

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C).

Application 15-07-009
(Filed July 2, 2015)

**MOTION OF THE PUBLIC ADVOCATES OFFICE
TO COMPEL RESPONSE TO DATA REQUEST; [PROPOSED] ORDER**

[PUBLIC VERSION]

MARION PELEO

Attorney
Public Advocates Office

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2130
Email: marion.peleo@cpuc.ca.gov

December 21, 2018

I. INTRODUCTION

Pursuant to Rule 11.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office), formerly the Office of Ratepayer Advocates,¹ hereby submits its motion to compel Charter Communications, Inc. (Charter) to respond to the Public Advocates Office's data request in the above-captioned proceeding. The Public Advocates Office is concurrently filing a motion to reopen the proceeding to facilitate the Commission's consideration of and issuance of a ruling on this motion to compel.

II. BACKGROUND

The Commission in Decision (D.) 16-05-007 authorized the transfer of control of Time Warner Cable Information Services (California) and Bright House Networks Information Services (California) to Charter, and a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC. In granting approval, the Commission set several conditions upon the new parent company, New Charter, and its subsidiaries, including the following requirement (Condition 2(h)):

By December 31, 2019, New Charter shall offer broadband Internet service with speeds of at least 300 [Megabits per second (Mbps)] download to all households with current broadband availability from New Charter in its California network. On December 31, 2016 and every year thereafter until December 31, 2019 New Charter shall submit a progress report to the Commission and [the Public Advocates Office] identifying progress made.²

In a confidential letter dated December 29, 2016 and addressed to Commission President Michael Picker and Public Advocates Office Director Elizabeth Echols, Charter provided its "Compliance Report Required by D.16-05-007." In the letter, Charter stated

¹ The Office of Ratepayer Advocates was renamed the Public Advocates Office of the California Public Utilities Commission pursuant to Senate Bill No. 854, which was signed by the Governor on June 27, 2018 (Chapter 51, Statutes of 2018).

² D.16-05-007 (as modified by D.16-12-070), *Decision Granting Application to Transfer Control Subject to Conditions*, p. 71 (mimeo), Ordering Paragraph 2(h).

that it was providing broadband Internet service with download speeds of at least 300 Mbps to a certain percentage of households with broadband availability within its California network.

On November 6, 2017, the Public Advocates Office recommended to Charter that its December 2017 progress report should include detailed data similar to what Charter provided to the Public Advocates Office in data request responses during the proceeding underlying D.16-05-007.³

In a second confidential letter, dated December 27, 2017 and addressed to President Michael Picker, Director Echols and Communications Division Director Cynthia Walker, Charter provided its “Compliance Report Required by D.16-05-007.” In this letter, Charter stated it was providing broadband Internet service with download speeds of at least 300 Mbps to a certain percentage of households with broadband availability within its California network, and a certain percentage have access to download speeds faster than 300 Mbps.

Charter’s December 2016 and December 2017 letters provided no explanation or supporting data to show how Charter identified or quantified the progress it claimed to have achieved. On January 23, 2018, the Public Advocates Office served Charter a data request (numbered Data Request No. 001),⁴ requesting broadband deployment and subscribership information that would enable the Public Advocates Office to verify Charter’s progress reports. Specifically, Data Request No. 001 requested census block level broadband deployment information similar to that provided by Charter to the Public Advocates Office during the proceeding underlying D.16-05-007.⁵

Charter’s response did not provide the broadband deployment information requested in the data request.⁶ Between January and July 2018, the Public Advocates

³ See Appendix B, 11/6/17 email from Ana Maria Johnson to James McTarnaghan.

⁴ See Appendix A to this Motion, “ORA Data Request No. 001 (2(h) Compliance Report).”

⁵ See Appendix A, Data Request No. 001.

⁶ See Appendix A, Charter Response to Data Request No. 001.

Office met and conferred with Charter in a good faith effort to obtain from Charter broadband deployment and subscribership data.⁷

In July 2018, at Charter's suggestion the Public Advocates Office obtained from the Commission's Communications Division Charter's broadband deployment data that the Public Advocates Office then used to verify Charter's December 2017 progress report. As described below, the analysis raised further questions regarding Charter's progress report. The Public Advocates Office notified Charter of these concerns in September 2018. The Public Advocates Office met and conferred with Charter to discuss the Public Advocates Office's analysis and its continuing request for the information requested in Data Request No. 001.

On September 21, 2018, the Public Advocates Office served Charter with Data Request No. 002.⁸ In October 2018, the Public Advocates Office met and conferred with Charter in a good faith effort to obtain the data sought in the data request. The parties discussed Charter's proposals to provide more aggregated or different data than what was requested in the data request, and to impose limitations on the Public Advocates Office's use of the data provided. The parties' conversations did not lead to agreement. On October 11, 2018, Charter provided a data request response with its objections and partial response to Data Request No. 002.⁹ The response did not include broadband deployment data requested in Data Request No. 002 and Data Request No. 001.

⁷ See Appendix B, 2/2/18 email from Tony Tully to Anne Beaumont, with copy to Ana Maria Johnson and James McTarnaghan; 2/5/18 email from Anne Beaumont to Tony Tully with copy to Ana Maria Johnson and James McTarnaghan; 3/23/18 email from Tony Tully to Anne Beaumont, with copy to Ana Maria Johnson and James McTarnaghan; 7/24/18 email from Ana Maria Johnson to Anne Beaumont, James McTarnaghan and Tony Tully.

⁸ See Appendix A, Data Request No. 002.

⁹ See Appendix A, Charter Response to Data Request No. 002.

III. DISCUSSION

A. The Public Advocates Office Has Made a Good Faith Attempt at an Informal Resolution of the Discovery Dispute.

Rule 11.3 requires that, before a motion to compel discovery is filed, the parties must have previously met and conferred in a good faith effort to informally resolve the dispute. The Public Advocates Office made a good faith attempt at an informal resolution of the discovery dispute with Charter, as shown by the following:

- On January 26, 2018, the Public Advocates Office met and conferred telephonically with Charter regarding Data Request No. 001.¹⁰
- On February 2, 2018, Charter provided a response to the January 23 No. 001.¹¹ The response did not provide the information requested in the data request. Charter's response included a confidential attachment, *Condition 2(h) Compliance Report Workpapers (CA Available Speeds by Franchise EOY 2017)*, that was not responsive to the data request.
- Between February 2 and July 24, 2018, the Public Advocates Office reached out to Charter and requested that Charter provide broadband deployment data.¹²
- On July 25, 2018, Charter stated that the process for providing the requested data to the Public Advocates Office was "complex" and it was "difficult for Charter to simply provide the information" to the Public Advocates Office. Charter also stated that it had submitted "information on subscribership, speeds etc" to other Commission divisions and recommended that the Public Advocates Office attempt to obtain the information from the Communications Division.¹³
- On July 25, 2018, the Public Advocates Office requested and the Communications Division provided Charter's broadband deployment data at the census block level. The data contained California census

¹⁰ See Appendix B, 1/24/18 email from Tony Tully to James McTarnaghan with copy to Anne Beaumont.

¹¹ See Appendix A, Charter Response to Data Request No. 001; Appendix B, 2/2/18 email from Anne Beaumont to Ana Maria Johnson with copy to James McTarnaghan.

¹² See Appendix B, 2/2/18 email from Tony Tully to Anne Beaumont, with copy to Ana Maria Johnson and James McTarnaghan; 2/5/18 email from Anne Beaumont to Tony Tully with copy to Ana Maria Johnson and James McTarnaghan; 3/23/18 email from Tony Tully to Anne Beaumont, with copy to Ana Maria Johnson and James McTarnaghan; 7/24/18 email from Ana Maria Johnson to Anne Beaumont, James McTarnaghan and Tony Tully.

¹³ See Appendix B, 7/25/18 email from James McTarnaghan to Ana Maria Johnson, Tony Tully and Anne Beaumont.

blocks where Charter claims to offer broadband service. However, the data did not identify how many households Charter passed in each census block. As a result, census data was used to determine how many households were in each census block, but not necessarily passed by Charter. Although the data obtained from the Communications Division was not as informative as the data requested in Data Request No. 001, in the absence of the requested data the Public Advocates Office performed an analysis to verify Charter's December 2017 progress report based on the data from the Communications Division.

- On September 12 and 13, 2018, the Public Advocates Office explained to Charter that the Public Advocates Office's analysis indicated that a much lower percentage of households had access to increased (higher than 300 Mbps) download speeds than the level Charter reported in its December 2017 letter. To more accurately verify the level of progress Charter has made, Charter must provide by census block, how many households Charter passes and the broadband speeds available to those households. The Public Advocates Office requested to meet with Charter to discuss how Charter could provide the Public Advocates Office the necessary data to verify Charter's progress report.¹⁴
- On September 20, 2018, the Public Advocates Office and met and conferred telephonically with Charter. The parties discussed the Public Advocates Office's analysis and the Public Advocates Office renewed its request for the the information requested in Data Request No. 001.
- On September 21, 2018 the Public Advocates Office issued Data Request No. 002, which included the same request made in Data Request No. 001 and additional requests for Charter to explain how it calculated the household percentages it provided in its December 2017 progress report letter, and to provide the data Charter used to perform the calculations.¹⁵
- On October 2, 2018, the Public Advocates Office met and conferred telephonically with Charter. The Public Advocates Office stated that it would accept the following information: For each community listed in Charter's *Condition 2(h) Compliance Report Workpapers*, the total number of households with broadband availability from Charter in each community, the maximum broadband speed (download and upload speeds) available to households in each community, and the number of households in each community that have access to the identified

¹⁴ See Appendix B, 9/12/18 and 9/13/18 emails from Shelly Lyser to James McTarnaghan, with copy to Ana Maria Johnson, Tony Tully, Anne Beaumont and Marion Peleo.

¹⁵ See Appendix A, Data Request No. 002.

speed.¹⁶ The Public Advocates Office also requested confirmation that Charter did not offer broadband service outside of the communities listed in Charter's *Condition 2(h) Compliance Report Workpapers*.

- On October 3, 2018, the Public Advocates Office met and conferred with Charter in person. Charter stated its objection to “providing households passed figures for the communities where we already provide 300 or [higher Mbps] speeds and instead propose to provide you with an aggregated figure.”¹⁷
- On October 4, 2018, the Public Advocates Office stated that Charter's October 3 proposal to provide aggregate data was not acceptable to the Public Advocates Office. The Public Advocates Office stated that it would accept the compromise discussed during the October 2 meet-and-confer with Charter.¹⁸ The Public Advocates Office also restated its request discussed during the October 2 meet-and-confer for confirmation that Charter did not offer broadband service outside of the communities listed in Charter's *Condition 2(h) Compliance Report Workpapers*.¹⁹
- On October 8, 2018 Charter stated that it continued to object to the Public Advocates Office's data request and that it was willing to provide information under certain conditions that would inappropriately limit the Public Advocates Office's broad discovery rights.²⁰
- On October 10, 2018 the Public Advocates Office responded regarding Charter's October 8 proposed conditions.²¹ The Public Advocates Office objected to Charter's condition that any information it provides must be used exclusively to verify progress report, because it inappropriately seeks to restrict how the information provided by Charter would be used by the Public Advocates Office. The Public Advocates Office has broad discovery rights under Public Utilities Code sections 309.5(e) and 314; therefore, it has a right to request and obtain

¹⁶ See Appendix B, 10/3/18 email from Marion Peleo to James McTarnaghan with copy to Shelly Lyser, Ana Maria Johnson and Tony Tully.

¹⁷ See Appendix B, 10/3/18 email from James McTarnaghan to Shelly Lyser, Marion Peleo and Ana Maria Johnson.

¹⁸ See Appendix B, 10/4/18 email from Marion Peleo to James McTarnaghan with copy to Shelly Lyser, Ana Maria Johnson and Tony Tully.

¹⁹ See Appendix B, 10/4/18 email from Marion Peleo to James McTarnaghan with copy to Shelly Lyser, Ana Maria Johnson and Tony Tully.

²⁰ See Appendix B, 10/8/2018 email from James McTarnaghan to Marion Peleo, Shelly Lyser, Ana Maria Johnson and Tony Tully.

²¹ See Appendix B, 10/10/18 email from Marion Peleo to James McTarnaghan, Shelly Lyser, Ana Maria Johnson and Tony Tully.

information that it believes is necessary to verify Charter's progress report. However, to facilitate receiving a response to Data Request No. 002, the Public Advocates Office agreed to accept the information regarding download speeds as proposed by Charter. In making this compromise, the Public Advocates Office did not relinquish any discovery rights to request in a follow-up or future data request information regarding upload speeds or any other information it deems relevant. In addition, the Public Advocates Office confirmed that it would keep confidential and not share with any other entity or person outside of the Commission any information provided pursuant to the data request, consistent with the Commission's confidentiality rules by which the Public Advocates Office is bound. The Public Advocates Office noted that, with regard to any information that may be included in Charter's data request response that is claimed to be confidential, the procedural requirements for providing such material to the Commission (including the Public Advocates Office) are set forth in Commission General Order 66-D.

- On October 11, 2018, Charter provided a data request response with its objections and a partial response to Data Request No. 002.²² The response did not include the broadband deployment data requested in Data Request Nos. 001 and 002.

As shown above, the Public Advocates Office has attempted several times to reach a mutually acceptable solution with Charter and has reached an impasse. The Public Advocates Office has offered several accommodations, but Charter has refused to provide complete and responsive answers to the data request. The Public Advocates Office has made a good faith attempt at an informal resolution of the discovery dispute and has exhausted informal remedies.

B. The Public Advocates Office's Data Request Seeks Relevant, Probative, Non-Privileged Information within the Scope of the Proceeding.

The Public Advocates Office is entitled to the information requested in its data request as a matter of law.²³ Rule 10.1 provides the Commission's broad standard for discovery between parties to a Commission proceeding:

²² See Appendix A, Charter Response to Data Request No. 002.

²³ Charter's refusal to respond to the Public Advocates Office's data request is cause for concern, particularly in light of recent developments in New York, where the Public Service Commission's Chair

Without limitation to the rights of the Commission or its staff under Pub. Util. Code Sections 309.5 and 314, any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence, unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.²⁴

Section 309.5(e) provides that the Public Advocates Office “may compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner.”²⁵

As discussed below, the Public Advocates Office seeks information within the scope of the proceeding that is relevant, probative and non-privileged.

1. The data request is relevant to D.16-05-007 and A.15-07-009.

The Public Advocates Office’s data request satisfies the standard of Rule 10.1. Charter is a party to A.15-07-009 and was directed in D.16-05-007 to report its progress in offering to its customers broadband Internet service with speeds of at least 300 Mbps. The questions in the Public Advocates Office’s data request relate to Condition 2(h) in

has proposed pursuing enforcement actions against Charter, including revocation of its ability to operate in the state, because Charter “has failed to meet its commitments to the state, including its obligation to timely extend its high-speed broadband network to 145,000 unserved and underserved homes and businesses.” *Public Service Commission Chair John B. Rhodes Pursuing New Enforcement Actions Against Charter*, New York Public Service Commission Press Release, July 20, 2018. See *Order Denying Petitions for Rehearing and Reconsideration and Revoking Approval*, New York Public Service Commission, Case 15-M-0388, issued and effective July 27, 2018. Both documents referenced here are available at:

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-M-0388&submit=Search>.

²⁴ Cal. Pub. Util. Comm. Rules of Practice and Procedure, Cal. Code of Regs. Title 20, Div. 1, Ch. 1, Rule 10.1.

²⁵ Cal. Pub. Util. Code § 309.5(e).

the Commission's order in D.16-05-007 and to the information Charter provided as required by that order.

2. The information requested in the data request is reasonably calculated to lead to the discovery of admissible evidence.

The purpose of discovery is to allow a broad search of facts that leads or potentially leads to admissible evidence²⁶ and the Public Advocates Office's data request is calculated to lead to such evidence.²⁷ The data request includes specific questions that call for specific responses. The questions are tailored to the Public Advocates Office's specific analytic needs and are not unnecessarily broad or general. The information that the Public Advocates Office seeks would be admissible as evidence because it relates directly to the reporting requirement imposed on Charter by D.16-05-007.

The Public Advocates Office does not request privileged information, such as information pertaining to attorney-client communications or attorney work product. Moreover, the fact that any information provided may be confidential is an insufficient reason to withhold such information from the Commission or the Public Advocates Office.²⁸

3. The burden, expense, or intrusiveness of responding to the data request does not clearly outweigh the likelihood that the information sought will lead to the discovery of admissible evidence.

Providing complete, substantive, and accurate responses to the questions in the Public Advocates Office's data request would not be unduly burdensome. The requested information is similar to that previously provided by Charter to the Public Advocates Office during the proceeding underlying D.16-05-007.²⁹ The questions in the data request

²⁶ A.14-04-013 *et al.*, Oct. 16, 2014 Reporter's Transcript on Law & Motion Hearing, at 40-41: ALJ Veith.

²⁷ Doubts concerning relevance should usually be resolved in favor of permitting discovery. *Colonial Life & Accident Insurance Co. v. Superior Court* (1982) 31 C3d 785, 183 CR 810.

²⁸ "We make clear that [the Public Advocates Office] staff shall have the same access to data as other Commission staff, which has always been our intent." D.06-06-066, p. 64 (mimeo).

²⁹ See Appendix A, Data Request No. 001. Charter provided similar information to the Public Advocates

are focused, and the likelihood that the information requested will lead to admissible evidence outweighs any alleged burden. The data request contains only questions that would inform the Public Advocates Office’s review of Charter’s progress report.

The Public Advocates Office is entitled to disclosure in discovery as “a matter of right unless statutory or public policy considerations clearly prohibit it.”³⁰ Because discovery is a matter of right, absent dilatory behavior by the requesting party, denying relevant discovery on claims of undue burden is generally considered an abuse of judicial discretion.

As the above discussion shows, the Public Advocates Office’s data request complies with the requirements of Rule 10.1 and, therefore, good cause exists to grant the Public Advocates Office’s motion to compel.

IV. CONCLUSION

For the reasons set forth in this motion, the Public Advocates Office respectfully requests that the Commission require Charter to respond to the Public Advocates Office’s data request.

A proposed order is attached.

Respectfully submitted,

/s/ MARION PELEO

MARION PELEO
Attorney

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2130
E-mail: marion.peleo@cpuc.ca.gov

December 21, 2018

Office in data request responses in A.15-07-009, the proceeding underlying D. 16-05-007. It is not otherwise available to the Public Advocates Office.

³⁰ *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 15 CR 90.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C).

Application 15-07-009
(Filed July 2, 2015)

[PROPOSED] ORDER

Having reviewed the Motion of the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office) to compel Charter Communications, Inc. (Charter) to respond to the Public Advocates Office's data request, and for good cause appearing,

IT IS HEREBY ORDERED that Charter must respond to the Public Advocates Office's data request, numbered Data Request No. 002, with substantive, complete, and accurate responses within ten days of the issuance of this order.

Dated: _____ at San Francisco, California.

Administrative Law Judge

APPENDIX A

Data Requests and Responses

[PUBLIC VERSION]

APPENDIX B

Emails

[PUBLIC VERSION]