



FILED

5-04-15
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013
(Filed April 11, 2014)

And Related Matter.

Application 14-06-012
(Filed June 17, 2014)

**COMMENTS OF THE JOINT INTERVENORS ON THE
ALTERNATE PROPOSED DECISION DENYING APPLICATION TO TRANSFER CONTROL**

LINDSAY M. BROWN
Attorney

Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1960
Email: Lindsay.Brown@cpuc.ca.gov

TODD O'BOYLE
Program Director

Common Cause
1133 19th St NW, 9th Floor
Washington, DC 20036
Telephone: (202) 736-5797
Toboyle@commoncause.org

BILL NUSBAUM
Staff Attorney

The Utility Reform Network
785 Market St. Suite 1400
San Francisco, CA 94103
Telephone: (415) 929-8876
Email: bnusbaum@pacbell.net

TRACY ROSENBERG
Executive Director

Media Alliance
1904 Franklin Street, # 818
Oakland, CA 94612
Telephone: (510) 832-9000
tracy@media-alliance.org

May 4, 2015

151492280

I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure and the Administrative Law Judge's (ALJ) Rulings of April 30, 2015 and May 1, 2015,¹ the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), Consumers Union and Media Alliance (collectively, "Joint Intervenors") submit these comments in support of the Alternate Proposed Decision Denying Application to Transfer Control (APD). The APD correctly denies the merger because the Joint Applicants did not meet their burden of proof and because the transaction is not in the public interest. And the status of those broadband lines post-merger is unclear.

That Joint Applicants² have now requested to withdraw their merger Applications before the CPUC,³ and both the Federal Communications Commission (FCC) and the State of New York have dismissed the Joint Applicants' merger proceedings in those venues, raises the question of why the APD remains important.⁴ Consolidation of this magnitude in the communications marketplace is an ongoing issue of concern for any agency that addresses issues of competition and diversity in that marketplace. While *this* merger may no longer be a live issue at the federal level, the question of how to appropriately consider proposals that would result in consolidation in the industry *is* a live issue. Commissioner

¹ The ALJ's Rulings set the date for Opening Comments on the APD to May 4, 2015 and Reply Comments on the APD to May 11, 2015.

² The Joint Applicants are Comcast Corporation (Comcast), Time Warner Cable, Inc. (TWC), Charter Communications (Charter) and Bright House Networks (Bright House).

³ See Joint Applicants' Motion to Withdraw, filed April 27, 2015. The Joint Applicants cannot automatically withdraw their application once the record is closed. See *Re Southern California Gas Company D.92-04-027*, (April 8, 1992): "We need not speculate on the possible circumstances which would cause us to regard dismissal or withdrawal as no longer a matter of right. It is sufficient that we indicate that submission of a matter upon an evidentiary record and obtaining a proposed decision within the meaning of section 311(d) involve steps which clearly make termination a matter of the Commission's discretion." (43 CPUC 2d 638, 641).

⁴ This would not be the first time that the Commission issued a decision on a merger that had already essentially been rejected at the federal level. In the San Diego Gas & Electric (SDG&E)/Southern California Edison (Edison) merger case, a Federal Energy Regulatory Commission (FERC) ALJ issued a decision denying the proposed merger after the record in California was closed, but before the CPUC took any final action. (*Order Denying Motion to Vacate Initial Decision, Southern California Edison Company and San Diego Gas & Electric Company*, Docket No. EC89-5-000, 55 F.E.R.C. P61,497; 1991 FERC LEXIS 1529, June 27, 1991.) After the FERC ALJ released his decision, based on the record in its own proceeding, the CPUC voted to deny the merger.⁴ The present situation is more akin to the SDG&E/Edison example than the AT&T/T-Mobile case. In AT&T/T-Mobile, the record of the proceeding had not yet closed and no proposed decision had been issued at the point in time that AT&T and T-Mobile filed their motion to withdraw. In the current consolidated proceedings, as was the case with the SDG&E/Edison merger, the record is closed and proposed decisions have been issued. (D.91-05-028, 1991 Cal. PUC LEXIS 253.)

Florio's APD advances a detailed and nuanced analytical framework to consider the effects of consolidation, and reaches the correct decision based on the articulated legal analysis and the evidence in the record.

Joint Intervenors urge the Commission to adopt the APD even though the Joint Applicants have filed a Motion to Withdraw. Jurisdictional matters at issue in the pending Applications have also been raised in other telecommunications matters, for example the Service Quality and LifeLine proceedings.⁵ It would be a substantial waste of Commission resources and be inefficient for parties to start from square one again and re-litigate jurisdictional issues that have been fully developed and briefed here. Instead of abandoning the completed work by both parties and policymakers here, it would be beneficial for both the Commission and the parties for a decision on the merits to issue in order to provide guidance in other proceedings on these jurisdictional questions and other substantive issues fully briefed in these consolidated proceedings. This is particularly significant because it is unclear whether parties will be able to develop as robust a record in other merger and acquisition proceedings if intervenors are chilled from participation due to the risks of being denied intervenor compensation. If the Commission does not render a substantive decision in this matter, then in other ongoing and future Commission proceedings, intervenors will have to decide whether the risk of not receiving intervenor compensation is great enough to preclude them from participating, thus diminishing the the range of input into some future Commission proceedings.⁶

Beyond that, the APD also correctly demonstrates the substantial harm to competition and customers that would continue and be exacerbated by the merger. For example, the APD identifies record evidence that demonstrates that the merger would lead to worse customer service and service quality, and that the Joint Applicants failed to demonstrate any clear net benefits of the merger, over and above what each company would independently provide if it remained separate, relative to the high risk

⁵ Service Quality Rulemaking, R.11-13-001; LifeLine Rulemaking, R.11-03-013.

⁶ See AT&T Petition for Writ of Review, Case No. No. A144005, filed January 22, 2015 (appealing D.13-05-031, affirmed by D.14-12-085 (awarding intervenor compensation to TURN) and D.14-06-026, affirmed by D.14-12-085 (awarding intervenor compensation to the Center for Accessible Technology). After AT&T initiated its appeals of these decisions, the Commission issued D.14-12-061 (awarding intervenor compensation to The Greenlining Institute), D.14-12-60 (awarding intervenor compensation to the Utility Consumers' Action Network (UCAN)) and D.15-01-014 (awarding intervenor compensation to the National Asian American Coalition and Latino Business Chamber of Greater Los Angeles). AT&T has sought reconsideration of these latter two decisions in an anticipated prelude to appealing them as well).

that it will be harmful to consumers.⁷ As the APD correctly finds, “Comcast has failed to meet its burden of showing by a preponderance of evidence that the proposed merger is in the public interest.”⁸ Most importantly, the APD correctly describes the terminating monopoly that cable and telephone last-mile providers have, and how that monopoly can squeeze edge provider content and services, and generally hinder the growth of a robust broadband market.⁹ The APD correctly recognizes that no conditions can mitigate the harms of the transaction and that Comcast has a poor track record on complying with merger conditions.¹⁰

The Joint Intervenors also support the APD’s decision to send the confidential record of the proceeding to the FCC. While the FCC has granted Joint Applicants’ Withdrawal Request,¹¹ it is still important for the Commission to send the confidential record of the California proceeding to the FCC in order to provide guidance to the FCC on the impact of present and future mergers and acquisitions on California.

Lastly, Joint Intervenors provide a few clarifications of the APD, as further discussed below.

II. DISCUSSION

A. The Persistence of the Terminating Monopoly

As the APD recites, the proposed merger would have left content and service providers with only one option in most areas to reach consumers through high-speed broadband.¹² In 78% of census blocks in what would have been the combined Comcast and Time Warner Cable service territories, a post-merger Comcast would have been the only available broadband service at 25 Mbps or higher speed.¹³ The discussion of the significance of terminating monopoly power remains highly relevant to any analysis of the communications landscape because cable companies operating coax cable and telephone corporations operating fiber traditionally have no duty to unbundle their last-mile connections to the

⁷ APD at 66.

⁸ *Id.* at 79.

⁹ *Id.* at 71-76.

¹⁰ *Id.* at 66, 76.

¹¹ See Order Dismissing Application and Closing Docket, MB Docket No. 14-57, <https://www.fcc.gov/document/comcast-time-warner-cable-charter-merger-docket-closed>

¹² APD at 41.

