

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

**RESPONSE OF CHARTER COMMUNICATIONS, INC.
TO ORDER TO SHOW CAUSE**

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

Samuel L. Feder
Howard J. Symons
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
lplatzer@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

BACKGROUND 2

LEGAL STANDARD..... 9

ARGUMENT 10

I. CHARTER’S REPORTED ADDRESSES SATISFY EACH ELEMENT OF THE EXPANSION CONDITION..... 10

 A. Charter’s Process Ensures that each Reported Address Represents the Expansion of Broadband Availability to a Location Not Previously Serviceable..... 12

 B. Charter’s Process Ensures that each Reported Address Previously Lacked 100 Mbps+ Broadband Serviceability from another Provider..... 16

 C. Charter Does Not Report Network Extensions Built with State Funds..... 19

 D. Charter Has Built each Network Extension without Customer Contributions..... 20

 E. Charter’s Robust Quality Assurance Process Ensures the Accuracy and Reliability of the Data Reported. 20

II. THE COMMISSION MAY NOT MODIFY THE EXPANSION CONDITION BY ADDING ADDITIONAL REQUIREMENTS. 21

 A. The *Merger Order*’s Plain Text Is Controlling..... 22

 B. The Commission’s Interpretive Authority Is Particularly Limited Here. 24

 1. The Merger Closed Nearly Two Years Ago and the Commission Cannot Modify Its Terms Retroactively. 24

 2. The Expansion Condition Derives Its Legal Force, if any, from Charter’s Agreement to It. 25

 C. Applying the New Disqualification Requirements Retroactively Would Work Particular Injustice. 27

III. “DISQUALIFYING” CHARTER’S COMPLETED NETWORK EXTENSIONS WITHIN METROPOLITAN NEW YORK CITY WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW..... 30

- A. New York City Is Not “100% Served” by Competitors at 100 Mbps Speeds. 32
 - 1. The FCC’s Broadband Availability Report Does Not Stand for the Proposition that All New York City Addresses Already Have High-Speed Broadband Service. 32
 - 2. Competing Providers Do Not Pervasively Offer High-Speed Broadband throughout Charter’s New York City Franchise Area. 35
- B. Deployment of Existing Street-Level Charter Facilities in New York City Does Not in All Cases Obviate the Need for Construction to Further Expand Serviceability. 36
- C. The *Merger Order* Does Not Limit the Expansion Condition Exclusively to Low-Density Areas. 39
 - 1. The Plain Text of the Condition Contains No Low-Density Requirement. 40
 - 2. The *Merger Order*’s Economic Figures Are Inconsistent with a Low-Density-Only Limit. 42
 - 3. A Low-Density-Only Limit Would be Inconsistent with Charter’s Reasonable Reliance Interests. 43
- D. The *Order*’s Remaining Miscellaneous Objections to New York City Addresses Are Inconsequential. 44
- E. Disqualifying New York City Addresses Would Work Particular Unfairness if Applied Retroactively. 46
- IV. THE *ORDER*’S CHALLENGES TO CHARTER’S COMPLETED NETWORK EXTENSIONS IN UPSTATE NEW YORK LACK MERIT. 47
 - A. Deployment of Existing Cable Does Not in All Cases Obviate the Need for Construction to Further Expand Serviceability. 48
 - B. Other Challenged Upstate Addresses. 50
 - C. Charter’s Cable Video Network Expansion Obligations Do Not Independently Require Broadband Construction. 50
- V. “DISQUALIFYING” CHARTER’S COMPLETED NETWORK EXTENSIONS BASED UPON THE BROADBAND PROGRAM OFFICE’S BIDDING DECISIONS WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW. 52

Redacted

A. Charter’s Expansion Condition Is Not Limited by the BPO’s Subsequent Decisions about which Areas to Subsidize. 53

B. Charter Exceeded Significantly Its Obligation under the *Merger Order* to Consult with the BPO. 54

C. Charter’s Earlier Plans Not to Focus Its Service Expansion on Certain Locations Are Not a Lawful Basis for Precluding Charter from Expanding Service to those Locations Now. 57

 1. Charter’s Expansion Plans Have Always Been Subject to Modification..... 58

 2. Locations Not Previously in Charter’s Plan Are Benefitting from Broadband Service and Charter Had Good Cause to Build to Them. 59

VI. POTENTIAL IMPACT OF THE *ORDER* ON CHARTER’S COMPLETED NETWORK EXTENSIONS AND FUTURE REPORTING. 61

VII. THE COMMISSION’S CONSIDERATION OF THE ISSUES RAISED BY THE *ORDER* MUST BE FREE OF EXTRANEIOUS CONSIDERATIONS. 64

CONCLUSION..... 66

TABLE OF AUTHORITIES

CASES

Barnert v. 41 Fifth Avenue Associates, 158 A.D.2d 289 (1st Dep’t 1990),
superseded by statute as stated in *Laub v. New York State Division of Housing
& Community Renewal*, 176 A.D.2d 560 (1st Dep’t 1991).....24

Bethesda Community Hospital v. Heckler, No. 83 CIV. 6418, 1987 WL 108995
(S.D.N.Y. Aug. 6, 1987).....28

Matter of Bohlander v. Williams, 114 A.D.2d 540 (1985).....23

Chauca v. Abraham, 30 N.Y.3d 325 (2017).....13

Matter of Cupo v. McGoldrick, 278 A.D. 108 (1st Dep’t 1951).....24

Matter of D. & D. Realty Corp. v. Coster, 277 A.D. 668 (1st Dep’t 1951).....24

District of Columbia Federal of Civic Ass’ns v. Volpe, 459 F.2d 1231 (D.C. Cir.
1971).....65

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51
(1984).....28

Home Care Ass’n of New York State Inc. v. Dowling, 218 A.D.2d 126 (3d Dep’t
1996).....28

Katz v. American Mayflower Life Insurance Co. of New York, 14 A.D.3d 195 (1st
Dep’t 2004).....13

Kennedy v. Novello, 299 A.D.2d 605 (3d Dep’t 2002).....23

Matter of Lewis Family Farm, Inc. v. N.Y. State Adirondack Park Agency, 64
A.D.3d 1009 (3d Dep’t 2009).....23

Matter of Lockport Light, Heat & Power Co. v. Maltbie, 257 A.D. 11 (3d Dep’t
1939).....26

Matter of Luyster Creek, LLC v. New York State Public Service Commission, 18
N.Y.3d 977 (2012).....41

MCI Telecommunications Corp. v. FCC, 10 F.3d 842 (D.C. Cir. 1993).....65

Meadow Green–Wildcat Corp. v. Hathaway, 936 F.2d 601 (1st Cir. 1991).....27

Miguel-Miguel v. Gonzales, 500 F.3d 941 (9th Cir. 2007).....28

National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir. 1987).....27

Redacted

NLRB v. Niagara Machine & Tool Works, 746 F.2d 143 (2d Cir. 1984).....28

People ex rel. Finnegan v. McBride, 226 N.Y. 252 (1919).....24

People ex rel. New York Century Railroad Co. v. Public Service Commission, 231 N.Y. 1 (1921)26

Public Service Commission v. Rochester Telephone Corp., 55 N.Y.2d 320 (1982)26

Matter of Raritan Development Corp. v. Silva, 91 N.Y.2d 98 (1997).....23

Russo Development Corp. v. Reilly, No. 87-3916 (HLS), 1991 U.S. Dist. LEXIS 20965 (D.N.J. May 17, 1991)65

Matter of Sciame Construction LLC v. Re:Source New Jersey, Inc., 157 A.D.3d 627, 67 N.Y.S.3d 462 (1st Dep’t 2018)27

Matter of Sowa v. Looney, 23 N.Y.2d 329 (1968).....9, 10

Matter of Stoker v. Tarentino, 101 A.D.2d 651 (3d Dep’t 1984) 9-10

Scenic America, Inc. v. Department of Transportation, 138 S. Ct. 2 (2017).....27

Town of Orangetown v. Ruckelshaus, 740 F.2d 185 (2d Cir. 1984).....65

STATUTES

47 U.S.C. § 544(a)26

N.Y. A.P.A. Law § 306(1)9

N.Y. Stat. Law § 9413

ADMINISTRATIVE RULINGS

Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments (Aug. 6, 2004).....5

Case 13-C-0193, *Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements*, Determination (Jan. 8, 2018)66

Redacted

Case 13-C-0193, *Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements*, Determination 18-04 (Feb. 28, 2018)66

Case 17-C-0757, *In re Management and Operations Audit of Time Warner Cable Information Services (New York), LLC*, Order Initiating a Management and Operations Audit (Dec. 8, 2017).....66

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 (Mar. 19, 2018)37

In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 31 FCC Rcd 6327 (2016).....3, 13

In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling, 22 FCC Rcd 5901 (2007)25

In re GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, 13 FCC Rcd 22,466 (1998).....25

In re Inquiry Concerning High- Speed Access to the Internet over Cable and Other Facilities, Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d in part, rev’d in part sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev’d sub nom. National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005)25

In re Modernizing the FCC Form 477 Data Program, Further Notice of Proposed Rulemaking, 32 FCC Rcd 6329 (2017)34

In re Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017).....25

In re Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), *petition for review denied sub nom. U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, 86 U.S.L.W. 3195 (U.S. Sept. 17, 2017) 25-26

Wireline Competition Bureau Publishes Preliminary Determination of Rate-of-Return Study Areas 100 Percent Overlapped by Unsubsidized Competitors, Public Notice, 30 FCC Rcd 8179 (WCB 2015).....12

Wireline Competition Bureau Releases Data Specification for Form 477 Data Collection, Public Notice, 28 FCC Rcd 12,665 (2013)12

OTHER AUTHORITIES

16 NYCRR § 895.5.....51

16 NYCRR § 895.5(c)51

Complaint, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. Mar. 13, 2017)35

Erin Durkin, *Cuomo, de Blasio Join Cable Workers in Rally to Seek New Contract with Spectrum*, N.Y. Daily News (Sept. 18, 2017), <http://www.nydailynews.com/news/politics/cuomo-de-blasio-back-workers-contract-fight-spectrum-article-1.3504933>64

FCC, *FCC Form 477 Telephone Competition and Broadband Reporting Instructions* (Dec. 5, 2016), <https://transition.fcc.gov/form477/477inst.pdf> (Dec. 5, 2016)34

FCC, *Fixed Broadband Deployment Data from FCC Form 477*, <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477> (last visited May 5, 2018)34

Daniel Frankel, *Charter picketed by NY Gov. Cuomo as strike approaches 6-month mark*, FierceCable (Sept. 19, 2017), <https://www.fiercecable.com/cable/charter-picketed-by-10-000-plus-ny-gov-cuomo-as-strike-approaches-6-month-mark>65

Mara Gray, *Charter Communications Strike Ratchets Up; Governor Cuomo’s counsel issues letter to the state regulator raising concerns about the company’s business practices*, Wall St. J. (Oct. 4, 2017).....65

Matthew Hamilton, *Cuomo rallies with Charter workers on strike*, TimesUnion (Sept. 18, 2017), <https://blog.timesunion.com/capitol/archives/277344/watch-at-3-p-m-cuomo-rallies-with-charter-workers-on-strike>.....65

<https://dictionary.cambridge.org/us/dictionary/english/consultation>.....57

Letter from Alphonso David, Counsel to the Governor, to John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission (Oct. 2, 2017)65

Letter from John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission to Thomas Rutledge, Chairman/CEO, Charter Communications (Oct. 12, 2017).....65

Troy McMullen, *Why Long Island City is Home to New York’s Biggest Building Boom*, Financial Times (Mar. 11, 2016)31

Memorandum of Law in Support of Plaintiff the City of New York’s Motion for Summary Judgment, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. July 19, 2017)36

New NY Broadband Program: Phase 3 Request for Proposal Guidelines at 34 (Mar. 30, 2017), https://nysbroadband.ny.gov/sites/default/files/broadband_-_phase_3_rfp_guidelines-final_0.pdf35

New York State, *Programs: Broadband for All, New NY Broadband Program*, NY.GOV, <https://www.ny.gov/programs/broadband-all>.52

NYC Information Technology & Telecommunications, Cable TV, <https://www1.nyc.gov/site/doitt/residents/cable-tv.page> (last visited May 5, 2018)36

Ivan Pereira, *Downtown Brooklyn, Williamsburg to See Boom in Development: Report*, amNEWYORK (Aug. 18, 2015), <https://www.amny.com/news/downtown-brooklyn-williamsburg-to-see-boom-in-development-report-1.10751216>31

Reply Comments of NYC DoITT, WC Docket No. 11-10, *In re Modernizing the FCC Form 477 Data Program* (Oct. 24, 2017)34

Spectrum Strike Enters Second Year With NYC Protest, And No End In Sight, Forbes (Mar. 29, 2018), <https://www.forbes.com/sites/janetwburns/2018/03/29/spectrum-workers-strike-enters-second-year-with-nyc-protest-and-no-end-in-sight/#7a42a22b623d>64

State Broadband Data and Development Grant Program, 74 Fed. Reg. 32,545 (July 8, 2009)12

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

**RESPONSE OF CHARTER COMMUNICATIONS, INC.
TO ORDER TO SHOW CAUSE**

Charter Communications, Inc. (“Charter”) hereby submits its response to the One-Commissioner Order issued by Chair Rhodes, without notice to Charter or vote of the New York Public Service Commission (the “Commission”), on March 19, 2018 (hereinafter “*Expansion Show Cause Order*” or “*Order*”).¹ In the *Order*, Chair Rhodes proposes that the Commission disqualify 14,552 addresses Charter has reported to satisfy Charter’s network expansion obligations in this docket. The *Order* also proposes that the Commission preclude Charter from reporting thousands of additional planned future addresses to satisfy its network expansion obligations.

For the reasons stated herein and in the accompanying declarations, the Commission should conclude that Charter has adequately shown cause and demonstrated that the Commission should

¹ Case 15-M-0388, *Joint Petition of Charter Communications, Inc. and Time Warner Cable Inc. for Approval of a Transfer of Control of Subsidiaries and Franchises; for Approval of a Pro Forma Reorganization; and for Approval of Certain Financing Arrangements, Order to Show Cause* (Mar. 19, 2018) (hereinafter “*Expansion Show Cause Order*” or “*Order*”). The *Order* was eventually adopted by the Commission at its April 19, 2018 meeting.

not disqualify the vast majority of the addresses that are the subject of the *Order*.² The *Order* rests on mistaken assumptions regarding key facts concerning Charter's network expansion efforts in New York and a series of legal errors. The proposals in the *Order* are inconsistent with the Commission's prior orders, exceed the legal limits on the Commission's authority, and lack the required substantial evidentiary support.³

BACKGROUND

As part of its 2016 order granting the applications of Charter and Time Warner Cable Inc. ("Time Warner Cable") to transfer control over Time Warner Cable's New York telecommunications affiliates and cable franchises to Charter (hereinafter "*Merger Order*"),⁴ the Commission held that it would approve Charter's acquisition of control over Time Warner Cable's regulated New York affiliates provided that Charter accepted certain conditions described in the *Merger Order* and set forth in its Appendix A.⁵

This acquisition of control over Time Warner Cable's regulated New York affiliates was an element of a much larger national transaction in which Charter and Time Warner Cable (along

² In a handful of instances, Charter concurs with questions raised by the Department and will withdraw addresses as described herein.

³ Certain subjects discussed in this filing pertain to non-jurisdictional products and services. Discussion of non-jurisdictional products and services is not intended as a waiver or concession of the Commission's jurisdiction beyond the scope of Charter's regulated telecommunications and cable video services. Charter respectfully reserves all rights relating to the inclusion of or reference to such information, including without limitation Charter's legal and equitable rights relating to jurisdiction, compliance, filing, disclosure, relevancy, due process, review, and appeal. The inclusion of or reference to non-jurisdictional information or to the ordering clauses or other requirements of the *Order* as obligations or commitments to provide non-jurisdictional services shall not be construed as a waiver of any rights or objections otherwise available to Charter in this or any other proceeding, and may not be deemed an admission of relevancy, materiality, or admissibility generally.

⁴ Case 15-M-0388, Order Granting Joint Petition Subject to Conditions (Jan. 8, 2016).

⁵ Case 15-M-0388, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (Sept. 14, 2017) ("*Expansion Settlement Order*").

with Bright House Networks LLC) merged into the new entity that today operates as Charter. As part of its national commitments to the FCC in obtaining approval for this larger national transaction, Charter committed to expanding its broadband network and making high-speed Internet access services available to additional locations nationwide. The FCC incorporated this commitment into a binding merger condition requiring Charter to expand its broadband services to an additional 2 million residential locations nationally.⁶

In considering Charter's New York application, the Commission acknowledged Charter's national commitment. However, it expressed concern that Charter's national network expansion plans might principally benefit other states. *Merger Order* at 32-33. To address this concern, the Commission's *Merger Order* conditioned its approval upon Charter's agreement to direct a significant portion of its national expansion of high-speed broadband services specifically to locations in New York. The full text of the condition is set forth as follows:

New 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.

Merger Order, App'x A, § I.B.1 (hereinafter "Expansion Condition").⁷ The *Merger Order* also separately required Charter to consult with the New York Broadband Program Office ("BPO") in order to enable Charter and the BPO to target their respective network expansion efforts at different parts of the state. Specifically, Condition B.1(a) states:

⁶ *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6544 Appendix B (2016) ("FCC Merger Order").

⁷ Charter expressly preserves any arguments as to the enforceability of the Expansion Condition itself, including without limitation under the Commerce Clause to the United States Constitution.

Redacted

New Charter and Time Warner are required to consult with Staff and the BPO to identify municipalities that will not be the focus of this expansion condition in order to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program. This consultation is required to occur within 45 days of the issuance of this Order.

Merger Order, App'x A, § I.B.1(a) (hereinafter the “Consultation Requirement”).

On January 19, 2016, Charter filed with the Commission a letter indicating that it “accepts the Order Conditions for Approval contained in Appendix A, subject to applicable law and without waiver of any legal rights.”⁸ It also initiated and participated in an extensive consultation and coordination process with the BPO, described in detail in Part V *infra*, to optimize the joint success of Charter’s and the BPO’s respective broadband deployment programs.

Charter has been proceeding apace with its national broadband expansion, as well as with its network expansion efforts in New York. As part of the latter effort, Charter has regularly reported its completed New York addresses to the Commission. Charter has also answered a series of questions that Department of Public Service (“Department”) Staff have raised regarding specific addresses in Charter’s reports, and—in instances where Charter has concluded that Department Staff have identified valid issues with Charter’s reports—Charter has revised its submissions accordingly.

Charter has consistently and comfortably exceeded its national buildout targets in connection with its FCC-imposed network expansion commitment. However, in New York Charter faced initial challenges with its network expansion efforts that it did not have to confront to nearly the same extent in other parts of the country. Among other things, in New York, Charter has uniquely been expected to plan out and project its network expansion down to the address level

⁸ Case 15-M-0388, Letter from Adam E. Falk, Senior Vice President, State Government Affairs, Charter Communications, Inc. to Secretary Kathleen Burgess New York State Public Service Commission (Jan. 19, 2016) (“Charter Acceptance Letter”).

years in advance, depriving Charter of much of the flexibility it would normally have to adapt its planning to changing circumstances and ongoing analysis (*see Part V infra*), and, unlike the FCC buildout requirement, the Expansion Condition does not credit Charter for network extensions that have the effect of expanding the competitive alternatives available to households or businesses. In addition, Charter is heavily reliant upon access to utility poles in order to expand its network, particularly in rural areas where underground deployment is not technically or economically feasible. As Charter detailed in complaints filed against several pole owners during the summer of 2017, pole owners in New York consistently failed to process Charter's pole applications within the timeframes required under the Commission's 2004 *Pole Attachment Order*.⁹ These delays substantially and adversely affected Charter's initial ability to expand its network in New York.

Due to Charter's initial challenges in meeting the Expansion Condition's targets, Charter, on June 18, 2017, reached a settlement with Department Staff, adopted by the Commission on September 14, 2017, which revised Charter's network expansion targets. The revised settlement framework accounted for the initial delays Charter encountered, while providing for financial forfeitures if Charter is unable to meet its revised network expansion schedule.¹⁰ The *Expansion Settlement Order, inter alia*, required Charter to pass 36,771 additional locations by December 16, 2017.

⁹ See Case 15-M-0388, Complaint of Charter Communications, Inc. Against Verizon New York, Inc. for Failure to Provide Lawful Access to Utility Poles (June 26, 2017); Charter's Complaint Against National Grid USA Service Company, Inc. (July 3, 2017); Verified Complaint of Charter Communications, Inc. (July 11, 2017); Complaint of Charter Communications, Inc. Against Frontier for Failure to Provide Lawful Access to Utility Poles (July 17, 2017); Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments (Aug. 6, 2004) ("*Pole Attachment Order*").

¹⁰ *Expansion Settlement Order* at 12-13.

Redacted

After Charter filed formal complaints against several pole owners due to their delays in processing Charter's applications and granting access to utility poles, Department Staff engaged with pole owners and began overseeing a coordination process that is now resulting in Charter's obtaining access to utility poles at a faster pace.¹¹ However, pole owners' processing of Charter's applications remains in many cases significantly behind the schedule that the Commission's *Pole Attachment Order* requires, and Charter has had to depend in significant part upon temporary attachments of its facilities to utility poles in order to construct extensions of its network. Nonetheless, the increased throughput rate has allowed Charter to expand its network at a faster rate and has enabled Charter to meet its revised targets under the *Expansion Settlement Order*. On January 8, 2018, Charter submitted its compliance report confirming that it had constructed network extensions to 42,889 addresses during the relevant reporting period ("January Buildout Compliance Report"), thereby comfortably satisfying the Expansion Condition as revised by the *Expansion Settlement Order*.¹²

On March 19, 2018, Chair Rhodes issued the *Expansion Show Cause Order*. The *Expansion Show Cause Order* had not been on the Commission's agenda for its March 15, 2018 meeting.¹³ Instead, Chair Rhodes issued it on March 19, 2018 without notice (to Charter or to the public) shortly after the meeting. The *Order* contains no explanation for why Chair Rhodes issued it unilaterally, and it identifies no exigency preventing the issues set forth therein from being

¹¹ This has been accomplished largely by relegating functions/responsibilities pole owners have under the Pole Attachment Order to contractors and/or Charter and through the use of temporary attachments, which greatly increase the cost and complexity of Charter's buildout efforts.

¹² Case 15-M-0388, Charter Communications, Inc. Build-Out Compliance Report (Jan. 8, 2017) ("*January Buildout Compliance Report*").

¹³ There had also been two additional prior Commission sessions since Charter filed its January Buildout Compliance Report—on January 18, 2018, and February 22, 2018. At neither was any supposed categorical disqualification of Charter's reported network extensions on the agenda.

Redacted

addressed in the regular course by means of notice to the public, placement on the Commission's agenda, and discussion at a public meeting with a quorum of Commissioners present, which had just taken place four days earlier.¹⁴

The *Order* proposes that, notwithstanding Charter's success in meeting the December 16, 2017 network expansion target by a significant margin, the Commission "disqualify" network extensions to 14,522 addresses that Charter had reported, thereby causing Charter retroactively to have "missed" the target. See *Expansion Show Cause Order* at 10. The overwhelming majority of these proposed disqualifications (12,467) result from the *Order's* proposal categorically to disqualify every address that Charter reported in New York City, reasoning (mistakenly) that New York City is "100% served" by broadband providers already. *Order* at 11-12. Charter has been reporting extensions of its network to pass additional homes and businesses in New York City since at least February 2017, meaning that the *Order* is proposing not only to disqualify Charter's incremental reported addresses in New York since Charter's previous report, but the entirety of such addresses since the initiation of the Expansion Condition.¹⁵

The *Order* also proposes to disqualify an additional 1,762 reported addresses in Upstate New York. *Order* at 13-15.¹⁶ Virtually all of these proposed disqualifications (1,726) are due to

¹⁴ Charter is providing the information requested by the *Order* in this Response. However, Charter reserves all rights with respect to the validity of the *Expansion Show Cause Order* itself and to the highly irregular process through which it was promulgated, including under New York's Open Meetings Law.

¹⁵ See Case 15-M-0388, Charter Communications, Inc. Network Expansion Plan Update (Feb. 17, 2017) (865 reported addresses in NYC); Charter Communications, Inc. Annual Update (May 18, 2017) (994 reported addresses in NYC); Charter Communications, Inc. Network Expansion Plan Update and Communications Plan Compliance Filing (Aug. 18, 2017) (994 reported addresses in NYC), Charter Communications, Inc. Network Expansion Plan Update and Bulk Address Update (Dec. 1, 2017) (6,568 reported addresses in NYC); Charter Communications, Inc. Build-out Compliance Report (Jan. 8, 2017) (14,552 reported addresses in NYC).

¹⁶ Although the *Order* proposed to disqualify these 1,762 addresses, it did not actually identify them. Department Staff later provided Charter with lists of these addresses on March 30, 2018,

an audit conducted by Department Staff, which, according to the *Order*, concluded that those locations were served by Charter's pre-existing cable network. *Id.* at 14. A handful (16) are proposed for disqualification on the basis that Department Staff believe that those locations already had 100 Mbps service available from another provider; a further 20 locations are proposed for disqualification as "duplicate-pre-existing/100 Mbps service addresses." *Id.* Unlike the Department's previous audits of Charter's network expansion reports, however, in which Department Staff had made inquiries regarding specific addresses and Charter has been given an opportunity to answer Staff's questions (or withdraw reported addresses if Staff's questions cause Charter to re-evaluate a reported address), the audit on which the *Order* relies was not previously disclosed or shared with Charter, and Charter was not given any opportunity to address Staff's questions.

Finally, the *Order* also proposes to disqualify an additional 44 reported addresses on the grounds that they are located in census blocks the BPO had bid out for subsidies, and a further 249 because they are located in areas that Charter had previously indicated, as part of its coordination efforts with BPO, were not part of its expansion plans. *Order* at 15-18.¹⁷ It also proposes to preclude Charter from receiving credit in the future for building several thousand additional new addresses that are currently part of Charter's network expansion plan, either because the locations

allowing Charter to start researching the *Order*'s claims. Based in substantial part upon Charter's need to investigate these addresses, the Secretary on April 4, 2018 extended the deadline for Charter to respond to the *Order* to May 9, 2018. *See* Ruling on Extension Request, Item No. 272 (Apr. 4, 2018).

¹⁷ As set forth in Part V *infra*, Charter's identification to the BPO of addresses to which Charter had no then-current plans to build expressly indicated that Charter was not required to disavow opportunities to build in those areas, and that Charter's plans were subject to further analysis as well as new development or construction in those areas.

are in BPO-bid census blocks and/or in locations Charter had not previously stated an intent to serve. *Id.*

The *Order* directs Charter to show cause why the Commission should not disqualify these addresses, and further directs Charter to provide additional information regarding its reporting under the Expansion Condition, specifically, “what criteria Charter used to determine whether a given address constituted a passing,” the “most up-to-date number of passings it has completed,” the number of days it will take Charter to meet the December 2016 target “assuming the passings discussed herein remain disqualified,” and Charter’s plan “to come into compliance” with the *Order* at 19.¹⁸

LEGAL STANDARD

The Commission’s *Merger Order* “explicitly incorporated the enforcement and penalty provisions of the [Public Service Law] into the [merger] Approval Order” and the *Expansion Show Cause Order* purports to act pursuant to those powers. *Merger Order* at 6. Accordingly, as in any other instance in which the Commission initiates enforcement proceedings, “the Commission has the burden of proof.” *See Expansion Settlement Order* at *7; N.Y. A.P.A. Law § 306(1) (“Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding.”). This burden is carried only when the record as a whole affords “substantial evidence” supporting the position of the PSC as the moving party. *Id.* That is, the finding must be “supported by the kind of evidence on which reasonable persons are accustomed to rely in serious affairs.” *Matter of Sowa v. Looney*, 23 N.Y.2d 329, 335 (1968) (quotation marks omitted). Mere conjectures are impermissible, *see Matter of Stoker v. Tarentino*, 101 A.D.2d 651,

¹⁸ Attached as Appendix A is a chart identifying the evidence supporting each element directed by the *Order*.

652 (3d Dep't 1984), and evidence must only be "given its logical probative force," *Sowa*, 23 N.Y.2d at 335.

ARGUMENT

I. CHARTER'S REPORTED ADDRESSES SATISFY EACH ELEMENT OF THE EXPANSION CONDITION.

Since receiving approval from the Commission for its merger with Time Warner Cable in 2016, Charter has completed well over [REDACTED] passings in the state of New York, extending its broadband service offerings to [REDACTED] of additional New Yorkers. *See* Declaration of Larry W. Kaschinske ("Kaschinske Decl.") ¶ 20.¹⁹ More than [REDACTED] of these passings had been built and activated by December 16, 2017. *Id.*

As Charter has been expanding its service and network availability throughout the state, it has devoted substantial resources and put in place a rigorous process to identify which of these passings satisfy the Expansion Condition requirements and thus may be included in Charter's reports to the Commission. Charter is providing herewith a declaration from Larry Kaschinske, its Group Vice President of Business Planning, explaining Charter's process for validating the addresses it reports to the Commission. As explained below, that process consists of both verifying that each project reported to the Commission involves a new network expansion to a location not previously passed by Charter's broadband network, and verifying that each reported household or business was either unserved or underserved (as defined by the *Merger Order*) before Charter expanded its network to reach it. Kaschinske Decl. ¶¶ 4-15. Each of the 42,889 addresses reported in Charter's January 8, 2018 report has been validated by this process. Kaschinske Decl. ¶ 19.

¹⁹ The declaration of Charter's Group Vice President of Business Planning, Larry Kaschinske, describing Charter's process for identifying and validating additional addresses to report under the Expansion Condition, is being submitted along with this filing.

Redacted

Charter designed this process to match the Expansion Condition precisely.²⁰ The Expansion Condition requires Charter to extend its network to an additional 145,000 “residential housing units and/or businesses within four years of the close of the transaction” and places four restrictions on the addresses Charter may report to meet this condition:

1. First, those reported homes and businesses must represent instances in which Charter “extend[ed] its network to pass additional” locations, *i.e.*, locations not previously serviceable by Charter. *Merger Order*, App’x A, § I.B.1.
2. Second, those residential housing units and/or businesses must be either “‘unserved’ (download speeds of 0-24.9 Mbps)” or “‘underserved’ (download speeds of 25-99.9 Mbps)” at the time Charter extends its network, *i.e.*, competitors must not already serve or offer service to those locations at 100 Mbps+ speeds. *Id.*
3. Third, network extensions to those addresses must be “exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs,” *i.e.*, Charter must use its own funds to complete the passings and may not count its own state-subsidized network extensions towards that goal. *Id.*
4. Fourth, Charter may “not require the payment of a line extension fee” to serve any of these additional premises. *Merger Order*, App’x A, § I.B.1.d.

Charter’s January 8, 2018 Buildout Compliance Report to the Commission identifies 42,889 qualifying locations in New York to which it had extended its network as of the December 16, 2017 target date. As set forth below, each of those reported addresses satisfies the four requirements of the *Merger Order*; collectively they comfortably exceed the 36,771 target in the *Expansion Settlement Order*.

²⁰ The *Order* omits that Charter has already explained its reporting process under the Expansion Condition in extensive detail to the Department’s Staff. This included a November 17, 2017 meeting in which several Charter representatives, including both attorneys and representatives from its business, traveled to Albany to walk through the topics set forth in Part I of this Response and offer Department Staff an opportunity to ask questions.

A. Charter’s Process Ensures that each Reported Address Represents the Expansion of Broadband Availability to a Location Not Previously Serviceable.

The first requirement in the Expansion Condition is that Charter report only locations that Charter extends its network to pass. The first step in Charter’s process, accordingly, is to review each network construction and expansion project it undertakes in New York to evaluate whether the project extended its network such that Charter served, or acquired the ability to serve, a home or business not previously serviceable.

It is well understood that a household or business is “passed” by a wireline provider’s network when the provider is capable of extending service to the household or business within a standard business interval and without an inordinate expenditure of resources. For instance, the FCC’s Form 477 data collection process on broadband deployment, upon which the *Expansion Order* itself relies, deems broadband service “available” only if it can be provided within seven to ten business days. *See Wireline Competition Bureau Releases Data Specification for Form 477 Data Collection*, Public Notice, 28 FCC Rcd 12,665, 12,669, Appendix (2013). Other orders and network expansion subsidy programs, such as the Connect America Fund and funds provided under the American Recovery and Reinvestment Act, all utilize similar definitions. *See, e.g., Wireline Competition Bureau Publishes Preliminary Determination of Rate-of-Return Study Areas 100 Percent Overlapped by Unsubsidized Competitors*, Public Notice, 30 FCC Rcd 8179, 8187 ¶ 20 (WCB 2015) (employing a standard of whether unsubsidized providers have voice and broadband-capable physical assets in or adjacent to the relevant area and can “provide service to a requesting customer within seven to ten business days without an extraordinary commitment of resources” to evaluate whether an area is served by those providers); *State Broadband Data and Development Grant Program*, 74 Fed. Reg. 32,545, 34,557 (July 8, 2009) (designating “broadband service” as “available” at any address “if the provider does, or could, within a typical service

interval (7 to 10 business days) without an extraordinary commitment of resources, provision two way data transmission” at designated speeds). Charter’s FCC-imposed national expansion condition arising out of the approval of the same transaction with Time Warner Cable likewise defines a location as “passed” for purposes of the FCC condition if “the Company does, or could, within a typical service interval (7 to 10 business days), without an extraordinary commitment of resources, provision two-way data transmission to and from the Internet capable of a download speed of at least 60 Mbps.”²¹

The *Merger Order* does not contain any unique or different definition of “extend[ing] [Charter’s] network to pass” that would depart from the commonly understood meaning of the term. It is a basic rule of construction that words, and particularly technical terms, are given their accepted meaning in the absence of a specific definition to the contrary.²² Consistent with the long-established understanding of what it means to “pass” a home or business, Charter’s reporting process thus looks to homes and businesses that Charter (1) was not previously capable of serving absent the design and construction of additional network elements, but (2) as a result of design and construction work, either served or acquired the ability (within a standard business interval) to serve. Kaschinske Decl. ¶¶ 4, 7, 11.

²¹ *FCC Merger Order*, 31 FCC Rcd at 6545, App’x B, § V.2.c.

²² See, e.g., *Katz v. Am. Mayflower Life Ins. Co. of N.Y.*, 14 A.D.3d 195, 206 (1st Dep’t 2004) (“Where a term has acquired a technical meaning, the technical construction is preferred over the common meaning except when another intention is established” (internal quotation marks omitted)); *Chauca v. Abraham*, 30 N.Y.3d 325, 330-31 (2017) (explaining that the “starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof” and that “words of special or technical meaning” should be interpreted “not loosely, but with regard for their established legal significance” (quotation marks omitted)); N.Y. Stat. Law § 94 (indicating that statutory language is “generally construed according to its natural and most obvious sense”).

Such projects may include geographic extensions of Charter's network into new areas in which it was previously not present. Such projects also may include construction work that allows existing facilities to reach and serve homes or businesses they could not reach or serve before, such as laying new underground cable or constructing risers that allow Charter's facilities to reach into the higher floors of larger structures. Kaschinske Decl. ¶ 7. The only projects that Charter considers as candidates for reporting to the Commission [REDACTED]

[REDACTED] Kaschinske Decl. ¶ 8. [REDACTED]
[REDACTED]
[REDACTED].

Id. Accordingly, the completion of a construction project makes a location serviceable (and thus "passed") whether a customer at the location chooses to take service from Charter or not.

Where Charter performs only so-called "installation" projects, which involve the connection of additional residences or businesses to existing Charter plant in the regular course of business (such as running standard cable drops connecting the network in the street to provide service to a single family home), such installation projects are never considered for inclusion in Charter's reports. Kaschinske Decl. ¶¶ 7, 11. Although installation projects often require installing additional equipment or running aerial or underground cable, they can generally be completed quickly and do not require design or construction work, meaning that locations serviceable by means of an installation are already passed. Construction projects, by contrast, require significantly greater time, effort, and investment. *Id.* ¶ 7.²³

²³ Charter is occasionally able to complete projects that extend its network within a standard business interval notwithstanding the design and construction work required, often by modifying existing network elements to add capacity to serve additional customers. These are sometimes

Redacted

Once Charter has identified construction projects that are candidates for inclusion in its reports to the Commission, Charter subjects them to a multi-step quality control process, and reviews each to ensure that only construction activities to extend service to residential or commercial structures are considered for reporting. *Id.* ¶ 18. Although Charter built more than [REDACTED] passings in New York during the relevant reporting period, it reported only approximately half of those addresses to the Commission because the other half did not meet each of the Expansion Condition criteria.

Even before considering whether the locations were unserved or underserved (*see* Part I.B *infra*) Charter excluded approximately [REDACTED] of its constructed passings on the grounds that the project type did not extend broadband serviceability to a new home or business. For instance, Charter categorically excludes construction activities that extend service to structures that are not homes or businesses, as well as construction activities that enhance service to homes or businesses that are already serviceable, such as residential WiFi projects, upgrading existing plant from coaxial cable to fiber, node segmentation to provide greater network capacity, fiber installed to connect cell towers, and upgrades to wiring in multiple dwelling units (“MDUs”). Kaschinske Decl. ¶ 10. This process ensures that each of the addresses reported in Charter’s January 8, 2018 report reflect extensions of its network to pass additional homes and businesses, as opposed to enhancements or upgrades to existing service or extensions of its network to locations that are not homes or businesses. *Id.* ¶¶ 11-12.

referred to as “tap-cuts” or “tap-cut-ins.” However, such projects are generally very small, highly uncommon, and impact only a small number of passed locations. *See* Kaschinske Decl. ¶ 11; *see also* Declaration of John Quigley ¶ 12. Because such projects still require design and construction work beyond a standard installation, Charter has historically considered addresses made serviceable by such projects reportable to the Commission. As part of its good faith efforts to address concerns raised by the Commission in the *Order*, however, Charter is willing to further discuss these types of projects with the Department.

In addition to expanding service to additional locations not previously serviceable by Charter within a standard business interval, the network expansion projects captured by Charter's process frequently require a significant resource commitment. Although the *Merger Order* neither compels Charter to spend any particular amount of funds to complete the Expansion Condition nor caps Charter's obligations under the Expansion Condition at a certain dollar amount, it does reflect the Commission's expectation that the Expansion Condition would cost Charter approximately \$2,000 for each additional residential unit or business to which Charter extends its network, resulting in a \$290 million value to the people of New York under the Commission's net benefits test for evaluating the merger. *See Merger Order* at 55. Many of the project types that Charter completes in order to generate the new passings reported to the Commission, however, exceed that amount significantly. By Charter's current estimation, the cost of its efforts to complete the Expansion Condition exceed significantly the Commission's expectations in the *Merger Order*. Charter has already incurred more than [REDACTED] per additional location passed, approximately [REDACTED] in upstate New York—and its projected aggregate cost of completing the new passings required by the Expansion Condition will exceed [REDACTED]—more than [REDACTED] dollars more than the Commission's expected benefit—taking into account the fact that the average cost per passing upstate will rise above [REDACTED] by the end of its planned build as it reaches into more remote areas. Kaschinske Decl. ¶ 21. Where Charter deprived of the ability to offset the higher-cost projects with passings in New York City, these costs would be even higher. *Id.*

B. Charter's Process Ensures that each Reported Address Previously Lacked 100 Mbps+ Broadband Serviceability from another Provider.

Once Charter has identified construction projects that qualify as extending its network to pass new residences and businesses (as described in Part I.A *supra*), it separately investigates each candidate address to determine whether other providers are already holding themselves out as

offering broadband service to the location at 100 Mbps speeds or above. Kaschinske Decl. ¶¶ 13-15. Of the [REDACTED] new passings in New York that Charter initially identified (through the process described above) as expanding broadband serviceability to new residences or businesses, it further excluded approximately [REDACTED] from its report to the Commission because a competitor was already offering broadband service to the address at 100 Mbps or higher. *Id.* ¶ 20.

Charter's process for investigating whether each address is already serviceable involves multiple steps. First, Charter geolocates each address and matches it to a census block, a process whose reliability is ensured by a trusted industry vendor with extensive experience with both Charter's and Time Warner Cable's facilities. *Id.* ¶ 14.a. It then reviews the appropriate FCC broadband availability report for the pertinent time period. *Id.* ¶ 14.b. If the FCC's Form 477 data indicates that no provider was offering Internet access at speeds of 100 Mbps or above within the census block during the relevant reporting period, Charter considers the address eligible for reporting under the Expansion Condition. *Id.* If other providers *have* reported the census block containing the address as serviceable for high-speed broadband as part of the FCC's Form 477 reporting process for the relevant time period, Charter investigates [REDACTED] [REDACTED]) whether those competitors offer such service to the *specific* address at issue. *Id.* ¶ 14.c; Declaration of Matthew Kardos ("Kardos Decl.") ¶ 3. As explained in Part III.A.1 *infra*, the FCC's Form 477 data will identify providers who offer broadband services to locations within a census block, but does not identify whether they serve the entire census block or only portions thereof.

Charter's investigation may involve individualized [REDACTED]

[REDACTED], or site visits and

Redacted

field walkout inspections by Charter's Field Operations personnel. Kaschinske Decl. ¶ 14.c; Kardos Decl. ¶ 4. In every case, however, Charter maintains individualized, address-level records of the investigation it undertook to confirm that a competitor was not offering 100 Mbps service at the specific reported address at the time Charter initiated the project through a walkout validation. Kaschinske Decl. ¶ 14.d; Kardos Decl. ¶ 5. For each of the 42,889 addresses reported in Charter's January 8, 2018 report, Charter conducted the inquiry described above to confirm on an individualized basis that service of 100 Mbps or above was not already available at the reported address. Kaschinske Decl. ¶ 19.

Charter also takes proactive steps to ensure that later-released data on competitors' broadband availability does not call into question its reports. Whenever new FCC Form 477 data is released, Charter not only uses the new data going forward, but also re-evaluates its *past* reported addresses to assess whether the new FCC information requires additional investigation or revisions to addresses already included in Charter's past reports. *Id.* ¶ 15. Specifically, if Charter had previously determined an address to be unserved or underserved because it was located in an unserved or underserved census block (using the 100 Mbps+ definition in the *Merger Order*) as reflected in the FCC's Form 477 data, Charter will continue to check any later-released FCC Form 477 data to ensure that the unserved or underserved status of the census block did not change during the time period Charter undertook the construction project. *Id.* When it does, Charter retroactively subjects every reported address in the census block (including those already reported) to the individualized investigation process it uses to investigate addresses in census blocks where

at least one other provider is offering 100 Mbps+ service, and revises its reports (and withdraws reported addresses) when appropriate. *Id.* ¶ 15.a.²⁴

C. Charter Does Not Report Network Extensions Built with State Funds.

Network extensions built with state grant funds are not considered by Charter for reporting to the Commission in satisfaction of the Expansion Condition, as they are ineligible under the terms of the *Merger Order*. Although Charter (including legacy Time Warner Cable) had participated in the Connect New York program, the requirements of that program compensated providers only for connections completed by the end of 2015. Thus, projects completed under that program are ineligible in any event because they fall outside the reporting period. Charter has not received any subsequent state or federal funding for network expansion in New York. *See* Declaration of Terence Rafferty (“Rafferty Decl.”) ¶ 20.

After the Commission issued the *Order*, Charter investigated the *Order*’s inquiry into whether some addresses built with Connect New York funds might have been included within Charter’s reports. As explained in the accompanying Declaration of Charter’s Regional Vice President of Field Operations, Terence Rafferty, human error caused one project to be so included. *Id.* ¶ 19. Time Warner Cable had completed in 2015 a project to serve locations in and around Grafton, New York with Connect New York funds.²⁵ However, [REDACTED] caused Charter’s records to show an incorrect completion date for this project. *Id.* ¶ 23. Specifically, [REDACTED]

²⁴ Charter has thus far has reason to subject [REDACTED] reported addresses to this further investigation and removed [REDACTED] of them from its reports, as part of its regular review process, on this basis. *See* Kaschinske Decl. ¶ 15.c.

²⁵ Lists of all addresses served by Charter with Connect New York funds are being provided in accordance with the *Order*’s instructions. *See* Rafferty Decl. Ex. E.

[REDACTED]

[REDACTED]

[REDACTED]. *Id.* As a result, 733 addresses were inadvertently included in Charter’s January 2018 Buildout Compliance Report that were completed in 2015 (and part of the Connect New York program) and thus ineligible. Charter is withdrawing these addresses from its report and has confirmed that no other Connect New York addresses were affected by the error. *Id.* ¶¶ 19-20 & Ex. E.

D. Charter Has Built each Network Extension without Customer Contributions.

Finally, Charter does not report network extensions for which it has received a customer contribution in aid of construction (“CIAC”) [REDACTED].

[REDACTED]. Kaschinske Decl. ¶¶ 16-17.²⁶

E. Charter’s Robust Quality Assurance Process Ensures the Accuracy and Reliability of the Data Reported.

In addition to the process described above, Charter takes additional steps to verify that only locations that are properly countable under the *Merger Order* are reported to the Commission. Kaschinske Decl. ¶ 18. After locations are identified for reporting through the process described above, Charter conducts a review of the underlying data to verify its planned reports. *Id.* This process includes verifying that each reported address meets a pre-established set of data checks, including that the address has complete census block information, that the location exists only in areas within Charter’s footprint, and that no duplicates exist within the reported addresses. *Id.*

Charter acknowledges that, during its early days of implementing the expansion of its network, its initial process for reporting its progress to the Commission was less thorough than the

²⁶ As Charter has made significant refunds of such contributions, it has withheld only [REDACTED] otherwise-reportable addresses from its reports on this basis.

process Charter uses today, and that errors in its reports to the Commission were more common. Due in significant part to some of the material differences between the Expansion Condition and Charter's FCC-imposed network expansion requirement, Charter's New York reporting under the Expansion Condition did not initially benefit from the national process the company created in connection with its federal buildout obligations. Following Charter's June 2017 settlement with the Department, however, Charter leveraged its experience in complying with its national buildout obligations to design and implement in New York the more rigorous process described herein, and further retroactively applied this process to the addresses in its previous reports to ensure consistency and accuracy across its reports. Although it is inevitable in a project of this sheer scale that occasional errors will still occur, Charter has worked in good faith to minimize such occurrences and has withdrawn reported extensions of its network when Department Staff have brought valid concerns to Charter's attention, as well as on its own initiative and through its own quality control processes.

