

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

COMMISSIONER PRESENT:

John B. Rhodes, Chair

CASE 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 TO SHOW CAUSE

(Issued and Effective March 19, 2018)

INTRODUCTION

On January 8, 2016, the Commission approved the merger of Time Warner Cable, Inc. (Time Warner) and Charter Communications, Inc. (Charter or the Company) subject to specific conditions.<sup>1</sup> One such condition involved an expansion of the Company's network to serve an additional 145,000 residential and/or business units. On January 8, 2018, Charter submitted its "Buildout Compliance Report," which provided the Commission with its purported number of claimed new "passings" as of December 16, 2017, and an update of its 145,000 buildout plan. This filing was submitted in accordance with the terms of a Settlement

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<sup>1</sup> Case 15-M-0388, Charter Communications and Time Warner Cable - Transfer of Control, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016) (Approval Order). Television, Internet and Voice services are now provided by Charter in New York under the name "Spectrum."

Agreement,<sup>2</sup> which addressed Charter's failure to extend its network to pass 36,250 residential and/or business units between May 18, 2016 and May 18, 2017, and the Commission's Approval Order in the above-referenced case.

Through this Order, Charter is required to provide evidence as to why the Commission should not (1) disqualify 14,522<sup>3</sup> passings<sup>4</sup> from its December 16, 2017 buildout target filed on January 8, 2018 (thereby Charter failing to satisfy the required 36,771 new passings target pursuant to the Settlement Agreement); (2) remove 6,612 "Negative Space"<sup>5</sup> addresses from Charter's current 145,000 buildout plan and preclude any future Negative Space addresses awarded by the Broadband Program Office (BPO) from Charter's 145,000 buildout plan; (3) remove 5,323 not-yet-completed addresses in Charter's current 145,000

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<sup>2</sup> 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 a Settlement Agreement, filed on June 19, 2017.

<sup>3</sup> This number includes residential and business units that (1) Charter provided to the BPO as part of a Negative Space list; (2) already have service available at 100 Megabits per second (Mbps) from another provider; (3) were otherwise part of the BPO's programs (including Broadband 4 All and Connect New York); or (4) were already capable of being served by Charter.

<sup>4</sup> Specifically, Appendix A §1(B)(1-2), states in relevant parts that Charter "is required to extend its network to pass ... 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," and that Charter is "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."

<sup>5</sup> The Negative Space is defined as addresses previously identified by Charter which would not be included in its 145,000 buildout plan.

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; and, (4) draw down on the letter of credit for the respective forfeiture amount.<sup>6</sup> If Charter does not provide a response to this Order to Show Cause within 21 days of its issuance, then the Chair of the Commission or his/her designee will draw upon the letter of credit posted by Charter in the amount of the respective forfeiture (i.e., \$1,000,000). This action is taken consistent with the Commission's January 8, 2016 Approval Order and September 14, 2017 Settlement Order in this case.

#### BACKGROUND

In approving the merger, the Commission stated that, for the transaction to meet the enumerated statutory "public interest" standard, it must yield positive net benefits, after balancing the expected benefits properly attributable to the transaction offset by any risks or detriments that would remain after applying reasonable mitigation measures.<sup>7</sup>

The Commission concluded that additional "enforceable and concrete conditions," were needed to satisfy the "net benefits test" otherwise the merger should be denied.<sup>8</sup> Accordingly, the Commission explicitly conditioned its approval on a host of conditions designed to yield incremental net

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<sup>6</sup> This should include any evidence Charter wishes to offer under the terms of the Settlement Agreement, adopted by the Commission in September 2017 in this case.

<sup>7</sup> Approval Order, p. 19.

<sup>8</sup> Id., p. 41.

benefits.<sup>9</sup> Among those established conditions, was a "Network Expansion" requirement wherein the Commission noted its "significant concern that there are areas of the State that have no network access even though they are located within current Time Warner/Charter franchise areas."<sup>10</sup> To mitigate this concern, the Commission required the extension of Charter's network to pass an additional 145,000 homes and businesses 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,<sup>11</sup> and file quarterly reports on the status of its network build. Under the Approval Order, any excess in a given year could be rolled into the next year and for "good cause" the Company could petition the Commission for an extension of the four-year buildout time period. The Approval Order, therefore, required Charter to complete an initial build-out of 36,350 premises by May 18, 2017.

As a threshold requirement, the Approval Order was also conditioned upon receipt by the Commission within seven days of the issuance of the Approval Order, of a certification by Charter 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. On January 19, 2016, Charter submitted a written certification letter accepting the imposed commitments, stating:

In accordance with the Commission's Order Granting Joint Petition by Time Warner Cable Inc. ("Time Warner Cable") and Charter

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<sup>9</sup> Id., p. 49.

<sup>10</sup> Id., pp. 52-53. This condition was particularly important to the Commission's ultimate decision to approve the transaction, accounting for \$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.

<sup>11</sup> The transaction closed on May 18, 2016.

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.<sup>12</sup>

In an effort to monitor and enforce the "Network Expansion," as well as the other conditions, the Commission explicitly incorporated the penalty provisions of the Public Service Law (PSL) into the Approval Order.<sup>13</sup> Under PSL §§24 and 25(2), the Commission could seek a court ordered penalty for each day that Charter is out of compliance with obligations, including the obligation to extend its network to pass an additional 36,250 unserved or under-served premises each year for four years from the date of the close of the transaction.

Charter's initial four-year buildout plan was filed with the Commission on July 6, 2016, with a subsequent revision filed July 26, 2016,<sup>14</sup> and additional updates on November 18, 2016, February 17, 2017 and May 18, 2017. In its initial November 18, 2016, quarterly update, Charter reported that it had completed just 7,265 passings.<sup>15</sup> Charter acknowledged that while the buildout pace was slow, it was attributable to the significant ramp-up work, data preparation and analysis and

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<sup>12</sup> See, Letters to the Secretary of the Commission dated January 20, 2017.

<sup>13</sup> Approval Order, p. 67; PSL §25(2).

<sup>14</sup> The July 26, 2016 Charter update also included a Negative Space list of addresses located within various franchise areas of the Charter service footprint, but identified as address locations which the Company did not intend to construct as part of its 145,000 location buildout per the Order condition. Charter provided this list, which included granular location addresses with associated census blocks and longitude/latitude coordinates, to the BPO for inclusion in BPO's Broadband 4 All auction processes.

<sup>15</sup> See, Network Expansion Plan Update (filed November 18, 2016).

mobilization of resources that would not need to be repeated in subsequent years. As such, Charter stated that the number of completed passings was "expected to substantially increase with time" and that it anticipated "major areas of new network construction ... to ramp up significantly in the second six months between November 18, 2016 and May 18, 2017."<sup>16</sup> In its February 17, 2017 quarterly update, however, Charter reported that it had only completed an additional 2,860 passings.<sup>17</sup>

On February 8, 2017, Department of Public Service (DPS) Staff further requested Charter provide "a detailed schedule showing the activities that need to be completed each month, including the anticipated number of line extensions that will be completed each month, in order for Charter to meet its obligation to extend its network to at least 36,250 unserved premises by May 18, 2017. This detailed schedule should describe any externalities that Charter identifies as actual or potential impediments to its satisfaction of this obligation, and all efforts Charter is taking to resolve these external impediments."

Charter's February 14, 2017 response stated that "intensive walk-out verification" of premises to be passed did not begin until September 2016. Charter also provided a list of issues associated with the pole attachment process that it claimed had slowed its deployment, including an inability of the pole owners to process pole attachment applications in bulk and whether the use of subcontractor labor for various make-ready tasks or special attachment procedures would be acceptable.<sup>18</sup>

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<sup>16</sup> Id., pp. 5-6.

<sup>17</sup> See, Network Expansion Plan Update (filed February 17, 2017).

<sup>18</sup> See, Letters from Department Staff to Charter dated February 8, 2017 and Response from Charter to Department Staff dated February 14, 2017.

DPS Staff has since coordinated a substantial effort to ensure that Charter's pole applications are timely processed by the various pole owners in New York State.

On May 18, 2017, Charter filed an update regarding its buildout progress. This update stated that Charter had passed only 15,164 premises, or 41.8% of the initial Year One Approval Order target.

Subsequently, discussions were initiated in anticipation of Charter not meeting the requirement to complete 25% of the required extension of its network to pass an additional 145,000 unserved and/or underserved residential housing units or businesses (36,250) by May 18, 2017. The culmination of those discussions resulted in the filing of the Settlement Agreement on June 19, 2017.

The Commission adopted the Settlement Agreement on September 14, 2017. Among other things, Charter agreed to pay \$1,000,000 into an escrow account within 30 days of the adoption of the Settlement Agreement by the Commission. Within six months of the adoption of the Settlement Agreement by the Commission, Charter was also required to pay the \$1,000,000 from the escrow account to third-party beneficiaries unaffiliated with Charter in the form of grants to pay for equipment to provide computer and internet access to low-income users. Charter also agreed to a series of interim targets for its buildout going forward with the ultimate completion date remaining May 18, 2020. The Settlement Agreement modified Charter's buildout obligations between December 2017 and May 2020, which now requires that Charter pass the following number of premises: 36,771 by 12/16/17; 58,417 by 5/18/18; 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. 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.

On January 8, 2018, Charter filed its update on buildout pursuant to the Settlement Agreement's December 16, 2017 target. In that filing, Charter stated that it had passed 42,889 premises by December 16, 2017, and provided a revised update to its overall 145,000 premises buildout plan. Based on the discussion below, however, it appears Charter is now including addresses that are clearly beyond the scope of the Commission's Approval Order. Therefore, for the reasons stated in detail below, this Order requires that Charter show cause why all current addresses that are listed in its January 8, 2018 filing that are (1) located within the Metropolitan New York City (NYC) region; (2) addresses where network already existed; (3) addresses included in Charter's July 2016 Negative Space List, or (4) located within any full or partial census blocks awarded by the BPO to other service providers in Phases 1, 2 or 3 (except those subset of locations that Charter claims as already completed which are located in the January 31, 2018 BPO Phase 3 census block award areas) of the Broadband 4 All program, should not be disqualified from consideration of the Settlement Agreement's December 16, 2017 target, and why all such other similarly situated address locations should not be precluded from any future Charter 145,000 buildout plan filings.

#### LEGAL AUTHORITY

The Commission approved Charter's acquisition of Time Warner Cable on January 8, 2016 pursuant to PSL §§99, 100, 101 and 222(3). In granting its approval, the Commission determined that the proposed transaction was in (or otherwise is consistent with) the public interest, provided that the benefits of the transaction outweighed any detriments, after mitigating

identified harm. In order to ensure these benefits were actually obtained by New York customers, the Commission established concrete, enforceable conditions, including the Network Expansion condition discussed above.

This Order enforces the Approval Order and §I(B)(1)(a-b) of Appendix A thereof. That section states in relevant part that "Charter is required to extend its network to pass, within their statewide service territory, an additional 145,000 'unserved' (download speeds of 0-24.9 Mbps) and 'underserved' (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction, exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs. If at any time during this four-year period, New Charter is able to demonstrate that there are fewer than 145,000 premises unserved and underserved as defined above, New Charter may petition the Commission for relief of any of the remaining obligation under this condition." This section also states among other things that Charter is "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."

The Commission is empowered to issue Orders regarding regulated telephone and cable companies doing business in the State of New York and to interpret its own Orders pursuant to PSL §5 and Articles 5 and 11. Charter is a regulated telephone and cable company and also acquiesced to the Commission's jurisdiction under the Commissions' merger approval authority.<sup>19</sup>

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<sup>19</sup> See, Case 15-M-0388, Charter Letter Accepting Conditions (filed January 9, 2016).

New York courts have further recognized that the Commission has the same authority to interpret its own orders as it does to interpret the PSL and its implementing regulations.<sup>20</sup>

#### DISCUSSION

Based on DPS Staff analysis as well as BPO input, it is found that, unless Charter can show cause to the contrary, thousands of purportedly completed new passings (and planned passings) do not comport with the Commission's Approval Order and Appendix A. These purported passings fall into the following categories, each of which will be discussed in detail below: (1) locations in Metropolitan NYC; (2) locations with pre-existing network in Upstate New York; (3) locations in the Negative Space awarded by the BPO as part of the Broadband 4 All program; and (4) locations awarded by BPO as part of the Broadband 4 All program but not otherwise in the Negative Space list.

In total, this Order is proposing to disqualify 14,522 passings from Charter's December 16, 2017 buildout filing, bringing Charter's number of passings to be counted toward the December 16, 2017 target to 28,367 resulting in Charter failing to satisfy the required 36,771 new passings target pursuant to the Settlement Agreement. Additionally, it is proposed to (1) remove 6,612 Negative Space addresses from Charter's current

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<sup>20</sup> The Commission's "interpretation and application of its prior determination[s] is entitled to no less deference than the courts give to the PSC's interpretation or application of a statute which involves knowledge and understanding of operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." (Matter of N.Y. State Cable Television Ass'n v N.Y. State Pub. Serv. Comm'n, 125 A.D.2d 3, 6 [3d Dep't 1987] [citing Matter of Cent. Hudson Gas & Elec. Corp. v Pub. Serv. Comm'n, 108 A.D.2d 266, 269-70 [3d Dep't 1985]]).

145,000 buildout plan as well as preclude any future Negative Space addresses from Charter's 145,000 buildout plan; and, (2) remove 5,323 not-yet-completed addresses in Charter's current 145,000 buildout plan that are not in the Negative Space list, but are co-located in the BPO Broadband 4 All Phases 1-3 awarded census blocks, as well as preclude any future addresses not in the Negative Space list, but co-located in the BPO's awarded census blocks from Charter's 145,000 buildout plan.

Metropolitan New York City

Metropolitan NYC is one of the most-wired cities in America and the world, and essentially, 100% of the NYC areas are served by one or more 100 Mbps wireline providers such as Verizon FiOS, Cablevision, RCN, and Charter itself. Indeed, According to Federal Communications Commission (FCC) data, which was considered when developing the network expansion condition in the Approval Order, NYC (and all census blocks therein) is served by multiple providers at speeds of 100 Mbps or more.<sup>21</sup> Despite the foregoing, Charter included 12,467 addresses in NYC in its January 2018 filing on the December 2017 target, and indicated that all 12,467 were newly completed.<sup>22</sup> These purported passings include addresses throughout the boroughs including Manhattan. Therefore, based on a review of FCC data,

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<sup>21</sup> See, FCC, Deployment - Broadband Progress Report (June 2016), available at <https://www.fcc.gov/reports-research/maps/fixed-broadband-deployment-data/#lat=40.785741&lon=-73.909836&zoom=11>.

<sup>22</sup> Staff notes that the number of claimed completed passings in the NYC area surged from 6,568 on December 1, 2017 to 12,467 on December 16, 2017. And prior to that, Charter claimed to have completed 0 NYC passings as of November 1, 2016, 865 as of February 2017 and just 995 in May 2017. In addition, Staff notes that of the 3,655 pole applications for attachment to 240,000 poles across the State since Charter's network expansion began, there are no pole applications associated with these 12,467 NYC passings.

as well as Field Inspections, DPS Staff recommends that all NYC addresses be disqualified on the basis of either (1) Charter's pre-existing network already serving locations, or (2) those addresses being served by one or more other providers at speeds of 100 Mbps.<sup>23</sup>

It is hereby determined that Charter should show cause why the Commission should not disqualify these 12,467 NYC area addresses from the claimed completed December 2017 total, unless Charter can provide a showing that these locations were unserved or underserved despite the substantial evidence to the contrary. In addition to the fact that these addresses have pre-existing network already serving their locations, supported by the lack of pole applications associated with any of these passings, and that Charter did not include any NYC addresses in its July 2016 Negative Space list to BPO, indicating that the Company had no unpassed locations in those franchise areas, the Commission explicitly stated in the Approval Order that Charter's buildout was required to occur in "less densely populated and/or line extension areas." New York City is not such an area. Finally, the surge in the number of NYC addresses in the January filing as compared to the December, May and August filings raises concern as to the legitimacy of these passings.

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<sup>23</sup> The DPS Staff Audit, discussed in detail below, included addresses in Metropolitan NYC, and for every address Staff was able to identify, it was determined that there was either pre-existing Charter network or 100 Mbps provided by a competitor.

Locations with Pre-Existing Network in Upstate New York

Department Staff commenced active auditing of Charter's alleged passings in January 2017.<sup>24</sup> DPS Staff's audit process involved field inspections of targeted address locations identified by Charter as completed. Department Staff used GPS and other mapping tools to identify addresses, cross roads, and landmarks in the periphery of the target inspection addresses. When an address was positively identified, DPS Staff made observations at the claimed completed location to determine if cable network (either aerial or underground) was present, and if so, was the cable newer or older vintage, and whether or not cable was already present and passing the location prior to January 2016. Amongst other things, Field Inspectors made visual observations of cabling, electronics, power supplies, connectors, cable shrink tubing and related attachments for overall condition, including signs of wear, corrosion, and discoloration that would associate weathering and age of the outside plant facilities. Department Staff also looked for noticeable recent additions of cable tags, subscriber drops, as well as the attachment conditions of other pole attachers to help determine if there had been any recent physical moves or changes to the facilities. Further, DPS Staff made visual observations of the foliage and vegetation in the periphery of the communications space, looking for signs of recent trimming or other activity that might indicate outside plant work activity.

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<sup>24</sup> DPS Staff began conducting field audits of Charter's claimed completed passings in January 2017, and forwarded the results of those passing audits to Charter on a monthly basis for over six months, including photographs and descriptive text identifying locations that appeared to not comply with the Commission's Approval Order.

Field Inspectors documented their observations by taking photographs, writing field notes and mapping overlays, as needed, to assist in reviewing each audited address. DPS Staff further utilized Internet-based mapping programs, such as Google Maps and Bing Maps, to help determine if cable network could be identified as having been present at a location prior to January 2016. In many cases, the Google and/or Bing Maps imagery positively identified cable network passing locations more than a year old, thus the imagery data supported Field Inspector observations of either older vintage cable network, or new vintage cable network that had been upgraded, already passing locations Charter claimed as new passings.

With respect to Charter's most recent December 2017 buildout list, DPS Staff audited 6,389 Upstate addresses included in the 42,889 purported completed passings.<sup>25</sup> Of the 6,389 audit attempts made, 465 audit attempts were unverifiable or undetermined;<sup>26</sup> of the remaining 5,924 passings that were successfully audited, Staff recommends that 1,762 of these be disqualified - 1,726 because there was pre-existing cable network, 16 because there was 100 Mbps service already available from another provider, and 20 duplicate pre-existing/100 Mbps service addresses.

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<sup>25</sup> One thousand five hundred ninety-seven (1,597) DPS Staff-audited addresses that were in previous quarterly Charter buildout lists, but which have since been removed by Charter through quarterly updates have likewise been removed from DPS Staff's audit results of the December 2017 list.

<sup>26</sup> Examples of unverifiable or undetermined audit attempts include those claimed new passings whose address information (such as a residence house number, street name, municipality name) that could not physically be located by DPS Staff, or, locations that could be located, but cable feeder network claimed as passing the location could not be observed, or the location was within a gated community preventing DPS Staff access at the time of the audit.

DPS Staff advises that many of these claimed newly completed passings actually consisted of cable and equipment upgrades to existing cable plant. In other words, Charter replaced older cabling and equipment on a pole with newer cabling and equipment, but the location had already been passed by the cable network, oftentimes having been originally passed with cable network for years. Many of these same claimed new passings were also found to be located in densely populated cities, within the cable Primary Service Area, which is separately required to be served under 16 NYCRR §895.5.

There is sufficient justification to order Charter to show cause as to why these 1,762 DPS Staff audited addresses with pre-existing cable network, competitive 100 Mbps broadband service, or duplicate addresses should not be disqualified from the December 2017 target. Any location where Charter plant passed prior to the Approval Order had access to cable network services (and as a separate Approval Order condition the Company was required to upgrade to 100 Mbps and 300 Mbps by the end of 2018 and 2019, respectively), even if it required some system upgrades or modifications on Charter's part. Therefore, these locations should not count toward satisfying the Commission's Approval Order's Network Expansion condition.

Negative Space Locations Awarded by the Broadband Program Office

The Approval Order required Charter to consult with DPS Staff and the BPO in the development of its 145,000 buildout to ensure that as many New Yorkers as possible gained access to high speed broadband services from wireline providers through various State efforts. The Commission sought to ensure that efforts were not duplicated and New Yorkers received the maximum benefit of both the Charter buildout and the BPO grants. To that end, and through a detailed and involved process, Charter provided the BPO a large list of addresses (Negative Space

addresses), with associated census block identification, that it did not intend to include in its network expansion. Based in part on this information, it is understood that the BPO developed its grant program and auctioned census blocks that included all of the Negative Space addresses.

DPS Staff and the BPO have reviewed the data contained in the January 8, 2018 filing and compared it to Charter's Negative Space address list. Charter included a total of 249 claimed completed passings toward its December 2017 target that were also on the Negative Space address list. Similarly, Charter included approximately 6,600 addresses over the remainder of its 145,000 buildout plan that were on the Negative Space address list and are also in BPO awarded census blocks.<sup>27</sup> DPS Staff recommends that these addresses be disqualified or otherwise removed from Charter's buildout plan as applicable.

The inclusion of these addresses violates both the letter and the spirit of the Approval Order. Charter previously indicated it would not be building to these addresses and the Approval Order required the Company to work cooperatively with the BPO. Unless Charter can show cause to the contrary, these 249 Negative Space passings are disqualified toward the December 2017 target and the 6,600 addresses should be removed from the 145,000 buildout plan. Charter is further disallowed from including other Negative Space addresses in BPO awarded census blocks from its overall buildout plan going forward.

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<sup>27</sup> While Charter indicated in its January 8, 2018 response that it could not complete its review of the January 8, 2018 and July 26, 2016 filing data to determine passings that may overlap between the two datasets, DPS and BPO Staffs were able to do so with the information provided in both filings.

Locations Contained in BPO Awarded Census  
Blocks Not Otherwise in the Negative Space List

Additionally, BPO and DPS Staff compared Charter's current 145,000 buildout list against all census blocks (full and partial) that have been awarded by the BPO in the Broadband 4 All program. This analysis determined that there are 6,779 actual addresses in the Charter buildout plan that were not included in the Negative Space address list but are located within census blocks awarded by the BPO in Phases 1-3 of its program, 1,456 reported as completed for purposes of the December 2017 target, and 5,323 planned, but not-yet-completed by Charter.<sup>28</sup> Of the 1,456 included in the December 2017 target, 44 were included in BPO's Phases 1 and 2 awards, while 1,412 were awarded in Phase 3.

Charter will not be allowed to count any passings in census blocks awarded in Phases 1 or 2. The BPO issued solicitations for both phases while Charter was in the early stages of developing its buildout plan and, therefore, Charter knew or should have known that those areas would likely be awarded by the BPO.

Charter will be allowed to count the 1,412 completed passings included in the December 2017 target that were awarded in BPO Phase 3. Charter has been constructing and activating new network since January 2016, including in census blocks that were awarded by the BPO in Phase 3. The BPO Phase 3 awards were not announced until January 31, 2018 and Charter should not be faulted for completing passings in those areas.

Notwithstanding the foregoing, Charter's buildout plan is based on address level data, while the BPO awarded its grants

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<sup>28</sup> The BPO indicates that there are approximately 17,447 address points that have been awarded in Phases 1-3 that are contained in the same census blocks as the 6,779 addresses in Charter's buildout.

based on census block (full and partial). Address points awarded by BPO do not directly correlate with actual addresses, including, potentially, those addresses included in the Charter buildout plan. Therefore, Charter will be allowed to provide a demonstration that a particular address within a BPO awarded census block remains unserved or underserved despite the award of a grant. Through this rebuttable presumption, it is noted that this is particularly germane to the partial census blocks awarded by BPO, because it is understood that where the BPO awarded a full census block, the grantee was required to serve all premises therein.

Finally, with regard to the BPO's Connect New York program for which Charter was a recipient, the Company is similarly precluded from including any addresses from that program in its December 2017 target or its 145,000 buildout plan. DPS Staff advises that there may be some overlap of the Connect New York program and the requirements in the Approval Order, but has not to date been able to verify the exact address information. Accordingly, Charter is ordered to provide DPS Staff with a complete list of addresses that are being served by infrastructure funded by the Connect New York program. This may in turn lead to additional disallowance of addresses in the Company's December 2017 target and further removal of addresses from its overall 145,000 buildout plan.

#### CONCLUSION

For the reasons stated herein, it is determined that 14,522 of the passings claimed by Charter as completed should be disqualified from its December 2017 target and that an additional 11,979 addresses should be removed from Charter's 145,000 buildout plan consistent with the discussion in this Order. Charter will, however, have the opportunity to

demonstrate why any of these disqualified or removed passings should be allowed to count towards its target consistent with the discussion above.

It is ordered:

1. Charter Communications, Inc. shall show cause, within 21 days of the issuance of this Order, why the identified passings discussed in the body of this Order should not be disqualified and why the letter of credit should not be drawn down as a result for the respective forfeiture amount.

2. Charter Communications, Inc. shall include with its responsive filing a list of witnesses who will defend every section of its argument(s), which shall include (but not be limited to) what criteria Charter used to determine whether a given address constituted a passing.

3. Charter Communications Inc., shall include 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.

4. Within 21 days of the issuance of this Order, Charter Communications Inc., shall file with the Secretary and provide Department of Public Service Staff a complete list of addresses that are being served by infrastructure funded by the Connect New York program.

5. If Charter Communications, Inc. does not provide a response to this Order to Show Cause within 21 days of its issuance, then the Chair of the Commission or his/her designee will draw upon the letter of credit posted by Charter

Communications, Inc. in the amount of the respective forfeiture (i.e., \$1,000,000).

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

7. This proceeding is continued.

(SIGNED)

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Commissioner