STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

CHARTER COMMUNICATIONS, INC.'S MOTION FOR STAY OF THE COMMISSION'S ORDER REVOKING APPROVAL

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

Samuel L. Feder
Ian Heath Gershengorn
Luke C. Platzer
Laura P. MacDonald
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
lplatzer@jenner.com

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Charter Communications, Inc. ("Charter" or "Company") hereby submits this Motion for Stay of clauses 3 and 4 of the New York Public Service Commission's ("Commission") order revoking approval of Charter's merger with Time Warner Cable Inc. and directing Charter to file within 60 days (since extended to December 24) a plan with the Secretary of the Commission to effect an orderly exit from the State and transition to another provider six months thereafter (hereinafter "*Revocation Order*" or "Order").[1]

INTRODUCTION

The *Revocation Order* imposes a draconian penalty on Charter's New York operations, commanding Charter to undo a significant portion of a multi-billion dollar merger the Commission approved over two-and-a-half years ago and purporting to evict Charter from the State where Charter serves 3.1 million customers and has more than 11,000 employees. The Order did so because Charter sought to dispute the Commission's revisionist interpretation of an expansion condition that the parties agreed to at the time of the merger. It did so even though Charter has spent nearly $200 million or more thus far (with even hundreds of millions more planned) to fulfill that expansion condition for the citizens of the State, leaving Charter on pace to far exceed the amount upon which the Commission premised its inclusion of the expansion condition in the merger approval order. And it did so without even the rudimentary due process of providing Charter (or other interested parties) any notice or an opportunity to be heard, despite the significant upheaval the Order threatens to millions of New York customers. To top it off, the Order, as

[1] Case 15-M-0388, Order Denying Petitions for Rehearing and Reconsideration and Revoking Approval (July 27, 2018). Charter is filing this petition to preserve its substantial and compelling legal rights. Nothing in this application is intended to foreclose the possibility of further discussions with the Commission to resolve this dispute without the need for judicial review.

extended, gives Charter only until December 24 to formulate an exit plan, and six months thereafter to accomplish the exit, timing that would (as the Commission knows) effectively insulate the Commission's actions from any judicial review. The Commission's actions reflect not reasoned decision-making directed to the public interest, but rather retaliation against Charter because Charter challenged the Commission by advocating for its good-faith reading of the expansion condition.

A stay is warranted to preserve the status quo and permit orderly judicial review of the Commission's unprecedented and unlawful action.

First, without a stay Charter is suffering and will continue to suffer clear and substantial irreparable harm from the *Revocation Order*'s command that Charter undo the merger and exit New York even while Charter's legal challenges are pending.[2] The harm from Charter's actual departure from New York roughly seven months from now would itself be massive and irreparable, as there would be no way for Charter to restore its position by "re-entering" the State in a commercially reasonable way if Charter later prevailed on judicial review. The eggs here are scrambled—the merged companies' national operations are fully integrated, and there is no obvious way to separate them. Any obligation to do so would require a massive commitment of time and resources—starting immediately—to navigate the complex business, legal, and

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

regulatory requirements needed to implement the Commission's order to unscramble the eggs. Moreover, the preparation of an exit plan would *itself* negatively impact Charter's reputation with employees, customers, and suppliers in highly competitive markets and require Charter to expend substantial effort, resources, and money that could not be recovered if Charter ultimately prevails in challenging the *Revocation Order*.

Compounding those harms, the *Revocation Order* has already begun to impact Charter's position in the marketplace, and is likely to result in the loss of existing and prospective customers unless stayed. The communications and cable industries are extremely competitive and customers, once gone, are not likely to be recovered—a subsequent judicial reversal of the Commission's order would not bring them back. Additionally, these anticipated customer losses will have adverse effects on Charter's revenue in the upcoming months if the Order is not stayed. The Order, and the media attention that attends it, is also having an adverse effect on Charter's reputation and goodwill, and if a stay is not granted Charter will have to devote substantial resources to combat the negative and unfair public impact of the Order.

Second, Charter is likely to succeed on the merits of its legal challenges to the *Revocation Order*—at a minimum, the errors infecting the Order raise serious questions on the merits.

As an initial matter, the *Revocation Order* is arbitrary and capricious because the Commission made a *post hoc* revision to the expansion condition inconsistent with the parties' negotiated agreement. Charter will not rehash those arguments here, because the Commission has rejected them.

But even assuming that Charter were behind schedule under the expansion condition, the Commission's order cannot stand. The revocation of the merger approval is an arbitrary and capricious Commission action. The unprecedented revocation of the Commission's approval of a

merger that closed over two years ago is grossly disproportionate to any conduct at issue here. Although the parties dispute the meaning of the expansion condition in the merger order, the revocation of the merger approval serves no legitimate Commission interest when other remedies are available and when the Commission has no reason to doubt Charter's readiness to comply with any authoritative judicial construction. Nor can the Commission's unprecedented action be justified by any finding of "bad faith." What the Commission inappropriately labels bad faith is simply Charter's reasonable effort to challenge the Commission's new interpretation, exhaust administrative remedies, and prepare its case for judicial review. There is no reasonable justification for the punishment the Commission imposed.

The Commission's actions are also unconstitutional. The *Revocation Order* makes clear on its face that the Commission explicitly retaliated against Charter for exercising its right to seek Commission and judicial review of Charter's reasonable, good faith dispute with the Commission. That is flatly forbidden by the First Amendment and inconsistent with due process. The Commission is entitled to advance its interpretation of the buildout condition, but Charter is equally entitled both to disagree and to advocate for its own view at the Commission and in the courts. The Commission's effort to punish Charter for those efforts is unconstitutional and cannot stand.

The Order is also the paragon of procedural irregularity. The Commission issued the "revocation" penalty *sua sponte*, at a rump session of the Commission, without providing Charter with an opportunity to comment or present any argument on the availability of the remedy itself, or upon most of the grounds on which the penalty was predicated. The Commission also denied the public—including Charter's customer base, who would be required to switch to a new provider, and the local governments that are parties to Charter's franchise agreements that the Order purports

to vacate—an opportunity to comment on the unprecedented proposal to force Charter to exit New York. These actions violated the procedural requirements of Section 227 of the Public Service Law and the New York State Administrative Procedures Act ("SAPA"), as well as basic notions of fairness and due process, and are arbitrary and capricious.

Third, the equities strongly support a stay: Charter seeks only to preserve the status quo so that it can seek judicial review of the *Revocation Order*, thereby sparing Charter and the public the full measure of the harms the order has imposed while a neutral arbiter assesses the Commission's actions. Failure to issue a stay will harm the public interest, upsetting Charter's relationships both with institutional and residential customers who have come to rely on Charter's services and with employees and vendors. At the same time, a stay will not impose any meaningful burden on the Commission. In sum, the Commission should preserve the status quo and stay the third and fourth ordering clauses of the *Revocation Order*, which are causing and will continue to cause Charter irreparable harm, while Charter seeks review of the Order.

Because the *Revocation Order*, as extended, sets a December 24, 2018 deadline for Charter to submit an exit plan, any relief from the Order—to be meaningful—must be well in advance of that deadline. Accordingly, Charter respectfully requests that the Commission rule on this motion for a stay no later than the start of business on Monday, November 26. If the Commission does not grant a stay on or before that date, Charter intends to seek a stay from the Supreme Court in Albany County to provide the Court with sufficient time to rule ahead of the December 24 deadline and to secure Charter's legal rights to judicial review of the *Revocation Order*.

FACTUAL BACKGROUND

On July 27, 2018, the Commission issued the *Revocation Order*, which revoked the Commission's approval of Charter's 2016 acquisition of Time Warner Cable Inc. The *Revocation Order* purports to be predicated upon the Commission's holding, *inter alia*, that Charter had fallen

short of its commitments to expand its network to additional unserved and underserved locations in the State (the "Expansion Condition") under the Commission's January 8, 2016 order approving Charter's merger with Time Warner Cable Inc. (the "*Merger Order*"),[3] as modified by a settlement agreement adopted by the Commission on September 14, 2017, and that Charter had acted in "bad faith" by, *inter alia*, challenging the Commission's interpretation of the Expansion Condition through its petition for rehearing.

Charter has a good faith disagreement with the Commission as to the precise meaning of the Expansion Condition, most notably with respect to whether construction projects to expand broadband availability within urban environments such as New York City are eligible. The Commission initially stated its proposed position that such addresses were categorically ineligible in its March 19, 2018 Order to Show Cause. Charter contested this interpretation in its May 9, 2018 response as inconsistent with (among other things) the text of the *Merger Order* and Appendix A. On June 14, 2018, the Commission issued an order denying Charter's May 9 filing, largely adhering to the proposals set forth in the Commission's March 19, 2018 order, notwithstanding Charter's response. Because the Commission's June 14, 2018 order raised some new factual issues and legal arguments not previously presented by its March 19, 2018 Order to Show Cause (and also swept in additional addresses for further disqualification), Charter on July 16, 2018 petitioned for rehearing of the June 14, 2018 order. All of Charter's filings with the Commission were made in good faith pursuant to the statutory and regulatory requirements for preserving Charter's arguments for further review.

On July 27, 2018, the Commission issued the *Revocation Order sua sponte*. Based upon Charter's adherence to its interpretation of the Expansion Condition and its effort to preserve its

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

arguments for judicial review, the Order characterizes Charter as "show[ing] an inability or a total unwillingness to extend its network in the manner intended by the Commission to pass the requisite number of unserved or underserved homes and/or businesses." *Revocation Order*, at 21. The Order further faults Charter for "continu[ing] to challenge the Commission's June 14 Order, despite the plain language in the Approval Order to the contrary," and for making public relations statements regarding Charter's overall expansion of broadband in New York that the Commission believes to be inconsistent with its orders. *Id.* at 22. The *Revocation Order* also predicates its choice of penalty upon what the Order describes as "safety issues" involving Charter "or its contractors," although (with one exception) it does not identify the alleged incidents on which it reaches that conclusion and Charter was not given notice or an opportunity to submit evidence or argument on the issue. *Id.* at 24.

Ultimately, the Order concludes "that the administrative remedies ordered to date . . . have been ineffective in prompting the Company to satisfy its buildout obligations" under the Expansion Condition. The Commission therefore claims justification for taking what the Commission itself admits is the "severe step" of revoking the January 8, 2016 approval of Charter's 2016 merger with Time Warner Cable Inc. *Id.* at 27. The Commission takes this severe step without providing Charter any notice or opportunity to submit materials in its defense. Instead, the Commission simply proclaims the revocation and directs Charter to file a plan with the Commission within 60 days of the issuance of the Order "to affect an orderly transition to a successor provider(s) . . . subject to Commission approval." *Id.*[4]

[4] This deadline has since been extended to December 24, 2018 in order to allow settlement discussions between Charter the Department, but those discussions have, so far, not resulted in a settlement.

Charter intends to pursue both administrative and judicial remedies, as appropriate, from the Commission's findings and holdings in the *Revocation Order*. In the September 14, 2017 Settlement Order ("*Settlement Order*"), the Commission agreed that it would not impose penalties on Charter regarding any dispute between the parties as to the Expansion Condition—specifically, that it would not draw down on the Letter of Credit that Charter had submitted—"until any such dispute has been finally resolved." *Settlement Order*, at 18. That dispute remains unresolved, as Charter is currently pursuing administrative and judicial review.

ARGUMENT

To prevent irreparable injury to Charter and to preserve the status quo while Charter's forthcoming petitions for administrative and judicial review of the Commission's orders are resolved, the Commission should stay the *Revocation Order*'s third and fourth ordering clauses, which revoke the *Merger Order* and direct Charter to file a plan to effect an orderly transition to a successor provider (hereinafter "exit plan"), now due December 24. As set out below, the order revoking the merger approval is causing and will continue to cause irreparable harm to Charter's competitive position and goodwill, and the public filing of an exit plan will only compound that harm. Absent a stay, Charter will be irreparably harmed if it is forced to comply with the *Revocation Order* while its legal challenges are pending, even if those challenges succeed. Moreover, Charter is likely to succeed in its multiple legal challenges to the Order; at the very least, there are fair grounds for litigation and the balance of equities tip decidedly in favor of a stay.[5]

[5] Although the *Revocation Order* gives the Secretary discretion to extend this deadline, the Secretary has previously in this docket taken the position that this authority may be used only for short extensions and not to grant stays. *See* Letter from Kathleen Burgess, Secretary, New York Public Service Commission, to Maureen Helmer, Partner, Barclay Damon (July 5, 2018). Accordingly, Charter is addressing this motion directly to the Commission.

Under Section 6301 of the Civil Practice Law and Rules, courts grant injunctive relief where the moving party demonstrates that it will suffer "irreparable injury absent the granting of the preliminary injunction" and shows that "a balancing of the equities" favors its position. *Putter v. Singer*, 73 A.D.3d 1147, 1148-49 (2d Dep't 2010) (citations omitted); *see also* N.Y. C.P.L.R. §§ 6301, 6313. Additionally, the moving party must demonstrate "a likelihood of success on the merits." *Putter*, 73 A.D.3d at 1148. However, this requirement is relaxed where, as here, preliminary relief "is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance." *Mr. Natural v. Unadulterated Food Prods., Inc.*, 152 A.D.2d 729, 730 (2d Dep't 1989); *see also N. Fork Preserve, Inc. v. Kaplan*, 31 A.D.3d 403, 405-06 (2d Dep't 2006) (similar).

Charter's request for injunctive relief satisfies each of these requirements, as discussed below. To spare both Charter and the Commission the unnecessary expenditure of effort and resources litigating the stay in court and to maintain the status quo to allow for an orderly review of the *Revocation Order*, the Commission should grant this application and stay its own order.

I. CHARTER WILL SUFFER IRREPARABLE HARM WITH NO ADEQUATE REMEDY AT LAW IF FORCED TO COMPLY WITH THE *REVOCATION ORDER.*

As a result of the *Revocation Order*, Charter has already suffered and will continue to suffer harms to its business that cannot readily be reversed even if the Order is ultimately modified or vacated as a result of further review.

First, if Charter were required *actually* to exit New York by June 24, 2019, as called for by the *Revocation Order*, the harm to Charter's business and operations would be severe, unquantifiable, and irreparable. There is no way to re-enter the State once Charter is forced to exit even if the Commission's order is later overturned—a rebuild of the divested infrastructure would be prohibitively expensive and is not a practical possibility. Moreover, Charter has several

unregulated lines of business in the State, such as broadband internet access, wireless services, business data services, programming and news services, and advertising sales, that fall outside the Commission's limited jurisdiction over regulated telephone services and cable video services Charter provides over its franchised cable systems. The effect of the *Revocation Order*'s directive that Charter "cease operations," however, would be to prohibit or functionally interfere with Charter's ability to offer these unregulated service lines as well.

