

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on September 14, 2017

COMMISSIONERS PRESENT:

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

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

ORDER ADOPTING REVISED BUILD-OUT TARGETS AND  
ADDITIONAL TERMS OF A SETTLEMENT AGREEMENT

(Issued and Effective September 14, 2017)

BY THE COMMISSION:

INTRODUCTION

By this Order, the Commission adopts a Settlement Agreement filed on June 19, 2017 which addresses Charter Communications, Inc.'s (Charter) failure to extend its network to pass 36,250 residential housing and/or business units between May 18, 2016 and May 18, 2017 (Year 1) pursuant to the Commission's Approval Order, Section I(B)(1)(c) of Appendix A.<sup>1</sup> The Settlement Agreement includes a number of benefits including: a \$1 million payment to an escrow account to pay for

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<sup>1</sup> Case 15-M-0388, Charter Communications and Time Warner Cable - Transfer of Control, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016) (Approval Order). Television, Internet and Voice services are now provided by Charter in New York under the name "Spectrum."

equipment to provide computer and internet access to low-income users; modification of Charter's buildout obligations between now and May, 2020, which will now require that Charter pass the following number of premises: 36,771 by 12/16/17; 58,417 by 5/18/18; 80,063 by 12/16/18; 101,708 by 5/18/19; 123,354 by 11/16/19 and 145,000 by 5/18/20; the filing of a letter of credit in the amount of \$12 million to secure Charter's obligations, subject to draw if Charter misses interim buildout targets; and the deployment of a communications plan for potential customers to find out whether they are included in Charter's buildout plan.

BACKGROUND

On January 8, 2016, the Commission approved the merger of Time Warner Cable, Inc. (Time Warner) and Charter subject to conditions. In approving the transaction, the Commission stated that, for the transaction to meet the enumerated statutory "public interest" standard, it must yield positive net benefits, after balancing the expected benefits properly attributable to the transaction offset by any risks or detriments that would remain after applying reasonable mitigation measures.<sup>2</sup>

The Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the net benefits test otherwise the merger should be denied.<sup>3</sup> Accordingly, the Commission explicitly conditioned its approval on a host of conditions design to yield incremental net benefits.<sup>4</sup> Among those established conditions, was a "Network Expansion" requirement wherein the Commission noted its "significant concern that there

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<sup>2</sup> Id., p. 19.

<sup>3</sup> Id., p. 41.

<sup>4</sup> Id., p. 49.

are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas.”<sup>5</sup> To mitigate this concern, the Commission required the extension of Charter’s network to pass an additional 145,000 homes and businesses across the State. Charter was required to complete this build-out in four phases, 25%, or 36,250 premises per year from the date of the close of the transaction,<sup>6</sup> and file quarterly reports on the status of its network build. Under the Approval Order, any excess in a given year could be rolled into the next year and for “good cause” the company could petition the Commission for an extension of the four year build-out time period. The Approval Order, therefore, required Charter to complete an initial build-out of 36,350 premises by May 18, 2017.

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

In accordance with the Commission's Order Granting Joint Petition by Time Warner Cable Inc. ("Time Warner Cable") and Charter Communications, Inc. ("Charter") dated January 8, 2016, Charter hereby accepts the Order Conditions for Approval contained in

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<sup>5</sup> Id., pp. 52-53. This condition was particularly important to the Commission’s ultimate decision to approve the transaction, accounting for \$290 million of the estimated \$435 million in incremental net benefits that the transaction was expected to accrue for the benefit of New York customers.

<sup>6</sup> The transaction closed on May 18, 2016.

Appendix A, subject to applicable law and without waiver of any legal rights.<sup>7</sup>

In an effort to monitor and enforce the "Network Expansion," as well as the other conditions, the Commission explicitly incorporated the penalty provisions of the Public Service Law (PSL) into the Approval Order.<sup>8</sup> Under PSL §§24 and 25(2), the Commission could seek a court ordered penalty for each day that Charter is out of compliance with obligations, including the obligation to extend its network to pass an additional 36,250 unserved or under-served premises each year for four years from the date of the close of the transaction.

Charter's initial four year build-out plan was filed with the Commission on July 6, 2016, with a subsequent revision filed July 26, 2016, and additional updates on November 18, 2016, February 17, 2017 and May 18, 2017. In its initial November 18, 2016 quarterly update, Charter reported that it had completed just 7,265 passings.<sup>9</sup> Charter acknowledged that while the build-out pass rate was slow, the pace of the pass rate was attributable to the significant ramp-up work, data preparation and analysis and mobilization of resources that would not need to be repeated in subsequent years. As such, Charter stated that the number of completed passings was "expected to substantially increase with time" and that it anticipated "major areas of new network construction ... to ramp up significantly in the second six months between November 18, 2016 and May 18, 2017."<sup>10</sup> In its February 17, 2017 quarterly update, however,

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<sup>7</sup> See, Letters to the Secretary of the Commission dated January 20, 2017.

<sup>8</sup> Approval Order, p. 67; PSL §25(2).

<sup>9</sup> See, Network Expansion Plan Update (filed November 18, 2016).

<sup>10</sup> Id., pp. 5-6.

Charter reported that it had only completed an additional 2,860 passings.<sup>11</sup>

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

Charter's February 14, 2017 response stated that "intensive walk-out verification" of premises to be passed did not begin until September, 2016. Charter also provided a list of issues associated with the pole attachment process that it claimed had slowed its deployment, including an inability of the pole owners to process pole attachment applications in bulk and whether the use of subcontractor labor for various make-ready tasks or special attachment procedures would be acceptable.<sup>12</sup>

On May 18, 2017, Charter filed an update regarding its build-out progress. This update stated that Charter had passed only 15,164 premises, or 41.8% of its Year 1 target.

The discussions leading to the Settlement Agreement were initiated in anticipation of Charter not meeting the requirement to complete 25% of the required extension of its network to pass an additional 145,000 unserved and/or

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<sup>11</sup> See, Network Expansion Plan Update (filed February 17, 2017).

<sup>12</sup> See, Letters from Department Staff to Charter dated February 8, 2017 and Response from Charter to Department Staff dated February 14, 2017.

underserved residential housing units or businesses (36,250) by May 18, 2017 under the Commission's Approval Order and Appendix A. The culmination of those discussions resulted in the filing of the Settlement Agreement on June 19, 2017.

NOTICES INVITING COMMENTS

Following the filing of the Settlement Agreement, the Commission issued a Notice Seeking Comments (Notice) dated July 5, 2017. The time for submissions in response to the Notice expired on August 21, 2017. In addition, pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on July 5, 2017, requesting comments on the Commission's consideration of whether to modify, consistent with a Settlement Agreement filed by Charter on June 19, 2017, Section I(B)(1)(c) of Appendix A of its January 8, 2016 Order Granting Joint Petition Subject to Conditions.<sup>13</sup> Comment pursuant to the SAPA Notice were due on August 19, 2017. Numerous comments were received from the Public Utility Law Project (PULP), members of various labor unions, especially the International Brotherhood of Electrical Workers (IBEW) and the public at-large.

In its comments, PULP states that the Commission should substantially modify the Settlement Agreement. Specifically, PULP proposes that the Commission should 1) include quarterly milestones and reporting requirements beyond the biannual build-out commitments contained in the Settlement Agreement; 2) require that Charter prioritize areas lacking

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<sup>13</sup> SAPA No. 15-M-0388SP2. The Settlement Agreement includes a proposal to change the build-out targets that requires a rulemaking by the Commission and that therefore the Commission will not be able to consider approving the Agreement until it decides whether to make the proposed rulemaking after following the rulemaking procedures of the SAPA.

2-way cable, or telephone service quality issues in order to serve "low-income and vulnerable households;" 3) simplify the process for municipalities to access information consistent with the communication plan required by the Settlement Agreement; 4) form a collaborative in order to determine how the \$1 million should be allocated; 5) increase the amount at risk under Charter's letter of credit from \$12 million to \$24 million; and 6) adopt the Federal Communication Commission's (FCC) enforcement provisions with respect to Charter's national buildout requirement in New York, which would increase the amount of passings required of the company by 5% for each yearly miss. PULP recognizes that a number of these recommendations would require a further rulemaking under SAPA on the part of the Commission as they would require further modification to the Approval Order.

The comments from the public at-large focused, in general, on the lack of choices for high-speed broadband services. One such comment which reflects the concerns of many stated that "[t]he situation is trending towards a monopoly, with poor customer value and poor worker protections ensuing. Corporate profits, conversely, are on the rise ... [and] the merger of Charter and Spectrum will [not] in any way improve the situation." Other commenters urge the Commission "... to stand up for workers and consumers by refusing this merger." Moreover, others commenters stated they are "unhappy with the service provided by Spectrum ... [and] cable often is not working and ... landline phone service is not functioning."

IBEW-member comments generally focused on the ongoing strike of IBEW represented Charter employees in the New York City area. One set of comments stated that:

This insignificant payment [\$1 million] is inadequate as a penalty for Charter's violation of the merger order and as a deterrent against future violations especially considering that without this commitment, the acquisition would have violated state law and would have been rejected.

In deciding whether to approve this settlement, the Commission should also consider Charter's other recent troubles in New York. The New York State Attorney General sued Charter in January of this year for intentional fraudulent and deceptive practices. The New York City Council Committee on Technology and Subcommittee on Zoning and Franchises continue to investigate whether Spectrum Cable, Charter's New York City subsidiary, violated its franchise agreement with the City of New York. This probe included a public hearing, during which, many issues were raised that called into question Spectrum Cable's ability to fulfill its obligations under the franchise agreement.

#### SUMMARY OF SETTLEMENT

In lieu of a potential penalty action, or other potential remedies in connection with Charter's failure to achieve the Year 1 build-out target, Charter and Department Staff negotiated the attached proposed Settlement Agreement. As part of the Settlement Agreement, Charter, among other things, explicitly agrees to do the following:

First, Charter agrees to pay \$1,000,000 into an escrow account within 30 days of the adoption of the Settlement Agreement by the Commission. Within six months of the adoption of the Settlement Agreement by the Commission, Charter shall pay the \$1,000,000 from the escrow account to third-party beneficiaries unaffiliated with Charter in the form of grants to pay for equipment to provide computer and internet access to low-income users.

Second, Charter agrees to a series of interim targets for its build-out going forward with the ultimate completion date remaining May 18, 2020. The interim schedule includes a



series of six month targets, with the prorated share of remaining Year 1 passings being completed by December 16, 2018. Charter further commits to the following revised build-out requirements:

<u>Date</u>	<u>New Passings Target</u>
12/16/2017	36,771
5/18/2018	58,417
12/16/2018	80,063
5/18/2019	101,708
11/16/2019	123,354
5/18/2020	145,000

In connection with this new schedule, Charter shall provide a \$12,000,000 Letter of Credit in a form satisfactory to Department Staff.

In the event that Charter misses one of its interim targets, the Chair of the Department of Public Service, or his/her designee, may draw down on the Letter of Credit in an amount up to \$1,000,000 for each missed target. In the event of a miss, Charter may make a demonstration (to a third-party auditor) that it missed for reasons outside of its control (as delineated in the Settlement Agreement), in which case, should the Commission agree after reviewing the audit, a lesser amount will be drawn down on the Letter of Credit. After each miss, Charter will have to demonstrate three months later that it has completed the remaining number of passings and failure to have completed the target will again lead to a draw down on the Letter of Credit of up to \$1,000,000. Any amounts drawn will go to the State Treasury and will not be recallable. If Charter achieves the December 16, 2018 target of 80,063 passings, the performance incentives in the Settlement Agreement will end and Charter commits to revised targets established in the Settlement

Agreement, otherwise subject to the terms of the Approval Order. The Settlement Agreement is conditioned upon Commission approval.