¹³ ORA Brief, Exhibit 1, Expert Report and Declaration of Lee L. Selwyn at 72, Table 10.

customer.¹⁴ This effectively locks out potential competitors, and gives a merged entity enormous market power. It is unclear what will happen with unbundling going forward, and it is also because of this lack of clarity that it is important for the Commission to issue the APD.¹⁵

Commissioner Florio's APD accurately described these facts, and could serve as a useful roadmap for future proposed mergers – like Time Warner and Charter – already looming on the horizon.¹⁶

B. The FCC's Open Internet Order Does Not Solve the Problem

In the Open Internet Order (OIO) adopted on February 26, 2015, the FCC reclassified broadband as a Title II common carriage telecommunications service. The OIO also emphasized that this reclassification is not a substitute for “robust competition” and antitrust enforcement on the issue of interconnection. Paragraph 203 of the OIO explicitly shields merger enforcement in acquisitions from any arguments that it solves interconnection market power issues:

Our ‘light touch’ approach does not directly regulate interconnection practices. Of course, this regulatory backstop is not a substitute for robust competition. The Commission’s regulatory and enforcement oversight, including over common carriers, is complementary to vigorous antitrust enforcement. Indeed, mobile voice services have long been subject to Title II’s just and reasonable standard and both the Commission and the Antitrust Division of the Department of Justice have repeatedly reviewed mergers in the wireless industry. Thus, it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and where appropriate, take action against any anti-competitive mergers, acquisitions, agreements or conduct, including where broadband Internet access services are concerned.” The Order then cites in a footnote the antitrust savings clause of the Telecom Act (47 U.S.C § 152(b), “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws).¹⁷

¹⁴ 1996 Telecommunications Act, 47 U.S.C. §§ 251, 252, 271. *See also Report and Order on Remand, Declaratory Ruling, and Order (OIO), In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 at ¶¶ 37, 417, 514 (¶ 417 states: “In particular, we forbear from imposing last-mile unbundling requirements, a regulatory obligation that several commenters argue has led to depressed investment in the European broadband marketplace.”)

¹⁵ *See*, OIO at ¶¶ 37, 417, 514.

¹⁶ *See e.g.*, <http://www.washingtonpost.com/blogs/the-switch/wp/2015/04/24/after-comcasts-failed-bid-charter-wants-to-give-time-warner-cable-another-try/>; <http://www.theverge.com/2015/4/27/8505937/time-warner-charter-merger-2015>; <http://www.forbes.com/sites/antoinagara/2015/04/27/a-stock-loaded-deal-with-charter-is-time-warner-cables-best-option/>

¹⁷ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 at 93, ¶ 203.

Thus, the Open Internet Order itself acknowledges that it is “not a substitute for robust competition” and that it does not substitute for a review of the anti-competitive effects of a proposed merger. Joint Intervenors recommend that the APD reference Paragraph 203 of the OIO, which further supports the APD’s analysis.

C. The Record in this Proceeding Needs to Be Preserved

Since the Joint Applicants formally requested to withdraw their merger applications at the CPUC, two of the Joint Applicants, Time Warner Cable and Charter, have revoked CPUC staff’s, ORA’s, the Greenlining Institute’s and TURN’s access to their responses to the FCC’s Requests for Information (FCC Responses), and the CPUC and other parties will likely lose access to the Comcast FCC Responses shortly. While Joint Intervenors understand that Joint Applicants do not wish to keep paying for and providing technical support for the Commission’s, ORA’s, TURN’s and Greenlining’s access to the FCC Responses, Joint Intervenors request that the Commission require the Joint Applicants to provide a full set of the FCC Responses, with the exception of the programming documents that are still subject to an appeal in the D.C. Circuit,¹⁸ on a hard drive to the CPUC. It is important that the CPUC preserve all records in its proceedings, and the FCC Responses are records that were used and relied upon by parties and the Commission in this proceeding.

For some contextual background on this issue, one of the areas of disagreement in this proceeding concerned the format of the responses to the FCC Requests for Information that Joint Applicants would provide to parties and CPUC staff. The Joint Applicants provided the FCC their Responses to its Requests for Information on hard drives in a TIFF format. Joint Applicants informed ORA and the CPUC that the FCC uses Relativity software to search the documents, and without the Relativity software, the documents would be virtually impossible to search.¹⁹ ORA researched the option of purchasing Relativity software to be installed in computers at the CPUC and found that this process would be expensive and time-consuming.²⁰ As a result, ORA requested the Joint Applicants to

¹⁸ See *CBS Corporation v. FCC*, Case No. 14-1242, D.C. Circuit Court of Appeals.

¹⁹ Joint Applicants’ Response to Motion of ORA for an Order to Compel Production of Information and Documents Pursuant to ORA Data Requests, Including Handling of Responses to FCC Data Requests at 13.

²⁰ See, e.g., Motion of ORA for an Order to Compel Production of Information and Documents Pursuant to ORA Data Requests, Including Handling of Responses to FCC Data Requests at 13-14; Motion of ORA for Reconsideration of Law And Motion Judge’s Ruling on Motion to Compel Production of Information and Documents in a Format that is Accessible to ORA and the Commission at 7-9.

provide the FCC documents in a PDF format.²¹ Joint Applicants refused to provide the documents in PDF stating it would be time intensive and too expensive.²²

Joint Applicants proposed instead that it would provide CPUC staff, ORA and any party who executed a non-disclosure agreement (NDA) with them access to the FCC documents via an on-line E-discovery platform through which ORA, CPUC staff, and other parties could review the documents using Relativity.²³ Joint Applicants stated that this would give parties and CPUC staff the same access, searching capabilities and functionality that the FCC has.²⁴ This issue was discussed in parties' communications with Joint Applicants, pleadings²⁵ as well as at the October 16, 2014 Law & Motion Hearing in these consolidated proceedings (Hearing).²⁶ At the Hearing, the ALJ ruled that Comcast, Time Warner Cable and Charter must give Commission Staff, ORA and any other party that executed an NDA with them full and complete access to the FCC Responses, notwithstanding the fact that it had previously been granted access.²⁷ The FCC Responses were provided to Commission staff and ORA pursuant to P.U. Code section 583(c).

Now that Joint Applicants have filed their Motion to Withdraw, the Commission has lost access to part of the FCC Responses, and will likely lose access to the remaining FCC Responses shortly. Joint Intervenor respectfully request that the APD be amended to require Comcast, Time Warner Cable and Charter to provide a full and complete set of the FCC Responses on hard drives within 15 days of issuance of the APD, and that these documents be submitted under Public Utility (P.U.) Code section 583(c). This is necessary in order to preserve the record of the Commission in this important proceeding.

²¹ Motion of ORA for Reconsideration of Law And Motion Judge's Ruling on Motion To Compel Production of Information and Documents in a Format That Is Accessible to ORA and the Commission at 7-9.

²² Joint Applicants' Response to Motion of ORA for Reconsideration of the September 23, 2014 Law and Motion Judge's Ruling on Motion to Compel Production of Information and Documents in a Format that is Accessible to ORA and the Commission at 2.

²³ See e.g., October 16, Law & Motion Hearing Transcript at 3-8.

²⁴ *Id.*

²⁵ See, e.g., Motion of ORA for Reconsideration of the September 23, 2014 Law and Motion Judge's Ruling on Motion to Compel Production of Information and Documents in a Format that is Accessible to ORA and the Commission at 5-7.

²⁶ October 16, 2014 Law & Motion Hearing Transcript, RT 10-15.

²⁷ *Id.* at 10-15, 18, 40, 79.

D. Clarifications to the Discussion on the CPUC’s Jurisdiction in this Proceeding

The APD correctly determines that the Commission has jurisdiction over the proposed merger under P.U. Code section 854(c).²⁸ Joint Intervenors agree with the APD’s finding that “even if a plain reading of § 854(c) did not apply to this transaction, it is reasonable to consider the § 854(c) factors in helping us determine if this transaction is in the public interest” and that “the Commission is not limited to these factors in determining whether a proposed utility merger is in the public interest.”²⁹ The APD further appropriately determined that “this Commission would be derelict in its duty to the people of California were it not even to consider the larger aspects of the utility transaction before it, a transaction that may in fact shape ‘the future of communications’ in California.”³⁰ Joint Intervenors heartily concur with the APD’s analysis here.

The APD also properly holds that Section 706(a) of the 1996 Telecommunications Act (Section 706(a))³¹ gives the Commission jurisdiction “to evaluate the broadband aspects of this merger.”³² Joint Intervenors have a few clarifications to make with regard to discussion of Section 706(a) in the APD. First, Section 706(a) gives the Commission jurisdiction to review the impacts of both broadband *and voice over Internet protocol (VoIP)*, and to determine whether it needs to take any action. Joint Intervenors request that APD included references to VoIP on pages 21 and 23, Finding of Fact 4 and

²⁸ APD at 16-18.

²⁹ *Id.* at 18. The APD’s analysis is also supported by *In the Matter of the Application of SCEcorp and its Public Utility Subsidiary Southern California Edison Company (U 338-E) and San Diego Gas & Electric Company (U 902-M) for Authority To Merge San Diego Gas & Electric Company Into Southern California Edison Company*, D.91-05-028, 1991 Cal. PUC LEXIS 253 at * 15, stating: “Subsection (c) is ambiguous in one regard, but we now resolve that ambiguity. It is clear that the statute requires the Commission to consider each of the criteria listed in Paragraphs (1) to (7) before finding, on balance, that the merger is in the public interest. What is left unstated is whether the Commission is limited to these seven criteria or whether the Commission may assess additional elements in its balancing of the beneficial and adverse effects of the merger. We believe that it is reasonable to read the statute to require the Commission to consider the criteria listed in Paragraphs (1) to (7) but to permit evaluation of other factors in making its overall determination of whether the merger is in the public interest. So construed, Subsection (c) complements the Commission’s previous authority and practice in cases involving the acquisition or control of California utilities. fn9 (fn9: We note that the listed criteria of Subsection (c) evolved from Commissioner Wilk’s testimony in the legislative hearings that eventually led to SB 52. Commissioner Wilk testified that the Commission would consider many of these criteria in evaluating the proposed merger even in the absence of a specific statutory requirement.)”

³⁰ *Id.* at 20 (citation omitted).

³¹ 47 U.S.C. § 1302(a).

³² *Id.* at 21.

Conclusion of Law 3 of the APD.³³

Second, the APD describes the Commission's jurisdiction under Section 706(a) as "limited," when in fact, it is quite broad. While the District of Columbia Court of Appeal (D.C. Circuit) in *Verizon v. FCC* discussed the limiting principles of Section 706(a), as noted in the APD,³⁴ the Court in fact found that the authority that the FCC and state commissions have under Section 706(a) is expansive.³⁵ Joint Intervenors request that the word "limited" be removed from the discussion of the Commission's jurisdiction under Section 706(a) on pages 21 and 23 of the APD.

The APD also briefly discusses *Northern California Power Agency (NCPA) v. CPUC*. Under this case, the CPUC is *required* to review the anti-competitive harms in every proceeding before it and is *required* to make findings on those anti-competitive effects, *whether the CPUC has jurisdiction or not*.³⁶ While the California Supreme Court issued *NCPA v. CPUC* 44 years ago, it remains good law and has been cited to and relied upon numerous times in other decisions and cases, as the APD notes.³⁷ For example, in *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.99-02-085, the Commission held:

We are also legally obligated to consider the reasonableness of the utility's negotiations as they affect competition. *Northern California Power Agency v. Public Util. Com.*, 5 Cal.3d 370, 379-381 (1971) provides that the Commission must take into account the antitrust aspects of applications before it, by a balancing test which places "the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (Id.) Under *Northern California Power Agency*, the Commission should undertake this obligation whether or not it is raised by a party.³⁸

Joint Intervenors request that the APD include *NCPA v. CPUC* in the list of legal authority under which this Commission may evaluate both the broadband and VoIP aspects of the proposed merger. The

³³ At page 23 of the APD, Joint Intervenors request that the APD rephrase the second sentence so it reads: "However, the D.C. Circuit Court also noted that there are two limiting principles to Section 706(a)'s delegation of authority: ..."

³⁴ *See Id.* at 23.

³⁵ *Verizon v. FCC*, 740 F.3d 623, 628, 635-640 (D.C. Cir. 2014).

³⁶ *Northern California Power Agency (NCPA) v. CPUC*, 5 Cal. 3d 370 at 377-378, 486 (1971).

³⁷ APD at 19, fn. 29.

³⁸ *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.99-02-085, 1999 Cal. PUC LEXIS 33, 85 CPUC2d 158.

language in the APD stating that “DISH objections based on video content agreements are considered only to the extent that they illustrate a way that the merger will regard advanced telecommunications deployment in California”³⁹ should also be modified to be consistent with *NCPA v. CPUC*, and an additional conclusion of law referencing *NCPA v. CPUC* as a source of authority for the Commission’s review of the merger should be added to the Conclusions of Law. Lastly, as the APD acknowledges, the proposed merger raises serious anti-competitive considerations and its effect on existing and potential competitors and customers. Therefore, the APD “must make specific findings of fact and conclusions of law relevant to all materials issues” of this proceeding. This encompasses findings of fact dealing with antitrust considerations, including defining the relevant market, determining the impact of the application on competition, and making findings “as to the reasonableness of any restraint.”⁴⁰

E. The APD Correctly Finds that Comcast Has a Poor Track Record on Conditions

The APD references Comcast’s “lackluster history” in complying with conditions attached to prior mergers.⁴¹ Both the Department of Justice (DOJ) and the FCC imposed a variety of behavioral remedies on Comcast-NBCU to prevent exclusionary conduct or discrimination against rivals. For instance, in addition to the conditions set forth in the DOJ consent decree, the FCC adopted several behavioral remedies, including: (1) a prohibition on discrimination in programming carriage on the basis of affiliation; (2) a must carry requirement for news and business channels in the same “neighborhood;” (3) a requirement to add ten new independently owned and operated channels to its basic cable package; (4) a requirement to market standalone broadband service at a given speed and price for a fixed period of time; (5) a prohibition on offering a specialized service composed substantially or entirely of its own content; and (6) a prohibition on engaging in unfair methods of competition or unfair or deceptive actions to the detriment of traditional and online competitors.⁴² Following the Comcast/NBCU merger, Comcast’s pattern of anticompetitive behavior remained unchanged. Comcast has been involved in a number of disputes involving violations of the behavioral conditions adopted in the FCC’s *Comcast/NBCU Order*.

³⁹ APD at 63-64.

⁴⁰ *NCPA v. CPUC*, 3 Cal. 3d at 380.

⁴¹ APD at 76.

⁴² *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum and Order Approving Merger with Conditions, January 20, 2011, MB Docket 10-56, https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf

Internet Essentials provides a salient example. Comcast has stated that it had previously considered deploying a similar program, but decided to save it “as a bargaining chip for government negotiations” in Comcast’s successful bid for regulatory approval of the NBCUniversal acquisition.⁴³ In an interview, David Cohen, Executive Vice President of Comcast, admitted “I held back because I knew it may be the type of voluntary commitment that would be attractive to the chairman [of the FCC]”.⁴⁴ Mr. Cohen’s statement provides clear evidence that Internet Essentials is not merger specific. Additionally, to the extent that the program delivers subscriber benefits, it has been notoriously undersubscribed. As the California Emerging Technology Fund noted in 2014, Internet Essentials only reached 11% of potential beneficiaries.⁴⁵

Comcast’s record on other conditions is troubling as well. After receiving information suggesting that Comcast was not adequately marketing its standalone broadband services,⁴⁶ the FCC instituted an investigation in March 2011 into Comcast’s compliance with a condition of the NBCU merger to offer standalone broadband on specific terms.⁴⁷ In a consent decree issued on June 27, 2012, Comcast agreed to pay \$800,000 for failing to abide by the NBCU condition that it make standalone broadband adequately available and also agreed to “an unprecedented year-long extension of the merger condition requiring Comcast to offer a reasonably priced broadband option to consumers who do not receive their cable service from the company.”⁴⁸ In its Consent Decree Order, the FCC wrote:

The Bureau considered the requirements and objectives of the Condition, the information submitted by Comcast, its efforts to comply with the Condition, and its full cooperation with the Investigation. Nevertheless, the Bureau continued to have concerns regarding the extent of Comcast’s compliance with the Condition. This Consent Decree provides additional steps that Comcast agrees

⁴³ See *David Cohen May be Comcast’s Secret Weapon, but in D.C. He’s a Wonk Rock Star* at http://www.washingtonpost.com/business/technology/david-cohen-chief-dealmaker-in-washington-is-comcasts-secret-weapon/2012/10/29/151e055e-080a-11e2-858a-5311df86ab04_story.html

⁴⁴ *Id.*

⁴⁵ See *Comcast’s Internet for the Poor Too Hard to Sign Up for, Advocates Say* at <http://arstechnica.com/business/2014/07/comcasts-internet-for-the-poor-too-hard-to-sign-up-for-advocates-say/>

⁴⁶ *In the Matter of Comcast*, DA 12-854, Consent Decree, File No.: EB-11-IH-0163 Acct. No.: 201232080025 FRN: 0015401581, adopted June 27, 2012.

⁴⁷ *Id.*

⁴⁸ FCC Press Release, *FCC Resolves Investigation Of Comcast-N Broadband-Related Merger Conditions; Ensures Consumer Access to Reasonably Priced Broadband Internet Service* at 1. <https://www.fcc.gov/document/fcc-resolves-comcast-nbcu-investigation>

to take for the benefit of consumers in general and its subscribers in particular, and to further the goals of the Standalone Broadband Internet Access Service Condition.⁴⁹

Additionally, Comcast agreed as an NBCU merger condition not to discriminate against news networks that competed against CNBC. It promised to assign all business news networks to the same “news neighborhood” on the channel lineup so that viewers could easily switch between them.⁵⁰ After securing merger approval, it placed Bloomberg in a dark corner of the lineup far away from CNBC, diminishing Bloomberg’s viewership and undermining an important voice of news and information. Bloomberg filed a complaint at the FCC against Comcast for noncompliance with this merger condition on June 13, 2011.⁵¹

When challenged, Comcast unleashed a team of lawyers to debate the meaning of “news” and “neighborhood” and years of legal bickering ensued. The FCC found that Comcast was not complying with the merger condition to not discriminate against new networks that competed against CNBC and ordered Comcast to make several changes.⁵² Smaller, resource-constrained programmers already lack leverage in carriage negotiations. By that time, however, substantial harm had already been caused, even for an entity with the resources of Bloomberg. An enlarged Comcast would exert even more market power in negotiations.

The NBCU conditions also forbade Comcast from attempting to undermine online video distributors, which compete for customers with Comcast’s traditional cable video business. That requirement notwithstanding, Project Concord, an innovative online video outlet, filed a complaint at the FCC in October, 2011, alleging that Comcast had locked it out of access to programming, violating a condition of the DOJ consent decree requiring Comcast to license content to online video distributors on non-discriminatory terms.⁵³ The FCC agreed with Project Concord that the programming was subject to

⁴⁹ See *Comcast Pays \$800,000 to U.S. for Hiding Stand-Alone Broadband* at <https://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/>

⁵⁰ *In the Matter of Bloomberg L.P. v. Comcast Cable Communications*, MB Docket No. 11-104, Memorandum Opinion and Order, FCC 13-124 (rel. Sept. 26, 2013).

⁵¹ *Bloomberg v. Comcast*, MB Docket No. 11-104, <http://www.fcc.gov/document/fcc-affirms-bloomberg-v-comcast-news-neighborhooding-decisions>

⁵² *Bloomberg v. Comcast*, Memorandum Opinion and Order released September 25, 2013 at 2-3, MB Docket No. 11-104, <http://www.fcc.gov/document/fcc-affirms-bloomberg-v-comcast-news-neighborhooding-decisions>

⁵³ See Proposed Final Judgment, *United States v. Comcast Corp.*, 808 F.Supp.2d 145 (D.D.C. 2011) (No. 1:11-cv-00106).

mandatory licensing, but also found that licensing this content to Concord would put Comcast in breach of contractual obligations to third parties.⁵⁴ While Project Concord scored a victory, it was only a pyrrhic one; it could not keep up with Comcast's legal gamesmanship and folded.

In the past year, Netflix claimed that Comcast was slowing delivery of its service to Comcast subscribers, forcing Netflix to pay for direct connection to Comcast's network "to reverse an unacceptable decline in our members' video experience."⁵⁵ Comcast claimed the slowdown was due to facilities limitations, but that those limitations disappeared immediately after Netflix agreed to pay Comcast.⁵⁶

Another condition of the NBCU merger is that Comcast is required, until 2016, to file quarterly reports detailing the news and information programming on its owned and operated stations in order to establish compliance with the requirement to air additional original, local news and information programming on NBC and Telemundo local stations.⁵⁷ In May, 2011, Free Press issued a Report titled "No News is Bad News: An Analysis of Comcast-NBCU Compliance with FCC Localism Conditions" addressing the first report filed by Comcast. The Free Press Report found that Comcast's report had failed to provide information sufficient to determine compliance.⁵⁸ The Free Press Report emphasized the news production discrepancies between the NBC stations and the corresponding Telemundo outlet in the same market, more or less alleging discrimination against Spanish-speaking communities.⁵⁹ The FCC never followed-up on Comcast's merger non-compliance outlined in the Free Press Report.

Most recently, the New York Times and Wall Street Journal have reported on allegations that Comcast interfered with and heavily influenced the joint decision of 21st Century Fox, Disney, and

⁵⁴ *In the Matter of Project Concord, Inc. v. NBCUniversal Media, LLC*, MB Docket No. 10-56, Order on Review, DA 12-1958 (rel. Nov. 13, 2012).

⁵⁵ Netflix US & Canada Blog, "The Case Against ISP Tolls," Apr. 24, 2014, *available at*: http://blog.netflix.com/2014_04_01_archive.html (last visited: Aug. 18, 2014).

⁵⁶ See, e.g., ORA Brief, Exhibit 1, Declaration and Expert Report of Dr. Lee L. Selwyn at t 147, Figure 14.

⁵⁷ *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum and Order Approving Merger with Conditions, January 20, 2011, MB Docket 10-56, https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf

⁵⁸ http://www.freepress.net/sites/default/files/fp-legacy/No_News_Is_Bad_News.pdf

⁵⁹ *Id.*

Comcast to call off the sale of Hulu in 2013.⁶⁰ This is in violation of another condition of the NBCU merger that Comcast had agreed not to “influence, interfere or attempt to influence or interfere” in the management or operation of Hulu.⁶¹

Moreover, as the APD seems to imply, this history illustrates how behavioral remedies are typically inadequate to address a merger’s competitive harms because they are difficult to enforce and do not address the merged entity’s profit-seeking motives that inevitably lead to behavior designed to circumvent the requirement or prohibition at issue. In addition, “behavioral remedies require ongoing oversight, monitoring, and compliance enforcement” by both government regulators and the merged entity.⁶² These inherent deficiencies make behavioral conditions insufficient to address the harms to consumers and competition that are posed by the instant transaction. The Commission is not well positioned in terms of time or resources to take the actions that would be needed to truly enforce behavioral merger conditions, thus conditioning an approval on behavioral conditions (whether 25 or any other number) is a futile endeavor.

In summary, the APD correctly determines that Comcast has a poor track record in complying with conditions and that conditions would not mitigate the harms of this merger. The APD also provides a reasoned analytical framework for this analysis that will be useful for consideration of future merger proposals. The Joint Intervenors applaud Commissioner Florio for reaching the right result in this proceeding, which will serve as effective guidance for all telecommunications stakeholders going forward.

⁶⁰ http://www.nytimes.com/2015/04/22/business/media/6-senators-urge-rejection-of-comcast-time-warner-cable-deal.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top-news&WT.nav=top-news&_r=0; <http://www.wsj.com/articles/comcast-role-in-aborted-hulu-sale-raises-questions-for-regulators-1429660758>

⁶¹ *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum and Order Approving Merger with Conditions, January 20, 2011, MB Docket 10-56, https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf

⁶² Diana L. Moss, “Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked,” American Antitrust Institute (June 11, 2014), n. 4 at 18. (focusing on two major categories of competitive issues stemming from Comcast’s enlarged video distribution footprint and control over additional marquee programming content as a result of the merger: (1) Comcast/TWC would become a more powerful buyer of products and services provided by Internet backbone providers, content delivery networks, and peering intermediaries that interconnect upstream content with downstream ISP networks; and (2) Comcast/TWC would have an enhanced ability and incentive to engage in exclusionary conduct with respect to what rival content reaches its subscribers and what affiliated content reaches competitors’ subscribers).

III. CONCLUSION

The Joint Intervenors enthusiastically support the Alternate Proposed Decision of Commissioner Florio. It is critical for the Commission to vote out a decision on the merits on this important matter in order to provide guidance to parties on key jurisdictional and substantive issues that were fully briefed in the proceeding and are addressed in the APD. Joint Intervenors agree that the harms of the merger would be real, that there are no conditions that would fully mitigate the harms of the merger and that the Commission's confidential record should be sent to the FCC. As noted in these comments, Joint Intervenors only request minor clarifications to the APD, as discussed herein.

Respectfully submitted,

/s/ LINDSAY BROWN

LINDSAY BROWN

Attorney for
Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1960
Email: lindsay.brown@cpuc.ca.gov

/s/ BILL NUSBAUM

BILL NUSBAUM

Staff Attorney
The Utility Reform Network
785 Market St. Suite 1400
San Francisco, CA 94103
Telephone: (415) 929-8876
Email: bnusbaum@pacbell.net

/s/ TODD O'BOYLE

Program Director
Common Cause
1133 19th St NW, 9th Floor
Washington, DC 20036
Telephone: (202) 736-5797
Toboyle@commoncause.org

/s/ TRACY ROSENBERG

Executive Director
Media Alliance
1904 Franklin Street, # 818
Oakland, CA 94612
Telephone: (510) 832-9000
tracy@media-alliance.org

May 4, 2015