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July 1, 2019

Hon. Kathleen H. Burgess, Secretary
Public Service Commission
State of New York
Three Empire State Plaza
Albany, NY 12223-1350

Re: **Case 15-M-0388 – Settlement Agreement**

Dear PSC Commissioners:

We are writing on behalf of Connect Columbia (connectcolumbiacounty.com), a community action network founded in 2016 by residents and elected town representatives in Columbia County to bring affordable broadband to *all* corners of the County. We also include the signatures below (in Appendix B) of other Columbia County organizations that have signed on in support of this letter.

We write to protest several features of the recently announced Settlement Agreement, dated April 19, 2019, with Charter Communications, Inc. ("Charter"),¹ and ask that certain specific changes be made to the settlement (detailed below).

We note that Columbia County was mentioned prominently in the Commission's original order approving the Charter-TWC merger. The order specifically required an upgrade to Charter's cable service in the County to add broadband.² Moreover, large parts of Columbia County – particularly eastern Columbia County – consist of exactly the types of less-densely populated areas that are the focus of the Commission's Network Expansion Condition: *i.e.*, the requirement that Charter extend its broadband network to pass an additional 145,000 residences and businesses in upstate New York that are "unserved" (with download speeds of 0-24.9 Mbps) and "underserved" (with download speeds of 25-99.9 Mbps).³

In the summer of 2018, the Commission found that Charter had brazenly defied this broadband expansion requirement. As the Commission found, Charter engaged in "repeated, continued, and brazen non-compliance" with this merger condition, and acted in such

¹ Capitalized terms used but not defined herein have the meanings ascribed to them in the Settlement Agreement.

² Merger Approval Order, pp. 4, 7-8, 32, 44, 51, 53 (fn. 107), 55, and Appendix A § I.A.2(a).

³ *Id.*, pp. 3-4, 52-55, and Appendix A § I.B.1; Network Expansion Settlement Order, pp. 15-21.

“continued bad faith” that the Commission ordered that the authority for the Charter-TWC merger be revoked.⁴

Given this history of non-compliance and bad faith, we believe the Settlement Agreement must be amended to provide extra protections to upstate residents and businesses.

The Settlement Agreement provides a mechanism for the Commission to make changes or require additional conditions in an Alternative Modified Buildout Order. Charter must then either unconditionally accept the revised order within seven (7) days or reject it, resulting in termination of the settlement and – presumably – revocation of the Charter-TWC merger.⁵

We respectfully request that the Commission make the following revisions to the settlement, in an Alternative Modified Buildout Order:

- 1) **Require Charter to extend its broadband buildout *only* to low-density upstate areas, including “line extension areas” beyond Charter’s primary service area.**

Specific revisions to Settlement Agreement:

- (a) Require that *all* passings, to qualify for the 145,000 buildout target, must be in low-density areas in Charter’s franchise area – *i.e.*, areas with less than 35 homes per mile (except for the 9,500 addresses in the “Upstate Cities” cap, under Ex. A ¶ 3(b)); and
- (b) Require that a minimum number of passings in the 145,000 buildout target be in “line extension areas” in Charter’s franchise area – *i.e.*, in areas outside of its primary service area, but without charging any fees for contributions-in-aid-of-construction (CIAC).

- 2) **Deny Charter any credits for areas served by NYS broadband grants to other providers, consistent with the Commission’s previous orders.**

Specific revisions to Settlement Agreement:

- (a) Delete any credits to Charter’s Total Passings for addresses covered by Broadband Program Office (BPO) grant awards to other providers, whether

⁴ Order Denying Petitions for Rehearing and Reconsideration and Revoking Approval, dated July 27, 2018 (the “2018 Revocation Order”), pp. 17, 28. *See also id.*, p. 27 (“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 even felt compelled to refer Charter’s false advertising on its expansion effort to the New York State Attorney General and the Securities and Exchange Commission. *Id.*, p. 22.

⁵ Settlement Agreement, ¶¶ 2(b) and 3.

for already completed passings or future passings (*i.e.*, delete Ex. A ¶¶ 3(c), 3(d), and 4(b)(ii)-(iii) of the Settlement Agreement); or

- (b) In the alternative, clarify that *Charter*, and not other providers, be required to complete all of the passings for addresses covered by BPO grant awards to other providers, in order for Charter to receive credits for those passings (*i.e.*, add this express completion requirement to Ex. A ¶¶ 3(c) and 3(d) of the Settlement Agreement).

3) **Clarify that Charter must complete its State-wide upgrade to 300 Mbps by the end of 2019, as required by the original merger approval.**

Specific revisions to Settlement Agreement:

- (a) Clarify that *all* of Charter’s New York networks, including those extended as new “passings,” be upgraded to 300 Mbps by the end of 2019 (as required in the Merger Approval Order).⁶

4) **Clarify whether any Charter buildout plans involve wireless or satellite technology, and if so require Department clearance on its effectiveness.**

Specific revisions to Settlement Agreement:

- (a) Provide that Charter shall not be allowed to credit any addresses provided with wireless or satellite broadband service as “passings,” for purposes of the Network Expansion Condition, until (i) it submits a plan to the Department showing that such service will consistently provide download speeds of at least 300 Mbps (as required by the end of 2019 for all Charter customers in New York), and (ii) the Department approves such plan.

5) **Deny Charter any confidentiality for its buildout plans and completion reports, so that affected upstate counties and municipalities may assess buildout efforts in their jurisdictions.**

Specific revisions to Settlement Agreement:

- (a) Delete the confidentiality provisions of all exhibits to the Settlement Agreement (Exhibits B, C, and D, as set forth in Ex. A ¶¶ 4-5 of the Settlement Agreement), and require that such exhibits, all monthly reports, and all updated Plans of Record and Interim Milestone Reports filed each four months (as set forth in Ex. A ¶¶ 5, 6 and 8 of the Settlement Agreement) be filed publicly in the record of this proceeding; and

⁶ Merger Approval Order pp. 4, 51, Appendix A ¶ I.A.2(b).

- (b) Require that the Plan of Record, each monthly report, and each updated Plan of Record and Interim Milestone Report filed each four months (as set forth in Ex. A ¶¶ 5, 6 and 8 of the Settlement Agreement) include:
 - (i) A “legacy” map showing which addresses in Charter’s franchise area had broadband access *prior to* the Charter-TWC merger;
 - (ii) An “as built” map showing which addresses in Charter’s franchise area have had broadband access added *since* the Charter-TWC merger; and
 - (iii) A “buildout plan” map showing which addresses in Charter’s franchise area *will* be added under the Plan of Record, with planned dates of completion.
 - (c) In the alternative, provide, in the event the Commission determines that the above information must be kept confidential, that County and municipal officials (including mayors, town supervisors, and their designated representatives) of jurisdictions in Charter’s franchise area be granted access to all confidential information filed by Charter with the Commission, the Department and the BPO, if such officials execute an agreement to maintain the confidentiality of such information. (This was previously done for the 2017 Settlement Agreement.)⁷
- 6) **Confirm that Charter must cooperate with all further audit efforts by the Department and the Commission, to ensure compliance with the Settlement Agreement.**

Specific revisions to Settlement Agreement:

- (a) Supplement the verification and objection procedures of the Settlement Agreement (Ex. A ¶¶ 7, 9) with the express right of either the Department or the Commission to seek any further information from Charter relating to the information provided by Charter in (i) its monthly and other reporting during the period covered by the 2019 Settlement Order, and (ii) any objections filed by Charter to notices of Interim Milestone Payments; and
- (b) Clarify that Charter’s failure to comply promptly with any such information requests of the Department or the Commission shall be grounds for both (i) deeming any reported passings related to such information requests ineligible for purposes of the Interim Milestones and Total Passings, and (ii) overruling

⁷ 2017 Settlement Agreement, ¶ 18(a)-(b).

any objections by Charter to notices of Interim Milestone Payments related to such information requests.

We address each of these points in greater detail in the following pages (in Appendix A - Discussion).

We appreciate the Commission's attention to the concerns of Columbia County, and its vigilance in ensuring that Charter and other providers live up to their commitments to the State.

Best regards,

David Berman, Co-Chair
Connect Columbia

Patti Matheny, Co-Chair
Connect Columbia

Attachments:

Appendix A - Discussion

Appendix B - Additional Signatories

APPENDIX A

DISCUSSION

The Commission should make the following revisions to the Settlement Agreement, consistent with the terms and spirit of its original approval of the Charter-TWC merger:

1) **Require Charter to Extend Its Broadband Buildout *Only* to Low-Density Upstate Areas, including “Line Extension Areas” Beyond Charter’s Primary Service Area**

The history of Charter’s non-compliance raises the palpable risk that it will attempt to fulfill its 145,000 buildout requirement by focusing on high-density urban areas whenever possible.⁸

The Settlement Agreement provides no cap on density levels for Charter’s broadband buildout – *i.e.*, no requirement that it serve *only* low-density areas. Instead, it requires only that Charter:

- (a) Exclude New York City;⁹
- (b) Cap its buildout in six upstate cities at 9,500 passings;¹⁰ and
- (c) Add only residences or businesses that are not already served by broadband networks with minimum download speeds of 100 Mbps: *i.e.*, not already “passed, served, or capable of being served” by a pre-existing network of

⁸ Order Denying Charter Communications, Inc.’s Response to Order to Show Cause and Denying Good Cause Justifications, dated June 14, 2018 (the “2018 Show Cause Order”), pp. 34-54, 57-58 (detailing and rejecting Charter’s attempts to count thousands of broadband passings in New York City and “some of the most densely populated cities served by Charter outside NYC” – Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady – where the average density exceeds 35 homes per mile). *See also* 2018 Revocation Order, pp. 21-24 (finding that Charter “continues to obscure and obfuscate its actual performance,” including by reporting passings for addresses the Commission had already disqualified, for New York City addresses (“one of the most-wired cities in America”), and for addresses in those six upstate cities that “are likely located in densely populated areas that already have, or should have had network passing at the street level”). The Commission found moreover that, in fact, Charter had constructed no new passings in those upstate cities, “which means Charter was again attempting to deceive the Commission and the public-at-large” on its performance of the 145,000 new passings buildout requirement. *Id.*, p. 24.

⁹ Settlement Agreement, Ex. A ¶¶ 2, 3(a).

¹⁰ *Id.*, Ex. A ¶ 3(b). The Settlement Agreement also gives Charter credit for almost 6,000 previously completed passings in the same six upstate cities – Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady – that the Commission had previously disqualified for credit in its 2018 orders. *Id.*, Ex. A ¶¶ 3(b), 4(b). As with the reversal of the Commission’s prior orders on areas served by BPO grants (discussed in Part (2) below), the Settlement Agreement provides no explanation of this reversal on densely populated upstate cities.

Charter or another provider “capable of delivering” broadband speeds of at least 100 Mbps.¹¹

This third requirement (item (c) above) presumably *should* result in Charter extending broadband access only to low-density areas like Columbia County, which are those least likely to be served by pre-existing broadband networks. However, given Charter’s history of bad faith interpretation of the Commission’s mandates, the requirement to build in low-density areas should now be made explicit.

The Commission has always made low-density buildout central to Charter’s Network Expansion Condition. In announcing the 145,000 buildout requirement, the Commission stated its central goal:

2. Network Expansion

The Commission also has a 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. Business and residential customers located in those areas often are not able to exercise the same level of communication choice as others absent an agreement to pay high connection fees through contributions-in-aid-of-construction (CIAC).

In order to ensure the expansion of service to customers in less densely populated and/or line extension areas within the combined company’s footprint, the Commission will require New Charter to extend its network to pass, within its statewide service territory, an additional 145,000 “unserved” (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.¹²

The Commission here cited the definition of “line extension area” from the State statute on cable television franchises, which defines it as any part of a provider’s franchise area that is *not* its “primary service area.”¹³

¹¹ *Id.*, Ex. A ¶ 3(a). The Settlement Agreement clarifies that upgrading or modifying an existing Charter network (*i.e.*, to meet the 100 Mbps-or-higher standard) does not qualify as a “passing.” *Id.*

¹² Merger Approval Order, pp. 52-53 (emphasis added; footnotes omitted).

¹³ *Id.*, p. 53, fn. 106, citing 16 NYCRR § 895.5. Subsection (a) of this statute defines “primary service area” and “line extension area” as follows:

- (1) *Primary service area* shall include each of the following within the franchised area:
 - (i) those areas where cable television plant has been built without a contribution-in-aid-of-construction by subscribers;
 - (ii) those areas where the cable television company is obligated by the terms of its franchise to provide cable television service without a contribution-in-aid-of-construction by subscribers;
 - (iii) any area adjoining an area described in subparagraph (i) or (ii) of this paragraph and which contains dwelling units at a minimum rate of 35 dwelling units per linear mile of aerial cable;

In establishing Charter's 145,000 buildout requirement, the Commission thus expressly focused on the State's existing regulatory structure: *i.e.*, on the distinction between Charter's "primary service area" and on "line extension areas" outside of it. The former are mostly already served by broadband, and the latter are not and must be reached by Charter.

Under the statute, Charter's "primary service area" consists of four types of areas (based on the statute quoted in footnote 13 above):

- (i) areas with already built networks (without CIAC fees);
- (ii) areas covered by franchise agreements (without CIAC fees);
- (iii) adjoining high-density areas (at least 35 homes per mile); and
- (iv) adjoining areas of the same residential density (homes per mile) as already built networks or areas covered by franchise agreements.

"Line extension areas" are everything else in the provider's franchise area – which, as the Commission noted, may usually be charged CIAC fees.¹⁴

These State regulatory categories provide a guide for creating an effective and enforceable low-density requirement for Charter's buildout effort. The history of the Commission's orders in this proceeding make it clear that the Commission has always intended Charter's buildout effort to cover two types of areas within its franchise area: (1) low-density areas covered by its local franchise agreements, and adjoining low-density areas (comparable to items (ii) and (iv) in the "primary service area" definition); and (2) "line extension areas" in its franchise area, but that *otherwise* would be subject to high CIAC charges.¹⁵

In the proposed Settlement Agreement, the Commission has also made clear that Charter's buildout may *not* include either areas that already have built broadband networks or any high-density urban areas (comparable to items (i) and (iii) in the "primary service area"

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- (iv) any area adjoining an area described in subparagraphs (i) and (ii) of this paragraph and which contains at least the same number of dwelling units per linear mile of aerial cable as is the average number of dwelling units per linear mile of cable in areas described in subparagraphs (i) and (ii) of this paragraph. The average is to be determined by dividing the sum of the dwelling units in areas described in subparagraphs (i) and (ii) of this paragraph by the number of linear miles of cable in the same areas.

(2) *Line extension area* shall be any area within the franchised area which is not the primary service area.

¹⁴ Merger Approval Order, p. 53, fn. 106 ("Under 16 NYCRR §895.5, a line extension area is defined, in part, as areas beyond the franchisees [sic] primary service area and may require a CIAC before service is provided.").

¹⁵ The Commission made it clear when approving the merger that CIAC charges could obviously not be charged to consumers as part of the 145,000 buildout effort – which it expressly called "high connection fees" that discourage broadband access (*see* the quoted passage above, Merger Approval Order, pp. 52-53) – but that these "line extension areas" should still be covered by the Charter broadband buildout.

definition), except for 9,500 addresses in the six specified “Upstate Cities” (Buffalo, Rochester, Syracuse, Albany, Mt. Vernon, and Schenectady).¹⁶ The Commission has previously described those six cities as having average densities of at least 35 homes per mile, and disqualified Charter “passings” on that basis.¹⁷

It is thus clear that this density measure – 35 homes per mile – has always been the Commission’s dividing line for qualifying and disqualifying addresses for Charter’s 145,000 buildout, and that a subset of low-density areas – “line extension areas” – was specifically targeted by the Commission for buildout.

To discourage further evasion by Charter, the Settlement Agreement should now simply specify that its buildout (1) must be in low-density areas – *i.e.*, *less than* 35 homes per mile – and (2) must include “line extension areas” – *i.e.*, those in Charter’s franchise area where it could otherwise charge CIAC fees.

Without such a clear standard, it is easy to imagine scenarios in which Charter would observe the letter but not the spirit of the Settlement Agreement: *i.e.*, by building *anywhere* in the State (outside of NYC and the six “Upstate Cities”) that technically complies with the new condition for “eligible passings.” That condition, by its express terms, covers only areas that are not already served by networks “capable of” broadband speeds of 100 Mbps or higher.¹⁸ But this condition *does not* preclude buildout in higher-density areas, since there is no density restriction. There is only a download-speed restriction. Although Charter cannot simply upgrade or modify one of its existing networks to meet the 100 Mbps threshold,¹⁹ it is likely that it would focus its buildout on the highest-density areas possible – *i.e.*, urban areas that happen to not be served by 100 Mbps, but are easiest to connect to existing networks – in order to minimize its own buildout costs. Harder to reach semi-urban and rural areas, the focus of the Commission’s Merger Approval Order, would continue to be neglected.

In fact, this is exactly what Charter did from 2016 to 2018, prompting the Commission to issue its order revoking merger approval last summer.

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Require that *all* passings, to qualify for the 145,000 buildout target, must be in low-density areas in Charter’s franchise area – *i.e.*, areas with less than 35 homes per mile (except for the 9,500 addresses in the “Upstate Cities” cap, under Ex. A ¶ 3(b)); and

¹⁶ Settlement Agreement, Ex. A ¶¶ 2, 3(a)-(b).

¹⁷ 2018 Show Cause Order, pp. 57-58.

¹⁸ Settlement Agreement, ¶ 3(a).

¹⁹ *Id.*

- (b) Require that a minimum number of passings in the 145,000 buildout target be in “line extension areas” in Charter’s franchise area – *i.e.*, in areas outside of its primary service area, but without charging any CIAC fees.

2) **Deny Charter Any Credits for Areas Served by NYS Broadband Grants to Other Providers, Consistent with the Commission’s Previous Orders**

The Settlement Agreement fails to explain why Charter will now be allowed to include, in its required 145,000 Total Passings, almost 40,000 addresses covered by grants to *other providers* by the New York Broadband Program Office (BPO).²⁰ This includes almost 14,000 addresses that Charter already completed *despite* those being in areas covered by BPO grants to other providers.²¹

The Commission has been explicit since approving the Charter-TWC merger that the 145,000 target *excludes* areas covered by New York broadband grants.²² It reiterated this exclusion last summer, when it disqualified thousands of passings in areas reserved for BPO grants that Charter had attempted to include in its 145,000 buildout plan. These disqualifications included so-called “Negative Spaces” where Charter had previously informed the Department it would *not* expand, freeing those areas up for coverage by the State’s broadband grant programs.²³

²⁰ *Id.*, Ex. A ¶ 3(c) (9,400 in permitted “Overlap” wireline passings); *id.*, Ex. A ¶ 3(d) (30,000 in permitted “Overlap” wireless/satellite passings).

²¹ *Id.*, Ex. A ¶¶ 3(c), 3(d), and 4(b) (4,388 in completed wireline passings and 9,397 in completed wireless/satellite passings permitted, despite being “Overlap” addresses covered by BPO grants to other providers).

²² Merger Approval Order, p. 4 (the 145,000 target is “exclusive of any available State grant monies from the Broadband 4 All program”); *id.*, p. 53 (“New Charter must not seek Broadband 4 All funding to accomplish these expansions,” but is required to seek such funding to achieve extensions “beyond the aforementioned 145,000 newly passed premises”); *id.*, pp. 54-55 (Charter must geographically demarcate the parts of its franchise area that will be the focus of the 145,000 target, and coordinate with Commission staff and the BPO to facilitate the use of the Broadband 4 All Program to serve other areas); *id.*, Appendix A § I.B.1 (the 145,000 target is “exclusive of any available State grant monies pursuant to the Broadband 4 All Program or other applicable State grant programs”); *id.*, Appendix A § I.B.1.a-b (Charter must identify where it will meet the 145,000 target “on a census block and street level basis,” update that quarterly, and consult with Commission 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”).

²³ 2018 Show Cause Order, pp. 2-3, 33, 61-62 (disqualifying 6,612 addresses from Charter’s “Negative Spaces” list and 5,323 other addresses that were “co-located in the BPO’s Broadband 4 All Phases 1-3 awarded census blocks,” and precluding any “Negative Spaces” or Broadband 4 All census blocks from Charter’s 145,000 buildout plan); *id.*, p. 7, fn. 17 (Charter’s “Negative Spaces” list was used by the BPO for its Broadband 4 All auction processes); *id.*, p. 36 (“passings must be in areas where Charter has not received State grant monies or in areas where State grant monies have been awarded to other providers”); *id.*, pp. 37-

The Settlement Agreement does an about-face on this crystal-clear requirement. Why? Allowing Charter to now skirt this condition both rewards its past misbehavior, and might even reduce the *actual* number of addresses that will be reached by Charter below 145,000.²⁴ It also duplicates broadband expansion efforts in areas already covered by BPO grants and defeats the public policy goal of the State – repeatedly declared by Governor Cuomo, the Commission, and the BPO – to reach as many unserved and underserved areas as possible.

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Delete any credits to Charter’s Total Passings for addresses covered by BPO grant awards to other providers, whether for already completed passings or future passings (*i.e.*, delete Ex. A ¶¶ 3(c), 3(d), and 4(b)(ii)-(iii) of the Settlement Agreement); or
- (b) In the alternative, clarify that *Charter*, and not other providers, be required to complete all of the passings for addresses covered by BPO grant awards to other providers, in order for Charter to receive credits for those passings (*i.e.*, add this express completion requirement to Ex. A ¶¶ 3(c) and 3(d) of the Settlement Agreement).

3) **Clarify that Charter Must Complete its State-Wide Upgrade to 300 Mbps by the End of 2019, as Required by the Original Merger Approval**

In approving the Charter-TWC merger, the Commission required that Charter upgrade *all* of its State broadband networks to a capacity of 100 Mbps in download speeds by the end of 2018, and 300 Mbps by the end of 2019.²⁵

38 (purpose of BPO coordination requirement was to avoid duplicative broadband expansion efforts and encourage deployment in unserved and underserved areas).

²⁴ The provisions of the Settlement Agreement on these so-called eligible “Overlap” passings, for almost 40,000 addresses covered by BPO grants to other providers (Ex. A ¶¶ 3(c), 3(d), 4(b)), give Charter credit for those addresses but do not expressly state that Charter itself must complete all of those passings. This is presumably an oversight, because Charter obviously cannot get credit for passings it does not construct. But by its terms, Charter gets credit for almost 14,000 addresses that it already completed (under Ex. A ¶ 4(b)), and the operative “Overlap” buildout provisions (in Ex. A ¶¶ 3(c)-(d)) do not expressly require it to complete the *remaining* 26,000 addresses. Charter has a proven history of misinterpreting and litigating the Commission’s orders, so we must assume that it will also exploit this textual ambiguity.

²⁵ Merger Approval Order pp. 4, 51, Appendix A ¶ I.A.2. The Commission confirmed this requirement in the 2017 settlement and in its show-cause order last summer. Network Expansion Settlement Order, p. 14; 2018 Show Cause Order, p. 58.

This requirement does not appear in the proposed Settlement Agreement. It should be reiterated again, so that Charter cannot later argue that its absence in the Settlement Agreement means that it no longer applies. Given Charter's history of non-compliance, we would also not be surprised if it tried to argue that the Settlement Agreement's condition for what counts as an "eligible passing" – *i.e.*, that Charter's required buildout applies only to areas that do not currently have networks with at least 100 Mbps in download speeds²⁶ – somehow means that 100 Mbps is the new threshold for Charter's required broadband service.

The State cannot afford another round of misinterpretation of the Commission's orders. The State-wide download speed condition in the original Merger Approval Order must be reiterated and enforced.

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Clarify that *all* of Charter's New York networks, including those extended as new "passings," be upgraded to 300 Mbps by the end of 2019 (as required in the Merger Approval Order).

4) **Clarify Whether Any Charter Buildout Plans Involve Wireless or Satellite Technology, and If So Require Department Clearance on Its Effectiveness**

The inclusion of "BPO Wireless/Satellite Grant Areas" in the Settlement Agreement raises the issue of whether Charter itself will use wireless or satellite broadband technology to comply with its 145,000 buildout requirement.

In the Commission's orders to date on Charter's buildout plans, and in the proposed Settlement Agreement, there is no express prohibition on Charter using wireless or satellite technology to fulfill the Network Expansion Condition.²⁷ This raises the risk that Charter might attempt to use it with no assurance of its effectiveness in providing broadband service.

The experience of some of our constituents in Columbia County is that wireless or satellite broadband services are not reliable in the long term for increased data expansion and service consistency. Such wireless systems often impose data caps and/or speed limitations that, as a practical matter, provide download speeds of far less than 100 Mbps to subscribers. Careful, ongoing oversight by the Commission is needed to ensure that Charter does not use this technology to avoid providing a fully functioning network expansion.

²⁶ Settlement Agreement, Ex. A ¶ 3(a).

²⁷ The Merger Approval Order discussed Charter's assertion that it would create 300,000 WiFi "hotspots" during the three to four years after the merger, but also questioned whether that program would have been pursued anyway by TWC absent the merger. Merger Approval Order, pp. 32, 34-35. In any case, these "hotspots" are separate from the 145,000 buildout requirement in the Network Expansion Condition.

We of course are not opposed to Charter and other providers experimenting with different types of broadband technology, especially if they are needed to reach rural areas. We simply want to ensure that they work, and provide speeds and data capacities that are sufficient for modern needs and comply with the Merger Approval Order (including 300 Mbps by the end of 2019).

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Provide that Charter shall not be allowed to credit any addresses provided with wireless or satellite broadband service as “passings,” for purposes of the Network Expansion Condition, until (i) it submits a plan to the Department showing that such service will consistently provide download speeds of at least 300 Mbps (as required by the end of 2019 for all Charter customers in New York),²⁸ and (ii) the Department approves such plan.

5) Deny Charter Any Confidentiality for Its Buildout Plans and Completion Reports, So that Affected Upstate Counties and Municipalities May Assess Buildout Efforts in their Jurisdictions

Upstate municipalities have local franchise agreements with Charter and other broadband providers, but no transparency on how those agreements are actually being performed. The Settlement Agreement exacerbates this lack of transparency.

The Settlement Agreement was based partly on Charter’s buildout report filed *confidentially* with the Commission on January 7, 2019. That in turn was used to determine which previously completed passings were eligible for credit toward Charter’s 145,000 buildout target.²⁹ Under the settlement, Charter will then be allowed to *confidentially* file its revised buildout plan (as Exhibit B),³⁰ its revised list of Eligible Completed Passings (as Exhibit C), and its list of completed passings that were either allowed or removed by the Department (as Exhibit D).³¹ The Settlement Agreement further states that Charter deems all of this information related to its past and future broadband expansion efforts to be “trade secret and/or otherwise confidential”³² – with no explanation of why this extensive confidentiality is necessary.

²⁸ Merger Approval Order pp. 4, 51, Appendix A ¶ I.A.2(b).

²⁹ Settlement Agreement, Ex. A ¶ 4.

³⁰ *Id.*, Ex. A ¶ 5.

³¹ *Id.*, Ex. A ¶ 4.

³² *Id.*, ¶ 10(c).

We object to this continued secrecy surrounding Charter's buildout effort and the new settlement – particularly since the various provisions of the Settlement Agreement are already complex, difficult to interpret, and susceptible to ambiguities that Charter will no doubt be tempted to exploit and litigate, again (as detailed above). We further assert that Charter's repeated, bad faith violations of the Commission's prior orders and settlements since the 2016 merger approval negate its claimed right to secrecy for its buildout plans.

Moreover, granting access to the details of Charter's buildout effort *only* to the Department and Commission denies the most affected upstate communities the ability to monitor it. Upstate counties and municipalities require full information on Charter's broadband plans and completed passings going forward, in order to determine whether those plans are actually being performed in their jurisdictions.

Simply put, there is no way for upstate localities to evaluate the broadband plans of Charter and other providers if they cannot get access to those plans and the actual, as-built results.³³

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Delete the confidentiality provisions of all exhibits to the Settlement Agreement (Exhibits B, C, and D, as set forth in Ex. A ¶¶ 4-5 of the Settlement Agreement), and require that such exhibits, all monthly reports, and all updated Plans of Record and Interim Milestone Reports filed each four months (as set forth in Ex.

³³ For example, in Columbia County, the public meetings of the Board of Supervisors, consisting of town supervisors throughout the County, have included reports that broadband efforts in the County are chaotic, uncoordinated, and riddled with poor service – *e.g.*, with broadband offered on one side of the street but not the other, multiple providers covering the same service areas, and no clarity on *where* broadband is offered and whether the offered download speeds are *actually* available. FCC reports on broadband access are also unreliable, reporting that an entire census block is “served” even if only one residence or business in that census block has service or *could* be served. *See, e.g.*, Microsoft Corporation, “An Update on Connecting Rural America” (Dec. 2018, available at: <https://news.microsoft.com/rural-broadband/>), at pp. 9-11 and 43 (FCC rules under Form 477 count an entire census block as having broadband “access” if a provider reports a single customer in that census block *or* that it “could” provide service “without an extraordinary commitment of resources”; national studies show a gap between the FCC’s estimates of “access” (92%) and actual availability and usage (from 49% to 65%)).

The State's broadband program relies on the FCC's Form 477 data to determine which census blocks are “served,” including for purposes of the BPO's broadband access map and a search tool for determining residential access. BPO, Frequently Asked Questions, at: <https://nysbroadband.ny.gov/frequently-asked-questions> (see response to: “The Broadband Availability Map and/or Residential Broadband Search indicates that a broadband provider(s) provides service at my address. When I contact that provider, it states it does not provide service at my address. Why is this?”; it notes that the FCC uses a “one-served, all-served method for identifying Census Block service, and, therefore, actual service may vary within and along Census Blocks.”).

A ¶¶ 5, 6 and 8 of the Settlement Agreement) be filed publicly in the record of this proceeding; and

- (b) Require that the Plan of Record, each monthly report, and each updated Plan of Record and Interim Milestone Report filed each four months (as set forth in Ex. A ¶¶ 5, 6 and 8 of the Settlement Agreement) include:
 - (i) A “legacy” map showing which addresses in Charter’s franchise area had broadband access *prior to* the Charter-TWC merger;
 - (ii) An “as built” map showing which addresses in Charter’s franchise area have had broadband access added *since* the Charter-TWC merger; and
 - (iii) A “buildout plan” map showing which addresses in Charter’s franchise area *will* be added under the Plan of Record, with planned dates of completion.³⁴
- (c) In the alternative, provide, in the event the Commission determines that the above information must be kept confidential, that County and municipal officials (including mayors, town supervisors, and their designated representatives) of jurisdictions in Charter’s franchise area be granted access to all confidential information filed by Charter with the Commission, the Department and the BPO, if such officials execute an agreement to maintain the confidentiality of such information. (This was previously done for the 2017 Settlement Agreement.)³⁵

³⁴ The 2017 Settlement Agreement required Charter to establish a “public information portal” on its website for residents and businesses to obtain Charter’s intended completion dates for their addresses. 2017 Settlement Agreement, ¶ 18(c). However, this fragmented access to individual address information (which itself has changed over time) is of little use to upstate County and local officials, who have no means of determining the system-wide status of Charter’s buildout efforts in their jurisdictions.

For example, in Columbia County, individual citizens and community groups have been forced to try to compile their own build-out maps and develop their own online “access” surveys, in an effort to track *actual* broadband access in the County. See, e.g., Connect Columbia, at: www.connectcolumbiacounty.com/#residential-and-business-surveys; and Hillsdale’s Broadband Committee Mapped Survey, at: <http://bit.ly/hillsdalebband>. It should not be this difficult for the State’s citizens and elected officials to find out the state of broadband in their communities, when system-wide maps can be easily provided by Charter and other providers.

³⁵ This confidentiality mechanism was included in the 2017 Settlement Agreement for address-level data (in excel format) showing Charter’s completed passings, which Charter was required to provide to the Department and BPO and update every six months. Affected municipalities were given access to such data on executing confidentiality agreements. 2017 Settlement Agreement, ¶ 18(a)-(b). However, the new proposed Settlement Agreement provides no such access to local officials.

6) **Confirm that Charter Must Cooperate with All Further Audit Efforts by the Department and the Commission, to Ensure Compliance with the Settlement Agreement**

The Settlement Agreement provides that the Department may “make efforts” to verify the passings reported by Charter in its monthly and four-month reports under the settlement.³⁶ But it contains no express requirement that Charter cooperate with the Department’s efforts.

Elsewhere the Settlement Agreement provides that the exclusive remedy for Charter’s failure to meet its periodic passing targets is an escrow payment for any missed passings below each four-month target (of \$2,800 per missed passing).³⁷ These penalties are based on the passings reported by Charter in its reports, so verifying the accuracy of Charter’s reports is critical to the enforcement mechanism of the settlement.

The Settlement Agreement provides detailed rights for Charter to object to the penalties and submit information supporting its objections.³⁸ The Department and Commission should have parallel rights to *compel* Charter to provide further information, particularly given the history of Charter’s bad faith in reporting what it claims are eligible passings.

Proposed Revisions: We respectfully request that the Commission issue an Alternative Modified Buildout Order, revising the Settlement Agreement to:

- (a) Supplement the verification and objection procedures of the Settlement Agreement (Ex. A ¶¶ 7, 9) with the express right of either the Department or the Commission to seek any further information from Charter relating to the information provided by Charter in (i) its monthly and other reporting during the period covered by the 2019 Settlement Order, and (ii) any objections filed by Charter to notices of Interim Milestone Payments; and
- (b) Clarify that Charter’s failure to comply promptly with any such information requests of the Department or the Commission shall be grounds for both (i) deeming any reported passings related to such information requests ineligible for purposes of the Interim Milestones and Total Passings, and (ii) overruling any objections by Charter to notices of Interim Milestone Payments related to such information requests.

³⁶ Settlement Agreement, Ex. A ¶ 7.

³⁷ *Id.*, Ex. A. ¶ 12(a); *id.*, Ex. A ¶¶ 8-9 (describing the four-month targets through the final target date, Sept. 30, 2021, and the “Interim Milestone Payments” of \$2,800 per missed passing). The only exceptions to the exclusive remedies provision are if Charter misses the passing targets by more than 15% for two successive four-month reporting periods, or the final target is missed on Sept. 30, 2021 – in which case the Department and the Commission may pursue judicial and other remedies. *Id.*, Ex. A. ¶¶ 12(b)-(c).

³⁸ *Id.*, Ex. A ¶¶ 9(b)-(c).

APPENDIX B

ADDITIONAL SIGNATORIES

(attached)



To:

Hon. Kathleen H. Burgess, Secretary
Public Service Commission
State of New York
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 15-M-0388 – Settlement Agreement

Dear PSC Commissioners:

We are adding our signature below, to support the comment, dated July 1, 2019, filed by Connect Columbia with respect to the recently announced Settlement Agreement, dated April 19, 2019, with Charter Communications, Inc.

Sincerely,

Canaan Broadband Committee

Name of Organization

By:

Printed name: Brenda Adams

Title: Chairperson

Date: 8 July, 2019



To:

Hon. Kathleen H. Burgess, Secretary
Public Service Commission
State of New York
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 15-M-0388 – Settlement Agreement

Dear PSC Commissioners:

We are adding our signature below, to support the comment, dated July 1, 2019, filed by Connect Columbia with respect to the recently announced Settlement Agreement, dated April 19, 2019, with Charter Communications, Inc.

Sincerely,

Town of Canaan
Name of Organization

By: [Signature]
Printed name: RICHARD KEAVENEY
Title: TOWN SUPERVISOR

Date: 7/8, 2019