Among other things, Department Staff and Charter will meet one time per month pursuant to a pre-determined schedule regarding the status of Charter's progress in meeting the targets (including a quantification of confirmed passings) contained in the Settlement Agreement. Moreover, under the terms of the Settlement Agreement, Department Staff (as well as a Project Management team including other State agencies) will continue to meet at least monthly with Charter to track its performance, and may report to the Commission, if necessary, regarding the company's progress. Charter represents that it has sufficient resources, including out-sourced contracted work, to timely achieve the passings contemplated by the revised targets and Charter represents that it will take all commercially reasonable actions necessary to implement the Deployment Plan as contemplated in the Settlement Agreement.

Charter also agrees to, within 60 days of the execution of the Settlement Agreement, prepare and implement a communications plan to assist residents and businesses in identifying if and when they can expect passings to occur in their respective locations. This, plan, which includes a website for customers to check to determine the status of their residence or business, was implemented on August 18, 2017 and has been available to the public since that time.<sup>14</sup> Data regarding individual towns/villages may also be made available upon request. As part of the communications plan, Charter will provide to Department Staff and the Broadband Program Office (BPO) within 60 days of the execution of the Settlement

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<sup>14</sup> See, Spectrum, New York State Broadband Expansion Address Lookup, <http://www.bldlkup.com>.

Agreement, in excel format, address level data for each passing for each twelve-month period under the Settlement Agreement, to be updated every six months based on deployment changes made from time-to-time by Charter. Again, as of August 18, 2017, that information is publically available in the form of an interactive public information portal on Charter's website.

The Settlement Agreement also contains a variety of other terms and conditions to facilitate the timely completion of Charter's build-out project and to provide information to the public on where and when Charter plans to build subject to certain confidentiality concerns and reservation of rights.

#### LEGAL AUTHORITY

In the Commission's approval of Charter's acquisition of Time Warner, the Commission reviewed the transaction under PSL §§99, 100, 101, and 221 using a "net benefits test" (as applied in other merger cases previously before the Commission) to determine whether the transaction was in the public interest. This test involved weighing the various proffered benefits of the transaction against the detriments identified by Department Staff and other parties while mitigating the harms. In the Approval Order, the Commission thus determined that without the conditions required therein, the transaction would not otherwise meet the net benefits test and would not otherwise be in the public interest. Moreover, the Commission explicitly incorporated the enforcement and penalty provisions of the PSL into the Approval Order.

The Commission can recover such penalties by bringing an action in Supreme Court, and the Commission has the burden of proof. The Commission's authority to seek penalties is permissive, and wholly discretionary. Under PSL §26, "the commission may direct counsel" to bring a penalty action in

Supreme Court (emphasis added). Finally, any penalties are forfeited to "the people of the state of New York," and cannot be used directly for the benefit of the ratepayers of the utility in question.<sup>15</sup>

DISCUSSION AND CONCLUSION

PSL §25(1) states that every public utility, and its agents and employees, "shall obey and comply with" the Public Service Law "and every order or regulation adopted under authority of" the Public Service Law. Maximum penalties are specified, depending on the offense. Under PSL §25(2), if a utility or its employees "knowingly fails or neglects to obey or comply with" a provision of the Public Service Law, or a Commission order, then a penalty of up to \$100,000 can be imposed for each offense. In the case of a continuing violation, "each day shall be deemed a separate and distinct offense."

The Settlement Agreement fully and finally resolves all the issues and concerns raised and/or asserted, or that could properly have been raised and/or asserted with regard to Charter's failure to achieve the Year 1 build-out target. Charter's New York customers stand to benefit from the further deployment of Charter's video, telephone, and broadband network. The \$1,000,000 fund to provide for grants to pay for equipment to provide computer and internet access to low-income users will further benefit consumers and is a better result for customers than other enforcement actions available to the Commission. The Settlement Agreement not only furthers consumer interests, but it provides stronger financial incentives for Charter to meet its future build-out commitments though the requirement to post a Letter of Credit that can be drawn down in the event

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<sup>15</sup> See, PSL §25(2).

circumstances so warrant. These new incentives will better encourage Charter to get and keep the build-out on track to achieve the completion date of May 18, 2020.

With respect to the comments filed by PULP, the Commission declines to adopt the recommendations, with one exception. Initially, since Charter is required to report regarding its performance on a quarterly basis under the terms of the Approval Order, no increased reporting is warranted. Second, the areas of the State in which the Charter build-out is occurring are areas that lack 2-way cable systems or, indeed, any cable system at all. Third, municipalities may, under the terms of the Settlement Agreement, request data from either Charter or Department Staff and need only sign a confidentiality agreement to do so. No further simplification appears necessary. Fourth the amount at risk for Charter to achieve its six-month targets is \$1 million, respectively, with additional risk should it fail to meet any given target. This is a reasonable risk to place on Charter to extend its network in New York. Finally, at this time, the Commission does not believe that the adoption of a provision similar to the FCC's enforcement clause is necessary, and that the terms of the Settlement Agreement provide incentive for Charter to make every effort to meet with the modified build-out commitments. Finally, with respect to the disposition of the \$1 million put forward by Charter in escrow, the Commission agrees that stakeholder input is important and will direct Charter to consult with stakeholders, including PULP, regarding the disposition of those funds.

Regarding the comments received from the various labor groups, the IBEW and the public at-large, adoption of the Settlement Agreement at issue here is intended to only address Charter's failure to meet its Year 1 build-out commitment. Notwithstanding same, the Commission was acutely aware of the

concerns raised around broadband speeds, competition and labor issues. The Commission has to respect the labor management contract negotiating process. However, it is Charter's responsibility to maintain adequate service for customers. As a result, the Commission did include conditions, subject to the penalty provisions of the PSL, in the Approval Order that required Charter to, among other things, offer all customers broadband speeds of up to 100 Megabits per second (Mbps) by the end of 2018 and 300 Mbps by the end of 2019 and ensure no reduction in customer service standards by precluding the company from reducing customer-facing jobs in New York for four years following the issuance of the Approval Order. Moreover, Charter was required to focus on improving service quality and satisfying the needs of its New York customers by investing \$50 million in service quality improvements in New York over two years following the close of the merger and achieve a 35% reduction in Time Warner's 2014 cable PSC Complaint Rate by the end of 2020, with half achieved by the end of 2018. If the improvement targets are not achieved, Charter will be required to invest additional monies in customer service.

The revisions to Charter's build-out schedule (and associated performance incentives in the form of a Letter of Credit and other mechanisms as described in the attached Settlement Agreement) are reasonable and will require that Charter meet its original commitment to pass 145,000 premises by May 18, 2020. Further, the communications plan and web portal will provide those without access to broadband service the information they need to determine whether they will be eligible to receive service under Charter's commitment. Moreover, the Project Management team will help facilitate timely deployment by meeting with the company regularly. Accordingly, the revised

build-out targets along with all the terms and conditions of the Settlement Agreement are adopted by the Commission.

The Commission orders:

1. The Commission ratifies and approves in its entirety without modification the Settlement Agreement in this proceeding by and among the New York State Department of Public Service ("Department"), New York State Public Service Commission ("Commission"), and Charter Communications, Inc. (Charter) dated June 19, 2017 and attached to this Order.

2. Charter shall fully comply with the terms of such Settlement Agreement.

3. Section I(B)(1)(c) of Appendix A of the Commission's January 8, 2016 Order in this case is modified consistent with the discussion herein and paragraph 2 of such Settlement Agreement.

4. Within 30 days of the issuance of this Order, Charter shall pay \$1,000,000 into an escrow account. Within six months of the issuance of this Order, Charter shall pay the \$1,000,000 from the escrow account to third-party beneficiaries unaffiliated with Charter in the form of grants to pay for equipment to provide computer and internet access to low-income users. Before making the grants, Charter shall demonstrate to the satisfaction of the Department that the grants are truly incremental to any similar support Charter provides to unaffiliated beneficiaries in the ordinary course of business.

a. Charter shall consult with stakeholders regarding the organization(s) to which Charter intends to provide the grants.

5. Charter shall achieve the following revised build-out requirements:

Date	Passings Target
12/16/2017	36,771
6/18/2018	58,417
12/16/2018	80,063
5/18/2019	101,708
11/16/2019	123,354
5/18/2020	145,000

6. For each and every six-month target not met, and where Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back \$1,000,000.

7. For each and every six-month target not met, and where Charter's performance in attempting to meet the target does establish Good Cause Shown, and the target is missed by 15% or more, Charter will forfeit its right to earn back \$500,000. For each and every six-month target not met, and where Charter's performance in attempting to meet the target does establish Good Cause Shown, and the target is missed by less than 15%, Charter will forfeit its right to earn back \$250,000.

8. If, three months after any six-month target is not met, the six-month passing target has still not been met, and Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back \$1,000,000.

9. If, three months after any six-month target is not met, the six-month passing target has still not been met, and Charter's performance in attempting to meet the target does establish Good Cause Shown, and the target is missed by 15% or more, Charter will forfeit its right to earn back \$500,000. If, three months after any six-month target is not met, the six-month passing target has still not been met, and Charter's



performance in attempting to meet the target does establish Good Cause Shown, and the target is missed by less than 15%, Charter will forfeit its right to earn back \$250,000. Note: This clause applies if Charter misses the May 18, 2020 target of 145,000 passings, and three months after the May 18, 2020 target, the 145,000 passings has still not been met.

10. If, during any period covered by the performance incentives, any two consecutive six-month targets are missed by more than 15% and (a) Charter's performance in attempting to meet those two consecutive targets does not pass the Good Cause Shown test, or (b) Charter has not provided documentation to the Department demonstrating that it has filed the requisite number of pole permit applications necessary to meet the enumerated targets at least 200 days in advance of the corresponding target deadline, the performance incentives will continue and, in addition, the "Sole Remedy" provisions shall not apply and the Commission reserves the right to assert that such failure is in violation of a Commission order and to utilize all the rights and remedies available to the Commission to enforce such violation.

11. The performance requirements with financial consequences and the "Sole Remedy" provisions shall not apply to Charter's performance subsequent to three months after the May 18, 2020 target.

12. To secure these obligations, Charter shall provide a \$12,000,000 Letter of Credit in a form satisfactory to Department Staff. The Letter of Credit shall be drawable by the Chair of the Commission or his/her designee at a drawing location in New York State. The Letter of Credit may be drawn upon in the amount of a respective forfeiture whenever the right to earn back a portion of the \$12,000,000 has been forfeited, provided that with respect to any forfeiture the amount of which

is to be determined by whether or not Charter has established Good Cause Shown, no drawdown shall occur as to any disputed amount until such dispute has been finally resolved, including any rehearing or judicial review. The Letter of Credit by its terms will be automatically renewed on an annual basis, unless the Department has received a Notice of Non-Extension at least 60 days prior to the then current expiration date. If the Department has received a Notice of Non-Extension and Charter has not replaced the letter of credit at least 30 days prior to the then current expiration date, then Charter will forfeit any remaining balance on the Letter of Credit. Any amounts drawn will go to the State Treasury and will not be recallable. Charter may from time to time provide a replacement Letter of Credit or an amendment to the Letter of Credit reflecting the then-remaining obligation amount in a form satisfactory to Department Staff, except that no replacement or amendment will be effective until accepted in writing by the Chair of the Commission or his/her designee. The Letter of Credit will be maintained until all forfeitures have been paid and all potential forfeitures have expired.

13. If Charter achieves the December 16, 2018 target of 80,063 passings, the performance incentives herein will end and Charter shall achieve revised targets established on the following six-month basis, otherwise subject to the terms of the Approval Order, and in such case if the targets below are not met the performance requirements with financial consequences and the "Sole Remedy" provisions shall not apply to Charter's performance subsequent to December 16, 2018:

Date	Passings Target
5/18/2019	108,750
11/16/2019	126,875
5/18/2020	145,000

14. All information provided by Charter to establish Good Cause Shown must include sufficient detail and support for all statements and representations so that it may be evaluated and must not be mere conclusory statements or representations such that if the presentation is insufficient, the Commission shall be entitled to reject the claim for failure to meet the burden of proof.

15. Within 21 days of each six-month target date, or if such 21st day is not a business day, upon the next business day following, Charter will report its actual passings for that six-month period. If Charter did not meet the target and wishes to make a Good Cause Shown claim, it will file its claim on the same date as the report.

16. If Charter misses any six-month target, within three months and 21 days of the six-month target date, or if such 21st day is not a business day, upon the next business day following, Charter will report its actual passings for the three-month period after the six-month target date. If three months after the six-month target date Charter has still not met the target and wishes to make a Good Cause Shown claim, it will file its claim on the same date as the report.

17. All information will be examined and presented to the Commission as follows: Charter will hire an independent auditor acceptable to DPS Staff (such acceptance not to be unreasonably withheld) to be available whenever a need for an audit report is triggered to audit Charter's performance on the "Good Cause Shown" test and to prepare an audit report. Within seven days of receiving a Good Cause Shown claim pursuant to ordering clause "15" above, the Chief Executive Officer (CEO) of the Department, in its sole discretion, shall determine whether an independent audit report is required to support the Good Cause Shown claim. If an independent audit report is not

required, the Good Cause Shown claim filed by Charter shall constitute Charter's full presentation on the matter. If an independent audit report is required, the auditor shall have authority to audit the supporting documentation and back-up materials and other documents and information of Charter relating to the Good Cause Shown claim reasonably necessary to audit Charter's achievement of the performance measures set forth in Appendix A of the Settlement Agreement and any additional claims made by Charter in its Good Cause Shown claim. The audit report will be filed with the Secretary to the Commission within 60 days of Charter making a claim of "Good Cause Shown". The Commission will make a determination as to whether Charter has passed the "Good Cause Shown" test in each instance. Any such decisions by the Commission are reviewable in an Article 78 proceeding in Court. No amounts related to such a "Good Cause Shown" demonstration will be drawn on the letter of credit until any such Article 78 remedies have been exhausted.

18. The Department Staff and Charter will meet one time per month pursuant to a pre-determined schedule regarding the status of Charter's progress in meeting the targets (including a quantification of confirmed passings) contained in this term sheet. These meetings will include the exchange of information regarding the status of Charter's pole attachment applications, including the type of information related to the "Good Cause Shown" test detailed in Appendix A of the Settlement Agreement, and any other relevant information reasonably deemed appropriate by either DPS Staff or Charter. At the monthly meeting Charter will provide to DPS Staff monthly metrics on all build out information in an excel format.

19. Charter shall deploy sufficient resources, including out-sourced contracted work, to timely achieve the

passings contemplated by the revised targets and Charter shall take all commercially reasonable actions necessary to implement the Deployment Plan described in the Settlement Agreement.

20. Charter shall implement the communications plan described in the Settlement Agreement to assist residents and businesses in identifying if and when they can expect passings to occur in their locations.

21. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary

**SETTLEMENT AGREEMENT**

This Settlement Agreement (“Agreement”), dated the 19<sup>th</sup> day of June, 2017, is by and among the New York State Department of Public Service (“Department”), New York State Public Service Commission (“Commission”), and Charter Communications, Inc. (Charter) (collectively the “Parties”).

**BACKGROUND**

The discussions leading to this Agreement were initiated in anticipation of Charter not meeting the requirement to complete 25% of the required extension of its network to pass an additional 145,000 unserved and/or underserved residential housing units or businesses (36,250) by May 18, 2017 (the “Event”) under the Commission Order.<sup>1</sup>

On January 8, 2016, the Commission approved the Joint Petition of Time Warner Cable, Inc. (Time Warner) and Charter (together the “Petitioners”). In its Approval Order, the Commission stated that for the transaction to be approved it must meet the statutory “public interest” standard, which requires a demonstration of the transaction’s positive net benefits after balancing the expected benefits properly attributable to the transaction offset by any risks or detriments that would remain after applying reasonable mitigation measures.<sup>2</sup>

The Commission further stated that based upon a review of the Joint Petition it found no discernable net benefits associated with the proposed transaction. However, it identified several potential detriments, including potential negative impacts to customer service in New York, network expansion and upgrades focused outside of New York, job losses in New York, and the issuance of substantial debt. The Commission concluded that without additional “enforceable and concrete conditions,” the Petitioners could not satisfy their burden under the enumerated standard of review and the Joint Petition should otherwise be denied.<sup>3</sup>

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<sup>1</sup> Case 15-M-0388, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016) (Approval Order). Television, Internet and Voice services are now provided in New York under the name “Spectrum.”

<sup>2</sup> Id., p. 19.

<sup>3</sup> Id., p. 41.

Accordingly, the Commission explicitly conditioned its approval on a host of conditions, stating that the measures put forward by the Petitioners lacked “sufficient specificity and enforceability,” and that without Charter’s acceptance of these conditions the Joint Petition would be rejected.<sup>4</sup> Among those established conditions, was a “Network Expansion” requirement wherein the Commission noted its “significant concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas.”<sup>5</sup> To mitigate this concern, and to demonstrate net benefits, the Commission required, among other things, the extension of Charter’s network to pass an additional 145,000 homes and businesses across the State by building out: 36,250 premises by May 18, 2017, 72,500 by May 18, 2018, 108,750 by May 18, 2019 and 145,000 by May 18, 2020. As a threshold requirement, the Approval Order was conditioned upon receipt by the Commission within seven days of the issuance of the Approval Order of certification by Charter that Charter and its successors in interest unconditionally accept and agree to comply with the commitments set forth in the body of the Approval Order and Appendix A. On January 19, 2016, Charter submitted a written certification letter accepting the imposed commitments, stating:

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

Charter’s initial four-year build-out plan was filed with the Commission on July 6, 2016, with a subsequent revision filed July 26, 2016, and additional updates on November 18, 2016 and February 17, 2017. As of the February 17, 2017 status report, Charter had only built-out 10,125 of the required 36,250 Year 1 passings. Subsequently, Charter stated that as of May 18, 2017 it completed 15,164 passings.

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<sup>4</sup> Id., p. 49.

<sup>5</sup> Id., pp. 52-53.



**TERMS OF THE SETTLEMENT**

In lieu of a potential penalty action, or other potential remedies in connection with the Event, the Parties agree to settle this matter at a cost to Charter of \$13,000,000, with a series of performance requirements with financial consequences to ensure Charter completes its build-out as defined herein that provide the right for Charter to earn back up to \$12,000,000 based on future performance as set forth in paragraphs “1” through “16” below in this section of the Agreement, and in exchange for additional commitments by Charter set forth in paragraphs “17” through “19” below in this section of the Agreement. The Parties further agree that the sole remedy against Charter for the failure of Charter to meet build-out “Passings Targets” as defined herein shall be the financial consequences set forth in paragraphs “1” through “16” below in this section of the Agreement except where specifically noted therein to the contrary (hereinafter “Sole Remedy”).

1. \$1,000,000 will be paid by Charter into an escrow account within 30 days of the adoption of this Agreement by the Commission. Within 6 months of the adoption of this Agreement by the Commission, Charter shall pay the \$1,000,000 from the escrow account to third-party beneficiaries unaffiliated with Charter in the form of grants to pay for equipment to provide computer and internet access to low-income users. Before making the grants, Charter must demonstrate to the satisfaction of the Department of Public Service that the grants are truly incremental to any similar support Charter provides to unaffiliated beneficiaries in the ordinary course of business.

2. Charter commits to the following revised build-out requirements:

<b>Date</b>	<b>Passings Target</b>
12/16/2017	36,771
6/18/2018	58,417
12/16/2018	80,063
5/18/2019	101,708
11/16/2019	123,354
5/18/2020	145,000



**CASE 15-M-0388**

3. For each and every six-month target not met, and where Charter's performance in attempting to meet the target does not establish Good Cause Shown (as detailed herein), Charter will forfeit its right to earn back \$1,000,000.

4. For each and every six-month target not met, and where Charter's performance in attempting to meet the target does establish Good Cause Shown, and:

- a. the target is missed by 15% or more, Charter will forfeit its right to earn back \$500,000;
- b. the target is missed by less than 15%, Charter will forfeit its right to earn back \$250,000.

5. If, three months after any six-month target is not met, the six-month passing target has still not been met, and Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back \$1,000,000.

6. If, three months after any six-month target is not met, the six-month passing target has still not been met, and Charter's performance in attempting to meet the target does establish Good Cause Shown, and;

- a. the target is missed by 15% or more, Charter will forfeit its right to earn back \$500,000;
- b. the target is missed by less than 15%, Charter will forfeit its right to earn back \$250,000.

Note: This paragraph applies if Charter misses the May 18, 2020 target of 145,000 passings, and three months after the May 18, 2020 target, the 145,000 passings has still not been met.

7. If, during any period covered by the performance incentives, any two consecutive six-month targets are missed by more than 15% and (a) Charter's performance in attempting to meet those two consecutive targets does not pass the Good Cause Shown test, or (b) Charter has not provided documentation to the Department demonstrating that it has filed the requisite number of pole permit applications necessary to meet the enumerated targets at least 200 days in advance of the corresponding target deadline, the performance incentives will continue and, in addition, the "Sole Remedy" provisions shall not apply and the Commission reserves the right to assert that such failure is in violation of a Commission order and to utilize all the rights and remedies available to the Commission to enforce such violation.

**CASE 15-M-0388**

8. The performance requirements with financial consequences and the “Sole Remedy” provisions shall not apply to Charter’s performance subsequent to three months after the May 18, 2020 target.

9. To secure these obligations, Charter shall provide a \$12,000,000 Letter of Credit in a form satisfactory to Department Staff. The Letter of Credit shall be drawable by the Chair of the Commission or his/her designee at a drawing location in New York State. The Letter of Credit may be drawn upon in the amount of a respective forfeiture whenever the right to earn back a portion of the \$12,000,000 has been forfeited, provided that with respect to any forfeiture the amount of which is to be determined by whether or not Charter has established Good Cause Shown, no drawdown shall occur as to any disputed amount until such dispute has been finally resolved, including any rehearing or judicial review. The Letter of Credit by its terms will be automatically renewed on an annual basis, unless the Department of Public Service has received a Notice of Non-Extension at least 60 days prior to the then current expiration date. If the Department of Public Service has received a Notice of Non-Extension and Charter has not replaced the letter of credit at least 30 days prior to the then current expiration date, then Charter will forfeit any remaining balance on the Letter of Credit. Any amounts drawn will go to the State Treasury and will not be recallable. Charter may from time to time provide a replacement Letter of Credit or an amendment to the Letter of Credit reflecting the then-remaining obligation amount in a form satisfactory to Department Staff, except that no replacement or amendment will be effective until accepted in writing by the Chair of the Commission or his/her designee. The Letter of Credit will be maintained until all forfeitures have been paid and all potential forfeitures have expired.

10. If Charter achieves the December 16, 2018 target of 80,063 passings, the performance incentives herein will end and Charter commits to revised targets established on the following six-month basis, otherwise subject to the terms of the Approval Order, and in such case if the targets below are not met the performance requirements with financial consequences and the



**CASE 15-M-0388**

“Sole Remedy” provisions shall not apply to Charter’s performance subsequent to December 16, 2018:

<b>Date</b>	<b>Passings Target</b>
5/18/2019	108,750
11/16/2019	126,875
5/18/2020	145,000

11. The test for establishing Good Cause Shown is contained in Appendix A to this Settlement Agreement.

12. All information provided by Charter to establish Good Cause Shown must include sufficient detail and support for all statements and representations so that it may be evaluated and must not be mere conclusory statements or representations such that if the presentation is insufficient, the Commission shall be entitled to reject the claim for failure to meet the burden of proof.

13. Within 21 days of each six-month target date, or if such 21<sup>st</sup> day is not a business day, upon the next business day following, Charter will report its actual passings for that six-month period. If Charter did not meet the target and wishes to make a Good Cause Shown claim, it will file its claim on the same date as the report.

14. If Charter misses any six-month target, within three months and 21 days of the six-month target date, or if such 21<sup>st</sup> day is not a business day, upon the next business day following, Charter will report its actual passings for the three-month period after the six-month target date. If three months after the six-month target date Charter has still not met the target and wishes to make a Good Cause Shown claim, it will file its claim on the same date as the report.

15. All information will be examined and presented to the Commission as follows: Charter will hire an independent auditor acceptable to DPS Staff (such acceptance not to be unreasonably withheld) to be available whenever a need for an audit report is triggered to audit Charter’s performance on the “Good Cause Shown” test and to prepare an audit report. Within seven days of receiving a Good Cause Shown claim pursuant to paragraph “13” above, the Chief Executive Officer (CEO) of the Department, in its sole discretion, shall determine whether an independent audit report is required to support the Good Cause Shown claim. If an

**CASE 15-M-0388**

independent audit report is not required, the Good Cause Shown claim filed by Charter shall constitute Charter's full presentation on the matter. If an independent audit report is required, the auditor shall have authority to audit the supporting documentation and back-up materials and other documents and information of Charter relating to the Good Cause Shown claim reasonably necessary to audit Charter's achievement of the performance measures set forth in Appendix A and any additional claims made by Charter in its Good Cause Shown claim. The audit report will be filed with the Secretary to the Commission within 60 days of Charter making a claim of "Good Cause Shown". The Commission will make a determination as to whether Charter has passed the "Good Cause Shown" test in each instance. Any such decisions by the Commission are reviewable in an Article 78 proceeding in Court. No amounts related to such a "Good Cause Shown" demonstration will be drawn on the letter of credit until any such Article 78 remedies have been exhausted.

16. The Department Staff and Charter will meet one time per month pursuant to a pre-determined schedule regarding the status of Charter's progress in meeting the targets (including a quantification of confirmed passings) contained in this term sheet. These meetings will include the exchange of information regarding the status of Charter's pole attachment applications, including the type of information related to the "Good Cause Shown" test detailed in Appendix A, and any other relevant information reasonably deemed appropriate by either DPS Staff or Charter. At the monthly meeting Charter will provide to DPS Staff monthly metrics on all build out information in an excel format.

17. Charter has submitted a confidential trade-secret protected summary of its Deployment Plan and on the representations made by Charter in such Deployment Plan and by this Agreement, Charter represents that it has sufficient resources, including out-sourced contracted work, to timely achieve the passings contemplated by the revised targets and Charter represents that it will take all commercially reasonable actions necessary to implement the Deployment Plan as contemplated in the plan. Within 60 days of the execution of this Agreement, Charter will prepare and implement a communications plan to assist residents and businesses in identifying if and when they can expect passings to occur in their locations.

18. As part of the communications plan, Charter will:

- a. Provide to DPS Staff and the Broadband Program Office (BPO) within 60 days of the execution of this Agreement, in excel format, address level data for each



passing for each twelve-month period of this Agreement, to be updated every six months based on deployment changes made from time to time by Charter:

- i. the first twelve-month period must show a completion date by May 18, 2018;
  - ii. the second twelve-month period must show a completion date by May 18, 2019;
  - iii. the last twelve-month period may state a completion date prior to May 18, 2020; and
  - iv. the data in aggregate plus completions to date shall equal or exceed 145,000 passings.
- b. DPS Staff and the BPO may share the bulk data for any particular affected municipality with that municipality if the municipality executes an agreement to maintain the confidentiality of the bulk data to be shared.
- c. The bulk data shall not be available on Charter's website, but a public information portal shall be made available on Charter's website in the form of an interactive website for the use of residents and businesses to obtain information for their own individual properties or tenancies at a street address level along with specific intended completion dates. An inquiry into the portal will yield one of the following results:
- i. if Charter is planning to complete a passing of the address within the next twelve months, a statement will be provided that Charter is planning to complete a passing of the address within the next twelve months;
  - ii. if Charter is not planning to complete a passing of the address within the next twelve months, but is planning to complete a passing of the address on or before May 18, 2020, a statement will be provided that Charter is planning to complete a passing of the address on or before May 18, 2020;
  - iii. if Charter is not planning to complete a passing of the address on or before May 18, 2020, a statement will be provided that Charter is not planning to complete a passing of the address as part of its current deployment plan; and

- iv. all information provided will be accompanied by a disclosure in plain language that the information is not a guaranteed commitment to build and that the build-out plan and completion dates are subject to revision and change.
- d. BPO and/or DPS may post on their websites seamless links to Charter's public information portal;
- e. Identify "Priority Counties" for Year 1 and a breakdown of monthly metrics on the build out status for those counties;
- f. Agree to cooperate/timely respond to requests for data or information regarding the build commitment in the Commission's Approval or the Broadband Program Office's programs;
- g. Agree to make Charter representatives available for community status meeting; and
- h. Draft a call center script acceptable to Department Staff that clearly answers whether a resident or business is in Charter's build out plan.
- i. A Project Management (PM) team will be formed by DPS Staff including other state agency stakeholders to monitor Charter's progress in meeting the deadlines established in this Agreement. Charter agrees to participate in progress and problem-solving calls with the PM team as needed.

19. Within 30 days Charter shall amend its Deployment Plan and identify all known State or municipal agencies from which it will need permits through the next year of the Deployment Plan, to be updated annually, and set forth a plan for obtaining those respective permits.