Moreover, the disruptive potential of the actions that Charter would need to take to prepare for an exit in the upcoming weeks also justifies a stay pending judicial review, as there would be no meaningful way to undo such disruption once initiated. In the over two-and-a-half years since the merger of Charter and Time Warner Cable Inc. was approved, the companies' respective national operations have become fully integrated, and there is no readily available way to separate them. Any obligation to do so would require extensive advance planning and alteration to Charter's ongoing operations, not to mention the challenges of, among other things: (a) identifying alternative operators for the Company's New York cable systems on commercially reasonable terms; (b) addressing the potential impact on the Company's contractual relationships with third parties; and (c) navigating the complex legal and regulatory requirements imposed by federal and municipal regulators that have jurisdiction over changes to the ownership and operation of the pertinent lines of business that would be implicated in any undertaking to separate the systems from Charter's organizational structure and transfer them to other operators. Charter's New York cable systems alone, for example, are governed by franchise agreements with over eleven hundred different municipal governments. Transferring any of those agreements to another provider is at least a multi-month process from the moment that the time-consuming and complex applications

are filed, to say nothing of the timelines that would be implicated in review by the Federal Communications Commission and United States Department of Justice.[6]

Second, in addition to the harm to the Company from bracing to exit New York, the preparation of an exit plan would *itself* require Charter to expend substantial effort, resources, and money that could not be recovered if Charter ultimately prevails in challenging the *Revocation Order*. The *Revocation Order* is unprecedented in its scale and represents a unique and extremely unusual penalty that, to Charter's knowledge, no other major cable or telecommunications provider has ever faced in New York. Merely developing an exit plan to meet the December 24, 2018 deadline would force Charter to divert significant resources from its business operations in order to explore what an exit plan might look like, if it is feasible at all. Already, business executives in various departments of Charter have had to take time away from overseeing the business in order to explain the impacts of the *Revocation Order* and expected impacts of any exit plan. Continuing to divert resources to such an effort, including the time of Charter's management teams, will necessarily impact Charter's ability to focus on its core operations.

Third, the *Revocation Order* and its requirement that Charter file an exit plan is likely to result in a loss of customers unless stayed. Courts have recognized that harms resulting from a loss of customers are sufficient justification for imposing a stay or other injunctive relief. *See Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 859 (3d Dep't 2003) (loss of customers may constitute irreparable injury); *Carleton v. Pindus*, No. 650096-06, slip op. at 7, 2006 WL 4682093 (N.Y. Sup. Ct., N.Y. Cty. Aug. 8, 2006) (trial order) ("Irreparable injury may

[6] As the regulator tasked with implementing these transfer requirements at the state level, the Commission is surely aware that an exit of the size and complexity contemplated in the *Revocation Order* could not be carried out in the time set out by the Commission. This further demonstrates the arbitrary, capricious, and draconian nature of the *Revocation Order*.

be shown by loss of customers, permanent loss of revenues, as well as loss of good will."); *Awwad v. Capital Region Otolaryngology Head & Neck Grp., LLP*, 18 Misc. 3d 1111(A), 2007 WL 4623509, at *9 (N.Y. Sup. Ct., Albany Cty. 2007) (unpublished table decision) (loss of patients and referral business may amount to irreparable harm).

The communications and cable industries are extremely competitive. As described in the Hargis Declaration and the Meeks Declaration, lost customers are difficult to recover. (Hargis Declaration, ¶ 5; Meeks Declaration, ¶ 7.) Institutional customers generally sign long-term contracts, and residential customers, even absent extended contractual commitments, do not frequently switch back and forth between providers. Being forced to commit to a public exit plan is likely to generate uncertainty in the marketplace regarding whether Charter will be operating in the State next summer. That uncertainty naturally affects customers as they are choosing a provider for their cable, internet, and voice services. And any customers Charter loses as a result of uncertainty caused by the *Revocation Order* are unlikely to be recovered by Charter for several years, if ever. (Hargis Declaration, ¶ 5; Meeks Declaration, ¶¶ 7, 10.)

Already, Charter's customers have voiced concern regarding Charter's continued operation in New York State as a result of the *Revocation Order*. *See*, *e.g.*, "Charter's Ouster Worries Western New Yorkers Without Broadband," *Times Union*, (Aug. 16, 2018); Letter from Sen. Robert G. Ortt to Chairman Rhodes (July 31, 2018). [redacted]

Charter anticipates that being forced to prepare and publicly file an exit plan—even if it never ultimately takes effect due to future administrative and judicial proceedings—would erode

Charter's customer base over the upcoming months as customers begin to revoke their contracts and instead purchase services from Charter's competitors due to concerns over Charter's future presence in the State. (Hargis Declaration, ¶¶ 7, 10-11.) Although this loss of customers will be most pronounced in New York, Charter is likely to lose customers across the country as a result of filing a public exit plan. Many of Charter's large, institutional customers have a presence in multiple locations throughout the United States, in addition to New York. (Meeks Declaration, ¶ 8.) Charter often provides these customers with services at many or all of their facilities across the country, an arrangement that is generally more efficient and cost-effective for the customer. (*Id.*) If Charter is required to file an exit plan and these customers perceive that Charter will be forced to exit the New York market, they may well decide to use a different service provider for all of their facilities across the country that Charter currently services. (*Id.*) Indeed, since the *Revocation Order*, competitors have begun to advertise Charter's potential exit from the New York market as a part of their marketing strategy and are likely to escalate such negative marketing campaigns if Charter is required to publicly file an exit plan. (Hargis Declaration, ¶ 7; Meeks Declaration, ¶ 6.) Because the communications industry is highly competitive, particularly in markets where Charter competes with high-speed broadband and commercial data services offered by incumbent telecommunications companies, the loss of customer goodwill as a result of these marketing campaigns has the potential to impose long-term harm that cannot readily be remedied even if Charter prevails in its challenges to the *Revocation Order*. (Hargis Declaration, ¶¶ 4-5, 12-13; Meeks Declaration, ¶¶ 7, 9-10.)

In addition to the likely loss of institutional and retail customers, the *Revocation Order* is also likely to start causing a loss of Charter's advertising customers. [redacted]

[redacted] The filing of an exit plan is likely to amplify this effect. (*Id.* ¶ 5.)

Fourth, absent a stay, these anticipated customer losses resulting from the uncertainty caused by the *Revocation Order* would have adverse effects on Charter's revenue in the upcoming months. Permanent loss of revenue is well recognized as a form of irreparable injury supporting preliminary relief. *See Battenkill*, 1 A.D.3d at 859 (loss of revenues may constitute irreparable injury); *Carleton*, 2006 WL 4682093 (trial order) ("Irreparable injury may be shown by . . . permanent loss of revenues"); *Paw Shop, LLC v. Mestre*, No. 601950/08, slip op. at 4, 2008 WL 8675213 (N.Y. Sup. Ct., N.Y. Cty. 2008) (trial order) (same); *Awwad, LLP*, 2007 WL 4623509, at *9 (same).

It is difficult to meaningfully quantify exactly how many sales or customers Charter would lose specifically due to confusion and uncertainty arising out of the *Revocation Order*, if it is not stayed. But, absent a stay, Charter expects a serious erosion of its New York customer base and revenue in the upcoming months as a result of the *Revocation Order*. (Hargis Declaration, ¶¶ 12-13); *see also Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992) ("Irreparable injury in this context means any injury for which money damages are

insufficient."); *see also Winchester Global Trust Co. Ltd. v. Donovan*, 58 A.D.3d. 833, 834 (N.Y. App. Div. 2d Dep't 2009).

Fifth, the *Revocation Order* has negatively affected Charter's reputation and goodwill, and will continue to do so unless stayed. The *Revocation Order* unfairly paints Charter as an irredeemable bad actor, and the *Revocation Order*'s unwarranted requirement that Charter exit the State within a matter of months has damaged Charter in the general public's eye. Indeed, Charter's goodwill was already harmed by the initial media attention the *Revocation Order* received, and this harm is likely to be exacerbated by the filing of an exit plan that will spur a second round of news stories and public speculation regarding the dispute. (*See* Hargis Declaration, ¶¶ 6, 10.) [redacted] If a stay is not granted, Charter will have to expend significant time and resources to combat the negative and unfair impact of the Order on the public's perception of the Company.

Courts have repeatedly recognized that "[h]arm to business reputation is harm for which money damages are insufficient and for which injunctive relief may be appropriate." *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 222 (4th Dep't 2009); *see also, e.g., Battenkill*, 1 A.D.3d at 859 ("Loss of goodwill associated with a business, which is difficult to quantify, can constitute irreparable injury even if monetary damages, as well as injunctive relief, are requested."); *Klein, Wagner & Morris*, 186 A.D.2d at 633 (finding that action that would "add confusion and affect the plaintiffs' reputation with clients, potential clients, and the [relevant business] community" constituted irreparable injury); *Jacob H. Rottkamp & Son, Inc. v. Wulfhost Farms, LLC*, 17 Misc. 3d 382, 388 (N.Y. Sup. Ct., Suffolk Cty. 2007) ("Evidence of

potential damage to a business reputation is a sufficient basis to establish irreparable injury justifying the grant of preliminary injunctive relief.").

Finally, the deprivation of Charter's constitutional rights resulting from the *Revocation Order* constitutes irreparable harm *per se*. *See, e.g.*, *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" (quoting Wright & Miller, *Federal Practice & Procedure*, § 2948)). Specifically, both (1) the violation of Charter's First Amendment rights due to the *Revocation Order*'s reliance on Charter's arguments in its legal briefs and its public relations statements as evidence of Charter's supposed bad faith; and (2) the Commission's violation of Charter's due process rights by revoking the merger without providing Charter an opportunity to submit evidence or argument on the subject, necessarily caused Charter irreparable harm.

II. CHARTER IS LIKELY TO SUCCEED ON THE MERITS OF ITS CHALLENGE TO THE COMMISSION'S *SUA SPONTE* DECISION TO REVOKE ITS MERGER APPROVAL AFTER TWO-AND-A-HALF YEARS.

A stay is also warranted because Charter is likely to succeed on the merits of its challenge to the Commission's *Revocation Order*. Charter is cognizant that the Commission itself issued the *Revocation Order* and is therefore unlikely to agree with Charter about the merits of the dispute. However, the "likelihood of success" requirement for granting a stay is relaxed where, as discussed below, the balance of equities tips strongly towards preserving the status quo (*see* Section III, *infra*). In such cases, the movant need only show "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Salinger v. Colting*, 607 F.3d 68, 75 (2d Cir. 2010); *see also Gasoline Heaven at Commack, Inc. v. Nesconset Gas Heaven, Inc.*, 191 Misc. 2d 646, 648-49 (N.Y. Sup. Ct., Suffolk Cty. 2002); *Fifteenth Ave. Food Corp. v. Sibstar Bread Inc.*, 16 Misc. 3d 1102(A), 2007 WL 1732825, at *3 (N.Y. Sup. Ct., Kings Cty. 2007) (unpublished

table decision). Accordingly, to grant a stay, the Commission need not agree with Charter on the underlying merits of Charter's forthcoming legal challenges to the *Revocation Order*.[7] Instead, it need only agree that there are "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Salinger*, 607 F.3d at 75. That standard is easily satisfied here.

As an initial matter, the Commission's interpretation of the Expansion Condition is erroneous. Charter incorporates by reference its objections on this front, and Charter will not restate those arguments here. *See, e.g.*, Case 15-M-0388, Response of Charter Communications, Inc. to Order to Show Cause (May 9, 2018) at 21-61; Case 15-M-0388, Petition of Charter Communications, Inc. for Rehearing and for Reconsideration of June 14, 2018 Order (July 16, 2018) at 21-53.

But even assuming a violation of the Expansion Condition—which there is not—the Commission's order cannot stand. The unprecedented remedy of revoking Charter's merger is excessive, irrational, and vastly disproportionate to any alleged violations of the Expansion Condition. This is especially true given that Charter's dispute as to the meaning of the Expansion Condition is in good faith and was made during the course of exhausting its administrative remedies (as it is required to do). Indeed, there is no reason for the Commission to force Charter to exit the State over a disagreement regarding the meaning of the Expansion Condition. Not only are other, less-dramatic remedies available for any potential violation, but the Commission has no reason to doubt that Charter will abide by any final judgment regarding the *Merger Order*'s requirements. Moreover, the Commission *itself* is currently seeking an injunction from a state court to require Charter to comply with the Commission's interpretation of the Expansion

[7] These challenges include arguments previously presented by Charter in its filings with the Commission as well as those it intends to raise in its forthcoming application for rehearing of the July 27 Orders.

Condition. It is irrational for the Commission to simultaneously require Charter both to cease *and* to expand its New York operations.

The Commission's actions are also unconstitutional. The *Revocation Order* relies to a significant extent on Charter's arguments in its legal briefs and its public relations statements as evidencing Charter's supposed "bad faith."[8] The Commission's statutory authority, however, does not include regulating the public statements or even advertising materials of cable operators, and the Commission may not properly predicate penalties upon such activity. The Commission's decision to penalize Charter for its statements raises clear First Amendment concerns, both regarding Charter's right to petition the government (with respect to Charter's statements in its filings with the Commission) and its right to engage in speech on matters of public concern (with respect to the public relations materials cited in the Order, none of which market Charter's services or propose a commercial transaction). Because the imposition of penalties on this basis concerns matters outside of the Commission's statutory authority and implicates core constitutional rights, the penalties imposed on Charter will be subject to heightened scrutiny on judicial review, and the Commission's decision will not receive deference.

Moreover, the Order's issuance was rife with procedural irregularity. The Commission issued the unprecedented remedy of revoking Charter's merger approval without first providing notice that the remedy was being considered, or allowing Charter or any of Charter's 3.1 million New York customers or any of the municipalities that are served by Charter and are parties to

[8] As Charter will be setting forth in more detail in its forthcoming application for rehearing, the particular public relations statements to which the *Revocation Order* specifically objected were more than six months old and had already been discontinued by the Company several weeks before the *Revocation Order*. More generally, the company's statements were truthful, and the mere fact that Charter declined to affirmatively publicize the Commission's unfavorable views of the Company did not render its statements misleading.

Charter's franchise agreements to comment on the Commission's plan to require their provider to exit the State. This constituted a violation of Section 227 of New York's Public Service Law, which is the exclusive mechanism for terminating franchise agreements and which sets forth both the procedural and substantive requirements the Commission must follow before terminating a cable franchise. Not only did the Commission's procedural maneuvering violate Section 227, but Section 227 limits the substantive bases on which the Commission may terminate a franchise agreement to material breaches of a franchise agreement, the statutory requirements in Article 11 of the Public Service Law, and the regulations promulgated thereunder. Here, the *Revocation Order*'s rationales—such as Charter's statements in its legal filings and in public relations materials (the latter of which are outside the Commission's statutory jurisdiction altogether)—are not among the grounds on which Section 227 allows a franchise to be terminated.[9] Accordingly, there are "sufficiently serious grounds for litigation" about whether the *Revocation Order* complied with the statute and whether Charter was afforded due process before the imposition of such a draconian remedy.

What is more, the sheer magnitude and potential consequences of the Commission's actions to third parties, such as municipalities who have contracts and franchise agreements with Charter, also raises serious questions under New York law about whether the Commission was required to seek public comment and consider the impact to third parties before taking such a momentous and unprecedented action—either under SAPA or under its obligation to engage in reasoned decision-making. More generally, the unprecedented nature of the *Revocation Order*

[9] Even assuming that Charter had fallen short of its buildout commitment under the *Merger Order* (which it contests), moreover, a unique, merger-specific requirement that the Commission imposes on a provider pursuant to a transaction approval is neither a franchise requirement nor a generally applicable "provision of [Article 11] or of the regulations promulgated hereunder" upon which a franchise may be terminated.

raises concerns regarding the proportionality of that remedy even assuming the regulatory violations alleged, which Charter intends to contest through judicial review. And the severity of the Commission's penalty, coupled with other evidence, also suggests that considerations external to the Commission's regulatory oversight responsibilities, including the fact that Charter is embroiled in a labor dispute, played a role in this matter.

The *Revocation Order* also purports to rely on various allegations about safety defects in Charter's network buildout efforts, but fails to identify details regarding those alleged incidents—and, most critically, the Commission never provided Charter an opportunity to submit evidence or argument on the subject. The decision to penalize Charter for these incidents raises serious procedural questions both under Section 227 and under the Due Process Clause.

Whether the Commission ultimately concurs with these concerns or not, they raise serious questions that will be the subject of forthcoming litigation. Requiring Charter to file an exit plan before these questions can be resolved—to say nothing of forcing Charter to start actually carrying out the array of disruptive and resource-draining tasks that would be needed to start planning for a withdrawal from the New York market—would deprive Charter of its statutory and constitutional rights to judicial review of the penalties the Commission is seeking to impose through the *Revocation Order*. New York law establishes a strong presumption that parties have a right to judicial review of final agency action. *See, e.g.*, *Long Island Coll. Hosp. v. Catherwood*, 23 N.Y.2d 20, 36 n.3 (1968) ("It is today an established principle of jurisprudence [sic] that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); citing *Matter of Jeanpierre v. Arbury*, 4 N.Y.2d 238, 240 (1958))). Indeed, the New York Court of Appeals has observed that "in the absence of some procedure for the review

of a final agency action, a serious constitutional question might arise." *Id*. Requiring Charter to commit to and submit an exit plan and to start undertaking the disruptive preparations that would be needed in advance of exiting the State, all before meaningful judicial review can take place, would deprive Charter of its clear statutory and constitutional rights to have a court evaluate the lawfulness of the Commission's actions.

III. THE BALANCE OF THE EQUITIES FAVORS CHARTER.

A court faced with Charter's request for a stay would "weigh the harm each side would suffer in the absence or face of injunctive relief" in balancing the equities. *Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 363 (N.Y. Sup. Ct., N.Y. Cty. 2003); *see also Klein, Wagner & Morris*, 186 A.D.2d at, 633 ("It must be shown that the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to the defendant through the imposition of the injunction."). Here, the balance of equities decidedly favors staying the third and fourth ordering clauses of the *Revocation Order* while Charter pursues its normal administrative and judicial remedies.

First, the equities favor a stay while Charter pursues administrative rehearing and judicial review because Charter seeks to "preserv[e] the status quo while the legal issues are determined in a deliberate and judicious manner." *State of N.Y. v. City of N.Y.*, 275 A.D.2d 740, 741 (2d Dep't 2000) (affirming the grant of a temporary restraining order (citation omitted)). Where a movant "merely seeks to maintain the *status quo*, the balance of equities tilt in its favor." *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (N.Y. Sup. Ct., N.Y. Cty. 2005); *Klein, Wagner & Morris*, 186 A.D.2d at 633. That is all that Charter seeks to do here—to prevent the Commission from revoking its two-and-half-year-old approval of the merger and requiring Charter to publicly commit to an exit plan that, as explained in Part I *supra*,

would cause irrevocable short-term harm to its business interests that could not subsequently be remedied through review of the Commission's order.

A stay will allow for a reasoned and appropriate administrative and judicial review of the ultimate questions in this dispute: whether the Commission's actions were within its statutory authority, consistent with the New York Public Service Law and the federal Constitution, proportional to the alleged violation, and otherwise consistent with law. Requiring Charter to file an exit plan—let alone prepare to leave the State entirely—before this process can move forward to conclusion would both deprive the Commission itself of the capability to reverse course on rehearing and foreclose a court from granting full relief once Charter has an opportunity to seek judicial review. The law favors interim relief that preserves the status quo precisely to ensure that such legal challenges can proceed in a deliberate fashion. *See Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976) (finding plaintiffs whose benefits were about to be cut off entitled to preliminary injunction "to hold the parties in *status quo*" so that the court could properly decide the issues). Granting the requested relief will allow the parties' dispute to proceed "in a deliberate and judicious manner," rather than disrupting that process by requiring Charter to undertake the substantial work of preparing for exiting the State, including drawing up an exit plan, all of which will damage its business interests (as set forth in Part I, *supra*), before such review can occur. *See State of N.Y.*, 275 A.D.2d at 741.

Second, the public interest weighs in favor of granting a stay. Without a stay, third parties potentially affected by the *Revocation Order* will be subjected to serious uncertainty in the interim. And this is putting aside the obvious and significant harm to Charter's employees if Charter is actually required to wind down its business by June 2019 and exit the State. In addition, large institutions that rely on Charter for communications services under long-term contracts today—

such as hospitals, municipal governments, and universities—are likely to view any publicly-filed plan as a strong indication of Charter's potential exit from New York State and, as a result, would be forced to divert resources immediately to planning for such a contingency. Charter continues to serve its customers in the State, offering increased broadband speeds and high-quality service. Forcing Charter to exit the State would harm individual Charter customers, who are likely to experience disruptions in service and billing if Charter is required to sell its assets to another provider. Such considerations are relevant to balancing the equities in assessing whether a preliminary injunction or other interim relief is appropriate. *See, e.g.*, *Destiny USA Holdings*, 69 A.D.3d at 223 (weighing the public interest when balancing the equities); *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 432 (1st Dep't 2016) ("The harm to plaintiff and its employees outweighs any potential harm to defendant resulting from delays to its redevelopment scheme"); *Vergari v. Pierre Prods., Inc.*, 43 A.D.2d 950, 951 (2d Dep't 1974) (considering harm to the public).

Moreover, preserving the status quo would preserve Charter's ability to persist in its ongoing broadband expansion efforts, which it has diligently continued in the months since the Commission's *Revocation Order*, and has every intention of continuing during the pendency of administrative and judicial review.[10] Forcing Charter out of the state would delay those efforts: not only would Charter's ongoing network construction activities be interrupted, but any successor provider(s) may not be bound by similar buildout commitments at all. And even if they were, the disruption from any change in ownership of Charter's New York cable systems—not to mention the difficulties that any successor provider(s) would face in navigating for the first time the

[10] In addition, although Charter and the Commission continue to disagree as to the appropriate methodology for counting qualifying passings, Charter is also currently on track—under its methodology—to meet the upcoming December 16, 2018 buildout target.

numerous logistical, administrative, and legal challenges that Charter has had to overcome over the course of the past two years—will almost certainly result in a significantly slower pace of construction than the one Charter is currently undertaking.

Third, granting Charter the requested relief will not impose any meaningful burden on the Commission. *See Gerald Modell*, 196 Misc. 2d at 363. The Commission is currently pursuing an action to enforce its interpretation of the Expansion Condition in the Supreme Court, suggesting that the Commission *itself* intends for the condition to remain in effect rather than for Charter to actually discontinue operations and leave the State. And even if the Commission truly intended to revoke Charter's merger approval and require it to leave New York, there is no reason the Commission needs Charter to do so—and to submit a plan to that effect—*immediately*, before Charter has had an opportunity to seek rehearing and obtain judicial review. If a stay is entered, the Commission will still be able to require Charter to submit a plan (and to exit the State) if the *Revocation Order* survives review. By contrast, if the Commission does not stay these requirements, Charter will suffer irreparable harm even if it ultimately prevails in challenging the revocation of merger approval. *See* Part I, *supra*. Where, as here, "the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to the defendant through the imposition of the injunction," the balance of equities favors immediate equitable relief. *See Klein, Wagner & Morris*, 186 A.D.2d at 633.

CONCLUSION

For the foregoing reasons, Charter respectfully requests that the Commission stay ordering clauses 3 and 4 of the *Revocation Order*.

Respectfully Submitted,

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/s/ *Maureen O. Helmer*

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

Samuel L. Feder
Ian Heath Gershengorn
Luke C. Platzer
Laura P. MacDonald
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
lplatzer@jenner.com

Counsel for Charter Communications, Inc.