

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 14, 2018

COMMISSIONERS PRESENT:

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

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

ORDER ON COMPLIANCE

(Issued and Effective June 14, 2018)

INTRODUCTION

Through this Order, Charter Communications, Inc. (Charter or Company) is directed to replace its defective January 19, 2016, acceptance letter of the Commission's Approval Order conditions with a new letter indicating full unconditional acceptance.¹ In approving the merger of Charter and Time Warner Cable, Inc. (Time Warner), the Commission stated that, for the transaction to meet the enumerated statutory "public interest" standard, it must yield positive net benefits, after balancing the expected benefits properly attributable to the transaction

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

offset by any risks or detriments that would remain after applying reasonable mitigation measures. The Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the "net benefits test" otherwise the merger between Charter and Time Warner should be denied.² Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York.

As a threshold matter, the Approval Order's Ordering Clause 1 explicitly required that Charter and its successors in interest "unconditionally accept and agree to comply with the commitments set forth in the body of the Approval Order and Appendix A."³ In its recently submitted response to the Commission's March 19, 2018 Order to Show Cause⁴ regarding the condition to expand the Company's network to pass an additional 145,000 homes and business units (Network Expansion Condition), Charter stated that its certification provided only a "qualified" acceptance of the Approval Order and thereby limited its obligations to Appendix A thereof.

As discussed in detail below, Charter is directed to cure its defective acceptance by filing a new letter of full unconditional acceptance of the Approval Order and Appendix A

² Id., p. 2.

³ Id., p. 69 ("The conditions adopted in this Order and listed in Appendix A shall be binding and enforceable by the Commission upon unconditional acceptance by New Charter within seven (7) business days of the issuance of this Order. If the Petitioners' unconditional acceptance is not received within seven (7) business days of the issuance of this Order, the Petitioners will have failed to satisfy their burden under the Public Service Law as described herein, and this Order shall constitute a denial of the Joint Petition." Id., p 67)

⁴ Case 15-M-0388, Order to Show Cause (issued March 19, 2018) (Show Cause Order).

with the Secretary to the Commission within 14 days of the issuance of this Order. Should Charter fail to provide such a replacement letter of full unconditional acceptance consistent with the discussion herein, the Commission may pursue other remedies at its disposal as discussed below.

BACKGROUND

By Joint Petition filed July 2, 2015, Time Warner and Charter requested Commission authorization for a holding company-level transaction that would result in the transfer of control of Time Warner's New York subsidiaries, including all of its broadband Internet, telephone, and cable television systems, franchises and assets to Charter. On January 8, 2016, the Commission granted its approval "subject to the conditions discussed in the body of this Order and Appendix A, and upon receipt by the Commission of certification by Charter Communications, Inc., that New Charter and its successors in interest unconditionally accept and agree to comply with the commitments set forth in the body of this Order and Appendix A."⁵

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

In accordance with the Commission's Order Granting Joint Petition by Time Warner Cable Inc. ("Time Warner Cable") and Charter Communications, Inc. ("Charter") dated January 8, 2016, Charter hereby accepts the Order Conditions for Approval contained in Appendix A, subject to applicable law and without waiver of any legal rights.⁶

⁵ Approval Order, p. 69.

⁶ Case 15-M-0388, Charter's Acceptance Letter (dated January 19, 2016).

On January 8, 2018, Charter filed a compliance report on its 145,000 buildout progress pursuant to a Settlement Agreement adopted by the Commission.⁷ In that filing, Charter stated that it had passed 42,889 premises by December 16, 2017, and provided a revised update to its overall 145,000 premises buildout plan. In response to Charter's filing, the Commission issued the Show Cause Order requiring the Company to provide evidence as to why, among other things, certain addresses should not be disqualified from that report thereby causing the Company to miss the Settlement Agreement's December 2017 buildout target and subjecting it to certain financial penalties. As part of its May 9, 2018 Response to the Show Cause Order, Charter claims that its certification provided only a "qualified" acceptance and thereby limited its obligations under the Approval Order. Charter now asserts that the terms of its acceptance were "... limited to the plain language of the terms set forth in Appendix A of the [Approval Order.]"⁸

As the Commission explains in its companion Order in this case, the Commission conditioned its approval of the merger transaction on Charter's acceptance of the conditions in Appendix A and the body of the Approval Order. Charter was not free to pick and choose the conditions it would accept or the portions of the Approval Order with which it would comply, nor was Charter free to accept only some of the conditions in the Approval Order and Appendix A yet still obtain Commission approval of the merger transaction. Charter is likewise not

⁷ Id., Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (issued September 14, 2017) (Settlement Order). On September 14, 2017, the Commission adopted the Settlement Agreement, filed on June 19, 2017.

⁸ Charter's Response to the Show Cause Order, p. 27 (filed May 9, 2018).

free to rewrite the Commission's conditions. The Commission will not reiterate the findings in the companion Order here other than to note their relevance and, more broadly, the importance to the Commission of ensuring Charter's compliance with the Network Extension Condition as intended.

LEGAL AUTHORITY

As set forth in the Approval Order, PSL §§99(2), 100(1) and (3), and 222(3) require a Commission finding that the proposed transfers be in the public interest. The Commission could not have been more clear that its finding that the proposed merger transaction was in the public interest was conditioned upon and subject to Charter's "unconditional accept[ance] and agree[ment] to comply with the commitments set forth in the body of [the] Order and Appendix A."⁹

The Approval Order is equally clear as to the consequence of Charter's failure to provide the required unconditional acceptance. "If the Petitioners do not unconditionally accept ... this Order, this Order shall constitute a denial of the Joint Petition."¹⁰ The Commission is empowered to act upon Charter's avowedly conditional, and thus defective, acceptance. It enjoys substantial enforcement powers under PSL §§25 and 26, and, pursuant to PSL §216, is specifically authorized to "promulgate, issue, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the purposes of [PSL Article 11]."

The Approval Order speaks for itself, and Charter's claims of some form of unwritten negotiated revision to that

⁹ Approval Order, p. 69.

¹⁰ Id.

Order are unavailing. It is well recognized that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties.¹¹

DISCUSSION AND CONCLUSION

In effect, Charter's position is that its defective acceptance is somehow a basis for lessening its obligations under the Approval Order. That position is wrong. The Commission is troubled by Charter's position that the Commission's Approval Order means something other than what it actually states. Given that many of the obligations in that Order are continuing and will need to be fulfilled in the future, the Commission believes it is critical that Charter acknowledge the obligations it agreed to undertake in exchange for the benefits it received by the Commission's conditional approval. Anything short of an unconditional full acceptance of the Approval Order and Appendix A would deprive New York state of its fair share of the incremental benefits.

In this Order, the Commission addresses the position laid out in Charter's Response to the Show Cause Order that "[i]t is Appendix A" only that "Charter explicitly accepted" and it is therefore "Appendix A that contains the specific text of the requirements with which Charter is ordered to comply."¹² According to Charter, the Network Buildout Condition in particular only "derives any legal force ... from Charter's

¹¹ See, e.g., Wedinger v. Goldberger, 71 N.Y.2d 428, 441 (N.Y. 1988); E.F.S. Ventures v. Foster, 71 N.Y.2d 359, 369-370 (N.Y. 1988); Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 282 (N.Y. 1988); Scruggs-Leftwich v. Rivercross Tenants' Corp., 70 N.Y.2d 849, 852 (N.Y. 1987).

¹² Charter's Response, p. 41.

(qualified) acceptance..."¹³ Apparently unable or unwilling to comply with the terms of the Approval Order, Charter now contends that it previously provided only a qualified acceptance of the Approval Order's commitments, and that it did not accept, for example, the Network Buildout Condition's geographical limitation to less densely populated areas of New York. Charter further states, it has a reasonable reliance interest based upon its limited acceptance of the Approval Order and its reading of the Appendix A requirements.¹⁴

Contrary to the Company's assertions, however, the Approval Order accorded Charter only two explicit choices: (1) to accept unconditionally the commitments set forth in the body of the Approval Order and Appendix A; or (2) have the Joint Petition rejected, subject to Charter's right to judicial review. Charter acknowledges this:

As part of its 2016 order granting the application 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*") 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 Appendix A.¹⁵

¹³ Id., p. 26

¹⁴ Id., pp. 43-44. In the companion order issued today, the Commission rejects Charter's interpretation of the buildout commitment. In that branch of this proceeding, Charter claims that service expansion within New York City and other areas of Upstate complies with its reading of the buildout obligations.

¹⁵ Id., p. 2.

Charter, through its various filings and its response to the Show Cause Order, admits that it did not provide the necessary unconditional acceptance.¹⁶ And, it has now become clear, the Company did so in an effort to limit the scope of, among other things, the Network Expansion Condition,¹⁷ a material commitment central to the Commission's conditional approval.

Charter's contention that its conditional acceptance effectively deleted the language within the body of the Approval Order, specifying a geographic requirement to build out service "in less densely populated" areas, or "line extension areas" beyond Time Warner's primary service areas,¹⁸ in addition to any other requirements contained in the Approval Order is contrary to the Approval Order's plain language, and is not acceptable and is disposed of in a separate order issued today.

The Commission cannot allow Charter's defective acceptance to avoid the Approval Order's obligations as intended, or any of the myriad conditions contained in the Approval Order that the Commission deemed necessary in order to find that the transaction was in the public interest. Charter is not free to pick and choose the conditions it would accept or the portions of the Approval Order with which it will comply. The language in the Approval Order's Ordering Clause 1 is

¹⁶ Id., p. 26

¹⁷ Charter claims to have only accepted the commitments as set forth in Appendix A and not the body of the Order because "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." Charter's Response, p. 43.

¹⁸ Approval Order, p. 53 and f.n. 106.

unambiguous. Charter was required to provide complete, unconditional acceptance and it has admittedly not done so here.

In sum, Charter is seeking to bootstrap its defective acceptance into an excuse for its faulty performance.¹⁹ The Commission will not countenance that conduct. Accordingly, by this Order, Charter is directed to cure its defective acceptance and file with the Secretary to the Commission a new letter indicating its full unconditional acceptance of the Approval Order and Appendix A thereof within 14 days.

Should Charter, however, fail to provide a new letter indicating full unconditional acceptance, the Commission may pursue other remedies at its disposal, including but not necessarily limited to the following. First, beginning proceedings pursuant to PSL §216 to rescind, modify or amend the Approval Order, specifically, the Commission's approval of the transfer of the Time Warner's cable franchises and associated facilities, networks, works and systems to Charter, in whole or in part. Second, initiate an enforcement action pursuant to PSL §26 for failing to comply with the Approval Order's Ordering Clause 1 including an action in Supreme Court to adjudicate the dispute and/or declare the Commission's conditional approval null and void for lack of an unconditional acceptance. And, third, initiate a penalty action for being out of compliance with the Approval Order's unconditional acceptance requirement under PSL §25.

¹⁹ As explained in today's companion order, the Commission rejects Charter's reading of the buildout obligation in Appendix A. But that defense must fail in any event because it is grounded in Charter's conditional and defective acceptance.

The Commission orders:

1. Charter Communications, Inc. is directed to cure its defective acceptance of the Approval Order and Appendix A thereof by filing a new letter indicating full unconditional acceptance and agreeing to comply with the commitments set forth in the body of the Approval Order and Appendix A within 14 days of the issuance of this Order.

2. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary