

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on July 27, 2018

COMMISSIONERS PRESENT:

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

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

ORDER CONFIRMING MISSED JUNE 2018 COMPLIANCE  
OBLIGATIONS AND DENYING GOOD CAUSE JUSTIFICATION

(Issued and Effective July 27, 2018)

BY THE COMMISSION:

INTRODUCTION

On January 8, 2016, the Commission approved the merger  
of Time Warner Cable, Inc. (Time Warner) and Charter  
Communications, Inc. (Charter or the Company) subject to specific  
conditions.<sup>1</sup> Charter operates in New York under the trade name  
"Spectrum." The most critical condition that was identified by  
the Commission as having the most public interest value involves  
a commitment by Charter to expand the Company's network to "pass"  
an additional 145,000 "unserved" (download speeds of 0-24.9  
Megabits per second (Mbps)) and "underserved" (download speeds of

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<sup>1</sup> Case 15-M-0388, Charter Communications and Time Warner Cable -  
Transfer of Control, Order Granting Joint Petition Subject to  
Conditions (issued January 8, 2016) (Approval Order).

25-99.9 Mbps) residential and/or business units in less densely populated areas of the State (the Network Expansion Condition).<sup>2</sup>

As a first step, Charter was required to pass 36,250 residential and/or business units by May 18, 2017. Charter failed to achieve that milestone. As a result of this failure, a Settlement Agreement<sup>3</sup> was reached with Charter establishing revised milestones. Pursuant to the Settlement Agreement, Charter was, among other things, required to meet new milestones by passing 36,771 residential and/or business units by December 16, 2017 and 58,417 by June 18, 2018. On January 8, 2018, Charter submitted its "Buildout Compliance Report," which provided the Commission with the Company's purported number of new passings as of December 16, 2017, and an update of its 145,000 buildout plan.

On June 14, 2018, following a process that included an Order to Show Cause and Charter's various responses thereto, the Commission, among other things, disqualified 18,363 passings from the Company's December 16, 2017 buildout report filed on January 8, 2018 because many of those addresses were in densely populated urban cities including New York City (NYC), thereby causing Charter to fail to satisfy the required 36,771 new passings target.<sup>4</sup> The Commission also required Charter to revise its 145,000 buildout plan to remove any additional addresses declared ineligible in accordance with its June 14 Order. On July 9, 2018, Charter submitted its "Update and Bulk Address

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<sup>2</sup> Id., p. 53 and Appendix A §I.B.1.

<sup>3</sup> Id., Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (issued September 14, 2017) (Settlement Order). On September 14, 2017, the Commission adopted the Settlement Agreement, filed on June 19, 2017.

<sup>4</sup> Id., Order Denying Charter Communications, Inc.'s Response to Order to Show Cause and Denying Good Cause Justifications (issued June 14, 2018) (June 14 Order).

Report," which provided the Commission with the Company's purported number of additional "passings" as of June 18, 2018, and an update of its 145,000 buildout plan. As a result of Charter's most recent filing, the Commission initiated a further review of the addresses contained therein.

Through this Order, it is determined that Charter has failed to satisfy the Settlement Agreement's June 18, 2018 target (by more than 22,000 passings) and that Charter has not made a sufficient Good Cause showing for this latest miss. As a result, Charter forfeits the opportunity to earn back \$1 million from the Letter of Credit under the Settlement Agreement. In addition, the Settlement Agreement's "Sole Remedy" provision is now null and void and Counsel to the Commission is directed to commence a special proceeding or an action in the New York State Supreme Court pursuant to Public Service Law (PSL) §§25, 26, and 227-a in the name of the Commission and the People of the State of New York to stop and prevent future violations by Charter of the Network Expansion Condition.

This step is being taken after repeated attempts by the Commission, through administrative enforcement, which have not resulted in changes to Charter's commitment to meet the requirements of the Network Expansion Condition. Counsel should request penalties and injunctive relief as appropriate.

#### BACKGROUND

In approving the merger, the Commission stated that, for the transaction to meet the enumerated statutory "public interest" standard, it must yield positive net benefits, after balancing the expected benefits properly attributable to the transaction offset by any risks or detriments that would remain

after applying reasonable mitigation measures.<sup>5</sup> Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York.<sup>6</sup> Among those established conditions, was the Network Expansion Condition wherein the Commission noted its "significant concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas."<sup>7</sup> To mitigate this concern, the Commission required the extension of Charter's network to pass an additional 145,000 homes and businesses in less densely populated areas across the State. Charter was initially required to complete this buildout in four phases, 25%, or 36,250 premises per year from the date of the close of the transaction,<sup>8</sup> and file quarterly reports on the status of its network build. The Approval Order, therefore, required Charter to complete an initial buildout of 36,250 premises by May 18, 2017.

On May 18, 2017, Charter filed an update regarding its buildout progress. This update stated that Charter had passed a total of only 15,164 premises, or 41.8% of the initial Approval Order target. Subsequently, discussions were initiated. The culmination of those discussions resulted in the filing of the Settlement Agreement on June 19, 2017.

The Commission adopted the Settlement Agreement on September 14, 2017. Among other things, Charter agreed to pay

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<sup>5</sup> Approval Order, p. 19.

<sup>6</sup> Id., p. 49.

<sup>7</sup> Id., pp. 52-53. This condition was particularly important to the Commission's ultimate decision to conditionally approve the transaction, accounting for approximately \$290 million of the estimated \$435 million in incremental net benefits that the transaction was expected to accrue for the benefit of New York customers.

<sup>8</sup> The transaction closed on May 18, 2016.

\$1,000,000 into an escrow account within 30 days of the adoption of the Settlement Agreement. Charter also agreed to a series of interim targets for its buildout going forward with the ultimate completion date remaining May 18, 2020. The Settlement Agreement modified Charter's buildout obligations between December 2017 and May 2020, which now require that Charter pass the following number of premises: 36,771 by 12/16/17; 58,417 by 6/18/18; 80,063 by 12/16/18; 101,708 by 5/18/19; 123,354 by 11/16/19; and, 145,000 by 5/18/20, and report its actual passings within 21 days after each six-month target date. If Charter misses the target and wishes to make a Good Cause Shown justification, it may file its claim on the same date as the report. The Settlement Agreement also required the filing of a Letter of Credit in the amount of \$12 million to secure Charter's obligations, subject to draw down if Charter misses these interim buildout targets.

According to the Settlement Agreement, for each and every six-month target not met, and where Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back \$1,000,000. The Settlement Agreement also established that if Charter misses any six-month target, within three months and 21 days of the six-month target date, or if such 21st day is not a business day, upon the next business day following, Charter will report its actual passings for the three-month period after the six-month target date. If three months after any six-month target date Charter has still not met the target and wishes to make a Good Cause Shown justification, it may file its claim on the same date as the report. A Good Cause justification requires that Charter "provide a sufficient showing for the Commission to determine that Good Cause Shown has been established" and requires that "such 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.”<sup>9</sup>

On December 28, 2018, Debra Labelle, Director of the Office of Telecommunications issued a letter to Charter laying out DPS Staff’s concerns about the Company’s inclusion of NYC addresses in its buildout plan and set forth DPS Staff’s expectations for Charter’s January 8 filing. Subsequently, on January 8, 2018, Charter filed its report on its buildout progress pursuant to the Settlement Agreement’s December 16, 2017 target. In that filing, Charter stated that it had passed 42,889 premises by December 16, 2017, and provided a revised update to its overall 145,000 premises buildout plan.

In response to Charter’s filing, the Commission issued a Show Cause Order requiring the Company to provide evidence as to why all current addresses that are listed in its January 8, 2018 report that are (1) located within the NYC region (12,467); (2) located where network already existed (1,762); (3) included in Charter’s July 2016 Negative Space List (249), or (4) located within any full or partial census blocks awarded by the Broadband Program Office (BPO) to other service providers in Phases 1, 2 or 3 (except those subset of locations that Charter claims as already completed which are located in the January 31, 2018 BPO Phase 3 census block award areas) of the Broadband 4 All program (44), should not be disqualified from consideration of the Settlement Agreement’s December 16, 2017 target, and why all such other similarly situated addresses should not be precluded from any future Charter 145,000 buildout plan filings and as to why the Chair of the Commission or his or her designee

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<sup>9</sup> Settlement Order, Appendix A.

should not draw down on the Letter of Credit established through the Settlement Order in the appropriate amount.

Charter filed its responses to the Show Cause Order on May 9, 2018. In general, Charter stated that the Show Cause Order disqualified many of its addresses based upon the fact that they are located: (1) in NYC; (2) within a primary service area under one of Charter's cable franchises; (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); (4) in census blocks the BPO has bid out for subsidies; and (5) in Negative Space locations to which Charter had previously indicated that it did not anticipate expanding its network. Charter claimed that the Commission is limited to the specific terms in the Network Expansion Condition as adopted, and that none of the new criteria it cites above are set forth therein. Adding them after the fact, according to the Company, would violate the plain text of the Approval Order.

The Commission ultimately determined that Charter had failed to provide sufficient evidence as to why the Commission should not (1) disqualify 18,363<sup>10</sup> passings from its December 16, 2017 buildout report filed on January 8, 2018, thereby causing Charter to fail to satisfy the required 36,771 new passings target pursuant to the Settlement Agreement; (2) remove 6,612 "Negative Space"<sup>11</sup> addresses from Charter's current 145,000 buildout plan and preclude any future Negative Space addresses awarded by the BPO from Charter's 145,000 buildout plan; and, (3) remove 5,323 not-yet-completed addresses in Charter's

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<sup>10</sup> See, generally, June 14 Order.

<sup>11</sup> The Negative Space is defined as addresses previously identified by Charter which would not be included in its 145,000 buildout plan.

current 145,000 buildout plan that are not in the Negative Space list, but are co-located in the BPO's Broadband 4 All Phases 1-3 awarded census blocks and preclude any future addresses that are not in the Negative Space list, but are co-located in the BPO's awarded census blocks from Charter's 145,000 buildout plan.

The Commission further determined through that Order that Charter had not provided sufficient justification to establish an independent showing of "Good Cause"<sup>12</sup> for failing to meet the December 16, 2017 buildout target and that it had therefore forfeited the right to earn back \$1,000,000 from the Letter of Credit in accordance with the Settlement Agreement. The Commission also concluded that Charter failed to remedy its missed December target by the Settlement Agreement's March 16, 2018 "cure" deadline and failed to make a sufficient Good Cause justification in this regard, resulting in a forfeit of its right to earn back an additional \$1,000,000 in accordance with the Settlement Agreement.

#### CHARTER'S JULY 9 FILINGS

On July 9, 2018, Charter filed its Update and Bulk Address Report, which included two exhibits, Confidential Exhibits A and B.<sup>13</sup> Charter states that in order to comply with the Commission's directives in the June 14 Order while also preserving its rights to appeal (as well as to retain a framework to govern the remainder of its buildout efforts in the event the June 14 Order is subsequently modified or reversed,

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<sup>12</sup> The Settlement Agreement provides Charter an opportunity to establish an independent showing of Good Cause, a process under which it could be relieved of a portion of the financial forfeitures under the Settlement Agreement.

<sup>13</sup> Charter also filed a buildout plan on July 5, 2018 in compliance with the June 14 Order. That plan is not being audited here.

either in whole or in part), the Company provided two separate updates for the purposes of its filing.

Charter states that Confidential Exhibit A was the Company's attempt to address the requirements included in the Commission's June 14 Order, to the extent it was practicable to do within what it calls a limited time period. Confidential Exhibit A was modified using the previously filed July 5, 2018 Revised Buildout Plan address list, and includes a total of 92,982 addresses. Charter notes that this list is not complete (52,018 addresses short of the 145,000) since Charter first needs to identify additional homes and businesses to substitute for passings disqualified by the Commission. Among the modifications to this Bulk Address List (BAL) are the removal of all NYC area addresses, as well as Upstate New York addresses disqualified as the result of the June 14 Order, such as locations in BPO Broadband Awarded areas or as contained within Charter's Negative Space list. Confidential Exhibit A contains only 35,681 addresses identified as completed. This figure is 22,736 short of the 58,417 passings that Charter was required to complete under the Settlement Agreement by June 18, 2018.

Charter states that Confidential Exhibit B update was prepared consistent with the Company's prior submissions and in accordance with its interpretation of the Approval Order. Charter states that it continues to disagree with the conclusions reached by the Commission in the June 14 Order, and as an alternative, submits Confidential Exhibit B to ensure that there remains a record for appeal as to Charter's buildout compliance efforts.

Confidential Exhibit B includes a total of 158,113 addresses, of which Charter claims 61,602 as completed passings, and 96,511 as not-yet-completed passings. Of the total 158,113 addresses, 142,381 are located in Upstate New York and 15,732

are located in the NYC area. Of the 61,602-total claimed completed passings, 45,870 are located in Upstate New York and 15,732 are located in the NYC area. All of the 96,511 not-yet-completed passings are located in Upstate New York. Whereas Confidential Exhibit A BAL is 52,018 addresses short of the 145,000 BAL plan requirement, Confidential Exhibit B BAL has an excess of 13,113 addresses above the 145,000 BAL plan requirement.

Confidential Exhibit B includes 15,732 NYC addresses claimed as completed, 3,265 NYC addresses beyond those already disqualified by the Commission. With respect to NYC passings, in this instance, as in all past Charter plan filings, the Company has never included or prospectively identified any NYC passings to be built in its 145,000 plan. Contrary to all other claimed passings (all of which are in Upstate New York) that Charter has provided through prospective four-year planning for review by Department of Public Service Staff (DPS Staff) and the Commission, Charter has continued to provide NYC address completion data, only after-the-fact, allegedly post-completion. At no point in the quarterly plan update process, or otherwise, except as now recently being contested by the Company, has Charter provided any indication that the Company has actually constructed, or ever intended to construct, any passings in the NYC area, until after it has submitted a quarterly filing.

In addition, the Confidential Exhibit B includes a total of 4,327 new addresses in the six previously identified disqualifying Upstate New York cities. Charter claims all 4,327 of these as completed new passings.

This Order will use Confidential Exhibit A as its reference point for the analysis contained herein because it nominally complies with the June 14 Order's directive to remove all ineligible passings. However, Exhibit A, as is, remains far

short of identifying sufficient addresses to complete the overall 145,000 plan requirement.

Charter also filed a "Good Cause Showing" on July 9, 2018. This filing generally argues that Charter has sufficient cause for failing to meet the June 18, 2018 target because the Commission's disqualification of addresses in its June 14 Order frustrated its ability to replace those addresses by the June 18, 2018 target. Charter initially claims to have good cause in believing it was entering the current reporting period with a sufficient number of reportable addresses and it was not until the Order to Show Cause that there was any indication that addresses would be found ineligible. Second, Charter believes that it reasonably relied on its interpretation of the Approval Order as to what could constitute a legitimate passing, which it continues to argue the Commission misinterprets. Finally, Charter is claiming that pole owner delay contributed to Charter's failure to meet the June 18, 2018 target. Charter believes that the Commission inappropriately rejected its previous good cause arguments and incorporates them by reference.<sup>14</sup>

#### LEGAL AUTHORITY

The Commission approved Charter's acquisition of Time Warner Cable on January 8, 2016 pursuant to PSL §§99, 100, 101 and 222(3). In granting its approval, the Commission determined that the proposed transaction was in (or otherwise is consistent with) the public interest, provided that the benefits of the transaction outweighed any detriments, after mitigating identified harms. The Commission also noted in its Approval

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<sup>14</sup> With respect to arguments previously made, by Charter, the Commission addressed those in detail through its June 14 Order and will not reiterate them again here.

Order that it had the broad authority provided through the public interest test to determine what constitutes the public interest, and that the applicable definition is reasonably related to the Commission's general regulatory authority, the nature of the transaction, and its potential impact on New Yorkers. In order to ensure these benefits were actually obtained by New York customers, the Commission established concrete, enforceable conditions, including the Network Expansion Condition at issue here.<sup>15</sup>

This Order enforces the Approval Order and §I(B)(1)(a-b) of Appendix A thereof, as well as the Settlement Agreement. That section states in relevant part that "Charter is required to extend its network to pass, within their statewide service territory, an additional 145,000 'unserved' (download speeds of 0-24.9 Mbps) and 'underserved' (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction, exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs. If at any time during this four-year period, New Charter is able to demonstrate that there are fewer than 145,000 premises unserved and underserved as

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<sup>15</sup> The Network Expansion Condition is consistent with federal law. 47 U.S.C. §1302(a) states in relevant part that "each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

defined above, New Charter may petition the Commission for relief of any of the remaining obligation under this condition.”

The Commission is empowered to issue Orders regarding regulated telephone and cable companies doing business in the State of New York and to interpret its Orders pursuant to PSL §5 and Articles 5 and 11. Charter is a regulated telephone and cable company and also acquiesced to the Commission’s jurisdiction under the Commission’s merger approval authority.<sup>16</sup> The Commission determined that its public interest review is as broad as its statutory obligations and related policies concerning cable and telecommunication services and that “... in reviewing the proposed transaction and its impact on the markets and consumer interests in New York, the Commission must consider the impact it will have on the ability of consumers to gain access to, and rely on broadband networks to exercise effective communication choices.”<sup>17</sup> New York courts have further recognized that the Commission has the same authority to interpret its orders as it does to interpret the PSL and its implementing regulations.<sup>18</sup> In determining whether the Approval Order and Appendix A thereof are legally sustainable, the

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<sup>16</sup> See, Case 15-M-0388, Charter Letter Accepting Conditions (filed January 9, 2016); Charter Unconditional Acceptance Letter (filed June 28, 2018).

<sup>17</sup> Approval Order, pp. 22-24.

<sup>18</sup> The Commission’s “interpretation and application of its prior determination[s] is entitled to no less deference than the courts give to the PSC’s interpretation or application of a statute which involves knowledge and understanding of operational practices or entails an evaluation of factual data and inferences to be drawn therefrom.” (Matter of N.Y. State Cable Television Ass’n v N.Y State Pub. Serv. Comm’n, 125 A.D.2d 3, 6 [3d Dep’t 1987] [citing Matter of Cent. Hudson Gas & Elec. Corp. v Pub. Serv. Comm’n, 108 A.D.2d 266, 269-70 [3d Dep’t 1985]]).

Commission must demonstrate that it had a "rational basis" to act.<sup>19</sup>

Charter executed the Settlement Agreement on June 19, 2017, which was adopted by the Commission on September 14, 2017. As part of the fully executed Settlement Agreement, Appendix A thereof sets out the process for making a Good Cause Shown justification. It requires that Charter "provide a sufficient showing for the Commission to determine that Good Cause Shown has been established" and requires that "such 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."<sup>20</sup> Appendix A of the Settlement Agreement further provides 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."<sup>21</sup> Finally, Appendix A of the Settlement Agreement establishes eight "objective metrics" that Charter must meet to make a Good Cause Shown justification based on pole owner delay.<sup>22</sup>

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<sup>19</sup> Matter of Indeck-Yerkes Energy v. Pub. Serv. Comm'n, 164 AD2d 618, 621 (3rd Dept. 1991) ["The issue in this proceeding is not one of pure interpretation of the language of the agreement between [an on-site generator and a utility] by application of common-law principles of contract. Rather, it is whether there was a rational basis to the PSC's determination of the scope of its prior approval of the parties' agreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output of approximately 49 MW."]

<sup>20</sup> Settlement Agreement, Appendix A.

<sup>21</sup> Id.

<sup>22</sup> Id.

Finally, the Settlement Agreement states in part that “[i]f, during any period covered by the performance incentives, any two consecutive six-month targets are missed by more than 15% and (a) Charter's performance in attempting to meet those two consecutive targets does not pass the Good Cause Shown test, or (b) Charter has not provided documentation to the Department demonstrating that it has filed the requisite number of pole permit applications necessary to meet the enumerated targets at least 200 days in advance of the corresponding target deadline, the performance incentives will continue and, in addition, the "Sole Remedy" provisions shall not apply and the Commission reserves the right to assert that such failure is in violation of a Commission order and to utilize all the rights and remedies available to the Commission to enforce such violation.”<sup>23</sup>

Under PSL §26, the Commission may direct the Counsel to the Commission to commence enforcement proceedings in New York State Supreme Court. Further, PSL §12 authorizes the Counsel to the Commission “to commence and prosecute all actions and proceedings [so] directed or authorized” by the Chairman.

#### DISCUSSION

By its own admission, Charter has failed to meet its June 18, 2018 target. Confidential Exhibit A contains only 35,681 addresses identified as completed. This figure is 22,736 short of the 58,417 passings that Charter was required to complete under the Settlement Agreement by June 18, 2018. As a result, Charter has missed this target and the next relevant inquiry is whether further addresses should be removed consistent with the Commission's June 14 Order and whether the Company has established “Good Cause” for this latest miss. As

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<sup>23</sup> Settlement Agreement, §7.

discussed in more detail below, it is determined that additional addresses in the Company's Confidential Exhibit A are ineligible for inclusion under the Network Expansion Condition consistent with the Commission's June 14 Order and the Company has failed to provide sufficient "Good Cause" justification for the June 18, 2018 miss.

A review of the claimed 35,681 passings was undertaken to determine whether this list fully complied with the Commission's June 14 Order. This review determined that included in the 35,681 claimed completed passings are 374 addresses within the six Upstate cities<sup>24</sup> previously identified by the Commission as disqualified. Also included among the claimed completed passings are 236 addresses identified as Negative Space addresses; 1,163 addresses identified by DPS Staff as disqualified through the audit processes; and 1,160 addresses identified as BPO Phase 3 award area passings.<sup>25</sup> Inclusive, the disqualifications sum to 1,773. Removing all 1,773 of these disqualified addresses from Charter's 35,681 claimed completed passings, consistent with the June 14 Order, results in a total of 33,908 eligible completed passings toward

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<sup>24</sup> The Cities of Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady.

<sup>25</sup> Consistent with the March 19, 2018 One Commissioner Order to Show Cause, Charter will be allowed to count the 1,160 completed passings included in the Exhibit A that coincide with locations that were awarded in BPO Phase 3. Charter has been constructing and activating new network since January 2016, including in census blocks that were awarded by the BPO in Phase 3. The BPO Phase 3 awards were not announced until January 31, 2018, and therefore, Charter should not be faulted for completing passings in those areas. However, now that those projects have been awarded, Charter must refrain from building further in these areas, unless it can demonstrate that such areas remain unserved or underserved.

the June 18, 2018 target, pending further DPS Staff review and adjustments.

Further, Confidential Exhibit A includes 57,301 BAL passings that have not yet been completed. Of these, 174 addresses are identified as Negative Space addresses, and 57 addresses are identified as BPO Phase 3 award area passings. All 231 of these addresses are disqualified from the BAL in compliance with the June 14 Order, resulting in 57,070 not-yet-completed addresses that are eligible passings, pending further Staff review and adjustments.

Overall, the disqualification of these 2,004 passings (1,773 completed and 231 not-yet-completed) contained in Exhibit A yields a remainder of 90,978 total planned and completed eligible passings, pending further Staff review. This results in a shortfall of 54,022 addresses.

With respect to the June 18 target of 58,417, the adjustments herein disqualify 1,773 of the 35,681 claimed completed passings yielding a remainder of 33,908 completed passings that are eligible, pending any additional review. This results in a shortfall of 24,509 completed passings.

It is not necessary to undertake an in-depth review of Confidential Exhibit B given that it does not comport with the June 14 Order's directives.

Recognizing that Confidential Exhibit A would result in missing the June 18, 2018 target, Charter provided a Good Cause justification stating that its miss was beyond its control. Charter makes several arguments with respect to Good Cause, each of which is analyzed below. The Company generally argues that the June 14 Order's timing provides it with Good Cause because Charter did not have enough time to replace the disqualified addresses with new eligible passings. Second, Charter states that its reliance on its own interpretation of

the Approval Order was reasonable and, therefore, it has good cause for missing the June 18, 2018 target. Third, Charter again argues that pole owner delay caused it to miss the target.

Initially, Charter argues that the question of whether it has missed a buildout target is still in dispute and thus a Good Cause claim should not be required until that dispute has been resolved. This argument has no merit. The Settlement Agreement states that "... no drawdown [of the Letter of Credit] shall occur as to any disputed amount until such dispute has been finally resolved, including any rehearing or judicial review."<sup>26</sup> Similarly, it states that "[n]o amounts related to such a "Good Cause Shown" demonstration will be drawn on the letter of credit until any such Article 78 remedies have been exhausted."<sup>27</sup> It does not state that the Commission is compelled to await judicial review on whether the Company has missed a buildout target. It only prohibits the Chair or his or her designee from drawing down on the Letter of Credit.<sup>28</sup> The Commission will now turn to the merits of the Company's Good Cause justification.

Charter argues that the unanticipated elimination of addresses from its January 8, 2018 compliance filing has frustrated its ability to replace those addresses and meet the June 18, 2018 target. This argument is unavailing for several reasons. Since 2016, the Company has been providing the Commission with buildout plans. These buildout plans included both addresses to be constructed and addresses already complete. As noted above, none of the buildout plans ever included

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<sup>26</sup> Settlement Agreement, ¶9.

<sup>27</sup> Id., ¶15.

<sup>28</sup> Under 16 NYCRR §3.7(d), a filing of a petition for rehearing does not in itself stay the application of or excuse compliance with an Order of the Commission

addresses to be constructed in NYC. Charter only included NYC addresses in those filings as already complete. In fact, in each update containing NYC addresses, as already complete, Charter removed an identical number of previously planned Upstate addresses. For every ineligible address added by Charter, an eligible passing (i.e., a home or business that is truly unserved or underserved) was removed from the original 145,000 buildout plan and therefore not included in the Network Expansion. Thus, Charter's attempt to add more than 12,000 NYC addresses towards its first reporting target under the Settlement Agreement deprived more than 12,000 New York State homes and businesses that were once part of Charter's buildout plan from receiving high speed broadband in contravention of the Commission's express intentions.<sup>29</sup> As such, in order to replace those disqualified addresses by the Commission, Charter needed only to review its own previous filings and include sufficient previously removed addresses.

Charter goes on to state that it acknowledges that:

[I]f 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.<sup>30</sup>

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<sup>29</sup> See, June 14 Order pp. 40-41.

<sup>30</sup> Case 15-M-0388, Charter's Good Cause Showing - Public (filed July 10, 2018), p. 23.

This argument related to pole owner delay is also unavailing. DPS Staff advises that throughout its pole application facilitation process between Charter and various Pole Owners, which commenced in July 2017, Charter has never correlated a single specific pole application or its weekly construction report (which includes aggregate pole application data as well as the number of completed plant miles) to any specific, fixed number of new passings in the BAL, despite Staff inquiries regarding these three inextricably inter-related elements of the buildout plan. Further, the Commission is advised that despite Charter's continued failure to tangibly demonstrate the linkage between new pole applications, new cable plant activation and alleged completed passings identified in its BAL, in order for Charter's BAL to make any logical sense such that Charter could meet its buildout targets, every pole application submitted to pole owners and the new plant subsequently activated must directly correlate with some certain number of alleged new passings.

Prior to this filing, Charter could not or would not correlate this inter-related buildout data, but now, as Charter alleges on page 22 of its Good Cause Showing, the Company seemingly has been able to correlate specific pole applications to a specific number of addresses. Notwithstanding the Company's apparent sudden ability to correlate pole applications with new addresses, Charter's claim of pole owner delay for the applications allegedly associated with the 7,662 addresses on page 22 of its Good Cause Showing is moot. DPS Staff advises that the Company has been in receipt of thousands of other pole approvals, with a substantial backlog, that the Company has not completed make-ready or cable network construction on despite having had the opportunity to do so. Charter's failure to complete both the make-ready and cable network construction on

all of these other approved pole applications, which would have substantially added to the number of new passings completed if Charter had performed the work, is squarely due to Charter delay, not pole owner delay.

Additionally, consistent with discussion in the June 14 Order, DPS Staff raised concerns regarding the inclusion of addresses located within primary service areas with pre-existing network capable of delivering 100 Mbps of broadband service, through its preliminary review of Charter's buildout plan, since the beginning of January 2017.<sup>31</sup> Charter was on formal notice as early as March 2018 that the Commission was considering the removal of all NYC addresses and certain other addresses, and Charter's failure to make a contingency plan in the event the Commission were to disqualify those passings was fully within the Company's control.

Charter's second argument, that its interpretation of the Approval Order was reasonable and therefore its reliance on that interpretation gives it Good Cause, is simply illogical. As the Commission pointed out in its June 14 Order, based on the plain meaning of the Approval Order and Appendix A, the Company would be precluded from including any NYC (and certain other) addresses in its 145,000 buildout plan or various reports.<sup>32</sup> The Company cannot now claim that it believed otherwise and be allowed to abdicate its obligations to the people of New York

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<sup>31</sup> Id., pp. 44-45.

<sup>32</sup> Id., pp. 35-37.

State. To do so would deprive the people of New York State the very benefits it relied upon in approving the merger.<sup>33</sup>

Moreover, and as described more fully in the June 14 Order, the Company had numerous opportunities to ask the Commission to clarify or otherwise interpret the conditions associated with the buildout. That Charter failed to take advantage of these opportunities and ignored DPS Staff guidance at various points regarding now disqualified passings is not an excuse for failed performance. Charter can pursue these frivolous arguments on appeal, but they are inappropriate as Good Cause justifications.

With respect to pole owner delay, as discussed in detail in the June 14 Order,<sup>34</sup> there is an eight-part test Charter must satisfy to show that pole owner delay, and not the Company's own failures, caused or materially contributed to the missed target(s). As in the June 14 Order, Charter has

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<sup>33</sup> Charter's reliance on Pub. Emps. Fed'n v. Pub. Emp't Relations Bd., 93 A.D.2d 910, 912 (3d Dep't 1983) and 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) is misplaced. Unlike in those cases, in which notice was not provided to the party relying on a previous determination, Charter was provided with notice, first in the form of DPS Staff's informal audit results, which the Company began to receive in January of 2017, and later in the form of an Order to Show Cause. In both instances, locations in NYC as well as Upstate locations with pre-existing network were identified to Charter as being inappropriately included as completed passings. Charter was therefore on notice as early as January 2017 that these categories of passings should not be counted, but chose to continue with its own interpretation of the Approval Order in spite of such notice. Additionally, as stated in the June 14 Order, Charter's failure to seek clarification from the Commission upon receiving feedback from DPS Staff in 2017 negates any claim of reasonable reliance. Charter cannot therefore show that it had Good Cause due to reasonable reliance.

<sup>34</sup> June 14 Order, pp. 69-78.

generally satisfied its burdens under the Settlement Agreement with respect to 1) field verifying sufficient passings to meet a given target; 2) construction approval of sufficient passings to meet a given target; 3) notification of applications to pole owners; 4) hiring of contractors where appropriate; and 5) use of temporary attachments where appropriate.

However, Charter continues to fail to satisfy criteria related to the submission of complete applications; and the timely payment of fees and, more recently has also failed to complete construction following the receipt of a license for pole attachments. As discussed in detail in the June 14 Order, DPS Staff has been closely involved in the pole application and attachment process since July 2017. Through this process DPS Staff confirms that Charter continues to fail to provide pole owners with complete applications and to pay all of its fees in a timely manner.

In order to demonstrate pole-owner delay, Charter must show that it constructed all licensed passings. Necessarily implied in this requirement is that Charter construct such passings safely and in compliance with all applicable codes. DPS Staff has informed the Commission of numerous incidents in which Charter (or its contractors) have completed work that is not compliant with the National Electric Safety Code or otherwise unsafe. These include, but are not limited to failure to properly set poles, detached guy wires laying on the ground creating tripping hazards for persons and yard hazards for lawn mowers; over-tensioning guy wires causing anchors to be pulled from the ground; cables attached within inches of power conductors; damaged telephone lines, disrupting phone service, including E911 service, to telephone customers; and other unsafe or below standard installation and construction work that has been identified by pole owners performing either post-

construction surveys, or otherwise discovered during the routine course of pole owner outside plant work, that necessitated the pole owners to contact Charter to immediately dispatch work crews to investigate and repair these types of non-compliant construction problems. In addition, in early July, an incident occurred in which a Charter contractor was electrocuted, and ultimately died as a result of his injuries. The result of this tragic incident was the issuance of a state-wide stop work order from National Grid, the largest pole owner in Charter's territory. This prohibition remains in effect and Charter is therefore unable to install facilities anywhere in National Grid's service territory. This incident remains under investigation as do wider safety issues associated with Charter's buildout.

Because Charter has failed to meet the June 18, 2018 target by more than 15% and has not provided Good Cause justification, it therefore has forfeited the right to earn back an additional \$1,000,000 from the Letter of Credit under the Settlement Agreement.

As a result of the conclusions and determinations made in this Order, it is determined that the Commission is no longer bound by the "Sole Remedy" provisions of the Settlement Agreement. The Settlement Agreement states in relevant part that "[t]he Parties ... agree that the sole remedy against Charter for the failure of Charter to meet build-out "Passings Targets" as defined herein shall be the financial consequences set forth in paragraphs "1" through "16" below in this section of the Agreement except where specifically noted therein to the contrary (hereinafter "Sole Remedy")."<sup>35</sup> However, the Settlement Agreement further states that "if, during any period covered by

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<sup>35</sup> Settlement Agreement, p. 3.

the performance incentives, any two consecutive six-month targets are missed by more than 15% and (a) Charter's performance in attempting to meet those two consecutive targets does not pass the Good Cause Shown test, or (b) Charter has not provided documentation to the Department demonstrating that it has filed the requisite number of pole permit applications necessary to meet the enumerated targets at least 200 days in advance of the corresponding target deadline, the performance incentives will continue and, in addition, the "Sole Remedy" provisions shall not apply and the Commission reserves the right to assert that such failure is in violation of a Commission order and to utilize all the rights and remedies available to the Commission to enforce such violation."<sup>36</sup>

Through this Order, it is determined that Charter has failed to meet a second consecutive six-month target, by more than 15%, and has failed to present a sufficient Good Cause justification for that failure. As determined in the June 14 Order, Charter also missed the December 16, 2017 target by more than 15% and failed to provide a Good Cause justification. As such, the Commission is no longer confined to the terms of the Settlement Agreement's "Sole Remedy" provisions, and may seek to enforce the targets agreed to by Charter through other means at its disposal including penalty and enforcement actions under the PSL.

To that end, Counsel to the Commission is hereby directed to commence a special proceeding or an action in the New York State Supreme Court in the name of the Commission and the People of the State of New York to stop and prevent future violations by Charter of the Approval Order and the Settlement Agreement's June 18, 2018 compliance obligation, and to seek

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<sup>36</sup> Id., ¶7

penalties for Charter's past and ongoing violations. To date, DPS Staff and the Commission have attempted, first, through informal consultations, through the Settlement Agreement, and finally through the June 14 Order disqualifying certain claimed passings, to correct Charter's behavior. In other words, Charter has had multiple opportunities to modify its buildout plan to comply with the Network Expansion Condition and the public's interest. In spite of these opportunities, however, Charter has twice failed to meet its buildout targets and, rather than demonstrate that the gap between its target and performance are narrowing, Charter's reports to the Commission in fact indicate that the gap is growing. This is unacceptable and requires that the Commission take additional steps to deliver critical benefits to New York consumers.

Administrative remedies have been unsuccessful. Charter continues to show an unwillingness or inability to extend its network in the manner intended by the Commission. For example, Charter has insisted here on filing two versions of its buildout plan, including addresses that the Commission has already disqualified. Charter also challenged the Commission's interpretation of the Approval Order in the June 14 Order despite the plain language of the Approval Order being contrary to Charter's arguments. In addition, the prospect of forfeiting its right to earn back all of the Settlement Agreement's \$12 million Letter of Credit does not seem to be an appropriate incentive where the Company stands to save approximately \$66 million by failing to pass more than 22,000 unpassed homes (assuming a cost to pass of \$3,000 per premise). Administrative remedies are, apparently, unmoving to Charter. And instead of working to meet its commitment to New York, the Company has continued to advertise and publish claims that the Company is "exceeding its mid-December 2017 commitment made to New York

(S]tate by more than 6,000 locations" and is "on track to extend the reach of [its] advanced broadband network to 145,000 unserved or underserved locations by May 2020."<sup>37</sup> Based upon those misleading representations, the Company was directed to "cease and desist this deceptive advertising."<sup>38</sup> To date, the Commission is advised that Charter continues to air these advertisements. The Commission has ceased to have confidence in Charter's ability to comply with the Approval Order and, more generally, its obligations to operate in compliance with the laws of New York State. The Commission's General Counsel has referred these issues to the New York State Attorney General for action under the General Business Law or other relevant statutes and also to the United State Securities and Exchange Commission.

As a result, the commencement of enforcement proceedings is being ordered. In the Approval Order, the Commission previously exercised jurisdiction over the merger transaction under PSL §§99, 100 (Article 5) and 222 (Article 11). Enforcement proceedings should therefore be commenced pursuant to PSL §§25, 26 (Article 5), and 227-a (Article 11). Counsel to the Commission should pursue penalties for Charter's non-compliance with the June 18, 2018 targets. Penalties should be sought in the amount of \$100,000 per day until the June 18, 2018 target is met. Further, Counsel should request injunctive relief as appropriate.

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<sup>37</sup> See, Bringing a New, True Broadband Choice to Over 42,000 New Yorkers, Charter Communications, <https://newsroom.charter.com/news-views/bringing-new-true-broadband-choice-over-42000-new-yorkers/>; Bringing a New, True Broadband Choice to Over 42,000 New Yorkers, Charter Communications, <https://www.youtube.com/watch?v=TBxOSvECx6E&t=2s>.

<sup>38</sup> See, Case 15-M-0388, Letter from Paul Agresta, General Counsel to Thomas Rutledge, Chairman and Chief Executive Office (dated June 26, 2018).

CONCLUSION

For the reasons stated herein, Charter has failed to meet its June 18, 2018 buildout target by more than 15%, and did not make a sufficient Good Cause justification, and therefore forfeits its right to earn back \$1,000,000 from the Letter of Credit. Additionally, this miss results in the Settlement Agreement's "Sole Remedy" provisions being made null and void and, therefore, the Commission may now pursue additional penalty and enforcement remedies at its disposal.

The Commission orders:

1. Charter Communications, Inc. shall remove 2,004 passings (1,773 claimed completed and 231 not-yet-completed) from its July 9, 2018 report consistent with the discussion in the body of this Order.

2. Charter Communications Inc.'s Good Cause justification is denied consistent with the discussion in the body of this Order. The Chair of the Commission or his/her designee may draw upon the Letter of Credit posted by Charter Communications, Inc. in the amount of \$1,000,000 in connection with the June 18, 2018 buildout target.

3. Counsel to the Commission shall commence a special proceeding or an action in the New York State Supreme Court in the name of the Commission and the People of the State of New York consistent with the discussion in the body of this Order.

4. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary