifies 3,044 newly identified addresses in Buffalo, Rochester, Syracuse, and several other cities.[149] At the time Charter assembled and filed its Good Cause Shown filing, it had no way of knowing that the Commission would keep altering the alleged shortfall relative to the December 16, 2017 buildout target, and lacked an opportunity to structure its Good Cause claim to account for those alterations. Until there has been a final determination, including judicial review, as to how many eligible passings Charter completed (both for the December 16, 2017 buildout target and the three-month cure period thereafter), any determination of Good Cause Shown is irredeemably premature, both as a matter of due process and under the terms of the *Expansion Settlement Order*. Accordingly,

[148] *Disqualification Order* at 63.

[149] *Disqualification Order* at 57.

the Commission should grant rehearing of its determination that Good Cause Shown has not been established, as well as its determination that Charter may not supplement its claims for Good Cause Shown at a later date, and defer such consideration (including Charter's right to support its Good Cause claims) until after exhaustion of judicial review of the *Disqualification Order*.

B. Charter's Interpretation of the Expansion Condition Was Reasonable and Its Network Expansion Efforts Were Conducted in Good Faith.

If the Commission declines to grant rehearing on the prematurity of its Good Cause Shown determination, it should find that Charter has established Good Cause Shown because it predicated its network expansion activities upon a reasonable understanding of the Expansion Condition and undertook them in good faith.

As set forth in Parts I and II, *supra*, Charter had reasonable grounds for understanding the Expansion Condition to permit it to include in its buildout reports network construction activities that did not depend upon attachment to utility poles to expand the availability of its broadband service. Moreover, Charter proceeded in good faith by seeking out opportunities to expand its services to unserved and underserved New Yorkers using such construction techniques when it encountered significant delays and challenges in obtaining access to necessary utility poles.

The *Disqualification Order* declines to find Good Cause Shown on this basis, finding that Charter could have sought rehearing or clarification of the *Merger Order*'s requirements and that its failure to do so forecloses any claim of reasonable reliance.[150] But this is not a meaningful basis for declining to find Good Cause. *First*, irrespective of whether the *Disqualification Order*'s restrictive reading of the Expansion Condition is ultimately approved by a reviewing court, it is not an obvious reading of the Expansion Condition or one that Charter reasonably could have

[150] *Id*. at 63.

anticipated, particularly given the parties' extensive course of conduct preceding the *Expansion Show Cause Order*. *See* Part II.B.4, *supra*. Charter's expectation that its network expansion activities would be eligible for reporting under the condition was based upon the condition's plain text and well-understood meaning of the condition's technical terms within the industry, and there was no reason for Charter to expect the far more restrictive reading that the Commission has now adopted. *See* Part II.A.1, *supra*.[151]

Second, whether or not Charter could have or would have sought clarification of the Expansion Condition is beside the point. The reason that Charter had good cause for relying upon its interpretation of the Expansion Condition does not depend upon any expectation that the *Commission* would agree with Charter's interpretation. Rather, it derives from the fact that Charter had good reasons to believe that its interpretation was correct and would be shared by a *reviewing court*. Whether Charter's understanding of the condition ultimately prevails or not, that understanding is undoubtedly reasonable and strongly supported by the text, history, and structure of the *Merger Order* and governing caselaw. Subjecting Charter to substantial financial forfeitures (and exposing it to possible other penalties) for reliance upon a reasonable and supported legal position would be arbitrary and capricious, and the Commission should grant rehearing to withdraw those penalties.

C. Pole Owner Delay Materially Adversely Affected Charter's Buildout and the Issues Identified by the June 14, 2018 Order Were Minor.

The Commission should also grant rehearing of its decision to deny Charter's Good Cause Shown claim for the 10,517 passings that Charter identified in its May 9, 2018 filing, because

[151] Indeed, given the recently-developed nature of the Commission's interpretation of the Expansion Condition, the likely outcome of a motion for clarification or rehearing—had Charter sought one in 2016—would have been to confirm the interpretation of the condition to which Charter still adheres in this Petition but the Commission has now abandoned.

Charter established that those passings would have been completed by the December 16, 2017 target but for pole owner delay. Of the eight objective criteria for establishing Good Cause Shown set out in the Expansion Settlement Order, the Commission found that Charter met six of them (Good Cause Criteria A, B, C, F, G, and H),[152] and therefore Charter does not address those six criteria here.

For the remaining two criteria, Good Cause Criterion D and Good Cause Criterion E, the *Disqualification Order* incorrectly found that Charter did not meet those requirements because of allegedly incomplete applications to pole owners and supposedly late payments to pole owners.[153] The *Disqualification Order* makes no effort to quantify either of these alleged deficiencies, or to identify the specific poles or applications that the Commission claims do not meet either or both of the two criteria. Instead, the *Disqualification Order* rejects wholesale all 10,517 passings at issue. The Good Cause Shown criteria, however, do not require Charter to demonstrate that every single application was perfect across its entire buildout effort in order to obtain any relief. That interpretation would render Charter's rights under the *Expansion Settlement Order* to establish Good Cause Shown a nullity. Rather, the Commission must evaluate whether Charter's performance was deficient with respect to the specific, "incremental" pole applications that were delayed by pole owners. In other words, the Good Cause evaluation focuses on Charter's performance with respect to the particular applications implicated by its Good Cause claim, not with respect to the entirety of its statewide buildout effort.

Charter has reviewed the applications that comprise the 10,517 passings in its May 9, 2018 Good Cause Shown filing, and has confirmed that any concerns regarding the completeness of

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[152] *Disqualification Order* at 70-71, 74-76.

[153] *Id.* at 71-74.

Charter's submissions are unfounded with respect to those specific applications. For the each of the pertinent applications, either (1) there was no assertion by pole owners that the application was incomplete to begin with, or (2) Charter was able to resolve any questions as to the completeness of the application, and, even excluding the time that Charter was resolving a pole owner claim that the application was incomplete, the application still sat with the pole owner for 200 days or more.[154] Accordingly, with respect to the specific applications for which Charter made its Good Cause filing, Good Cause Criterion D is satisfied.

Similarly, as to the requirement that Charter establish proper payment was made to pole owners under Good Cause Criterion E, the *Disqualification Order* incorrectly focuses on generalized concerns with Charter's payments across its entire statewide buildout effort, instead of inquiring into whether payment disputes or delays caused by Charter materially inhibited pole owner processing and approval of the particular applications that comprise Charter's Good Cause Shown claim. Here, again, however, Charter's records indicate that there have been no payment issues with respect to the majority of the applications on which its Good Cause Filing was predicated. Although there have been some delays involving invoices for a subset of those applications, particularly early on in the process when many pole owners used an invoice-based billing process (which could occasionally result in Charter's not receiving invoices in a timely fashion), Charter has since 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, this reducing the likelihood of such payment delays.[155] Charter has no record that those issues, when they arose, materially held up processing

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[154] *See* Declaration of Terence Rafferty in Support of Charter's Petition for Rehearing and Reconsideration of June 14, 2018 Order (July 16, 2018) at ¶ 5.

[155] *Id.* ¶ 6.

of the applications pertinent to Charter's Good Cause showing beyond the 200-day pole owner review period provided in the Settlement Agreement.[156] Charter therefore also met the requirement of Good Cause Criterion E, and the Commission should grant rehearing and find Good Cause Shown on this basis as well.

CONCLUSION

For the reasons stated above, the Commission should grant rehearing (or reconsideration) of the *Disqualification Order*, find that Charter has successfully met the December 16, 2017 buildout target set forth in its *Expansion Settlement Order*, and allow Charter to resume reporting its future buildout efforts accordingly. If the Commission does not grant rehearing on the disqualified passings, it should either withdraw its decision that Charter has not established Good Cause Shown (both with respect to any failure to meet the December 16, 2017 target as well as the three-month cure period thereafter) and defer any decision on that issue pending judicial review, or—in the alternative—should find that Charter has established Good Cause Shown with respect to both targets.

July 16, 2018

Respectfully Submitted,

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[156] *Id.* ¶ 6.