BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C) ; Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).	A.15-07-009 (Filed July 02, 2015)

PROTEST OF THE OFFICE OF RATEPAYER ADVOCATES

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TABLE OF CONTENTS

BEFORE THE PUBLIC UTILITIES COMMISSION
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Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; TWC Information Services (California), LLC (U68 74C) ; Advance Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both TWC Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).	A.15-07-009 (Filed July 02, 2015)

PROTEST OF THE OFFICE OF RATEPAYER ADVOCATES

I. INTRODUCTION

Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) Protests the Joint Application (Application) of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) (collectively, the Joint Applicants) pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks

Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).[1]

As further discussed below, based on the information provided in the Application, as well as what was not in the Application but what is commonly known, the proposed merger does not appear to be in the public interest and does not appear to comply with existing laws and regulations.[2] On its face, the Application concerns only the merger of three existing competitive local exchange carriers (CLECs). If approved, Charter, Time Warner Cable, and Bright House Networks will merger into New Charter. In reality, however, the proposed merger would make New Charter one of the largest providers of high-speed last mile broadband service in California, passing over 50% of households in the State[3] and the only provider satisfying the current FCC definition of "broadband" at 25 Mbps download and 3 Mbps upload for the vast majority of those households.[4]

The California Public Utilities Commission (CPUC or Commission) should ensure it reviews and considers the effects of the proposed merger on safety, reliability, and competition for voice and broadband services to California consumers. While the proposed merger would likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services, it is also likely to have an effect in the separate market for last-mile access to consumers, *i.e.*, in the interface between Internet content providers like Google, Wikipedia, Amazon and the like.

As explained below, it is not only the FCC that has delegated authority to monitor broadband competition; the 1996 Telecommunications Act delegated this authority equally to the

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[1] Application at 1.

[2] P.U. Code § 854; 47 U.S.C. § 1302(a) (Section 706(a)).

[3] California Broadband Availability Database, Round 10 data (as of June 30, 2014) as submitted by ISPs.

[4] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, Rel. Feb 4, 2015, at 4.

FCC and "state commissions." As it did in the Frontier-Verizon proposed acquisition[5] and the Comcast-TWC merger,[6] this Commission should rigorously investigate the effects of the proposed merger on California voice (including VoIP) and broadband Internet access customers. As further discussed below, based on the information provided in the Application, it is not evident that the proposed transaction is in the public interest.

II. SUMMARY OF RECOMMENDATIONS

The proposed merger does not appear to be in the public interest. Ratepayers should not be adversely impacted by the effects of the proposed merger. The proposed transaction will impact millions of consumers primarily located in Southern California. The Commission should ensure that the transaction does not adversely affect competition and that voice and broadband service quality and reliability, public safety, and deployment of advanced communications are not diminished but rather enhanced. The Joint Applicants did not provide sufficient detail to meet their burden of proof regarding the public interest and the benefits of the proposed transaction. The Commission should require the Joint Applicants to amend the Application and provide sufficient detail on the effects of the transaction on competition and service quality and reliability for voice, VoIP, and broadband services. The Assigned Commissioner and ALJ should hold public participation hearings throughout the combined service territories of the Joint Applicants, to received feedback from the public.

III. DISCUSSION

A. JURISDICTION

Review of this Application comes under P.U. Code § 851 to 854, Section 706(a) of the Telecommunications Act of 1996 and *Northern California Power Agency v. CPUC*.

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[5] Frontier-Verizon Acquisition Scoping Ruling
http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M152/K971/152971955.PDF

[6] Comcast-Time Warner Cable Inc. Merger Scoping Ruling
http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=101123512

1. P.U. Code Section 854 (Section 854)

The Joint Applicants filed the merger application pursuant to Section 854. Under Section 854, the Commission must find that the merger, "[p]rovides short-term and long-term economic benefits to Ratepayers . . . [n]ot adversely affect competition, and must examine several factors to ensure that the merger is in the public interest.[7] Section 854's language indicates that it applies to public utilities, which in the proposed merger are TWCIS, Charter and Bright House California.

In order to approve the proposed merger under Section 854(b), the CPUC will need to find that the merger "[p]rovides short and long-term economic benefits to ratepayers", "[e]quitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits" between shareholders and ratepayers, and does not "adversely affect competition".[8] The Joint Applicants have failed to make this showing, as required under Section 854(e).[9] Furthermore, under Section 854(c), the CPUC must consider a list of eight criteria "and find, on balance, that the merger, acquisition, or control proposal is in the public interest. These criteria include:

> (1) Maintain or improve the financial condition of the resulting public utility doing business in the state.
>
> (2) Maintain or improve the quality of service to public utility ratepayers in the state.
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> (3) Maintain or improve the quality of management of the resulting public utility doing business in the state.
>
> (4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees.
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> (5) Be fair and reasonable to the majority of all affected public utility shareholders.

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[7] P.U. Code § 854.

[8] P.U. Code § 854(b). The Commission should also seek an advisory opinion from the Attorney General in assessing whether the proposed transaction adversely affects competition and the mitigation measures necessary to avoid this result.

[9] P.U. Code § 854(e) states: "The person or corporation seeking acquisition or control of a public utility organized and doing business in this state shall have, before the commission, the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met."

(6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility.

(7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.

(8) Provide mitigation measures to prevent significant adverse consequences which may result.

Lastly, Section 854 requires the Commission to "consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal."[10]

2. Section 706(a) of the 1996 Telecommunications Act (Codified at 47 U.S.C. § 1302)

The District of Columbia Circuit Court of Appeal (D.C. Circuit or Court) last year issued a decision, *Verizon v. FCC* 740 F.3d 623, 638 (D.C. Cir. 2014), which discussed Section 706(a) of the 1996 Telecommunications Act (Section 706(a)) concerning advanced telecommunications incentives. Section 706(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[11]

Section 706(a) defines "advanced telecommunications services" to include broadband. [12]

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[10] P.U. Code § 854(d).

[11] Section 706(a) is codified at 47 U.S.C. § 1302(a), *et seq*.

[12] 47 U.S.C. § 1302(d)(1) states: "The term 'advanced telecommunications capability' is defined, without

In *Verizon v. FCC*, the D.C. Circuit determined that Section 706(a) was a grant of authority to the FCC **and to the state commissions** to take concrete steps that will promote competition in broadband.[13] The D.C. Circuit also found that Congress, in passing the 1996 Telecommunications Act, most likely relied on the FCC's continued oversight of broadband facilities.[14] Notably, the Court reasoned that "the legislative history suggests that Congress may have, somewhat presciently, viewed that provision [Section 706(a)] as an affirmative grant of authority to the Commission whose existence would become necessary **if other contemplated grants of statutory authority were unavailable**."[15] The Court also quotes the Senate Report's description of section 706(a) as a "'necessary fail-safe' 'intended to ensure that one of the primary objectives of the [Act]--to accelerate deployment of advanced telecommunications capability--is achieved.'"[16] Thus, the D.C. Circuit's recent opinion underscores that Section 706(a) clearly delegates authority to the states to take concrete steps that will promote broadband competition.

The D.C. Circuit noted that, in Section 706(a), Congress delegated authority to *both* the FCC and the states. In response to Verizon's contention that "Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities", the Court reasoned, "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here."[17] Because the language in

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regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[13] 740 F.3d at 637-640.

[14] "To the contrary, … when Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet. Indeed, one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously." 740 F.3d at 639.

[15] *Id.* (emphasis added).

[16] 740 F.3d at 639 (citation omitted).

[17] 740 F.3d at 638.

Section 706(a) does not distinguish between the delegation to the FCC and to the state commissions, the CPUC may invoke Section 706(a) in its review of the merger of Charter and TWC.

The plain language of Section 706(a) directs states to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Thus, the CPUC has the authority to adopt some regulations and conduct a review of advanced telecommunications services in California. Under Section 706(a), the CPUC has delegated power to promote competition by adopting rules for broadband providers, including issuing data requests to ascertain who owns telecommunications infrastructure in California; monitoring broadband service quality and consumer protection and imposing relevant rules if needed; monitor market concentration; and adopting strong reporting requirements so that states may assist federal agencies in monitoring and promoting competition.[18]

3. P.U. Code Section 710

P.U. Code section 710 contains clear exceptions that preserve the Commission's jurisdiction to review and adopt regulatory measures for Internet Protocol (IP) enabled and VoIP services, consistent with Section 706(a). P.U. Code section 710 states:

> The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c).[19]

By enacting P.U. Code section 710, the Legislature affirmed the Commission's subject matter jurisdiction over VoIP and IP enabled services, and then chose to limit the Commission's

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[18] SB 1161 should not be an impediment to a robust Commission investigation here. Section 710 of the Public Utilities Code prohibits Commission jurisdiction or control over IP-enabled services "except as required or expressly delegated by federal law," and Section 706(a), codified at 47 U.S.C. § 1302(a), provides that delegation.

[19] P.U. Code § 710(a) (emphasis added).

authority to regulate such services. If the CPUC did not have regulatory authority over VoIP service before the Legislature enacted P.U. Code section 710, then the need for it would have never arisen.

P.U. Code section 710 preserves aspects of the Commission's regulatory jurisdiction and authority over IP enabled and VoIP services. In addition to the reporting requirements discussed above, P.U. Code section 710(a) also provides a clear exception for requirements or express delegations of federal law. Section 706(a) constitutes one example of a requirement and an express delegation of federal law.

In the recent merger review of Comcast, Time Warner Cable, and Charter Communications, Applications (A.) 14-04-013 et al., the ALJ and assigned Commissioner issued a scoping memo and ruling asserting that the "scope of the Commission's current review… falls within the limited authority granted under Pub. Util. Code § 854 and Section 706(a) of the Telecommunications Act."[20] The Commission sought information on the effects of the merger on broadband deployment in California "to promote state and federal goals, such as encouraging broadband deployment, promoting safety and furthering "innovation, consumer choice and protection, and economic benefits to California." Both the proposed decision and the alternate proposed decision in the Comcast/Time Warner Cable merger proceeding found that Section 706(a) applied to the review of the proposed merger.[21]

4. The FCC's Recent Open Internet Order

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 it is not a substitute for 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

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[20] A.14-04-013, Scoping Memo at 12 (emphasis added).

[21] A.14-04-013 et al., Proposed Decision Granting with Conditions Application to Transfer Control at 11, 18-21; Alternate Proposed Decision Denying Transfer of Control at 12, 20-24.

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 and have failed to approve some even where the post-merger level of competition would have exceeded even the pre-merger level of competition extant today in the Southern California wireline broadband market.[22] 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).[23]

Notably, the Comcast/TWC/Charter merger application pre-dated the OIO by almost a year, and the record in that proceeding had been largely completed before the OIO was issued. The OIO and, in particular, its reclassification of broadband as a Title II Telecommunications Service raises both jurisdiction and policy issues that were not even addressed in last year's proceeding – issues that bear directly upon the findings required under § 854 -- and thus will need to be explored thoroughly before the Commission can make the required § 854 findings here.

5. Northern California Power Agency v. CPUC

Lastly, under Northern California Power Agency (NCPA) v. CPUC, the Commission 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 Commission has antitrust

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[22] https://transition.fcc.gov/transaction/att-tmobile.html/DA-11-1955A2.pdf

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

enforcement jurisdiction or not.[24] In NCPA v. CPUC, which is still good law,[25] the California Supreme Court stated:

> It is no longer open to serious question that in reaching a decision to grant or deny a certificate of public convenience and necessity [the specific issue in that proceeding], the Commission should consider the antitrust implications of the matter before it. The Commission itself has stated: "'There can be no doubt that competition is a relevant factor in weighing the public interest,'" and that "[antitrust] considerations are also relevant to the issues of . . . public convenience and necessity." (citing M. Lee (Radio Paging Co.) (1966) 65 Cal. P.U.C. 635, 640 and fn. 1.)[26] In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content to the broad statutory concept of the "public interest."

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

[25] See Greenlining Institute v. Public Utilities Com., 103 Cal. App. 4th 1324, 1333 (Cal. App. 1st Dist. 2002); Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, Decision 99-02-085, R. 94-04-031, I. 94-04-032, 85 CPUC2d 158, February 18, 1999; Rulemaking on the Commission's own motion for the purpose of modifying existing tariff filing rules for telecommunications utilities, other than local exchange carriers and AT&T-C, and for the purpose of addressing other issues concerning the regulation of these utilities, Decision No. 92-06-069, Rulemaking No. 85-08-042 (Filed August 21, 1985), 1992 Cal. PUC LEXIS 972, 2-3 (Cal. PUC 1992); In the Matter of the Application of SCE Corp 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, Decision No. 91-05-028, Application No. 88-12-035 (Filed December 16, 1988; amended April 17, 1989), California Public Utilities Commission, 1991 Cal. PUC LEXIS 253; 40 CPUC2d 159, 122 P.U.R.4th 225, May 8, 1991; United States Steel Corp. v. Public Utilities Com., 29 Cal. 3d 603 (Cal. 1981)29 Cal. 3d 603; 629 P.2d 1381, 175 Cal. Rptr. 169; 1981 Cal. LEXIS 156, July 6, 1981; Industrial Communications Systems, Inc. v.PUC, 22 Cal. 3d 572, 150 Cal. Rptr. 13, 585 P.2d 863, 1978 Cal. LEXIS 304 (1978); 1981 Cal. AG LEXIS 74, 11-13 (Cal. AG 1981).

[26] NCPA v. CPUC, 5 Cal. 3d 370, 377 (1971).

> As seen above, the Commission may approve projects even though they would otherwise violate the antitrust laws; it may also disapprove projects which do not violate such laws. Its consideration of antitrust problems is for purposes quite different from those of the courts; it does not usurp their function.
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> …
>
> As we have seen, it is clear that the Commission must take into account the antitrust aspects of applications before it. As we have indicated above, the public interest in preventing monopolies is one facet of the larger public convenience and necessity which the Commission was established to protect. The Commission may and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty, and where a private party has so clearly demonstrated the adverse impact of the proposed facilities, the Commission certainly cannot ignore the problem simply because it was not raised by one having impeccable credentials of legal standing. (Marine Space Enclosures, Inc. v. Federal Maritime Com'n (1969) 420 F.2d 577, 585, 591-592 [137 App.D.C. 9].)[27]

After carefully reviewing the facts of that specific case, the Court stated:

> As we have seen, it is clear that the Commission must take into account the antitrust aspects of applications before it. It is equally obvious that the Commission failed to perform this essential duty in the instant case…The Commission must place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public. Here, the Commission did not perform this task.[28]

Finally, the Court noted, which is consistent with the requirements of P.U. Code section 854:

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[27] Id. at 378.

[28] Id. at 379.

> Even if we were to assume, as the Commission and PG&E [the real party in interest] contend, that the Commission did in fact take into account the antitrust problems, we would still be compelled to annul the decision because of the Commission's obvious failure to make appropriate findings. As we have often said, the Commission must make specific findings of fact and conclusions of law relevant to all materials issues of a case. Here, there are no findings of fact which could possibly be construed as dealing with antitrust considerations. There is no definition of relevant market, no determination of effect upon competition, no finding as to the reasonableness of any restraint.[29]

The Joint Applicants state in their Application that there is no overlap in their respective service territories today.[30] While perhaps accurate with respect to their respective physical cable distribution infrastructures, the Joint Applicants' individual and combined business activities are in no sense confined to their respective physical geographic service territories. In just the one year since the Comcast/TWC/Charter merger application was filed, streaming of video content over high-speed broadband connections has become a significant competitive factor to traditional cable-based multichannel video programming distributor (MVPDs). If as is now widely expected those same cable-based MVPDs were themselves to enter and compete for streaming video customers, their geographic market would no longer be confined to their cable footprint and the three companies that are here seeking to merge would in fact be competing directly with one another for that business. Worse still, not only would their merger diminish potential competition for streaming video services, by expanding the Joint Applicants' combined control of high-speed broadband services in Southern California, their ability to block or otherwise frustrate entry by other streaming video competitors would be significantly enhanced. The fact that, with respect to their respective geographic cable footprints, the Joint Applicants' current geographic markets do not overlap, does not necessarily mean that the Application, if granted, will not result in additional market power which New Charter would have the incentive and ability to exercise. There is a clear and distinct relationship between the Joint Applicant's

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[29] Id. at 380.

[30] Application at 4

increase control over broadband Internet access and its MVPD cable television business. The Commission must assess in this proceeding the extent to which this additional market power can potentially result in significant harmful effects on competition and customers; this is squarely within the Commission's jurisdiction to review the anti-competitive harms in every proceeding before it and under Section 706 as discussed above.

The Charter Application may implicate antitrust considerations and its effect on existing and potential competitors and customers. Therefore, in rendering its decision on the Application, the CPUC "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."[31]

In the Comcast/Time Warner Cable merger proceedings, A.14-04-013, et al., both the proposed decision and the alternate proposed decision acknowledged the applicability of NCPA v. CPUC.[32]

IV. DISCUSSION

A. Approval of a Merger While there is Current Litigation and Disputes Involving TWC is not in the Public Interest

1. City of Los Angeles lawsuit against TWC

On March 14, 2014, after years of attempted negotiations, the City of Los Angeles filed a lawsuit against TWC alleging that TWC "blatantly refused to live up to its obligations to the city" to pay franchise fees to operate its cable network over city-owned rights of way while collecting more than $500 million a year from customers in the city.[33] The lawsuit contends that TWC owed $2.5 million in franchise fees and public, education and governmental channel fees

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[31] NCPA v. CPUC, 3 Cal. 3d at 380.

[32] Proposed Decision Granting with Conditions Application to Transfer Control at 17-18; Alternate Decision Denying Application to Transfer Control at 19.

[33] *City of Los Angeles v. Time Warner Cable, Inc.*, Case No. CV-14-1984, Central Dist. CA, Complaint for Damages and Injunctive Relief; Demand for Jury Trial (Complaint) at p. 1, ¶ 2.

in 2008 and 2009 and an additional $7.2 million in fees in 2010 and 2011, in violation of the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).[34] The City claims that once in 2008 and again in 2011, TWC withheld more than $5 million in fees the city said it was owed. The company finally paid a portion of the disputed fees but then subtracted the same amount from its franchise fee payment, resulting in another underpayment.[35] While this litigation is still pending, and ORA does not take a position on the merits of the City's claims, if true, the City of Los Angeles' allegations are troubling and demonstrate the extent of TWC's existing monopoly as further discussed below.

2. Los Angeles Dodgers

The Complaint discussed above mentions the monopoly TWC enjoys in the Los Angeles market:

> This Complaint arises from two simple facts: TWC enjoys a virtual monopoly for the provision of cable service to the residents of the City, and it has blatantly refused to live up to its obligations to the City resulting from the grant of that effective monopoly.[36]

Press coverage discussing the lawsuit also discusses other aspects of TWC's current monopoly, including how "TWC has been playing hardball with DirecTV, Dish Network, Charter Communications, AT&T Inc.'s U-Verse, Cox Communications and Verizon Communications Inc.'s FiOS over terms to carry the new Los Angeles Dodgers channel."[37] Dodgers fans must now must subscribe to a pay-TV service if they want to watch a Dodgers game. To date, only TWC and Bright House California have the channel as "TWC reportedly has agreed to an $8.35-billion, 25-year deal with the Dodgers' organization for the rights to distribute the channel, called SportsNet LA."[38] While the new SportsNet LA channel launched on TWC and Bright House California systems, "most other pay TV distributors have been balking at the terms for providing the channel, contending that TWC is demanding fees that are too high." For

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[34] *Id.* at pp. 2-3, ¶¶ 4-5.

[35] *Id.*

[36] Complaint at p. 1, ¶ 2. DIVCA is codified at P.U. Code §§ 5800-5970.

[37] http://articles.latimes.com/2014/mar/15/entertainment/la-et-ct-time-warner-cable-lawsuit-20140315

[38] *Id.*

example, an article notes that TWC "has been asking other distributors for more than $4 a month per subscriber, meaning the channel would cost their customers at least $50 a year — regardless of whether those viewers watched the Dodgers."[39] On May 26, 2015, press coverage[40] announced that Charter will begin offering Los Angeles Dodgers games in Southern California. However, this appears to be as a result of the proposed merger and does not guarantee that other providers will offer the channel.

B. The Proposed Merger will not Enhance Competition on Broadband Access, in Contravention of Section 706(a)

1. Proposed Charter transaction with TWC and Bright House Networks

Charter delivers high-speed Internet, phone service and video to more than 6 million customers in 29 states.[41] Nationwide, the proposed transaction will increase Charter's voice subscribers from 2.6 million to 9.4 million, broadband subscribers from 5.1 million to 19.4 million and video subscribers from 4.3 million to 17.3 million.[42] Specifically for California, the Joint Applicants stay silent on the increase of customers subscribing to voice, broadband and video services. However, what we know based on the California Broadband Availability Data, is that the New Charter will become one of the largest providers of high-speed last mile broadband service in California, passing over 50% of households in the State. Charter and TWC broadband availability overlap in over 1,200 census blocks in California, representing about 45,000 households in the state.[43] The New Charter would absorb TWC and customers in Los Angeles would have one less choice. Particularly for broadband speeds of 25 Mbps download, which the FCC qualifies as advanced broadband service, 75.20% of California census blocks, or over 4

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[39] *Id.*

[40] http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-charter-communications-to-offer-dodgers-tv-channel-20150526-story.html

[41] http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-homeProfile

[42] Application at 28

[43] California Broadband Availability Database, Round 10 data (as of June 30, 2014) as submitted by ISPs.

million households, have no competitor in the service area of Charter, TWC, and Bright House Network.[44] The Joint Applicants have failed to clearly identify how the proposed merger, and the resulting consolidation of market power, creates benefits for California consumers, particularly in the Los Angeles area.

2. Overall Consolidation Trend in the Broadband Industry

There is a troubling consolidation trend in the broadband industry. Customers need more choices, not fewer, as FCC Chairman Wheeler has stated.

Consolidation in the broadband industry, which, according to news reports, is where the growth and money will be,[45] is disturbingly familiar. Since the breakup of the original AT&T and creation of Regional Bell Operating Companies (RBOCs), there has been a great deal of consolidation of traditional telephone companies.[46] While the breakup occurred in 1984, competition in the provision of local phone service did not take off until after passage of the 1996 Federal Telecommunications Act, which authorized that competition. However, over the following decade, many start-up telephone companies went out of business or were acquired by the ILECs, thus limiting competitive options.

With that recent lesson in mind, the Commission should view the current proposed merger as evidence of a tipping point in terms of broadband consolidation. Should regulators approve the proposed Charter merger with TWC, ORA fears that it will be become more difficult for other broadband providers to compete effectively against Charter and it will be

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[44] California Broadband Availability Database, Round 10 data (as of June 30, 2014) as submitted by ISPs.

[45] http://gigaom.com/2014/02/12/comcast-and-time-warner-cable-forget-tv-it-is-all-about-broadband/

[46] In 1974, the Department of Justice filed a lawsuit against AT&T. At the time AT&T was the sole provider of telephone service throughout most of the United States. Furthermore, most telephonic equipment in United States was produced by its subsidiary, Western Electric. As a result, AT&T had almost total control over communications technology in the country. As a result of the antitrust suit, as of January 1, 1984, AT&T divested Bell several of its member-companies, which were merged into seven independent "Regional Holding Companies" or "Baby Bells".

extremely difficult, if not outright impossible, for new entrants to break into the broadband market. The CPUC should not let history repeat itself. Approving a merger which would ultimately lessen, to an apparently significant degree, competition in the broadband market, and which would leave, as the only remedy, an unpredictable and uncertain Department of Justice antitrust lawsuit, is not something that the CPUC should allow to happen.

3. Charter and Time-Warner *Do* Compete in the Marketplace for Last-Mile High-Speed Broadband Access to Consumers.

The network neutrality problem can be located either in the last mile, or in a carrier's upstream connections with other carriers, content delivery networks (CDNs), and large content providers like Netflix and Google. It is in this latter instance that the problem of the two-sided market raises: A carrier's interest is in charging not only the customer for Internet connectivity, but also charging content provider for access to customers.[47] At present, Charter and Time-Warner offer content providers competing alternatives for this access to consumers. If the merger proceeds, this competition would disappear.

C. The Proposed Merger does not Comply with Section 854

The Joint Applicants claim that the merger "will therefore produce many public interest benefits, including providing improved voice and other non-jurisdictional services at better value; offering more competition for enterprise customers; spurning the creation of new jobs in California; and expanding other exceptional community initiatives."[48] However, beyond making sweeping statements about how a larger merged company will "bring substantial benefits," the Joint Applicants fail to explain how this merger will enhance competition in voice and broadband services in California.[49]

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[47] The two-sided market is discussed in the D.C. Circuit Decision, Slip Op. at 12, 53. Verizon was quite frank in its briefs, and at the September 9, 2013 oral argument, about its desire to experiment with "two-sided" payment models. In its 2010 Order, the FCC noted the "likely detrimental effects of access and prioritization charges on the virtuous circle of innovation … Less content and fewer innovative offerings make the Internet less attractive for end users than would otherwise be the case." *Open Internet Order*, at ¶28 and fn. 79.

[48] Joint Application at 3.

[49] *Id.*

The Joint Applicants also do not meet the requirements of Section 854(c).[50] Outside general statements lacking specificities, the Joint Applicants do not demonstrate how the merger will "[m]aintain or improve the quality of service to public utility ratepayers in the state . . . [or] the quality of management of the resulting public utility doing business in the state."[51]

As previously noted, Section 854(d) requires the Commission to "consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal."[52] The CPUC should not approve this merger under Section 854 as the Joint Applicants have failed to meet their burden of proof.

D. The CPUC Needs More Data on Whether the Merger Will Impact Public Safety

On February 15, 2012, the FCC issued a report and order extending outage reporting requirements to interconnected VoIP.[53] The FCC recognized that consumer use of interconnect VoIP is growing in lieu of traditional phone service, hence the importance of a reliable VoIP service to reach emergency services such as 9-1-1.[54] The FCC report highlights some significant VoIP outages that left many customers without VoIP service and therefore without the ability to make emergency calls for hours.[55] Specifically in California, TWC and Charter had a number of FCC major outages affecting voice services; including VoIP customers.[56] The Commission should obtain and review up to date information on recent and new outages customers of the

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[50] P.U. Code § 854(c).

[51] P.U. Code § 854(c).

[52] P.U. Code § 854(d).

[53] http://www.fcc.gov/document/fcc-requires-outage-reporting-interconnected-voip-improve-911

[54] *Id.*

[55] *Id.*

[56] A.14-04-013 ORA Legal Brief, Exhibit 2, Declaration of Dr. Ayat Osman, at 5, 40-42

Joint Applicants have faced. Service quality and reliability of voice and VoIP services are critical and essential for public safety.

The 2011 CPUC Market Share Analysis reported that 50% of the interconnected VoIP market was concentrated in areas served by Comcast and TWC.[57] ORA has ongoing concerns with VoIP and Broadband outages that impact public safety. The proposed merger continues to make it critical for the CPUC to know how a combined Charter-TWC may impact public safety. More recent information and data is needed on VoIP and Broadband outages in California by each company.

E. Customer Satisfaction for Residential Telephone and Internet Service are for the Most Part Below the West-Average for Charter and TWC.

Based on J.D. Power and Associates 2014 Residential Wireline Telephone satisfaction study (West)[58], TWC and Charter ranked below the West Region average for ***residential telephone customer satisfaction***. Out of eight companies[59] measured, TWC ranked seventh, and Charter fifth. In the years 2012 to 2014, Customer Satisfaction for both TWC and Charter fell below the West Average.

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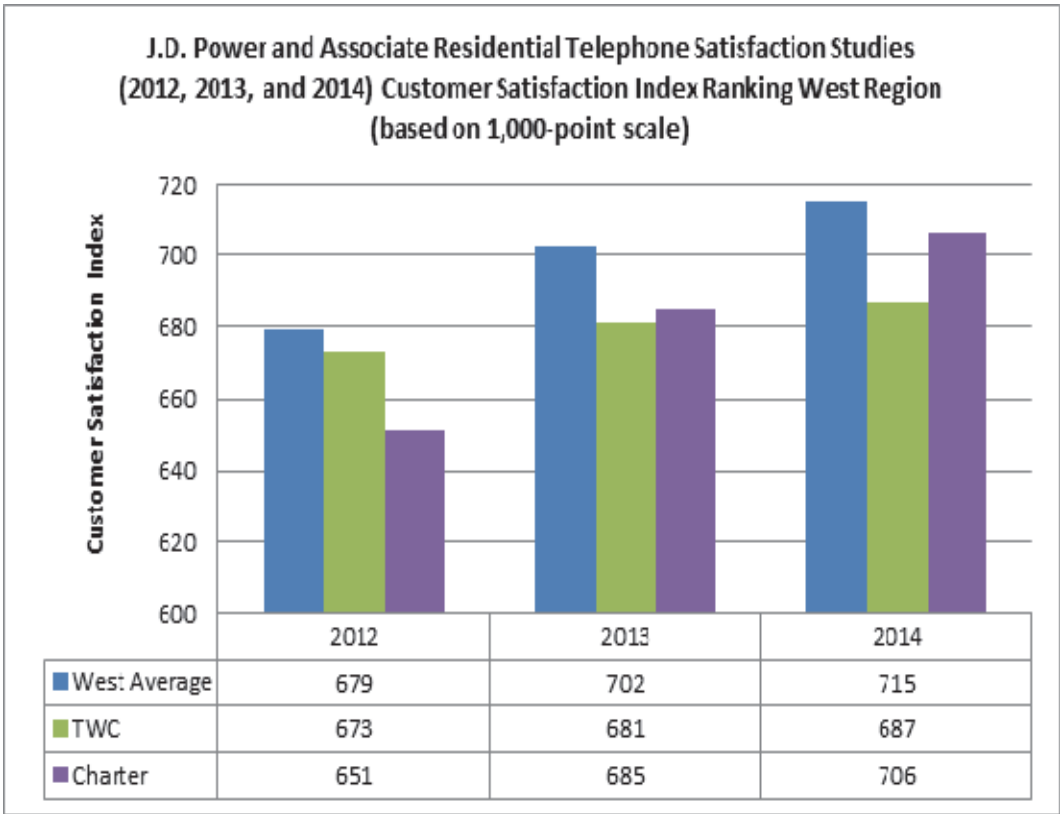
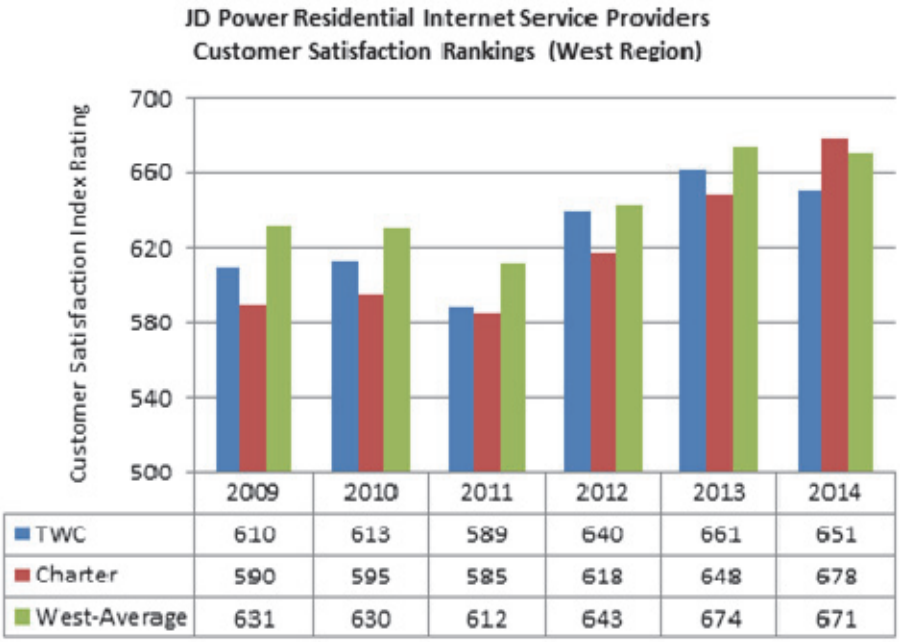
[57] Communications Division of CPUC Market Share Analysis of Retail Communications in California 2001 through 2009, dated March 10, 2011.

[58] http://www.jdpower.com/press-releases/2014-us-residential-television-internet-telephone-service-provider-satisfaction

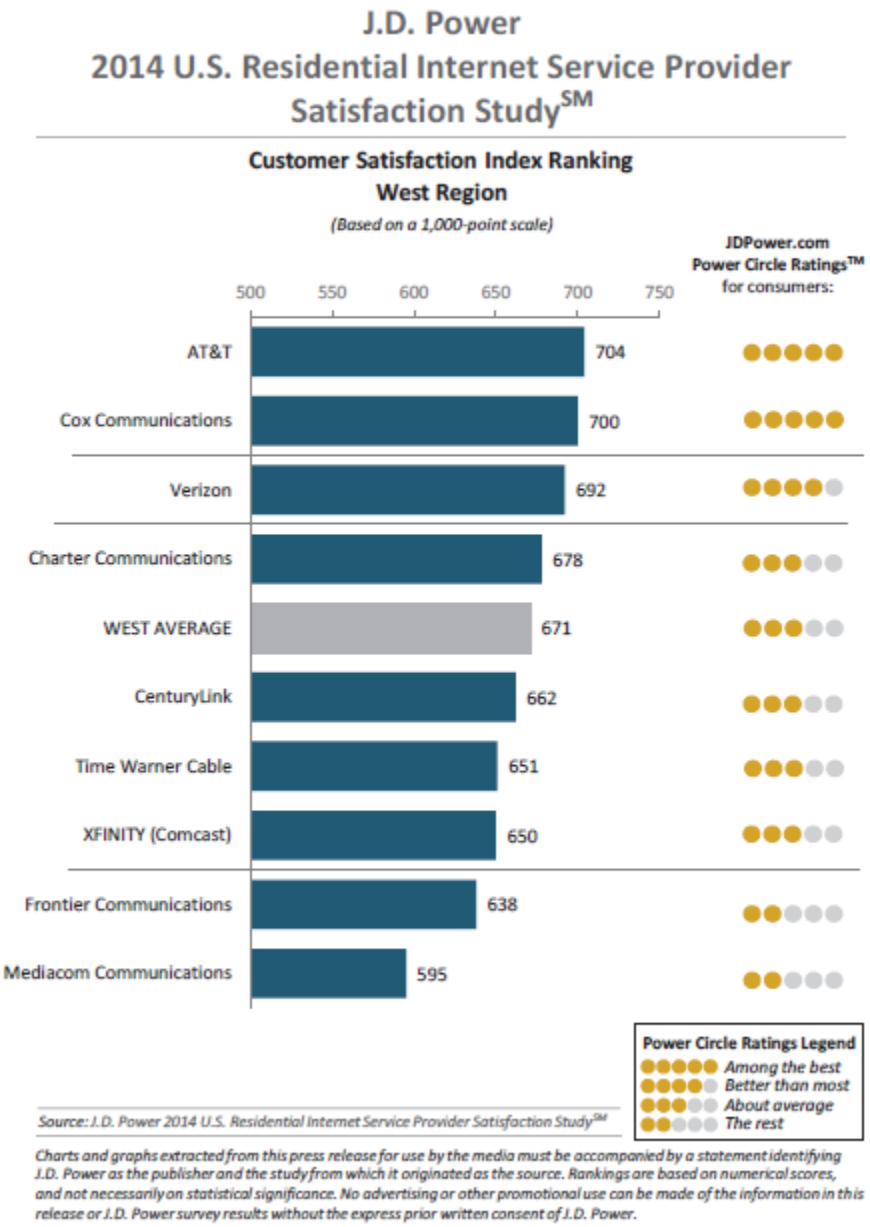
[59] Bright House Network was not one of the eight companies; the eight companies in the order of ranking (first on the list is highest) are: Cox Communications, AT&T, Verizon, CenturyLink, Charter Communications, Comcast, TWX, and Frontier Communications. *Ibid.*


J.D. Power and Associate Residential Telephone Satisfaction Studies
(2012, 2013, and 2014) Customer Satisfaction Index Ranking West Region
(based on 1,000-point scale)
Customer Satisfaction Index
720
700
680
660
640
620
600
2012
2013
2014
West Average 679 702 715
TWC 673 681 687
Charter 651 685 706

For Internet Services, both Charter and TWC ranked below the West Average with exception of 2014, where Charter ranked a bit above the West Average. However, it should be noted that most years, Charter has ranked below the West Average and it is undetermined if the company will continue to improve on its ranking.



	2009	2010	2011	2012	2013	2014
TWC	610	613	589	640	661	651
Charter	590	595	585	618	648	678
West-Average	631	630	612	643	674	671



Outside of the general couple of statements of the Joint Applicants on quality of service in the Application,[60] no specific plans are provided on how the company plans to increase customer satisfaction and address any service quality concerns consumers face.

[60] Application at 28

V. PROCEDURAL MATTERS

The Assigned commissioner and ALJ should hold public participation hearings throughout the combined service territories of Charter, TWC, and Bright House Networks in California to receive feedback from the public on this proposed transaction. As noted previously, the Joint Applicants should be required to amend the Application to ensure it affirmatively addresses all of the issues required to be addressed including all topics under Section 854(b)(c) and (d) and Section 706(a).

Additionally, Joint Applicants request an expedited approval of the Application.[61] The proposed schedule is aggressive and unrealistic.[62] The schedule overlaps with a number of remaining milestones in the Frontier/Verizon proposed transaction[63] where ORA's resources are actively engaged. ORA continues to work on a proposed modified schedule and looks forward to discussing during the proceeding's prehearing conference.

VI. CONCLUSION

For the aforementioned reasons, ORA protests the Application as Joint Applicants have not demonstrated that the proposed merger complies with Section 854 or Section 706(a). The proposed merger would unite potentially two of the largest providers of high-speed last mile broadband service in the State and likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services. ORA urges the Commission to review the concerns detailed herein to determine if the proposed transaction is in the public interest.

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[61] Application at 34

[62] Application at 35

[63] A.15-03-005, July 2, 2015 Scoping Ruling

Respectfully submitted,

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