

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

GOOD CAUSE SHOWING

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GOOD CAUSE SHOWING

Charter Communications, Inc. (“Charter”) hereby submits this claim for Good Cause Shown under its June 19, 2017 settlement with the New York State Public Service Commission (“Commission”), which the Commission adopted by order on September 14, 2017 (hereinafter “*Expansion Settlement Order*”).¹

INTRODUCTION AND SUMMARY

As Charter is documenting in its July 9, 2018 report, filed herewith (“July 9 Buildout Compliance Report”), Charter extended its network to pass a total of 61,202 unserved and underserved homes and businesses in New York, comfortably exceeding the *Expansion Settlement Order*’s June 18, 2018 target to complete expansions of its network to 58,417 addresses (the “June 18 Buildout Target”). This was a tremendous undertaking and as a result of the Company’s efforts thousands of new homes and businesses now have access to broadband services that were not available before.

¹ Case 15-M-0388, *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (Sept. 14, 2017).

However, in an order issued June 14, 2018 (hereinafter “*Disqualification Order*”), the Commission disqualified 18,363 of the addresses that Charter had reported in its January 8, 2018 Buildout Compliance report (“January 8 Buildout Compliance Report”), based upon the Commission’s interpretations of the network expansion condition contained in the Commission’s order approving the merger of Charter and Time Warner Cable Inc. (hereinafter “Expansion Condition”).² Charter did not learn that the Commission might disqualify 14,522 of these addresses until March 19, 2018, midway through the six-month buildout period leading up to the June 18 Buildout Target, when Chair Rhodes issued a one-Commissioner order requiring Charter to show cause why those addresses should be counted towards Charter’s modified buildout obligations under the *Expansion Settlement Order* (hereinafter “*Expansion Show Cause Order*”).³ This one-Commissioner order was not issued until more than three months after the December 16, 2017 buildout target, and three days after the *end* of the period established in the *Expansion Settlement Order* to “cure” in the event a target is missed.

In addition to disqualifying the 14,522 addresses previously identified in the *Expansion Show Cause Order*, the *Disqualification Order* required Charter to remove from its January 8 Buildout Compliance Report an *additional* 3,044 addresses located in Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady. Charter received no prior notice of the Commission’s intent to disqualify these addresses. The result of removing these addresses from Charter’s January 8 Buildout Compliance Report—if the *Disqualification Order* decision were ultimately to remain effective following rehearing and judicial review—would be to cause Charter

² Case 15-M-0388, Order Denying Charter Communications, Inc.’s Response to Order to Show Cause and Denying Good Cause Justifications (June 14, 2018).

³ Case 15-M-0388, Order to Show Cause (Mar. 19, 2018) (hereinafter “*Expansion Show Cause Order*” or “*Order*”). The *Order* was eventually adopted by the Commission at its April 19, 2018 meeting.

to fall short of the June 18 Buildout Target as well due to the impossibility of constructing sufficient incremental passings to replace the unexpectedly removed addresses in so short a timeframe.

As Charter has set out in its response to the *Expansion Show Cause Order* and intends to further articulate in its forthcoming motion for rehearing of the *Disqualification Order*, the disqualifications of the addresses set forth in Charter's January 8 Buildout Compliance Report are unlawful under the text and negotiating history of both the Expansion Condition and the *Expansion Settlement Order*, and Charter intends to seek administrative and judicial review (and other relief as appropriate) from that decision. Accordingly, it believes that it need not—and should not be required to—submit a Good Cause Shown claim with respect to the June 18 Buildout Target. Notwithstanding the filing of this claim for Good Cause Shown, Charter expressly reserves its right to contend that it should not be required to submit a Good Cause Shown claim with respect to the June 18, 2018 target until and unless it is deemed (following exhaustion of motions for rehearing and judicial review) to have fallen short of the buildout target. Both logic and the text of the *Expansion Settlement Order* for which Charter negotiated dictate that such a filing, if any, is not required until and unless Charter has missed a target. Where, as here, whether Charter has satisfied a buildout target is disputed and the subject of ongoing litigation, a Good Cause claim should not be required until that dispute has been resolved through rehearing and judicial review. Requiring Charter to make this claim on July 9, 2018—before Charter knows which addresses in its July 9, 2018 Buildout Compliance Report will ultimately “count” towards the Expansion Condition—is irredeemably premature and is inherently arbitrary and capricious. By filing this Good Cause Shown claim today, Charter does not waive its right to supplement such claim if and when a final decision on its compliance with the June 18 Buildout Target is ultimately reached.

However, in the alternative, and in the event the disqualification by the Commission of addresses set forth in the *Disqualification Order* remain effective (either in whole or in part), the Commission should find that Charter has established “Good Cause Shown” for any alleged resulting failure to meet the June 18 Buildout Target. This is due to three circumstances outside of Charter’s control.

First, the Disqualification Order, if it remains effective after administrative and/or judicial review, will serve to unreasonably frustrate Charter’s ability to satisfy the June 18 Buildout Target by eliminating so many of the addresses from its January 8 Buildout Compliance Report (many of those with no notice) as to make it impossible for Charter to realistically make up the resulting shortfall under the terms of the Merger Order and Expansion Settlement Order. Charter has been working diligently to meet the Expansion Settlement Order’s buildout targets and its efforts have kept pace with the Order’s requirements, but the shortfall going into the December 16, 2017-June 18, 2018 reporting period that would result from the Disqualification Order and the Commission’s new interpretations of the Expansion Condition set forth therein would be too large for any provider to make up in so short a timeframe, especially given the late date on which Charter learned of such disqualifications. Charter did not learn of many of the putative disqualifications until June 14, 2018, four days before the end of the reporting period. As the Commission is well-aware, network expansion is a multi-month process requiring extensive lead times to obtain access to utility poles, licenses for underground construction, and arranging make-ready and construction crews. No provider could have recovered from an unanticipated shortfall of the sort created by the Disqualification Order in such a short timeframe, and Charter could not reasonably have anticipated the Disqualification Order or its scope with sufficient time to change course on the planning and implementation of its buildout efforts.

Second, the *Disqualification Order*, if it remains effective after administrative and/or judicial review, will have frustrated Charter's ability to satisfy the June 18 Buildout Target by subjecting Charter's further network expansion efforts to unanticipated criteria that a reasonable regulated entity could not have anticipated or planned for, given the text of the Expansion Condition. Setting aside the still-unresolved question of whether the Commission's current interpretations of the Expansion Condition set forth in the *Disqualification Order* are ultimately deemed to be within the scope of the Commission's lawful authority, Charter's different interpretation of the condition on which Charter predicated its planning efforts was, at minimum, reasonable and the Department of Public Service ("Department") had been aware of Charter's interpretation of the condition for months before the Commission issued the *Expansion Show Cause Order*. There is no facial ambiguity in the text of what the Expansion Condition requires, and the Commission's interpretations of the condition are non-obvious and differ from common and well-accepted meanings of the terms in the Expansion Condition as a reasonably regulated entity would have understood them. Moreover, even if there were any ambiguity in the Expansion Condition, the course of dealing between the Commission, the Department, and Charter aligns with Charter's interpretation of the condition. Charter's reliance upon reasonable interpretations of the Expansion Condition, as well as upon the Department's failure to raise with Charter the Commission's apparently more restrictive interpretation (despite the many months the Department was negotiating the *Expansion Settlement Order* with Charter and reviewing and auditing Charter's reported passings, with full awareness of Charter's interpretation of the condition), coupled with the unreasonably short time period Charter has been given to adjust to the *Disqualification Order's* new and still-unsettled (pending judicial review) interpretations of the condition, constitute Good Cause Shown.

Third, Charter has continued to face delays in obtaining the necessary access to third-party utility poles to which it is legally entitled under the Commission's orders. Access to these poles is outside Charter's direct control. Although the Department's intervention has been productive in facilitating greater cooperation by pole owners in granting Charter the required access and such delays have become less pervasive, meaningful delays have continued to impede Charter's ability to extend its network, particularly in upstate New York. Under the terms set forth in the *Expansion Settlement Order*, Charter should not be penalized for these delays beyond its control when it has taken objective and good-faith efforts to overcome this significant barrier. During the period from December 16, 2017 through June 18, 2018, Charter estimates that there remain an additional 7,662 addresses to which it plans to extend its network, but for which Charter requires access to utility poles to which Charter has been unable to obtain access notwithstanding timely applications and satisfaction of the Expansion Settlement Order's Good Cause Shown criteria.

BACKGROUND

As part of its 2016 *Merger Order*,⁴ the Commission held that it would approve Charter's acquisition of control over Time Warner Cable's regulated New York affiliates provided that Charter accepted certain conditions described in the *Merger Order* and set forth in its Appendix A. As relevant here, the Commission's *Merger Order* conditioned its approval upon Charter's agreement to direct a significant portion of its national expansion of high-speed broadband services to locations in New York.⁵ Specifically, the *Merger Order*, through its Expansion Condition,

⁴ 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).

⁵ Certain subjects discussed in this filing pertain to non-jurisdictional products and services. Discussion of non-jurisdictional products and services is not intended as a waiver or concession of the Commission's jurisdiction beyond the scope of Charter's regulated telecommunications and

requires Charter to extend its network to pass an additional 145,000 unserved and underserved residential housing units and/or businesses, as defined by the broadband speeds to which those locations have access,⁶ within four years of the close of the transaction.⁷

Charter has been proceeding apace with its network expansion efforts. Since accepting the Expansion Condition in January 2016, Charter has worked diligently towards meeting its buildout obligations in New York. It filed with the Commission on July 5, 2016 (and revised on July 26, 2016) a Network Expansion Implementation Plan and 45-Day Report detailing the Company's plans to expand service in compliance with this condition (collectively, the "Network Expansion

cable video services. Charter respectfully reserves all rights relating to the inclusion of or reference to such information, including without limitation Charter's legal and equitable rights relating to jurisdiction, compliance, filing, disclosure, relevancy, due process, review, and appeal. The inclusion of or reference to non-jurisdictional information or to the ordering clauses or other requirements of the *Merger Order* and/or *Disqualification 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.

⁶ As Charter has stated throughout this proceeding and reiterates here, the exclusively interstate nature of Internet access services places significant boundaries on the Commission's authority to compel Charter's construction of broadband facilities or offering of Internet services. The FCC has made abundantly clear that states may not impose "any so-called 'economic' or 'public utility-type' regulation[]" on broadband services and that federal law flatly preempts such requirements. *See In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 427-28 ¶ 195 (2017) ("*RIF Order*"). The *RIF Order* also classified broadband services as information services, which are exempt from public utility requirements entirely. *RIF Order*, 33 FCC Rcd at 318 ¶ 20. As the federal Cable Act makes clear, franchising authorities such as the Commission are prohibited from leveraging their control over cable video franchises (including, as in the case of the *Merger Order*, the transfer of such franchises) to regulate a cable operator's other non-cable services, and specifically directs that franchising authorities "may not . . . establish requirements for . . . information services." *See* 47 U.S.C. § 544(a) & (b)(1). Accordingly, whatever legal force the Expansion Condition has, it has solely by virtue of Charter's voluntary agreement to the condition and is thus constrained by the scope of that agreement.

⁷ *See Merger Order*, App'x A, § I.B.1.

Plan” or “Plan”).⁸ Charter has since submitted a summary of the activities, expenditures, and schedules related to its Network Expansion Plan on August 16, 2016 as part of its 90-Day Report and Implementation Plan, along with subsequent updates on November 18, 2016, February 17, 2017, May 18, 2017, August 18, 2017, and December 4, 2017, followed by its January 8 Buildout Compliance Report to report upon its progress under the first of its network expansion targets.⁹ Charter has also explained its reporting process under the Expansion Condition in extensive detail to the Staff of the Department. This included a November 17, 2017 meeting in which several Charter representatives, including both attorneys and representatives from its business, traveled to Albany to walk through Charter’s process for identifying and reporting eligible addresses under the Expansion Condition and offer Department Staff an opportunity to ask questions. Charter has also answered a series of questions that Department Staff have raised regarding specific addresses in Charter’s reports, and—in instances where Charter has concluded that Department Staff have identified valid issues with Charter’s reports—has revised its submissions accordingly.

Charter faced initial challenges with its network expansion efforts in New York that it did not have to confront to nearly the same extent in other parts of the country. Specifically, as Charter detailed in complaints filed against several pole owners during the summer of 2017 (hereinafter,

⁸ Case 15-M-0388, Charter Communications, Inc.’s Network Expansion Implementation Plan 45-Day Report (July 5, 2016) (Item No. 120); Case 15-M-0388, Charter Communications, Inc.’s Revised Network Expansion Implementation Plan 45-Day Report (July, 26, 2016) (Item No. 123).

⁹ Case 15-M-0388, Charter Communications, Inc. Network Expansion Update (Nov. 18, 2016) (Item No. 128); Case 15-M-0388, Charter Communications, Inc. Network Expansion Update (Feb. 17, 2017) (Item No. 136); Case 15-M-0388, Charter Communications, Inc. Annual Update (May 18, 2017) (Item No. 145); Case 15-M-0388, Charter Communications, Inc. Network Expansion Plan Update and Communications Plan Compliance Filing (Aug. 18, 2017) (Item No. 177); Case 15-M-0388, Charter Communications, Inc. Network Expansion Plan Update and Communications Plan Compliance Filing (Dec. 4, 2017) (Item No. 236).

“Pole Attachment Complaints”),¹⁰ pole owners in New York consistently failed to process Charter’s pole applications within the timeframes required under the Commission’s 2004 *Pole Attachment Order*.¹¹ Indeed, between January 2016 (when the Expansion Condition became effective) and July 17, 2017, Charter had prepared and submitted to various pole owners applications for approximately 180,164 poles within the State of New York in order to obtain access to poles needed under its Network Expansion Plan.¹² However, as of that date in July 2017, New York pole owners had granted approval for only approximately 6,472 of those poles, *i.e.*, fewer than 4% of those that Charter had submitted.¹³ The Commission’s 2004 *Pole Attachment Order* requires pole owners to process applications and complete initial surveys within 45 days.¹⁴ Yet pole owners were consistently and systematically disregarding this requirement—statewide, over 76% of Charter’s applications had been pending without approval for more than 45 days; 62% of Charter’s applications had been pending without approval for more than 90 days; and over 61% of Charter’s applications (covering 110,213 poles) had been pending for more than 100

¹⁰ 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*, Complaint of Charter Communications, Inc. Against Verizon New York, Inc. for Failure to Provide Lawful Access to Utility Poles (June 26, 2017) (“Verizon Complaint”); Verified Complaint of Charter Communications, Inc. [against National Grid USA Service Company, Inc.] (July 3, 2017) (“NGRID Complaint”); Verified Complaint of Charter Communications, Inc. Against New York State Gas & Electric Corp. (July 11, 2017) (“NYSEG Complaint”); Complaint of Charter Communications, Inc. Against Frontier for Failure to Provide Lawful Access to Utility Poles (July 17, 2017) (“Frontier Complaint”).

¹¹ Case. No. 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments (Aug. 6, 2004) (“*Pole Attachment Order*”).

¹² Frontier Complaint at 9-10.

¹³ *Id.*

¹⁴ *Pole Attachment Order* at 3.

days.¹⁵ Because Charter is heavily reliant upon access to utility poles in order to expand its network, particularly in rural areas where underground deployment is not technically or economically feasible, these delays have substantially and adversely affected Charter's ability to expand its network, especially in upstate New York.

Due to Charter's initial challenges in meeting the Expansion Condition's targets, Charter on June 19, 2017, reached a Settlement Agreement with Department Staff, which the Commission adopted on September 14, 2017 in its *Expansion Settlement Order*.¹⁶ The *Expansion Settlement Order* revised Charter's network expansion targets to account for the initial delays Charter encountered, while at the same time providing for financial forfeitures of up to \$1 million if Charter is unable to meet its revised network expansion schedule and fails to cure such failure within three months of the target deadline.¹⁷ As relevant here, the *Expansion Settlement Order* required Charter to pass 58,417 locations by June 18, 2018.¹⁸ The *Expansion Settlement Order* also established a process under which Charter can be relieved of a portion of the financial forfeitures if it can establish "Good Cause Shown" to justify the failure to meet any incremental passing targets established therein.¹⁹

Since entering into the Settlement Agreement in June 2017, Charter's network expansion efforts in New York have accelerated considerably, outpacing the requirements and targets established by its terms. After Charter filed its Pole Attachment Complaints in the summer of

¹⁵ Frontier Complaint at 9-10.

¹⁶ Case 15-M-0388, 2017 WL 4224402 (N.Y. P.S.C. Sept. 14, 2017), *Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement*.

¹⁷ *Expansion Settlement Order* at 15-17.

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 16, 19-20.

2017, Department Staff have engaged with pole owners and overseen a coordination process that is finally resulting in Charter obtaining access to utility poles at a faster pace.²⁰ That said, pole owners' processing of Charter's applications still remains in many cases behind the schedule that the Commission's *Pole Attachment Order* requires, and Charter has had to depend in significant part upon temporary attachments of its facilities to utility poles in order to construct extensions of its network.

Despite the challenges presented by pole owner delays, Charter was able in its January 8 Buildout Compliance Report to confirm that it had constructed network extensions to 42,889 addresses during the relevant reporting period, thereby comfortably satisfying its revised December 16, 2017 buildout target.²¹ On March 19, 2018, however, Chair Rhodes issued the *Expansion Show Cause Order*. The *Expansion Show Cause Order* proposed that, notwithstanding Charter's success in meeting the December 16, 2017 network expansion target by a significant margin, the Commission "disqualify" network extensions to 14,522 addresses that Charter had reported, which (if the Commission were to follow through with the proposal) would cause Charter retroactively to have "missed" the December 16, 2017 buildout target.²² This was the first time the Commission had ever raised the sweeping new interpretation of the Expansion Condition, which exceeded significantly the positions the Department had previously taken during its review and audits of Charter's reports. Specifically, the *Order* proposed not to "allow" Charter to count

²⁰ This has been accomplished largely by relegating functions and responsibilities pole owners have under the 2004 *Pole Attachment Order* to contractors and/or Charter and through the use of temporary attachments, which greatly increase the cost of Charter's buildout efforts.

²¹ 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*, Charter Communications, Inc. Build-Out Compliance Report (Jan. 8, 2018) (Item No. 246) ("*January 8 Buildout Compliance Report*").

²² See *Expansion Show Cause Order* at 10.

many of its addresses based upon the fact that they are, as relevant here: (1) in New York City;²³ (2) within a primary service area under one of Charter’s cable franchises;²⁴ (3) in the vicinity of Charter feeder cable (irrespective of whether they were actually serviceable from that cable within 7-10 business days and without a significant resource commitment);²⁵ (4) in census blocks the Broadband Program Office (“BPO”) has bid out for subsidies (even if those census blocks encompassed addresses that had been part of Charter’s Department-approved buildout plan);²⁶ and (5) in “Negative Space” locations to which Charter had previously indicated during the initial round of consultation with the BPO (with significant caveats, including future field validation or new construction in those areas) that it did not anticipate expanding its network if the BPO subsequently bid those areas out.²⁷ The *Order* directed Charter to show cause why the Commission should not disqualify these addresses.²⁸

Charter filed a response to the *Expansion Show Cause Order* on May 9, 2018 (“Show Cause Response”).²⁹ In its Show Cause Response, Charter explained why Charter’s reported addresses satisfy each element of the Expansion Condition. Charter also explained why the Commission’s novel interpretation of the *Merger Order* to add five new requirements to the Expansion Condition was inconsistent with the text of the Expansion Condition; why, even if that were not the case, that the Commission’s interpretation is not entitled to deference; and why

²³ *Id.* at 12.

²⁴ *Id.* at 15.

²⁵ *Id.* at 14.

²⁶ *Id.* at 17.

²⁷ *Id.* at 16.

²⁸ *Id.* at 19.

²⁹ Case 15-M-0388, Response of Charter Communications, Inc. to Order to Show Cause (May 9, 2018).

applying the new disqualification criteria retroactively would be particularly unjust and unlawful. Finally, Charter explained why the factual findings and legal conclusions underpinning the Commission's decision to disqualify Charter's completed passings in New York City and upstate New York were arbitrary and capricious, and contrary to the plain terms of the Expansion Condition. Simultaneous with its Show Cause Response, Charter also filed a Good Cause Shown claim with respect to any deficiency in meeting the December 16, 2018 buildout target, as well as the three-month period thereafter (the "May 9 Good Cause Claim").

Despite Charter's objections set forth in the Show Cause Response, the Commission issued its *Disqualification Order* on June 14, 2018. In addition to disqualifying the 14,522 passings identified in the *Expansion Show Cause Order*, the *Disqualification Order* requires that an *additional* 3,044 previously unidentified passings located in the Cities of Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady be removed from Charter's list of completed passings.³⁰ The *Disqualification Order* also denied Charter's May 9 Good Cause Claim.

As noted above, Charter intends to petition the Commission for rehearing of the *Disqualification Order* and seek judicial review or other remedies as appropriate. In the interim, however, Charter's good faith efforts to expand its network to meet its modified buildout obligations under the *Expansion Settlement Order* have continued unabated. Simultaneous with this Good Cause Showing, Charter is filing today its July 9 Buildout Compliance Report. As Charter's July 9 Buildout Compliance Report indicates, Charter has expanded its network to pass 61,202 unserved and underserved New York homes and businesses, and therefore exceeded significantly the June 18, 2018 target by 2,785 passings. However, to comply with the Commission's new interpretations of the *Merger Order* in the *Disqualification Order's* various

³⁰ *Disqualification Order* at 57.

ordering clauses, Charter’s July 9 Buildout Compliance Report also includes a count of the subset of those 61,202 addresses that would still remain if every holding in the *Disqualification Order* were to remain effective following rehearing and judicial review. By this count—which Charter has calculated under protest given that the *Disqualification Order* itself remains contested and is still subject to rehearing and further legal challenges—Charter’s count of completed addresses would drop to below the June 18, 2018 target. Accordingly, while Charter does not believe a showing of Good Cause to be necessary, it is submitting this filing in the alternative and to preserve its rights in the event the *Disqualification Order* remains effective in its current form.

LEGAL STANDARD

Appendix A to the *Expansion Settlement Order* sets out the process for making a Good Cause Shown claim. It requires that Charter “provide a sufficient showing for the Commission to determine that Good Cause Shown has been established” and requires that “[s]uch a demonstration include, but need not be limited to, affidavits of witnesses, detailed descriptions of the events that led to the delay(s), and supporting documentation for any factual claims.”³¹ Appendix A further states that “Charter may provide any other information with respect to Acts of God or other conditions beyond its or other pole owners’ control with respect to delays in meeting the targets contained in the Agreement.”³² Finally, Appendix A sets out eight “objective metrics” that Charter must meet to make out a Good Cause Shown claim based on pole owner delay (hereinafter, “Good Cause Criteria”).³³

³¹ Settlement Agreement, App’x A.

³² *Id.*

³³ *Id.*

ARGUMENT

I. THE ELIMINATION OF UNANTICIPATED ADDRESSES FROM CHARTER'S JANUARY 8 BUILDOUT COMPLIANCE REPORT FRUSTRATED CHARTER'S ABILITY TO REPLACE THOSE ADDRESSES IN TIME FOR THE JUNE 18 BUILDOUT TARGET.

As Charter set forth in its May 9 Good Cause Claim, Good Cause Shown exists both with respect to any failure by Charter to satisfy its December 2017 buildout target as well as to satisfy the December 2017 buildout target within the three-month period thereafter. The reasons for this showing of Good Cause are set forth in the May 9 Good Cause Claim and will be further articulated in Charter's forthcoming Petition for Rehearing of the *Disqualification Order*, in which the Commission denied Charter's May 9 Good Cause Claim, and Charter incorporates those arguments herein by reference.

Good Cause Shown with respect to the December 2017 buildout target (and for the three-month period thereafter) constitutes Good Cause Shown with respect to the June 18 Buildout Target as well, because the *Disqualification Order's* putative removal of so many completed addresses from Charter's January 8 Buildout Compliance Report will have the effect of causing Charter to (retroactively) enter the December 16, 2017-June 18, 2018 reporting period with a substantial deficit of completed network extensions from which no company could reasonably recover. In effect, the result of the *Disqualification Order* is to penalize Charter repeatedly for the same alleged disqualifications of Charter's reported addresses—with respect to the December 16, 2017 buildout target, the three-month cure period after the December 2017 target, and the June 18 Buildout Target—all before a court has had a chance to review the Commission's decision. It

would be unjust, as well as arbitrary and capricious, to subject Charter to substantial financial forfeitures in those circumstances.

As the Commission is well aware, network expansion efforts must be planned out months in advance, as providers must walkout and validate potential addresses, submit utility pole applications to pole owners and/or seek licenses from municipal authorities for underground construction, as well as arrange for and prioritize the deployment of survey, make-ready, and construction crews. In addition, the Department-supervised coordination process between Charter and utility pole owners requires extensive advance notice, planning, and communication of priority applications, which makes it highly time-consuming for Charter to change its buildout plans and requires multi-month lead times before Charter can undertake additional construction projects. Accordingly, the Commission's decision in the *Disqualification Order* to remove significant numbers of Charter's already-completed addresses from Charter's January 8 Buildout Compliance Report made it effectively impossible for Charter to make up the resulting shortfall in so short and limited a timeframe.

Given the long lead times required for expansions of broadband networks, any provider would have faced significant challenges making up so significant an alleged shortfall even with notice at the beginning of the pertinent reporting period. Here, however, Charter did not even receive notice that the disqualification of most of the pertinent addresses from its January 8 Buildout Compliance Report was a meaningful possibility until March 19, 2018 (halfway through the December 16, 2017-June 18, 2018 reporting period, and after the three-month cure period for the reporting period ending on December 16, 2017 had already ended) and did not receive confirmation that those addresses would be removed, or even learn of the *additional* upstate New

York address disqualifications set forth for the first time in the *Disqualification Order*, until June 14, 2018, a mere *four days* before the relevant reporting period was over.

Charter acknowledges that merely starting a reporting period behind schedule would not *alone* constitute Good Cause Shown for a shortfall at the conclusion of the reporting period. If a provider were knowingly to enter a reporting period short of its buildout targets, it would be incumbent upon the provider to plan its activities in the subsequent reporting period accordingly. Here, however, Charter did not learn that the Commission believed it to have fallen short of the December 16, 2017 buildout target until several months into the next reporting period, and Charter has made (via its May 9 Good Cause Claim) a showing of Good Cause with respect to any deficiency in meeting the December 16, 2017 buildout target. Although the *Disqualification Order* did not concur with Charter's Good Cause Shown filing with respect to that earlier target, that decision remains subject to rehearing and judicial review. At minimum, Charter's belief that it had entered the most recent current reporting period with a higher number of reportable addresses was reasonable based upon its construction activities and interpretation of what the Expansion Condition requires. Accordingly, both because Charter had good cause for believing that it was entering the current reporting period with a higher number of reportable addresses and did not learn that the Commission believed otherwise until too late to change course on the planning and implementation of its buildout efforts, the Commission should find that Good Cause Shown exists and should not impose forfeitures or other penalties under the Settlement Agreement.

II. CHARTER'S REASONABLE RELIANCE ON THE PLAIN TEXT OF THE EXPANSION CONDITION CONSTITUTES GOOD CAUSE SHOWN.

Since 2016, Charter has been expanding its network to pass additional homes and businesses in New York and reporting these addresses to the Commission based upon reasonable and good faith reliance on the plain text of the Expansion Condition, which requires only that a

reported address (1) represent an extension of Charter's network, (2) pass to a previously unserved or underserved location, (3) be constructed without state grant funding, and (4) be constructed without a contribution from the customer.³⁴ Charter had no reason to anticipate that the Commission would, as it proposed in the *Expansion Show Cause Order* and ultimately adopted *Disqualification Order*, interpret the *Merger Order* in such a way as to functionally impose prohibitions against reporting several categories of addresses that satisfy each of the criteria set forth in the Expansion Condition's text.

As set forth in Charter's response to the Commission's *Expansion Show Cause Order*, and as Charter intends to set forth in its forthcoming petition for rehearing (and, if necessary, for judicial review) of the *Disqualification Order*, Charter believes that the *Disqualification Order* is wrongly decided insofar as it departs from both the text and understood meaning of the Expansion Condition. But setting aside whether the *Disqualification Order*'s interpretations of the Expansion Condition are legally within the Commission's authority, those interpretations are non-obvious and differ materially from what a reasonable regulated entity would read the condition to require, particularly (as here) where the Expansion Condition had an extensive negotiating history preceding the *Merger Order*'s adoption that aligns with Charter's interpretation of the condition and is inconsistent with the Commission's new positions set forth in the *Disqualification Order*.³⁵ Charter had every right to plan and structure its network expansion activities around the obvious and reasonable interpretation of non-ambiguous requirements as set forth in the *Merger Order* and its discussions with the Department.³⁶

³⁴ Expansion Show Cause Order Resp. at 11, 25-27.

³⁵ *Id.* at 43-44.

³⁶ *Id.* at 25-27, 43-44.

The fact that the Commission’s interpretations depart meaningfully from the text of the condition constitutes Good Cause Shown for the fact that Charter did not structure and plan its buildout efforts around those interpretations. For instance, Charter expanded its network to offer high-speed broadband service to thousands of unserved and underserved homes and businesses that previously lacked access to such services (including addresses in upstate New York in areas for which the BPO had awarded grants to other providers, but to which the grantee had not *actually* expanded its network to offer service, as well as unserved or underserved homes in parts of New York City, such as Harlem), reasonably believing that such addresses would “count” towards the Expansion Condition. Similarly, Charter also reasonably believed, based upon the well-accepted definition of what it means to “pass” an address (as set forth, for instance, in the FCC’s order approving the same transaction as the *Merger Order*) that the expansion of its service to additional unserved homes and businesses by means of activities such as the construction of risers or trenches (and not only horizontal line extensions) would “count” towards its Expansion Condition targets.³⁷ Indeed, delays from pole owners in granting Charter necessary access to utility poles made it necessary for Charter proactively to identify such additional unserved and underserved opportunities to which it could extend its network without reliance on third-party utility poles. In both cases, Charter did not turn away unserved or underserved homes or businesses in order to prioritize its construction efforts elsewhere.

Charter’s decisions to expand service to such locations was a reasonable one given how a reasonable entity would read the Expansion Condition and it would be arbitrary and capricious to subject Charter to financial forfeitures or other penalties for those decisions, even if the Commission adheres to the view that Charter must construct additional network extensions

³⁷ See *id.* at 38-31; 50-51.

elsewhere to meet its buildout targets. In addition, Charter's process for identifying and counting reportable addresses was transparent, with Charter representatives, *inter alia*, traveling to Albany to present the details of its reporting process to Department Staff four months before the *Expansion Show Cause Order*. Even if the Commission ultimately adheres to the *Disqualification Order's* proposal to disqualify Charter's already-completed passings retroactively, the Commission should, at the very least, consider Charter's reasonable reliance interests when determining whether Charter has established Good Cause Shown under the Settlement Agreement. Indeed, it would be particularly arbitrary and capricious for the Commission *not* to consider those reasonable reliance interests as well as Charter's lack of adequate notice of any perceived deficiency until after it was too late for Charter to change course on the planning and implementation of its buildout efforts.³⁸

Public Employees Federation is instructive.³⁹ In that case, the Public Employment Relations Board ("PERB") concluded that the petitioner had committed an improper labor practice by failing to submit, simultaneously with agency shop fee refund checks,⁴⁰ complete and detailed explanations of how such refunds were calculated, and ordered the petitioner to issue full refunds of the shop fee.⁴¹ In reaching this conclusion, PERB relied on a case it recently decided holding that full refund was the appropriate remedy, which had overturned earlier precedent holding that

³⁸ See *Pub. Emps. Fed'n v. Pub. Emp't Relations Bd.*, 93 A.D.2d 910, 912 (3d Dep't 1983); *Pantelidis v. N.Y. City Bd. of Standards & Appeals*, 43 A.D.3d 314, 315 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 846 (2008) (finding that it was "arbitrary and capricious" for the New York City Board of Standards and Appeals not to consider petitioner's good faith reliance on a later revoked permit when deciding variance application).

³⁹ *Pub. Emps. Fed'n*, 93 A.D.2d 910.

⁴⁰ Under New York Civil Service Law, § 201, non-union employees are required to pay an agency shop fee equivalent to dues which the union collects from its members, but are entitled to refunds for that portion of the agency shop fee used for activities of a political or ideological nature only incidentally related to the terms and conditions of employment.

⁴¹ 93 A.D.2d at 910.

“future disclosure and posted notice” were the appropriate remedies.⁴² The petitioner challenged PERB’s decision in an Article 78 proceeding on the grounds that, among other things, it was arbitrary and capricious for PERB to order it to refund the shop fees as penalty.⁴³ The court agreed, holding that the “petitioner should not be unduly penalized for past actions taken in good-faith reliance upon PERB’s previous determinations.”⁴⁴

Like the union in *Public Employees Federation*, Charter should not be penalized for actions taken in good faith reliance on the Commission’s and the Department’s prior actions. These include but are not limited to the Commission’s adoption of the *Merger Order* (whose plain text does not contain the additional disqualifications set forth in the *Disqualification Order*); the extensive negotiating history that preceded the *Merger Order*’s adoption; the Department’s negotiation of the terms of the *Expansion Settlement Order* with Charter (during which the Department gave Charter no reason to believe that it or the Commission believed entire categories of Charter’s reported passings to be invalid under the Expansion Condition); and the Department’s failure to raise these issues with Charter in the extended period prior to the *Expansion Show Cause Order*—during which Charter had explained its reporting process to the Department and the Department was otherwise engaged in reviewing and auditing Charter’s reported passings, but raised only concerns far more limited than the sweeping disqualifications proposed by the *Expansion Show Cause Order* and ultimately adopted by the *Disqualification Order*.

Prior to the *Expansion Show Cause Order*—which was not issued until halfway into the time period covered by Charter’s July 9 Buildout Compliance Report—Charter had no meaningful

⁴² *Id.* at 912.

⁴³ *Id.*

⁴⁴ *Id.*

knowledge of or reason to anticipate the Commission's sweeping interpretations of the Expansion Condition. Moreover, until the Commission issued the *Disqualification Order*—which was released a mere four days before the end of the reporting period—Charter did not know that the Commission would actually adhere to the legal positions proposed by the *Expansion Show Cause Order* in the face of Charter's evidence and legal authority to the contrary. Given the extensive planning required for Charter to construct expansions of its network to new locations, the extremely limited windows of time given to Charter to respond to the Commission's newfound, restrictive interpretations of the Expansion Condition have left Charter with no way of responding or changing course to implement the Commission's new instructions. Accordingly, the impositions of financial forfeitures or other penalties under such circumstances would be inappropriate, arbitrary, and capricious. The Commission should accordingly find that Charter has established Good Cause Shown.

III. POLE OWNER DELAY IN PROVIDING CHARTER ACCESS TO UTILITY POLES CONSTITUTES GOOD CAUSE SHOWN.

Good Cause Shown also exists with respect to additional addresses to which Charter would have had access to utility poles necessary to expand its network, but lacked such access due to delays by pole owners. Although such delays are no longer as pervasive as they were when Charter first sought the Commission's intervention, they have persisted into the most recent reporting period. Moreover, even with the benefit of the Commission's intervention, Charter has been required to seek licenses from pole owners on a much slower schedule than the Commission's Pole Order requires. The pole applications still outstanding at the end of the December 16, 2017-June 18, 2018 reporting period that meet the required elements under the *Expansion Settlement Order* are necessary for Charter to expand its network to an additional estimated 7,662 addresses.

Charter acknowledges that, if the *Disqualification Order* were to remain effective without modification, the number of addresses implicated by pole owner delay would be fewer than the difference between the June 18 Buildout Target and the completed addresses in Charter's July 9 Buildout Compliance Report if every address disqualified by the *Disqualification Order* were removed. However, the number of addresses for which Good Cause Shown exists due to pole owner delay remains substantial. Moreover, the addresses affected by such delays are relevant to Charter's efforts to satisfy the June 18 Buildout Target within three months and will also be pertinent in the event that the *Disqualification Order* is modified or reversed in part. As shown below, Good Cause Shown for these addresses exists under each of the *Expansion Settlement Order* criteria.

A. Charter Completed the Verification and Design of Sufficient Incremental Passings to Meet the Target at Least 230 Days in Advance of the Target Deadline.

First, Appendix A to the *Expansion Settlement Order* requires that Charter must have completed the verification and design of sufficient incremental passings to meet the target at least 230 days in advance of the deadline ("Good Cause Criterion A"). As explained in the accompanying declaration of Terence Rafferty, Charter completed verification and design of each of the projects encompassing the passings for which Charter is making this Good Cause Showing more than 230 days in advance of June 18, 2018.⁴⁵ The *Disqualification Order* agreed that Charter had satisfied this requirement with respect to its May 9 Good Cause Claim, and the same result should apply here.⁴⁶

⁴⁵ Declaration of Terence Rafferty in Support of Charter Communications, Inc.'s July 9, 2018 Good Cause Showing ("Rafferty Decl.") ¶ 4.

⁴⁶ *Disqualification Order* at 70.

B. Charter Approved for Construction Sufficient Incremental Passings to Meet the Target at Least 210 Days in Advance of the Target Deadline.

Second, Appendix A to the *Expansion Settlement Order* requires that Charter approve for construction sufficient incremental passings to meet the target at least 210 days in advance of the deadline (“Good Cause Criterion B”). For reasons set forth in Charter’s May 9 Good Cause Claim, Charter satisfies this criterion categorically for all of its New York network expansion projects relevant to the Expansion Condition, and Charter’s internal budget approval process did not delay any projects needed to meet the June 18 Buildout Target.⁴⁷ The *Disqualification Order* agreed that Charter had satisfied this requirement with respect to its May 9 Good Cause Claim, and the same result should apply here.⁴⁸

C. Charter Notified Pole Owners of All New Applications for Pole Attachments in Advance of Submitting Pole Applications.

Third, Appendix A to the *Expansion Settlement Order* requires that Charter notify pole owners of all new applications for pole attachments in advance of submitting pole applications (“Good Cause Criterion C”). As required by Good Cause Criterion C, Charter has, since entering into the Settlement Agreement in June 2017, provided pole owners with a letter 30 days in advance of a pole application being filed notifying them that the application is forthcoming.⁴⁹ This notice provides pole owners with a variety of information, including: (i) the approximate date on which Charter intends to file the new application, (ii) the approximate number of poles in the application, (iii) the town or city in which the poles are located, and (iv) the date Charter intends to begin construction on the poles. It also refers the pole owner to Charter’s plan of record, which provides

⁴⁷ Rafferty Decl. ¶ 5.

⁴⁸ *Id.* at 70-71.

⁴⁹ Rafferty Decl. ¶ 6.

the pole owner with a list of pole applications (by permit number and project/DID#) in order of priority by month, to assist the pole owner in prioritizing Charter's outstanding applications.⁵⁰ Thus, the letter provides the pole owner with all of the information the pole owner requires to deem the application complete and to process it in advance of the application being submitted. In addition to these letters, Charter (through the Department-supervised process with pole owners) now regularly provides notice of its planned construction projects to affected pole owners through its Pole Priority plan, which provides notice many months in advance of upcoming projects, giving pole owners ample time to prepare for forthcoming applications.⁵¹ The *Disqualification Order* agreed that Charter had satisfied this requirement with respect to its May 9 Good Cause Claim, and the same result should apply here.⁵²

D. Charter Submitted Applications for Pole Attachments for Sufficient Incremental Passings to Meet the December 16, 2017 Target Date at Least 200 Days in Advance of the Target Deadline.

Fourth, Appendix A to the *Expansion Settlement Order* requires that Charter submit applications for pole attachments for sufficient incremental passings to meet the target at least 200 days in advance of the deadline ("Good Cause Criterion D"). Charter properly submitted 282 applications (encompassing 20,917 poles) 200 days or more in advance of the June 18 Buildout Target that still remain open and have not yet been approved by the pole owners.⁵³ Of those 282 applications, only ten applications were delayed by pole owner claims that the application was incomplete such that (excluding the period of the delay) the pole owner had the application in hand

⁵⁰ *Id.*

⁵¹ Rafferty Decl. ¶ 7.

⁵² *Id.* at 71.

⁵³ Rafferty Decl. ¶ 8. This count excludes pole applications currently with Osmose, Charter's contractor, as Charter is not making a Good Cause claim with respect to addresses encompassed by these applications. *Id.*

for fewer than 200 days before the reporting deadline.⁵⁴ Although Charter does not necessarily agree with the pole owner assertions in those ten instances, it has excluded those applications and the associated poles from this Good Cause filing. Cumulatively, the remaining applications for those poles comprise an estimated 7,662 passings.⁵⁵

Charter notes that the *Disqualification Order* declined to find Good Cause Shown under this criterion with respect to the December 2017 buildout target (as well as separately for the three-month period thereafter) based upon the Commission's belief that Charter "often provided incomplete applications or applications that the pole owners could not process for one reason or another."⁵⁶ Charter disagrees with the Commission's reasoning in several respects. First, notwithstanding the assertion that pole owners "often" could not process Charter's applications due to alleged incompleteness, the significant majority of Charter's applications have involved no

⁵⁴ *Id.* Some of the outstanding applications call for return dates that postdate June 18, 2018, and the fact that a pole owner has not yet approved such an application does not necessarily reflect a failure by the pole owner to adhere to the Department-supervised coordination process (under which Charter designates a priority schedule for outstanding applications). However, the Good Cause Shown criteria in the *Expansion Settlement Order* are based on Charter's adherence to objective criteria set forth therein, and not upon whether the pertinent pole owners have violated the expectations within the Department-supervised coordination process. In many cases, Charter has had to build pole owners' slow pace in processing applications into Charter's own construction planning, and Charter could have planned more rapid network expansion efforts had pole owners processed and approved applications within the timeframes set forth in the *Expansion Settlement Order's* Appendix A.

⁵⁵ Rafferty Decl. ¶ 8. This reasonable estimate is based upon the number of poles covered by pending applications that have not been approved within the 200-day period established in paragraph d of Appendix A, offset by the number of poles encompassed by applications as to which the relevant pole owner contended that the application was not complete and the time to resolve that disagreement, when subtracted from the time since Charter submitted the application, resulted in the pole owner having the application for fewer than 200 days. Charter then divided the resulting number of poles for those applications by the average number of poles in a mile of plant, and multiplied the result by the current average number of passings per mile in Charter's Plan of Record. *Id.* ¶ 9.

⁵⁶ *Disqualification Order* at 72.

such claims at all, and delays resulting from pole owner requests for supplemental information are rarely material. Second, generalized concerns with Charter's applications, absent any demonstrated nexus to the *specific* applications for which Charter was claiming Good Cause Shown in its May 9 Good Cause Claim, does not form a proper basis for the denial of a claim for Good Cause Shown and Charter intends to seek rehearing (and, if necessary, judicial review) of the *Disqualification Order* on that basis. The *Expansion Settlement Order* does not require perfection in the execution of every pole application that Charter submits across the entire reporting period; even in a well-managed process there will inevitably be some follow-up questions and iteration as Charter and pole owners work cooperatively to secure access to necessary utility poles. Rather, the Good Cause Shown criteria are meant to limit Charter's claims of Good Cause Shown only to pole applications as to which Charter itself, based upon objective criteria set forth in Appendix A, was not the cause of material delays. Here, any such concerns are moot. Charter is claiming Good Cause Shown only with respect to applications as to which either: (1) there was no assertion that the application was incomplete to begin with, or (2) any questions as to the completeness of the application were resolved and the application *still* sat with the pole owner for 200 days or more even *after* excluding the time Charter took to resolve the claimed incompleteness. Accordingly, with respect to the specific 272 applications (and estimated 7,662 passings) for which Charter is making this Good Cause filing, the Commission should find that Good Cause Criterion D is satisfied.

E. Charter Has Paid All Fees and Other Payments Required by Pole Owners in Order to Effectuate Pole Attachments.

Fifth, Appendix A to the Settlement Agreement requires that Charter pay all fees required by pole owners in order to effectuate a pole attachment ("Good Cause Criterion E"). Charter has

satisfied that requirement with respect to all of 272 applications for which Charter is making a Good Cause Shown claim through this filing.

In the *Disqualification Order*, the Commission took issue with Charter's showing with regard to this criterion, concluding that some of Charter's payments to pole owners were made beyond the time period established in the Pole Order.⁵⁷ Again, Charter disagrees with the *Disqualification Order* on this point and intends to seek rehearing (and, if necessary, judicial review) of this conclusion, because it incorrectly focuses on generalized concerns with other applications instead of asking whether any of the *specific* applications for which Charter is claiming Good Cause Shown were materially delayed by Charter. Here, Charter's records indicate that there have been no payment issues with respect to the majority of the applications for which it is claiming good cause, and although there have been some delays involving invoices for a subset of those applications, Charter has no record that those issues have materially held up processing beyond the 200-day pole owner review period provided in the Settlement Agreement.⁵⁸ Accordingly, Charter has met the requirements of Good Cause Criterion E.

F. Charter Hired a Contractor to Conduct Survey Work (as Allowed by the Pole Order) If Necessary to Avoid Delay in Meeting the Targets.

Sixth, Appendix A to the Settlement Agreement requires that Charter hire a contractor to conduct survey work (as allowed by the *Pole Attachment Order*) if necessary to avoid delay in meeting the targets ("Good Cause Criterion F"). Charter has satisfied these criterion as well.

As the Commission is aware, on or around June 2017, Charter hired the contractor Osmose to conduct surveys for poles jointly-owned by Verizon and National Grid as part of a Charter-managed single vendor make-ready process. Frontier signed off on this single vendor make-ready

⁵⁷ *Disqualification Order* at 73-74.

⁵⁸ Rafferty Decl. ¶ 10.

process in early 2018 and Windstream is about to join as well. Charter continues to offer the remaining pole owners (*i.e.*, Fairpoint, TDS, and Middleburg) the opportunity to take advantage of the single vendor process on weekly calls with the pole owners and Department Staff, but so far none has taken Charter up on its offer.

Charter also requested permission to hire an outside contractor to perform survey and make-ready work prior to June 2017. However, as detailed in Charter's Pole Attachment Complaints, the pole owners generally declined Charter's repeated requests for authorization to hire an outside contractor to conduct survey and make-ready work.⁵⁹

Since October 2017, when Osmose was able to begin conducting survey work and processing applications for Verizon and National Grid poles, Osmose has conducted surveys on jointly owned poles associated with projects for which Charter is claiming Good Cause Shown.⁶⁰ As the Commission acknowledged in its *Disqualification Order*, Charter has met this requirement.⁶¹

G. Charter Requested Permission to Use Temporary Attachments If Doing So Would Avoid Delay in Meeting Its Obligations.

Seventh, Appendix A to the Settlement Agreement requires that Charter request permission to use temporary attachments if doing so would avoid delay in meeting its obligations ("Good Cause Criterion G"). As required by Good Cause Criterion G, Charter requested permission to use temporary attachments to avoid delay in meeting its obligations. Specifically, in late July

⁵⁹ Verizon Complaint ¶¶ 26-36; NGRID Complaint ¶¶ 23-32; NYSEG Complaint ¶¶ 27-29; Frontier Complaint ¶¶ 33-34. Verizon finally agreed to allow Charter to use Osmose to conduct surveys, and to discuss the use of contractors with respect to make-ready design, on June 6, 2017, but only after receiving Charter's demand letter on June 5, 2017.

⁶⁰ See Rafferty Decl. ¶ 11.

⁶¹ *Disqualification Order* at 74 ("As an initial matter, Charter has met this criterion.").

2017, with the assistance of Department Staff, Charter entered into an agreement with all of the pole owners setting forth a framework governing temporary attachment requests. Since that time, Charter has regularly requested permission to use temporary attachments in order to accelerate the pole attachment process, including for those applications for which Charter is claiming Good Cause Shown.⁶² On this basis, as the Commission concluded in its *Disqualification Order* that Charter had satisfied this criterion.⁶³ It should do the same again here.

H. Charter Completed Construction and Verification of All Necessary Passings within 45 Days of Receiving Licenses for Pole Attachments.

Finally, Appendix A to the Settlement Agreement requires that Charter complete construction and verification of all necessary passings within 45 days of receiving licenses for pole attachments (“Good Cause Criterion H”). Charter has satisfied this condition as well.

Charter cannot complete construction efforts on individual poles; network expansion projects can only be completed once a cable operator has access to a complete set of poles forming a coherent construction project. For instance, if a pole owner approves half of the pole attachment applications in a given project, but the outstanding half of the poles are required for construction (*e.g.*, if the poles for which applications remain outstanding fall between the poles approved), it may preclude Charter from starting the project at all, or may limit the work that Charter can complete to substantially less than one half of the homes passed by the planned project. Where Charter has obtained partial access to poles for only portions of its network expansion projects, Charter has made every effort to start partial construction where the specific network configuration and arrangement of the approved poles so allows. Due to the interdependencies of pole applications within particular projects, Good Cause Criterion H necessarily precludes Charter only

⁶² Rafferty Decl. ¶ 12.

⁶³ *Disqualification Order* at 75.

from counting towards a Good Cause Showing any projects for which Charter received licenses for *all* poles required for the project but did not promptly construct.

The Commission agreed in the *Disqualification Order* that Charter had satisfied this criterion and should do so again here.⁶⁴ To date, Charter's network expansion efforts have been heavily dependent upon temporary attachments (in advance of receiving licenses) and partial construction in advance of full licensing and approval for a submitted project, and few projects have received complete licenses. As pertinent to this claim for Good Cause Shown, none of Charter's projects for which it is claiming Good Cause Shown had received complete pole attachment approval by May. 4, *i.e.*, within 45 days of the June 18, 2018 deadline and none of the projects that Charter has been unable to complete due to pole owner delay have received such approval.⁶⁵ Thus, Charter has established Good Cause Shown with respect to each of those passings.

* * *

In sum, under the *Expansion Settlement Order*, all of the objective criteria necessary to establish Good Cause Shown based upon pole owner delay are satisfied for 272 applications (representing an estimated 7,662 passings) as of the June 18 Buildout Target date and the Commission should find that Good Cause Shown exists with respect to those addresses.

⁶⁴ *Disqualification Order* at 75-76.

⁶⁵ Rafferty Decl. ¶ 13. Only a modest number of projects have received all needed licenses to date, and, of those, Charter completed the substantial majority within 45 days. Although there were a small number of projects as to which Charter's construction required more than 45 days to complete upon receipt of all licenses (9 projects, representing 543 passings), Charter is not making a claim of Good Cause Shown with respect to any of those projects, all of which have been successfully completed, and they are not material to this filing. *Id.*

CONCLUSION

For the reasons stated above, in the event Charter is ultimately deemed to have fallen short of the June 18 Buildout Target, the Commission should determine that Good Cause Shown has been established, as contemplated by the *Expansion Settlement Order*.

Respectfully Submitted,

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/s/

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