STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding to Investigate Whether Charter Communications, Inc. and its Subsidiaries Providing Service Under the Trade Name "Spectrum" Have Materially Breached Their New York City Franchises	)	CASE 18-M-0178

RESPONSE OF CHARTER COMMUNICATIONS, INC.
TO ORDER TO SHOW CAUSE

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Charter Communications, Inc. ("Charter" or the "Company") hereby submits its response to the One-Commissioner Order issued by Chair Rhodes, without notice to Charter or vote of the Commission, on March 19, 2018 (hereinafter "*Franchise Show Cause Order*" or "*Order*").[1]

Charter is in full compliance with its cable video franchise agreements with the City of New York ("the City"). The *Order*, which proposes to begin proceedings to revoke Charter's franchises, is flawed both procedurally and substantively, and the proceeding it initiates should be dismissed immediately.

First, the *Order* is premised on speculation, not evidence. Specifically, the *Order* hypothesizes that Charter *might* be underpaying its franchise fees to the City and *might* have insufficiently deployed its cable video network within its franchise area, and then proposes to initiate termination proceedings based on those unsubstantiated alleged defaults unless Charter

[1] Case 18-M-0178, *Proceeding to Investigate Whether Charter Communications, Inc. and its Subsidiaries Providing Service Under the Trade Name "Spectrum" Have Materially Breached Their New York City Franchises*, Order to Show Cause (Mar. 19, 2018) (hereinafter "*Franchise Show Cause Order*" or "*Order*"). The Commission did not adopt the *Order* until its April 19, 2018 meeting.

carries the burden of dispelling that speculation. Both allegations are baseless, and it is apparent that the Commission issued the *Order* without conducting any investigation.

Second, the *Order* is riddled with procedural and substantive infirmities. It was adopted by a single Commissioner; it arrogates to the Commission oversight authority that has traditionally been solely exercised by the City; and it runs roughshod over the terms of Charter's Franchise Agreements that set forth both the permissible bases and proper procedures for revocation proceedings.

Third, as set forth below and in the accompanying declarations, Charter is in full compliance with its New York City franchise fee and network deployment obligations and the Commission's expressed concerns provide no basis for continuing these proceedings. The revenue concerns that the Commission has raised are already the subject of an inquiry by the City—an inquiry with which Charter is cooperating fully—and Charter's treatment of its revenues is consistent with FCC guidance, generally accepted accounting principles ("GAAP"), and the Franchise Agreements themselves. And the incidents the Commission has invoked with respect to Charter's network deployment obligations reflect compliance with, not disregard of, Charter's Franchise Agreement obligations.

In short, for the reasons stated herein and in the accompanying declarations, the Commission should decline to follow the *Order*'s proposed approach. Any legitimate questions regarding either subject should be addressed through the City's ongoing oversight of Charter's performance and through the specific dispute-resolution procedures the parties negotiated (and the Commission itself approved) in the Franchise Agreements themselves—the normal process that municipalities, the Commission, and cable operators have followed for decades. The *Order*'s speculative claims could have been easily dispelled through simple discussions if the Commission

had reached out to Charter instead of hastily issuing a procedurally infirm *Order* without any notice or investigation. It is disappointing that the Commission initiated this highly unusual and procedurally improper exercise, which has caused significant damage to Charter's reputation and to its business without any conceivable justification. The Commission should abandon these proceedings promptly.

BACKGROUND

As part of the May 2016 transaction between Charter and Time Warner Cable Inc. ("Time Warner Cable"), which the Commission approved in January 2016,[2] Charter assumed control of Time Warner Cable's cable video operations and franchises nationwide, including within New York City. Time Warner Cable, through a subsidiary, is a party to five franchise agreements with the City, covering Northern Manhattan, Southern Manhattan, Brooklyn, Queens, and Staten Island (collectively, the "Franchise Agreements"),[3] each entered into between Time Warner Cable and the City and approved by the Commission on November 30, 2011.[4]

[2] *See* 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 (Jan. 8, 2016) ("*Merger Order*").

[3] Pertinent terms and requirements are the same across the five agreements except where explicitly so noted, and this brief for simplicity will cite to them using the format "Franchise Agreement § [X]."

[4] *See* Cases 11-V-0549, 11-V-0550, 11-V-0551, 11-V-0552, and 11-V-0553, Orders Approving Renewal (Nov. 30, 2011).

A. Charter's New York City Franchise Agreements and the City's Supervision of Charter's Compliance.

The Franchise Agreements define Charter's and the City's respective obligations governing the provision of Charter's cable video services within the City. Three provisions of these agreements are pertinent here.

First, the Franchise Agreements require Charter to pay franchise fees upon "Gross Revenue," which they define to include "all revenue, *as determined by generally accepted accounting principles*, which is derived by the Franchisee (or any Affiliate) from the operation of the Cable System to provide Cable Service in the Franchise Area," as caveated and qualified by a series of more detailed provisions.[5] This requirement tracks federal law, which caps such fees at 5 percent of a cable operator's revenue from cable services provided over its system and limits the categories of revenue on which such fees may lawfully be assessed.[6]

Second, the Franchise Agreements include a "Residential Deployment" requirement, which requires Charter's cable system to have "passed all households that exist as of the Effective Date [*i.e.*, Nov. 30, 2011]."[7] (hereinafter the "Cable Franchise Deployment Obligation").[8] The Cable Franchise Deployment Obligation defines a household as "passed" for these purposes "when functioning System facilities have been installed in the street fronting the building in which such household is located, such that Service could be provided to such building in conformance with"

[5] Franchise Agreement § 1.32(i) (emphasis added).

[6] *See* 47 U.S.C. § 542(b).

[7] Franchise Agreement §§ 5.1(a) (Cable Franchise Deployment Obligation) & 3.1 (Effective Date); *see also* n.4 *infra* (Commission approval of Franchise Agreements on Nov. 30, 2011).

[8] Franchise Agreement § 5.1.

the Franchise Agreements' "Standard Installation" terms when those "Standard Installation" terms apply.[9]

The "Standard Installation" terms, in turn, require Charter to be able to honor certain types of residential customer requests for cable service within 7 business days (or, with notice to the customer explaining the delay, within 14 business days).[10] The Franchise Agreements recognize that not all households "passed" by facilities in the street can be served within 7 business days, however, and the Standard Installation provisions accordingly do not govern all extensions of service. Instead, the Franchise Agreements spell out different procedures, timelines, and requirements for extending Charter's cable network to potential customers that cannot be served by means of simple, "standard" service installations. In particular, Charter is not subject to the "Standard Installation" requirements when residential customers are located inside of multiple-dwelling units ("MDUs") unless Charter has already "prepositioned" its facilities inside the building itself.[11] Different rules and timelines also apply where barriers such as commercial infeasibility or lack of access to a structure prevent or delay Charter's ability to extend its network.[12] And the Cable Franchise Deployment Obligation does not apply at all to extensions of cable service into commercial blocks and buildings constructed after the franchise agreements' effective date.[13]

Third, the Franchise Agreements also contain a carefully negotiated and thorough "Default and Remedies" section, which sets forth procedures for investigating and remedying any alleged

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[9] *Id.* § 5.3.1 *et seq.*

[10] *Id.* § 5.3.1.1.

[11] *Id.* §§ 1.41 & 1.51.

[12] *Id.* § 5.4.

[13] *Id.* §§ 5.3.2, 5.4, 5.6, 5.7; n.4 *infra*.

noncompliance by Charter with any of its terms. As pertinent here, the agreements define and circumscribe the remedies available to the City in the event of a default by Charter on any of its obligations,[14] define a limited set of "Revocation Defaults" that would allow the City to terminate the franchise,[15] and set forth procedures for resolving both claims of alleged defaults and claims involving alleged revocation defaults.[16]

The Franchise Agreements also entitle the City, based upon negotiated procedures, to inspect Charter's records to confirm its compliance with its requirements, including the payment of appropriate franchise fees and the Cable Franchise Deployment Obligation.[17] The City has requested records from Charter under these provisions to inquire into Charter's calculation of revenue for purposes of the franchise fees it pays to the City, which Charter has been providing, and the City's review of those records is ongoing. The City has not, however, formally notified Charter that it believes Charter to be in breach of Franchise Agreements with respect to the franchise fee requirement (or provided Charter with an opportunity to cure any such purported breach) as the agreements would require before taking any adverse action. And with respect to the Cable Franchise Deployment Obligation, Charter is not aware of *any* allegation, claim, or even specific request for information by the City suggesting that Charter is not in compliance.

Likewise, at no point prior to the *Order* did the Commission give Charter any indication that it believed or suspected Charter to be out of compliance with the Franchise Agreements. Neither the Commission nor Department of Public Service ("Department") Staff has ever brought to Charter's attention any concerns with Charter's performance under its New York City

[14] Franchise Agreement § 15.

[15] *Id.* § 15.6.

[16] *Id.* §§ 15.2-15.5 & 15.8.

[17] *Id.* § 11.1.

franchises, nor had either at any point formally requested any information from Charter relating to its agreements with the City.[18]

B. The Commission's *Franchise Show Cause Order*.

Notwithstanding the apparent absence of any prior investigation or inquiry by the Commission or by the Department, without any notice to Charter that the Commission was considering such action, and without providing Charter any opportunity to address the Commission's concerns, Chair Rhodes on March 19, 2018 issued the *Order* unilaterally and without a public meeting or vote of the Commission—even though the Commission had just held a full, regularly scheduled and noticed meeting mere days before. The *Order* asserts that the Commission had "recently learned that Charter may be in violation of at least two" of its commitments under the Franchise Agreements. *Order* at 2. Specifically, the *Order* alleges that Charter may have failed to pay its required franchise fees to the City and that Charter may have breached the Cable Franchise Deployment Obligation. Contrary to the standards governing enforcement proceedings, the *Order* places on Charter the burden of disproving both hypotheses.[19]

1. Franchise Fee Allegations.

The sole basis for the *Order* assertion that Charter "may" have failed to pay its required franchise fees is that Department Staff had been "advised by NYC DoITT that franchise fee

[18] Charter is aware of only one instance in which the Department made anything resembling an informal inquiry on this topic. [redacted]

[19] Chair Rhodes simultaneously issued, also as a One-Commissioner order, another Show Cause Order in Case 15-M-0388, which, like the *Franchise Show Cause Order*, provides no explanation for why the issues raised therein could not have been addressed at a regular, publicly noticed meeting of the Commission in the normal course. Case 15-M-0388, Order To Show Cause (Mar. 19, 2018) ("*Expansion Show Cause Order*").

payments to NYC from Charter have been declining year-over-year since Charter consummated its merger with Time Warner." *Order* at 3. Although the *Order* later acknowledges that the City has already "made a request for information under Section 11 of the NYC franchises to determine generally if Charter is making its franchise fee payments," the *Order* does not mention that the City is still reviewing those records and has not made any finding or allegation that the records show Charter to have underpaid. *Order* at 10-11. The *Order* also asserts that "[i]f Charter is improperly calculating its franchise fee payments to NYC it may be construed as a material breach of the agreement and a basis for revocation proceedings." *Order* at 11. The *Order* does not, however, cite to the Franchise Agreements' own definition of the "Revocation Defaults," which spells out the specific conditions under which monetary or injunctive relief are inadequate and franchise revocation becomes available as a remedy for noncompliance with the Franchise Agreements' requirements—and mere underpayment of franchise fees is *not* among the breaches that can support revocation.[20] Nor does the *Order* cite the Franchise Agreement's provisions itemizing the City's remedies in the event of a default that is *not* a "Revocation Default," such as seeking monetary compensation or drawing upon a performance bond or letter of credit securing Charter's obligations under the franchises.[21] Nor, for that matter, does the *Order* otherwise provide any explanation or analysis for its assertion that an underpayment of franchise fees, if proved, would constitute a "material" breach of the franchises.

2. Network Deployment Allegations.

The *Order* also alleges that Charter "may" have breached the Cable Franchise Deployment Obligation, which it inaccurately characterizes as an obligation to "pass all buildings in [Charter's]

[20] Franchise Agreement § 15.6.

[21] *Id.* §§ 15.1.1, 15.1.2, 15.1.5.

NYC footprint as required by the respective franchise renewals." *Order* at 3.[22] This allegation is predicated upon two claims.

First, the *Order* cites reports that Charter has filed with the Commission in Case No. 15-M-0388, in which Charter is subject to a requirement to expand its network to pass additional residences and businesses in New York and to report those newly constructed passings to the Commission (the "Expansion Condition").[23] Charter has filed five reports over the past year in Case No. 15-M-0388 that have included the Company's network expansion activities in New York City.[24] Although Charter has been regularly reporting the construction of passings in the City to the Commission since at least February 2017, the *Order* seizes upon Charter's "recently filed" January 2018 Buildout Compliance Report as a basis for hypothesizing that Charter may be in violation of the Cable Franchise Deployment Obligation. The fact that Charter reported network

[22] As set forth in Part III.B.1 *infra*, this is not an accurate characterization of the Cable Franchise Deployment Obligation set forth in the Franchise Agreements. The condition does not apply to commercial or industrial buildings in any portion of the City.

[23] 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 *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.

[24] *See* Case 15-M-0388, Charter Communications, Inc. Network Expansion Plan Update (Feb. 17, 2017) (865 reported passings in NYC); Charter Communications, Inc. Annual Update (May 18, 2017) (994 reported passings in NYC); Charter Communications, Inc. Network Expansion Plan Update and Communications Plan Compliance Filing (Aug. 18, 2017) (994 reported passings in NYC), Charter Communications, Inc. Network Expansion Plan Update and Bulk Address Update (Dec. 1, 2017) (6,568 reported passings in NYC); Charter Communications, Inc. Build-out Compliance Report (Jan. 8, 2017) (14,552 reported passings in NYC).

expansion activities within New York City, the *Order* reasons, implies that Charter's network previously "could not provide cable service to these locations" even though they "should have already had network available." *Order* at 8.

Second, the *Order* points to a Department Staff audit of "490 premises" within the City. According to the *Order*, this audit identified three structures (two MDUs and one office in a commercial building)[25] that "should have already been served" by Charter prior to its reported network expansion activities but were included as new passings in Charter's most recent report. *Order* at 13. The *Order* does not identify any other structures to which it alleges that Charter had not extended its network consistent with the Cable Franchise Deployment Obligation.

* * * *

The *Franchise Show Cause Order* cites no further evidence to support a conclusion that Charter has breached the franchise fee requirement or the Deployment Requirement other than with the limited evidence set forth above. The *Order* does not itself assert that these limited facts would be sufficient to support a finding that Charter is in noncompliance with its franchise obligations. Rather, it only asserts that Charter "may" be in noncompliance, claims that the evidence cited "rais[es] some legitimate questions," and eventually concedes that it is merely hypothesizing "potential violations." *Order* at 3, 15. Notwithstanding these implicit acknowledgements of the thin evidentiary basis underlying the *Order*, it places the burden of proof

[25] The *Order* misleadingly implies that Charter had claimed the entire "Reuters Building," a commercial structure at 3 Times Square, as "countable towards the December 2017 target." *Order* at 14. This passing represented the extension of Charter's network to a commercial tenant on the [redacted] Floor of the structure [redacted], and to which competitors' online serviceability tools indicated that they did not offer commercial broadband service at the requisite 100 Mbps+ speeds. *See* Declaration of John Quigley ¶ 14.

back on Charter to dispel its speculation and demands that Charter "show cause why the Commission should not begin proceedings to revoke [Charter's] NYC franchises."[26] *Order* at 15.

LEGAL STANDARD

When the Commission initiates enforcement proceedings, "the Commission has the burden of proof." N.Y. A.P.A. Law § 306(1) ("Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding."). This burden is carried only when the record as a whole affords "substantial evidence" supporting the Commission's position. *Id*. That is, the finding must be "supported by the kind of evidence on which reasonable persons are accustomed to rely in serious affairs." *Matter of Sowa v. Looney*, 23 N.Y.2d 329, 335 (1968) (quotation marks omitted). Mere conjectures are impermissible, *see Matter of Stoker v. Tarentino*, 101 A.D.2d 651, 652 (3d Dep't 1984), and evidence must only be "given its logical probative force," *Matter of Sowa*, 23 N.Y.2d at 335.

Further, under New York law, the authority of administrative agencies is cabined by their obligation to take action that is neither arbitrary nor capricious nor an abuse of discretion. *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974); *Matter of Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal*, 21 N.Y.3d 649, 652 (2013) ("An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts"); *Arc Plumbing & Heating Corp. v. Board of Responsibility of Dep't of Gen. Servs.*, 135 Misc. 2d 413, 414 n.1 (N.Y. Sup. Ct., N.Y. Cty. 1987) (agency "determination that lacks substantial evidence to support would necessarily be an arbitrary and capricious decision"). Agency action taken "without foundation in fact" or unsupported by proof sufficient to authorize the determination is invalid. *See Matter of Pell*, 34

[26] The Secretary on April 4, 2018 extended the deadline for Charter to respond to the *Order* to May 9, 2018. *See* Case 15-M-0388, Ruling on Extension Request (Apr. 4, 2018).

N.Y.2d at 231 (quotation marks omitted); *Caputi v. Town of Huntington*, Index. No. 19803/2012, 2013 N.Y. Misc. Lexis 997, at *6 (N.Y. Sup. Ct., Suffolk Cty. Mar. 5, 2013) ("The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact").

ARGUMENT

I. THE *ORDER* IS LEGALLY AND PROCEDURALLY INFIRM.

The *Franchise Show Cause Order* threatens to initiate revocation of Charter's New York City cable television franchises based upon little more than speculation that Charter "may" have committed "potential violations" of the Franchise Agreements.[27] Although the *Order* is mistaken on the merits for reasons explained in Parts II and III below, it fails at the outset on procedural grounds. It lacks sufficient evidentiary support for its allegations, departs from the Commission's established prior practice with regard to the handling of disputed franchise compliance issues, exceeds the Commission's legal authority by purporting unilaterally to supersede key provisions of agreements Charter negotiated with the City, fails to satisfy the required predicates for revoking a franchise under state law, and violates federal constitutional protections.

A. Revocation Is an Extraordinary Measure Subject to Specific Safeguards to Protect Both the Public and the Franchisee.

Revocation of a cable television franchise is an extraordinary measure. It could severely disrupt the availability of critical communications services to residents of the affected municipality and interfere substantially with the affected cable company's investment-backed expectations in the operation of its cable system throughout the term of the franchise.

[27] *See Franchise Show Cause Order* at 4, 15-16.

Due to the draconian nature of franchise revocation and its potentially severe impacts on both municipalities and cable operators, the Commission's state-law franchise revocation authority is limited by several safeguards. Section 227 of Article 11 of the Public Service Law makes clear that no cable franchise can be revoked until, after public notice and opportunity for a hearing, there has been a determination that the cable operator has committed a material breach and has failed without reasonable justification to cure within sixty days of receiving notice.[28] Section 227's safeguards reflect and mirror the analogous provisions under federal law regarding the renewal of cable television franchises, which establish a presumption of renewal limit a franchising authority's power even to deny a renewal based upon a franchise breach.[29] A franchise non-renewal, under the Cable Act, may be predicated only upon breaches that constitute a "failure to substantially comply" with the "material terms" of the agreement, and then only in circumstances in which the operator has been afforded adequate notice and an opportunity to cure.[30] Revocation of an ongoing franchise before its scheduled termination date is at least as serious a measure as the denial of a renewal; the showing necessary for the former is thus necessarily at least as great as,

[28] N.Y. Pub. Serv. Law § 227.

[29] *See* 47 U.S.C. § 521(5) (Cable Act "establish[es] an orderly process for franchise renewal which protects cable operators against unfair denials"); H.R. Rep. No. 98-934, at 22 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4659 ("The legislation seeks to provide stability and certainty to the process of granting and renewing cable franchises"). The Commission itself has highlighted the importance of continuity of service in orders confirming the New York City franchises. *See, e.g.*, Case 11-V-0557, *Application of Time Warner Entertainment Company, L.P. for Approval of the Renewal of its Cable Television Franchise for the Borough of Brooklyn, Kings County*, Order Approving Renewal, at 1 (Nov. 30, 2011) ("*Brooklyn Confirmation Order*") ("The franchise renewal will serve the public interest, because it continues the availability of cable service in the community"); *see also* H.R. Rep. 98-934 at 72, 1984 U.S.C.C.A.N. at 4709 ("It is intended that a cable operator whose past performance and proposal for future performance meet the standards established by this section be granted renewal"); 47 U.S.C. § 546(c)(1)(D).

[30] 47 U.S.C. § 546(d).

the showing required for the latter.[31] Indeed, Charter is not aware of the Commission's *ever* having revoked a cable franchise for cause under Section 227.[32]

The *Franchise Show Cause Order* disregards these principles. It threatens to initiate revocation proceedings in short order, without making any finding of default, without any prior notice or offering any opportunity to cure, unless Charter dispels to the Commission's satisfaction the speculative "potential violations" alleged by the *Order*.[33] Moreover, it does so in disregard of the specific procedures the parties bargained for to address disputes under the franchise—not to mention the City's *own* review (or decision not to review) the issues raised in the *Order*. As demonstrated more fully below, the *Order*'s directives and proposed course are unlawful.

B. The *Franchise Show Cause Order* Identifies No Valid Basis to Initiate an Investigation.

1. The Alleged Violations of Charter's Franchise Fee Obligations Lack Evidentiary Support.

The *Order*'s sole basis for impugning Charter's compliance with its franchise fee obligations set forth in the *Franchise Show Cause Order* is the fact that Charter's franchise fee payments have declined. *See Franchise Show Cause Order* at 3 ("Staff was also advised by NYC DoITT that franchise fee payments to NYC from Charter have been declining year-over-year since Charter consummated its merger with Time Warner raising some legitimate question pertaining to

[31] Charter expressly reserves all available remedies in the event the Commission takes adverse action in this proceeding, including without limitation the remedies available in Section 635(a) of the Cable Act. *See* 47 U.S.C. § 555(a).

[32] Insofar as any New York state-law franchise nonrenewal and revocation procedures vary from the Cable Act, federal law controls. *See* 47 U.S.C. § 556(c) ("any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded").

[33] *See Franchise Show Cause Order* at 15-16.

NYC's franchise fee payments"); *id.* at 11 ("Staff was additionally advised by NYC DoITT that franchise fee payment to NYC from Charter has been declining year-over-year since Charter consummated its merger with Time Warner").

While there may be legitimate bases for seeking further information or back-up support for certain computations or exclusions underlying a cable operator's computation of gross revenue, the *Franchise Show Cause Order* proffers no specific objections or questions. Instead, it simply observes that franchise fee revenues have declined, speculates that Charter must have done something illegal, and demands that Charter prove otherwise. Threatening sanctions so severe based on mere speculation and conjecture is inconsistent with the Commission's legal obligation to base its decisions upon reasoned consideration of the evidence. *See Matter of Am. Tel. & Tel. Co. v State Tax Comm'n*, 61 N.Y.2d 393, 400 (1984) (Agency determination must be "supported by facts or reasonable inferences that can be drawn from the record"); *Matter of Pell*, 34 N.Y.2d at 234 (Agency determination may be invalidated if its impact is disproportionate to putative misconduct or harm to the agency or public).

2. The *Order*'s Approach to the Franchise Fee Issue Is Procedurally Defective.

Not only does the *Order*'s allegation of a franchise fee violation lack foundation, the *Order* arbitrarily and capriciously reverses the longstanding Commission policy of deferring to municipalities' own processes in fee disputes. As the Commission acknowledges in the *Order*, the City already is reviewing pursuant to its authority under the Franchise Agreements (as it does periodically) whether Charter has computed its franchise fee payments appropriately.[34] The *Order*'s decision to ignore these proceedings and make a highly public threat to terminate Charter's franchise departs dramatically from how the Commission has previously conducted itself

[34] *Franchise Show Cause Order* at 10-11.

in franchise fee disputes between cable operators and municipalities.[35] Although the Commission has on occasion addressed franchise fee disputes between a municipality and a franchisee in response to formal requests for a declaratory ruling, Charter is unaware of the Commission's ever having initiated such a dispute *sua sponte* as the *Order* proposes.[36] And in instances in which the Commission's Cable Municipal Assistance Section has been asked to provide informal input on franchise fee disagreements,[37] Department Staff have stressed that the "ultimate resolution of franchise fee obligation and payment issues is a matter of discussion and interaction" between the municipality and the cable operator "due to the contractual nature of the obligation."[38]

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[35] *See* Press Release, New York Public Service Commission, *PSC Issues Orders to Show Cause to Penalize Charter Communications and Potentially Terminate NYC Franchise Agreements* (Mar. 19, 2018).

[36] *See, e.g.*, Case 05-V-0210, *Complaint of Town of Gates Against Time Warner Cable Concerning Time Warner Cable's Franchise Fee Payments to the Town of Gates, et al.*, Declaratory Ruling on Time Warner Cable's Franchise Fee Payments to Various Municipalities (May 26, 2006) (addressing dispute between Time Warner Cable and several municipalities regarding inclusion of subscriber receipts for franchise fees in computation of gross revenues subject to franchise fee obligation); Case 13-V-0144, *Complaint of Computel Consultants Regarding Time Warner Cable Franchise Fee Payments to the Village of Camden*, Order Granting Rehearing and Additional Relief (Feb. 10, 2015); Case 13-V-0143, *Complaint of Computel Consultants Regarding Time Warner Cable Franchise Fee Payments to the Village of South Glens Falls*, Order Denying Request (May 23, 2013); Case 11-V-0224, *Complaint of Computel Consultants Against Time Warner Cable Concerning Franchise Fee Payments to the Town of Alden*, Order Denying Request For Increased Franchise Fees (Feb. 22, 2012).

[37] *See* Letter from Kevin Hillegas, Public Utilities Auditor 2, Department of Public Service, to Brian Wirth, Time Warner Cable (Oct. 3, 2005) (Referencing request for a franchise fee review from the City of Rochester) (attached here as Ex. A); New York Public Service Commission, Cable Municipal Assistance Section, http://www3.dps.ny.gov/W/PSCWeb.nsf/All/F09C832AAF7A98BE85257687006F3941?OpenDocument (last visited May 3, 2018); New York Public Service Commission, Cable Franchising – Franchise Fee, http://www3.dps.ny.gov/W/PSCWeb.nsf/All/209301053B2661F085257687006F3A64?OpenDocument (last visited May 3, 2018).

[38] *See, e.g.*, Letter from Kevin Hillegas, Public Utilities Auditor 2, Department of Public Service, to Johanna F. Brennan, Municipal Attorney, City of Rochester (Nov. 3, 2005) (attached here as Ex. B); Letter from Dave Shahbazian, Senior Auditor, Department of Public Service, to Tom Tarapacki, City of Buffalo (Feb. 3, 2012) (attached here as Ex. C) (reporting findings of compliance review requested by municipality regarding "the adequacy of franchise fee payments

Even when formally determining that a cable operator has computed its franchise fees incorrectly, the Commission has refrained from opining on whether the incorrect calculation amounts to a breach of the operator's franchise agreement. Instead, the Commission has provided its findings on the issue in dispute and then allowed the municipality and the franchisee to address the legal effect of that decision.[39] The *Order*'s determination that any franchise fee underpayment arising during the period under review should automatically be treated as a potential basis for revocation represents a significant and unexplained break from the Commission's longstanding approach. This unexplained departure from established practice contravenes basic tenets of valid agency action. *See Nat'l Fuel Gas Distribution Corp. v. Pub. Serv. Comm'n*, 154 A.D.2d 31, 36-37 (3d Dep't 1990); *Matter of Local 100, Transp. Workers Union of Greater N.Y. v. City of N.Y. Dep't of Citywide Admin. Servs.*, Index No. 103015104, 2005 N.Y. Misc. LEXIS 8620, at *11 (N.Y. Sup. Ct., N.Y. Cty. 2005).

made by Time Warner Cable" and noting that "[f]inal payment terms are the matter of discussions between TWC and the City"); Letter from Dave Shahbazian, Senior Auditor, Department of Public Service, to Ms. Sharon Hanson, Time Warner Cable (Mar. 5, 2013) (attached here as Ex. D) (addressing dispute between franchisee and municipality over whether various revenue items should be excluded from gross revenues, noting that "final payment terms are the matter of discussions between TWC and the City," and encouraging "the City and TWC to discuss any remaining issues."

[39] *See Declaratory Ruling on Time Warner Cable's Franchise Fee Payments to Various Municipalities*, at 10 (Finding that Time Warner failed to comply with certain of the Commission's orders on renewal relating to its franchise fee obligations and directing the parties to "collaborate on the amount of monies owed consistent with this declaratory ruling" and provide a joint report to the Municipal Assistance Section); Case 05-V-0210, *Complaint of Town of Gates Against Time Warner Cable Concerning Time Warner Cable's Franchise Fee Payments to the Town of Gates, et al.*, Order Clarifying Prior Ruling at 4 (Sept. 24, 2007) ("The parties should continue to collaborate on the amount of monies owed consistent with this clarification and provide a joint report" to the Municipal Assistance Section).

3. The Alleged Violations of the Cable Franchise Deployment Obligation Lack an Adequate Factual Foundation.

The *Order*'s claim that Charter has failed to comply with the Cable Franchise Deployment Obligation is likewise without foundation. It is based exclusively upon the fact that Charter reported to the Commission that it had constructed additional passings in New York City as part of its network expansion efforts, and that Department Staff in an audit had identified two MDUs and one commercial structure that they believed Charter should have already served.[40]

As explained in greater detail in Part IV below, Charter complies fully with the Cable Franchise Deployment Obligation. But in any case, Charter's reporting additional passings in New York City should never should have been the basis for initiating a Commission order to show cause to begin with. Even a cursory review of the Franchise Agreements would show that "passing" an MDU for purposes of the Cable Franchise Deployment Obligation is materially distinct from having network plant deployed *inside* an MDU such that the franchisee can serve residents within a standard business interval (*e.g.*, seven business days).[41] Section 5.1 makes clear that an MDU is considered "passed" for purposes of the condition irrespective of whether the franchisee has obtained building access or deployed risers and other internal MDU facilities within the building.[42]

Notably, the Commission's *Expansion Show Cause Order*, issued simultaneously with this one, directly undercuts its allegation in the *Franchise Show Cause Order* that Charter has breached the Cable Franchise Deployment Obligation. With respect to the 12,467 New York City addresses

[40] *Franchise Show Cause Order* at 8, 13.

[41] *See infra* at Part III.

[42] Franchise Agreement § 5.1; *Order* at 7 ("For purposes of this Agreement household is 'passed' when functioning System facilities have been installed in the street fronting the building in which such household is located, such that service could be provided to such building in conformance with the provisions of Sections 5.3.1, 5.3.1.1., 5.3.1.2, 5.3.1.3 (assuming no delays in gaining lawful access)").

that serve as the basis for the *Franchise Show Cause Order*'s alleged violation of the Cable Franchise Deployment Obligation, the *Expansion Show Cause Order* states that "these addresses have pre-existing [Charter] network already serving their locations, supported by the lack of pole applications associated with any of these passings."[43] As noted, however, the Franchise Agreements count any MDU with functioning system facilities in the street fronting the building as "passed" for purposes of the Cable Franchise Deployment Obligation. Thus, the *Build-Out Show Cause Order* itself concedes that the *Franchise Show Cause Order*'s allegations on this point are meritless.

C. The Commission Lacks Authority Unilaterally to Initiate Revocation Proceedings absent a Revocation Default Finding by the City.

The Franchise Agreements establish the particular circumstances under which Charter's franchises can be revoked and the specific procedures that must be followed to invoke those circumstances.[44] Due to the contractual nature of the agreements, the Commission may not disregard the agreements' own negotiated provisions directly governing those issues as the *Order* proposes.

The Franchise Agreements' procedures include providing an initial notice of an alleged default to the franchisee,[45] followed by—should the issue remain unresolved—a formal written "Notice of Default" identifying the specific provision of the franchise and apprising the franchisee of the grounds for the alleged violation.[46] Following receipt of a Notice of Default, the franchisee

[43] *Expansion Show Cause Order* at 12. As set forth in the Declaration of John Quigley, Charter's New York City facilities are in significant part undergrounded, rendering inapposite the *Expansion Show Cause Order*'s reference to "pole attachments" as a means for extending service to additional structures in the City.

[44] Franchise Agreement § 15.6.

[45] *Id.* § 15.2.

[46] *Id.*

has thirty days to either respond to the City (if it contests the allegation of default) or cure the alleged default.[47]

Under the Franchise Agreements, moreover, only a narrowly defined set of defaults are defined as a "revocation default"[48] on which a revocation proceeding can be initiated.[49] These include actions such as a franchisee's failure to maintain the required performance bond, letter of credit, and insurance coverage, an unlawful transfer of the franchise in contravention of the agreement, conviction of key officials of certain enumerated offenses, abandonment of service, or intentionally fraudulent conduct or intentional material false entries in the franchisee's books or accounts.[50] And if the City wished to initiate a revocation proceeding based on such allegations, it would first need to provide the franchisee with written notice of its intention to revoke the franchise (which can occur no earlier than 90 days from the date of the notice).[51]

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[47] *Id.* § 15.3. The Franchise Agreements also provide that "no Default shall exist" if a breach is curable but the work to be performed or acts to be undertaken to cure such Default cannot be completed within the cure period specified in the agreement, so long as franchisee has commenced to cure such Default within the specified cure period and works diligently to complete the acts necessary to effectuate such cure. *Id.* § 15.4.

[48] *Id.* § 15.6.

[49] *Id.* § 15.8.

[50] *Id.* § 15.6.1-10. The Franchise Agreements also contain a catch-all provision for a "persistent and repeated pattern" of "material" defaults, but that provision is inapposite as well: it presupposes a series of formal breach findings by the City with cure opportunities afforded the franchisee, neither of which has taken place here. The catch-all revocation provision also expressly excludes "defaults subject to good faith disputes." *Id.* § 15.6.11.

[51] The agreement also details the process that must take place *after* the issuance of a Notice of Revocation, including the opportunity for franchisee to provide materials responsive to the notice, review of such materials by the City, the need for the City to provide the franchisee with at least 30 days notice of its intent to conduct a hearing, the opportunity for "full participation" by the franchisee at the hearing, post-hearing rights to submit findings and conclusions, the requirement of a written decision subject to enumerated safeguards including whether the putative Revocation Default has been cured or is excusable, and appeal rights. *Id.* § 15.8.1-2. The franchise also sets forth the consequences that flow from a determination to revoke the franchise for both parties to the franchise. *Id.* § 15.8.3.

None of the potential violations alleged in the *Franchise Show Cause Order* falls within the rubric of a revocation default as delineated in the Franchise Agreements. And the *Order* envisions far less process and deliberation—a one-time filing by Charter responding to the *Order*'s allegations—prior to initiating a revocation hearing.

The *Order*'s attempt to ignore the Franchise Agreements' limits on the events that may lead to revocation, and the Franchise Agreements' procedures for initiating any revocation process, is unlawful. Under Federal law, cable franchise agreements are contracts,[52] and are subject to the Contracts Clause of the Constitution.[53] Unilateral action by the Commission to initiate a revocation proceeding, unmoored from the bargained-for process agreed upon by Charter and the City, would impair the franchise contract in violation of the constitutional protections to which the Franchise Agreements are entitled.[54]

[52] *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 772 (1996) (Stevens, J., concurring) (noting Court's consensus view that franchise agreements between cable operators and local franchising authorities are contracts); *id.* at 794 (Kennedy, J., concurring) ("[a] franchise agreement is a contract"); *Tex. Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x 210, 212 (5th Cir. 2008) (characterizing franchise agreements between cable operators and municipalities as "long-term contracts"); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314-15 (8th Cir. 1991) (franchise is a bargained-for contractual agreement); *Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875, 887 (E.D.N.Y. 1994), *aff'd*, 57 F.3d 1062 (2d Cir. 1995) (unpublished table decision) (treating franchise agreement as a contract); *Mecklenburg Cty. v. Time Warner Ent'mt/Advance Newhouse P'ship*, Civ. A. No. 3:05cv333, 2010 U.S. Dist. LEXIS 6215, at *24 (W.D.N.C. Jan. 26, 2010) (characterizing cable franchise agreement as a contract).

[53] U.S. Const. art. 1, § 10.

[54] *See Pac. Gas & Elec. Co. v. City of Union City*, 220 F. Supp. 2d 1070, 1087-88 (N.D. Cal. 2002); *see also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 893 (9th Cir. 2003) (franchise cannot be read in a way that reserves to local government the power to unilaterally alter the terms of the agreement).

D. The Alleged Breaches Are Not Material and Section 227's Necessary Predicates for Revocation Have Not Been Met.

Even if Section 227 somehow empowered the Commission to disregard the limits on revocation established in the Franchise Agreements—which it does not due to the contractual nature of those agreements as set forth above—the *Franchise Show Cause Order* would still contravene Section 227 itself. The Commission's statutory authority to initiate revocation of a franchise expressly requires: (1) the existence of a material breach, (2) a failure by the cable operator to cure such breach after receiving written notice thereof, and (3) the absence of any reasonable justification for such cure.[55] The *Order* meets none of these prerequisites.

Applicable case law holds that a breach can be "material" only when "the departure from the terms of the contract or defects of performance . . . pervade[] the whole of the contract or have been so essential as substantially to defeat the object that the parties intended to accomplish."[56] Neither an alleged failure to deploy service in a timely manner to approximately one-half of one percent of the 2.5 million homes passed by Charter in New York City nor an alleged miscalculation of franchise fees meets this high threshold. Moreover, both of these alleged violations would be fully and completely cured through payment of any established arrearage and deployment to any unpassed locations. Yet the *Order* provides Charter with no opportunity to either cure the alleged breaches or provide a reasonable justification for them.[57]

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[55] N.Y. Pub. Serv. Law, § 227.

[56] *Town of East Hampton*, 862 F. Supp. at 885; *see also Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) ("for a breach of a contract to be material, it must go to the root of the agreement between the parties" (internal quotation marks omitted)).

[57] *Weeden v. Town of Clyde Hill*, 1991 U.S. App. Lexis 25367, at *11 (9th Cir. Oct. 24, 1991) ("A cable television franchisee has a property right in its franchise that is entitled to due process"); *Chicago Cable Commc'ns v. Chicago Cable Comm'n*, 879 F.2d 1540, 1545-46 (7th Cir. 1989) (addressing whether a notice provided to cable operator of breach of franchise provisions regarding local origination programming satisfied due process requirements); *Madison Cablevision, Inc. v. City of Morganton*, No. SH-C-86-5, 1990 U.S. Dist. Lexis 18794, at *38 (M.D.N.C. May 14, 1990)

II. CHARTER'S NEW YORK CITY FRANCHISE FEE PAYMENTS ARE CONSISTENT WITH ITS FRANCHISE OBLIGATIONS.

As set forth above, it is improper for the Commission to engage in a duplicative inquiry into the calculation of franchise fees that Charter remits to the City while Charter and the City are already working together on their own review. Subject to that objection, Charter is providing the explanation below to answer the *Order*'s inquiry into "whether and how any [of Charter's] methods [for calculating its franchise fees paid to the City] differ from those used by Time Warner Cable prior to the merger." *Order* at 16.

Section 622 of the Cable Act caps the franchise fees that a franchising authority may impose at "5 percent of [a] cable operator's gross revenues derived in such period from the operation of the cable system *to provide cable services*." 47 U.S.C. § 542(b) (emphasis added). Charter pays New York City the maximum franchise fee permitted by federal law, *i.e.*, 5% of its gross revenues derived from the operation of the cable system to provide cable services.[58] The definition of "Gross Revenue" within Charter's New York City Franchise Agreements further clarifies that "Gross Revenue" is that which would be recognized under "generally accepted accounting principles."[59] With respect to advertising revenue specifically, the Franchise

("The rule with regard to revocation or annulment of an existing franchise is simply that the franchise is a property right which may not be terminated without due process").

[58] Indeed, Charter has concerns that additional fees it pays pursuant to other provisions in the Franchise Agreements may be causing its aggregate payments to exceed the federal statutory cap. Although these fees are not the subject of the Commissions' inquiry in the *Order*, Charter expressly reserves all rights in any revocation proceeding the Commission may undertake pursuant to the *Order* with respect to any offsets to its franchise fee liability to which it may be entitled under federal law.

[59] Franchise Agreement § 1.32(i).

Agreements state that "advertising revenue" will be included within Gross Revenue, but only if it is received "from or in connection with the distribution of any service over the System."[60]

Charter is providing along with this filing a declaration from its Senior Director of Accounting Steven D. Lottmann ("Lottmann Decl."), which attaches additional records setting forth in detail the Company's franchise fee payments to the City within each category, along with an explanation of the Company's pertinent calculation methods.

As the detailed franchise fee reports from 2012-2017 demonstrate, [redacted]. *See* Lottmann Exs. A-F (franchise fee reports).[61] In addition, since assuming control of Time Warner Cable's New York City operations, Charter has reviewed the methodology that Time Warner Cable had previously used to calculate franchise fees remitted to the City. Lottmann Decl. ¶ 5. Charter has concluded that there are certain categories of advertising revenue that Time Warner Cable had erroneously included within as well as excluded from its "Gross Revenue" for purposes of calculating its franchise fee payments to the City. *Id.*

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[60] *Id.* § 1.32(ii).

[61] [redacted]. It is well-known that cable television revenues are falling across the industry. *See, e.g.*, Chris Mills, *Cable companies freak out after 1 million cut cord in 3 months*, N.Y. Post (Nov. 1, 2017), https://nypost.com/2017/11/01/cable-companies-freak-out-after-1-million-cut-cord-in-3-months/ (Noting reports of pay-TV subscriber losses in the 3rd quarter of 2017 for AT&T/DirecTV, Comcast, Charter, and Verizon). A study by eMarketer estimated that 22 million Americans "cut the cord on cable, satellite or telco TV service" in 2016, up 33% from 16.7 million in 2016. Todd Spangler, *Cord-Cutting Explodes: 22 Million U.S. Adults Will Have Canceled Cable, Satellite TV by End of 2017*, Variety (Sept. 13, 2017), http://variety.com/2017/biz/news/cord-cutting-2017-estimates-cancel-cable-satellite-tv-1202556594/. In addition, the number of "cord-nevers" (consumers who have never subscribed to multichannel video programing service) was estimated to rise 5.8% in 2017, to 34.4 million. *See* Comments of NCTA – The Internet & Television Association at 7 n.7, MB Docket No. 17-214 (FCC Oct. 10, 2017).

To date, Charter has not yet taken any action to deduct Time Warner Cable's past overpayments from Charter's franchise fee payments to the City. *Id*. Charter has, however, for present purposes corrected its methodology on a going-forward basis to align its payments with the franchise fees to which the City is legally entitled. *Id*. In response to the City's inquiry regarding Charter's reported advertising revenue, Charter provided detailed financial backing data, which it is providing to the Commission along with this filing as well. *See* Lottmann Ex. G. In addition, a description of the key differences between Charter's methodology and Time Warner Cable's is provided below.

A. Revenue Derived from Broadband Advertising.

Time Warner Cable had previously included within its "Gross Revenue" for franchise fee calculation purposes its revenues derived from the sale of advertising placed on its broadband internet access services. Lottmann Decl. ¶ 7. However, broadband internet access services provided over a cable system are not "cable services" and revenues from such services are not "from the operation of the Cable System to provide Cable Services" within the meaning of the Franchise Agreements.[62] In addition, inclusion of revenues derived from such services would cause Charter to exceed the federal cap on franchise fees that may lawfully be assessed under the Cable Act.[63] Accordingly, Time Warner Cable's inclusion of such revenues in the Gross Revenue it used to calculate its franchise fee payments resulted in overpayment, which Charter has now discontinued. *Id*.

[62] *Id*. § 1.32(i) (emphasis added).

[63] 47 U.S.C. § 542(b).

B. Revenue Derived from Selling Advertising on Non-Charter Cable Systems.

Gross revenue "from the operation of *the Cable System* to provide cable services," as set forth both in the Franchise Agreements and in the Cable Act, does not include any revenues a cable operator derives from selling advertising time on *other* operators' networks. And it most certainly does not include the revenues derived by the operators of such other systems. Time Warner Cable, however, had previously included both types of revenues within the revenue base on which it paid franchise fees to New York City, a practice that Charter has also discontinued. Lottmann Decl. ¶ 9.

Consistent with Time Warner Cable's prior practices, Charter sometimes arranges the sale of a package of advertising time that includes Charter's cable systems as well as the systems of other cable operators in a market (an arrangement known as an "advertising interconnect"). *Id.* ¶ 8. Advertising interconnects enable advertisers more conveniently to distribute advertising throughout a larger territory (and over multiple operators' cable systems) while avoiding the inefficiencies that would result if each advertiser had to engage in piecemeal transactions with each cable operator in a market. In such arrangements, Charter is not only selling advertising time on its own system. It is also acting, in part, as a representative for the sale of advertising on the systems of *other* New York City area cable operators.

Time Warner Cable had previously paid franchise fees on revenue received from selling advertising under these arrangements irrespective of whether the revenue pertained to the sale of advertising time on Time Warner Cable's own system, to Time Warner Cable's role as a representative selling advertising on behalf of the other providers, and even to the sale of the advertising on the systems of other providers itself. *Id.* ¶ 9. Charter is liable for franchise fees only on advertising revenue derived from distribution "over *the System*," *i.e.*, Charter's own

system.[64] Accordingly, Charter has discontinued the inclusion within Gross Revenue of revenues it derives from selling advertising time on non-Charter systems."[65] *Id.*

C. Revenues Earned by Third-Party Agents.

Gross revenue under the Franchise Agreements is also limited to revenue "determined in accordance with generally accepted accounting principles…" ("GAAP").[66] Accordingly, it necessarily includes only income that is recognized under GAAP as Charter's revenue and excludes income that GAAP treat as properly recognizable by other parties.

This distinction is pertinent to certain sales to agencies who represent purchasers of advertising time on Charter's system, purchase advertising time from Charter, and then charge a markup to the eventual purchaser. Lottmann Decl. ¶ 10. Charter does not actually receive the revenue that these agencies earn from their markup, only the revenue those agencies themselves remit to Charter. *Id.*

When Time Warner Cable sold advertising time under such arrangements, it had previously included within its Gross Revenue for franchise fee purposes both the purchase price paid by the agency and the markup the agency then charged to the advertiser on whose behalf it had purchased the advertising time. *Id.* ¶ 11. Charter instead includes within its revenue base for franchise fees only the revenue it receives from the sale of the advertising time; it books the agency's markup as contra revenue. *Id.*

[64] Franchise Agreement § 1.32(ii).

[65] *Id.* § 1.32(i).

[66] *Id.*

Charter's approach is consistent with GAAP.[67] The FCC's Order in *Time Warner Entertainment/Advance/Newhouse Partnership and City of Orlando, Florida* is also on point.[68] There, the FCC concluded that "[t]he language of the Act, its legislative history, and the Commission rate rules regarding franchise fee passthroughs, support the notion that only revenues actually received by the cable operators can be included in the gross revenue determination."[69] Charter's accounting accordingly complies with FCC guidance, GAAP, and the Franchise Agreements themselves.[70]

D. Revenues Derived from Selling Advertising on SportsNet New York and NY 1.

The Franchise Agreements require Charter to pay franchise fees not only on its own revenues from the "operation of [Charter's] Cable System to provide Cable Service in the Franchise Area," but also upon any revenues that an "Affiliate" derives from the same source.[71] An "Affiliate," in turn, is defined as "Any person who, directly or indirectly, owns or controls, or

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[67] *See, e.g.*, Fin. Accounting Standards Bd., Accounting Standards Update No. 2016-08, *Revenue from Contracts with Customers (Topic 606): Principal Versus Agent Considerations (Reporting Revenue Gross Versus Net)* (Mar. 2016) (modifying GAAP and explaining when entities can be considered principals); PwC, *Revenue from Contracts with Customers* § 10.2.2.3 (Aug. 2017) (explaining that "the entity should recognize revenue equal to the sales price to the intermediary" when the intermediary controls pricing of the ultimate sale of the entity's services); Lottmann Decl. ¶ 11.

[68] *Time Warner Entertainment/Advance/Newhouse Partnership and City of Orlando, Florida*, Memorandum Opinion and Order, 14 FCC Rcd 7678 (Cable Serv. Bureau 1999).

[69] *Id.* at 7683 ¶ 13.

[70] Charter is cognizant that the Franchise Agreements also include a provision specifying that "Advertising commissions paid to third parties shall not be netted against advertising revenue included in Gross Revenue." *See* Franchise Agreement § 1.32(ii). However, since Gross Revenue includes only revenues "determined in accordance with generally accepted accounting principles" to begin with, this provision necessarily applies only when the ultimate purchaser's payment would be recognized as Charter's revenue under GAAP. For instance, when Charter sells advertising time through a national representation firm, Charter books the agent's fee as an expense, and does not net the agent's fee from the revenue on which it pays franchise fees. Lottmann Decl. ¶ 12.

[71] Franchise Agreement § 1.32(i).

is owned or controlled by, or is under common ownership or control with, Franchisee."[72] Charter has revised Time Warner Cable's methodology for calculating franchise fees pertaining to the advertising revenues of two programmers, SportsNet New York ("SNY") and New York 1 ("NY1") to better accord with these requirements. Lottmann Decl. ¶ 14.

Charter owns only a non-controlling interest in SNY, a joint venture in which the New York Mets own a controlling interest. Lottmann Decl. ¶ 13. Accordingly, SNY is not an "Affiliate" within the meaning of Section 1.3 of the Franchise Agreement, and its advertising revenues are not part of the "Gross Revenue" on which the City is entitled to franchise fees. Instead, the City is entitled only to franchise fees upon any revenue that Charter *itself* derives from selling advertising on SNY. Time Warner Cable, however, had previously been paying franchise fees on revenues that SNY itself had derived from advertising sales, a practice that Charter has discontinued. *Id.* ¶ 14. Charter instead pays franchise fees on the revenue Charter earns when Charter sells advertising time on SNY. *Id.*

Charter has also revised Time Warner Cable's payment methodology in at least one way that results in an *increase* in Charter's franchise fee payments. Time Warner Cable had not paid franchise fees on revenues it had derived from the sale of advertising on the NY1 programming service. Charter takes the position that these revenues are subject to franchise fees to the extent provided in the definition of Gross Revenues at Article 1.32(v) of the franchise.[73] *Id.*[74]

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[72] *Id.* § 1.3.

[73] Franchise Agreement § 1.32(v) (revenue from Affiliate transactions shall be treated as "the revenue that would be derived from prevailing market arms-length agreements (with entities that are not Affiliates) of the same type").

[74] [redacted]

III. CHARTER IS IN COMPLIANCE WITH THE CABLE FRANCHISE DEPLOYMENT OBLIGATION.

The *Franchise Show Cause Order*'s suggestion that Charter's network deployment in New York City might be insufficient to satisfy the Cable Franchise Deployment Obligation is unsupported by the evidence cited in the *Order* and is incorrect. Charter's cable plant is pervasively deployed throughout residential blocks in the City where so required by the franchise obligation, and the City has never contended otherwise. The *Franchise Show Cause Order*'s speculation to the contrary is unsupported by the facts and predicated upon a misunderstanding of what the Cable Franchise Deployment Obligation and related Commission regulations require.

A. Charter's Network Is Deployed throughout Residential Streets within Its Franchise Area.

The Cable Franchise Deployment Obligation requires Charter in Manhattan, Queens, and Staten Island to have "functioning System facilities … installed in the street fronting" each residential building within its franchise area that existed as of November 30, 2011, such that it can respond to requests for cable television service within seven business days from residential customers subject to the Standard Installation requirement.[75] In Brooklyn, it requires Charter similarly to have such facilities installed, albeit only within certain designated portions of Charter's franchise area.[76] Charter will be making available for confidential review by the Commission and the Department digital maps that show the locations of Charter's New York City cable plant. Charter created these digital maps with the assistance of a trusted and reliable vendor with whom Charter regularly works to map and provide geospatial information regarding its facilities and

[75] *Id*.; Franchise Agreement § 5.3.1 *et seq.*; Franchise Agreement § 1.11 (defining the pertinent "System" as the cable system within meaning of federal Cable Act, 47 U.S.C. § 522(6)).

[76] *See* Brooklyn Franchise Agreement §§ 5.3.1 (condition limited to "Initial Service Area"); 1.34 (defining geographical boundaries of the Initial Service Area within which condition applies).

serviceable areas.[77] As is evident from those maps, Charter's cable network in New York City pervasively covers the streets fronting all residential areas within its franchise area, and further covers the majority of streets in commercial and industrial portions of its footprint that are not subject to the Cable Franchise Deployment Obligation. This evidence fully dispels the *Franchise Show Cause Order*'s unsupported suggestion that Charter does not comply with the requirement.

To Charter's knowledge, the City has never contended otherwise. Indeed, when Time Warner Cable transferred its franchises to Charter, even though the City had no direct approval authority over the transfer, Charter and the City engaged in extensive discussions regarding the Franchise Agreements. Although the City raised various issues in those discussions, it never made any allegation that the Cable Deployment Obligation in the Franchise Agreements were not being met. And the City has demonstrated that it is perfectly willing and able to enforce network deployment requirements where it believes that a provider has not expanded its cable network consistent with its franchise commitments, as evidenced by its current litigation alleging that Verizon has failed sufficiently to extend its FIOS network.[78] Charter routinely shares network mapping data with the City, and the City has significantly more day-to-day familiarity with the operations of providers within its jurisdiction than the Commission does. The fact that the City has never made such a claim against Charter undermines and calls into serious question the *Order*'s pursuit of such allegations.

Nor, for that matter, does the *Order* cite any complaints from putative subscribers that Charter's cable network is insufficiently deployed. Were Charter missing significant portions of

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[77] Quigley Decl. ¶ 6.

[78] *See* Compl., *City of N.Y. v. Verizon N.Y., Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct., N.Y. Cty. Mar. 13, 2017); *See* N.Y. City Info. Tech. & Telecomms., *Verizon FiOS Implementation, Final Audit Report* (June 18, 2015).

the City, one would expect there to be numerous complaints from residents or businesses that Charter had been unable or unwilling to offer or extend cable service when requested to do so. The *Order* identifies no such complaints or reports, and their absence further confirms the emptiness of the *Order*'s speculation.[79]

B. Charter's Continued Network Extensions within NYC Are Consistent with Its Franchise Deployment Obligations.

The *Franchise Show Cause Order*'s speculation that Charter "may" have violated the Cable Franchise Deployment Obligation rests on two claims: (1) that Charter reported to the Commission its construction of new passings in New York City as part of its reporting under the Expansion Condition in Case No. 15-M-0388, and (2) that a Department Staff audit of 490 premises in New York City identified two MDUs, and one commercial location, that the *Order* believes "should have already been served" by Charter. *Order* at 13.[80] Neither fact even implies, much less demonstrates, noncompliance by Charter with the Cable Franchise Deployment Obligation.

1. The *Order* Misapprehends Charter's Network Construction Obligations.

The *Franchise Show Cause Order*'s logic on this point reflects a misunderstanding of Charter's legal obligations under the Franchise Agreements and pertinent Commission regulations. In particular, the *Order* repeatedly characterizes the Cable Franchise Deployment Obligation as though it required Charter to already be able to serve *every* residence or business with cable service, within *every* building in its service area, and to do so *without* ever having to do any

[79] Charter is aware of very such few complaints arising in New York City, and where it has been made aware of such issues raised by potential customers, [redacted]

[80] With respect to the remaining addresses, the Department's audit questions the existing availability of broadband service at those locations prior to Charter's construction activities. Charter is providing evidence on this point in Response to the *Expansion Show Cause Order*.

additional construction work first. *See, e.g.*, *Order* at 3 (requirement is to "pass *all buildings* in [Charter's] NYC footprint as required by the respective franchise renewals") (emphasis added); *id.* at 8 (requirement is to be able to "*provide* cable service to these locations") (emphasis added); *id*. at 14 (with respect to two MDUs, "if Charter's network was not capable of providing these addresses with service, then it appears as though it may be a material breach of the NYC franchise renewals…"). These statements in the *Order* either misapprehend or mischaracterize Charter's pertinent legal obligations.

First, the Cable Franchise Deployment Obligation does not require Charter to be able to *already* offer cable service immediately to every residence or business inside every building in New York City. Rather, it is a requirement to have "functioning System facilities … installed in the street fronting" each residential building that existed as of November 30, 2011, "such that Service could be provided to such building in conformance with" the Franchise Agreements' "Standard Installation" terms, "within seven (7) business days," upon a "potential residential Subscriber's request" for such a "Standard Installation."[81] Thus, the Cable Franchise Deployment Obligation does not require Charter already to have passed commercial or industrial buildings with its cable system, nor does it require Charter already to have passed residential buildings constructed after November 30, 2011, nor does it require Charter's street-level facilities to already be able to serve within 7 business days customers to whom the Standard Installation requirements are not applicable to begin with because they are located inside of structures into which Charter's facilities have not yet been deployed.

Second, for all cable service requests *other* than standard installations to non-MDU residential buildings already in existence as of November 30, 2011, the Franchise Agreements

[81] *Id*.; Franchise Agreement § 5.3.1 *et seq.*

expressly contemplate that additional time, design, and construction work may be required, and do not require Charter to be able to extend cable service to those locations within 7 business days.[82] Instead, it requires only that Charter "make Cable Service available" to residential units,[83] but acknowledges that such requests may require up to six months for non-standard installations, potentially longer if there are commercial challenges or difficulties obtaining access to buildings.[84] And for *non*-residential areas, the Franchise Agreements specifically contemplate that Charter will continue to create new passings after the Franchise Agreements' effective date of November 30, 2011.[85]

Third, the Commission's regulations at 16 NYCRR § 895.5, cited by the *Order*, do not impose any additional obligations above and beyond the terms of the Franchise Agreements themselves. Section 895.5 requires franchise agreements to include a requirement that cable providers be able to offer cable television service throughout their primary service area, subject to certain conditions. Charter's New York City Franchise Agreements implement that requirement by means of the Cable Franchise Deployment Obligation and service availability provisions discussed above. Nothing in Section 895.5, however, requires cable operators to serve every unit in every building in their primary service area without the need for further design or construction work. To the contrary, it requires installation within "seven business days" only when a request

[82] *Id.* §§ 5.2 ("Availability of Cable Service to Residents"), 5.3 ("Provision of Service").

[83] *Id.* § 5.3.

[84] *Id.* §§ 5.3.2 & 5.4.

[85] *See id.* § 5.6 ("By each anniversary of the Effective Date, Franchisee . . . will have installed within the TWC Service Area since the Effective Date not less than the total Minimum Expansion Mileage of fiber optic cable, which will be used, among other things, to provide services to previously unserved non-Residential addresses."); *see also id.* § 5.7 (describing provision of service to "previously unserved non-residential blocks").

is made by a potential cable subscriber "located within 150 feet of *aerial feeder cable*."[86] It does not preclude franchise agreements from recognizing, as Charter's Franchise Agreements with the City do, the additional construction requirements and timelines that are implicated in particular areas, in this case in urban environments—where cable is often underground rather than aerial,[87] where additional licenses are needed to construct facilities underground, and where access from landlords and interior construction are needed to extend networks into urban structures.

2. Charter's Extension of Its Network to the Additional Passings Reported to the Commission in Case No. 15-M-0388 Is Consistent with Charter's Obligations under the Franchise Agreements.

Properly framed, there is no disconnect between Charter's satisfaction of its Cable Franchise Deployment Obligation obligations and its continued expansion of its network to additional passings in New York City.

Charter is separately responding to the Commission's March 19, 2018 Show Cause Order in Case No. 15-M-0388 ("*Expansion Show Cause Order*"), in which the Commission is proposing to "disqualify" all of the passings in New York City that Charter has reported to the Commission in connection with its network expansion obligations in that docket. As Charter is explaining in its separate response, Charter reports, and is legally entitled to report, the construction of additional broadband passings whenever Charter completes design and construction work if that construction extends broadband service to a previously-unserviceable location or makes the location newly broadband-serviceable. Serviceable, for those purposes, means that broadband service can be

[86] 16 NYCRR § 895.5(b)(3) (emphasis added).

[87] *See* Quigley Decl. ¶ 11(a).

provided "within a typical service interval (7 to 10 business days), without an extraordinary commitment of resources."[88]

Charter believes that its position in Case No. 15-M-0388, defining the new passings that it is entitled to count towards satisfying its network expansion obligations, is correct for reasons stated in Charter's separate response to the *Expansion Show Cause Order*. For purposes of this present *Order*, however, it is irrelevant whether the Commission ultimately agrees or disagrees with Charter's position as to which passings it is entitled to count for purposes of its network expansion requirement. The passings that Charter reports to the Commission in Case No. 15-M-0388 required design and construction activity because they do not fall within the Franchise Agreements' Standard Installation requirements. Accordingly, they do not represent construction work that Charter was *already* required to have completed, either under the Cable Franchise Deployment Obligation or under the Franchise Agreements' general cable service availability requirement.

That is because, for purposes of its Case No. 15-M-0388 reporting, Charter (consistent with the FCC and industry definitions) treats locations as passed, and as broadband serviceable, only when they are serviceable within 7 to 10 business days—*i.e.*, similar to what Charter's NYC Franchise Agreements define as a "Standard Installation." The only structures to which Charter is required by the Franchise Agreements to offer cable service within 7 business days are (1) non-MDU residences that already existed on November 30, 2011, and (2) units inside of MDUs within which Charter has already "obtained building access and prepositioned such of its facilities" in a

[88] *See, e.g.*, *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, 6545 Appendix B, Conditions (2016).

such a manner as "necessary for serving requesting households within such building."[89] Since the Cable Franchise Deployment Obligation does not otherwise require Charter to be able to offer cable (let alone broadband) service to every residential unit or commercial tenant in every building immediately—only to have street-level plant deployed that permits prompt *standard* installations in certain cases—there are numerous scenarios in which Charter extends (by way of additional design and construction work) its broadband service to additional residences and business.

For instance, a structure might not be subject to the Cable Franchise Deployment Obligation at all, either because it is a commercial structure or because it is a newly-built residence that did not yet exist on the "Effective Date" of the Franchise Agreements. For instance, as everyone familiar with New York City's recent wave of development is well-aware, in the years since the Cable Franchise Deployment Obligation went into effect in 2011, the Long Island City neighborhood in Charter's Queens franchise area and the Williamsburg neighborhood in Charter's Brooklyn franchise area each have seen a significant boom in residential construction. Quigley Decl. ¶ 11(c).[90] And other structures are constantly being built in Charter's New York City footprint, which are neither cable- nor broadband-serviceable until Charter undertakes design and construction work, even when there are already taps in the streets adjacent to the units. *Id.*

Alternatively, even pre-existing buildings adjacent to Charter plant deployed in the street might not be serviceable by means of a "standard" installation but instead require additional design

[89] Franchise Agreement § 1.51.

[90] *See also* Ivan Pereira, *Downtown Brooklyn, Williamsburg to see Boom in Development: Report*, amNEWYORK (Aug. 18, 2015), https://www.amny.com/news/downtown-brooklyn-williamsburg-to-see-boom-in-development-report-1.10751216 (noting plans to develop more than 10,000 units in 50 new buildings in Downtown Brooklyn and Williamsburg, and 22,000 units borough-wide, by 2019); Troy McMullen, *Why Long Island City is Home to New York's Biggest Building Boom*, Financial Times (Mar. 11, 2016) (noting that more than 24,500 units are at the planning and construction stages in Long Island City).

and construction work to extend Charter's facilities vertically and into the structure. This is often the case with MDUs to which Charter previously had not obtained access and/or from which it had not yet received requests for cable service, such that Charter had not yet prepositioned its facilities inside the buildings. *Id.* ¶ 11(b).[91] Here, again, businesses and residences inside the structures are not yet serviceable by means of a "standard installation" within 7 business days, but become serviceable as a result of additional design and construction that Charter performs and reports to the Commission. *Id.* ¶ 12.

As explained in the accompanying declaration of John Quigley, Charter is able to honor the overwhelming majority of customer service requests in New York City with standard installations. *Id*. ¶ 11. However, situations in which additional design and construction work are required are not uncommon due to the inherent challenges of building and extending a cable system within an urban environment. *Id*. The Franchise Agreements specifically contemplate that such further work will be required notwithstanding the D Cable Franchise Deployment Obligation, which is why they contemplate "Non-Standard" cable installations that may take six months to a year to construct,[92] as well as a series of exceptions predicated upon commercial feasibility and access to structures not serviceable from street-level facilities.[93] Charter's continued reporting of such work in Case No. 15-M-0388 is entirely lawful so long as the addresses otherwise satisfy the Expansion Condition's criteria.

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[91] Extensions of service to residential units inside of MDUs are not considered "standard installations" under the Franchise Agreements unless Charter has already "prepositioned" its facilities *inside* the building, which prepositioning is *not* itself required by the Cable Franchise Deployment Obligation. *See* Franchise Agreement §§ 5.3.2 ("Non-Standard Installations"), 1.41 & 1.51 (defining "standard" and "non-standard" installations).

[92] Franchise Agreement §§ 1.41, 5.3.2.

[93] *Id*. §§ 5.3.2.1, 5.4.

To be sure, in many of the situations requiring additional construction work by Charter to honor a customer request for service, Charter may be required, either by the Franchise Agreements' "Availability of Cable Service to Residents" requirement or (arguably) by 16 NYCRR § 895.5, to honor the request by extending its network to provide cable video service, so long as barriers such as lack of access to a structure or commercially unreasonable demands by a landlord do not stand in the way. But those provisions speak to cable video service, not to broadband service, meaning that Charter exceeds their requirements when it extends a 100 Mbps+ broadband network to those locations. And those provisions certainly do not require Charter *already* to have built out its network or pre-positioned its facilities inside of buildings *before* receiving a request for cable service, nor do they require Charter to be able to complete the connection with the speed that would be needed for the location to be considered broadband-serviceable under the well-accepted FCC and industry standards.

3. Three Structures Separately Identified in the Order.

Consistent with this proper framing of its legal obligations described above, Charter has also investigated the specific two MDUs and one commercial addresses called out in the *Order* as newly-completed passings that the Department believed Charter already should have already served. As set forth below, Charter had already served the two reported MDUs prior to the recent additional design and construction work and included those MDUs in its reports to the Commission in error, and the commercial structure involved the additional construction of new fiber into the building and Charter was under no pre-existing legal requirement to have done so previously.

As set forth in the accompanying Quigley Declaration, the two MDUs discussed in the Order, [redacted]., were both structures that Charter already served, but which underwent complete renovations that required Charter to remove, rewire, or relocate elsewhere in the building its network facilities. Quigley Decl. ¶ 14(a)-(b). Charter does

not consider relocations of its plant, or rewiring of already-served buildings, to create new passings reportable to the Commission. *Id*. However, since in both cases the renovations of the structures also resulted in the creation of new and different addresses from the ones Charter had previously served (by reconfiguring/renumbering residential units), [redacted]. *Id*. Thus, while Charter mistakenly included addresses in both structures in its reports (and will withdraw both), neither indicates any prior noncompliance by Charter with its Cable Franchise Deployment Obligation obligations.

As for the commercial location at 3 Times Square, the *Order* misleadingly implies that Charter had reported the entire building as a new passing. Rather, Charter had reported extending service to a commercial tenant [redacted]. Particularly in very large structures, merely having network facilities deployed in one part of a building does not necessarily provide the capability to serve other locations within the building without further design and construction work. Accordingly, Charter had to perform extensive additional design and construction work in order [redacted]. *Id.* ¶ 14(c). In this instance, there was no legal requirement that Charter already have served the floor of the building to which it extended service. Nothing in either the Franchise Agreements or the Commission's regulations requires Charter to

have already built its network into the risers of commercial structures in the absence of an affirmative customer request for cable service.[94]

IV. THE COMMISSION'S CONSIDERATION OF THE ISSUES RAISED BY THE *ORDER* MUST BE FREE OF EXTRANEOUS CONSIDERATIONS.

Finally, the circumstances surrounding the issuance of the *Order*, including but not limited to its adoption without notice or a public hearing and its threat of draconian sanctions predicated upon highly speculative allegations that the Commission does not appear to have meaningfully investigated beforehand, raise troubling questions as to which Charter is compelled expressly to reserve its rights to judicial review or other legal action.

The Commission is well aware that Charter is currently engaged in a labor dispute in New York City[95] that has been the subject of considerable political attention and attracted significant interest from State and City officials, as well as from the Commission itself.[96] In the course of

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[94] As set forth separately in Charter's response to the *Expansion Show Cause Order*, Charter investigates for every reported address whether competitors offered 100 Mbps+ broadband to the location. *See Charter Expansion Show Cause Response* Part I.B. In the case of 3 Times Square, Verizon's online serviceability tool indicates that Verizon did not (and still does not) offer its commercial FIOS service to the floor in question. *See* Quigley Decl. ¶ 14(c)(ii). With the benefit of further investigating the claims in the *Order*, however, Charter concurs with Department Staff insofar as Verizon's public-facing sales data may have understated Verizon's capabilities in this particular instance. Accordingly, Charter will withdraw this passing from its reports. However, it was not unreasonable for Charter to rely upon competitors' public-facing statements as to their service offerings.

[95] *See, e.g.*, Janet Burns, *Spectrum Strike Enters Second Year With NYC Protest, And No End In Sight*, Forbes (Mar. 29, 2018), https://www.forbes.com/sites/janetwburns/2018/03/29/spectrum-workers-strike-enters-second-year-with-nyc-protest-and-no-end-in-sight/#7a42a22b623d.

[96] Erin Durkin, *Cuomo, de Blasio Join Cable Workers in Rally to Seek New Contract with Spectrum*, N.Y. Daily News (Sept. 18, 2017), http://www.nydailynews.com/news/politics/cuomo-de-blasio-back-workers-contract-fight-spectrum-article-1.3504933 ("Gov. Cuomo backed up cable workers Monday who have been on strike for more than six months in a fight with Spectrum. . . . blast[ing] Spectrum and its parent company Charter Communications. "We're going to demand respect for the blood and sweat of the workforce," Cuomo said as the rally kicked off at Cadman Plaza Park."); Matthew Hamilton, *Cuomo rallies with Charter workers on strike*, TimesUnion (Sept. 18, 2017), https://blog.timesunion.com/capitol/archives/277344/watch-at-3-p-m-cuomo-rallies-with-charter-workers-on-strike/; Mara Gray, *Charter Communications Strike*

that labor dispute, representatives of the striking employees have repeatedly threatened that New York State government entities will take adverse, unrelated regulatory actions against Charter if the labor dispute is not resolved to the union's satisfaction—implying that the union believes it has the ability to influence the actions of certain public officials and may try to use that influence. Consideration by the Commission of Charter's labor dispute, including as an unstated basis animating the actions proposed by the *Order*, would be manifestly improper, would represent an abuse of process, would violate the ethics provisions of section 74 of the New York State Public Officers Law, and would call into question the public trust placed in the Commission to carry out its functions fairly and free from political favoritism.[97]

In the months since Charter's labor dispute reached an impasse, Charter has become the target of numerous proposed adverse regulatory actions, including the *NYC Franchise Order*, the

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Ratchets Up; Governor Cuomo's counsel issues letter to the state regulator raising concerns about the company's business practices, Wall St. J. (Oct. 4, 2017), https://www.wsj.com/articles/charter-communications-strike-ratchets-up-1507111201; Daniel Frankel, *Charter picketed by NY Gov. Cuomo as strike approaches 6-month mark*, FierceCable (Sept. 19, 2017), https://www.fiercecable.com/cable/charter-picketed-by-10-000-plus-ny-gov-cuomo-as-strike-approaches-6-month-mark ("New York Governor Cuomo spoke to the crowd, alongside New York City Major Bill de Blasio, who has been a vocal proponent of the union workers since they began their work stoppage on March 28."); *see also* Letter from Alphonso David, Counsel to the Governor, to John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission (Oct. 2, 2017); Letter from John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission to Thomas Rutledge, Chairman/CEO, Charter Communications (Oct. 12, 2017).

[97] *See, e.g.*, *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984) (courts may invalidate agency action motivated by improper political influence, if plaintiff can show facts indicating that political pressure caused other than statutorily permissible motives to influence the decision); *D.C. Fed. of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971) (relevant inquiry for assessing validity of agency action where political pressure applied focuses on whether "extraneous pressure intruded into the [agency decisionmaker's] calculus of consideration"); *see also Russo Dev. Corp. v. Reilly*, No. 87-3916 (HLS), 1991 U.S. Dist. LEXIS 20965, at *8-9 (D.N.J. May 17, 1991) ("[A]n agency action can be arbitrary and capricious, even if it is ultimately correct, if the action is taken for the wrong reasons." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)); *MCI Telecomms. Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993) ("A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious.").

Expansion Show Cause Order, an order initiating a "management and operations audit" of one of Charter's telephone affiliates that referenced and was predicated specifically upon Charter's labor dispute,[98] and two orders proposing to publicly reveal confidential network and service information that Charter had been reporting to the Commission for years without objection or incident.[99] The sudden focus of these enforcement efforts on Charter, the procedural irregularities of the Commissions orders, and the lack of any serious evidentiary foundation for the charges could lead reasonable observers to question whether they are animated by additional purposes unrelated to the Commission's legitimate oversight responsibility. The imminent threat to terminate Charter's New York City franchise, in particular, has garnered considerable media attention harmful to Charter's reputation and inflicted material damage on its business.[100] Any effort by the Commission to initiate proceedings to pressure Charter to resolve its labor disputes

[98] *See* Case 17-C-0757, *In re Management and Operations Audit of Time Warner Cable Information Services (New York), LLC*, Order Initiating a Management and Operations Audit (Dec. 8, 2017).

[99] Case 13-C-0193, *Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements*, Determination 18-01 (Jan. 8, 2018); *id.* Determination 18-04 (Feb. 28, 2018).

[100] John Brodkin, *NY says Charter lied about new broadband, threatens to revoke its franchise*, ArsTechnica (Mar. 20, 2018), https://arstechnica.com/tech-policy/2018/03/ny-says-charter-lied-about-new-broadband-threatens-to-revoke-its-franchise/; Daniel Frankel, *Charter's NYC franchise overtly threatened by state officials*, FierceCable (Mar. 21, 2018), https://www.fiercecable.com/cable/charter-s-nyc-franchise-overtly-threatened-by-state-officials; Marie J. French & Danielle Muoio, *PSC threatens Charter*, Politico (Mar. 20, 2018), https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2018/03/20/psc-threatens-charter-046039; Brandon Hill, *New York Slams Charter For Allegedly Lying About Broadband Deployments, Threatens Franchise Revocation*, Hot Hardware (Mar. 21, 2018), https://hothardware.com/news/ny-slams-charter-for-lying-about-broadband-deployments-signals-franchise-revocation. *See also*, Press Release, New York Public Service Commission, *PSC Issues Orders to Show Cause to Penalize Charter Communications and Potentially Terminate NYC Franchise Agreements* (Mar. 19, 2018).

would violate both state law and federal labor law. Charter is committed to demonstrating its compliance with its New York City Franchise Agreements within the four corners of those agreements themselves, but reserves all rights with respect to these efforts.

CONCLUSION

For the reasons stated above, the Commission should decline to adopt any of the proposals set forth in the *Franchise Show Cause Order* and should allow the City's regular compliance process to proceed without interference.

/s/

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