20. In order to facilitate the timely completion of the buildout project, the Department and/or the Commission will timely act on all complaints between Charter and pole owners and shall take all measures the Department and/or the Commission, as applicable, deem, in their discretion, appropriate to enforce the 2004 Pole Order or otherwise enable Charter to gain access to poles.

21. Nothing herein is intended to, does, or shall be deemed, in any manner, to waive, limit, impair, or restrict the ability of either party hereto to protect and preserve its rights, remedies, and interests, so long as such actions are not inconsistent with such party's obligations



under the express terms of this Agreement. Neither party shall use (expressly, by inference, or otherwise) the other party's acknowledgement of the enforceability of the express terms of this Agreement to otherwise affect such other party's other rights or any previous reservation of rights by such other party in this proceeding regarding matters outside the express terms of this Agreement.

### GENERAL PROVISIONS

1. This Agreement fully and finally resolves all the issues and concerns raised and/or asserted, or that could properly have been raised and/or asserted with regard to the Event. Accordingly, in consideration of this Agreement after it has been ratified or approved by the Commission, except as otherwise stated herein, the Commission and the Department will not institute or cause to be instituted against Charter, its directors, officers, employees or agents, or shareholders or affiliates, a penalty action under the Public Service Law, or under any other statute or regulation or Commission order, with respect to Charter's actions, inactions or practices, directly or indirectly related to the Event, nor shall the Commission entertain a request by another person seeking penalties or other administrative remedies against Charter with respect to Charter's actions, inactions or practices, directly or indirectly related to the Event under the Public Service Law or under any other statute or regulation or Commission order.

2. The execution, delivery and performance of this Agreement by each Party hereto is within its corporate or statutory powers, as appropriate, has been duly authorized by all necessary corporate or statutory action, and does not and will not (i) require any governing or governmental consent or approval except as required in Paragraph 6 below, (ii) contravene its organizational documents or enabling legislation, or (iii) violate applicable law.

3. The Agreement has been entered into voluntarily by the Parties. The Parties have determined the Agreement constitutes a resolution of all outstanding issues relating to the Event. The Agreement is not, and should in no way be construed as, a Commission finding or an admission by Charter of a violation of any law or regulation or order; or a Commission finding or an admission by Charter that Charter's actions or inactions caused or constituted a contributing factor to the Event; or a Commission finding or an admission by Charter that these events are amenable to suit under Sections 24 and 25 of the Public Service Law. In addition, this Agreement is not and should not be construed as an assessment of a fine or penalty.

**CASE 15-M-0388**

4. The Agreement may be executed by original, facsimile or electronic signature, each of which shall be equally binding.

5. The Parties recognize that the provisions of the Agreement include a proposal to change the build-out targets that requires a rulemaking by the Commission and that therefore the Commission will not be able to consider approving the Agreement until it decides whether to make the proposed rulemaking after following the rulemaking procedures of the State Administrative Procedure Act.

6. The Agreement is subject to ratification or approval by the Commission and will have no effect in the absence thereof. If the Commission does not approve this Agreement in its entirety, without modification, Charter may withdraw its acceptance of this Agreement by serving written notice on the Commission, and shall be free to pursue its position without prejudice. If the Commission approves this Agreement or modifies it in a manner acceptable to Charter, the parties intend that this Agreement thereafter be implemented in accordance with its terms.



CASE 15-M-0388

IN WITNESS WHEREOF, each of the Parties hereto has executed this Agreement as of the day and year first written above.

STATE OF NEW YORK PUBLIC SERVICE COMMISSION  
STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

By: 

BRIAN OSSIAS  
Managing Attorney

CHARTER COMMUNICATIONS, INC.

By: 

Appendix A

In making any claim for Good Cause Shown for any reason, Charter shall provide a sufficient showing for the Commission to determine that Good Cause Shown has been established. Such a demonstration shall include, but need not be limited to, affidavits of witnesses, detailed descriptions of the events that led to the delay(s), and supporting documentation for any factual claims. If applicable, Charter may provide any other information with respect to Acts of God or other conditions beyond its or other pole owners' control with respect to delays in meeting the targets contained in the Agreement. If Charter is claiming Good Cause Shown due to pole owner delay, its claim will not be accepted unless Charter can demonstrate that it achieved the following objective metrics, consistent with the Commission's August 6, 2004 Order in Case 03-M-0432:<sup>1</sup>

- a. That Charter completed the verification and design of sufficient incremental passings to meet the target at least 230 days in advance of the target deadline;
- b. That Charter approved for construction sufficient incremental passings to meet the target at least 210 days in advance of the target deadline;
- c. That Charter notified pole owners of all new applications for pole attachments to pole owners in advance of submitting pole applications.
  - i. This shall include where each build-out project is located, when Charter intends to file pole applications, when it expects to begin construction, and the order in which pole applications should be prioritized.
  - ii. This shall include all information required by pole owners in order for an application to be deemed complete and processed and the keeping of records as to when Charter filed such complete applications.
- d. That Charter submitted applications for pole attachments for sufficient incremental passings to meet the target at least 200 days in advance of the target deadline;
- e. That Charter paid all fees and other payments required by pole owners in order to effectuate a pole attachment, including:

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<sup>1</sup> Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments (issued August 6, 2004) (Pole Order).

**CASE 15-M-0388**

- i. Payments for any additional resources required by the pole owner in order to satisfy permitting of the poles related to the project.
  - ii. Payments of any application fees and/or survey fees at the time it submitted the pole applications.
  - iii. Make ready fees in the 14-day timeframes established by the Pole Order.
- f. That Charter hired a contractor to conduct survey work (as allowed by the Pole Order) if necessary to avoid delay in meeting the targets.
- g. That Charter requested permission to use temporary attachments if doing so would avoid delay in meeting its obligations. To the extent Charter pursues temporary attachments or other solution to avoid delays, the status of any proposed solution must be reported.
- h. That Charter completed construction and verification of all necessary passings within 45 days of receiving licenses for pole attachments.