

**LAURA M. MILLER** | Partner

[lmiller@sh-law.com](mailto:lmiller@sh-law.com)

Direct Phone: 201-896-7121 | Fax: 201-896-7122

May 12, 2020

**Via Email ([board.secretary@bpu.nj.gov](mailto:board.secretary@bpu.nj.gov))**

Aida Camacho-Welch, Secretary

Board of Public Utilities

44 South Clinton Avenue

9th Floor

Trenton, NJ 08625

**Re: In the Matter of the Petition of Charter Communications, Inc. for Relief Pursuant to N.J.A.C. 14:18-16.7  
Response to Rate Counsel's February 27, 2020 Amended Comments  
BPU Docket No. CO19101329  
Our File No. 41008.1000**

Dear Secretary Camacho-Welch:

This firm represents Charter Communications, Inc. ("Charter" or the "Company"), in connection with the above-captioned matter.

Kindly accept this correspondence as a response to the amended comments dated February 27, 2020 (the "Amended Comments") submitted to the Board of Public Utilities (the "Board") by the Division of Rate Counsel ("Rate Counsel") in regard to Charter's Petition for Relief Pursuant to N.J.A.C. 14:18-16.7 (the "Petition").

**Introduction:** The Board has established that relief from certain regulations affecting cable operators is appropriate when the Federal Communications Commission (the "FCC") has determined that effective competition is present.<sup>1/</sup> This standard is set forth clearly in the Board's rules,<sup>2/</sup> and the Board has twice upheld, over Rate Counsel's objections,<sup>3/</sup> application of

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<sup>1/</sup> See Board of Public Utilities, *Proposed Readoption with Amendments: N.J.A.C. 14:18*, 31 N.J.R. 3061(a), at 15 (Oct. 18, 1999) ("*Proposed Readoption*"); *Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7*, Docket No. CO11050279, Order, at \*15 (Sept. 22, 2011) ("*Cablevision Waiver Order*") (stating that, in adopting Section 14:18-16.7, the Board had "identified specific provisions of its cable television rules . . . for which a cable television company may seek relief, and [] explicitly determined that upon a final finding of effective competition, the Board could relieve a cable television company of these provisions since such relief would not harm customers").

<sup>2/</sup> See N.J.A.C. 14:18-16.7; *see also* Petition at 1-3.

this straightforward standard—where “a cable television operator is found to be subject to effective competition pursuant to 47 C.F.R. § 76.905, certain provisions of this chapter *will not apply to it.*”<sup>4/</sup>

Nevertheless, Rate Counsel now attempts for a third time to persuade the Board that a cable operator, having met the criteria set forth above, must also meet unspecified evidentiary burdens of Rate Counsel’s own devising in order for the Board to grant the requested relief. Specifically, Rate Counsel contends that “the six regulations requested for waiver in [the Petition]” should “not be waived by the Board absent factual and evidentiary proof that support and warrant the Board’s grant of regulatory waiver relief.”<sup>5/</sup> This purported requirement for relief is fashioned from whole cloth, as evidenced by Rate Counsel’s failure to adequately define or provide any legal support for the criteria it claims should be satisfied. Rate Counsel’s arguments for denying the Petition based on Charter’s purported failure to meet an evidentiary burden that Rate Counsel itself has conjured (without even defining) are without merit.

To support its claim that Charter must furnish additional evidence (beyond a showing of effective competition) before the Petition’s requested relief is warranted, Rate Counsel principally relies upon general self-proclamations about consumer protection: e.g., “consumer protections . . . do not disappear merely upon the recognition of competition in the cable industry.”<sup>6/</sup> These are straw-man arguments that fail as a matter of logic and also as a matter of law. The Petition does not ask for the abolition of all consumer protections. It asks for precisely the targeted relief that the Board deemed appropriate based on the Board’s considered view (i) that the provisions enumerated in Section 14:18-16.7 were promulgated to address a “lack of competition” and (ii) that the authorized relief “should have no adverse effect on customers” where effective competition exists.<sup>7/</sup> Rate Counsel cannot negate Charter’s entitlement to relief from the specific regulatory provisions enumerated in Section 14:18-16.7 simply by observing that competition does not dispel consumer protections generally.

More importantly, as established above, there is simply no legal support for Rate Counsel’s core contention that Charter must build a factual record to justify its requests for relief. Under Section 14:18-6.7, if the FCC determines that effective competition exists in a franchise area, “the Board is obligated to grant the requested relief” when “satisfied that consumers are

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<sup>3/</sup> See Amended Comments at 2 (acknowledging that “the Board has previously granted waivers to Verizon and Cablevision, over Rate Counsel’s objections”).

<sup>4/</sup> *Proposed Readoption* at 15 (emphasis added); see also *Verizon New Jersey, Inc. for Relief of Compliance with Certain Provisions of N.J.A.C. 14:18 Pursuant to N.J.A.C. 14:18-16.7*, Docket No. CO10040249, Order, at \*5 (“*Verizon Waiver Order*”) (rejecting Rate Counsel’s argument that “Verizon has shown no empirical evidence as to why it should be granted relief”); *Cablevision Waiver Order* at \*12-13 (Sept. 22, 2011) (finding that Rate Counsel’s request that the Board “should deny the waiver requests because Cablevision has failed to sustain its burden of proof to show that the waivers are warranted” “are without merit and should be denied”).

<sup>5/</sup> Amended Comments at 2-3.

<sup>6/</sup> Amended Comments at 1.

<sup>7/</sup> *Proposed Readoption* at 15; see also *Cablevision Waiver Order* at \*15.

adequately protected.”<sup>8/</sup> No other factual predicate for granting the requested relief exists. As the Board emphasized in both the *Verizon* and *Cablevision Orders*, “the standard for rule relief deals with competition, not inability to perform or undue hardship as required for a waiver.”<sup>9/</sup> In rejecting Rate Counsel’s demands for additional evidence, the Board repeatedly credited the assertions by Verizon and Cablevision in their petitions as sufficient to grant relief,<sup>10/</sup> and hewed closely to the rationale that led to the adoption of Section 14:18-16.7—lifting the provisions enumerated in the rule will not harm consumer interests where effective competition exists to protect them.<sup>11/</sup> Rate Counsel has not and cannot allege that the Petition is in any way deficient compared to the relief petitions submitted by Verizon and Cablevision. It is therefore entirely appropriate and consistent with Section 14:18-16.7 for the Board to credit Charter’s statements in support of its requests for relief given the FCC’s finding of effective competition. The Amended Comments’ continuous assertions that Charter’s relief requests should be denied based on lack of evidence are thus red herrings. They are irrelevant under the standard and should be afforded no weight.<sup>12/</sup>

Finally, Rate Counsel invites the Board to simply disregard its precedents in the *Verizon* and *Cablevision Orders*,<sup>13/</sup> without even attempting to distinguish the Petition from Verizon’s or Cablevision’s successful relief submissions. Accepting Rate Counsel’s invitation would violate a fundamental principle of administrative law: similarly situated parties must be treated similarly absent adequate justification.<sup>14/</sup> Since Rate Counsel has not attempted to furnish any

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<sup>8/</sup> *Verizon Waiver Order* at \*7 (emphasis added).

<sup>9/</sup> *Verizon Waiver Order* at \*6; *see also Cablevision Waiver Order* at \*15 (“the standard of review for rule relief . . . deals with competition, rather than inability to perform or undue hardship”).

<sup>10/</sup> *See, e.g., Verizon Waiver Order* at \*10 (“Rate Counsel contends that Verizon has not proven why such relief should be granted . . . . The Board has accepted Verizon’s assertions . . . .”); *Cablevision Waiver Order* at \*22-23 (“Rate Counsel . . . argu[es] that Cablevision petition lacks empirical support . . . . The Board has accepted Cablevision’s assertions . . . .”).

<sup>11/</sup> *See, e.g., Verizon Waiver Order* at \*17-18 (Verizon maintaining that “it does not bear the burden of proof as characterized by Rate Counsel, to demonstrate adequately why the rule should be eliminated,” and the Board finding that “in a competitive environment, the cable television company can decide how and when to notice its customers”).

<sup>12/</sup> *See, e.g., Amended Comments* at 3 (“the information provided does not justify approval of the waiver relief requested by Charter in its filing”); *id.* at 5 (“The assertions presented by Charter as a basis for granting a waiver are not supported by the record.”); *id.* (“The facts and supporting evidence herein do not demonstrate the hardship claimed by Charter to warrant waiver of this regulation and Board precedent alone is insufficient for a finding that waiver relief is warranted.”).

<sup>13/</sup> *Amended Comments* at 3.

<sup>14/</sup> *See McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (“[W]e remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.”); *Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (FCC must provide an adequate explanation to justify treating similarly situated parties differently); *see also, e.g., Miller v. DMV*, 2002 N.J. AGEN LEXIS 108, at \*17 (N.J. Office of Admin. Law, Jan. 28, 2002) (following non-binding precedent based on the principle that “similarly situated parties should be treated similarly”).

such justification, its requested denial of the Petition should be rejected on that basis alone. Accepting Rate Counsel's invitation would also be illogical—denying Charter relief would make Charter less competitive compared to cable operators who have already been granted relief, thereby tending to inhibit the free functioning of the market and to diminish the competitiveness that the Board has determined protects consumers. Moreover, proposing the imposition of additional burdens as a condition of relief for certain requirements undermines the purpose of the statute and is counterproductive.

In short, the Petition satisfies the straightforward criteria for granting the requested relief. Rate Counsel has presented no valid argument to support its request for denial (and, indeed, has presented no argument that the Board has not already expressly rejected). As a result, arbitrarily denying the Petition, given the Board's approval of relief for Verizon and Cablevision, would subject Charter to unlawful and disparate treatment.

Rate Counsel Amended Comments: Charter addresses Rate Counsel's objections to five of the regulations for which Charter seeks relief as follows:<sup>15/</sup>

**N.J.A.C. 14:18-3.15, Trial and promotional services.** Rate Counsel claims that Charter has not provided sufficiently detailed information, explanations, or evidence regarding “the number of trial services . . .”, “the costs associated with [recordkeeping] . . .”, the “number of pre-notifications of trial products or services [during the last three years] . . .”, “costs incurred” for compliance during the last three years, “Charter's assertions that ‘all consumers benefit when offered discounts without prior notice or approval’”, and Charter's representation that “‘prior notice requirements delay the benefits of discount programs.’”<sup>16/</sup>

The Board rejected such arguments when Rate Counsel proffered them in both the Verizon and Cablevision regulatory relief proceedings, and Rate Counsel has adduced nothing that would support a different outcome here. In the Verizon and Cablevision proceedings, the Board accepted the companies' assertions that providing notice and keeping detailed records of trial services would be unnecessarily burdensome<sup>17/</sup> and granted the requested relief based on identical reasoning:

[S]ince trial services are for a limited time only (up to six months) and must thereafter either be introduced as a standard offering or discontinued, there is a limited time window for potential dispute. If introduced as a standard offering, [the company] would be required to provide notice to the Board of the terms and conditions of that service. Because of the limited nature of these trial services, the Board believes that customers are adequately protected.<sup>18/</sup>

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<sup>15/</sup> Rate Counsel does not oppose the Board granting Charter's Petition with respect to N.J.A.C. 14:18-7.6.

<sup>16/</sup> Amended Comments at 5

<sup>17/</sup> *Verizon Waiver Order* at \*10; *Cablevision Waiver Order* at \*23.

<sup>18/</sup> *Verizon Waiver Order* at \*10; *Cablevision Waiver Order* at \*23.

Charter's submission makes precisely the same representations as did Verizon's and Cablevision's.<sup>19/</sup> Accordingly, the Board should follow its own precedent and grant the same relief to Charter.

**N.J.A.C. 14:18-3.17, Notice of alteration in channel allocation.** Rate Counsel argues that Charter fails to demonstrate that providing the required notices of channel allocation changes had a detrimental competitive impact and fails to provide information about the number of channel alterations notices filed within the past three years.<sup>20/</sup> As established above, there is simply no connection in Section 14:18-16.7 between the provision of such information and granting relief under the rule. A finding of effective competition, which the FCC has made, is the relevant factual predicate for relief. Moreover, the Board has twice previously recognized that the relief sought by Charter would not adversely impact customer notice protections for the common-sense reasons that customers generally do not learn about channel changes from channel allocations sheets and it is already in a cable operator's best interest to properly notify customers of channel additions.<sup>21/</sup>

Reaching for yet another standard that has no foundation in the relevant rule or in Board precedent, Rate Counsel also claims that the existence of certain federal written notice requirements means that the relief sought by Charter should be denied because the state notice requirements at issue here *ipso facto* cannot create an undue burden.<sup>22/</sup> Rate Counsel's argument does not follow as a matter of logic and is also irrelevant. Verizon and Cablevision were both granted relief from N.J.A.C. 14:18-3.17 on condition that the companies: (1) "continue to provide 30 day notice to the OCTV and to [] customers of any channel deletion in a manner reasonably calculated to provide such information"; (2) "notify the OCTV and [] customers no later than five days after the addition of a channel"; and (3) "file updated channel allocation sheets upon request of Board staff."<sup>23/</sup> Charter has already agreed to meet the conditions imposed by the Board upon Verizon and Cablevision in regard to N.J.A.C. 14:18-3.17.<sup>24/</sup> There is no bar to the Board granting the same relief here that it granted to Verizon and Cablevision.

**N.J.A.C. 14:18-3.20(a)(2) and (3), Notice of discounts for senior and disabled citizens.** Rate Counsel objects to Charter's request for relief from these provisions because, it claims, the elderly population is vulnerable and advance notice provides "cost saving opportunities for service."<sup>25/</sup> The Board, however, has already twice reached the common-sense conclusion that providing information regarding such cost saving opportunities is in the best interest of the cable

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<sup>19/</sup> Petition at 6-7.

<sup>20/</sup> Amended Comments at 7.

<sup>21/</sup> *Verizon Waiver Order* at \*13; *Cablevision Waiver Order* at \*26.

<sup>22/</sup> Amended Comments at 8.

<sup>23/</sup> *Verizon Waiver Order* at \*14; *Cablevision Waiver Order* at \*27.

<sup>24/</sup> Petition at 9-10. The only exception is that Charter asks that it be permitted ten, rather than five, days after a channel addition to notify the OCTV and customers.

<sup>25/</sup> Amended Comments at 10.

provider, since “[o]therwise, there would be no point to offering the discount.”<sup>26/</sup> In other words, in a competitive environment where potential customers are routinely shopping for the best available deal, including options from the numerous streaming services available to consumers today, a cable operator is obviously incentivized to promote and otherwise provide information about attractive cost saving opportunities that would help attract and retain customers.

Rate Counsel also repeats the refrain that waiver relief should be rejected absent an evidentiary showing by Charter, in this case, either of “detrimental impact” or of “how elimination of this regulation is beneficial to customers.”<sup>27/</sup> Rate Counsel fails to provide any authority for these contentions, nor did the Board require such a showing in the Verizon or Cablevision relief proceedings. Rather, the Board found that “customers are adequately protected” because quarterly notice of a discount would still be required under N.J.A.C. 14:18-3.18.<sup>28/</sup> The same determination is warranted here.

**N.J.A.C. 14:18-3.22, Notice of planned interruptions.** Rate Counsel objects to Charter’s request for relief from N.J.A.C. 14:18-3.22 based on the meritless and speculative argument that market incentives promoting customer notification of planned interruptions may be ineffective because customers may not actually avail themselves of competitive alternatives.<sup>29/</sup> This argument is breathtaking in scope. If Rate Counsel’s bare conjecture that customers might not explore competitive options were actually an obstacle to relief, no regulation intended to promote competition could ever be removed, even if competition were manifestly flourishing. The Board rejected Rate Counsel’s argument in the Verizon relief proceeding and should do so again here.<sup>30/</sup>

Rate Counsel’s suggestion that Charter should be denied relief absent proof that there is no consumer benefit to Section 14:18-3.22 is likewise unavailing. As established, the adoption of Section 14:18-16.7 reflects the Board’s prior determination that Section 14:18-3.22 could safely be eliminated if effective competition exists. Indeed, the very purpose of a rule such as Section 14:18-16.7 is to avoid petitioners having to prove anew with each petition that the relief requested is sensible. Rate Counsel, in fact, inadvertently confesses as much by requesting that the Board review customer service complaints filed within the last three years related to “planned service interruptions *and general service*.”<sup>31/</sup> Rate Counsel requests this approach—which Charter urges the Board to reject—so that, “[i]f review of complaints reveal [*sic*] service issues” the Board can require remediation of “the service quality issues discovered in review.”<sup>32/</sup> Not

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<sup>26/</sup> *Verizon Waiver Order* at \*16; *Cablevision Waiver Order* at \*28.

<sup>27/</sup> Amended Comments at 10.

<sup>28/</sup> *Verizon Waiver Order* at \*16; *Cablevision Waiver Order* at \*29.

<sup>29/</sup> Amended Comments at 10.

<sup>30/</sup> *Verizon Waiver Order* at \*17-18. Although Rate Counsel did not renew this argument in its opposition to Cablevision’s relief petition, which was decided six months after the *Verizon Waiver Order* issued, the Board nonetheless made the same finding in the *Cablevision Waiver Order*. *See id.* at \*31.

<sup>31/</sup> Amended Comments at 12 (emphasis added).

<sup>32/</sup> Amended Comments at 12.

only does this sentence conclusively establish that Rate Counsel has no compelling (or even discernible) basis for denying Charter relief, it also demonstrates Rate Counsel's apparent view that regulatory relief should be denied unless petitioner has boiled the ocean to prove that no problems exist. The Board's adoption of Section 14:18-16.7 stands as a rejection of Rate Counsel's view. Under the rule and under Board precedent, Charter has no obligation to make the showing Rate Counsel wishes, and the absence of such a showing is no basis to deny Charter the relief sought.

**N.J.A.C. 14:18-7.4, Notice of system rebuilds, upgrades, hub and headend relocations.** Rate Counsel again argues, without citing authority, that Charter must prove that continued application of Section 14:18-7.4 "curtails its ability to effectively compete" in order for the requested relief to be granted. Not so. Rate Counsel again ignores the Board's determination that relief is appropriate once effective competition is present. Similarly, Rate Counsel's suggestion that the Board review customer complaints filed within the last three years that are "attributable to the maintenance of the infrastructure and the general provision of safe and adequate service"<sup>33/</sup> is neither authorized by, nor germane to, the application of Section 14:18-16.7. After the FCC has made a finding of effective competition, no additional evidentiary support is required.

Notwithstanding Rate Counsel's objection, Rate Counsel notably states that it "does not oppose a Board grant of this waiver relief if the Board is satisfied that the rule relaxation is not detrimental to Charter customers and is in the public interest."<sup>34/</sup> As set forth in Charter's relief petition, continued imposition of the rule harms consumers by restricting the Company's ability to respond to established market forces and serve its customers. The requested relief is therefore in the public interest.

For the above reasons, the Board should reject Rate Counsel's Amended Comments and grant the relief sought by Charter in its Petition for Regulatory Relief.

Very truly yours,

*Laura M. Miller*

Laura M. Miller  
For the Firm

LMM/rj

cc: Paul E. Flanagan, Executive Director (paul.flanagan@bpu.nj.gov)  
Lawanda R. Gilbert, Director (lawanda.gilbert@bpu.state.nj.us)  
Harold Bond, Bureau Chief (harold.bond@bpu.nj.gov)  
Carol Ann Entenza-Artale, Legal Specialist (carol.artale@bpu.nj.gov)  
William H. Furlong, Bureau Chief (william.furlong@bpu.nj.gov)  
Caroline Vachier, Chief Deputy Attorney General ([caroline.vachier@law.njoag.gov](mailto:caroline.vachier@law.njoag.gov))

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<sup>33/</sup> Amended Comments at 13

<sup>34/</sup> Amended Comments at 14.

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Stefanie A. Brand, Director (sbrand@rpa.state.nj.us)

Maria T. Novas-Ruiz, Assistant Deputy Rate Counsel (mnovas-ruiz@rpa.state.nj.us)

**SCARINCI HOLLENBECK**