II. THE COMMISSION MAY NOT MODIFY THE EXPANSION CONDITION BY ADDING ADDITIONAL REQUIREMENTS.

Part I above demonstrates that Charter reports addresses under the Expansion Condition only after a rigorous and reliable process to ensure that each reported address satisfies the requirements that it is (1) an extension of Charter's network, (2) to a previously unserved or underserved home or business, (3) constructed without state grant funding, (4) without a contribution from the customer. Those are the only four limitations in the *Merger Order* that would exclude an address from counting towards the Expansion Condition. In effect, the *Expansion Show Cause Order* seeks to modify or expand these conditions and decide, *ex post facto*, to disallow addresses that meet the conditions in the *Merger Order*. *Order* at 10, 15, 17, 19. Specifically, the *Order* proposes not to "allow" Charter to count many of its addresses based upon

the fact that they are, *inter alia*, (1) in New York City, *Order* at 12; (2) within a primary service area under one of Charter’s cable franchises, *Order* at 15; (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), *Order* at 14; (4) in census blocks the BPO has bid out for subsidies, *Order* at 17; and (5) in “Negative Space” locations to which Charter had previously indicated during the initial round of consultation with the BPO (with significant caveats and qualifications) that it did not anticipate expanding its network, *Order* at 16.²⁷ Charter is providing more detailed responses to each of these purported bases for disqualification below. *See* Parts III, IV, & V *infra*. However, these proposed bases for disqualification all suffer from a common legal defect: none of these additional criteria are elements of the Expansion Condition. The Commission does not have authority after the fact to modify or add to the conditions upon which Charter’s agreement to the *Merger Order* was predicated.

A. The *Merger Order*’s Plain Text Is Controlling.

This analysis should start and end with the plain text of the Expansion Condition itself. Charter has satisfied the criteria in the condition as stated in Appendix A to the *Merger Order*. Basic principles of administrative law limit the Commission to the specific terms of the Expansion Condition as adopted. None of the new criteria that the *Expansion Show Cause Order* would effectively impose are set forth in the Buildout Condition, and adding them after the fact would violate the plain text of the *Merger Order*.

Courts reviewing an agency’s interpretations of its own authorizing statutes, rules or orders first look to the terms of the statute, rule or order. Where the terms are “clear and unambiguous,”

²⁷ *But see* Part V.C.1 *infra* (Charter’s Negative Space List indicated that then-current plans were subject to further analysis, including with respect to new construction/development in those areas).

Redacted

the court's job is simply to determine whether the agency's determination is consistent with those terms and the statutory or regulatory intent embodied therein. *Matter of Lewis Family Farm, Inc. v. N.Y. State Adirondack Park Agency*, 64 A.D.3d 1009, 1013 (3d Dep't 2009). The agency's interpretation is afforded no deference, because "there is little or no need to rely on any special expertise on the agency's part." *Id.*; see also *Matter of Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102–03 (1997) ("Where 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required'" (quoting *Toys R Us v. Silva*, 89 N.Y.2d 411, 419 (1996)); *Kennedy v. Novello*, 299 A.D.2d 605, 607 (3d Dep't 2002) ("a question of 'pure legal interpretation' of clear and unambiguous statutory terms requires no deference to an agency's interpretation."). In other words, in such cases, the agency is bound by the plain text of the order it adopted.

This is one of those cases. On its face, the *Merger Order* unambiguously sets forth the four exclusive criteria under which Charter's network extensions to pass new addresses will satisfy its terms. The *Order* does not claim that those criteria are ambiguous, and those criteria reference and incorporate well-understood technical terms with accepted meanings in the industry. Were the Commission to seek to re-interpret those terms, any such argument would do "nothing more than urge ambiguity where none exists." *Matter of Bohlander v. Williams*, 114 A.D.2d 540, 541–42 (1985) (quoting *Sega v. State*, 60 N.Y.2d 183, 190 (1983)).

This should be the end of the matter. Charter satisfied the requirements for eligible network extensions set forth in the Expansion Condition and did so by a comfortable margin. The Commission may not now, as the *Order* does, seek to disqualify addresses that satisfy those conditions by adding five new requirements without violating basic and fundamental tenets of administrative law.

B. The Commission's Interpretive Authority Is Particularly Limited Here.

Even if the plain text of the *Merger Order* left any ambiguity as to the criteria for the Expansion Condition (which it does not), the Commission's authority to interpret that text to *ex post facto* add significant additional burdens to Charter, as the *Expansion Show Cause Order* proposes, is sharply limited in this instance.

1. The Merger Closed Nearly Two Years Ago and the Commission Cannot Modify Its Terms Retroactively.

The *Merger Order* addressed the conditions that would govern Charter's acquisition of control of Time Warner Cable's telecommunications affiliates and cable franchises in New York. That acquisition of control was consummated nearly two years ago. Agencies may not modify, amend, or revisit a prior order once the order is final and the agency's jurisdiction over that matter has been exhausted. *People ex rel. Finnegan v. McBride*, 226 N.Y. 252, 259 (1919); *accord, Barnert v. 41 Fifth Ave. Assocs.*, 158 A.D.2d 289, 290 (1st Dep't 1990), *superseded by statute as stated in Laub v. N.Y. State Div. of Hous. & Cmty. Renewal*, 176 A.D.2d 560 (1st Dep't 1991); *Matter of D. & D. Realty Corp. v. Coster*, 277 A.D. 668, 671 (1st Dep't 1951); *Matter of Cupo v. McGoldrick*, 278 A.D. 108, 111-13 (1st Dep't 1951). That is true even if the agency, in hindsight, finds reason to question the efficacy of its prior judgment or determination. As the Court of Appeals explained almost a hundred years ago in *People ex rel. Finnegan*, “[p]ublic officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made...” *Id.* Here, the merger is long consummated on the terms set forth in the *Merger Order*, and the Commission may not now revisit the *Merger Order* to add to or modify those requirements.

2. The Expansion Condition Derives Its Legal Force, if any, from Charter's Agreement to It.

The Expansion Condition also involves unique jurisdictional circumstances not usually present in the Commission's enforcement proceedings. The Commission does not have the authority to compel broadband providers to offer service to particular customers at particular speeds or at particular locations, or to establish any other obligations in a cable television and telecommunications service merger related to the provision of broadband services. Indeed, it has been established for years that Internet access services are interstate, and accordingly subject to exclusive federal jurisdiction.²⁸ The FCC has made abundantly clear that states may not impose "any so-called 'economic' or 'public utility-type' regulation[]" on broadband services and that federal law flatly preempts such requirements.²⁹ Requiring a provider to expand the geographical

²⁸ See, e.g., *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4832 ¶ 59 (2002) (concluding that the "points among which" broadband communications travel "are often in different states and [different] countries"), *aff'd in part, rev'd in part sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5911 ¶ 28 (2007) ("Having concluded that wireless broadband Internet access service is an information service, we also find that the service is jurisdictionally interstate."); *In re GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22,466, 22,474-75 ¶ 16 (1998).

²⁹ See *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 427-28 ¶ 195 (2017) ("*RIF Order*"). The *RIF Order* also classified broadband services as information services, which are exempt from public utility requirements entirely. *RIF Order*, 33 FCC Rcd at 318 ¶ 20. The federal prohibition on state regulation of broadband services, however, precedes the *RIF Order*'s classification of those services as "information services" and was already in effect at the time of the *Merger Order*. See *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 (2015) (reiterating the FCC's "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme" adopted by the FCC), *petition for review denied sub nom. U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, 86 U.S.L.W. 3195 (U.S. Sept. 17, 2017).

range in which it offers broadband services and to offer it at specific speeds—as the Expansion Condition does—is a quintessential public utility obligation that could never lawfully be imposed by a state, as such a requirement would blatantly violate federal law.

In addition to the limits on state regulation of broadband Internet services generally, the Commission’s authority to regulate cable operators is specifically delegated by federal law and constrained by the terms of that delegation. The federal Cable Act makes clear that a “franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with” the Cable Act itself. 47 U.S.C. § 544(a). The Cable Act, in turn, does not delegate to franchising authorities any authority to dictate the terms on which cable operators offer services *other than* cable video services, much less to do what the Expansion Condition does: dictate the speeds and locations at which a provider must make broadband *Internet access* service available.

The Commission’s authority over broadband services is thus doubly constrained by federal law. Because of those dual constraints, to the extent that the Expansion Condition has any legal force at all, that force derives entirely from the fact that Charter accepted it.³⁰ And because the *Expansion Condition* derives any legal force it has from Charter’s (qualified) acceptance, courts will hold the Commission strictly to the terms of that agreement and will not afford the Commission’s legal interpretations or factual findings the degree of deference the Commission

³⁰ Charter’s acceptance of Appendix A was expressly made “subject to applicable law and without waiver of any legal rights.” Charter Acceptance Letter, Item No. 97, at 1. Charter expressly reserves all rights with respect to the legality and enforceability of the Expansion Condition. *See, e.g., Matter of Lockport Light, Heat & Power Co. v. Maltbie*, 257 A.D. 11, 14 (3d Dep’t 1939) (company’s assent to Commission-imposed condition in connection with approval of asset transfer did not waive defect that condition was unlawful); *People ex rel. N.Y. Century R.R. Co. v. Pub. Serv. Comm’n*, 231 N.Y. 1, 5-6 (1921) (same); *Pub. Serv. Comm’n v. Rochester Tel. Corp.*, 55 N.Y.2d 320, 325-26 (1982) (confirming that *Lockport* remains good law as to conditions imposed by the Commission exceeding its jurisdiction).

might receive when applying generally-applicable orders or statutory requirements. *See Meadow Green–Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604–605 (1st Cir. 1991) (Breyer, C.J.) (declining to apply *Chevron* deference to “agency’s interpretation of a contract that it makes with an outside party”); *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that deference to an agency’s interpretation of a statute incorporated into a contract may be inappropriate where the agency itself is a party to the contract).³¹

Here, the terms of Charter’s acceptance were limited to the plain language of the terms set forth in Appendix A of the *Merger Order*—and not any of the five new requirements the *Expansion Show Cause Order* now seeks to add after the fact. The Commission, like any party to a contract, must accept performance by Charter consistent with the condition’s terms as reasonable contracting parties would have understood them. *Matter of Sciame Constr. LLC v. Re:Source N.J., Inc.*, 157 A.D.3d 627, 67 N.Y.S.3d 462, 463 (1st Dep’t 2018) (holding that to construe an unambiguous contract provision other than by its plain terms “would impermissibly rewrite the provision under the guise of contract construction”).

C. Applying the New Disqualification Requirements Retroactively Would Work Particular Injustice.

Even if the Commission could add five new requirements to the Expansion Condition as the *Order* proposes, it would be unlawful to use those requirements as a basis for disqualifying addresses to which Charter has *already* completed and reported network extensions without notice of those new requirements. An agency may not give retroactive effect to a new rule created

³¹ *See also* Statement of Gorsuch, J. Respecting Denial of Certiorari, *Scenic America, Inc. v. Department of Transportation*, 138 S. Ct. 2, 2-3 (2017) (Mem.) (questioning the logic of deferring to an agency’s interpretation of a contract, especially where the agency is self-interested (citing Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol’y 203 (2004))).

through adjudicatory action when, as here, the new rule “would unduly intrude upon reasonable reliance interests.” *See, e.g., Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 n.12 (1984) (recognizing the principle that “an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007) (observing that “in certain circumstances an agency may abuse its discretion by announcing new rules through adjudication rather than through rulemaking, such as when the rule operates retroactively and disturbs settled expectations.”).³² “The decision of whether to grant retroactive force to a newly promulgated agency rule is a question of law for the courts, with no overriding obligation of deference to the agency decision.” *Bethesda Cmty. Hosp. v. Heckler*, No. 83 CIV. 6418, 1987 WL 108995, at *1 (S.D.N.Y. Aug. 6, 1987) (quotation marks omitted) (alteration omitted). Factors relevant to this determination include:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

NLRB v. Niagara Mach. & Tool Works, 746 F.2d 143, 151 (2d Cir. 1984) (quotation marks omitted).

As set forth in Parts III, IV, & V *infra*, the new retroactive requirements that the *Order*'s new interpretations of the Expansion Condition would functionally add to Charter's obligations under the *Merger Order* (in particular the *Order*'s proposed prohibition on reporting addresses in

³² The New York State Administrative Procedure Act is “modeled” after the federal Administrative Procedure Act, *Home Care Ass'n of New York State Inc. v. Dowling*, 218 A.D.2d 126, 129 (3d Dep't 1996), and New York courts regularly look to federal APA case law when interpreting and applying the state APA. *Id.*

New York City, or in any area that does not have a low density) represent an abrupt departure from past practice, given that Charter has been reporting such addresses since nearly the beginning of its compliance efforts.³³ As a result of these moving goalposts, Charter would stand to forfeit up to \$1 million now, and potentially much more in the future due to the difficulties of making up the shortfall that would be caused if the Commission were to follow through with the *Order*'s proposal to disqualify a large percentage of the addresses on which Charter has been relying to satisfy the condition.

Moreover, even assuming *arguendo* that the Commission's new interpretation of the Expansion Condition could be applied prospectively, the injustice of retroactive application in this instance would be particularly compounded by the timing of the *Expansion Show Cause Order*. Chair Rhodes issued the *Order* on March 19, 2018—three days *after* the 3-month period after the December 16, 2017 target date had already lapsed, even though there had been three previous public Commission sessions subsequent to Charter's January Buildout Compliance Report at which the Commission could have raised the issues set forth in the *Order*. Moreover, Charter's January 8, 2018 report made it abundantly clear that it was including New York City passings. Had the Commission sought to disqualify those passings, there is no reason it should have taken seventy days to give Charter notice of its decision. This alleged disqualification could have been disclosed to Charter shortly after its January 8, 2018 filing, not on March 19, 2018 when the Commission issued its one-Commissioner order. Thus, applying the *Order* retroactively would not only cause Charter to forfeit \$ 1 million due to "missing" the December 2017 target, it would also retroactively deprive Charter of its bargained-for opportunity under the Settlement Agreement

³³ See n.15 *supra* and Part III.E *infra* (Department had not previously objected to inclusion of New York City addresses in Charter's reports notwithstanding Charter's longstanding inclusion of such addresses).

to cure a “missed” target within 3 months of the previous target (by March 16, 2018). Finally, no statute or rule compels the Commission to apply its novel interpretations of the Expansion Condition—such as “no New York City addresses,” “low-density areas only” or “no BPO overlap”—retroactively.

For the reasons discussed above, the Commission has no authority, either prospectively or retroactively, to interpret the Expansion Condition in a manner that functionally adds additional requirements to which Charter never consented and which are not apparent on the face of the *Merger Order*. But applying those novel interpretations retroactively, to network extensions already completed and reported, as the *Order* proposes, would represent a particularly egregious and unlawful abuse of the Commission’s discretion.

III. “DISQUALIFYING” CHARTER’S COMPLETED NETWORK EXTENSIONS WITHIN METROPOLITAN NEW YORK CITY WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

As detailed in Part I *supra*, Charter has reported to the Commission only network extensions to addresses satisfying each of the four criteria set forth in the Expansion Condition. The majority of these new addresses have been in upstate New York. However, Charter has also been extending its network within metropolitan New York City during the same time. Much of Charter’s network extension activity within New York City has been to accommodate new development within Charter’s franchise areas, such as in Upper Manhattan (Harlem), the Long Island City neighborhood of Queens and the Williamsburg neighborhood of Brooklyn, where previously non-residential portions of Charter’s franchise area have seen significant new construction and development. *See* Declaration of John Quigley (“Quigley Decl.”) ¶ 11.c.³⁴ There is no basis by which these areas should be deprived of access to robust, high-speed Internet service.

