

New York State 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;]	Case 15-M-0388
For Approval of a Pro Forma Reorganization; and]	
For Approval of Certain Financing Arrangements]	

Comments of the Public Utility Law Project of New York

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I. Introduction

On July 2, 2015 Charter Communications, Inc. (“Charter”) and Time Warner Cable Inc. (“Time Warner,” hereafter jointly “Petitioners” or “Companies”) filed a joint petition (“Petition”) with the Public Service Commission (“PSC” or “Commission”) seeking approval under Public Service Law (“PSL”) §§ 99, 100, 101, and 222 to transfer control of subsidiaries and franchises, for a reorganization, to transfer Time Warner telephone systems, cable systems and assets to Charter, and to engage in certain financing arrangements. Subsequently, on July 22 of 2015, the Commission invited parties to comment on the petition.¹

The proposed transaction would have Charter and a newly purchased subsidiary, Bright House Networks LLC (“Bright House”) merge with Time Warner and its subsidiaries (“TWC Subsidiaries”)² into an entity described as “New Charter”. It is asserted by Petitioners that upon completion of the proposed transaction, the TWC Subsidiaries would be indirect subsidiaries of New Charter.³ Simultaneously, Charter asserts it will reassign its existing franchises in New York State among its wholly owned subsidiaries, with the goal of consolidating all current New York State franchises held by Charter into the control of one entity, Charter Communications Entertainment I (“Charter I”).⁴ Finally, as part of the above described reorganization(s), one or more of the merging entities will enter into financing arrangements totaling approximately \$26.8 billion.⁵

¹ See, Case 15-M-0388, Notice Inviting Comments, filed July 22, 2015.

² The relevant Time Warner subsidiaries include Time Warner Cable Information Services (New York) LLC (f/k/a Time Warner Cable ResCom of New York LLC) (hereafter “TWCIS”) and Time Warner Cable Business LLC (“TWCB”) (together, the “TWC Competitive Carriers”); and Time Warner Cable Northeast LLC and Time Warner Cable New York City LLC (the “Cable Franchisee subsidiaries”).

³ See, 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; for Approval of Assignment of 16 Franchises; and for Approval of Certain Financing Arrangements (“Joint Petition”), filed July 2, 2015, pg. 2.

⁴ Id.

⁵ Id. The Public Utility Law Project of New York notes here that overly leveraged entities potentially expose customers to downside risk and increased prices, and the entity to significantly increased costs of borrowing for infrastructure upgrades.

The Public Utility Law Project of New York (“Utility Project”) appreciates the opportunity to submit comments on the proposed transaction and its implications for New York’s cable, telephone and broadband consumers. The Utility Project offers herein several recommendations to the Commission to protect the interest of New York consumers, and the public interest generally. The Utility Project neither opposes or supports the proposed transaction at this time. However, if the Commission votes to approve the proposed transaction, we respectfully request that the Commission make approval conditional on Petitioners making a number of commitments that would directly advance the public interest, as recommended below.

The Utility Project recommends that the Commission condition approval of the merger on a guarantee that Petitioners will make certain commitments, including but not be limited to: (i) increasing benefits for low-income/fixed-income consumers; (ii) reforming and upgrading Time Warner’s existing standalone broadband service(s), with a firm commitment to expand construction, reform and upgrade specifically throughout the rural areas of the state served by the Joint Petitioners; (iii) the implementation of public service quality measures relating to its provision of telephony; and (iv) implementing a new “Social Contract” reasonably calculated to aid in the economic development of New York’s lowest-income, rural, and most economically-challenged census tracts within the company’s service territories, and to make high-speed low-cost broadband service(s) as universally available on a retail basis to New Yorkers as practicable, and particularly to places of education where children might benefit from such access.

II. Low-Income Customer Needs

Although the Petitioners provide some detail in the “Overall Public Benefits” and “Corporate Citizenship” sections of their petition concerning improvements to the

franchised entity(ies) and the services offered,⁶ the Petitioners only identify three low-income programs with specificity in their petition.⁷ The Utility Project respectfully requests the Commission require Petitioners to continue offering such low-income focused programs, and to supplement the record in detail concerning Time Warner, Charter and Bright House's existing low-income programs, how those programs shall or might be initiated or reformed in New York, and any innovative programs that might be initiated in New York to benefit its low-income communities.⁸

a. High-speed Low-Cost "Lifeline" Broadband

In the Joint Petition, Charter notes that it currently makes minimum broadband Internet download speeds of 60 or 100 Mbps available for retail purchase in almost all of its service areas, which currently include 4.8 million residential and business customers spread over twenty-eight (28) states.⁹ In New York State, only New York City currently receives minimum broadband download speeds above 100 Mbps; in Rochester broadband download speeds test much lower, and in Buffalo, broadband download speeds do not even achieve 60 Mbps.¹⁰ Furthermore, Charter asserts it will "build upon Bright House Networks' broadband program for low-income consumers by making a broadband offering available with higher speeds and expanded eligibility while continuing to offer the service at a significant discount..." with such service to be

⁶ See, e.g., Joint Petition at pp. 23-27, 30-34.

⁷ See, Joint Petition at p. 27. While there are other programs that quite likely may confer benefit to low-income customers (see, e.g., Joint Petition at 26), they are not clearly so identified. Similarly, no additional low-income programs are identified in Petitioners' Public Interest Statement filed with the FCC on June 25, 2015, which is available at <https://transition.fcc.gov/transaction/charter-twc-bhn/charter-twc-bhn-public-interest.pdf>

⁸ The Utility Project is aware that the Joint Petitioners also offer low-income cable television programs and would request the Commission condition an approval of the proposed transaction if there were any evidence in the record that the companies intended to curtail such programs.

⁹ See, Joint Petition at p. 33.

¹⁰ According to SpeedTest Results for 2015, Time Warner Cable is showing downstream speeds in NYC, Buffalo, and Rochester as 140.52 Mbps, 81.23 Mbps, and 39.81 Mbps, respectively. The upstream speeds are 21.42 Mbps, 73.21 Mbps, and 5.78 Mbps, respectively. To view SpeedTest Results by State across the U.S. see: <http://www.speedtest.net/awards/us>.

available within six months of the closing of the proposed Transaction.¹¹ Charter also asserts it will significantly expand Bright House Networks' schools-focused "Connect2Compete" program, which provides "low-cost Internet service, discounts on Internet-capable devices" and digital literacy training.¹² The Commission should demand that these assertions be supplemented with explanation, so that Petitioners are required to demonstrate how the proposed merger will enable consumers across all parts of New York State fast and reliable broadband service, within the timeline proposed by Petitioners.

Additionally, while Time Warner has deployed "Everyday Low Price" and "Lite Internet" Internet offerings at various times, it is unclear whether a broadly available high-speed Internet service exists for less than \$14.99 per month in New York. The Utility Project therefore respectfully requests that if the Commission approves the proposed Transaction, that it condition such approval upon Charter offering a low-cost high-speed broadband Internet service of approximately 25 Mbps downstream and 1-3 Mbps upstream at a cost of \$10 or less per month without undue delay upon the closure of the merger, if such occurs.

b. Maintaining Lifeline Service Currently Offered via Time Warner Cable

Universal service is the cornerstone of the United States' and New York's public policy toward basic and advanced telephony. The Telecommunications Act of 1996 ("TCA") and the Federal Communications Commission's ("FCC's") recent "Open Internet" rules extended that policy to include access to broadband Internet services at just and reasonable (i.e., affordable) rates.¹³ The Lifeline program for low-income/fixed-

¹¹ See, Joint Petition at p. 27. Absent such a deployment, the Utility Project would potentially have significant concerns, since Charter does not have a dedicated low-income broadband offering.

¹² Id.

¹³ The FCC's February 26, 2015 Order properly classified the Internet and broadband service(s) within Title II of the Communications Act and Section 706 of the Act. See, e.g., <https://www.fcc.gov/openinternet>.

income customers¹⁴ is particularly important and relevant to this proceeding, and was also expanded in the TCA.

Historically, the PSC has required Eligible Telecommunications Carriers (“ETCs”) to offer a Lifeline telephony service if it chooses to operate in New York. In 2013, Time Warner became the first non-circuit switched cable telephony services provider to file for ETC status.¹⁵ The result of obtaining ETC status is that the telephony provider becomes eligible for a subsidy for the provision of Lifeline service, and the low-income customers of such provider become eligible for Lifeline rate-reduced telephone service. It is the Utility Project’s understanding that Charter’s existing sixteen (16) franchises do not provide Lifeline service, and that Charter has not been designated an ETC by the PSC. As such, Charter’s existing customers in New York do not have access to discounted wireline telephone service that was designed for and directly benefits low-income and vulnerable customers. This is an especially critical distinction since Charter’s current service areas in New York are in communities with some of the highest poverty rates.¹⁶

The Utility Project therefore respectfully requests that any Commission approval of the proposed merger transaction be conditioned upon Charter seeking and/or maintaining the ETC status Time Warner was granted, and offering Lifeline telephony service without delay to all eligible low-income customers in its service areas (i.e., franchise territories). Low-Income New Yorkers are too often forced to choose between vital services like telephone or electricity, and food or medicine. Charter’s continuance

¹⁴ See, <https://www.fcc.gov/guides/lifeline-and-link-affordable-telephone-service-income-eligible-consumers>.

¹⁵ See, Case 12-C-0510, Order Approving Designation as a Lifeline-Only Eligible Telecommunications Carrier, filed March 18, 2013.

¹⁶ For example, Charter provides service in the City of Rochester, which has been reported to have a city poverty rate of 33.9%, more than double NY state’s poverty rate of 15.9%. See, NY State Community Action Association, New York State Poverty Report, issued March 2015, available here: <http://nyscommunityaction.org/wp-content/uploads/2014/03/2015-Poverty-Report-w-50th-logos-for-online.pdf>, page 95. For a list of Charter’s current service areas in New York, see here: <https://www.thecharterbundle.com/New-York>.

and expansion of Time Warner's provision of Lifeline would therefore unequivocally be in the public interest by providing the vital service of telephony to fiscally vulnerable New Yorkers.

III. General Broadband Concerns

a. Completion of Build-out of Retail Accessible Broadband

While it is common to talk as if all, or substantially all, of New York is wired for high-speed broadband, such a belief is inaccurate. As the New York State Broadband Program Office reported in its 2012-2013 annual report, significant portions of the state remain unwired for broadband.¹⁷ In the Capital Region for example, more than 17% of households lack access to broadband (approximately 85,000 households), and it is likely that number is predicated upon the erroneous broadband industry concept that "homes passed" is equivalent to houses with actual retail access to broadband.¹⁸ In New York City, where one might expect ubiquitous broadband, more than 250,000 households lack access to broadband.¹⁹ This failure to completely wire New York for broadband has been documented in many reports, among which is the Utility Project's 2014 report "It's All Connected," filed in Case 14-C-0370 before the Commission.

In its public interest filing at the FCC, Charter stated that within four years of the completion of the Transaction: (i) it would invest \$2.5 billion into commercial areas within its footprint; (ii) it would build 1 million line extensions in its service area to either wire new customers in unserved areas, or to create competition with existing

¹⁷ See, New York State Broadband Program Office, Annual Report: 2012-2013, <http://nysbroadband.ny.gov/annual-reports>

¹⁸ Id. at p. 33.

¹⁹ Id. at p. 39.

providers; and (iii) it would deploy over 300,000 out-of-home Wi-Fi access points.²⁰ The Utility Project supports these proposed initiatives, but respectfully requests in addition that the Commission additionally require the Petitioners to supplement the record with specific plans for how such initiatives would be deployed in New York.

The expanded build-out in New York's rural areas has been recognized as an extremely important State issue, as Governor Cuomo acknowledged in 2014, when he pointed out that almost 30% of New Yorkers – six million New Yorkers -- do not use broadband at home because of issues including affordability and lack of access or a perception of need. Therefore, the Utility Project respectfully requests the Commission to make the following demands of Petitioners: that a significant portion of Charter's proposed infrastructure investment into commercial areas be directed toward distressed census tracts, with more than 50% of the New York State allocation of the 1 million new lines Charter states it will construct be specifically directed to rural and distressed census tracts outside of New York City; and that the proposed Wi-Fi deployment specifically include areas of the State where cellular broadband and voice are known to lack ubiquitous coverage.²¹

b. Standalone Service

Time Warner currently has a stand-alone basic broadband offering that is provided at a cost of \$29.99 per month, and an Everyday Low Price offering that is \$14.99 per month (absent any costs for modem rental and associated taxes and fees).²² In this instance, Charter and/or Bright House's offerings appear to be superior in price

²⁰ See, MB Docket No. 15-149, In the Matter of Application of Charter Communications Inc., Time Warner Cable Inc., Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations ("Charter FCC Filing"), p. 18.

²¹ See, "Governor Cuomo Announces \$9 million Broadband Investment in the North Country," press release issued July 30, 2014, see <http://www.governor.ny.gov/press/07302014-north-country-broadband-investment>.

²² See, Time Warner Cable homepage showing current offers, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Sept. 16, 2015).

and speed. However, it is important to note for the record that it will be important to low-income households and other New Yorkers to be able to purchase such stand-alone whether they are new or existing customers, and without paying modem rental fees (as is standard with Time Warner) or other associated fees.

Both of these plans perform with speeds far below the standard service offering which is priced at \$34.99 per month (absent any costs for modem rental and associated taxes and fees). Comparatively, under the proposed transaction, Charter and/or Bright House's offerings appear to be superior in price and speed to that of Time Warner Cable. However, Petitioners have not clarified in their petition whether low-income households and other New Yorkers will be able to purchase such stand-alone service under the newly merged New Charter (as a new or existing customer), without paying the modem rental fees or other associated fees which are customarily added on to Time Warner's internet service charges. The Utility Project respectfully requests therefore that any approval of the proposed Transaction be conditioned upon the offering by Charter of an enhanced stand-alone basic broadband service ubiquitously across the State, and that such service be offered without inclusion of a modem rental fee.

IV. Service Quality

Setting aside the consumer complaints that may be attributable to Superstorm Sandy and to continual rate increases, Time Warner has been the subject of a large number of consumer complaints in New York,²³ and reportedly had the lowest customer satisfaction of any cable or broadband provider.²⁴ While such complaints if allocated to the cable may be regrettable indicia of subpar investment in physical plant,

²³ See, e.g., the Better Business Bureau noted that 697 complaints about Time Warner's service were closed over the past three years, <http://www.bbb.org/new-york-city/business-reviews/television-cable-catv-and-satellite/time-warner-cable-s-new-york-city-region-in-new-york-ny-460>; see, also,

²⁴ See, Brian Stellar, "Comcast and Time Warner Cable Customers Say Service is Getting Worse," CNN Money, June 2, 2015, <http://money.cnn.com/2015/06/02/media/comcast-time-warner-cable-customer-satisfaction/>. According to this story, Time Warner's customer satisfaction measure dropped 10% from the previous year.

or of poor allocation of resources toward consumer service and satisfaction, if they are attributable to telephony services, they could implicate serious public safety concerns.

Failure in one's telephone service relates directly to public health and welfare, and thus is strongly protected in the Public Service Law and in the PSC's rules concerning telephone service quality – 16 NYCRR 600-609 et seq. Time Warner as an ETC files service quality reports with the PSC on measures akin to those applied to traditional telephone corporations, but such reports are protected by claims of trade secrecy.²⁵ As a consequence, it is difficult to determine how much of Time Warner's consumer complaints are directly attributable to telephony service quality. The Public Utility Law Project therefore respectfully requests that the Commission condition any approval of the proposed merger upon a service quality improvement plan with a negative revenue adjustment similar to those applicable over time to the other dominant New York telephone corporations such as Verizon and Frontier. Additionally, the Utility Project requests the Commission work with the Joint Petitioners to give rise to a publically available service quality report so that individual consumers can see patterns of bad service quality, and the State's consumer protection entities can advocate for better service quality and infrastructure investment based upon objective and transparent factual data.

V. A New Social Contract

In 1995 in case FCC 95-478, the FCC issued an Order binding Time Warner to what was termed the "Social Contract."²⁶ The Social Contract resolved more than 900 disputed rate increases, refunded more than \$4.7 million plus interest to subscribers,

²⁵ See, letter from Public Utility Law Project of New York to Hon. David Prestemon, Administrative Law Judge, Case 14-M-0183, Concerning a FOIL Determination Relating to a Request for Service Quality Records, October 20, 2014, at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0183>.

²⁶ See, Case FCC 95-478, In the Matter of Social Contract for Time Warner, adopted and released November 30, 1995.

and committed the company to a five year program under which it invested in excess of \$4 billion into its cable systems to increase fiberoptic deployment, system reliability, channel bandwidth and signal quality.²⁷ At least 60% of all capital invested was to be focused upon basic service tier upgrades, and the company was ordered to create a “lifeline basic tier” of programming on cable systems serving at least 85% of its total subscribers.²⁸ Time Warner was additionally ordered to provide a free cable connection to all public schools within its service territories that are passed by its system(s), and to provide a free cable connection to private secondary schools whose students received funding under Title I of the Education and Secondary School Act.²⁹ Finally, Time Warner was directed to provide access to cable modem services and a free modem to schools when such a product was created, and the FCC required an immediate 10% reduction of basic service tier costs and limited annual increases in rates by the company.³⁰

Arguably, given Time Warner’s record low customer approval statistics over the past several years, and other objective indicia of poor service quality and customer satisfaction, the Utility Project submits that the time is right for the Joint Petitioners to enter into a new social contract with New York’s municipal franchisees. Given the scale and scope of Charter’s promised investment, upgrades and reforms, the Utility Project will forebear from outlining in detail its conception of a new social contract in these comments. However, such an agreement would be reasonably calculated to aid in the economic development of New York’s lowest-income, rural and most economically-challenged census tracts within the company’s service territories, and to make available high-speed low-cost broadband service(s) as universally available on a retail basis to New Yorkers as practicable, and particularly to places of education where children might benefit from such access, low-income housing projects, areas of public

²⁷ Id. at p. 4.

²⁸ Id.

²⁹ Id. at p. 5.

³⁰ Id.

association, and such other places as might reasonably give rise to new entrepreneurial business models among under-represented groups.³¹

VI. Conclusion

As noted above, the Utility Project neither opposes the proposed merger, nor supports it at this time. There are a number of significant commitments that would need to be negotiated, and information requests to be sought and scrutinized, before such an action would be prudent.

In order to have a reasonable argument that the proposed transaction is in the public interest, it would be necessary to be able to point to:

- savings refunded to consumers or reinvested in the network or new construction;
- service quality metrics and negative revenue adjustments that are reasonably calculated to incentivize improved results;
- a specific and granular commitment with clear deliverables, to construct, extend and upgrade network in unserved and under-served areas of the State;
- broad reform of and investment in infrastructure; and
- a commitment to a broad and deep investment in jobs, support of entrepreneurial businesses, and to eliminating the digital divide that would be evinced in a new social contract.

While it is not unreasonable to assume that such factors may be demonstrated or conditioned upon approval later in this proceeding, such is not the case now, and is why among other reasons the Utility Project reserves its final opinion on the

³¹ Such an expansion might profitably include upgraded or new service to libraries, community centers, municipal properties, public facilities, hospitals, and other areas of potentially high concentration of community-based organization usage.

proposed merger until later in the proceeding. Additionally, the Utility Project notes here that it has not covered in these comments all areas of inquiry that might be addressed in the course of determining where the public interest lies in the proposed merger. Consequently, the Utility Project reserves the right to take up those other areas of inquiry in its Reply Comments or later in the proceeding where such inquiry is necessary or convenient.

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