

# Public Service Commission

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## Enforcement of Commission Orders and Other Agreements

Report 2018-S-27 | March 2020

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

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Division of State Government Accountability



# Audit Highlights

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## Objective

To determine whether the Public Service Commission (Commission) monitors utilities' compliance with merger/acquisition Commission Orders and other agreements (including performance plans) and uses its enforcement power to hold utilities accountable when the terms and conditions of those agreements are not met, including applying monetary penalties and other sanctions. The audit scope covers the period January 1, 2015 through July 10, 2019.

## About the Program

The Commission regulates 650 utilities responsible for a wide range of services across the State. Through its Department of Public Service (Department), the Commission works to ensure affordable, safe, secure, and reliable access to electric, gas, steam, telecommunications, and water services for New York's residential and business customers.

As part of its responsibilities, the Commission reviews and approves utility companies' applications for potential mergers and acquisitions, rate cases, and other agreements. Often, approval of these applications is based on conditions, such as pledges to replace or upgrade infrastructure, provide access to services to outlying areas, or enhance quality of service. These conditions are listed in Commission Orders (Orders), and any violation of an Order's terms is grounds for the Commission to seek reparations, terminate the approved acquisition/merger, or even revoke a utility's license. The Commission also has the statutory authority to pursue civil penalties against gas and electric utilities.

The Department's responsibilities include advising the Commission on rate determinations, utility financing, consumer protection, and safety and reliability of utility services. The Department also develops and implements regulatory and energy policies; inspects utility facilities; conducts and participates in hearings; oversees management and operations audits; and receives, investigates, and resolves complaints regarding utility practices. Additionally, the Department monitors major electric and gas utilities' performance related to benchmarks set in utility performance plans.

## Key Findings

- The Department does not sufficiently monitor utilities' compliance with all conditions listed in Orders, and in some cases even lacks the equipment necessary to do so. For example, until 2019, the Department did not have equipment to measure Internet speeds, despite setting minimum speeds in Orders to be implemented as early as the end of 2017.
- Some Order conditions lack interim measures of performance and consequences for non-compliance. The Department lacks policies and procedures for staff to follow when monitoring Orders for compliance, and, rather than imposing penalties, prefers to work with utilities on compliance, creating little incentive for utilities to meet all Order conditions.
- Utilities, in some cases, are submitting inaccurate data that the Department is using –

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without verification – to calculate electric reliability, gas safety, and utility service quality. While this information has not been used in determining rates utilities can charge, it is sometimes used for determining fines and for general decisions made by the Department and the Commission regarding utility monitoring.

## **Key Recommendations**

- Actively monitor all conditions listed in Orders to ensure all utilities are in compliance.
- Develop and issue Orders that include well-defined, measurable, and enforceable conditions. The Orders should also include the consequences for non-compliance, as appropriate.
- Verify the accuracy of data submitted by utilities used by the Commission or Department to evaluate or make decisions concerning the utilities, including data submitted for performance metrics, safety standards, and reports.



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## Office of the New York State Comptroller Division of State Government Accountability

March 3, 2020

Mr. John B. Rhodes  
Chairman  
Public Service Commission  
Building 3, Empire State Plaza  
Albany, NY 12223

Dear Chairman Rhodes:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively. By doing so, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Enforcement of Commission Orders and Other Agreements*. The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Division of State Government Accountability*

# Contents

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- Glossary of Terms** ..... **5**
- Background** ..... **6**
- Audit Findings and Recommendations** ..... **8**
  - Mergers and Acquisitions ..... **8**
  - Performance Plans ..... **15**
  - Recommendations ..... **19**
- Audit Scope, Objective, and Methodology** ..... **20**
- Statutory Requirements** ..... **21**
  - Authority ..... **21**
  - Reporting Requirements ..... **21**
- Agency Comments and State Comptroller’s Comments** ..... **22**
- Contributors to Report** ..... **40**

# Glossary of Terms

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<b>Term</b>	<b>Description</b>	<b>Identifier</b>
Altice	Altice USA	<i>Utility</i>
Charter	Charter Communications, Inc.	<i>Utility</i>
Commission	Public Service Commission	<i>Auditee</i>
Department	Department of Public Service	<i>Department</i>
FairPoint	FairPoint Communications, Inc.	<i>Utility</i>
NRA	Negative revenue adjustment	<i>Key Term</i>
Orders	Commission Orders	<i>Key Term</i>
RG&E	Rochester Gas & Electric Company	<i>Utility</i>

# Background

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The Public Service Commission (Commission) regulates 650 utilities operating in New York State. Through its Department of Public Service (Department), the Commission seeks to ensure affordable, safe, secure, and reliable access to electric, gas, steam, telecommunications, and water services for New York's residential and business customers, while also protecting the environment.

The Commission, which consists of up to five members appointed by the Governor and confirmed by the State Senate, reviews and approves applications for potential mergers and acquisitions, rate cases, and other agreements with utility companies. Often, approval is based on conditions such as replacing or upgrading infrastructure, providing access to services to outlying areas, or improving the quality of service. These conditions are listed in Commission Orders (Orders), and any violation of an Order's terms is grounds for the Commission to seek reparations, terminate the approved acquisition/merger, or even revoke a utility's license. The Commission also has the statutory authority to pursue penalties against utilities pursuant to Section 25 of the Public Service Law. According to Department officials, penalties pursued under Section 25 can only be collected when the Commission sues the utility in a court, while Section 25-a provides the Commission with the authority to assess civil penalties against combination gas and electric companies and the officers thereof. Between January 1, 2015 and December 31, 2018, the Department reported four settlements under these provisions, totaling \$157.5 million, which includes a \$153 million settlement with Con Edison from a 2014 gas explosion in East Harlem.

The Department's responsibilities include advising the Commission on all decisions, including rate determinations, utility financing, consumer protection, safety and reliability of utility services, and siting of gas and electric transmission facilities. The Department also represents the Commission in State and federal proceedings that affect New York rate payers or that have a bearing on State legislative mandates concerning utility services or Commission policies. Additionally, the Department develops and implements State regulatory and energy policies; inspects utility facilities; conducts and participates in hearings; oversees management and operations audits; and receives, investigates, and resolves complaints regarding billing, services, and other utility or energy service company practices. For the 2017-18 fiscal year, the Department had 520 employees.

For electric and gas utilities, the Department employs individualized measures of utility service quality, reliability, and safety, which include performance improvement goals that utilities agree are appropriate and achievable. The Department monitors the major electric and gas utilities' performance in

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relation to benchmarks in each utility's performance plan. These performance plans state the utilities have sufficient resources to meet agreed-upon performance standards. Failure to meet the goals in these plans may result in fines based on a fixed-dollar amount or a percentage of equity.

# Audit Findings and Recommendations

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We found that the Department does not always adequately monitor compliance with Order conditions – and in some cases even lacks the equipment necessary to do so. The Department has since made improvements in this area, in response to our audit findings.

Orders are, at times, ambiguous and lack time frames for completion, interim performance measures, and consequences for non-compliance, making enforcement difficult and inconsistent. In the absence of policies and procedures, Department staff use their own discretion for identifying non-compliance and the Commission imposes fines and/or sanctions. Historically, the Department has worked with utility companies on compliance rather than imposing fines, which it states do not provide a direct benefit to the customers. However, when utilities face no penalty for ongoing or repeated non-compliance, there is little incentive to become compliant.

We found, overall, that utilities submitted required documents per the Orders and performance plans. However, the Department does not always verify the information it receives from utilities and shares with the Commission – information the Department and Commission then may use for decision-making purposes.

## Mergers and Acquisitions

When a merger/acquisition is approved and an Order is agreed upon, utility companies generally submit documentation to the Department to demonstrate compliance with the conditions detailed in the Order. For the period January 1, 2015 through June 27, 2018, the Department was responsible for monitoring utilities' compliance with Orders for 37 mergers/acquisitions. We reviewed the Department's monitoring efforts to ensure utilities complied with the conditions in these Orders.

We found, overall, that utilities submitted required documents per the Orders. However, the Department did not sufficiently monitor the utilities' compliance with all the conditions in its Orders, and the Department, at times, lacked clear criteria and documented procedures for doing so. Additionally, in most instances, the Department did not verify reported data used for monitoring. Effective monitoring requires firm criteria against which performance can be evaluated. Additionally, evaluations must be timely, and the results should be assessed to determine if the established goal is appropriate. While each Order contains unique features, some standard procedures could be implemented and then supplemented with additional monitoring efforts. Conditions within the Orders generally are meant to ensure New York consumers as a whole will benefit from the merger. Failure to meet these

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conditions creates a risk that consumers are not receiving the intended and agreed-upon benefit.

The Department could not provide sufficient evidence to demonstrate the individual utility companies complied with all Order conditions for three of the nine utilities (Charter Communications [Charter], Altice USA [Altice], and FairPoint Communications, Inc. [FairPoint]) in our sample. In total, we identified nine instances of non-compliance involving three Orders.

Since we brought these issues to its attention, the Department has made progress in addressing them. The Department has been in negotiations with the three utilities to develop ways to meet the conditions of the Orders. However, it has not demonstrated an escalating scale of enforcement actions that would be expected for such long-term issues, including one that has persisted for more than a year – Altice. The absence of financial consequences may not be the most effective means of achieving compliance.

## Charter

In January 2016, the Commission approved the merger of Time Warner Cable and Charter, affecting approximately 2.6 million customers. The resulting Order contained ten conditions. We found four of the ten conditions either were not fulfilled by Charter or were not sufficiently verified by the Department. The Commission reported that Charter did not comply with one of the four conditions we identified and that it had taken enforcement actions in that instance. In July 2018, the merger approval was rescinded altogether, and Charter was required to develop a transition plan for a successor. We also found three other conditions for which we could not verify compliance due to the Department's lack of verification and/or the vagueness of the condition in the Order. Department officials stated that they had been devoting most of their staffing resources to the litigation rather than monitoring compliance with the Order. Compliance will now be measured against the conditions of a new agreement, and Department management states it will be closely monitoring Charter's progress.

### Condition 1: Network Expansion

Charter was to extend its network to an additional 145,000 unserved and underserved premises within four years, beginning January 8, 2016, with a goal of 25 percent expansion annually. The Commission required Charter to submit quarterly reports detailing its progress in this area. During the first year of the agreement, details of Charter's progress as described in its reports caused Department officials to question the utility's ability to meet its goal. Department officials noted that they did not receive a listing of completed new

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Internet connections from Charter, despite weekly meetings to discuss any issues.

A timeline of Charter's compliance with network expansion Order conditions follows:

- May 2017 – Approximately 1.5 years into the agreement, Charter reported it had extended its network to only 15,164 of the 36,250 premises (42 percent of the goal) expected in the first year.
- September 2017 – The Commission approved a settlement agreement requiring Charter to submit a letter of credit (a letter issued by a bank that serves as a guarantee for payments under specified conditions) in the amount of \$12 million, propose a newly revised buildout plan requiring six semi-annual deadlines, and pay an additional fine of \$1 million (drawn from the \$12 million) for every missed goal under the new schedule.
- December 2017 – Charter reported that it had extended its network to 42,889 premises as of December 16, 2017, meeting its first target in the revised buildout plan. However, an investigation by the Department disqualified over 14,000 premises, leaving Charter short of that goal. Additionally, the Department found that Charter should have removed almost 12,000 premises from its buildout plan because networks already existed at those locations. As a result, the Commission fined Charter \$1 million. However, before being allowed to collect the fine, the Commission was required, by the Order, to give Charter the opportunity to dispute the fine and explain why it should not be imposed.
- July 2018 – The Commission eventually rescinded the merger approval, stating “Charter, doing business as Spectrum, has – through word and deed – made it clear that it has no intention of providing the public benefits upon which the Commission’s earlier approval was conditioned.”

While Department staff continued to work with Charter on developing a plan to meet requirements, none of the fines have been collected. We determined at least \$5 million should have been paid to the Commission. The Department reported it had attempted to collect the fines from the \$12 million account, but had been prevented by the litigation initiated by Charter. The Commission has issued Orders imposing these fines and has undertaken various efforts to collect them, including petitioning the New York State Supreme Court to impose the maximum \$100,000 per day until Charter extends its network to the required number of premises. Despite these efforts, the Department reported that it has only been able to collect \$1 million. The Department has since ceased efforts to collect these fines and has approved a new settlement

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agreement with Charter. However, the process to collect fines can be drawn out by the utilities because of the permissible legal remedies afforded them. Nevertheless, failure to collect fines imposed for failing to meet Order conditions creates a lack of accountability and inspires little motivation to stay in compliance.

The Department reports that the net benefits of the new settlement agreement with Charter will far exceed the benefits of the initial settlement agreement. However, as it has been over three years since the merger was approved, network expansion should have already been provided to approximately 126,875 unserved or underserved premises based on the 2016 Commission Order approving the merger. As of July 2019, Charter had only extended its network to 64,827 premises. Based on the original Order, 62,048 additional customers should have received access to these services. Charter now has until September 2021 to complete the network expansion of 145,000 premises previously scheduled to be completed by May 2020.

In addition to Charter's non-compliance regarding network expansion, we found three other conditions for which the lack of Department verification or clear and measurable benchmarks in the Order resulted in insufficient evidence of compliance.

## **Condition 2: Network Speed Enhancements**

Charter was required to invest in system upgrades to permit the transition to all-digital technology, including an increase in broadband Internet speeds by the end of 2018. Although Charter submitted the required documentation stating compliance with this requirement, the Department has not verified that these system upgrades have actually been completed. In fact, Department staff stated they lack the equipment required to perform such verification. Department staff reported that the condition to increase network speeds is unique and that the Orders involving Charter and another utility, Altice, were the first to include this condition. Further, this equipment is expensive, and Department staff had to perform extensive research to ensure the right equipment was procured, which took longer than anticipated. The Department reports the required equipment was purchased in June 2019 and testing of the network speeds was to begin at Altice in August 2019, with testing at Charter to follow. While the commitment to testing is encouraging, the Department and Commission should consider the feasibility of future Order conditions while drafting them, rather than relying on reported information or retrospectively attempting to monitor for compliance after a deadline has passed. Use of unverified information results in an unreliable basis for monitoring and enforcement efforts.

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### **Condition 3: Free Broadband Expansion**

Charter was required to provide free broadband service to 50 community locations such as schools, libraries, and public housing in low-income or underserved areas of the State. Charter submitted a list of institutions it believed would benefit from such service. However, as of the 2018 Annual Report provided to the Department, Charter had not provided any of the 50 institutions with the required services, despite almost two years having elapsed since approval of the agreement. We noted that the agreement does not establish a time frame for providing this service, making it difficult to determine what, if any, enforcement action the Department could take and when it should be taken. Again, the lack of compliance deprives customers of the services the Order was meant to provide. Time frames for this expansion should have been included in the Order, and compliance with this condition should have been reviewed by the Department when discussing the July 2019 settlement. Clearly stating deadlines and consequences in Orders would help promote compliance by establishing guidelines for Department monitoring efforts.

### **Condition 4: Customer Service**

Charter was required to invest \$50 million in service quality improvements over the two years following the approval of the merger. Charter reported it had met this requirement; however, the Department has not verified that the \$50 million in service quality improvements had been made by May 2018. Considering the issues with Charter regarding network expansion compliance, it seems reasonable to question compliance with all other conditions prior to settling a new agreement. Department staff reported that they have, instead, dedicated resources to the litigation and settlement discussions and began to verify this information in August 2019. Reliance on reported information without verification, especially in the case of demonstrated non-compliance and inaccurate data in other areas, does not create a valid basis for monitoring and enforcement of Order conditions.

## **Altice**

In June 2016, the Commission approved a merger of Cablevision Systems Corporation and Altice, affecting approximately 1.9 million customers. The Department could not provide evidence that three of the five required conditions for the Order had been met, and officials were unaware of the issues with one of the conditions. The Department had not performed the necessary monitoring steps prior to us identifying the issues to ensure the utility was in compliance with the required conditions.

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## **Condition 1: Network Speed Enhancement**

Altice was required to increase broadband speeds by the end of 2017. Altice reported that it met this requirement one year ahead of schedule. However, the Department was unable to verify these system upgrades because, as stated earlier, it lacks equipment necessary to perform network speed testing. The Department has since purchased the necessary equipment and is expected to begin testing the network speeds in August 2019 – almost two years after Altice was required to have met its goal.

## **Condition 2: Broadband Access**

Altice was required to provide free broadband service to 40 locations such as libraries, schools, and public housing in low-income or underserved areas of the State. Altice reported in June 2018 that it had provided services to 31 of the 40 institutions. However, the Department did not start verifying this information until January 2019 – just five months before the condition was to be achieved. In July 2019, the Department did confirm that all 40 locations were receiving service. The Department should have begun verification soon after Altice reported these locations to ensure they did indeed receive the required services.

## **Condition 3: Customer Service**

Altice is required to resolve 90 percent of its complaint calls within two days of receipt and is required to invest \$500,000 in service improvements each quarter it does not meet this threshold. On three separate occasions, we found that Altice reported a drop below the 90 percent threshold (with only 73.1, 88.2, and 87.4 percent of calls resolved within the two-day requirement for three quarters), translating to a potential \$1.5 million in service improvements that should have been made. Department staff informed us in an October 2018 meeting that they were looking into this issue – about a year after the first missed threshold.

During its review, the Department found that Altice reported making \$7.6 million in qualifying investments (five times the required amount) for new employees and contractors to improve customer complaint response. Further, the Department states that Altice has not missed this metric since the second quarter of 2018 – evidence that customer service has improved. While this may be true, the Department did not verify that the required investments had been made until after we identified the issue.

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## FairPoint

In June 2017, the Commission approved a merger of FairPoint and multiple other communication companies, affecting an estimated 13,700 customers. The Department did not provide evidence that FairPoint is on target to comply with two of the eight conditions required by the merger or that the Department even performed the monitoring necessary to make such a determination.

### **Condition 1: Network Reliability and Service Quality Improvements**

FairPoint is required to invest at least \$4 million in network reliability and service quality improvements, including the expansion of Internet access service to at least 300 additional locations. FairPoint submitted an expansion plan, as well as updated reports, including the number of locations completed (over 300). However, the Department has not verified these claims, stating it does not have enough staff to perform the field inspections and it has only seven employees across the entire agency who can perform such audits. Although this condition is not due until 2020, the Department could be verifying the number of locations – at least on a sample basis – to determine if reports are accurate and whether FairPoint locations are legitimate and all count toward the goal. The Department should not wait until the deadline to determine if the utility will meet the conditions of the Order. In response to our preliminary findings, Department officials stated they would be performing site visits in the second and third quarters of 2019. However, we were informed these visits did not occur, as staffing resources were instead used to prepare for Internet speed tests at Altice and Charter. Incremental monitoring of this requirement would give the Department a better idea of FairPoint’s compliance, allowing the potential for timely corrective actions should FairPoint not be on track to accomplish its goal. Compliance review only after all deadlines have passed does not allow utilities or the Department the same opportunities to assess goals outlined in Orders or provide the benefit those Orders intended for customers.

### **Condition 2: Staffing Requirements**

FairPoint is required to maintain current staffing levels for all customer-facing jobs for two years after the close of the agreement. FairPoint submitted a report in August 2018, stating that its initial identification of customer-facing positions was “based on a simple review of job titles rather than a review of actual job duties and functions” and was, therefore, inaccurate. As a result, FairPoint reclassified 9 of the 39 customer-facing positions and ultimately eliminated them, claiming they “duplicated work being performed in other work centers.” After we brought this issue to the Department’s attention, it

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looked into the issue, and agreed that additional supporting documentation should have been requested. Ultimately, the Department found that the utilities' action was appropriate, but only after we identified the potential problem.

In response to our questions about compliance with these conditions, Department officials noted they have limited resources to verify information and, in some cases, do not have the equipment to verify compliance, and they instead relied on the information provided by the utilities, customer complaints, and oversight provided by other entities (including the New York Attorney General). In fact, we found the Department does not routinely verify the data provided by utility companies in support of its compliance with the Orders. Department staff generally verify the data only when they receive complaints or otherwise have concerns.

Also, the Department verifies data submitted by the utilities prior to preparing Orders approving mergers or acquisitions. While the Department periodically collects and reviews reports submitted by the utilities after these Orders are issued, it is the Department's practice to wait until the deadlines for conditions to be completed before they begin to verify the data obtained. Given the issues we identified, however, it is clear that more attention to monitoring is needed after the Order approving the merger or acquisition is issued to ensure the utilities are making appropriate progress in achieving compliance with those conditions. We noted a lack of documented policies and procedures for Department staff to follow when monitoring compliance with Orders and enforcing fines and penalties. Additionally, when we noted the lack of policies and procedures, Department officials agreed that comprehensive policies and procedures would be a valuable tool in enhancing the process used to monitor Order and agreement compliance. Active monitoring using accurate data, clear direction, and defined metrics and deadlines – and enforcement of stated consequences, as needed – would assist the Department in ultimately assuring New York rate payers that the utilities are meeting their intended goals and delivering promised benefits.

## **Performance Plans**

The purpose of performance metrics is to enhance the quality of service that customers receive. These benchmarks represent the level of service utilities are supposed to provide to rate payers. When they are not met, customers are deprived of the services those performance standards were meant to provide or enhance.

Further, verification of information is an important step when monitoring

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compliance. Unverified data provides no assurance that the service is improving. Performance metrics calculated using inaccurate data may not be a true representation of the performance levels the Department wants the utility to achieve, as the basis for their calculation is flawed.

The Department is responsible for overseeing the quality of utility services through electric safety, electric reliability, gas safety, and utility service performance metrics. It reviews all major gas and electric utilities (utilities serving more than 25,000 customers), as directed by the Commission. The utilities are required to submit their performance statistics to the Commission on a monthly or an annual basis. The Department ensures service quality by measuring the self-reported data from utilities against the performance benchmarks agreed to by the Commission and the utilities. The Commission also uses performance indicators to monitor and analyze the operations of gas, electric, and water utilities. Failure to meet performance metrics can result in adverse financial consequences known as a negative revenue adjustments (NRAs).

Overall, we found utility companies complied with the document submission requirements for performance reports. Although Department staff review this information for reasonableness, it is not the Department's practice to periodically verify information received from the utilities for the electric and gas safety areas until they come in for a rate case. This means the Department does not verify that the utilities are meeting the agreed-to performance metrics for the period of time in between its rate cases. Therefore, the Department cannot be assured customers are receiving the expected level of services during this time. We reviewed the 2017 performance reports for electric reliability, electric safety, gas and pipeline safety, and utility service quality for four of the seven major utility companies (Central Hudson Gas & Electric, Rochester Gas & Electric Company [RG&E], New York State Electric & Gas, and Niagara Mohawk Power Corporation d/b/a National Grid). Based on the information provided by the utilities and obtained by the Department during its compliance audits, we found the Department is basing its calculations on data from the utilities, which is sometimes inaccurate. We identified instances where utilities submitted inaccurate data that the Department used for calculations in its electric reliability, electric safety, and Utility Service Quality Reports. Details on the testing of our sample follow.

## **Electric Reliability**

Electric reliability performance metrics include the frequency and duration of service interruptions. Utilities submit monthly data to the Commission for performance reviews. Based on the information submitted by the utilities,

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all four companies met the performance metrics for 2017, and, accordingly, no NRAs would have been applied during the next rate case for any of the utilities. However, we found three of the four utilities submitted inaccurate information for 33 metric items – including number of service interruptions, number of customers affected, and duration of interruptions – resulting in inaccurate calculations.

Although the corrected metrics were still within the utilities' benchmarks, the Department was not aware of the discrepancies and had no reassurance that the benchmarks were being met. The Department did not identify this issue and accepted the calculations reported by the utilities. The Department does not audit or take additional actions to verify the utilities' self-reported metrics until rate cases are conducted. Failure to verify the data submitted by the utilities – at least on a sample basis – may result in the Department failing to detect metrics that are not being met by utilities and using flawed data to make decisions.

## Electric Safety

Electric safety performance metrics include: stray voltage testing of streetlights and electric facilities accessible to the public; inspection of utility electric facilities on a minimum of a five-year cycle; and record-keeping, certification, quality assurance, and reporting requirements. Utilities submit an annual report to the Commission, detailing their stray voltage testing and facility inspections. Department staff told us that they have teams performing field and desk audits on the utility data.

We found the Department does not verify certain information it receives from the utilities, whether through analyses, site visits, audits, or other methods. For example, the utilities are required to inspect 20 percent of their facilities each year, with a goal of inspecting 100 percent within a five-year cycle. The only information that the utilities submit to the Commission is the number of inspections performed – no identifying information is required (e.g., location names or addresses). Therefore, the Department cannot ensure utilities are inspecting all facilities within the five-year cycle. Department staff told us that a list of identifying information would be too large to maintain and did not provide any alternate methods they use to ensure all facilities are inspected.

## Utility Service Quality

Utility service quality performance metrics measure Commission Complaint Rates, and survey data is used to measure customer satisfaction. The Department compares the data reported by the utilities against performance benchmarks. When the Department determines benchmarks are not met,

NRAs are levied against the utilities, which are settled during the utility’s next rate case. We reviewed self-reported data for several performance areas, including Commission Complaint Rates, how well scheduled appointments are kept, telephone response times, adjustment of bills, provision of estimated bills, and customer satisfaction surveys. We identified one utility (RG&E) that did not meet the assigned performance criteria for the provision of estimated bills in 2017. The Department also identified these issues and initially determined that an NRA totaling \$525,000 was appropriate, based on information submitted by RG&E. However, we found that RG&E submitted inaccurate information, and the correct data would have resulted in an NRA totaling \$700,000 – \$175,000 more than what the Department recognized. The Department did not discover this discrepancy because it did not audit utility service metrics at the time this occurred and would not have identified the accurate amount of the NRA. When presented with this information, Department staff confirmed our calculations were correct. The calculation of the undercharge is detailed in the following table.

### Undercharge for RG&E NRA

Criteria	Metric	OSC Calculation and NRA	RG&E Calculation and NRA	Difference
Estimated bills	6 percent less than or equal to	8.86% \$525,000	7.01% \$350,000	1.85% \$175,000

This example further demonstrates the need for the Department to verify data submitted by utilities. After this issue was brought to the Department’s attention, it stated that staff have now been instructed to audit the data used in the Department’s Utility Service Quality Reports. However, only verbal instructions were provided to staff, and no official change has been made to Department policies and procedures.

A 2015 audit report from an outside firm also found instances of inaccurate data. The audit, which included operational data submitted to the Commission from 2009 through 2013 for the nine major utility companies, addressed electric reliability, gas safety, and utility service quality.

While the firm found that the utilities generally complied with the intent of the data reporting requirements, the methodologies used by utilities to measure metrics changed over time. The final audit report contained more than 425 recommendations, including that the utilities should:

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- Conduct their own internal audits of electric reliability, gas safety, and utility service quality data collection, as well as their own reporting policies and processes;
  - Improve their documentation of processes and procedures regarding the collection, calculation, and reporting of gas safety and utility service quality data; and
  - Adopt standardized methodologies and metrics for measuring electric reliability, gas safety, and utility service quality.

The Department reports that, since the issuance of the report in 2015, 99 percent of the recommendations have been addressed. However, we found that some inaccurate data is still being reported by the utilities and the Department does not, in all instances, verify the data. Some information is presented to the Commission before it is verified, and the Department states that this information is for “informational purposes only” and not for any formal determinations. However, regardless of the stated purpose, providing inaccurate information to the Commission is not beneficial for any decision-making process and could lead to improper allocation of Department resources.

## Recommendations

1. Actively monitor all conditions listed in Orders to ensure all utilities are in compliance.
2. Develop and issue Orders that include well-defined, measurable, and enforceable conditions. The Orders should also include the consequences for non-compliance, as appropriate.
3. Verify the accuracy of data submitted by utilities that is used by the Commission or Department to evaluate or make decisions concerning the utilities. This includes data submitted for performance metrics, safety standards, and Utility Service Quality Reports.
4. Develop policies and procedures that provide employees with standard monitoring steps to perform when overseeing compliance with merger or acquisition Orders, as well as steps addressing the auditing of data submitted in support of Utility Service Quality Reports.

# Audit Scope, Objective, and Methodology

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The objective of our audit was to determine whether the Commission monitors utilities' compliance with merger/acquisition Orders and other agreements (including performance plans) and uses its enforcement power to hold utilities accountable when the terms and conditions of those agreements are not met, including applying monetary penalties and other sanctions. The audit scope covers the period January 1, 2015 through July 10, 2019.

To accomplish our objective, we reviewed relevant laws and regulations and Commission policies related to performance plans, merger/acquisitions, and rate cases. We also became familiar with, and assessed the adequacy of, the Commission's internal controls as they relate to our audit objective. We met with Department staff to gain an understanding of their oversight. Additionally, we reviewed 2017 performance plans for electric safety and reliability, gas safety, utility service quality, Orders, and various other data, including utility reports, plans, and Department reviews. We judgmentally selected samples for mergers/acquisitions, rate cases, and performance plans. For mergers/acquisitions, we selected the two most recent agreements for each service category (communications, electric, miscellaneous, cable, and water) for which a merger agreement had been approved between January 1, 2015 through June 27, 2018. For rate cases, we selected rate case transactions (approvals, deferred, or denied cases) between January 1, 2015 through September 21, 2018 using the following criteria: most recent major and minor approved and deferred/denied rate cases for each service category (communications, electric, gas, and water); one case based on inquiries and media attention; and one case where the approved rate was higher than the rate requested by the utility. For performance plans, we selected the same four utilities for all our performance testing, choosing the utilities based on the highest basis points for gas and electric in the Commission's 2017 Utility Service Quality Report; and one utility noted in any performance report for not meeting a standard. The results of our samples cannot be projected to the population as a whole, but support the findings, conclusions, and recommendations in this report.

# Statutory Requirements

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## Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

## Reporting Requirements

We provided a draft copy of this report to Department officials for their review and formal comment. We considered their comments in preparing this final report and have included them in their entirety at the end of it. While Department officials disagreed with many of the report's findings and conclusions, and commented on report issues they felt needed further clarity, they agreed with the report's recommendations. Our rejoinders to certain comments are included in the report's State Comptroller's Comments, which are embedded within the Department's response.

Within 180 days of the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Public Service Commission shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where the recommendations were not implemented, the reasons why.

# Agency Comments and State Comptroller's Comments

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**Department of  
Public Service**

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**Public Service Commission**

**John B. Rhodes**  
Chair and  
Chief Executive Officer

**Diane X. Burman**  
**James S. Alesi**  
**Tracey A. Edwards**  
**John B. Howard**  
Commissioners

**Thomas Congdon**  
Deputy Chair and  
Executive Deputy

**Robert Rosenthal**  
General Counsel

**Michelle L. Phillips**  
Secretary

December 9, 2019

Mr. Brian Reilly  
Audit Director  
State Government Accountability  
Office of the State Comptroller  
110 State Street-11th Floor  
Albany, New York 12236

Response to OSC Audit findings of the Public Service Commission Enforcement of  
Commission Orders and Other Agreements – Report 2018-S-27

Dear Mr. Reilly,

The New York State Department of Public Service (Department) has reviewed the draft Office of the State Comptroller (OSC) Enforcement of Commission Order and Other Agreements audit report dated October 2019.

By way of background, through the Department of Public Service (Department) the Public Service Commission (Commission) regulates 650 utilities operating within New York State. Ensuring the State's ratepayers are provided affordable, safe, secure and reliable access to electric, gas, steam, telecommunications, and water services is both the Commission's and Department's primary mission. The review and approval of utility mergers and acquisitions, the focus of this audit, represents one aspect of the Commission's many responsibilities. Before a merger or acquisition is approved by the Commission, Department Staff thoroughly analyzes the benefits and risks to the State's consumers and presents a recommendation to the Commission. The recommendation typically includes conditions for approval, often requiring infrastructure upgrades or improvements to customer service, that must be met by the acquiring utility. An Order specifying these conditions is issued by the Commission and agreed to by the acquiring company. Non-compliance with Commission Orders may result in a revocation of the agreement or a penalty action pursuant to PSL Sections 25, 25-a, and 26. In recent years, including during the OSC audit period, the Department

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December 9, 2019  
Department of Public Service Response

has vigorously exercised its investigatory and enforcement powers against regulated entities consistent with the New York Public Service Law. For example, the Department pursued focused and escalating enforcement action against Charter Communications following the January 2016 merger order. The Department also took prompt enforcement action against New York American Water Company and has worked to ensure compliance by Altice and FairPoint Communications. Collectively, these investigations and enforcement actions have protected New York ratepayers and citizens and made clear the Department's willingness and ability to hold regulated entities accountable to Commission orders, regulations, and laws.

### **Response to OSC Key Findings**

**Finding 1:** "The Department does not sufficiently monitor utilities' compliance with all conditions listed in Orders."

**Response:** The Department disagrees with this statement as it does, in fact, monitor the utilities compliance with Order requirements and takes appropriate action when necessary to ensure compliance through a combination of annual field, record and management audits; continuous data analysis and risk assessments; and analysis of consumer complaint trends.

**Finding 2a:** "Some Order conditions lack consequences for non-compliance."

**Response:** The Department disagrees with this statement as there is no legal or policy reason to include potential consequences in each and every order issued by the Commission. The New York State legislature has already specified what the potential consequences are for violating Commission orders as established in PSL sections 25, 25-a, and 26. The PSL sets out maximum financial penalty consequences for violating agency orders and vests the Department with enforcement discretion to fashion enforcement remedies.

**State Comptroller's Comment 1** - The Department misquoted our wording and, in so doing, misrepresented the finding. On page 1 of the Audit Highlights, we state, "Some Order conditions lack interim measures of performance and consequences for non-compliance"; on page 8 of the full report, we further elaborate: "Orders are, at times, ambiguous and lack time frames for completion, interim performance measures, and consequences for non-compliance, making enforcement difficult and inconsistent." We recognize it is not necessary for all conditions to have specific consequences listed in the Order. However, as we stated to Department officials during our audit and reiterate in the report, the Department can take what it has learned from prior agreements and include more defined benchmarks – as well as consequences – in the Orders when appropriate. In fact, the Department itself has acknowledged the benefits of more clearly defined conditions, as stated in the July 11, 2019 Settlement Agreement: "this Agreement has more granular targets and reporting requirements that will enable the Commission to more efficiently track Charter's performance."

**Finding 2b:** "...rather than imposing penalties, (the Department) prefers to work with utilities on compliance, creating little incentive for utilities to meet all Order conditions."

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December 9, 2019  
Department of Public Service Response

**Response:** The Department disagrees with this statement. The Department utilizes penalty actions in a strategic manner to address violations. It can be more beneficial to the State's customers to obtain at shareholder expense expanded infrastructure, reductions in rates, or improvements in customer service rather than imposing financial penalties, and when that is the case, the Department does indeed prefer the best response for customers.

**State Comptroller's Comment 2** - We are puzzled by the Department's disagreement with this point. During the audit, Department officials told auditors they generally try to work with the utility to gain compliance instead of levying a fine. Further, their statement above simply explains why they would prefer to not fine utilities.

**Finding 3.** "Utilities, in some cases, are submitting inaccurate data that the Department is using – without verification – to calculate electric reliability, gas safety, and utility service quality."

**Response:** The Department partially disagrees with this statement. Performance plan information provided by the utilities was used by the Commission and Department Staff for informational purposes only. Neither Staff nor the Commission rely on unaudited information to make any decisions that could affect the utilities or the State's ratepayers. All information used to establish utility rates, issue Negative Rate Adjustments, or make important decisions is fully audited during the Department's comprehensive rate case process and the Offices' annual audit activities. That said, we agree that data accuracy of course is critically important.

**State Comptroller's Comment 3** - As stated in our report on page 16, although Department staff review this information for reasonableness, it is not the Department's practice to periodically verify the information received from the utilities for the electric and gas safety areas until they come in for a rate case. This means the Department does not verify that the utilities are meeting the agreed-to performance metrics for the period of time in between its rate cases. Therefore, the Department cannot be assured that customers are receiving the expected level of services during this time. Based on the information provided by the utilities and obtained by the Department during its compliance audits, we found the Department is basing its calculations on utilities' self-reported data, which is sometimes inaccurate.

**Finding:** OSC determined that "The Department could not provide sufficient evidence to demonstrate the individual utility companies complied with all Order conditions for three of the nine utilities (Charter, Altice, and FairPoint) in our sample. In total, we identified nine instances of non-compliance involving three Orders."

**Response:** The Department disagrees with five of the instances identified and partially disagrees with two others, as detailed in our response below.

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December 9, 2019  
Department of Public Service Response

## **Mergers and Acquisitions**

### **Charter Communications**

The Commission and Department took vigorous and timely enforcement action against Charter. After pursuing a series of escalating enforcement actions, the Commission in mid-2018, revoked the merger authorization. This final enforcement action which revoked the company's authorization to operate in the state set an important precedent in New York -- and across the Nation -- as this type of enforcement remedy had not been previously utilized in the regulatory community. Ultimately, the enforcement action was settled in a manner that resulted in a company commitment to expand its network entirely Upstate at an estimated cost of more than \$600 million, more than twice the original estimate at the time of the merger approval, and \$12 million paid by the company in lieu of penalty for additional network expansion work. During the approximately three-year audit period ended August 2019, the Commission issued 37 Orders approving utility merger or acquisition transactions, 9 of which were reviewed during the audit.

**Condition 1: Network Expansion** – OSC has asserted that Charter failed to comply with network expansion and that the Order lacked “clear and measurable benchmarks.”

**State Comptroller's Comment 4** - The Department used our words out of context. While the Department disagreed with this statement, we clearly show on page 10 that Charter did not meet its network expansion Order condition and actions were taken by the Department – which the Department acknowledges in the next paragraph of its response. Additionally, outside of network expansion, we found three other conditions for which the lack of Department verification or clear and measurable benchmarks in the Order resulted in insufficient evidence of compliance.

**Department Response:** The Department disagrees with this observation. Pursuant to paragraph 1 of the 2017 Settlement Agreement, Charter placed into escrow \$1 million that would be used to pay “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.” The expenditures have been made and were verified by Staff. The remaining \$3 million in to-date uncollected penalties relates to Charter's failure to comply with the 2017 Settlement Agreement, which was the subject of litigation that was resolved in July 2019, as described in more detail below.

While the Commission determined that Charter failed to meet its December 16, 2017, March 16, 2018, and June 18, 2018 targets and failed to demonstrate good cause for these failures, the Commission was legally prevented from immediately drawing monies from the associated Letter of Credit. Pursuant to paragraph 16 of the 2017 Settlement Agreement adopted by the Commission in September 2017, determinations regarding good cause made by the Commission are “reviewable in an Article 78 proceeding in Court,” and “[n]o amounts related to such a “Good Cause Shown” demonstration will be drawn on the letter of credit until any such Article

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December 9, 2019  
Department of Public Service Response

78 remedies have been exhausted.<sup>1</sup>

Charter filed an Article 78 petition in Supreme Court, Albany County on November 26, 2018.<sup>2</sup> The commencement of that proceeding forestalled the Commission's ability to draw on the Letter of Credit because it challenged the Commission's underlying "good cause" determinations, i.e., that Charter missed its targets and failed to demonstrate good cause for those failures.

However, despite being legally prevented from collecting the \$3 million due under the letter of credit, the Commission promptly commenced an action in New York State Supreme Court in July 2018 in which it sought the maximum statutory penalties of \$100,000 per day for Charter's failure to meet its June 2018 requirement.<sup>3</sup> Moreover, the Commission also revoked the merger approval altogether in a July 27, 2018 Order. The Commission's actions/efforts taken to date are summarized briefly as follows:

1. First Settlement Agreement compliance filing was made by Charter, January 2018.
2. Department analysis was completed and Order to Show Cause was presented to Commission on March 15, 2018.
3. Charter was given opportunity to present Good Cause Shown and response to Order to Show Cause.
4. PSC rejected Charter's Order to Show Good Cause response on June 14, 2018 and directed draw on letter of credit in amount of \$1 million for December miss, and \$1 million for not being in compliance within three months of the target date.
5. Following the filing of Charter's June 2018 compliance report showing continued non-compliance, the Commission acted in special session to:
  - a. draw on letter of credit in amount of \$1 million for the June 2018 miss;
  - b. direct counsel to immediately commence an action in court to seek maximum statutory penalties; and
  - c. revoke 2016 approval of the merger due to persistent non-compliance.
6. Following the filing of enforcement proceedings, the Department and Charter

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<sup>1</sup> Case 15-M-0388, Charter Communications and Time Warner Cable – Transfer of Control, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreements (issued September 14, 2017).

<sup>2</sup> *Charter Communications, Inc v. New York Public Service Commission* (Albany County Supreme Court Index No. 907147-18).

<sup>3</sup> *State of New York Public Service Commission v. Charter Communications, Inc.* (Albany County Supreme Court Index No. 4819-18) (filed July 27, 2019).

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December 9, 2019  
Department of Public Service Response

engaged in litigation efforts as well as settlement discussions to resolve all disputes related to the June and July Orders.

7. The Department reached a Settlement Agreement with Charter on April 19, 2019 and the Commission approved the Settlement Agreement in a July 11, 2019 Order. The Settlement Agreement requires Charter to meet the network expansion by using addresses entirely in Upstate New York, and to pay \$12 million for additional network expansion beyond the 145,000-passing condition. The settlement also establishes frequent milestones for the remainder of the network expansion and requires additional payments for future non-compliance. In that same Order, the Commission rendered moot its Revocation Order as well as previous Orders determining Charter's non-compliance.

As a result of the July 2019 Settlement Agreement, Department Staff estimates that Charter will need to spend more than \$600 million, more than two times the amount originally estimated by the Commission as the public benefit value of the Network Expansion condition. In short, the Department and the Commission have implemented timely and substantial administrative and civil actions to remedy/resolve Charter's failures to comply with the Merger Approval Order's network expansion condition.

**State Comptroller's Comment 5** - While the Department asserted that it has implemented timely actions to remedy Charter's failures to comply with the Order's network expansion condition, nearly half of the 145,000 premises were not receiving these services as of July 2019 – approximately 3½ years into the 4-year condition completion period according to the original Order approved in January 2016. Charter now has until September 2021 to complete the expansion – one year and eight months later than originally scheduled.

**Condition 2: Network Speed Enhancement** - OSC has asserted that “[w]hile the commitment to testing is encouraging, the Department and Commission should consider the feasibility of future Order conditions while drafting them, rather than relying on reported information or retrospectively attempting to monitor for compliance after a deadline has passed.”

**Department Response:** The Department disagrees with this observation. The July 2018 Revocation Order rendered the conditions of the 2016 merger moot and was issued before the network speed condition deadline. Following the Revocation Order, the Department was dedicated to litigation preparation and settlement discussions. The Department reached a Settlement Agreement with Charter on April 19, 2019 and the Commission approved the Settlement Agreement in a July 11, 2019 Order. In that same Order, the Commission rendered moot its Revocation Order as well as previous Orders determining Charter's non-compliance, thus reinstating the 2016 merger conditions (and modifying the network expansion condition consistent with the Settlement Agreement).

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December 9, 2019  
Department of Public Service Response

While correct that Department Staff had not yet acquired specialized broadband speed equipment at the end of 2018 when the first portion of the Charter speed enhancement requirement was due, Staff's verification of Charter's compliance with either of the speed enhancement conditions was not contingent upon only a single action of conducting physical speed tests to determine compliance. Indeed, the Order conditions were not defined, or limited to, a single verification process such as a speed test because the speed enhancement work by which the conditions were to be achieved by Charter were of a lengthy duration, complex and comprehensive in nature.

As planned and undertaken, Staff employed various means to verify speed enhancement compliance, including review of the company's website for service availability and marketing information; review of certain subscribership data; and even via anecdotal evidence, such as speed tests in Staff homes subscribed to Charter broadband service. Importantly, Staff engaged Charter in continuous and ongoing technical discussions, to ascertain how network enhancements were progressing with inside plant (headends), outside plant (transportation and distribution network) and customer premises (cable modems) facilities, to help gauge the work being completed to fulfill the speed enhancement conditions. These technical discussions resulted, in part, with details expressed in periodically filed company progress reports. It is also important to note that, with respect to both the 100 Mbps and 300 Mbps broadband speed conditions for Charter, the Commission and Department were already aware that approximately half of the former Time Warner Cable (TWC) customer base (all of the NYC region) was already in compliance with both portions of the speed enhancement condition, since the NYC region was already capable of receiving broadband service with download speeds of 300 Mbps (TWC MAXX Service) pre-merger. In addition, a large portion of the legacy Charter footprint (the Plattsburgh systems), was already capable of receiving broadband service with download speeds of 100 Mbps pre-merger. Both companies advertised, marketed and sold those broadband services to portions of their respective customer base before the transaction was considered, or approved, by the Commission.

In November 2017, Charter announced, via its website and blog, (<https://policy.charter.com/blog/increasing-broadband-speeds-giving-customers-less>), that the company would be increasing broadband speed increases to 100 Mbps, in virtually every market area, by the end of the year. As noted in the company blog, broadband speed increases were observed by Staff who live in the Charter service footprint and subscribed to Charter services. Staff took further steps to validate Charter's speed enhancement work by comparing technical information submitted by the companies during pre-merger approval review. The company provided granular data on its bonded channel capabilities in every franchise area of the state. At the time, in areas outside of the TWC MAXX service areas, essentially all of Upstate, the network did not have enough bonded channels to meet the terms of the Order conditions.

In order to create more bonded channels, which itself is a requisite action necessary to increase broadband download speeds to comply with the Order conditions, the company employed "spectrum farming," which entails re-allocation of spectrum bandwidth for other purposes. When post-merger construction data was compared to pre-merger data, the sequential equipment upgrades, and spectrum farming results clearly indicated that Charter had substantially enhanced its network design. The number of bonded channels available for broadband service had doubled,

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December 9, 2019  
Department of Public Service Response

and in some instances, quadrupled, evidencing that the network was capable of broadband download speeds in excess of 300 Mbps. Staff verified the actual broadband download speeds with random tests. The field tests helped validate that the company investments in network re-configuration and architectural upgrades that were made in order to increase the number of bonded channels, and which were necessary to provide broadband service with download speeds greater than 300 Mbps, were completed and working as expected.

Staff has completed its random testing of Charter's Eastern, Central, Western, and Hudson Divisions. Test results have demonstrated compliance with each division averaging over 1 Gbps download speeds, which is above the Order's 300 Mbps requirement for the end of 2019. On Friday, December 6, 2019, Staff completed testing in the NYC Division, and the preliminary analysis from those tests further confirms that the NYC Division complies with this requirement. As of December 6, 2019, DPS staff had conducted 2,016 broadband download speed tests at 200 in-the-field locations across Charter's five divisions in New York State. While Staff has performed these random, supplemental broadband download speed tests of the Charter (and Altice) network, Staff has also annotated the number of active bonded channels for broadband download service. The bonded channel observations made during field testing, again, confirm and cross-validate Staff's previous review and verification of the company's written records of network speed enhancements, the company marketing materials and website service offerings, its FCC-provided "SamKnows" data; Staff's technical discussions with the company's work progression, and Staff's anecdotal observations of service performance. Staff is confident that, in all areas field tested to date, the Charter network is capable of providing broadband service with download speed in excess of 300 Mbps, and the network itself has the potential to provide download speed beyond 1 Gbps. In fact, the company is marketing 1 Gbps service in much of the New York State service footprint.

[State Comptroller's Comment 6 - While we appreciate the actions reported by the Department, this information was not provided to auditors until after we issued our draft report and, therefore, we could not verify it. Additionally, had the Department truly believed that these actions were sufficient to definitively and accurately document network speeds, there would have been no need to purchase the specialized broadband speed equipment in August 2019.](#)

**Condition 3: Free Broadband Expansion** - OSC has asserted that "[c]learly stating deadlines and consequences in Orders would help promote compliance by establishing guidelines for Department monitoring."

**Department Response:** The Department recognizes the Comptroller's concern regarding defined deadlines in Commission Orders, however, it partially disagrees. As discussed above, the July 2018 Revocation Order rendered moot this condition. The Department reached a Settlement Agreement with Charter on April 19, 2019 and the Commission approved the Settlement Agreement in a July 11, 2019 Order. In that same Order, the Commission rendered moot its Revocation Order as well as previous Orders determining Charter's non-compliance, thus reinstating this condition.

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December 9, 2019  
Department of Public Service Response

Although Charter did share a list of institutions it believed would benefit from free broadband service with Staff at a meeting held at the Department in the spring of 2017, Charter was not willing to provide Staff with the list as it was created from a list of institutions that were receiving free service from TWC and company personnel believed that providing that list would be in conflict with cable customer privacy protections under federal law. The list was described by Charter to Staff as containing locations across Charter's entire footprint (including NYC). At that point, Staff and Charter began developing the criteria for selecting the 50 anchor institutions in order to provide the most benefit across the State. Staff suggested that the criteria include schools, libraries, or community centers, located outside of NYC, Westchester, or Hamilton Counties and focus on low income cities/area (household income of approximately \$48,000). Citing federal customer privacy issues, Charter continually refused to provide an actual list.

After multiple discussions, Charter finally provided a list of the 50 Anchor Institutions on July 17, 2019 and included bill copies and/or account screen shots demonstrating no charge for broadband service to these institutions. Staff has been able to independently confirm that 33 of the 50 institutions are receiving broadband service from Charter at no charge. For the remaining institutions, Charter was asked to provide additional evidence that these institutions have been provided this complimentary service. If Charter cannot definitively demonstrate that the 17 institutions are receiving free service, Charter must select a replacement institution in order to fulfill this condition. Once Charter has provided this information, Staff will then begin its independent confirmation.

[State Comptroller's Comment 7](#) - We are not in a position to determine the actual effect the revocation order had on the timely completion of this condition due to the lack of a deadline in the original Order.

**Condition 4: Customer Service** - OSC has asserted that the Department's "[r]eliance on reported information without verification, especially in the case of demonstrated non-compliance and inaccurate data in other areas, does not create a valid basis for monitoring and enforcement of Order conditions"

**Department Response:** The Department disagrees with this observation. Charter had until May 2018 to comply with this requirement. In its May 2018 Annual Update, Charter provided a list of expenditures totaling over \$90 million to comply with this condition. From that list, Staff identified completed projects totaling approximately \$70 million that were dedicated to New York State. To verify these expenditures, Staff requested and analyzed actual invoices to determine whether the expenditures were made. Before further work was done to continue verifying this information, the Revocation Order was issued.

From July 2018 to July 2019, Staff resources were dedicated to settlement negotiations and litigation preparation related to the Revocation Order issued by the Commission, which rendered this condition moot. The Department reached a Settlement Agreement with Charter on April 19, 2019 and the Commission approved the Settlement Agreement in a July 11, 2019 Order. In that

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December 9, 2019  
Department of Public Service Response

same Order, the Commission rendered moot its Revocation Order as well as previous Orders determining Charter's non-compliance, thus re-instating all other conditions contained in the 2016 merger order (and modifying the network expansion condition consistent with the Settlement Agreement).

Staff has resumed examining and verifying Charter's investments in service quality improvements and will follow the same procedures utilized to verify Altice's compliance with similar investment requirements (described below). Per that procedure, Staff is examining the expenditures and related invoices provided by Charter to determine whether the funds were specifically invested towards service quality improvements.

**Altice**

**Condition 1: Network Speed Enhancement** - OSC has asserted that the "Department was unable to verify these system upgrades because . . . it lacks equipment necessary to perform network speed testing."

**Department Response:** The Department recognizes the Comptroller's concern regarding network speed testing; however it partially disagrees. The Order condition required Altice to make investments to ensure the company could offer 300 Mbps (download) broadband service over the network by the end of 2017. While it is true the Department did not purchase the necessary equipment to test network speed until August 2019, Staff had been taking steps since the Order's issuance to do so. In late 2016, Staff did extensive research regarding the equipment necessary to test this condition and initially considered re-outfitting multiple vehicles with new Telecom test equipment resulting in an equipment request that was more expansive than that needed to only test Order compliance. Staff submitted this initial request in January 2017 and received approval to purchase in February 2017. Subsequent to that approval due to rapid, significant, and ongoing technological changes, Department Staff re-evaluated its technology needs for a complete re-outfitting of its vehicles. Accordingly, Department Staff researched and evaluated equipment needed to perform broadband speed testing only. As a result of these ongoing technology changes and updates, the Department acquired the test equipment in June 2019.

In the interim, Staff employed various other means to verify speed enhancement compliance, including review of the company's website for service availability and marketing information; review of certain subscribership data; analysis of technical data; and monitoring of network speed complaints submitted by customers. Over the past 9 months, the Department developed testing protocols, conducted Staff training, met with Altice, reviewed test processes, scheduled pre-tests in the Hudson Valley, and upon successful pre-tests, commenced compliance testing of the Altice network on August 12. Department Field Inspectors performed over 1,200 download speed tests at 120 randomly selected locations (40 locations in each of Altice's three operating divisions: Hudson Valley, Long Island, and New York City. Ten repetitive tests were conducted at each test location, for a total of at least 400 tests in each of the three operating divisions). Test

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December 9, 2019  
Department of Public Service Response

locations were randomly selected and Altice was not informed of the exact test locations to be visited prior to each daily excursion to prevent system grooming prior to Department testing.

Broadband testing concluded on August 29 and overall found that for 111 of the 120 locations where repetitive tests were performed (10 repetitive individual tests per location to derive an average download speed), each individual test had results in excess of 300 Mbps. For the remaining nine locations, where one or two of the 10 repetitive individual tests (a total of 10 out of 90) recorded results less than 300 Mbps, the average download speed of the 10 tests combined yielded results well above 300 Mbps<sup>4</sup>. Department inspectors did not encounter any locations where there was repetitive download speed testing below 300 Mbps speed. Had inspectors encountered repetitive download test results below 300 Mbps, it could be an indicator that something in the network (cabling, active electronics, passive devices, or faulty headend equipment or some other factor) was causing the consistent low speed broadband service at the test location, which would have led to further Department analysis and review. However, based on Staff's review of test results, Staff has determined that, to date, Altice has fulfilled this Order condition requirement.

**State Comptroller's Comment 8** - Again, while we appreciate the actions reported by the Department, this information was not provided to auditors until after we issued our draft report and, therefore, we could not verify it. Regardless of the reason, the Commission issued an Order with a condition for which the Department had no means to definitively confirm compliance. Further, the testing was performed well after the end of the 2017 deadline for compliance.

**Condition 2: Broadband Access** - OSC has asserted that the "Department should have begun verification [of broadband service] soon after Altice reported locations to ensure they did indeed receive the required services."

**Department Response:** The Department disagrees with this observation. In compliance with the Order, Altice provided free broadband service to 40 anchor institutions by June 2019. As of Altice's June 2019 filing, the Department's Consumer Outreach and Education unit within the Office of Consumer Services has verified that the free service was provided to each institution.

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<sup>4</sup> Ten tests, measured at nine different locations, resulted in speed tests below 300 Mbps, however, Staff notes that the test methodology at each test location included a minimum of ten discreet speed tests per location. Multiple repetitive tests were conducted to ascertain network operating conditions, which vary continuously throughout the day as customers on the network log on and off, and in recognition of other activities or factors that affect the broadband throughput measurement and affect the capabilities of the network. Thus, a single test result measured below 300 Mbps is not a sole indicator that the network is not designed or upgraded properly, operating incorrectly, or incapable of providing 300 Mbps service. The average broadband download speed at the nine locations where a speed test measurement below 300 Mbps was recorded were as follows: Location 1, 493 Mbps average; Location 2, 502 Mbps average; Location 3, 473 Mbps average; Location 4, 498 Mbps average; Location 5, 511 Mbps average; Location 6, 410 Mbps average; Location 7, 513 Mbps average; Location 8, 514 Mbps average; Location 9, 481 Mbps average.

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December 9, 2019  
Department of Public Service Response

While it is the Department's normal operating procedure to verify compliance on or soon after a condition due date has expired, in this case Staff simply completed the process early to satisfy the auditors. Staff had been actively monitoring and questioning the company's progress towards completing the requirement. At the time of OSC's audit, Altice had over five months remaining to achieve full compliance. Altice has the right to utilize the full time period granted under the Commission Order to fulfill the requirements. The company was aware that failure to comply with an Order will result in a penalty.

**State Comptroller's Comment 9** - The Department's normal operating procedure is to perform a full verification of compliance for conditions at or soon after the deadline. This monitoring effort should be supplemented with periodic sample testing of the data submitted to determine if the utility is on track to fully comply with the condition timely or if adjustments need to be made. This is especially important when utilities submit data that is inaccurate and that portrays the utilities as meeting expectations when, in fact, they are not.

**Condition 3: Customer Service** - OSC has asserted that "the Department did not verify that the required investments had been made [by Altice]."

**Department Response:** The Department agrees that the issue should have been identified and investigated by Staff in a timelier manner. Staff reviewed Altice filings detailing \$7.6 million in investments designed to address the missed trouble call metric and analyzed the company's service quality data to determine whether the investments resulted in metric improvements.

On three separate occasions (3rd quarter 2017, and 1st and 2nd quarters 2018), Staff found that Altice failed to meet the trouble call metric, while at a consolidated net leverage ratio below 6.0x, resulting in the requirement to invest \$1.5 million in service improvements (\$500,000 for each miss). As required, Altice filed documentation with the Department detailing the investments made to improve customer service following each quarterly metric miss. For example, the company reported that it hired additional Staff in specific areas to address trouble call deficiencies. Staff reviewed the Altice filing and determined that, cumulatively, the company made qualifying investments of more than \$7.6 million, or more than five times the required amount. Staff also engaged in discussions with the company to determine if the investments were reasonable and subsequently analyzed the actual service quality data in subsequent quarters to ascertain whether the company's investments resulted in actual metric improvements. Staff noted that Altice's performance under the 90 percent trouble call resolution within two days metric has improved post-investment, and the company has not missed the service quality metric since mid-2018.

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December 9, 2019  
Department of Public Service Response

**FairPoint Communications**

**Condition 1:** Network Reliability and Service Quality Improvements - OSC has asserted that the “Department should not wait until the deadline to determine if the utility will meet the conditions of the Order” and that “Incremental monitoring of this requirement would give the Department a better idea of FairPoint’s compliance, allowing the potential for timely corrective actions should FairPoint not be on track to accomplish its goal.”

**Department Response:** The Department disagrees with this observation. Staff has continuously monitored the expansion progress via meetings and analysis of project update reports from the company. Staff met with the company on May 30, 2019 to discuss the revised \$4M investment plan. The plan needed to be revised to allocate funds originally intended to be used in a BPO Phase 3 project to the remaining two planned projects, as the company was not awarded a BPO Phase 3 award.

In a July 1, 2019 worksheet FairPoint listed \$813,000 in expenditures, approximately \$200,000 of that for 4 projects that had been completed. Staff has been auditing projects/expenditures as projects are completed. The Office of Accounting, Audits and Finance (OAAF) has been conducting its audit of completed FairPoint projects in compliance with this condition by requesting and examining the list of vouchers that make up the completed projects, requesting a sampling of external vouchers from this list, and confirming that the expenditures were incurred by tracing them from the voucher through the general ledger. Using this process, OAAF confirmed \$101,000, or 50% of the \$200,000 that make up those 4 completed projects. On November 12, 2019, FairPoint reported that through the third quarter of 2019 it had spent \$2.645 million toward the \$4 million order requirement. Staff will continue the process outlined above to verify expenditures on completed projects. Necessary field audits of completed projects will also be performed. This condition needs to be completed by July 2020. Staff has no reason to think at this point that FairPoint will not be able to fulfill its commitment by that date and FairPoint has indicated that it is confident that the company will meet its \$4 million commitment by July 3, 2020.

**Condition 2: Staffing Requirements** – OSC has asserted that “the Department does not routinely verify the data provided by utility companies in support of its compliance with the Orders.

**Department Response:** The Department partially agrees with this observation. On August 1, 2018 Staff contacted FairPoint to request information on Clause 7 of the agreement (number of customer facing jobs), including the nine positions eliminated by the company. On August 9, 2018 FairPoint’s filing indicated that the nine positions were incorrectly categorized as customer facing and had been appropriately reclassified. While Staff took the necessary action to investigate and determine there was no problem, Staff did not document the decision. When

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December 9, 2019  
Department of Public Service Response

questioned by the auditors, Staff obtained the necessary information from the company to formally document the decision.

### **Performance Plans**

**Electric Reliability** - OSC has asserted that the “Department does not audit or take additional actions to verify the utilities’ self-reported metrics until rate cases are conducted.”

**Department Response:** The Department recognizes the audit’s concern and has instructed Staff to increase sampling of raw data to verify data continuity. However, it should be noted that self-reported data submitted by the utilities represents only one part of the information used by Staff when performing their monitoring activities. Staff reviews the data for reasonableness and whether it proves compliance with the corresponding Order conditions. Staff are granted the authority to question any information received from the companies and often do so. Self-reported data per 16NYCRR Part 97 is meant to provide a broad picture of how the companies are performing on a monthly and annual basis. The companies’ reliability data performance has been independently verified on an as needed basis in the past through audits, including reliability data specific audits or overall operations audits conducted by the Department’s Office of Accounting, Audits and Finance. Such efforts are expected to continue as needed in the future.

In addition, had the data discrepancies noted by this audit been of statistical significance with regard to measurable benchmarks, Staff would have performed additional data reviews to identify and correct these discrepancies.

### **Electric Safety**

OSC has questioned the Staff’s verification of information received from the utilities.

**Department Response:** The Department recognizes the audit’s concern regarding the utilities’ requirement to inspect 100 percent of facilities within a five-year cycle. On average the utilities inspect 700,000 to 750,000 electric facilities each year. The Department does not have (nor does it need to have) the resources to inspect, or verify the utilities’ inspection of 100 percent of the facilities during that time. Maintaining a roster of each utility’s electric facilities is not the highest use of Staff resources, especially since Staff requests and reviews utility facilities inspection data as part of periodic investigation efforts of customer complaints or other service inquiries as another means of tracking and verifying utility data. For example, Staff often receives customer complaints relating to pole conditions or vegetation management concerns. As part of our initial review and analysis of these complaints, Staff first identifies when the facilities in question were last inspected by the utility to ensure compliance with the safety standards as well as general asset conditions. Any instances where inconsistencies/inaccuracies are identified, Staff would perform a more in-depth analysis as part of its reconciliation efforts.

Staff also performs annual site visits and field audits of a sample size of utility facilities to verify

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December 9, 2019  
Department of Public Service Response

utility compliance with the Commission's electric safety standards. In 2018, Staff performed 65 field inspections and verifications of the utilities' safety standards compliance efforts across each of the utilities service territories and operating divisions. Results of these field visits are recorded and shared with the utilities as part of the tracking and monitoring efforts. Additionally, if through Staff's monitoring it is determined the utility has not conducted the required number of testing and inspections, a performance target is in place that could result in a negative revenue adjustment of 75 basis points (150 for both testing and inspections) to the utility.

### **Utility Service Quality**

OSC has asserted that the Department did not discover a discrepancy of utility RG&E because it did not audit utility service metrics at the time of the occurrence and would not have identified the accurate amount of the NRA.

**Department Response:** The Department partially agrees with this observation. Customer Service Performance Indicators and Service Quality Performance Mechanisms are self-reported by the utilities. Traditionally, the companies have self-reported their annual performance calculations for each performance metric to Staff. For 2017 data, Staff reported this unaudited information to the Commission as an "informational item". The Commission took no action as a result of the information reported nor did the report to the Commission include any Staff recommendations or conclusions. This information was then audited during each utility's subsequent rate case.

The Department however, recognizes the audit's concern and has taken steps to enact improvements. The Department's processes and procedures have been revised for 2018 data and all years going forward. Staff now assembles the data provided by the utilities and audits this information for accuracy. Staff contacts the utilities, requesting the raw data and confirms any changes that have been made to the reports during the year. If discrepancies are noted, Staff works with the utilities to determine the cause of the discrepancy and establish corrective measures to ensure similar errors do not happen in the future. During its audit of the 2018 data, Staff found several instances of discrepancies with the figures provided by the utilities. Corrective measures have been taken by the utilities, which include: updating their process and procedures; providing additional details not addressed in each utility's metrics manual; altering computer system programs; and, adding further internal audits of the data to ensure accuracy. Following the review and correspondences with the utilities, Staff is satisfied that these errors were corrected and the utilities will maintain these changes on a forward-going basis.

Staff has drafted written procedures to document the process and the steps necessary to properly audit the data and related information. These revised processes will be utilized next year when auditing the utilities' 2019 data reported to the Commission.

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December 9, 2019  
Department of Public Service Response

### **OSC Recommendations and Department Responses**

**OSC Recommendation 1:** Actively monitor all conditions listed in Commission Orders to ensure all utilities are in compliance.

**Department Response:** The Department agrees with this recommendation but strongly believes that it is already diligently monitoring the companies' compliance with the ordering clauses.

Staff utilizes documents submitted by the utilities (e.g. monthly, quarterly and annual reports) to actively monitor the utilities' progress in completing Order requirements. Data is analyzed and questioned to ensure the utilities remain on track to fulfill the Order requirements by established due dates. Continuous monitoring provides Staff with an indication of whether the company will complete the Order requirements on schedule enabling Staff to work with the company to ensure deadlines are met. At or soon after the deadline passes Staff verifies that the Order requirements have been completed. The companies are aware that failure to comply with an Order will result in a penalty or negative rate adjustment in the subsequent rate filing.

Compliance reporting is a key control utilized by the Department to ensure the companies are adhering to the requirements of Order conditions. The companies face stiff penalty under New York State law for reporting falsified information to the Department, see, e.g., NY Penal Law Article 175 (offenses involving false written statements). When utilities file information to the Department, it is considered an attestation that the submitted information is correct. In addition, the Department's Offices utilize a risk-based approach to ensure its finite resources are used in the most efficient and effective manner while focusing monitoring efforts on the greatest areas of risk. Through a combination of site visits, annual audits, management performance audits and analysis of consumer complaints, the Offices are continuously monitoring the utilities.

The Department is committed to improve the efficiency and effectiveness of its processes and has tasked a Lean project team with conducting a comprehensive review of the existing Order condition monitoring processes. This will include determining where current processes can be streamlined and/or homogenized and developing more efficient and effective methods by which utility performance is monitored. This project began in November 2019.

**State Comptroller's Comment 10** - As also addressed in Comment 9, the Department's normal operating procedure of waiting until the deadline or soon after to perform a full verification of compliance creates the risk that, where a utility has been failing to meet expectations all along, customers have been missing out on the services that the condition was meant to provide. We are pleased to see the Department is initiating a project to review its monitoring process.

**OSC Recommendation 2:** Develop and issue Orders that include well-defined, measurable, and enforceable conditions. The Orders should also include the consequences for non-compliance, as appropriate.

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December 9, 2019  
Department of Public Service Response

**Department Response:** The Department agrees with this recommendation. Well-defined, measurable and enforceable conditions are essential elements of a Commission Order. The Department feels that its Orders as currently written already include these elements, particularly for the most valuable conditions (e.g. buildout and speed upgrade conditions worth hundreds of millions of dollars vs free service to anchor institutions worth a few thousand dollars). However, the Department can appreciate that some conditions may seem ambiguous to outside parties and, therefore, will ensure all future Order conditions include specific requirements such as established dates and timeframes for compliance obligations.

Regarding consequences for non-compliance however, there is no legal or policy reason to include potential consequences in each and every order issued by the Commission since the New York State legislature has already specified what the potential consequences are for violating Commission orders as established in PSL sections 25, 25-a, and 26. The PSL sets out maximum financial penalty consequences for violating agency orders and vests the Department with enforcement discretion to fashion enforcement remedies.

**OSC Recommendation 3:** Verify the accuracy of data submitted by utilities that is used by the Commission or Department to evaluate or make decisions concerning the utilities. This includes data submitted for performance metrics, safety standards, and Utility Service Quality Reports.

**Department Response:** The Department agrees with this recommendation but strongly believes that it is already in compliance. Neither Staff nor the Commission rely on unaudited information to make any decisions that will affect the utilities or the State's ratepayers. All information used to establish utility rates, issue Negative Rate Adjustments, or make important decisions is fully audited during the Department's comprehensive rate case process and the Offices' annual audit activities.

Regarding the utilities' self-reported data, the Department recognizes the audit's concerns and has implemented improvements as discussed above and will continue to incorporate those improvements throughout the Offices.

**OSC Recommendation 4:** Develop policies and procedures that provide employees with standard monitoring steps to perform when overseeing compliance with merger or acquisition Orders, as well as steps addressing the auditing of data submitted in support of Utility Service Quality Reports.

**Department Response:** The Department agrees with this recommendation. The Offices have been instructed to review current policies and procedures to ensure these documents are up-to-date and the process changes described in the Department's response have been incorporated and disseminated to appropriate Staff. Additional review will be conducted by the Lean project team when reviewing the process utilized to monitor Order compliance.

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December 9, 2019  
Department of Public Service Response

Please feel free to contact me if additional information or clarification is needed.

Sincerely,

A handwritten signature in black ink that reads "John B. Rhodes". The signature is written in a cursive style with a large initial "J" and "B".

John B. Rhodes

Chair

# Contributors to Report

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