³⁴ The Declaration of John Quigley, Charter’s Regional Vice President of Field Operations for the greater New York City area, is being submitted along with this filing. *See also* Ivan Pereira,

Charter evaluates its New York City builds under the same standards as its upstate builds to determine whether each is reportable under the Expansion Condition. Kaschinske Decl. ¶ 19. It does not consider construction projects for reporting unless they extend serviceability to new locations, and, if the FCC’s Broadband Availability Report indicates that 100 Mbps+ service is already available from other providers in the census block, individually investigates availability at the specific address in question. *Id.* ¶¶ 7-15. Whereas most of the construction projects Charter undertakes in upstate New York create passings reportable under the Expansion Condition, most in New York City do not, because (as the *Order* notes) locations in New York City are considerably more likely to be serviceable already. Charter has constructed more than [REDACTED] passings in New York City since the Expansion Condition went into effect and completed approximately [REDACTED] installations that did not require construction activity. *Id.* ¶ 23. Only a small fraction of those addresses—12,467—were reportable under the Expansion Condition criteria. *Id.*

Including the January Buildout Compliance Report itself, Charter has filed five reports in Case 15-M-0388 that have included Charter’s network expansion activities in New York City.³⁵ The *Expansion Show Cause Order* now proposes to take the remarkable step of “disqualifying” every single one of these addresses—including not only those newly reported by Charter in its January 8, 2018 report, but also every address Charter had reported to the Commission in its four

Downtown Brooklyn, Williamsburg to See Boom in Development: Report, amNEWYORK (Aug. 18, 2015), <https://www.amny.com/news/downtown-brooklyn-williamsburg-to-see-boom-in-development-report-1.10751216> (noting plans to develop more than 10,000 units in 50 new buildings in Downtown Brooklyn and Williamsburg, and 22,000 units borough-wide, by 2019); Troy McMullen, *Why Long Island City is Home to New York’s Biggest Building Boom*, Financial Times (Mar. 11, 2016) (noting that more than 24,500 units are at the planning and construction stages in Long Island City).

³⁵ See n.15 *supra*.

previous reports since February of 2017.³⁶ None of the evidence proffered by the *Order*, however, can support this step, and none of the *Order*'s reasons would constitute a lawful basis for such an action.

A. New York City Is Not “100% Served” by Competitors at 100 Mbps Speeds.

The *Expansion Show Cause Order* begins with the remarkable assertion that “100% of the NYC areas are served by one or more 100 Mbps wireline providers.” As explained above, Charter’s process for determining which addresses are reportable to the Commission includes a rigorous, address-by-address assessment of whether high-speed broadband is already available at that location. *See* Part I.B *supra*. In fact, Charter made an address-by-address inquiry into each reported address in New York City (as well as those elsewhere in the state) to confirm that the address lacked 100 Mbps+ broadband serviceability before including it in its report. *Id.*³⁷ Charter reports to the Commission very few of the network extension activities it completes in New York City in large part because of the much better availability of broadband within the city as compared to upstate New York. But the proposition that *every* location in New York City is necessarily already serviceable with a high-speed connection, as the *Order* contends, is demonstrably false.

1. The FCC’s Broadband Availability Report Does Not Stand for the Proposition that All New York City Addresses Already Have High-Speed Broadband Service.

The *Order* cites for its remarkable proposition that there are no unserved or underserved locations in New York City only the data collected and reported by the FCC as part of its Form

³⁶ Prior its January 2018 submission, Charter had already reported 6,568 addresses in New York City to the Commission as part of its preceding reports, as the *Order* itself notes. *Order* at 11 n.22.

³⁷ In satisfaction of the *Order*'s requirement that Charter “provide a showing that these locations were unserved or underserved,” *Order* at 12, Charter is including with its submission a chart identifying for each reported New York City address the specific evidence on which Charter relied to reach the conclusion that the address was reportable. *See* Kaschinske Decl. ¶ 24 & Ex. B.

477 process. *Order* at 11. The FCC’s Form 477 data, as described in Part I.B *supra*, gathers information regarding, *inter alia*, broadband availability by census block (as opposed to addresses) across the country. The FCC Form 477 reports do not support the proposition for which the *Order* cites them.

At the outset, the FCC’s data does not reflect what the *Order* says it does. At relevant times since the *Merger Order* in January 2016, the FCC’s Form 477 reports have showed significant numbers of census blocks within New York City in which *none* of Charter’s competitors reported offering broadband at 100 Mbps+ speeds. Charter is providing along with this Response maps of the FCC’s data illustrating 100 Mbps+ availability from other providers during the relevant periods.³⁸ Thus, while broadband *in general* may be widely available in New York City, the broadband speeds that Charter can offer have *not* universally been available throughout the City from other providers throughout the time period (from January 2016 through the present) relevant to the Expansion Condition.

Moreover, Form 477 reports are a useful tool for identifying *census blocks* containing broadband-serviceable addresses, not for identifying broadband-serviceable *addresses*, because the data collected and reported is insufficiently granular for that purpose. Providers report to the FCC the census blocks in which they “make broadband connections available to end-user premises,” *i.e.*, “where a provider does, *or could*, without an extraordinary commitment of resources, provide services.”³⁹ However, the FCC has emphasized that this does not indicate how widely such service is available within the census block; a “provider that reports deployment of a

³⁸ See Kaschinske Decl. ¶ 26 & Ex. D.

³⁹ *In re Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, 32 FCC Rcd 6329, 6339-40 ¶ 33 (2017) (“*Form 477 FNPRM*”); see also FCC, *FCC Form 477 Telephone Competition and Broadband Reporting Instructions*, at 17 (Dec. 5, 2016), <https://transition.fcc.gov/form477/477inst.pdf> (Dec. 5, 2016).

particular technology and bandwidth in a census block may not necessarily offer that service everywhere in the block[.]”⁴⁰

This well-known limitation of the Form 477 data is the reason that Charter considers it only as the first step in its process for evaluating whether an address is unserved or underserved: if the census block itself is not 100 Mbps+ serviceable, individual addresses in the census block are necessarily not serviceable either. Conversely, if the census block is serviceable, Charter understands that it must investigate the serviceability of the address individually. *See* Part I.B *supra*.

The FCC has a pending rulemaking to consider whether it should alter its Form 477 data collection process so that the resulting data can be used to determine broadband availability at the address level, since its current Form 477 data cannot.⁴¹ The City of New York has commented in that proceeding and urged the FCC to make such changes.⁴² The BPO has likewise acknowledged that Form 477 data cannot be used for address-by-address determinations, and, “recognizing the limitations of the FCC’s Form 477 data,” has concurred that “it is possible that additional Unserved or Underserved Units are located in [census blocks] currently classified as ‘Served’” by the Form

⁴⁰ FCC, *Fixed Broadband Deployment Data from FCC Form 477*, <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477> (last visited May 5, 2018).

⁴¹ *See also Form 477 FNPRM*, 32 FCC Rcd at 6340 ¶ 33 (noting that “if a block was listed by a provider, it is impossible to tell whether residents of that block seeking service could turn to that provider for service or whether the provider would be unable or unwilling to take on additional subscribers”); *id.* at 6341-42 ¶¶ 38-39 (observing that “we lack the locations of individual homes (or businesses)” and seeking comment on whether to collect broadband deployment data at the street address level).

⁴² *See Reply Comments of NYC DoITT at 2, WC Docket No. 11-10, In re Modernizing the FCC Form 477 Data Program* (Oct. 24, 2017) (noting that the FCC “currently collects [fixed broadband deployment] data at the census block level...providing a list of blocks where a provider does or could provide service” and supporting the FCC’s proposal to collect more granular data).

477 reports. Indeed, precisely because of that limitation in the FCC’s data, the BPO has stated that it “will also consider applications that propose to address identified Unserved and/or Underserved Units within Served [census blocks] in [] New York City.”⁴³ In light of the uniform acknowledgements from the FCC, the BPO, and New York City, the *Expansion Show Cause Order*’s proposal to rely upon Form 477 data for the proposition that there are no unserved or underserved locations in New York City is perplexing. The *Order*’s disconnect, on this point, from other government entities—including the State’s BPO, which is responsible for running the broadband expansion program in New York—demonstrates that the Commission’s reasoning here is misapplied.

2. Competing Providers Do Not Pervasively Offer High-Speed Broadband throughout Charter’s New York City Franchise Area.

The *Expansion Show Cause Order*’s assertion that New York City is “100% Served” would also come as a surprise to the City itself. The City is currently suing Verizon, the only other broadband provider with authority to offer service throughout Charter’s New York City footprint, based upon allegations that Verizon has failed to build out its FiOS network to “pass all households” in the City in accordance with its franchise agreement.⁴⁴ According to the City’s summary judgment filings, Verizon’s fiber-optic network is in a position to serve only 2.2 million of the City’s 3.1 million households.⁴⁵ The City’s allegations call into further question the

⁴³ New NY Broadband Program: Phase 3 Request for Proposal Guidelines at 34 (Mar. 30, 2017), https://nysbroadband.ny.gov/sites/default/files/broadband_-_phase_3_rfp_guidelines-final_0.pdf.

⁴⁴ See Complaint, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. Mar. 13, 2017).

⁴⁵ See Memorandum of Law in Support of Plaintiff the City of New York’s Motion for Summary Judgment at 1, *City of New York v. Verizon New York, Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct. July 19, 2017).

Commission’s remarkable assertion that “100% of the NYC areas are served by one or more 100 Mbps wireline providers.” *Order* at 11.

The *Order* also suggests that the presence of Cablevision and RCN in New York City somehow calls into question the plausibility of Charter’s reporting of unserved or underserved locations to which Charter has extended service. *Order* at 11. This assertion is similarly puzzling. Altice’s (f/k/a Optimum’s) New York City service areas and Charter’s do not overlap. Altice holds a franchise in the Bronx and Charter holds franchises in Manhattan, Queens, and Staten Island. Although both providers hold franchises in Brooklyn, they serve non-overlapping parts of the borough.⁴⁶ RCN, moreover, although it has overbuilt small portions of Charter’s service area in Queens and Manhattan, has only a minimal presence in Brooklyn and offers service in only a fraction (approximately [REDACTED]) of Charter’s New York City service area overall. Quigley Decl. ¶ 16 n.4. The mere fact that other cable companies offer service in *parts* of New York City is not a reasonable or lawful basis on which to infer, much less conclude, that they already offered service to every New York City address to which Charter has expanded its network—particularly where, as here, Charter has investigated those competing providers’ service availability at each individual address.

B. Deployment of Existing Street-Level Charter Facilities in New York City Does Not in All Cases Obviate the Need for Construction to Further Expand Serviceability.

Another basis set forth in the *Expansion Show Cause Order* for disqualifying Charter’s reported New York City addresses is that Charter itself already has facilities in New York City

⁴⁶ See NYC Information Technology & Telecommunications, Cable TV, <https://www1.nyc.gov/site/doitt/residents/cable-tv.page> (last visited May 5, 2018).

deployed pursuant to its cable franchises, such that any passings it completed could not have been new.⁴⁷ This reasoning is mistaken both as a factual matter and as a legal one.

The *Expansion Show Cause Order*'s logic conflates two distinct concepts: (1) having network infrastructure deployed adjacent to a structure (as required by Charter's cable franchises with the City), and (2) being able to extend service, when a potential customer requests it, to residential or commercial units inside the structure within a standard business interval or without an extraordinary commitment of resources. Charter's "Residential Deployment" obligations under its New York City franchises address the former concept, requiring Charter (with respect to certain residential structures) to have "functioning System facilities . . . installed in the street fronting the building in which such household is located" such that, subject to various exceptions itemized in the agreement, Charter can complete a standard installation to certain residences that are not in MDUs within seven business days (fourteen business days if accompanied by a notice explaining the cause for delay) if a customer asks for one.⁴⁸ Having street-level facilities fronting a home in this manner will usually allow a cable provider to serve the home within a standard business interval. As noted above, Charter—utilizing its existing New York City infrastructure to meet customer service requests without the need for additional construction—performed approximately

⁴⁷ Another One-Commissioner order issued by Chair Rhodes on the same day cites a Department Staff audit of 490 premises in New York City, of which Department Staff recommended that 462 unidentified addresses were already served by Charter or another provider. *See* 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 at 13 (Mar. 19, 2018) ("*NYC Franchise Order*"). The *Expansion Show Cause Order*, however, does not propose to disqualify only these 462 unidentified addresses, but all of Charter's New York City addresses.

⁴⁸ *See, e.g.*, Northern Manhattan Franchise Agreement §§ 5.1, 5.3.1. Charter is separately responding to Chair Rhodes' March 19, 2018 One-Commissioner Order to Show Cause in connection with Charter's New York City Franchise with evidence demonstrating Charter's compliance with its New York City network deployment obligations.

█ installations (*i.e.*, new service connections not requiring construction activity) in the City during the relevant time period, and, even when it performed construction projects, in a significant number of cases did not consider those construction projects reportable under the Expansion Condition. Quigley Decl. ¶ 10; Kaschinske Decl. ¶ 23.

However, as Charter’s five New York City franchise agreements themselves recognize, not all street-level deployment is sufficient to enable a broadband provider to complete installations within a regular business interval and without a significant resource commitment.⁴⁹ Particularly in dense urban environments, significant design and construction work, which often requires the cooperation and concurrence of the building owner, is sometimes required to extend a broadband network from street level up into larger structures in order to offer service to residential or commercial units inside. Quigley Decl. ¶ 11.b. Extending a broadband network vertically from the street to reach a commercial tenant on a high floor of a high-rise building, for instance, can represent a significant undertaking even when the provider already has plant deployed adjacent to the structure in the street. *Id.* ¶ 11.c.

The attached Declaration from John Quigley, Charter’s Regional Vice President of Field Operations for the greater New York City area, explains how extending Charter’s network in urban areas to reach residential and commercial units not previously connected to Charter’s network sometimes requires extensive design, construction, and expenditure of resources even when (as in

⁴⁹ *See, e.g.*, Northern Manhattan Franchise Agreement § 5.1 (noting that cable operator satisfies deployment obligations by having street-level facilities fronting certain residential buildings, such that Service can be provided in response to “Standard Installation” requests, “assuming no delays in gaining lawful access to any necessary private right-of-way”); *id.*, §1.51 (clarifying that “Standard Installation” requirements to install service within 7 business days do not apply to households inside Multiple Dwelling buildings if the cable operator does not yet have facilities inside the building); § 5.3.2 (setting forth significantly longer timeframes to complete “Non-Standard Installations”); § 5.4 (exempting various scenarios from cable availability requirement, including inability to gain access to building and commercial unreasonability).

New York City) Charter already has pre-existing network deployed in the street. *Id.* ¶¶ 7-12. These can include projects to extend Charter’s network into MDUs that can take several months and cost hundreds of thousands of dollars, and often involve new or repurposed building structures. *Id.* ¶ 11. The substantial majority of Charter’s reported passings in New York City relate to building its network into such MDUs. *See* Kaschinske Decl. ¶ 24.

Such construction projects are properly eligible for reporting under the Expansion Condition. If a residence or business cannot currently be served within a standard business interval and/or without an extraordinary commitment of resources due to the particular construction requirements of the urban environment, it is not yet “passed” for purposes of the *Merger Order*, even if there is already “pre-existing Charter network” fronting the structure in which the business or residence is located such that Charter has met its network deployment conditions under its cable franchise agreements. *See Order* at 12 n.23. Here, the addresses in New York City that Charter reported to the Commission all became broadband-serviceable as a result of Charter’s construction activity. *See* Part I.A *supra*. The fact that Charter already has a New York City network deployed consistent with its franchise requirements is not inconsistent with the continued extension of its network to pass additional homes and businesses via such construction, and is not a lawful basis on which to disqualify those addresses.

C. The *Merger Order* Does Not Limit the Expansion Condition Exclusively to Low-Density Areas.

Another purported basis for disqualifying Charter’s New York City addresses set forth in the *Expansion Show Cause Order* is that such addresses are *per se* ineligible because the *Merger Order* “explicitly stated” that “Charter was required” to build only in “less densely populated and/or line extension areas.” *Order* at 12 (internal quotation marks omitted). The *Merger Order*, however, contains no such requirement.

1. The Plain Text of the Condition Contains No Low-Density Requirement.

Restated in full, the pertinent body text within the *Merger Order* provides:

In order to ensure the expansion of service to customers in less densely populated and/or line extension areas within the combined company's footprint, the Commission will require New Charter to extend its network to pass, within its statewide service territory, an additional 145,000 "unserved" ... and "underserved" ... residential housing units and/or businesses within four years of the close of the transaction.

Merger Order at 56.

The text of the *Merger Order* is unambiguous: expanding coverage to low density areas is a reason explaining *why* the Commission adopted the Expansion Condition, not an *element* of the Expansion Condition. The requirement is to extend Charter's network to pass an additional 145,000 homes and businesses within Charter's "*statewide* service territory." *Id.* The Commission's statement that it is adopting the condition "*in order to* ensure the expansion of service to customers in less densely populated and/or line extension areas" is prefatory language explaining its *reasoning*. *Id.* (emphasis added). And as an explanation of the Commission's reasoning for adopting the Expansion Condition, this makes perfect sense: densely populated areas are more likely to be served already, and thus contain fewer locations that would be candidates for further network expansion. But nothing in the *Merger Order* requires that *every* additional address to which Charter extends its network must be in "less densely populated and/or line extension areas" or precludes Charter from reporting addresses that are not.

Even if the *Merger Order* could somehow be construed, as the *Expansion Show Cause Order* does, as limiting the Expansion Condition exclusively to "less densely populated and/or line extension areas" (which it cannot), the *Merger Order's* Appendix A, which sets forth the actual text of the Expansion Condition, contains no such requirement, requiring only that the "residential housing units and/or businesses" be "unserved" or "underserved," not that they also be located in

low-density areas. *See Merger Order*, App'x A, § I.B.1. Accordingly, even though there is no conflict as between the body of the *Merger Order* and Appendix A, Appendix A would control in the event of any such conflict. It is Appendix A that Charter explicitly accepted, and it is Appendix A that contains the specific text of the requirements with which Charter is ordered to comply.

Matter of Luyster Creek, LLC v. New York State Public Service Commission, 18 N.Y.3d 977 (2012), is on point. There, the Commission sought to rescind a prior order approving the sale of certain property based upon the purchaser's failure to build a factory at the location, which the Commission contended had been a condition of its order approving the transfer. 18 N.Y.3d at 978-79. The Court disagreed. Among other things, the Court observed that whereas the Commission expressly conditioned its approval of the transaction upon the parties' compliance with certain laws and the Commission's rules and regulations, "[t]he development of an envelope factory was not made an express condition of the Commission's approval or a condition precedent to the transfer of the property"; it was merely an acknowledged intention of the purchaser. *Id.* Therefore, the Court held that the Commission's order nullifying its prior approval of the sale "lack[ed] a rational basis." *Id.*

The same logic controls here. As discussed above, the Commission's contention that the Expansion Condition can be satisfied *only* by network extensions in "less densely populated and/or line extension areas" is nowhere to be found among the express approval conditions enumerated in Appendix A. *Merger Order* at 56. Indeed, Appendix A in the *Merger Order* is entitled "Conditions of Approval" indicating its intention for this section to set forth its conditions for approving the merger. Had the Commission intended for this to be a condition of approval, as opposed to its expectation, it could have included it in Appendix A's approval conditions and

Charter could have made an informed decision about whether to accept it.⁵⁰ The Commission did not do so and cannot lawfully create such a condition retroactively now. *See* Part III *supra*.

2. The *Merger Order*'s Economic Figures Are Inconsistent with a Low-Density-Only Limit.

The *Merger Order* is also further inconsistent with any limitation of the Expansion Condition to low-density areas insofar as it estimates that Charter will need to incur approximately “\$2,000 per premises passed” in order to satisfy it. *Order* at 55. Given the costs of expanding broadband networks into low-density areas, this figure would be implausibly low if Charter’s network expansion were to consist *exclusively* of such network buildout efforts. Charter’s average costs for its passings not located in New York City already exceed [REDACTED] each and are expected to rise above [REDACTED] by the end of the reporting period. Kaschinske Decl. ¶ 21. Only if Charter can include qualifying network extensions in other parts of its service area, including urban areas where lower costs can offset the average, are the Commission’s financial estimates even remotely plausible. Moreover, the *Order* derived those estimates from the BPO’s Connect New York program. *Order* at 55 n.109. The Connect New York program, however, contained no limitation to low-density areas only. Like the Expansion Condition, it subsidized broadband buildout to any area that was unserved or underserved.⁵¹

⁵⁰ If the Commission’s mere *expectations* represented binding conditions of the *Merger Order*, those expectations would have implications beyond the importation of a low-density requirement into the Expansion Condition. Among other things, the *Merger Order* expressed the Commission’s expectation that the Expansion Condition would represent a financial commitment of \$290 million. *Order* at 55. Charter has not, however, taken the position that the *Merger Order*’s \$290 million figure alters the requirements of the Expansion Condition as embodied in Appendix A, even though its current projected expenditure to satisfy the condition now exceeds [REDACTED].

⁵¹ *See* Connect New York Grant Guidelines at 2, <https://nysbroadband.ny.gov/ConnectNY2012>.

3. A Low-Density-Only Limit Would be Inconsistent with Charter's Reasonable Reliance Interests.

Reading the Expansion Condition to import an additional requirement limiting Charter's extensions of its network to low-density areas would also be inconsistent with the Expansion Condition's history.

The *Merger Order* directed Charter to decide within seven business days whether to accept its conditions in exchange for obtaining the Commission's approval for its acquisition of control over Time Warner Cable's New York telecommunications affiliates and cable franchises.⁵² In its evaluation of whether the *Merger Order's* requirements were acceptable, it was of material importance to Charter that the Expansion Condition reflected in Appendix A of the *Merger Order* focused on whether *individual addresses* were unserved or underserved instead of containing a geographical limitation. See Declaration of Adam Falk, Charter's Senior Vice President of Government Affairs ("Falk Decl.") ¶ 6. This distinction was important to Charter because it provided Charter's business with some additional flexibility as to the manner in which it would be able to satisfy the condition. *Id.* ¶ 5.

Due to the significant importance to Charter of the *absence* of any geographical limitation on the Expansion Condition and an abundance of caution even though the low-density requirement was not a condition of the *Merger Order*, a Charter representative inquired with Department Staff, subsequent to the issuance of the *Merger Order* and prior to Charter's acceptance of its conditions, as to the presence within the body of the *Merger Order* of language (now relied upon by the *Expansion Show Cause Order*) referencing low-density areas of the State as a rationale underlying the condition. See *Id.* ¶ 7. Department Staff at the time (specifically, the Department's General

⁵² *Merger Order* at 69.

Counsel and Solicitor) directed Charter's attention to the *Luyster Creek* decision, cited above, to address Charter's concern that text in the body of an order would not have the effect of altering its ordering requirements in the Appendix A of the *Merger Order*. *Id.* ¶ 8.

On that basis, when Charter formally accepted the *Merger Order's* Appendix A in its acceptance letter, it reasonably relied upon the fact that the Expansion Condition was based upon the unserved or underserved status of individual addresses, and Department Staff confirmed Charter's understanding as to the effect of text in the body of the *Order*, as opposed to its formal merger conditions. Importing a low-density requirement into the Buildout Condition now, two years after Charter specifically relied on the *absence* of such a geographical limitation as a basis for accepting the condition and after a pattern of practice in which New York City addresses were routinely accepted after audit and review by the Department, would work a fundamental unfairness under these circumstances and run contrary to reasonable reliance interests.

D. The *Order's* Remaining Miscellaneous Objections to New York City Addresses Are Inconsequential.

The *Expansion Show Cause Order's* remaining proposed bases for disqualifying Charter's New York City addresses are easily refuted.

First, the *Order* notes the "lack of pole applications associated with any of [the New York City] passings" as calling into question whether Charter in fact undertook network expansion activities as reported. *Order* at 12. Pole attachments, however, are not required to extend a cable provider's network vertically, from facilities in the street fronting a structure, up into the structure itself. Quigley Decl. ¶ 11.a n.3. Further, in many cases extensions of plant in New York City occur through underground conduits, ducts and vaults because there are no above ground utilities and poles in these areas. *Id.* ¶ 11.a. The absence of pole attachment applications should be wholly

unsurprising for network extensions in dense urban areas where facilities are underground and/or must be constructed into the risers of buildings. *Id.* ¶ 11.b.

Second, the *Order* notes that “Charter did not include any NYC addresses in its July 2016 Negative Space list to BPO,” from which it jumps to the conclusion that “the Company had no unpassed locations in those franchise areas.” *Order* at 12. But the second proposition does not follow from the first one. The purpose of the Negative Space list was to coordinate Charter’s network expansion plans with the BPO and indicate areas in which Charter did *not* intend to build. There would have been no reason to include on that list locations in New York City, where Charter is constantly expanding its network to keep up with new construction and zoning changes and those construction projects would not be planned years in advance due to the ongoing nature of such new development. Moreover, on its own terms, Charter’s Negative Space List was heavily caveated and purported to be only a statement of Charter’s then-current plans subject to further analysis and future construction in those areas. *See* Part V.C.1 *infra*. The fact that Charter had not as of July 2016 planned network expansion activities within New York City (where much of Charter’s network expansion activity has involved new structures that are constantly being created and may not have even existed in early 2016) does not call into question Charter’s subsequent construction to those structures. And, in fact, in Charter’s network expansion plans and other documents submitted to the Commission outlining its intentions with regard to meeting the Buildout Condition, the company routinely disclosed that they were subject to change, for among other reasons, future new housing development in its service area.

Third, the *Order* claims that Charter reported more New York City addresses in its January 2018 filing than in earlier reports. *Order* at 12. Construction data shows that Charter built these projects throughout the entire reporting period. Kaschinske Decl. ¶ 15.c. Unlike upstate, where

Charter can rely to a greater extent on Form 477 data to identify unserved and underserved addresses, its New York City reported passings rely to a much greater extent on more complex, address-by-address investigation as to the presence of competitors. *Id.*

E. Disqualifying New York City Addresses Would Work Particular Unfairness if Applied Retroactively.

Disqualifying all of Charter's New York City addresses would also be arbitrary and capricious for another reason: Charter had been reporting additional addresses in New York City to the Commission in at least four reports preceding its January Buildout Compliance Report.⁵³ Moreover, the inclusion of New York City addresses in those reports has been transparent and obvious, as the reports specifically indicate the county in which each address is located, including Kings County (Brooklyn) and New York County (Manhattan) among others.⁵⁴ At no point has the Commission given Charter reason to believe that it viewed network extension activities to pass addresses in New York City as *per se* improper under the Expansion Condition, depriving Charter of any reasonable notice that its reports would be held to an unwritten "no New York City passings" rule. To the contrary: the Commission has accepted Charter's past reports without disqualifying its New York City addresses or otherwise indicating that those addresses were categorically improper.

As part of their ongoing rounds of auditing Charter's reported addresses, Department Staff have audited *individual* addresses in New York City, giving Charter every reason to believe that its New York City addresses would be evaluated and scrutinized based on the same criteria as its

⁵³ See n.15 *supra*.

⁵⁴ *Id.*

passings anywhere else in the state.⁵⁵ Indeed, mere days before Charter’s report was due, the Department sent a letter to Charter’s counsel “to set forth some of DPS Staff’s initial concerns and expectations” regarding Charter’s upcoming filing.⁵⁶ Although the letter restated questions raised by Department Staff in audits of Charter’s earlier reports, which had challenged the eligibility of some specific reported individual addresses, it made no mention of New York City at all, and certainly provided no indication that Department Staff’s “concerns and expectations” for Charter’s upcoming report included that Charter not report any network extension activities to pass addresses within metropolitan New York City.

Thus, even if the Commission had any authority categorically to preclude Charter from counting New York City addresses towards the expansion condition (which it does not), exercising that authority *retroactively* here, to addresses Charter completed and reported before it had any notice of this new rule, would be arbitrary and capricious. *See* Part II.B.1 *supra*.

IV. THE *ORDER*’S CHALLENGES TO CHARTER’S COMPLETED NETWORK EXTENSIONS IN UPSTATE NEW YORK LACK MERIT.

The *Expansion Show Cause Order* next seeks to disqualify 1,762 Charter reported addresses in upstate New York, virtually all of them (1,726) on the grounds that a Department Staff audit, shared with Charter nearly two weeks *after* the issuance of the *Order* on March 30, 2018, concluded that Charter already had pre-existing facilities in the vicinity of each of those addresses. *Order* at 13-15. It also identifies a handful of additional addresses for disqualification on the grounds that they are purportedly either duplicate addresses (in the case of 20) or already served by another provider (for 16 others). *Id.* at 14. The *Order* also vaguely asserts that “many”

⁵⁵ The Commission’s sudden adoption of this new position regarding Charter’s New York City addresses raises questions regarding the timing and motivation of the *Expansion Show Cause Order*. *See* Part VII *infra*.

⁵⁶ December 28, 2017 Letter from Debra LaBelle to Maureen Helmer.

of the addresses were “separately required to be served under 16 NYCRR § 895.5” because they are in “densely populated cities, within the cable Primary Service Area,” although neither the *Order* itself nor the data provided by the Department on March 30, 2018 identifies the addresses to which this additional rationale supposedly pertains. *Order* at 15.

Charter has investigated each address that the *Expansion Show Cause Order* proposes to disqualify on this basis. A detailed response to each individual address is provided in the accompanying declaration of Terence Rafferty, Charter’s Regional Vice President of Field Operations and its supporting exhibits. Excluding some special cases discussed below, the *Order* largely repeats the same error it commits with respect to the new addresses Charter has constructed in New York City: assuming that the mere presence of Charter cable plant in the general vicinity of a structure means that the structure is already serviceable, and disregarding the variety of construction projects and accompanying outlays of effort, time, and resources that can sometimes still be necessary to extend service to such locations.

The *Order* also misconstrues the state-law obligation to extend *cable video* networks to reach new customers in certain areas to include a state-law obligation to extend broadband *Internet* access service to those same customers. However, no such legal obligation exists independent of the Expansion Condition, and there is no lawful reason that a construction project cannot simultaneously satisfy Charter’s obligations under its cable video franchises and under the *Merger Order*. Charter addresses each subject below.

A. Deployment of Existing Cable Does Not in All Cases Obviate the Need for Construction to Further Expand Serviceability.

As set forth in the Rafferty declaration and its supporting exhibits (which include the details of each construction project), the overwhelming majority of the Department’s challenges to Charter’s reported upstate addresses on the grounds that the locations were (purportedly) already

serviceable by Charter's existing network are not well taken. Of the 1,461 addresses challenged by the Department on this basis that remain pertinent,⁵⁷ 1,417 (or 97%) represent design and construction work properly reportable under the Expansion Condition.

Charter has investigated each project and is providing details of the work performed. The Department appears to have indiscriminately challenged construction projects whenever there were already Charter network facilities in the vicinity of the address to which Charter extended service. *See* Rafferty Decl. ¶ 15. This approach neglects the wide range of construction activity *other* than running horizontal aerial cable to reach new geographic areas that is sometimes necessary to extend service to additional locations. For instance, the projects that the Department audit challenged involve, *inter alia*, work such as running new underground facilities, building new nodes to serve newly-constructed apartment buildings, building internal plant within new structures, new coaxial cable connections running several hundreds of feet, as well as work to modify existing network facilities to expand their capacity to serve additional addresses. *See* Rafferty Decl. ¶ 17 & Exs. C, D. Charter is supplying the details of the work performed in each project.⁵⁸

⁵⁷ Charter's ongoing review of newly-released FCC Form 477 data described in Part I.B *supra* had already caused it to withdraw 265 of the 1,726 addresses challenged by the Department on an unrelated ground: that new FCC data, not yet available at the time of Charter's report, has since indicated that a previously-unreported competitor started offering service in the pertinent census block. *See* Rafferty Decl. ¶ 12 & Ex. C.

⁵⁸ In a very small number of instances (43), Charter concurs with the Department's assessment and will withdraw the address from its reports. By way of example, some of the addresses include instances in which Charter built a new fiber connection to an address, but the address was close enough to Charter's plant that Charter could have extended 100 Mbps+ service by means of a standard coaxial installation. *See* Rafferty Decl. ¶ 18.

B. Other Challenged Upstate Addresses.

The accompanying Rafferty Declaration and its exhibits also provide address-by-address responses to the other addresses challenged in the Department Audit. As demonstrated therein, the majority of the 20 addresses claimed as “duplicates” in the Department’s audit are unique and properly reportable addresses, although Charter concurs with the Department in the remaining cases and will withdraw the addresses from its report. *See* Rafferty Decl. ¶¶ 6-7 & Ex. A. As to the 16 addresses that the Department has claimed are serviceable by other competitors, some are moot for unrelated reasons, but for the remainder, the best evidence available indicated that, irrespective of whether a competitor may be present today, competitive alternatives to Charter’s service were not yet available at the time of Charter’s construction. *See* Rafferty Decl. ¶¶ 9-10 & Ex. B.

C. Charter’s Cable Video Network Expansion Obligations Do Not Independently Require Broadband Construction.

The remaining basis for disqualification set forth in the *Expansion Show Cause Order* is that “many” of Charter’s reported addresses are purportedly within its Primary Service Area and subject to disqualification because they are “separately required to be served under 16 NYCRR § 895.5.” *Order* at 15. The *Order* fails to identify any addresses it is proposing to disqualify on this basis, and this is in any event not a lawful reason for excluding addresses otherwise satisfying the Expansion Condition.

Nothing in the Expansion Condition makes it mutually exclusive of other legal obligations Charter might be under to expand its network, rendering this rationale for disqualification improper under the plain text of the *Merger Order*.⁵⁹ But even if the Expansion Condition could somehow

⁵⁹ The only time the *Merger Order* references primary service areas at all is a footnote, and there only to explain the “line extension areas” in which the Commission expressed an expectation that the Expansion Condition would encourage deployment—and even then refers to line extension

be read to contain an unwritten prohibition against Charter’s reliance upon the same network expansion activities to satisfy multiple legal obligations, the requirement in 16 NYCRR § 895.5 is inapplicable on its face because it is a legally distinct obligation from the Expansion Condition. The former is a rule governing the “[r]equirements for construction of *cable television plant* and provision of *cable television services*,” 16 NYCRR § 895.5 (emphasis added), and its operative provision requires “cable television companies operating in the State of New York [to] make *cable television* service available” upon request within their primary service areas. *Id.* § 895.5(c) (emphasis added). Thus, it is not an obligation to provide broadband service at all. It is an obligation to provide cable video services upon request to customers in some areas of the state, and only if they ask for it.

To the extent 16 NYCRR § 895.5 imposes network expansion requirements on cable providers, providers can meet those requirements without offering broadband service at all, or by offering broadband service at speeds below 100 Mbps. Although Charter has made a business decision to make a range of high-speed data and Voice over Internet Protocol (“VoIP”) services available to customers across its network, a company’s business decisions about which services to offer do not define its legal obligations. Charter’s decision to make a greater investment and build its network to offer to all customers broadband at speeds exceeding 100 Mbps, therefore, exceeds any requirements under 16 NYCRR § 895.5 (or Charter’s applicable franchise agreements). All Charter network extensions that meet the Expansion Condition criteria, accordingly, may be used to satisfy the condition irrespective of whether 16 NYCRR § 895.5 might have independently required Charter to extend cable video service to the same locations.

areas “and/or” less densely populated ones. *See Merger Order* at 53 n.106. Nothing about that footnote even remotely implies that a network extension *must* be outside a primary service area in order to satisfy the Expansion Condition.

V. “DISQUALIFYING” CHARTER’S COMPLETED NETWORK EXTENSIONS BASED UPON THE BROADBAND PROGRAM OFFICE’S BIDDING DECISIONS WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The *Expansion Show Cause Order* also proposes to disqualify a number of Charter’s already-completed addresses from its January 8, 2018 Expansion Compliance Report, and to preclude Charter from receiving credit for extending its network to pass certain new addresses in the future, based upon choices the BPO has made with respect to directing subsidies towards broadband deployment in those locations as part of the New NY Broadband Program.⁶⁰ Specifically, it proposes to disqualify Charter from receiving credit for completing passings to addresses to which Charter had previously indicated, in its July 26, 2016 “Negative Space” filing,⁶¹ that it did not intend to extend service, and which the BPO subsequently included in its Phase 1 and Phase 2 bidding processes under the Broadband for All Program.⁶² The *Order* also proposes to preclude Charter from receiving credit under the Expansion Condition for addresses that were *not* in Charter’s “Negative Space” filing, but which the BPO included in its bids anyway, unless Charter can make an individualized demonstration that the BPO grantee is not serving the address. *Order* at 17-18.

The Commission may wish to minimize overlap between Charter’s network expansion efforts and those funded by the BPO but any overlap is not the fault or responsibility of Charter to address. Charter has engaged in expansive, and expensive, good faith efforts to coordinate with

⁶⁰ *Order* at 2.

⁶¹ Case 15-M-0388, Charter Communications, Inc.’s Revised Network Expansion Implementation Plan 45 Day Report (July 26, 2016) (“*Negative Space Filing*”).

⁶² In 2015, Governor Andrew M. Cuomo announced the launch of the New NY Broadband Program, an initiative that is intended to provide statewide broadband access in New York by the end of 2018. The Program is administered by the BPO. *See generally*, New York State, *Programs: Broadband for All, New NY Broadband Program*, NY.GOV, <https://www.ny.gov/programs/broadband-all>.

the BPO, well above and beyond its legal obligations under the *Merger Order*, to help support that goal. But frustrating Charter's ability to satisfy the Expansion Condition, as the *Expansion Show Cause Order* proposes, is not a lawful or equitable tool at the Commission's disposal to advance that objective.

A. Charter's Expansion Condition Is Not Limited by the BPO's Subsequent Decisions about which Areas to Subsidize.

The plain text of the Expansion Condition controls here. The Expansion Condition does not preclude Charter from building connections to pass addresses that are unserved or underserved today, but may in the future become serviceable by subsidized third parties. Because the Commission is not authorized to add to the conditions in the *Merger Order* after the fact, *see* Part II.B.1 *supra*, it may not now retroactively create a new requirement that Charter's network extension efforts be located outside of BPO-bid areas.

This conclusion is strengthened by the fact that the *Merger Order* specifically contemplated the form of coordination between Charter's and the BPO's broadband expansion efforts. The required coordination was not a blanket prohibition on Charter's extension of its network into BPO-bid areas nor did it put on Charter the responsibility of determining what the BPO would put in its bid criteria. Rather, the *Merger Order* addressed that subject by requiring the stakeholders to all talk to one another through a single Consultation Requirement:

New Charter and Time Warner are required to consult with Staff and the BPO to identify municipalities that will not be the focus of this expansion condition in order to facilitate coordination of this network expansion with the implementation of the Broadband 4 All Program. This consultation is required to occur within 45 days of the issuance of this Order.

Merger Order, App'x A, § I.B.1(a).

The *Merger Order* chose to encourage coordination between Charter and the BPO by means of a consultation process to maximize the mutual success of the two broadband programs,

rather than by taking the more draconian step of prohibiting Charter from building in areas that the BPO later chose to subsidize with grants to third parties. Accordingly, neither the Consultation Requirement, nor anything else in the *Merger Order*, provides a basis for disqualifying otherwise-eligible addresses based upon the activities or disapproval of the BPO subsequent to the required consultation. Nowhere in the *Merger Order* does it state that the BPO has the authority to dictate which addresses may or may not be included in Charter's reports. Nor is there any requirement that Charter's addresses be approved by the BPO or that BPO-bid addresses should be disqualified as counting as potential passings. Therefore, whether the BPO chose to include a particular address in Phase 1 or Phase 2 (or Phase 3) of the BPO program is irrelevant. The *Merger Order* does not authorize the Commission to disqualify Charter's eligible network extensions on that basis.

B. Charter Exceeded Significantly Its Obligation under the *Merger Order* to Consult with the BPO.

As discussed above, the Consultation Requirement required Charter within 45 days of the *Merger Order* "to consult with DPS Staff and the BPO" to identify municipalities that would not be the focus of Charter's expansion plan. Charter went above and beyond this obligation to coordinate the scope of its own network expansion plans with the Governor's Broadband 4 All Program.

The Consultation Requirement itself is limited. Charter is required only to "consult" with the BPO and Department Staff, and to do so once—"within 45 days" of the *Order*. This qualification makes clear that the Consultation Requirement envisions only a one-time exchange of information at the outset of the process. It does not impose upon Charter a continuing obligation to coordinate its ongoing planning and construction activities against each of the BPO's future tranches of bids.

Notwithstanding the limited nature of the obligation imposed by the Consultation Requirement, Charter continued to support the work of BPO through mapping, company data, and computer support well beyond the 45-day period following the issuance of the *Order* and with information well beyond the obligation to identify “municipalities” that were not going to be the *focus* of the expansion conditions as set forth in the Consultation Requirement. As detailed in the attached Declaration of Noel Dempsey and Charles Williams (hereinafter “Dempsey/Williams Declaration”), Charter continued such support activities and made accommodations to Charter’s own plan well in excess of anything required by the *Merger Order* in an effort to demonstrate its cooperation and good-faith. *See generally* Dempsey/Williams Declaration (“Dempsey/Williams Decl.”).

As described in detail in the Dempsey/Williams Declaration, the Charter team invested many hours meeting with BPO and Department Staff over almost six months, both as part of its effort to go above and beyond the formal consultation process and later in order to provide support to the BPO and the Governor’s broadband deployment goals. *Id.* Over the course of that coordination process—although nothing in the Consultation Requirement compelled it to do so—Charter repeatedly revised its broadband expansion plan in order to accommodate the BPO’s inexplicable opinion that the BPO’s own program had to be bid out on the basis of entire census blocks. *Id.* ¶ 32.

As discussed in detail in the Revised 45-day plan Charter filed with the Commission on July 26, 2016, Charter engaged in repeated consultation sessions with the BPO, during which the BPO requested that Charter provide additional information to assist the BPO with its own planning, and asked that Charter make changes to Charter’s own Network Expansion Plan in order to accommodate the BPO’s objectives and planning needs. *See also id.* ¶¶ 11-24. Although the

Consultation Requirement did not compel Charter to alter its own expansion plans to facilitate the BPO's needs or objectives, Charter engaged in that process cooperatively and issued its revised 45-day plan. Moreover, although the Consultation Requirement only required Charter to identify “municipalities that will not be the focus of this expansion condition,” *Merger Order* Appendix A at I.B.1.a, Charter sought to further assist the BPO's planning by going well beyond that requirement, providing its Negative Space List of approximately 105,296 parcels within Charter's current service territory (at the census block and address level) that Charter did not currently intend to build to as part of its network expansion plans (albeit subject to caveats, including further analysis and excluding new construction or development within those areas).⁶³ Moreover, Charter added longitudinal and latitudinal coordinates to assist the BPO in further identifying locations outside Charter's projected network expansion plan area.

Even after the extensive detail that Charter provided to the BPO (as well as to Department Staff) as part of this consultation process, the BPO still went out and bid out hundreds (eventually thousands) of addresses that were already in the Network Expansion Plan that Charter had shared with the BPO before it bid them out. Dempsey/Williams Decl. ¶¶ 28-29. The BPO failed to communicate with Charter prior to announcing these bids. *Id.* On numerous occasions throughout 2016 and 2017, Charter brought these overlapping areas to the BPO's attention. *Id.* ¶¶ 22, 24, 27-28. Despite being on notice of this issue, the BPO indicated to Charter that its preference was to bid out entire census blocks, even if Charter had already informed it of plans to expand service into portions of those census blocks. *Id.* ¶ 31.

Under these circumstances, even if the Consultation Requirement somehow limited or modified the Expansion Condition (which it does not), it would be arbitrary and capricious to

⁶³ See generally *Negative Space Filing*.

disqualify Charter from counting otherwise-eligible addresses that were disclosed to the BPO and the Department, based upon the BPO's subsequent choices about which areas to subsidize. Charter went above and beyond the Consultation Requirement in sharing information with the BPO and accommodating its plans. The purpose of the Consultation Requirement, however, as set forth in its text, was to facilitate "coordination" of the two expansion programs. "Coordination" is a two-way process, not a unilateral exercise.⁶⁴ To the extent that the BPO chose to ignore Charter's Network Expansion Plan or the multiple attempts Charter made to inform it of overlap, those bids should be viewed as being issued at the BPO's (and the awardees') risk. Disqualifying any of Charter's completed or planned passings because the BPO decided to bid out the census blocks in which they are located would be unlawful, arbitrary, and capricious.⁶⁵

C. Charter's Earlier Plans Not to Focus Its Service Expansion on Certain Locations Are Not a Lawful Basis for Precluding Charter from Expanding Service to those Locations Now.

Finally, the *Order* proposes to disqualify 249 of Charter's completed addresses, as well as preclude Charter from claiming extensions of its network to pass an additional approximately 6,600 planned future addresses, because they overlap with the Negative Space List Charter supplied as part of the coordination process with Department Staff and the BPO.⁶⁶ This is not a

⁶⁴ The dictionary definition of "consultation" is a "deliberation or an act of exchanging information and opinions about an issue in order to reach a better understanding between parties on a case." See <https://dictionary.cambridge.org/us/dictionary/english/consultation>. "Consultation" is not supposed to be equivalent of "seeking approval" or simply engaging in a one-way discussion with stakeholders. Both parties must collaborate.

⁶⁵ Insofar as BPO grantees in fact extend service to residences or businesses in advance of any Charter build to those locations, Charter's regular reporting process will already ensure that Charter does not claim credit for those addresses under the Expansion Condition. See Part II.B *supra*; *Order* at 18 (indicating that Charter may not claim credit for new addresses to which a BPO grantee actually offers service).

⁶⁶ *Order* at 16.

lawful or proper basis either for disqualifying Charter's already-completed addresses or for frustrating its plans to satisfy the Expansion Condition going forward.

1. Charter's Expansion Plans Have Always Been Subject to Modification.

The plan that Charter shared with the BPO in July of 2016, years before most of the proposed network expansion was to take place, represented a good-faith effort to plan and predict Charter's construction activities far in advance. Charter was not compelled by the Expansion Condition or the Consultation Requirement to disavow any potential areas for the expansion of its network at any time, let alone so early in the planning stages of a massive, multi-year project that would require substantial additional analysis, field verification and walk out of plant to determine actual address level locations. To the contrary of the assertions made in the *Expansion Show Cause Order*: the Merger Agreement expressly provides that Charter may "update[] as necessary on a quarterly basis" its plan for completing its network expansion efforts. *Merger Order* Appendix A, § I.B.1.b. Prohibiting Charter from modifying its expansion plans would run contrary to the update process contemplated by the *Merger Order*.

The Negative Space List that Charter voluntarily prepared and shared with Department Staff and the BPO represented a good faith effort by Charter to capture its then-current expansion plans. It did not purport to permanently disavow any possibility that those plans might change in the future and, in fact, explicitly acknowledged the contrary:

Subject to further ongoing analysis and review, Charter has no plans to build-out to any current homes or businesses that are located on these 105,296 parcels and, therefore, these constitute the "negative space" where BPO may want to offer opportunity for competitive bid through the Broadband4All program. Further, although ***Charter is not required under the Order to disavow any specific build-out opportunity area, subject to completing its further analysis and review***, Charter commits to only avail itself of opportunities on these 105,296 parcels to the extent that: 1) there is new residential or commercial development thereon, or 2) there are portions of these areas that are not the subject of a subsequent second round Broadband4All grant. Otherwise, however, these parcels within Charter's

current service area and identified in Appendix C would not be used to satisfy the condition.

Negative Space Filing at 9 (emphasis added).

Again, Charter was not required by either the Expansion Condition or the Consultation Requirement to provide the Negative Space List at all—it did so voluntarily and in the spirit of cooperation. Moreover, Charter specifically contemplated and reserved that its voluntary decision to provide such a significant level of detail about its then-current network expansion plans should not be used against it in the future, by precluding Charter from claiming addresses in particular areas or by forcing it to disavow expansion opportunities that later became technically or economically viable. There is no legal basis for the Commission to disqualify any addresses—whether in Charter’s completed passings or its future network expansion plans—based on the voluntary, heavily caveated information Charter chose to share with the BPO above and beyond its legal obligations.

2. Locations Not Previously in Charter’s Plan Are Benefitting from Broadband Service and Charter Had Good Cause to Build to Them.

As set forth above, the mere inclusion of addresses on Charter’s July 2016 Negative Space List is not a lawful basis to disqualify them under the Expansion Condition. But even if the Commission had discretion to decide whether or not to allow Charter to count such addresses (which it does not), it would be unreasonable for the Commission to withhold such consent with respect to the specific addresses reported here.

The *Order* identifies 249 completed passings that it proposes to disqualify based upon overlap with the Negative Space List. Previously-unserved homes and businesses at these locations are now benefiting from broadband serviceability consistent with the purposes of the Expansion Condition. Moreover, the overlap between Charter’s completed passings and the areas in which Charter had previously indicated it did not plan to build is *de minimis*. The 249 addresses

Redacted

proposed for disqualification by the *Order* account for less than six-tenths of one percent of Charter's reported total build to date. The fact that this overlap is so miniscule confirms Charter's good-faith cooperation with the BPO and efforts to avoid duplication of effort across the two expansion programs.

Charter has investigated the 249 specific addresses challenged by the *Order* and there are other valid reasons why it completed each build and why the Commission should credit them. These reasons are set forth in greater detail in the Kaschinske Declaration. The principal categories include the following:

- 33 addresses to which Charter expanded service because they were geographically proximate to other areas in which Charter was expanding its network, or to the route Charter's plant ended up taking in order to reach its planned build area. Kaschinske Decl. ¶ 27.a. These represent classic instances in which network expansion is efficient and beneficial and there is no reason to penalize Charter for efficiency by excluding them, or why the residents at similarly situated addresses should instead be forced to wait until they are reached by a BPO grantee.
- 96 addresses to which Charter expanded service because a specific customer or Government entity requested that Charter do so, and a further 69 that Charter constructed in the regular course of business due to a market need for its services. *Id.* ¶ 27.b. Charter should not be penalized for providing services when there is a specific demand not yet being met by a BPO grantee.
- 13 addresses to which Charter expanded service because they were geographically proximate to (or close to the route to) addresses to which Charter expanded its network in response to a specific request. *Id.* ¶ 27.c.
- 32 addresses that have always been part of Charter's original network expansion plan shared with the Commission, as well as 6 additional addresses that were on the edges of Charter's planned network expansion efforts and mistakenly included on the Negative Space List because they are located on large lots that led to the individual structures being attributed to the incorrect census block during geolocation. *Id.* ¶ 27.d.

In each of these instances, expanding Charter's network to the addresses in question is consistent with the purposes of the Expansion Condition. Charter should not be penalized for bringing broadband to more unserved or underserved New Yorkers simply because they live in

areas Charter had not initially designated as within areas that were part of its initial focus (per the Negative Space List) for meeting the condition.

Disqualifying these addresses would also send a troubling message: that the Commission does not value further broadband expansion by commercial providers into any areas already bid out by the BPO, and that Charter should cease its network expansion efforts or start insisting upon its right to cost-sharing by the customer whenever or wherever its existing network runs up against BPO-bid regions—even when customers or government entities specifically ask Charter to build out to their homes or residences. It would also send an ironic message that the State prefers to have buildouts subsidized by taxpayer dollars even when a company stands willing and able to fund those projects entirely with private investment and it would delay the customers' receipt of broadband service from Charter *now* in favor of some future promise of another provider to offer service in the future based upon some subsidy grant and corresponding commitment of that provider, which has not yet been fulfilled. It would be unfortunate if the Commission, ostensibly acting to encourage broadband deployment to more New Yorkers, chose to exercise its authority in a way that will make it harder for many of them to receive service sooner.

VI. POTENTIAL IMPACT OF THE *ORDER* ON CHARTER'S COMPLETED NETWORK EXTENSIONS AND FUTURE REPORTING.

The *Order* also demands in its third ordering clause that Charter:

[i]nclude with its responsive filing a report regarding the most up-to-date number of passings it has completed, the number of days it will take for Charter Communications, Inc. to come into compliance with the December 18, 2017 deadline assuming the passings discussed herein remain disqualified, and all relevant details regarding its plan to come into compliance with the discussion in this Order for the remainder of the buildout period.

Order at 19.

This directive is irredeemably premature. The Commission has not yet “disqualified” Charter's reported network extensions. It has merely requested evidence and argument as to why

Redacted

it should not do so. And the Commission has not yet had the benefit of the evidence and argument Charter is submitting in this Response, which explains why the vast majority of passings identified in the *Order* should *not* be disqualified. Nor, for that matter, has Charter yet had an opportunity to avail itself of judicial review, if necessary.

The clause's reference to passings "remain[ing] disqualified" when they have not yet been disqualified in the first place, paired with its demand that Charter explain how it "plan[s]" to comply with an order that has not even been issued yet, would suggest to most reasonable observers that the Commission may have already prejudged the outcome of this show cause proceeding. It is inappropriate to demand that a party pre-commit itself to any particular course of action in the event of an adverse result in a regulatory proceeding that has barely even started. Charter deserves a fair hearing of its evidence and the third ordering clause does not otherwise afford the company due process.

The third ordering clause cannot meaningfully be answered in any event. The *Order* creates far too much uncertainty as to what the Commission thinks the Expansion Condition means going forward, which passings it would now consider ineligible under that revised new interpretation, and whether those standards will be applied retroactively. For instance, Charter has no way of knowing whether the *Order*'s purported prohibition on passings not located in low-density areas is now (in the Commission's view) a requirement of the Expansion Condition, or whether the *Order* merely deploys this reasoning as a one-time justification to exclude Charter's New York City passings. Under these circumstances, generating a "plan to come into compliance with the discussion in this Order for the remainder of the buildout period" is impossible.

Subject to and without waiving Charter's objections: were a final order issued by the Commission (and no longer subject to judicial review) "disqualifying" the passings identified in

the *Order*, Charter's present expectation is that it would, as a threshold matter, analyze any such order or judicial outcome to comply. In addition, Charter also anticipates that it would reevaluate its network expansion plans to exclude future projects no longer eligible for reporting and to identify other potential network extension opportunities to substitute for those projects. Because no such order or judicial resolution exists and its contours are not yet known, however, Charter cannot at this point pre-commit itself to the specific form that such modifications to its reporting process and future network expansion plans would take.

Nonetheless, also subject to and without waiving its objections, Charter has attempted to estimate the effect the *Order* would have on Charter's reported passings were the *Order* adopted by the Commission in its present form. As of May 4, 2018, Charter had completed network extensions to [REDACTED] addresses that satisfy the Expansion Condition criteria. Charter has calculated the number of addresses that would remain were Charter to remove from its reports (a) all addresses identified in the *Order*, (b) all subsequently-completed passings in New York City, (c) all addresses that overlap with the Negative Space List, (d) all addresses in census blocks bid by the BPO in Phases 1 or 2, and (e) all addresses in census blocks bid by the BPO in Phase 3 to which Charter completed network extensions after March 19, 2018. *See Kaschinske Decl.* ¶ 28. Collectively, those reductions would reduce Charter's reportable address count as of May 4, 2018 from the current [REDACTED] down to [REDACTED], which would fall [REDACTED] short of the December 2017 target. *Id.* ¶ 29.

Charter does not concur that this is the correct figure under the Expansion Condition. Subject to that objection, it currently projects its incremental completed network extensions (subsequent to the records on which its May 4, 2018 estimate is based) will total to [REDACTED] imminently, likely within the next week or two. *See Rafferty Decl.* ¶ 26.

VII. THE COMMISSION'S CONSIDERATION OF THE ISSUES RAISED BY THE ORDER MUST BE FREE OF EXTRANEOUS CONSIDERATIONS.

Finally, the circumstances surrounding the issuance of the *Order* raise troubling questions as to which Charter is compelled expressly to reserve its rights to judicial review or other legal action.

The Commission is well aware that Charter is currently engaged in a labor dispute in New York City⁶⁷ that has been the subject of considerable political attention and attracted significant interest from New York State and City officials, as well as from the Commission itself.⁶⁸ In the course of that labor dispute, representatives of the striking employees have repeatedly threatened that New York State government entities will take adverse, unrelated regulatory actions against Charter if the labor dispute is not resolved to the union's satisfaction—implying that the union

⁶⁷ See, e.g., *Spectrum Strike Enters Second Year With NYC Protest, And No End In Sight*, Forbes (Mar. 29, 2018), <https://www.forbes.com/sites/janetwburns/2018/03/29/spectrum-workers-strike-enters-second-year-with-nyc-protest-and-no-end-in-sight/#7a42a22b623d>.

⁶⁸ Erin Durkin, *Cuomo, de Blasio Join Cable Workers in Rally to Seek New Contract with Spectrum*, N.Y. Daily News (Sept. 18, 2017), <http://www.nydailynews.com/news/politics/cuomo-de-blasio-back-workers-contract-fight-spectrum-article-1.3504933> (“Gov. Cuomo backed up cable workers Monday who have been on strike for more than six months in a fight with Spectrum. . . . blast[ing] Spectrum and its parent company Charter Communications. “We’re going to demand respect for the blood and sweat of the workforce,” Cuomo said as the rally kicked off at Cadman Plaza Park.”); Matthew Hamilton, *Cuomo rallies with Charter workers on strike*, TimesUnion (Sept. 18, 2017), <https://blog.timesunion.com/capitol/archives/277344/watch-at-3-p-m-cuomo-rallies-with-charter-workers-on-strike/>; Mara Gray, *Charter Communications Strike Ratchets Up; Governor Cuomo’s counsel issues letter to the state regulator raising concerns about the company’s business practices*, Wall St. J. (Oct. 4, 2017), <https://www.wsj.com/articles/charter-communications-strike-ratchets-up-1507111201>; Daniel Frankel, *Charter picketed by NY Gov. Cuomo as strike approaches 6-month mark*, FierceCable (Sept. 19, 2017), <https://www.fiercecable.com/cable/charter-picketed-by-10-000-plus-ny-gov-cuomo-as-strike-approaches-6-month-mark> (“New York Governor Cuomo spoke to the crowd, alongside New York City Mayor Bill de Blasio, who has been a vocal proponent of the union workers since they began their work stoppage on March 28.”); see also Letter from Alphonso David, Counsel to the Governor, to John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission (Oct. 2, 2017); Letter from John B. Rhodes, Chair and Chief Executive Officer, New York Public Service Commission to Thomas Rutledge, Chairman/CEO, Charter Communications (Oct. 12, 2017).

believes it has the ability to influence the actions of certain public officials and may try to use that influence. Consideration by the Commission of Charter's labor dispute, including as an unstated basis animating the actions proposed by the *Order*, would be manifestly improper, would represent an abuse of process, would violate the ethics provisions of section 74 of the New York State Public Officers Law, and would call into question the public trust placed in the Commission to carry out its functions fairly and free from political favoritism.⁶⁹

In the months since Charter's labor dispute reached an impasse, Charter has become the target of numerous proposed adverse regulatory actions, including the *Expansion Show Cause Order*, the *NYC Franchise Order*, an order initiating a "management and operations audit" of one of Charter's telephone affiliates that referenced and was predicated specifically upon Charter's labor dispute,⁷⁰ and two orders proposing to publicly reveal confidential network and service information that Charter had been reporting to the Commission for years without objection or incident.⁷¹ The sudden focus of these enforcement efforts on Charter, the procedural irregularities

⁶⁹ See, e.g., *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984) (courts may invalidate agency action motivated by improper political influence, if plaintiff can show facts indicating that political pressure caused other than statutorily permissible motives to influence the decision); *D.C. Fed. of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971) (relevant inquiry for assessing validity of agency action where political pressure applied focuses on whether "extraneous pressure intruded into the [agency decisionmaker's] calculus of consideration"); see also *Russo Dev. Corp. v. Reilly*, No. 87-3916 (HLS), 1991 U.S. Dist. LEXIS 20965, at *8-9 (D.N.J. May 17, 1991) ("[A]n agency action can be arbitrary and capricious, even if it is ultimately correct, if the action is taken for the wrong reasons." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943))); *MCI Telecomms. Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993) ("A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious.").

⁷⁰ See Case 17-C-0757, *In re Management and Operations Audit of Time Warner Cable Information Services (New York), LLC*, Order Initiating a Management and Operations Audit (Dec. 8, 2017).

⁷¹ Case 13-C-0193, *Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service*

of the Commissions orders, and the lack of any serious evidentiary foundation for the charges could lead reasonable observers to question whether they are animated by additional purposes unrelated to the Commission's legitimate oversight responsibility, especially in light of public statements by public officials. Any effort by the Commission to initiate proceedings to pressure Charter to resolve its labor disputes would violate both state law and federal labor law. Charter is committed to demonstrating its compliance with the Expansion Condition within the four corners of the *Merger Order* itself, but reserves all rights with respect to these efforts.

CONCLUSION

For the reasons stated above, the Commission should decline to adopt any of the proposals set forth in the *Expansion Show Cause Order* and should find that Charter has successfully met the December 16, 2017 target set forth in its *Settlement Order*.

May 9, 2018

Respectfully Submitted,

/s/

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

Samuel L. Feder
Howard J. Symons
Luke C. Platzer
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
lplatzer@jenner.com

Counsel for Charter Communications, Inc.

Quality Reporting Requirements, Determination 18-01 (Jan. 8, 2018); *id.* Determination 18-04 (Feb. 28, 2018).