

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

COMMISSIONERS PRESENT:

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

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

ORDER DENYING PETITIONS FOR REHEARING AND
RECONSIDERATION AND REVOKING APPROVAL

(Issued and Effective July 27, 2018)

BY THE COMMISSION:

INTRODUCTION

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

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

review, the Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the "net benefits test" otherwise the merger between Charter and Time Warner should be - and would be - denied.¹ Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net benefits to New York. The most critical of those conditions required Charter to expand the Company's network to "pass" an additional 145,000 "unserved" (download speeds of 0-24.9 Megabits per second (Mbps)) and "underserved" (download speeds of 25-99.9 Mbps) residential and/or business units within less populated areas of New York (the Network Expansion Condition).²

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

¹ Case 15-M-0388, Charter Communications and Time Warner Cable - Transfer of Control, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016) (Approval Order), p. 2.

² Id., p. 53 and Appendix A §I.B.1.

BACKGROUND

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

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

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

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

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

³ Approval Order, p. 69.

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

concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas.”⁵ To mitigate this concern, the Commission required the extension of Charter’s network to pass an additional 145,000 homes and businesses in less densely populated areas across the State. Charter was initially required to complete this buildout in four phases, 25%, or 36,250 premises per year from the date of the close of the transaction,⁶ and file quarterly reports on the status of its network build. The Approval Order, therefore, required Charter to complete an initial buildout of 36,250 premises by May 18, 2017. Charter, however, did not comply with that obligation.

The Settlement Agreement

On May 18, 2017, Charter filed an update regarding its buildout progress. This update stated that Charter had passed a total of only 15,164 premises, or 41.8% of the Approval Order’s initial target. Subsequently, settlement discussions were initiated. The culmination of those discussions resulted in the filing of a Settlement Agreement in this case on June 19, 2017.⁷

The Commission adopted the Settlement Agreement on September 14, 2017. Among other things, Charter agreed to pay one million dollars into an escrow account within 30 days of the adoption of the Settlement Agreement. Charter also agreed to a series of interim targets for its buildout going forward with

⁵ Id., pp. 52-53. This condition was particularly important to the Commission’s ultimate decision to conditionally approve the transaction, accounting for approximately \$290 million of the estimated \$435 million in incremental net benefits that the transaction was expected to accrue for the benefit of New York customers.

⁶ The transaction closed on May 18, 2016.

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

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

According to the Settlement Agreement, for each and every six-month target not met, and where Charter's performance in attempting to meet the target does not establish Good Cause Shown, Charter will forfeit its right to earn back one million dollars. The Settlement Agreement also established that if Charter misses any six-month target, within three months and 21 days of the six-month target date Charter will report its actual passings for the three-month period after the six-month target date. If three months after any six-month target date Charter has still not met the target and wishes to make a Good Cause Shown justification, it may file its claim on the same date as the report. A Good Cause justification requires that Charter "provide a sufficient showing for the Commission to determine that Good Cause Shown has been established" and requires that "such a demonstration include, but need not be limited to, affidavits of witnesses, detailed descriptions of the events

that led to the delay(s), and supporting documentation for any factual claims.”⁸

The Order to Show Cause

On January 8, 2018, Charter filed its first report on the Company’s buildout progress pursuant to the Settlement Agreement’s December 16, 2017 target date. In that filing, Charter stated that it had passed 42,889 premises by December 16, 2017, and provided a revised update to its overall 145,000 premises buildout plan. In response to Charter’s filing, the Commission issued a Show Cause Order.⁹ The Order to Show Cause required the Company to provide evidence as to why all current addresses that are listed in its January 8, 2018 report that are (1) located within the New York City (NYC) region (12,467); (2) located where network already existed (1,762); (3) included in Charter’s July 2016 Negative Space List (249), or (4) located within any full or partial census blocks awarded by the Broadband Program Office (BPO) to other service providers in Phases 1, 2 or 3 (except the subset of locations that Charter claims as already completed which are located in the January 31, 2018 BPO Phase 3 census block award areas) of the Broadband 4 All program (44), should not be disqualified from consideration of the Settlement Agreement’s December 16, 2017 target, and why all such other similarly situated addresses should not be precluded from any future Charter 145,000 buildout plan filings and as to why the Chair of the Commission or his or her designee should not draw down on the Letter of Credit

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

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

established through the Settlement Order in the appropriate amount.

Charter filed its responses to the Show Cause Order on May 9, 2018. In general, Charter stated that the Show Cause Order disqualified many of its addresses based upon the fact that they are located: (1) in NYC;¹⁰ (2) within a primary service area under one of Charter's cable franchises; (3) in the vicinity of Charter feeder cable (irrespective of whether they were actually "serviceable" from that cable within 7-10 business days and without a significant resource commitment); (4) in census blocks the BPO has bid out for subsidies; and (5) in Negative Space locations to which Charter had previously indicated that it did not anticipate expanding its network. Charter claimed that the Commission is limited to the specific terms in the Network Expansion Condition as adopted, and that none of the new criteria it cites above are set forth therein. Adding them after the fact, according to the Company, would violate the plain text of the Approval Order.

The June 14 Order

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

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

buildout plan that are not in the Negative Space list, but are co-located in the BPO's Broadband 4 All Phases 1-3 awarded census blocks and preclude any future addresses that are not in the Negative Space list, but are co-located in the BPO's awarded census blocks from Charter's 145,000 buildout plan.¹¹

The Commission further determined through its June 14 Order that Charter had not provided sufficient justification to establish an independent showing of Good Cause¹² for failing to meet the December 16, 2017 buildout target and that it had therefore forfeited the right to earn back one million dollars from the Letter of Credit in accordance with the Settlement Agreement. The Commission also concluded that Charter failed to remedy its missed December target by the Settlement Agreement's March 16, 2018 "cure" deadline and failed to make a sufficient Good Cause justification in this regard, resulting in a forfeit of its right to earn back an additional one million dollars in accordance with the Settlement Agreement. In addition, the Commission on June 14, 2018, also released a companion Compliance Order on Charter's "qualified" acceptance of the Approval Order's conditions.¹³ In the Compliance Order, the Commission directed the Company to "... cure its defective acceptance by filing a new letter of full unconditional acceptance of the Approval Order and

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

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

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

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

Charter’s July 2018 Submissions

On July 9, 2018, Charter filed its Update and Bulk Address Report with respect to the Settlement Agreement’s June 18, 2018 target, which included two exhibits, Confidential Exhibits A and B.¹⁵ Charter stated that Confidential Exhibit A was the Company’s attempt to address the requirements included in the Commission’s June 14 Order, to the extent it was practicable to do so within what it calls a limited time period. Confidential Exhibit A was modified by the Company using the previously filed July 5, 2018 Revised Buildout Plan address list, and included a total of 92,982 addresses. This list is not complete, as it is 52,018 addresses short of the required 145,000 addresses.

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

¹⁴ Id., pp. 1-2, 9.

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

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

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

By its own admission, under the Commission's June 14 Order, Charter has failed to meet its second milestone, the June 18, 2018 target. Confidential Exhibit A contained only 35,681 addresses identified as completed. This figure is 22,736 short of the 58,417 passings that Charter was required to complete under the Settlement Agreement by June 18, 2018.¹⁸ The Commission, therefore, determined that Charter missed its

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

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

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

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

This failure further resulted in the abrogation of the Settlement Agreement's "Sole Remedy" provision.²¹ This section states in relevant part that "[t]he Parties ... agree that the sole remedy against Charter for the failure of Charter to meet build-out "Passings Targets" as defined herein shall be the financial consequences set forth in paragraphs "1" through "16" below in this section of the Agreement except where specifically noted therein to the contrary (hereinafter "Sole Remedy")." However, the Settlement Agreement further states that "if, during any period covered by the performance incentives, any two consecutive six-month targets are missed by more than 15% and (a) Charter's performance in attempting to meet those two consecutive targets does not pass the Good Cause Shown test, or (b) Charter has not provided documentation to the Department demonstrating that it has filed the requisite number of pole permit applications necessary to meet the enumerated targets at least 200 days in advance of the corresponding target deadline, the performance incentives will continue and, in addition, the "Sole Remedy" provisions shall not apply and the Commission reserves the right to assert that such failure is in violation of a Commission order and to utilize all the rights and remedies available to the Commission to enforce such violation."

¹⁹ Id.

²⁰ Id.

²¹ Settlement Agreement, ¶7.

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

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

LEGAL AUTHORITY

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

²² See, f.n. 14 and 15, supra.

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

Turning to the Commission's authority to rescind and revoke, the Approval Order specifically stated that "[a]bsent acceptance of these conditions, the public interest standard cannot be met, and the petition for transaction approval [should be] denied."²⁴ As set forth therein, PSL §§99(2), 100(1) and (3), and 222(3) require a Commission finding that the proposed transfers be in the public interest. In granting its approval, the Commission determined that the proposed transaction was in (or otherwise is consistent with) the public interest, provided that the benefits of the transaction outweighed any detriments, after mitigating identified harms. The Commission also noted in its Approval Order that it had the broad authority provided through the public interest test to determine what constitutes the public interest, and that the applicable definition is reasonably related to the Commission's general regulatory authority, the nature of the transaction, and its potential impact on New Yorkers. In order to ensure these benefits were actually obtained by New York customers, the Commission established concrete, enforceable conditions, including the

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

²⁴ Approval Order, p. 2.

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

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

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

²⁵ The Network Expansion Condition is consistent with federal law. 47 U.S.C. §1302(a) states in relevant part that “each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

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

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

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

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

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

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

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

DISCUSSION

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

Request for Rehearing - June 14 Order

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

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

²⁷ Buildout Rehearing Petition, pp. 17-21.

²⁸ Id., pp. 21-53.

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

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

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

Request for Rehearing - Compliance Order

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

²⁹ Id., pp. 53-60.

³⁰ Id., pp. 60-67.

³¹ Compliance Rehearing Petition, p. 13.

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

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

³² Id.

³³ Id., p. 14.

³⁴ June 14 Order, pp. 52-53.

Revocation

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

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

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

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

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

Obscuring and Obfuscating Buildout Performance

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

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

The Company continues to advertise and claim that it is "exceeding its mid-December 2017 commitment made to New York [S]tate by more than 6,000 locations" and is "on track to extend the reach of [its] advanced broadband network to 145,000 unserved or underserved locations by May 2020."³⁶ Based upon those representations, Charter was directed to stop making such claims in the Commission's June 14 Order. The matter was also referred to the New York State Attorney General for action under the General Business Law or other relevant statutes and to the United State Securities and Exchange Commission.³⁷ To date, the Commission is advised that Charter continues to air these deceptive advertisements. Such advertising is a public declaration by Charter that it refuses to accept the Commission's determination of non-compliance.

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

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

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

³⁷ Id.

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

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

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

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

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

Safety Issues

DPS Staff advises that the Company has been involved in numerous incidents in which Charter (or its contractors) have completed work that is not compliant with the National Electric Safety Code (NESC) or is otherwise unsafe, or in violation of the PSL and the Commission's regulations. These include, but are not limited to failure to properly set poles, detached guy wires laying on the ground creating tripping hazards for persons and yard hazards for lawn mowers; over-tensioning guy wires causing anchors to be pulled from the ground; cables attached within inches of power conductors; damaged telephone lines, disrupting phone service, including E911 service, to telephone customers; and other unsafe or below standard installation and construction work that has been identified by pole owners performing either post-construction surveys, or otherwise discovered during the routine course of pole owner outside plant work, that necessitated the pole owners to contact Charter to immediately dispatch work crews to investigate and repair these types of non-compliant construction problems.

In addition, in early July 2018, an incident occurred in which a Charter contractor was electrocuted, and unfortunately died as a result of his injuries. The result of

this tragic incident was the issuance of a State-wide stop work order from National Grid, the largest pole owner in Charter's territory. This prohibition remains in effect as Charter has persistently delayed in providing National Grid and the Department responses to requested actions and information necessary to ensure safe and adequate service. As a result, Charter remains unable to install facilities anywhere in National Grid's service territory. This incident remains under investigation as do wider safety issues associated with the Company's buildout.

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

Unconditional Acceptance

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

The Commission orders:

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

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

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

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

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

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

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

6. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary