ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1281

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISIONS

REPLY BRIEF FOR APPELLANTS

Sam Kazman
Ryan C. Radia
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street N.W., 7th Floor
Washington, D.C. 20005

Melissa A. Holyoak*
Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
1609 K Street N.W., Suite 300
Washington, D.C. 20006
(573) 823-5377
melissa.holyoak@hlli.org
Counsel for Appellants
**Counsel of Record*

April 11, 2019

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Reconsideration Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 32 FCC Rcd 3238 (rel. Apr. 3, 2017)
ASH	Action on Smoking & Health
CEI	Competitive Enterprise Institute
DEA	Drug Enforcement Administration
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FTC	Federal Trade Commission
FERC	Federal Energy Regulatory Commission
INS	Immigration and Naturalization Service
Mbps	megabits per second
NHTSA	National Highway Traffic Safety Administration
NLRB	National Labor Relations Board
NYPSC	New York Public Service Commission
SEC	Securities and Exchange Commission

Summary of Argument

The FCC imposed conditions on the New Charter merger approval that had nothing to do with the merger transaction and that the FCC would otherwise have no authority to regulate, causing injury to the appellants. Initial Brief 16-31 ("Br."). Rather than defending the unlawful merger conditions, the FCC responds that the Appellants lack standing and even if they did have standing, this Court need not review the merits because the individual Appellants did not file comments with the agency prior to petitioning for reconsideration. Both contentions are wrong.

First, the individual Appellants and Appellant Competitive Enterprise Institute ("CEI") have Article III standing. The FCC does not dispute that the individual Appellants have sustained an injury-in-fact, disputing instead that Appellants have not demonstrated causation or redressability. FCC Br. 14-24. But the FCC applies the wrong standard. *Id.* 15. All Appellants need to prove is a "substantial likelihood of the alleged causality." *Competitive Enterprise Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("*CEI*"). And redressability is satisfied if reversal would "generate a significant increase in the likelihood" that New Charter would either improve quality of services or its billing rates. *Americans for Safe Access v. DEA*, 706 F.3d 438, 448 (D.C. Cir. 2013) (internal quotation marks omitted).

Appellants satisfied this Court's standards through expert economist Dr. Crandall's conclusions that the merger conditions likely caused increased rates and reduced quality of service, corroborating the dissenting statements of Commissioner O'Rielly and then-Commissioner (current FCC Chairman) Pai, who recognized that the conditions would harm the merging companies' consumers. Br. 39-40. This was

the same type of record evidence that satisfied causation and redressability in *CEI*. 901 F.2d at 114.

Dr. Crandall's conclusions are not "speculative" because they are based on sound economic principles. *United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989). And this Court is in no way restricted to "agency views" for evidentiary support of standing; the dissenting Commissioners' views are part of the administrative record. *CEI,* 901 F.2d at 115 (finding standing based on administrative record).

CEI board member Jean-Claude Gruffat, the FCC argues (FCC Br. 24-29), does not have an injury-in-fact because his declaration states that he will likely have increased rates and decreased quality of service but not that he "actually" did. FCC Br. 25. But, of course, an injury may be "actual or *imminent*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). And again, Mr. Gruffat's allegations of imminent injuries are supported by the conclusions of Dr. Crandall and the dissenting FCC Commissioners. Br. 39-40. Contrary to the FCC's belief (FCC Br. 26), CEI need not demonstrate that it is the "functional equivalent" of a membership organization. Under *Action on Smoking & Health v. Department of Labor* ("*ASH*"), CEI "may act in a representative capacity for the members of its board." 100 F.3d 991, 992 (D.C. Cir. 1996). And while CEI need not show that board members are the "functional equivalent" of members, board members satisfy all the factors of *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 344 (1977), as to "indicia of membership."

Second, the FCC argues that it properly dismissed the individual Appellants' petition for reconsideration because Appellants had not previously filed comments and made no "attempt" at explaining why they didn't file comments. FCC Br. 29. But as explained in the opening brief, the individual Appellants did supply such a reason: the FCC gave no notice that it was even considering imposing the merger conditions. Br. 32-33. The FCC continues to maintain that the individual Appellants were somehow required to scour the thousands of pages of public comments and file responsive comments *predicting* which conditions the FCC might impose. FCC Br. 31. There is no legal authority requiring such clairvoyance, and for good reason: such a standard would effectively forever insulate un-noticed FCC merger conditions from consumer challenge.

Finally, the FCC cannot rely on its procedural denial of reconsideration to avoid the merits of this appeal. Because the FCC had the "'opportunity to pass' on a question of fact or law raised in the petition" for reconsideration and indeed did consider the conditions in its *Merger Order*, the merits are properly before this Court. *Time Warner Entm't Co., L.P. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (quoting 47 U.S.C. § 405(a)).

Argument

I. Contrary to the FCC's claim, individual Appellants satisfy causation and redressability; Appellant CEI has organizational standing.

A. Appellants' injuries are "fairly traceable" to the merger conditions.

The FCC does not dispute that Appellants have injury in fact, but instead, argues that the Appellants' alleged injuries are not "fairly traceable" to the merger conditions. FCC Br. 14. The FCC recognizes that standing is not foreclosed merely because government action (FCC's merger conditions) works injury through third-party conduct (New Charter's increased cable rates). FCC Br. 12. But ignoring this Circuit's precedents, the FCC contends that Appellants have not "show[n] the *Commission* is responsible" for Appellants' injuries. FCC Br. 15 (emphasis in original).

This argument improperly conflates merits with standing. Appellants need only demonstrate a "substantial probability" that the increased cable rates are fairly traceable to the merger conditions. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Thus, contrary to the FCC's contention (FCC Br. 15), Appellants need not show that the merger conditions were *in fact* "responsible" for the increased cable rates, but only that it was substantially *probable* that the merger conditions caused Appellants' injuries. Appellants satisfy this requirement with record evidence: expert economist Dr. Crandall opined that the merger conditions—requiring New Charter's significant capital expenditures and eliminating sources of revenue—likely caused the increased cable rates and decreased quality of service. Br. 40. The FCC complains that Dr. Crandall only declared the conditions to "likely" be the cause of Appellants' harm, FCC Br. 15, but that is precisely the showing required. Appellants "need not prove a

cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *CEI*, 901 F.2d at 113. Where a third-party "has heeded the [agency's] judgment," "the question of causation [becomes] relatively easy." *Americans for Safe Access*, 706 F.3d at 447.

The FCC challenges Dr. Crandall's declaration because he does not explain why other factors did not produce Appellants' increased cable rates. FCC Br. 15. But the FCC's suggestion (FCC Br. 15) that increased programming costs or fixed costs caused Appellants' increased bills is contradicted by the FCC's own conclusions that the merger would reduce such costs. *Merger Order* ¶¶ 12, 304, 318, 405, 410 (JA___, JA___, JA___, JA___, JA___). More importantly, when the alleged injury turns on a third-party's response, Appellants need only show that the agency action is "a substantial factor" in the third party's decisionmaking. *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987). Consistent with well-established economic theory, the *Merger Order* notes New Charter's "observed behavior" of passing through increased costs to its customers. *Merger Order* ¶ 328 (JA___). The significant capital expenditures and loss of revenue required by the merger conditions constitute a substantial factor in increasing pass-through costs to consumers. Crandall Decl. ¶¶ 3-12 (Br. A27-A29).

This Circuit has found causation in such price-increase cases, rejecting the same argument the FCC makes here that prices are increased "for any number of reasons." FCC Br. 15. For example, in *Community Nutrition Institute v. Block*, consumers challenged regulations regarding reconstituted milk products. 698 F.2d 1239, 1242 (D.C. Cir. 1983), *rev'd on other grounds*, 467 U.S. 340 (1984). Consumers claimed that the

regulations caused increased prices in reconstituted milk products, depriving them of a lower-priced alternative to whole milk. *Id.* at 1247. This Court rejected appellees' argument that the pricing was too complex to determine if costs would have been passed on to consumers. *Id.* at 1247. "Consumers are not required to *prove* that lower prices will result, they are only required to *assert* a *fairly* traceable causal connection between the challenged action and the alleged injury." *Id.* at 1247-48 (emphasis in original); *see also Crete Carrier Corp. v. EPA*, 363 F.3d 490, 493 (D.C. Cir. 2004) (causation could be easily proved where trucking companies alleged government regulation caused higher prices). Here, Appellants have demonstrated that their increased billing rates could fairly be traced to the significant financial burdens the merger conditions placed on New Charter.

The FCC disputes Dr. Crandall's conclusions as speculative, quoting *United Transportation* that this Court need not accept "allegations founded solely on the complainant's speculation." FCC Br. 17 (quoting *United Transp.*, 891 F.2d at 912 n.7). But the FCC omits the very next sentence from that decision: "Allegations founded on economic principles … are at least more akin to demonstrable facts than are predictions based only on speculation." *Id.* Unlike predictions of future events or injuries, Dr. Crandall explains (based on sound economic principles) why the merger conditions *caused* Appellants' injuries. Crandall Decl. ¶¶ 3-12 (Br. A27-A29).

The FCC's arguments against Dr. Crandall's specific conclusions fare no better. *First*, the FCC questions Dr. Crandall's conclusion that the build-out condition diverted resources from existing networks, arguing that large corporations can "reallocate resources to new projects, without sacrificing service to their customers."

FCC Br. 16. The FCC misses the mark. New Charter did not freely *choose* to make these expenditures like a company strategically planning new projects. Most of New Charter's previous expenditures furnished plant upgrades for existing clients, *see* Crandall Decl. ¶ 6 (Br. A28), and New Charter would normally only expand "networks organically in response to market demand." *Merger Order* ¶ 383 (JA___). Because New Charter was forced by the FCC to build out to two million new customer locations—greatly exceeding its natural growth rate (*id.* ¶ 388 (JA___))—Dr. Crandall soundly concluded that New Charter would have to divert resources from existing-customer projects. Crandall Decl. ¶¶ 5-6 (Br. A28).

Indeed, the FCC's argument that New Charter can simply reallocate resources is unrealistic, given the immense cost of the build-out conditions. For example, the New York Public Service Commission ("NYPSC") revoked its approval of the New Charter merger in July 2018 based on New Charter's failure to comply with NYPSC's timeline for build-out of 145,000 homes and businesses.[1] After multiple revised deadlines, the NYPSC found that New Charter had failed to show good cause for

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[1] N.Y. Pub. Serv. Comm'n, *Joint Petition of Charter Communications and Time Warner Cable*, Case 15-M-0388, Order Confirming Missed June 2018 Compliance Obligations and Denying Good Cause Justification, (July 27, 2018) ("Order Confirming Noncompliance"), *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B9D0B225E-C626-4915-A96F-240CE9A9363A%7D and Order Denying Petitions for Rehearing and Reconsideration and Revoking Approval, (July 27, 2018), *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B9D0B225E-C626-4915-A96F-240CE9A9363A%7D. (attached at Addendum).

missing its obligations and that the prospect of forfeiting its $12 million letter of credit was not an "appropriate incentive" because the company stood to "save approximately $66 million by failing to pass more than 22,000 unpassed homes." Order Confirming Noncompliance at 3, 26 (A74, A97). At approximately $3,000 per home, that translates to nearly $6 billion to comply with the FCC's build-out condition for two million new homes.

Second, the FCC challenges Dr. Crandall's conclusion that New Charter will not likely recoup its costs for the $14.99 low-income broadband New Charter must provide under the merger, pointing to merger applicant Time Warner's $14.99 per month broadband offer to all subscribers. FCC Br. 17. The FCC is comparing apples to oranges. Broadband internet pricing varies significantly depending on download speeds which are measured in megabits per second ("Mbps"). Time Warner's $14.99 plan provides only 2 Mbps download and 1 Mbps upload. *Merger Order* ¶ 449 n.1482 (JA___). Under the merger conditions, New Charter's $14.99 low-income program must provide speeds of 30 Mbps download and 4 Mbps upload. *Id.* ¶ 450 (JA___). Apples to apples, Time Warner's 30 Mbps plan is $54.99 per month. *Id.* ¶ 90 n.298 (JA___). Thus, the FCC's argument regarding Time Warner's $14.99 plan actually *supports* Dr. Crandall's conclusion that New Charter's low-income program is unlikely to recoup its costs and negates the FCC's argument that it was "dubious" that one program could have any effect on customer service. FCC Br. 17.

Importantly, the FCC does not argue that the other merger conditions—settlement-free interconnection and data-usage pricing—would have no effect on customer service or billing rates. The merger condition requiring settlement-free

interconnection costs New Charter interconnection revenues of millions per year. *Merger Order*, Appendix C ¶ 44 (JA___). And the merger condition restricting data-usage pricing deprives New Charter of a "method for making additional investments in broadband infrastructure." *Merger Order*, ¶ 75 (JA___). Those merger conditions independently support standing here. Crandall Decl. ¶ 4 (Br. A27-A28).

Finally, the FCC fails to distinguish cases supporting Appellants' standing here. FCC Br. 18-20. The FCC mischaracterizes *Consumer Federation of America v. FCC* in two respects. *First*, *Consumer Federation* did not involve government action allowing "conduct that would otherwise have been prohibited." FCC Br. 18. In *Consumer Federation*, a consumer group requested that the merger approval include a condition requiring "AT&T Comcast to allow unaffiliated ISPs access to its cable system and to refrain from interfering with content." 348 F.3d 1009, 1012 (D.C. Cir. 2003). When the FCC rejected the consumer group's request, it merely continued the *status quo ante* of allowing AT&T Comcast to engage in these practices. *Id.* Not only was there no backdrop prohibition, there was no discussion of the legality of these practices in its standing analysis. *Id.* Instead, the Court held that "[w]hen an agency order permits a third party to engage in conduct that allegedly injures a person, the person has satisfied the causation aspect of the standing analysis." *Id.* If causation is satisfied when agency action simply *permits* injurious conduct to occur, then the FCC action *requiring* conduct that injured Appellants here certainly satisfies causation. "[W]here the government's decision to *require* an action by private parties will cause them to act as directed—the second and third factors [traceability and redressability] can be

presumed satisfied." *Public Citizen v. FTC,* 869 F.2d 1541, 1547 n.9 (D.C. Cir. 1989) (emphasis in original).

And *second*, the FCC argues that *Consumer Federation* rejected a theory of standing based on increased cable rates. FCC Br. 18. Also not true. The consumer groups in *Consumer Federation* made "no attempt" to show causation based on increased cable rates. 348 F.3d at 1012. Thus the Court did not specifically address whether causation could be satisfied on that basis, though it acknowledged that it was "certainly an injury-in-fact." *Id.* Appellants here, by contrast, provided record evidence demonstrating causation. Br. 39-40.

FCC attempts to distinguish *Tozzi v. U.S. Department of Health & Human Services* and *CEI* by arguing that those cases involved "formidable" or "overwhelming" evidence, respectively. FCC Br. 18-20. Those cases, however, did not transform "fairly traceable" into an "overwhelming evidence" standard. *Tozzi*, 271 F.3d 301, 308 (D.C. Cir. 2001) ("We have never applied a 'tort' standard of causation to the question of traceability."); *CEI*, 901 F.2d at 113 ("[S]ubstantial likelihood of the alleged causality meets the test."). Indeed, this case has the same "overwhelming" evidence that satisfied causation in *CEI*. In addition to consumer affidavits complaining that the strict fuel economy standards restricted their ability to purchase large vehicles, the Court in *CEI* relied on "evidence in the administrative record itself as supporting the causal link, evidence derived from the agency's own experience and sound market analysis." *CEI*, 901 F.2d at 114. Here, in addition to declarations from Appellants and an economic expert, two of the FCC Commissioners issued dissenting statements that supported causation based on sound market analysis. Br. 39-40.

The FCC argues that those dissenting statements do not reflect the "Commission's views." FCC Br. 20. But the Court is not limited to the agency's official views in assessing standing. In *CEI*, this Court looked not only to NHTSA's factual findings but to evidence "in the public comments" that "substantiate[d]" the consumers' arguments regarding causation. 901 F.2d at 115. Indeed, it is extremely unlikely that an agency's own factfinding would conclude that the agency action would *cause injury* to consumers. In *CEI*, the Court held that it "must not accept NHTSA's determination on the merits, that the [fuel economy] standards will not cause sufficient downsizing or vehicle mix restrictions to affect vehicle safety, as predetermining petitioners' standing to challenge that decision." 901 F.2d at 116. Otherwise, agencies could intentionally shield their decisions from judicial review by injured parties simply by putting such findings in the record. Here, regardless of whether the dissenting Commissioners' statements reflect the FCC's position, they are part of the administrative record and serve as additional evidence corroborating Appellants' evidence of causation.

B. Appellants satisfy redressability.

The FCC argues that Appellants failed to provide "'substantial evidence' required to establish a likelihood of redress." FCC Br. 24. That is not the law. While *CEI* found "overwhelming evidence" to meet causation and redressability, it certainly did not transform the law to require as much. 901 F.2d at 113, 116. *National Wrestling Coaches Association v. Department of Education*, on which the FCC heavily relies, FCC Br. 13-14, 17-19, noted that "some cases" presented "substantial evidence" of causation, 366 F.3d 930, 941 (D.C. Cir. 2004), but as the dissent also observed, this Court has

found causation "with little direct evidence," *id.* at 954 (Williams, J., dissenting). In fact, this Court has since disclaimed the broad reading of the *Wrestling Coaches* decision that the FCC espouses. *Americans for Safe Access*, 706 F.3d at 447-48 (D.C. Cir. 2013); *Emergency Coal. to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 11 (D.C. Cir. 2008).

Most recently, the Court reaffirmed that "[a] party need not demonstrate with certainty that its injury will be redressed." *NTCH, Inc. v. FCC*, 841 F.3d 497, 506 (D.C. Cir. 2016). *Block*, *supra* at 5-6, warned that redressability should not be so onerous as to prevent those harmed by government action to seek relief:

> [B]ecause the relevant inquiry is directed to the effect of a future act (the court's grant of the requested relief) it would be unreasonable to require the plaintiff to ***prove*** that granting the requested relief is ***certain*** to alleviate his injury. Furthermore, as cases such as the present one show, litigation often "presents complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed." Thus, a court should be careful not to require too much from a plaintiff attempting to show redressability, lest it abdicate its responsibility of granting relief to those injured by illegal governmental action.

698 F.2d at 1248 (emphasis in original). The FCC's proposed standard would prevent injured consumers from ever challenging government regulatory action in a complex market economy.

Moreover, this case includes record evidence (declarations and administrative record) supporting causation and redressability similar to the evidence presented in

CEI. *See supra* at 10-11. Where Appellants seek to stop the agency's illegal conduct, "[t]he questions whether the injury alleged is 'fairly traceable' to the purportedly illegal conduct and whether the relief requested is 'likely to redress' the injury ***substantially overlap***." *CEI*, 901 F.2d at 113 (emphasis added). Appellants have met their burden of showing that Appellants' injuries were fairly traceable to the merger conditions, *see supra* Section I.A, and relatedly, a reversal of the merger conditions would "generate a significant increase in the likelihood" that New Charter would either improve quality of service or its billing rates with the estimated billions of dollars the FCC conditions cost. *Americans for Safe Access,* 706 F.3d at 448 (internal quotation marks omitted); *see* Br. 41-42.

The FCC challenges Appellants' evidence supporting redressability because the Commissioners' statements do not represent the agency's views and Dr. Crandall only provides a "conclusory assertion." FCC Br. 23-24. Again, as explained above, the Commissioners' dissenting statements support standing as part of the administrative record regardless of whether they constitute the "agency's views." *See supra* at 10-11. And Dr. Crandall's expert conclusions are based on sound economic analysis, which this court has found is sufficient evidence for standing purposes. *See CEI*, 901 F.2d at 117 ("manufacturers are substantially likely to respond to market forces"); *United Transp.*, 891 F.2d at 912 n.7. Further, Dr. Crandall's conclusions are bolstered both by the Commissioners' dissenting statements regarding market conditions, Br. 41-42, and by the agency's own predictions regarding New Charter's behavior: that New Charter would likely pass a portion of savings through to customers, *see Merger Order*, ¶¶ 346, 415 (JA___).

The FCC's reliance on *Klamath Water User Association* is misplaced. FCC Br. 21. In *Klamath*, an electricity consumer challenged the Federal Energy Regulatory Commission's ("FERC's") decision regarding a license to electricity provider PacifiCorp, alleging that it caused increased rates for the consumer. 534 F.3d 735, 736 (D.C. Cir. 2008). But "both Oregon and California had recently elected to exercise their independent authority to modify PacifiCorp's retail electric rates." *Id.* at 738. The Court concluded that the consumer could not prove redressability because the state utility commissions—not FERC or PacifiCorp—had already set new retail rates. *Id.* at 740. For those same reasons, *Northern Laramie Range Alliance v. FERC*, 733 F.3d 1030 (10th Cir. 2013), where state regulatory commissions also set the challenged rates, is inapposite. FCC Br. 21. Here, those independent conditions don't exist. Instead, New Charter would be free to improve both quality of service or prices if the merger conditions were removed. As the FCC acknowledges, New Charter, not state regulatory commissions, "sets customers' prices." FCC Br. 22.

The FCC's citation to *Burton v. Central Interstate Low-Level Radioactive Waste Compact Commission*, 23 F.3d 208, 209-10 (8th Cir. 1994), FCC Br. 22, is not instructive because the Eighth Circuit's holding that redressability cannot be satisfied if dependent on third-party actions is not the law of this Circuit or others. *See CEI*, 901 F.2d at 117 (finding redressability because "manufacturers are substantially likely to respond to market forces"); *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000) (Alito, J.) (plaintiffs could sue even though it was uncertain that third-party advertisers would voluntarily resume advertising with plaintiff again if state-law restriction were lifted); *Heldman v. Sobol*, 962 F.2d 148, 156-57 (2d Cir. 1992) (plaintiff could sue state board

over its regulation even though his injury was proximately caused by a third-party local school district). And in *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 458 (9th Cir. 1977), cited at FCC Br. 22, appellants failed to allege an injury-in-fact or causation. Moreover, none of the increased-rate cases cited by the FCC included allegations like Appellants' averments that redress would *also* improve customer service. *Compare Consumer Fed'n*, 348 F.3d at 1012 (inability to obtain the service consumers wished constituted an injury-in-fact).

Finally, the FCC argues that redressability is speculative because New Charter was implementing "versions of the conditions" voluntarily. FCC Br. 22. But if New Charter was going to implement the conditions on its own, then why require those conditions for the merger? And why create a "monitoring system" to ensure New Charter's compliance? *Merger Order*, ¶ 12 (JA___). In reality, the FCC knew that New Charter would not implement those conditions unless they were mandatory. If the FCC had not adopted the conditions, New Charter could have been financially incentivized to abandon them. For example, the FCC prohibited data-usage pricing specifically because "New Charter would have an "increased incentive … to use these practices to hinder the development of [online video distributors] as a competitive option to its own video offerings." *Id.* ¶ 457 (JA___). And regarding settlement-free interconnection, the FCC noted that New Charter had "sufficient power in the interconnection market to raise prices." *Id.* ¶ 456 (JA___). Finally, the FCC's argument that New Charter would independently implement a low-income program because a pre-merger company had a $14.99 plan, FCC Br. 23, is belied by the fact

that the merger conditions required the low-income program to provide 30 Mbps speeds, comparable to plans priced at $54.99. *See supra* at 8.

This is another strike against the FCC's attribution (FCC Br. 12) of Appellants' injuries to New Charter's decisions. As the FCC concedes, its argument that standing is more difficult when based on third-party action depends on "the ***unfettered*** choices made by independent actors not before the courts." *Id.* (quoting *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 48-49 (D.C. Cir. 2016)) (emphasis added). But the entire crux of Appellants' challenge is that New Charter's choices injuring consumers were not unfettered, but imposed by the *ultra vires* conditions on the merger the FCC illegally created. If the FCC believes that New Charter would engage in the economically irrational conduct harming service quality and promoting the FCC's political agenda absent the agency's merger conditions, then it should simply grant Appellants' motion to reconsider rather than wasting agency resources on a monitoring system.

C. CEI has associational standing.

The FCC argues that CEI does not possess a concrete injury because CEI board member Mr. Gruffat—who declared that the merger likely caused New Charter to raise his cable rates and invest less in improving service than it would otherwise—did not allege that his "service *actually* became worse" or "*actually* charged him higher prices." FCC Br. 25 (emphasis in original). But an injury-in-fact may be "actual or *imminent*." *Lujan*, 504 U.S. at 560 (emphasis added). "A threatened injury must be certainly impending to constitute injury in fact." *Orangeburg v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017) (cleaned up). But "[s]tanding depends on the probability of harm, not its temporal proximity." *Id.* (internal quotation marks omitted) (finding city

had standing based on imminent loss of opportunity to purchase power although city's contract did not expire until 2022). Mr. Gruffat's declaration that he would likely suffer increased rates and decreased quality of service is imminent because it is based on the probability of harm caused by the merger conditions that continue to be implemented. His injuries are corroborated by Dr. Crandall's expert analysis, *see* Crandall Decl. ¶¶ 4, 12 (Br. A27-A29), declarations from the other individual Appellants attesting to similar injuries, and the dissenting Commissioners' statements, *see* Br. 39-40. Thus, Mr. Gruffat possesses individual standing.

The FCC further argues that CEI does not have standing because it is not "the functional equivalent of a traditional membership organization." FCC Br. 26. (The FCC attributes this quote to *Hunt*, 432 U.S. at 342, but that quote actually comes from *American Legal Foundation v. FCC,* 808 F.2d 84, 89 (D.C. Cir. 1987).) But under this Court's decision in *ASH*, however, CEI does not need to show that it is functionally equivalent for associational standing. 100 F.3d 991.

ASH involved a charitable trust (ASH) that challenged the Occupational Safety and Health Administration's failure to issue a final rule regulating secondhand smoke in the workplace. 100 F.3d at 991-92. ASH furnished post-argument affidavits from some of its donors and from the chairman of its board of trustees who discussed the secondhand smoke he suffered in his regular employment. *Id.* at 992. This Court explained that it did not need to decide whether ASH's donors were "equivalent" to members or "the novel issue of derivative standing posed by a charitable trust" because the chairman's affidavit showed that "ASH ha[d] standing on standard grounds." *Id.* The Court reasoned:

> **We have no doubt that ASH may act in a representative capacity for the members of its board of trustees**, and may treat their interests as its own for the purposes of establishing its standing to sue when those interests "are germane to the organization's purpose." The injury to the interests of one of its board members is therefore enough to allow ASH to proceed with the lawsuit.

ASH, 100 F.3d at 992 (emphasis added; citations omitted). Similarly, CEI also has standing on "standard grounds" because Mr. Gruffat is a board member.

The FCC argues that *ASH* is distinguishable because the Court considered whether the alleged injury was germane to the organization's purpose and CEI has not made a similar showing. FCC Br. 29. Not so. Mr. Gruffat is not simply a concerned member of the public, but a board member who was harmed by the unlawfully-imposed merger conditions. Br. 11-12. CEI is a non-profit public interest organization dedicated to advancing free-market solutions to regulatory issues. Br. 16; Declaration of Sam Kazman ¶ 3, A42 ("Kazman Decl") (attached at Addendum). This appeal argues that the FCC had no authority to impose the merger conditions because as dissenting Commissioner Pai described, the FCC "turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy." Pai Dissent at 340 (JA___). Thus, Mr. Gruffat's interests in challenging the harmful merger conditions are directly germane to CEI's purpose. Accordingly, CEI may act in a representative capacity to redress his injuries.

But even if this Court were to find that CEI could not represent its board members on "standard grounds" as specified in *ASH*, the board of directors possess

all the "indicia of membership in an organization" as specified in *Hunt*. 432 U.S. at 344. The CEI board of directors satisfies all of the *Hunt* criteria: only members of the board of directors of CEI elect future members of the organization's governing body—which is the board of directors; only members of the board of directors serve on CEI's governing body; and Mr. Gruffat financially contributes to the activities of CEI.[2] *See Hunt*, 432 U.S. 344-45. As in *Hunt*, the board of directors "[i]n a very real sense ... provide the means by which [CEI] express their collective views and protect their collective interests." *Id.* at 345.

While CEI can directly represent its board members using "standard grounds" as specified in *ASH*, members of the board of directors also satisfy all of the criteria specified in *Hunt* to be the functional equivalent to members of CEI.

II. The individual Appellants had no reason to file comments prior to seeking reconsideration because the conditions that Appellants challenge did not exist *until* the FCC approved the merger.

As Appellants explained in their opening brief, the individual Appellants' petition for reconsideration provided a dispositive reason for not initially filing comments regarding the merger conditions: there was no indication that the FCC was even *considering* imposing such conditions on the merger approval. *See* Br. at 32-33 (citing Petition for Reconsideration at 7-9). Following the course of the *Reconsideration Order*, the FCC on appeal completely ignores Appellants' explanation (and Appellants'

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[2] *See* Kazman Decl. ¶ 3, A42. Kazman's declaration supports CEI's jurisdictional arguments (Br. 42-43) and directly responds to FCC Br. 28. Thus, it is not new argument in its reply. *Ash*, 100 F.3d at 992; *contra* FCC Br. 27 n.7.

petition for reconsideration), instead baselessly asserting that "[t]he individual customers did not even attempt" to provide a reason for not filing comments. FCC Br. 30. The FCC takes for granted the permissibility of appending an atextual "good cause" to eligibility for 47 U.S.C. § 405(a) reconsideration review. That is dubious. Br. 32 n.6. But even if 47 C.F.R § 1.106(b)(1) were a permissible agency interpretation of § 405(a), it cannot be interpreted as giving the agency *carte blanche* to refuse to address reconsideration petitions based on subjective whim without explanation. The FCC cannot avoid review of the conditions by simply ignoring Appellants' reasons.

The FCC cites *Havens v. FCC* to support its dismissal of the petition for reconsideration, FCC Br. 30, but in that case, appellant "did not argue before the Commission that he had good reason for failing to participate." 424 Fed. Appx. 3, 4 (D.C. Cir. 2011). Here, the individual Appellants *did* provide good reason for not filing comments. *Virgin Islands Telephone Corp. v. FCC,* cited at FCC Br. 30, also provides no support for the FCC's dismissal because there, the Court found appellant's reconsideration petition properly dismissed for failure to file within 30 days. 989 F.2d 1231, 1237 (D.C. Cir. 1993). Importantly, the *Virgin Islands* Court held that it could still rule on the merits because the FCC "*did* pass" on the issues when it disposed of the case. *Id.*; *see infra* Section III.

The FCC argues that Appellants "conflate a Commission order arising from a rulemaking—in which the Commission issues a notice of proposed rulemaking delineating the issues under consideration—with an order arising from an adjudication as in this case." FCC Br. 31. But the FCC provides no explanation of how this affects Appellants' reason for not filing comments. The FCC provided no public notice that

it was considering imposing conditions on the merger. Br. 32-33. If the FCC is suggesting that it wasn't required to provide notice, that makes no difference. Even if notice were not required, the individual Appellants would still have had no reason to file comments regarding conditions that did not yet *exist*.

Citing no authority, the FCC argues that "entities" are still expected to participate in the proceedings and expected to reply to comments. FCC Br. 31. But Appellants are individual consumers. (The FCC concedes that CEI filed comments and could challenge the conditions on reconsideration. FCC Br. 31 n.8.) Under the FCC's version of Section 405(a) reconsideration review, the FCC can provide notice of a merger with no conditions, then approve the merger with conditions that harm consumers, but because the consumer didn't file comments *predicting* those conditions (and impending harm), the consumer is out of luck. The FCC's unlawful imposition of merger conditions would forever be insulated from consumer challenge. Hogwash! Br. 33 (citing cases). It is not surprising that the FCC cannot cite any legal authority requiring such clairvoyance.

III. Because the FCC addressed the issue in its *Merger Order*, this Court should reach the merits of Appellants' challenge to the imposed conditions.

When Appellants sought reconsideration of the FCC's *Merger Order*, the FCC refused to address their arguments, finding that Appellants lacked standing and that the individual Appellants had not previously filed comments with the FCC. *Reconsideration Order* ¶ 2-6 (JA___). But "there is no need for petitioners to establish Article III standing before agencies." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235,

241 (D.C. Cir. 2015). Because CEI had filed comments, it was improper for the FCC to refuse to address the merits of the petition for reconsideration based on CEI's alleged lack of standing.

Appellants' opening brief describes in detail why the conditions that the *Merger Order* imposes upon the transfer of licenses are *ultra vires* and must be extirpated. Br. 16-31. Rather than defend the legality of the conditions, the FCC places all its eggs in the threshold question basket of Appellants' entitlement to review in this Court. The FCC suggests that if it is mistaken as to this threshold question, the proper remedy is a remand to give the agency another opportunity for further consideration. FCC Br. 31-32 n.9. The FCC is incorrect; the agency is not entitled to punt once again after passing upon the question in the underlying *Merger Order*. *See, e.g., Virgin Islands*, 989 F.2d at 1237 (addressing merits of a question on appeal from a denial of reconsideration on purely procedural grounds because the Commission "*did* pass on the issues" in its underlying order).

As discussed in Appellants' opening brief (Br. 34-35), the gravamen of 47 U.S.C. § 405(a) requires only "that the Commission have an 'opportunity to pass' on a question of fact or law raised in the petition." *Time Warner*, 144 F.3d at 79 (quoting statute). The question is not who brought the issue to the FCC's attention, it is merely whether the *issue itself* "was 'flagged' or to use a sports metaphor, 'teed up,' before the Commission." *Id.* at 81; *accord e.g., Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37, 50 (D.C. Cir. 2014).

"Thus, where a dissent by a Commissioner raises 'the very argument' that the parties address [on appeal,] there is ordinarily no bar to judicial review because it

would be 'ignoring the realities of administrative decision-making to say that the Commission majority had no opportunity' to pass on the issue." *Prometheus Radio Project v.* FCC, 824 F.3d 33, 57 (3d Cir. 2016) (quoting *Office of Commc'n of United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972)) (cleaned up). Here, dissenting Commissioners Pai and O'Rielly squarely presented the issue Appellants' raise on appeal. Br. 36 (citing JA___). And if that were not enough, the majority commissioners considered it themselves. Br. 36 (citing JA___); *compare EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013) ("Even if no other party brought the matter to the agency's attention, the FCC's independent contemplation of the issue satisfies § 405's mandate.").

Appellants have complied with the necessary rules to obtain a decision on the merits of their challenge to the FCC's imposition of the merger conditions. The reconsideration petition tolled the deadline for appealing from the underlying order. *Microwave Commc'ns, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974). Because Appellants' timely notice of appeal designated both the *Reconsideration Order* and the *Merger Order* (JA__), both orders are properly before this Court for review.

A bare remand would be particularly inequitable here as the FCC has already been the cause of undue delay. After failing to rule on Appellants' reconsideration motion within the statutorily allowed ninety days, Appellants were compelled to engage in a lengthy mandamus proceeding, mooted when the FCC ruled on the motion days before oral argument in this Court. Br. i-ii. Now, having already forced Appellants to wait two years for a decision that they were entitled to within three months, the FCC ask that the Appellants wait even longer. This Court has recently

repeatedly reprimanded the FCC for similar dilatory tactics. *See, e.g., Stolz v. FCC*, 882 F.3d 234, 239 (D.C. Cir. 2018); *Sandwich Isles Commc'ns v. FCC*, 741 Fed. Appx. 808, 810-11 (D.C. Cir. 2018) (FCC "sat on petitioner's appeal" for six years).

"The Commission had an opportunity to pass on the question [on appeal], but chose to duck—its failure to address the point was not an accidental mistake." *Time Warner*, 144 F.3d at 82. "Because the Commission chose not to argue the merits in the alternative, [this Court has] no choice but to vacate the challenged portions of the [*Merger Order*]." *Id.* The FCC's reliance (FCC Br. 32 n.9) on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and *INS v. Ventura*, 537 U.S. 12 (2002), is misplaced as here the FCC *did* address the issue raised on appeal. But even if it had not, "*Chenery* does not require [converting] judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (Fortas, J., plurality op.). Raising only legal issues, Appellants do not ask the Court to impinge on the agency's "role as fact-finder." *Contrast Ventura*, 537 U.S. at 16. Over multiple years of litigation, the FCC has not proposed a single legal theory under which the merger conditions could be salvaged.

Relief Sought

Appellants respectfully urge this Court to vacate the transaction conditions contained in the FCC's *Merger Order*.

April 11, 2019

Respectfully submitted,

/s/ Melissa A. Holyoak
Melissa A. Holyoak*
Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
1609 K Street N.W., Suite 300
Washington, D.C. 20006
(573) 823-5377
melissa.holyoak@hlli.org

Sam Kazman
Ryan C. Radia
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street N.W., 7th Floor
Washington, D.C. 20005
(202) 331-1010

Counsel for Appellants
**Counsel of Record*

Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,499 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this initial brief has been prepared in a proportionally spaced typeface, 14-point Garamond, using Microsoft Word 2013.

/s/ Melissa A. Holyoak
Melissa A. Holyoak

Counsel for Appellants

April 11, 2019

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

April 11, 2019

/s/ Melissa A. Holyoak
Melissa A. Holyoak
HAMILTON LINCOLN LAW INSTITUTE
1609 K Street N.W., Suite 300
Washington, D.C. 20006
(573) 823-5377
melissa.holyoak@hlli.org

Counsel for Appellants

ADDENDUM

No. 18-1281

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

DECLARATION OF SAM KAZMAN

1. I am General Counsel of the Competitive Enterprise Institute ("CEI"), and am a co-counsel for the appellants in this action.

2. I have been CEI's General Counsel for over thirty years, and am fully familiar with its charter and bylaws, and with its other procedures and operations.

3. I am personally familiar with the facts set forth on pages 18-19 of Appellants' Reply Brief concerning CEI's structure and purpose, the functions of its Board of Directors, and Jean-Claude Gruffat's status as a CEI donor. The description of those facts in the Reply Brief is, to the best of my knowledge, accurate and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Sam Kazman

Executed on April 10, 2019

CEI
1310 L St. NW, Suite 700
Washington DC 20005

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 DENYING PETITIONS FOR REHEARING AND RECONSIDERATION AND REVOKING APPROVAL

(Issued and Effective July 27, 2018)

BY THE COMMISSION:

INTRODUCTION

Through this Order, the Commission denies Charter Communication, Inc.'s (Charter or the Company) petitions for rehearing and reconsideration and also rescinds and revokes its previous approval of the Company's 2016 acquisition of Time Warner Cable Inc. (TWC or Time Warner). Charter operates in New York under the trade name "Spectrum."

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. As part of its

review, the Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the "net benefits test" otherwise the merger between Charter and Time Warner should be – and would be - denied.[1] Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York. The most critical of those conditions required 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 25-99.9 Mbps) residential and/or business units within less populated areas of New York (the Network Expansion Condition).[2]

For the reasons stated herein, the Commission denies the Company's petitions for rehearing and reconsideration of the Commission's previous orders as discussed below. The Commission further finds that Charter's performance in attempting to comply with the Approval Order's Network Expansion Condition and related matters is deficient and its behavior before the Commission is contrary to the public policy and the laws of New York State and the regulations of the Commission to such an extent that the Commission should now exercise its authority to revoke and rescind the Approval Order and further order that Charter cease its operations in New York State previously served by Time Warner Cable.

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[1] 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), p. 2.

[2] Id., p. 53 and Appendix A §I.B.1.

BACKGROUND

By Joint Petition filed July 2, 2015, TWC and Charter requested Commission authorization for a holding company-level transaction that would result in the transfer of control of Time Warner's New York subsidiaries, including all of its broadband Internet, telephone, and cable television systems, franchises and assets to Charter. On January 8, 2016, the Commission granted its approval "subject to the conditions discussed in the body of this Order and Appendix A, and upon receipt by the Commission of certification by Charter Communications, Inc., that New Charter and its successors in interest unconditionally accept and agree to comply with the commitments set forth in the body of this Order and Appendix A."[3]

On January 19, 2016, Charter submitted a letter containing the following written certification:

> In accordance with the Commission's Order Granting Joint Petition by Time Warner Cable Inc. ("Time Warner Cable") and Charter Communications, Inc. ("Charter") dated January 8, 2016, Charter hereby accepts the Order Conditions for Approval contained in Appendix A, subject to applicable law and without waiver of any legal rights.[4]

As discussed below, Charter subsequently sought to use this limited and qualified statement to justify its noncompliance with the Approval Order.

Among those established conditions, was the Network Expansion Condition wherein the Commission noted its "significant

[3] Approval Order, p. 69.

[4] See, Case 15-M-0388, Charter Letter Accepting Conditions (filed January 9, 2016); See, also, Charter Unconditional Acceptance Letter (filed June 28, 2018).

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."[5] 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,[6] 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. Charter, however, did not comply with that obligation.

The Settlement Agreement

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 Approval Order's initial target. Subsequently, settlement discussions were initiated. The culmination of those discussions resulted in the filing of a Settlement Agreement in this case on June 19, 2017.[7]

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

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[5] 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.

[6] The transaction closed on May 18, 2016.

[7] Case 15-M-0388, Settlement Agreement (filed June 19, 2017) (Settlement Agreement).

the ultimate completion date remaining unchanged from the Approval Order's May 18, 2020 date. 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 any given 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 one million dollars. 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 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."[8]

The Order to Show Cause

On January 8, 2018, Charter filed its first report on the Company's buildout progress pursuant to the Settlement Agreement's December 16, 2017 target date. 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.[9] The Order to Show Cause required 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 New York City (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 the 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 should not draw down on the Letter of Credit

[8] Case 15-M-0388, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (issued September 14, 2017) (Settlement Order), Appendix A.

[9] Id., Order to Show Cause (issued March 18, 2018); Confirming Order (issued April 20, 2018).

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;[10] (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 June 14 Order

The Commission ultimately determined that Charter had failed to provide sufficient evidence as to why the Commission should not (1) disqualify 18,363 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 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 current 145,000

[10] Undisputedly, NYC is not a less-populated area within the State of New York.

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.[11]

The Commission further determined through its June 14 Order that Charter had not provided sufficient justification to establish an independent showing of Good Cause[12] for failing to meet the December 16, 2017 buildout target and that it had therefore forfeited the right to earn back one million dollars 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 one million dollars in accordance with the Settlement Agreement. In addition, the Commission on June 14, 2018, also released a companion Compliance Order on Charter's "qualified" acceptance of the Approval Order's conditions.[13] In the Compliance Order, the Commission directed the Company to "… cure its defective acceptance by filing a new letter of full unconditional acceptance of the Approval Order and

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[11] June 14 Order, pp. 32-33. On June 14, 2018, the Commission also issued the Compliance Order directing Charter to replace its incomplete and conditional commitment concerning the Approval Order and its conditions.

[12] 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.

[13] Case 15-M-0388, Order on Compliance (issued June 14, 2018) (Compliance Order).

Appendix A with the Secretary to the Commission within 14 days of the issuance of this Order." If it failed to provide such a replacement letter of full unconditional acceptance, the Commission indicated its intention to pursue other remedies at its disposal including but not necessarily limited to rescinding and revoking the Approval Order.[14]

Charter's July 2018 Submissions

On July 9, 2018, Charter filed its Update and Bulk Address Report with respect to the Settlement Agreement's June 18, 2018 target, which included two exhibits, Confidential Exhibits A and B.[15] Charter stated 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 so within what it calls a limited time period. Confidential Exhibit A was modified by the Company using the previously filed July 5, 2018 Revised Buildout Plan address list, and included a total of 92,982 addresses. This list is not complete, as it is 52,018 addresses short of the required 145,000 addresses.

Subsequently, on July 16, 2018, Charter filed two petitions for rehearing and reconsideration on the Commission's June 14 Order and its Compliance Order, respectively. With regard to the Compliance Order, Charter argued it was unnecessary because the Company does not believe it has disavowed its commitments in New York. Moreover, the Company claimed that its 2016 Acceptance Letter was not a limitation on

[14] Id., pp. 1-2, 9.

[15] Charter also filed a buildout plan on July 5, 2018 in compliance with the June 14 Order. That plan has not been fully audited, but remains under review.

its acceptance of the commitments in the Approval Order, but rather a reservation of its legal rights. The Company also argued that the Commission waived any alleged defect in the form of Charter's voluntary commitments and is now estopped from revisiting them here.[16]

With respect the June 14 Order, Charter claimed that its reported passings satisfy the criteria set forth in the Approval Order, that the Commission's subsequent disqualification of certain addresses was inconsistent with and exceeds the Commission's authority, that the Commission's disqualification of certain addresses was arbitrary and capricious, and that, in any event, Good Cause justification existed for the delay in satisfying the missed targets.[17]

By its own admission, under the Commission's June 14 Order, Charter has failed to meet its second milestone, the June 18, 2018 target. Confidential Exhibit A contained 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.[18] The Commission, therefore, determined that Charter missed its

[16] See, generally, Motion for Rehearing and Reconsideration of Order on Compliance filed July 16, 2018 (Compliance Rehearing Petition).

[17] See, generally, Petition for Rehearing and Reconsideration of June 14 Order filed July 16, 2018 (Buildout Rehearing Petition).

[18] In a companion Order, the Commission separately audited this list, which resulted in a further reduction of 1,773 for a total of 33,908 completed passings allowed. This is 42% short of the Company's target. See, Case 15-M-0388, Order Confirming Missed June 2018 Compliance Obligations and Denying Good Cause Justification (issued July 27, 2018) (July 27 Order).

June 18, 2018 target under the Settlement Agreement.[19] In addition, the Commission determined that the Company failed to provide a sufficient Good Cause justification for its failure and that it had also forfeited its right to earn back an additional one million dollars from the Letter of Credit on file with the Commission.[20]

This failure further resulted in the abrogation of the Settlement Agreement's "Sole Remedy" provision.[21] This section 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")." However, the Settlement Agreement further states that "if, 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."

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[19] Id.

[20] Id.

[21] Settlement Agreement, ¶7.

As a result, the Commission may now seek to enforce the obligations agreed to by Charter through other means at its disposal including penalty and enforcement actions in New York Supreme Court or other proceedings under the Public Service Law. This Order is the culmination of the Commission's repeated, and ultimately unsuccessful, efforts to address through administrative remedies the Company's chronic misses on the Network Expansion Condition and Charter's persistent actions demonstrating bad faith.

On July 16, 2018, Charter filed requests for rehearing of the Commission's June 14 Order and Compliance Order.[22]

LEGAL AUTHORITY

Regarding petitions for rehearing, Public Service Law (PSL) §22 states that "after an order has been made by the commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, but any such application must be made within thirty days after the service of such order, unless the commission for good cause shown shall otherwise direct; and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefore be made to appear." In the regulations implementing this section, pursuant to 16 NYCRR §3.7(b), rehearing may be sought only on the grounds that an error of law or fact was committed or that new circumstances

[22] See, f.n. 14 and 15, supra.

warrant a different determination. As discussed below, Charter has not demonstrated sufficient grounds to grant its relief.[23]

Turning to the Commission's authority to rescind and revoke, the Approval Order specifically stated that "[a]bsent acceptance of these conditions, the public interest standard cannot be met, and the petition for transaction approval [should be] denied."[24] As set forth therein, PSL §§99(2), 100(1) and (3), and 222(3) require a Commission finding that the proposed transfers be in the public interest. 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 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

[23] Moreover, under 16 NYCRR §3.7(d), filings of petitions for rehearing do not stay or excuse compliance with a Commission order.

[24] Approval Order, p. 2.

Network Expansion Condition, which Charter has consistently and continuously violated.[25]

The Commission is generally empowered to issue orders regarding regulated telephone and cable companies doing business in the State of New York and to interpret and enforce its orders pursuant to PSL §5 and Articles 5 and 11. The Commission is also specifically empowered to examine the practices and facilities of telephone corporations under PSL §94, to issue, amend or rescind orders regarding cable companies pursuant to PSL §216, and to terminate cable franchises in the event of a material breach under PSL §227.

With regard to cable companies, the Commission's jurisdiction is broad. Under PSL §215(c), the Commission is required "… to prescribe standards by which the franchising authority shall determine whether an applicant possesses (i) the technical ability, (ii) the financial ability, (iii) the good character, and (iv) other qualifications necessary to operate a cable television system in the public interest[.]" Pursuant to PSL §216(1), "[t]he commission may promulgate, issue, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the purposes of this article. Such orders, rules and regulations may classify persons and matters within the jurisdiction of the commission

[25] 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."

and prescribe different requirements for different classes of persons or matters." And, PSL §216(5) states that the Commission "shall have and may exercise all other powers necessary or appropriate to carry out the purposes of this article."

PSL §227(1)(a) further empowers to the Commission to terminate cable television franchises where the franchisee "has committed a material breach of its franchise or any applicable provision of [Article 11] or of the regulations promulgated [t]hereunder…."

Moreover, under PSL §226(1), "[n]o cable television company, notwithstanding any provision in a franchise, may abandon any service or portion thereof without giving six months' prior written notice to the commission and to the franchisor, if any, and to the municipalities it serves." And, under PSL §226(2), "[w]hen abandonment of any service is prohibited by a franchise, no cable television company may abandon such service without written consent of the franchisor, if any, and the commission. In granting such consent, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest."

The Commission jurisdiction over telephone companies is similarly broad. PSL §4(1) provides that the Commission "shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter." Under PSL §99(2), "[n]o telegraph corporation or telephone corporation hereafter formed shall begin construction of its telegraph line or telephone line without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity…."

Additionally, PSL §94(2) grants the Commission "general supervision of all … telephone corporations…within its jurisdiction … and shall have the power to … examine … their franchises, and the manner in which their lines and property are leased, operated or managed, conducted and operated with respect to the adequacy of and accommodation afforded by their service and also with respect to the safety and security of their lines and property, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirement."[26]

This Order denies the Company's requests for rehearing and revokes and rescinds the Commission's January 8, 2016 Approval Order. This rescission and revocation is the result of Charter's repeated failure to comply with the Approval Order and §I(B)(1)(a-b) of Appendix A thereof, as well as the Settlement Agreement. For the reasons discussed below, Charter has consistently violated the Approval Order and the Commission's laws and regulations, leading the Commission to rescind and revoke its January 8, 2016 Approval Order and require that Charter cease operations in New York State, subject to the conditions laid out below.

[26] Additionally, PSL §91(1) requires that telephone corporations' facilities be "adequate and in all respects just and reasonable," and PSL §94(2) requires that the Commission review the safety of and manner in which telephone plant is operated. Similarly, PSL §220 requires that facilities installed by cable companies be adequate and conform with the Commission's construction standards, including the National Electric Safety Code (NESC) and PSL §221, requires that cable companies comply with the requirements contained in any franchise agreement confirmed by the Commission.

DISCUSSION

Through this Order, the Commission denies both of Charter's rehearing requests and determines that stronger remedies are warranted in light of the Company's continued non-compliance with the Network Extension Condition and continued bad faith.

Request for Rehearing – June 14 Order

Turning first to the requests for rehearing, the Commission denies these requests on the basis that Charter has not alleged an error of fact, or law nor have any new circumstances been identified, sufficient to grant rehearing with regard to the June 14 Order. Charter makes four arguments in its Buildout Rehearing Petition. Each argument has been previously addressed by the Commission in connection with its June 14 Order and, therefore, the Company has not raised any new issues of fact or law sufficient to support a grant of rehearing.

First, Charter argues that each and every address it submitted in its January 8, 2018 filing complied with the Approval Order's requirements.[27] The June 14 Order addressed this argument at length and determined that Charter's position lacked merit. Charter's request fails to present a basis to disturb the Commission's previous determination. Second, Charter argues that the Commission added requirements to the Approval Order through the June 14 Order, and based its conclusions on "generalized policy rationalizations" and not the Approval Order itself.[28] This argument is also without merit. The Commission previously explained at length in its June 14 Order that all actions taken therein were grounded in the plain

[27] Buildout Rehearing Petition, pp. 17-21.

[28] Id., pp. 21-53.

text of the Approval Order and Appendix A thereof and the Commission was interpreting and ensuring compliance with the Approval Order, not adding any new requirements or criteria.

Third, Charter argues that the Commission erred by not providing earlier notice regarding the disqualified passings and that Charter's reliance on that failure should not count against it.[29] Again, the Commission has already considered and rejected this argument. Charter was notified repeatedly regarding issues associated with its claimed passings and did nothing to correct its behavior or ask the Commission for clarification regarding the application of the plain meaning of the Approval Order and Appendix A. Charter has not presented a reason to disturb the Commission's earlier finding on this point.

Finally, Charter alleges that the Commission should not have reached its Good Cause determination in the June 14 Order, but that since it did, the Commission should have found that Good Cause existed on the basis that Charter's failure was the result of the Commission interpretation of the Approval Order, and not a failure on Charter's part to complete its network buildout.[30] Charter's failure to take steps to respond to Department of Public Service (DPS) Staff audits or to ask the Commission to clarify its Approval Order are not the fault of the Commission, but of Charter's own making.

Request for Rehearing – Compliance Order

Charter states that if the Compliance Order "takes issue with the fact that Charter's acceptance was 'subject to applicable law and without waiver of any legal rights,'" then it is predicated on a legal error.[31] Specifically, the Company

[29] Id., pp. 53-60.

[30] Id., pp. 60-67.

[31] Compliance Rehearing Petition, p. 13.

argues that its acceptance of the commitments simply restates "the rule of law that a party's acquiescence to an agency order cannot confer jurisdiction on the agency if it otherwise lacks it. Merely stating what the law is, is not a deficiency in Charter's acceptance letter that requires correction."[32]

Charter also states, however that "as Charter is currently only challenging the Commission's right to alter the Expansion Condition and not the condition itself, there is currently no live dispute on this issue."[33] Based on this statement, the Commission finds that this issue is moot and, therefore, not a valid basis for Charter to seek rehearing. However, as the Commission noted in the June 14 Order, it has consistently recognized federal jurisdiction over broadband as an interstate service. The Company misstates the Commission's application of the PSL's public interest standard in this proceeding. The Commission, through the Approval Order, required that Charter expand its network as a whole; a network that provides regulated cable television and telephone services as well as broadband, services that inherently compete against each other. This was a significant reason why the Commission determined that it was appropriate to consider broadband availability at length, in relation to network buildout in unserved and underserved areas of the State, and ultimately to require expansion of that network.[34] The Commission did not seek to regulate broadband service and went so far as to explicitly acknowledge the federal law preemption. The Company's reliance on such a preemption continues to be a red herring.

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[32] Id.

[33] Id., p. 14.

[34] June 14 Order, pp. 52-53.

Revocation

Both the Commission and the DPS Staff have repeatedly attempted to correct Charter's behavior and secure its performance of the Approval Order's Network Expansion Condition. This process began in mid-2016 in the form of informal consultations and discussions regarding DPS Staff audits of purported completed passings. Those efforts next took the form of the negotiation and adoption of the Settlement Agreement. Contemporaneous with that effort, DPS Staff undertook the painstaking process of collaborating with Charter and the various Pole Owners around the State to ensure Charter was receiving sufficient pole application approvals to complete its network buildout, which has yielded substantial results and seen pole application approvals dramatically increase.

These steps were all insufficient, however, to secure Charter's compliance with the Network Expansion Condition. Charter instead opted to include addresses in its network buildout December 18, 2017 target that were neither unserved nor underserved including many addresses in densely populated urban areas like NYC. Thus, on March 19, 2018, the Commission was compelled to issue an Order to Show Cause as to why certain claimed passings should not be disqualified from the Company's buildout plan and in its June 14 Order, in fact, found those addresses and others to be ineligible. Through its June 14 Order disqualifying certain claimed passings, the Commission made a further attempt to ensure that those areas of New York State that lack access to a network receive service from Charter, as the Company committed to provide and as the Approval Order (and the Settlement Agreement) required.

Subsequently, the Company again failed to meet its June 18, 2018 target and the Commission again determined that the Company had included ineligible addresses in its buildout

plan through its July 27 Order. In short, Charter has had repeated opportunities to demonstrate its commitment to and compliance with the Commission's Approval Order and Settlement Order, modify its buildout actions to comply with the Network Expansion Condition, and advance the public's interest. Unfortunately, through its systemic actions, Charter has ignored these opportunities.

In spite of these opportunities, Charter repeatedly and continuously fails to meet its buildout targets (in the form of missing the May 2017, December 2017 and June 2018 targets). And, instead of demonstrating that the gap between its target and performance is narrowing, Charter's most recent July 9, 2018 report to the Commission indicates that the gap is growing and unlikely to ever be satisfied by the Company in the time allowed under the Settlement Agreement. Charter continues to show 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, which make evident that there was not – and is not – a corporate commitment of compliance with regard to this important public interest condition.

Obscuring and Obfuscating Buildout Performance

In addition to Charter's repeated violations of the Approval Order's Network Expansion Condition and the Settlement Agreement, the Company continues to obscure and obfuscate its actual performance. For example, it has most recently insisted on filing two versions of its buildout plan, including addresses that the Commission has already disqualified. Charter also

continues to challenge the Commission's June 14 Order,[35] despite the plain language in the Approval Order to the contrary.

The Company continues to advertise and claim that it 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."[36] Based upon those representations, Charter was directed to stop making such claims in the Commission's June 14 Order. The matter was also referred to the New York State Attorney General for action under the General Business Law or other relevant statutes and to the United State Securities and Exchange Commission.[37] To date, the Commission is advised that Charter continues to air these deceptive advertisements. Such advertising is a public declaration by Charter that it refuses to accept the Commission's determination of non-compliance.

Another example of Charter misleading the public can be found in Metropolitan NYC, one of the most-wired cities in America where essentially, 100% of the NYC areas are served by

[35] See, generally, Case 15-M-0388, Charter Rehearing Petition on Network Expansion Disqualification Order (filed July 16, 2018).

[36] See, Case 15-M-0388, Letter from Paul Agresta, General Counsel to Thomas Rutledge, Chairman and Chief Executive Office dated June 26, 2018.

[37] Id.

one or more 100 Mbps wireline providers.[38] Charter included 12,467 addresses in NYC in its January 2018 filing on the December 2017 target, and indicated that all 12,467 were newly passed with broadband services. These addresses, however, were required to be passed pursuant to the Commission cable rules and the Company's cable franchise agreements with NYC.

Further, through the course of its review, the Commission also determined that Charter sought to include more than 4,000 addresses in the Cities of Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady (the most densely populated cities served by Charter outside of NYC) as part of its buildout. U.S. Census Bureau data indicates that the average density in all of these municipalities is in excess of 35 homes per mile. Through a review of online mapping, field audits, and the Charter franchise agreements with these municipalities, it was determined that all these addresses are likely located in densely populated areas that already have, or

[38] In fact, according to Time Warner Cable's own press release, "Time Warner Cable Completes 'TWC MAXX' Rollout in Los Angeles and New York City," dated November 13, 2014 (available at https://www.timewarnercable.com/content/twc/en/about-us/press/twc-completes-twc-maxx-rollout-in-la-and-nyc.html) every New York City address passed by its network was capable of receiving 300 Mbps broadband service as a result of the MAXX project upgrades. The press release states that "[t]he service transformation was announced by TWC in January 2014 as a commitment to reinvent the TWC experience market by market, beginning in LA and NYC. The enhancements have been rolled out in stages by area as TWC completed a top-to-bottom network evaluation and upgrades to support the advanced services," and that "[e]very customer in our two largest markets now has access to the superfast Internet and new TV experience promised by TWC Maxx." Thus, in any case, no passings in Charter's NYC franchise area footprints could be deemed as unserved (less than 25 Mbps available) or underserved (25 Mbps-100 Mbps) since all locations had 300 Mbps MAXX access as of 2014, and every location in the franchise areas should have had service available to it at that time.

should have had network passing at the street level. If these locations were not in fact passed, then Charter may have been in violation of its respective franchise agreements.

Based on a review of available pole application data, Charter has no active pole applications for network expansion in any of these cities, indicating that no new passings could have been constructed and only new customers were made serviceable, which means Charter was again attempting to deceive the Commission and the public-at-large regarding its performance under the Approval Order's Network Expansion Condition.

Safety Issues

DPS Staff advises that the Company has been involved in numerous incidents in which Charter (or its contractors) have completed work that is not compliant with the National Electric Safety Code (NESC) or is otherwise unsafe, or in violation of the PSL and the Commission's regulations. 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 2018, an incident occurred in which a Charter contractor was electrocuted, and unfortunately 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 as Charter has persistently delayed in providing National Grid and the Department responses to requested actions and information necessary to ensure safe and adequate service. As a result, Charter remains unable to install facilities anywhere in National Grid's service territory. This incident remains under investigation as do wider safety issues associated with the Company's buildout.

In sum, these issues demonstrate that Charter has failed to comply with the Commission's laws and regulations, which require, among other things that cable installations comply with the NESC and other standards. Safety is of paramount importance and these violations are unacceptable and demonstrate Charter's unfitness to provide service to the people of New York State.

Unconditional Acceptance

Finally, as noted above, instead of presenting an unconditional written acceptance to the Approval Order, Charter initially submitted an incomplete and conditional statement that referenced only Appendix A to the Approval Order. Charter subsequently sought to use that incomplete and conditional statement as a means to justify including locations within New York City as passings that would qualify under the Approval Order. In turn, Charter sought to use that argument to avoid the buildout requirement in unserved and underserved areas in Upstate New York. However, the Approval Order required that the network buildout take place in unserved or underserved areas located in the less-densely populated areas of the State. Moreover, there simply can be no legitimate contention that NYC is a less-populated area of the State. Given Charter's attempt

to use its limited and conditional commitment as a means to avoid the Network Extension Condition in the less-populated areas, the Commission directed Charter to replace its defective January 19, 2016 acceptance letter with a new letter indicating full unconditional acceptance. Thereafter, Charter filed a new letter indicating unconditional acceptance that referenced the entire Approval Order and Appendix A thereto.

Despite this recent written commitment, Charter – in its filings with the Commission – continues to maintain its position that NYC locations should count towards the Network Extension Condition compliance totals established by the Approval Order. Thus, despite its submission of a letter replacing its defective unconditional acceptance letter, Charter through its conduct continues to display a lack of a commitment of compliance toward its buildout obligations contained in the Approval Order. Charter's actions continue to demonstrate that it seeks to avoid the buildout obligations in less-densely populated areas of the State.

Based on the forgoing, it appears that the prospect of forfeiting its right to earn back all of Settlement Agreement's $12 million Letter of Credit does not seem to be an appropriate incentive where the Company stands to save tens of millions of dollars by failing to live up to its buildout obligations in New York. For each of the reasons stated above, the Commission determines that the administrative remedies ordered to date – establishment of a one million dollar escrow fund and forfeiture of three million dollars under the Settlement Agreement's Letter of Credit - have been ineffective in prompting the Company to satisfy its buildout obligations under the Network Expansion Condition. As indicated, the gap between required buildout and completed passings is growing not shrinking and Charter seems more focused on controlling its public relations perception than

its public interest obligations. The Company has had multiple opportunities to correct these issues and either has not done so or has been openly brazen in its efforts to avoid them.

The Commission is now forced to take the more severe step of revoking and rescinding its January 8, 2016 Approval Order, pursuant to the PSL including §§99, 216, 226, and 227. To that end, Charter is directed to file with the Secretary to the Commission, within 60 days of the issuance of this Order, a plan to affect an orderly transition to a successor provider(s). The plan will be subject to Commission approval.

As discussed in pertinent part, under Article 11 (cable companies), Charter may not abandon any service or portion thereof without giving six months' prior written notice to the commission. Moreover, abandonment of any service is prohibited without written consent of the franchisor, if any, and the commission. In granting such consent, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Here, the Commission is requiring a six-month plan for Charter to cease operations in areas formerly served by TWC to coincide with the provisions of abandonment of a cable service. In doing so, the Commission is cognizant of the importance of having an orderly transition to protect the health and safety of its New York customers. The Commission recognizes that this is not a voluntary abandonment, but the statute must be read in conjunction with the Commission's most critical authority to protect the health and safety of the Company's customers and the reliability of the network upon which hospitals, emergency personnel and other first responder rely.

Similarly, to protect the health and safety of the Company's telephone customers, Charter is directed to continue

providing service until Charter's regulated New York operations cease – via an orderly process.

Until the orderly cessation of Charter operations in these areas has been completed, the Company must continue to comply with all local franchises it holds in New York State and all obligations under the Public Service Law and the Commission regulations. In the event that Charter does not do so, the Commission will take further steps, including seeking injunctive relief in Supreme Court to protect New York consumers.

CONCLUSION

The Commission determines that the requests for rehearing are denied. In addition, the Commission determines that the administrative remedies applied to date to Charter's ability to comply with the Approval Order's Network Expansion Condition are insufficient and, more generally, Charter has repeatedly failed to meet its obligations under the Approval Order and to operate in compliance with the Public Service Law and the laws and regulations of New York State. Charter's repeated, continued, and brazen non-compliance with the Commission-imposed regulatory obligations and failure to act in the public's interest necessitates a more stringent remedy as discussed herein.

The Commission orders:

1. Charter Communications, Inc.'s Motion for Rehearing and Reconsideration on the Order on Compliance filed July 16, 2018 is denied for the reasons stated in the body of this Order.

2. Charter Communications, Inc.'s Petition for Rehearing and Reconsideration of the June 14 Order Denying Response to Order to Show Cause and Denying Good Cause

Justification filed July 16, 2018 is denied for the reasons stated in the body of this Order.

3. The January 8, 2016 Order Granting Joint Petition Subject to Conditions in this proceeding is revoked and rescinded for the reasons stated in the body of this Order.

4. Charter Communications, Inc. is directed to file a plan with the Secretary to the Commission within 60 days of the issuance of this Order, consistent with the discussion in this Order. This plan will be subject to Commission review and approval.

5. Charter Communications, Inc. shall not abandon any regulated service during the pendency of plan required to be filed pursuant to Ordering Clause 4.

6. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include justification for the extension, and must be filed at least one day prior to the affected deadline.

6. This proceeding is continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

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.[1] 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

[1] 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).[2]

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[3] 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.[4] 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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[2] Id., p. 53 and Appendix A §I.B.1.

[3] 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.

[4] 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.[5] Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York.[6] 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."[7] 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,[8] 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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[5] Approval Order, p. 19.

[6] Id., p. 49.

[7] 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.

[8] 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."[9]

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

[9] Settlement Order, Appendix A.

should not draw down on the Letter of Credit established though 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[10] 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"[11] 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

[10] See, generally, June 14 Order.

[11] 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"[12] 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.[13] 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,

[12] 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.

[13] 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.[14]

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

[14] 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.[15]

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

[15] 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 Commissions' merger approval authority.[16] 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."[17] 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.[18] In determining whether the Approval Order and Appendix A thereof are legally sustainable, the

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

[17] Approval Order, pp. 22-24.

[18] 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.[19]

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."[20] 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."[21] 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.[22]

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[19] 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."]

[20] Settlement Agreement, Appendix A.

[21] Id.

[22] 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."[23]

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

[23] 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[24] 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.[25] Inclusively, 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

[24] The Cities of Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady.

[25] 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."[26] 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."[27] 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.[28] 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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[26] Settlement Agreement, ¶9.

[27] Id., ¶15.

[28] 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.[29] 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.[30]

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[29] See, June 14 Order pp. 40-41.

[30] 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.[31] 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.[32] The Company cannot now claim that it believed otherwise and be allowed to abdicate its obligations to the people of New York

[31] Id., pp. 44-45.

[32] 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.[33]

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,[34] 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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[33] 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.

[34] 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")."[35] However, the Settlement Agreement further states that "if, during any period covered by

[35] 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."[36]

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

[36] 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."[37] Based upon those misleading representations, the Company was directed to "cease and desist this deceptive advertising."[38] 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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[37] 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.

[38] 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