

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on March 19, 2018

COMMISSIONER PRESENT:

John B. Rhodes, Chair

CASE 18-M-0178 - Proceeding to Investigate Whether Charter
Communications, Inc. and its Subsidiaries
Providing Service Under the Trade Name
"Spectrum" Have Materially Breached Their New
York City Franchises.

ORDER TO SHOW CAUSE

(Issued and Effective March 19, 2018)

INTRODUCTION

This order directs Charter Communications, Inc.
(Charter or the Company) to provide records that will be reviewed
by the Commission to determine whether Charter and its
subsidiaries providing service under the trade name "Spectrum"
have materially breached their City of New York (NYC) franchise
agreements, with particular focus on whether Charter is meeting
basic requirements to pay the appropriate level of franchise fees
to NYC and to deploy its network within NYC.

On or about October 6 and October 7, 2011, Time Warner
Entertainment Company L.P. and Time Warner NY Cable LLC
separately submitted five applications for Commission approval of
the renewals of their respective cable television franchises
(franchise renewals) with NYC covering Northern Manhattan,

Southern Manhattan, Brooklyn, Staten Island and Queens, Counties.¹ The Commission, through five separate Orders, approved the franchise renewals on or about November 30, 2011.²

On January 8, 2016, the Commission approved the merger of Time Warner Cable, Inc. (Time Warner) and its operating subsidiaries with Charter subject to conditions.³ As a result of that transaction, Charter and its new operating subsidiaries became the third-largest cable provider in the country. In New York, Charter now provides cable television services to approximately 2.6 million subscribers through approximately 1,150 franchise agreements throughout New York State and four out of the five New York City boroughs (Manhattan, Staten Island, Queens, and Brooklyn).

Importantly, Charter's franchise agreements with NYC require, among other things, that the Company pay to NYC a franchise fee of five percent of its annual gross video revenue as defined by the franchise renewal agreements. The franchise agreements also contain requirements for the deployment of cable services.

The Commission has recently learned that Charter may be in violation of at least these two commitments. The NYC Department of Information Technology and Telecommunications

¹ Time Warner Cable was first granted cable franchises for Northern and Southern Manhattan in 1970, which were renewed in 1990 and again in 1998; the Queens, Staten Island and Western Brooklyn franchises were granted in 1983 and renewed in 1998.

² See Cases 11-V-0549, 11-V-0550, 11-V-0551, 11-V-0552, and 11-V-0553, Applications, Orders Approving Renewal (issued November 30, 2011).

³ 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). Television, Internet and Voice services are now provided by Charter in New York under the name "Spectrum."

(DoITT) recently made a request for information under Section 11 of the franchise renewals to determine generally if Charter is making its full franchise fee payments to NYC pursuant to the franchise renewal terms. Department of Public Service (DPS) Staff was also advised by NYC DoITT that franchise fee payments to NYC from Charter have been declining year-over-year since Charter consummated its merger with Time Warner raising some legitimate question pertaining to NYC's franchise fee payments.

Additionally, Charter recently filed its December 2017 buildout target under the Commission's Approval Order and Settlement Agreement in Case 15-M-0388⁴ claiming to have passed 42,889 residential and/or business units of which 12,467 were supposedly located in Metropolitan NYC. In a companion Order to Show Cause issued simultaneously with this order, those Metropolitan NYC passings are being disqualified from Charter's December 2017 buildout requirement on the basis that cable network was already present. Accordingly, there are serious concerns as to whether Charter is otherwise in compliance with the network deployment requirements of the NYC franchise renewal agreements. Specifically, it is questionable whether Charter's network did in fact pass all buildings in its NYC footprint as required by the respective franchise renewals.

Public Service Law (PSL) §227(1) states in pertinent part that "[a] franchise shall terminate at the expiration of its term or otherwise in accordance with the provisions thereof, unless, prior thereto, the [C]ommission otherwise orders. The [C]ommission may so order only if it finds, after public notice and opportunity for a hearing, that the franchisee: (a) has committed a material breach of its franchise or any applicable

⁴ Id., Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (issued September 14, 2017) (Settlement Agreement). On September 14, 2017, the Commission adopted a Settlement Agreement, filed on June 19, 2017.

provision of this article or of the regulations promulgated hereunder and has failed, without reasonable justification, to cure said breach within sixty days after having received written notice thereof from the commission..."

Through this order, Charter is required to show cause as to why the Commission should not begin the process of revoking the NYC franchise agreements based on the Company's material breach of some of the terms contained therein or any applicable provision of PSL Article 11 or of the regulations promulgated thereunder. Failure to respond to this Order to Show Cause in the time allowed will result in the immediate initiation of said public notice and opportunity for hearing.

BACKGROUND

The Commission is responsible for regulating the cable television industry in New York State and promulgates minimum standards that are incorporated by law into every cable operator's franchise agreements.⁵ Public Service Law §222(1) requires the Commission's approval of a franchise renewal. Public Service Law §222(4) provides that the Commission may approve the application for a franchise renewal contingent upon compliance with certain standards, terms or conditions set by the Commission determined not to have been met by the applicant system or franchise renewal as proposed. The Commission's practice in reviewing cable franchise agreements has been to specifically reference the minimum franchise standards where we intend such standards to govern.

The franchise renewal agreements may contain additional provisions that are not required by the Commission's rules. The Commission's approval of these provisions is granted to the extent that they pertain to the provision of cable

⁵ PSL §§211-216.

service and are, and remain, consistent with PSL Article 11, the Commission's regulations, policies and orders and applicable federal statutes and regulations. In the event of an ambiguity in any such provision or among separate provisions, the provision or provisions will be construed in the manner most favorable to the franchisor.⁶

Under 16 NYCRR §895.1 et seq., a franchise will be confirmed or approved by the Commission only if it contains certain provisions. One such provision relating to franchise fees requires a provision stating: "(1) whether a franchise fee shall be payable by the franchisee to the municipality; and, if applicable, (2) the precise amount or method of calculation of such franchise fee; [and] (3) whether any facilities or support for public, educational and governmental access that may be required by the franchise shall be part of such franchise fee." (16 NYCRR §895.1(o)). This provision shall also provide that the amount or method of calculation shall be competitively neutral when compared to the amount or method of calculation of a franchise fee contained in any other cable television franchise granted by the municipality.

Under Section 10.1 of the NYC franchise renewals, the Company "shall pay to the City a Franchise Fee of five percent (5%) of annual Gross Revenue (the 'Franchise Fee.')" In the case of the NYC franchise agreements, under Section 1.32 Gross Revenue has been given a very broad definition including "...without limitation (unless expressly excluded hereinafter), all revenue, as determined in accordance with generally accepted accounting principles, which is derived by Franchisee (or any

⁶ See e.g., Case 11-V-0553 - Application of Time Warner NY Cable LLC for Approval of the Renewal of its Cable Television Franchise for Northern Manhattan, New York County, Order Approving Renewal (issued November 30, 2011), p. 3 (Renewal Agreement).

Affiliate) from the operation of the Cable System to provide Cable Service in the Franchise Area including...all advertising revenue which is received directly or indirectly by Franchisee or any Affiliate from or in connection with the distribution of any service over the System and including without limitation compensation for use of studio or other facilities and equipment associated with production and distribution of any programming or advertising to be distributed as part of Cable Service Advertising commissions paid to third parties shall not be netted against advertising revenue included in Gross Revenue." Gross Revenue also includes "...revenues from the lease of channels or channel capacity [] compensation received by Franchisee that is derived from the operation of the Cable System to provide Cable Service with respect to commissions that are paid to Franchisee or an Affiliate providing Cable Service under this Franchise as compensation for promotion or exhibition of any products or services on the Cable System such as home shopping or similar channel subject to the exceptions described below." Coincidentally, this definition of franchise fees is similar to that used by Verizon New York Inc. (Verizon) in its agreement with NYC.

The Commission's regulation at 16 NYCRR §895.5 further states, in pertinent part, "[t]hat, within five years after receipt of all necessary operating authorizations, cable television service will be offered throughout the authorized area to all subscribers requesting service in any primary service area." The primary service area shall include each of the following within the franchised area: "(i) those areas where the cable television plant has been built without a contribution-in-aid-of-construction by subscribers; (ii) those areas where the cable television company is obligated by the terms of its franchise to provide cable television service

without a contribution-in-aid-of-construction by subscribers; (iii) any area adjoining an area described in subparagraph (i) or (ii) of this paragraph and which contains dwelling units at a minimum rate of 35 dwelling units per linear mile of aerial cable; (iv) any area adjoining an area described in subparagraphs (i) and (ii) of this paragraph and which contains at least the same number of dwelling units per linear mile of aerial cable as is the average number of dwelling units per linear mile of cable in areas described in subparagraphs (i) and (ii) of this paragraph. The average is to be determined by dividing the sum of the dwelling units in areas described in subparagraphs (i) and (ii) of this paragraph by the number of linear miles of cable in the same areas."

The NYC franchises contain language on the deployment of cable service as follows: Under Section 5.1 "Residential Deployment: [a]s of the Effective Date the System shall have passed all households that exist as of the Effective Date within the Franchise Area except as the Commissioner has approved specific exceptions to such requirement. For purposes of this Agreement household is passed when functioning System facilities have been installed in the street fronting the building in which such household is located such that Service could be provided to such building in conformance with the provisions of Sections 5.3.1, 5.3.1.1, 5.3.1.2 and 5.3.1.3 assuming no delays in gaining lawful access to any necessary private right-of-way." (emphasis added)

On January 8, 2018, Charter filed an update on its buildout pursuant to the Approval Order and 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. However, it appears Charter included addresses

located within the Metropolitan NYC region which, assuming Charter's compliance with the Franchise Agreements, should have already had network available. The Commission is concerned that because Charter presents its existing network as capable of providing all services and now it claims that the network did not pass more than 12,000 addresses in NYC with broadband service, that the network could not provide cable service to these locations either in violation of the Commission's regulations or the NYC franchise agreements.

LEGAL AUTHORITY

Public Service Law §221(1) states "[n]o person shall exercise a franchise, and no such franchise shall be effective, until the commission has confirmed such franchise. A person wishing to exercise a franchise shall file with the [C]ommission an application for a certificate of confirmation in such form and containing such information and supportive documentation as the commission may require." Under PSL §222(1) "[n]o transfer, renewal or amendment of any franchise, or any transfer of control of a franchise or certificate of confirmation or of facilities constituting a significant part of any cable television system shall be effective without the prior approval of the [C]ommission." Charter's predecessor Time Warner and/or its operating subsidiaries obtained local franchises from NYC and Certificates of Confirmation/Renewals from the Commission to provide cable service. Charter provides cable services to NYC through five local franchises located in: (1) Northern Manhattan, (2) Southern Manhattan, (3) Brooklyn, (4) Staten Island, and (5) Queens. Charter does not have an agreement to serve the Bronx. These agreements were last renewed by NYC and approved by the Commission on or about November 30, 2011 and effective through July 18, 2020.

Public Service Law §227(1) states "[a] franchise shall terminate at the expiration of its term or otherwise in accordance with the provisions thereof, unless, prior thereto, the commission otherwise orders. The commission may so order only if it finds, after public notice and opportunity for a hearing, that the franchisee: (a) has committed a material breach of its franchise or any applicable provision of this article or of the regulations promulgated hereunder and has failed, without reasonable justification, to cure said breach within sixty days after having received written notice thereof from the commission..." Under PSL §227(2) "[u]pon termination of a franchise or certificate of confirmation, the cable television company shall dispose of its facilities in accordance with the provisions of the franchise or certificate. However, on motion of any interested party or upon its own motion, and after public notice and opportunity for hearing, if the [C]ommission finds that the continued presence of the facilities in any public thoroughfare would pose a nuisance to the municipality or its residents, the cable television company shall remove its facilities within such period as the [C]ommission shall order. In the absence of any applicable franchise or certificate provision or order by the [C]ommission to the contrary, the cable television company may abandon its facilities."

Finally, under PSL Section 216(2-4), "[t]he [C]ommission may require cable television companies to maintain and file such reports, contracts and statements, including but not limited to ownership, accounting, auditing and operating statements, engineering reports and other data as the commission may deem necessary or appropriate to administer the provisions of this article;" may "examine, under oath, all officers, agents, employees and stockholders of any cable television company, municipal officials and any other persons and compel

the production of papers and the attendance of witnesses to obtain the information necessary to administer the provisions of this article;" and " may require and receive from any agency of the state or any political subdivision thereof such assistance and data as may be necessary to enable the commission to administer the provisions of this article."

DISCUSSION

Franchise fees represents a significant source of revenue for any municipality in New York State and certainly NYC is no exception. It is one of the most critical terms in any franchise agreement. A NYC Comptroller audit of Northern Manhattan in 2002 indicated that "[f]or the audit period, October 1, 1998, to December 31, 2000, Time Warner reported gross revenues totaling \$137.9 million, and paid the City franchise fees of \$6.7 million."⁷ A 2002 audit regarding the Southern Manhattan franchise indicated that "[f]or the audit period October 1, 1998, through December 31, 2001, Time Warner reported gross revenues totaling \$628 million. Time Warner paid the City \$39.3 million in franchise fees."⁸

Department Staff has been advised by NYC DoITT that it made a request for information under Section 11 of the NYC franchises to determine generally if Charter is making its

⁷ See, Audit Report on the Compliance of Time Warner Cable of New York City, Northern Manhattan Division, With Its Franchise Agreement, available at, <https://comptroller.nyc.gov/reports/audit-report-on-the-compliance-of-time-warner-cable-of-new-york-city-northern-manhattan-division-with-its-franchise-agreement/>

⁸ See, Audit Report on the Compliance of Time Warner Cable of New York City, Southern Manhattan Division, With Its Franchise Agreement, available at, <https://comptroller.nyc.gov/reports/audit-report-on-the-compliance-of-time-warner-cable-of-new-york-city-southern-manhattan-division-with-its-franchise-agreement/>.

franchise fee payments to NYC pursuant to the NYC franchise agreement terms. Department Staff was additionally advised by NYC DoITT that franchise fee payment to NYC from Charter has been declining year-over-year since Charter consummated its merger with Time Warner.

Consistent with the Commission's minimum franchise requirements, the NYC franchise agreements contain clauses on whether a franchise fee shall be payable by the franchisee to the municipality; and, if where applicable, the precise amount or method of calculation of such franchise fee. The Commission determined that approval of the franchise renewals is "... conditioned upon full compliance at a minimum with these requirements, whether or not the provisions in this franchise agreement specifically state or are in conflict with these requirements. Any franchise provision required in the Commission's rules that is omitted from the franchise agreement is added to it and is hereby incorporated in the franchise agreement; and, any federal and state law, rule, regulation and order, as amended, shall control the interpretation of and performance under this franchise renewal to the extent that any franchise provision does not meet the requirements in the Commission's rules or conflicts with or is inconsistent with federal and state laws, rules, regulations and orders."⁹

If Charter is improperly calculating its franchise fee payments to NYC it may be construed as a material breach of the agreement and a basis for revocation proceedings to begin under PSL §227. This Order to Show Cause seeks records regarding franchise fee payments made by Charter to NYC since the merger, including how such payments were individually calculated for each of the five franchise areas noted above. Charter should provide detailed records regarding its method for calculating

⁹ See e.g., Renewal Agreement pp. 2-3.

gross revenues and whether and how any such methods differ from those used by Time Warner Cable prior to the merger. The franchise fee payment records and all associated backing data used as determinants in any fees paid to NYC should be inclusive of the time period 2012 through 2017.

Turning to network deployment, as stated above, Charter recently filed its first-year buildout target under the Commission's Approval Order and Settlement Agreement claiming to have passed 42,889 residential and/or business units of which 12,467 were located in NYC, despite the fact that the NYC franchise agreements include network deployment requirements as discussed above. Specifically, based on this representation, DPS Staff has identified concerns as to whether Charter's network did in fact pass all buildings in its NYC footprint as required by Section 5 of its franchise renewal agreements.

As indicated in the companion Order to Show Cause, Metropolitan NYC is one of the most-wired cities in America and the world, and essentially, 100% of the NYC areas are served by one or more 100 Megabits per second (Mbps) wireline providers

such as Verizon FiOS, Cablevision, RCN, and Charter itself.¹⁰ Despite the foregoing, 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 purported passings include addresses throughout the boroughs including Manhattan.

In auditing Charter's compliance with the Merger Approval Order, DPS Staff conducted 490 premises audits in NYC. Of those addresses attempted to be audited, Field Inspectors could not gain access to 28 addresses. The remaining 462 were recommended for disqualification in the companion Order to Show Cause because they were either served by pre-existing Charter network, 100 Mbps service from another provider, or a combination of both.

Department Staff identified at least two address examples for where Charter is claiming an address that should be counted toward its December 2017 target that according to Field Inspection notes should have already been served by the Company.

¹⁰ 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, every customer passed by its network was capable of receiving 300 Mbps broadband service as a result of the MAXX project upgrades. "The 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 "Every 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. See, <https://www.timewarnercable.com/content/twc/en/about-us/press/twc-completes-twc-maxx-rollout-in-la-and-nyc.html>.

They are multi-dwelling units (one with 16 units, one with 198). These addresses are also a part of the NYC Franchise Area that Time Warner (and Charter) should have already built to pursuant to its franchise agreements with NYC. Google Street View imagery shows that these buildings existed, as they do now, prior to November 30, 2011, when the Commission approved the NYC franchise agreements for both Northern and Southern Manhattan.

In a more egregious example, Charter also listed the Reuters Building as countable toward the December 2017 target in Charter's January 2018 filing, which has a listed address of 3 Times Square. Staff could not find any photos of the building prior to 2014 beside aerial views, but construction was completed in 2001, well before the effective date of the current franchise agreements. If Charter's network was not capable of providing these addresses with service, then it appears as though it may be a material breach of the NYC franchise renewals that warrants further investigation here and grounds to begin revocation proceedings under PSL §227.¹¹ In providing evidence, Charter should include proof that its network was capable of providing cable service to its entire NYC footprint, including the 12,467 addresses identified in the companion Order to Show Cause issued in Case 15-M-0388.

¹¹ The Commission recognizes that the franchise does not require that Charter provide broadband service to all locations in its franchise area, however, Charter (and previously Time Warner Cable) has long advertised its network as capable of providing broadband, video, and telephone services. See, e.g., Time Warner Cable Launches Its Fastest Internet Yet in New York City, <https://www.businesswire.com/news/home/20090924005362/en/Time-Warner-Cable-Launches-Fastest-Internet-New> (September 24, 2009); Time Warner Cable Boosts Internet Speeds in New York City, NJ and the Hudson Valley, https://www.timewarnercable.com/en/about-us/press/time_warner_cableboostsinternetspeedsinnewyorkcitynjaandthehudson.html (March 19, 2012).

Based on these potential violations (i.e., failure to remit proper franchise fee payments and failure to comply with network deployment requirements) of the NYC franchises, this Order to Show Cause requires that the Company provide evidence as to why these "material" breaches of the NYC cable franchises should not result in the commencement of a termination proceeding of Charter's NYC cable franchises under PSL §227(2). Charter is therefore ordered to provide such evidence within 21 days of the issuance of this Order. Should Charter fail to provide such evidence, revocation proceedings will begin immediately.

CONCLUSION

For the reasons stated herein, it is determined that Charter should show cause why the Commission should not begin proceedings to revoke its NYC cable franchises in connection with apparent material breaches of its franchise fee remittance and buildout requirements.

It is ordered:

1. Charter Communications, Inc. is ordered to show cause, within 21 days of the issuance of this Order, why the Commission should not begin a public notice and opportunity for a hearing on whether the Company has committed material breaches of its franchise agreements with NYC or any applicable provision of PSL Article 11 or of the regulations promulgated thereunder.

2. Charter Communications, Inc. is ordered to provide, within 21 days of the issuance of this Order, records regarding franchise fee payments made by Charter to NYC since the 2016 merger, including how such payments were individually calculated for each of the five franchise areas noted above. Charter Communications, Inc. is ordered to provide detailed records

regarding its method for calculating gross revenues and whether and how any such methods differ from those used by Time Warner Cable prior to the merger. The franchise fee payment records and all associated backing data used as determinants in any fees paid to NYC should be inclusive of the time period 2012 through 2017.

3. Charter Communications, Inc. is ordered to provide, within 21 days of the issuance of this Order, documents or other evidence to prove that its network was capable of providing cable service to its entire NYC footprint as required by Section 5 of its NYS franchise agreements.

4. Charter Communications, Inc. shall include with its responsive filing a list of witnesses who will defend every section of its argument(s).

5. 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 a justification for the extension, and must be filed at least one day prior to the affected deadline.

6. This proceeding is continued.

(SIGNED)

Commissioner