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]BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

REPLY BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES
[PUBLIC VERSION]

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I. INTRODUCTION & SUMMARY

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the February 10, 2016 ruling of the assigned Administrative Law Judge (ALJ), the Office of Ratepayer Advocates (ORA) files this Reply Brief concerning 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) (TWCIS); 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).

If approved, Charter Communications, Inc. (Charter), Time Warner Cable (TWC), and Bright House Networks (Bright House) will be consolidated into one company, referred to in this Reply Brief as "New Charter."[1] The proposed merger would make New Charter one of the largest providers of high-speed last mile broadband service in California, passing over 82% of households in Southern California[2] and the only provider satisfying the current Federal Communications Commission (FCC) definition of "broadband" at 25 megabits per second (Mbps) download and 3 Mbps upload (25/3) for the vast majority of those households.[3]

On November 13, 2015, the Assigned Commissioner issued a Scoping Ruling (Scoping Ruling).[4] ORA conducted a review and analysis of the issues set forth in the Scoping Ruling, the Joint Applicants' Application, testimony from all parties, responses to data requests and the transcripts from the public participation hearing and the prehearing conference to determine whether the proposed transaction is in the public interest and meets the requirements of applicable law.

As discussed in ORA's Opening Brief, the Joint Applicants have not met their burden of proof to demonstrate, as required under Public Utilities (P.U.) Code section 854 and other applicable law, that the merger is in the public interest and that there are compelling merger-specific benefits to this transaction that would not otherwise be realized if the companies remained independent. The Joint Applicants did not state anything in their opening brief that

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[1] New Charter means the Joint Applicants' successor company or future parent that will result from the proposed transaction/merger; whatever that name may be, e.g., "Charter Communications, Inc." In accordance with the Joint Applicant's CPUC Application A.15-07-009, the new reorganized parent company is referred to as "New Charter." However, the parent entity resulting from the transaction and reorganization will ultimately assume the name "Charter Communications, Inc."

[2] Reply Testimony of Dr. Lee L. Selwyn (Selwyn Reply Testimony) at 107-108, ¶ 97, Table 13.

[3] 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment issued on January 29, 2015 in GN Docket No. 14-126, *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*.

[4] Scoping Ruling at 5.

would allow the Commission to reach the opposite conclusion. The proposed transaction is anti-competitive, the Joint Applicants have not demonstrated that there will be public benefits to the merger and the merger would likely lead to higher prices and worse service quality. In fact, the Joint Applicants continue to fail to provide California-specific commitments. Joint Applicants' opening brief confirms that California will represent one of New Charter's largest markets, yet, the company does not make any measurable commitments to the state other than making general claims that the nation-wide commitments will benefit California.[5] For these reasons, the Commission should deny the proposed merger.

If the Commission elects to approve the proposed transaction, then it should only do so if it adopts, at minimum, the conditions outlined in ORA's Opening Brief and attached to this Reply Brief as Appendix A. These conditions are necessary to partially mitigate the harms of the proposed transaction and to ensure that at least some public interest benefits of the proposed transaction are, in fact, realized. These conditions, on the whole, provide a pragmatic, performance-based approach toward addressing significant concerns about: (1) the lack of competition in the relevant market; (2) the sub-par level of service quality and reliability provided by Charter, TWC and Bright House that negatively impact public health and safety; (3) the uncertainty over Charter's ability to take on so much debt; (4) the unsatisfactory advancement of wireline broadband Internet access across the combined service territories of Charter, TWC and Bright House; (5) non-compliance with Commission Lifeline rules; and (6) the absence of a commitment to meet specific performance-based outcomes in its proposed broadband low-income program.[6] Even if the Commission adopts ORA's proposed conditions in Appendix A, the proposed merger is still not in the public interest.

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[5] Joint Applicants' Opening Brief at 93-94.

[6] 2015 Broadband Progress and Notice of Inquiry on Immediate Action to Accelerate Deployment issued on January 29, 2015 in GN Docket No. 14-126, *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*.

II. JURISDICTION

The Joint Applicants admit that "[t]he Scoping Ruling did not accept the Joint Applicants' legal position that broadband services should not factor into the Commission's review, and the Joint Applicants do not expect the Proposed Decision to revisit that determination."[7] However, the Joint Applicants also continue to argue that the broadband, voice over Internet protocol (VoIP) and video services it offers should not be part of the Commission's review the proposed merger:

> For purposes of avoiding any claim of waiver, however, the Joint Applicants renew their objection that the Commission may not consider: (1) the effects of the transfer of control of the Joint Applicants' broadband and cable video subsidiaries that provide broadband and cable services, and which are not parties to this proceeding, or (2) the effects of the transfer of control of Charter's and Bright House Networks' respective VoIP affiliates that provide retail voice service and that likewise are not parties to this proceeding.[8]

The Joint Applicants are correct that the Commission should not revisit its determination that the Commission should review the transaction in its entirety, including broadband, VoIP and video services, as discussed below.

1. The Commission Must Review the Transaction in its Entirety, as the Joint Applicants Admit in Their Opening Brief

While Joint Applicants make the sweeping statement that the Commission should not review the merger in its entirety, including broadband, VoIP and video services, they completely contradict themselves in their opening brief. The Joint Applicants contend that "[t]he Commission's approval authority here pertains to the "public utilit[ies]" CLECs—TWCIS, Bright House California, and Charter Fiberlink. Those CLECs are uninvolved in the provision of broadband services, and the change of control among those entities will, by definition, have no effect on the provision of broadband services."[9] It is truly ironic that Joint Applicants raise this

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[7] Joint Applicants' Opening Brief at 16.

[8] *Id.*

[9] *Id.* at 18.

argument on page 18 of their opening brief, but by page 25 of their opening brief they make the following factually accurate statement that in reviewing the proposed merger, the Commission must look at the integrated company as a whole, including broadband, VoIP and video services:

> The Joint Applicants' regulated state affiliates—such as Charter Fiberlink, TWCIS, and Bright House California—are wholly owned subsidiaries of the Joint Applicants, rather than fully independent entities responsible for their separate respective finances. Consequently, **the Transaction's effects on "the resulting public utility" are best understood by looking to the financial condition of New Charter as a whole.**[10]

Indeed, as Joint Applicants so carefully point out, Charter Fiberlink, TWCIS and Bright House California are "wholly owned subsidiaries of the Joint Applicants, rather than fully independent entities responsible for their separate respective finances." Thus, the Commission must look both at New Charter (the company resulting from the merger) as whole and at all of the companies that will become part of New Charter, on an individual basis, in order to determine whether the proposed transaction is in the public interest.

In discussing the relevancy of various products and services in their opening brief, the Joint Applicants appear to be seeking to exclude portions of intervenor reply testimony, including the reply testimony of ORA witness Dr. Lee L. Selwyn, that directly respond to testimony proffered by the Joint Applicants' own experts.[11] Joint Applicants placed broadband, VoIP and video services squarely at issue in the CPUC proceeding in their testimony. Dr. Scott Morton's two FCC statements were submitted for the record in this proceeding, as exhibits to her opening testimony, **in their entirety** without any deletions or exclusions. Indeed, all

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[10] *Id.* at 25-26 (emphasis added).

[11] For services related to broadband online video specifically, portions of Dr. Selwyn's Reply Testimony are responding directly to the proceeding's Scoping Ruling and/or the Joint Applicant's CPUC Opening Testimony as follows: Selwyn Reply Testimony at ix-x, 9:9 to 10:18, 164:12 to 166:12 respond to the Scoping Ruling 5, issue b, "How will the Transaction affect broadband deployment and/or affordability?" and issue c., "Is the proposed change of control in the public interest?." Selwyn Reply Testimony at 27:9-13, 47:11 to 52:16, 75:1 to 89:11, 101:7, 144:9-22, 148:8 to 149:10, respond to Scott Morton Opening Testimony, Exhibit A at ¶ 18, Table 2, ¶ 29, Table 4, Table 5, ¶¶ 30, 32, 34, 35-56 and 39-61. Selwyn's Reply Testimony at 32:24 to 35:16, 46:14 to 23, 47:11 to 52:16, 69:1 to 72:12, and 75:1 to 89:11 respond to Scott Morton Opening Testimony, Exhibit B at ¶¶ 13, 29, 31-61, 102,128 and 132.

"confidential" and "highly confidential" information that was included in the two FCC filings was also provided here as well.

In submitting their opening testimony on December 4, 2015, the Joint Applicants' covered the full scope of issues that they had presented to the FCC, including in particular issues relating to their pre- and post-merger multichannel video programming distributor (MVPD) operations, their purported interests and incentives regarding online video distributors (OVDs), and other issues that were responded to by ORA and other intervenors in their January 15, 2016 Reply Testimony and which the Joint Applicants now apparently seek to exclude in their opening brief. In no sense did the Joint Applicants limit any aspect of their December 4, 2015 Opening Testimony to the four specific issues delineated in the Scoping Ruling and which they now appear to seek to employ as a transparent device to exclude reply testimony that the Scoping Ruling expressly authorized. The time for the Joint Applicants to limit the scope of this proceeding to the four Scoping Ruling issues has passed.[12]

In fact, virtually the entirety of the "public interest benefits" outlined by the Joint Applicants in their December 4, 2015 Opening Testimony go to MVPD and OVD issues. For example, Dr. Scott Morton testifies that:

- "The mergers will not cause any harmful price effects in the markets for multichannel video programming distributor ("MVPD"), broadband, or voice services."[13]
- Due to "Its increased geographic scope, … New Charter will have an increased incentive to invest in attracting and maintaining its [MVPD] subscribers using mass market advertising."[14]
- "Because of its increased scale, the post-merger firm's marginal cost will decrease. … Charter's World Box [video set-top box] is also a likely source of reduced marginal cost."[15]
- "An example of the type of innovation that New Charter will support comes from Charter's current effort to include OVDs on its Spectrum Guide."[16]

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[12] Selwyn Reply Testimony at 35, ¶ 36, lns. 4-16, footnote reference omitted.

[13] Scott Morton Opening Testimony at Exhibit A, ¶ 5.

[14] *Id.* at ¶ 17.

[15] *Id.* at ¶¶ 21-22.

[16] *Id.* at ¶ 32.

- "New Charter Will Not Foreclose OVD Providers."[17]
- "New Charter has different incentives that favor rather than harm OVDs. New Charter will not have a similar incentive to foreclose OVDs and other vertically related providers. Unlike Comcast, New Charter will not own substantial interests in nationwide broadcast and cable programming, while its technology is relative inexpensive for both OVDs and consumers. Because it will not have substantial interests in these vertically related industries, New Charter will not have an incentive to foreclose firms in those industries from access to its subscribers."[18]
- "… TWC has lower programming costs than Charter. Because programming costs are typically paid on a per-subscriber basis, if New Charter can lower its programming costs for current Charter subscribers by purchasing all of its programming under TWC's terms, it will reduce New Charter's marginal cost per video subscriber. Part of that reduction in cost would likely be passed through to subscribers in the form of lower prices."[19]

Dr. Selwyn's Reply Testimony responds directly to these and similar issues, **all of which Joint Applicants addressed in their opening testimony**.

The Joint Applicants also ask the Commission to ignore the integrated nature of the voice, broadband and video services that require that the effects of the proposed merger be examined comprehensively across the entirety of the Joint Applicants' business operations. In fact, the three lines of business – voice, broadband and video – are jointly produced by a highly integrated organization utilizing common network infrastructure, common installation, maintenance and repair personnel and resources, joint marketing, advertising and sales operations, bundled pricing, and adhesion agreements detailing company-customer relationships that embrace all three service categories, and a common customer service support organization. The Joint Applicants themselves address these lines of businesses themselves in their testimony. Virtually all of the "public interest benefits" outlined by the Joint Applicants in their December 4, 2015 opening testimony includes topics related to MVPDs and OVDs. Dr. Selwyn's Reply

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[17] *Id.* at 12, header for ¶ 39.

[18] *Id.* at ¶ 36 (citation omitted).

[19] *Id.* at ¶ 23.

Testimony directly responds to the Joint Applicant's Opening testimony discussing these services.

Furthermore, the ability of consumers to access content of any sort over their broadband services also falls squarely within the Scoping Ruling's second issue area. Streaming video was the "killer application" that was singularly responsible for creating the current demand for and interest in broadband. In setting its current 25 Mbps download 3 Mbps upload minimum standard for consumer broadband, the FCC's focus was specifically directed toward assuring that consumers could access streaming video content, noting that "the speeds required to use high quality video, data, voice, and other broadband applications" were among the factors leading the FCC to "find that, having 'advanced telecommunications capability' requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps (25 Mbps/3 Mbps).[20] Actions that may be taken by the Joint Applicants that would operate to foreclose or frustrate OVD entry, or discourage customers' use of certain OVDs that have not entered into a "partnership" with a post-merger New Charter then able to control as much as 82% of the Southern California broadband market, are at odds with Congress's and the FCC's explicit objectives with respect to "advanced telecommunications services,", i.e., broadband, and with Congress's specific delegation of jurisdiction with respect to "advanced telecommunications services" to state commissions such as the CPUC.

The Joint Applicants' claim in their opening brief that the scope of the proceeding should be limited to the issues pertaining to the CLEC transfers is a transparent and improper attempt to exclude testimony that they find troublesome and which they have largely failed to adequately rebut in their own January 23, 2016 submissions. For all of these reasons, the Commission should not grant Joint Applicants' request in their opening brief to limit the scope of the proceeding.

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[20] 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment issued on January 29, 2015 in GN Docket No. 14-126, *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* at ¶ 3.

2. Section 706(a) is Applicable to this Proceeding

Joint Applicants contend that 706(a) of the 1996 Telecommunications Act (Section 7006(a))[21] is "not an affirmative grant of jurisdiction to the CPUC, but rather merely preserves jurisdiction that already exists as a matter of state law, and (2) that California law does not create any jurisdiction for [Section] 706[a] to preserve."[22] Joint Applicants' interpretation would render Section 706(a) meaningless. As the United States Circuit Court of the District of Columbia (D.C. Circuit) has found, Section 706(a) unequivocally gives both the FCC and the states parallel regulatory authority to encourage the deployment of advanced telecommunications:[23]

> The Commission *and each State commission with regulatory jurisdiction over telecommunications services*[24] *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability*[25] *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.[26]

The unambiguous language of Section 706(a) has been read by the D.C. Circuit and the FCC as an actual grant of authority to both the FCC and the state commissions to take concrete

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[21] 47 U.S.C. § 1302(a).

[22] Joint Applicants' Opening Brief at 19.

[23] *Verizon v. FCC*, 740 F. 3d 623 at 638, 639 (D.C. Cir. 2014). The D.C. Circuit Court rejected the argument that Section 706(a) was merely a statement of congressional policy: "the language [of Section 706(a)] can just as easily be read to vest the Commission with actual authority to utilize such 'regulating methods' to meet this stated goal." *Id*. at 637.

[24] The 1996 Telecommunications Act states: "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. (47 U.S.C. § 153(53).)

[25] Section 706 defines "Advanced Telecommunications capability" to include Voice over Internet Protocol (VoIP) and broadband. Federal statute provides at 47 U.S.C. § 1302(d)(1) that: "The term 'advanced telecommunications capability' is defined, without 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."

[26] 47 U.S.C. § 1302(a) (emphasis added).

steps by utilizing measures that "promote competition" and "remove barriers to infrastructure investment.

While Joint Applicants and other parties may dispute the applicability of Section 706(a), certainly if the FCC has the authority to adopt Open Internet Rules pursuant to Section 706(a), then this Commission, which has parallel authority to the FCC under Section 706(a), may adopt similar conditions to promote broadband deployment and competition in the advanced telecommunications market in California. Maintaining adequate service quality and reliability is necessary for public health and safety. Especially as it relates to VoIP and broadband, as the number of California consumers relying on these services continue to increase, the Commission must consider it in its review of the proposed transaction of Charter, TWC and Bright House service quality of such services.

3. P.U. Code section 710 Does Not Prevent the Commission from Reviewing the Effects of the Merger on VoIP and IP-enabled Services

Joint Applicants also claim that P.U. Code section 710 prevents the Commission from reviewing the broadband and VoIP aspects of the proposed transaction, including invoking Section 706(a), and that "[n]one of the exceptions to that statutory jurisdictional limitation are applicable here."[27] Under their jurisdiction argument, Joint Applicants would have the Commission not look at the transferred network as a whole, but rather, have the Commission only focus on small islands within that network. Of course, this line of logic directly conflicts with Joint Applicants' statement that the Commission must look at the integrated company when reviewing the financial impact of the proposed merger.[28] Joint Applicants also reference a Legislative Counsel Bureau memo dated June 18, 2015, which is not even a part of the record of this proceeding.[29] ORA has reviewed and analyzed the Legislative Counsel Memo and has found that it contains several legal errors in its analysis, as discussed below.

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[27] Joint Applicants' Opening Brief at 18.

[28] *See* Joint Applicants' Opening Brief at 25-26.

[29] *Id.* at 19 (referencing Letter from Daniel S. Vandekoolwyk, Deputy Legislative Counsel Bureau to Honorable Ian C. Calderon ("Counsel Letter"), June 18, 2015).

P.U. Code section 710(a) specifically provides for an exemption for the Commission to take regulatory actions concerning VoIP and Internet protocol (IP)-enabled services as an express delegations of federal authority:

> 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).[30]

The Commission is an agency embodied in the California Constitution,[i] and as such, has broad, far-reaching discretionary authority, though the Legislature can limit such authority, as it did with passage of P.U. Code section 710. However, even in enacting P.U. Code section 710, the Legislature has acknowledged the CPUC's subject matter jurisdiction over VoIP and IP enabled services, while placing limits on the exercise of that authority. The legislative limits on Commission authority in P.U. Code section 710 contain exceptions, and one of those exceptions is federally delegated authority. If the CPUC had never had authority over VoIP and IP-enabled services, then the need for P.U. Code section 710 would have never arisen.

Section 706(a) provides the required express delegation in P.U. Code section 710(a). The federal statute could not be more explicit: state commissions "shall encourage the deployment on a reasonable and timely basis of advanced *telecommunications capability* … 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."[31] The CPUC is the state commission in California with regulatory jurisdiction over

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[30] P.U. Code § 710(a) (emphasis added). In addition to Commission jurisdiction or action where directed or required by federal law, the prohibition to regulate VoIP and IP enabled services in P.U. Code section 710 is subject to several further exceptions, including: (1) existing proceedings or authority over non-VoIP or non-Internet Protocol (IP) wireline or wireless services, "including regulations governing universal service … [and] basic service;" (2) backup power systems; (3) pole attachments and other support structures; (4) matters relating to the Warren-911-Emergency Assistance Act; and (5) actions required to "monitor and discuss VoIP services." P.U. Code § 710 (c), (e), (f); *see also* P.U. Code § 710(c)(1) (authority over "state's universal service programs" preserved).

[31] 47 U.S.C. § 1302(a) (emphasis added).

telecommunications services.[32] Thus, clearly, the "advanced telecommunications capability" referenced in Section 706(a) is within the CPUC's subject matter jurisdiction, consistent with P.U. Code section 710. This is plainly an authorization and directive for action.

Furthermore, if the delegation in Section 706(a) is not "express" enough to fit into the "express delegation" provision under P.U. Code section 710 (as the Legislative Counsel contends), then neither is the delegation of numbering authority, and possibly other authority, e.g., pole attachment authority, state universal service funds, etc., all of which are delegated with less decisive language in federal statute.[33]

The Legislative Counsel Memo's claim that Section 706(a) at most authorizes a public utility commission to use the authority it already possesses under other provisions of law to advance the deregulatory policy that Congress pursued in Section 706(a) is legally erroneous. The memo essentially argues that Section 706(a) has no purpose and effect and would render the exceptions provisions of P.U. Code section 710 meaningless.[34] The Legislative Counsel Memo's view is also at odds with the FCC's position on Section 706(a) and with the D.C. Circuit's determination in *Verizon v. FCC* that Section 706(a) is a specific grant of regulatory authority to both the FCC and state commissions.[35] Congress would not have added Section 706(a) if it did not actually confer any authority on the states and the FCC. As the D.C. Circuit noted, "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could have not done the same here."[36]

The Legislative Counsel Bureau's opinion is also inconsistent with the Senate Committee Report on the Telecommunications Competition and Deregulation Act of 1995 (Senate

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[32] *See, e.g.*, Pub. Util. Code §§ 216, 233-236, 270-285, 871-887, 2871-2897.

[33] *See, e.g.,* 47 U.S.C. 251(e)(1) (delegation of numbering authority); 47 U.S.C. 224 (state authority over pole attachments).

[34] The Legislature passed Section 710 when the FCC's *2010 Open Internet* rules (i.e., net neutrality rules) were still in effect. The FCC recently issued its *2015 Open Internet Order* where it finds unequivocally that Broadband is a telecommunications service.

[35] *2010 Open Internet Order*, 25 F.C.C.R. at 17968-17971, ¶¶ 117-122; *Verizon*, 740 F.3d at 635.

[36] *Verizon*, 740 F.3d at 638.

Committee Report).[37] The Senate Committee Report states that Section 706(a) is "intended to ensure that one of the primary objectives of the [1996 Telecommunications Act]--to accelerate deployment of advanced telecommunications capability--is achieved," and emphasized that Section 706(a) is "'a necessary fail-safe' to guarantee that Congress's objective is reached."[38] As the FCC observed, and the D.C. Circuit quoted in *Verizon v. FCC*, "[i]t would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the [Federal Communications] Commission's ability to promote advanced services if it conferred no actual authority."[39] The D.C. Circuit further observed that "when Congress passed section 706(a) in 1996, it did so against the backdrop of the [Federal Communications] 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."[40] Indeed, as discussed below, the FCC recently reclassified broadband Internet access service as a common carrier telecommunications service in its *2015 Open Internet Order*.[41]

Furthermore, because Section 706(a) delegates specific authority to "each State commission with regulatory jurisdiction over telecommunications services," the CPUC does not need additional authority granted by the California Legislature to have regulatory authority over deployment of advanced telecommunications.[42] Under the Supremacy Clause of the United States Constitution,[43] federal law can preempt state law:

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[37] The Telecommunications Competition and Deregulation Act of 1995 was eventually adopted by Congress in 1996, and became known as the 1996 Telecommunications Act.

[38] Committee Reports, 104th Congress (1995-1996) Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 50-51 (1995). *See also Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *Verizon*, 740 F.3d at 639.

[39] *2010 Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120. *See also Verizon*, 740 F.3d at 639.

[40] *Verizon*, 740 F.3d at 638.

[41] *In re Protecting and Promoting an Open Internet*, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, in GN 14-28 (Adopted February 26, 2015, Released March 10, 2015) (*2015 Open Internet Order*).

[42] 47 U.S.C. § 1302(a).

[43] U.S. Const. Art. VI., § 2. ORA notes that under Article 3.5(c) of the California Constitution, an administrative agency, such as the CPUC, does not have the authority "to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the

> The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. Congress may exercise that power by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption.[44]

Section 706(a) delegates to state commissions, by explicit language, the authority to "promote competition" and "remove barriers to infrastructure competition" in "advanced telecommunications services." The Supremacy Clause of the US Constitution forbids a state from attempting to override this federal delegation. Because P.U. Code section 710 contains exceptions to accommodate federal law requirements, there does not appear to be a Supremacy Clause issue here. If, however, Joint Applicants' view of the law were adopted here, then the Supremacy Clause would apply.

In addition, the Commission, like any public agency, may inquire into its own jurisdiction, to inform itself and the Legislature whether its jurisdiction is adequate to the public interest, and to inform actions that the Commission might take within its jurisdiction. P.U. Code section 321.1 reflects this principle, and obligates the Commission to assess the impact of its actions:

> It is the intent of the Legislature that the Commission assess the economic effects or consequences of its decisions as part of each ratemaking, rulemaking, or other proceeding, and that this be accomplished using existing resources and within existing Commission structures.[45]

Even if the Commission were to determine that it lacks jurisdiction over certain aspects of the communications marketplace, it remains subject to this requirement to examine that marketplace to provide assurance that its determinations regarding competition remain reliable,

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enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

[44] *Brown v. Mortensen*, 51 Cal. 4th 1052, 1059 (2011).

[45] Pub. Util. Code § 321.1.

and to satisfy itself going forward that Commission regulations, as well as state law, are sufficient to meet state communications goals and its regulatory responsibilities.

Furthermore, P.U. Code section 701 states:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.[46]

As has been noted in numerous decisions, P.U. Code section 701 confers upon the Commission broad authority to regulate public utilities.[47]

In view of the D.C. Circuit Court's conclusion that Section 706(a) is "an affirmative grant of authority" to the FCC and the state commissions, it falls clearly within the highlighted exemption in P.U. Code section 710.

4. The FCC's Open Internet Order Supports the Commission's Review of all Aspects of the Proposed Transaction

Joint Applicants assert that the Commission cannot examine their broadband services as part of its review of the proposed merger because "the FCC has recently reaffirmed that 'broadband Internet access service is jurisdictionally interstate for regulatory purposes,' and has announced its 'firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored

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[46] P.U. Code § 701.

[47] *See, e.g., Order Instituting Rulemaking to Implement Portions of AB 117 Concerning Community Choice Aggregation*, D.12-07-023, 2012 Cal. PUC LEXIS 322 at *24 (citing *Consumer Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905-906); *Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Pub. Util. Code § 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010 Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company's Natural Gas Transmission Pipeline System in Locations with High Population Density*, D.15-04-024, 2015 Cal. PUC LEXIS 230 at *43-44, 50*; Order Instituting Rulemaking on the Commission's own motion to determine the impact on public benefits associated with the expiration of ratepayer charges pursuant to Public Utilities Code Section 399.8*, D.14-11-018, 2014 Cal. PUC LEXIS 688 at *5 (citations omitted).

regulatory scheme' that the FCC has created for broadband services."[48] Joint Applicants misread the FCC's *2015 Open Internet Order*.[49]

The FCC's *2015 Open Internet Order* reclassified broadband as a telecommunications service under the Telecommunications Act (47 U.S.C. 153(50) and (53)).[50] While the FCC's *Open Internet Order* declares that broadband Internet access service is "jurisdictionally interstate," it does so in order to be able to preempt state initiatives that are inconsistent with federal open Internet goals.[51] The FCC concedes in its *2015 Open Internet Order* that broadband contains "an intrastate component," and asserts that its primary interest is avoiding "conflict" between federal and state regulation.[52] The "intrastate component" in this transaction is obvious: it involves facilities located in California.[53] The hybrid nature of the network is reflected in the 1996 Telecommunications Act, which created a system of "cooperative federalism," where states regulate within a framework set up by the 1996 Telecommunications Act and the FCC. Those state decisions, such as those at the CPUC, often involve "jurisdictionally interstate" services. For example, the CPUC has delegated authority under sections 251 and 252 of the 1996 Telecommunications Act to arbitrate interconnection disputes, even when they involve "jurisdictionally interstate" traffic.[54] Also, as discussed in ORA's Opening Brief, the CPUC has

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[48] Joint Applicants' Opening Brief at 18-19.

[49] *In re Protecting and Promoting an Open Internet*, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, in GN 14-28 (Adopted February 26, 2015, Released March 10, 2015) (*2015 Open Internet Order*).

[50] 47 U.S.C. 153(50) and (53) provide as follows:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content of the information as sent and received.* (Emphasis added).

[51] *2015 Open Internet Order,* at ¶ 431 **("**broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes").

[52] *Id.*

[53] Indeed, some broadband facilities are hyper-local, e.g., local loops that carry DSL or other forms of high-speed transmission.

[54] *See, e.g., Cox v. Global NAPs,* D.07-01-004 (CPUC jurisdiction over interconnection dispute regarding

jurisdiction over various aspects of advanced telecommunications in the California Public Utilities Code.[55] Thus, state action in this realm is subject only to the requirement that it be "not inconsistent" with the federal framework.[56] ORA has not made any proposals in this proceeding that are inconsistent with the federal framework set forth in the *2015 Open Internet Order.* Therefore, the Joint Applicants' argument is not applicable here.

Moreover, Joint Applicants themselves have proposed conditions related to the *2015 Open Internet Order*, which they discuss in several places in their opening brief. For example, Joint Applicants discuss their commitment to have New Charter comply with the Open Internet Rules adopted in the *2015 Open Internet Order* as a benefit of the proposed transaction.[57] As an initial matter, this is a hallow commitment as New Charter will already be required to follow existing law. Moreover, as the Joint Applicants' make evident in their opening brief, it is clear that the provisions of the *2015 Open Internet Order* are not only relevant to the proposed merger at hand, but they also do not preclude this Commission's review of all aspects the transaction, including broadband.

5. NCPA v. CPUC Applies to All Aspects of the Proposed Transaction

Joint Applicants allege that the California Supreme Court case *Northern California Power Agency (NCPA) v. CPUC*, 5 Cal. 3d 370 (1971) (*NCPA v. CPUC*) applies very narrowly in the Commission's review of the proposed merger. They state in their opening brief that:

> NCPA establishes that the Commission has jurisdiction to consider the antitrust implications of the merger it is reviewing under ~ 854, i.e., of the regulated CLECs, as part of its public interest analysis. Thus, it would be proper for the Commission to inquire into how the changes of control among the Joint Applicants' regulated CLECs will affect the markets for the regulated services those

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IP-initiated calls), *aff'd Global NAPs v. CPUC,* 624 F.3d 1225 (9th Cir. 2010). It is again worth noting that, although the FCC has declared broadband "jurisdictionally interstate," it is operationally and factually a hybrid, offered over facilities (local loops, for example) that are undeniably and completely located within California.

[55] 47 U.S.C. §§ 251-252.

[56] *Id.,* and fn. 1280.

[57] Joint Applicants' Opening Brief at 11-12, 85-86.

> CLECs provide. NCPA does not hold, however, that the Commission has jurisdiction to consider the antitrust implications of changes of control of unregulated entities, simply because they result from the same holding-company-level transaction as a change of control within the Commission's jurisdiction.[58]

What Joint Applicants fail to acknowledge in their argument, although they admit it elsewhere in their opening brief, is that this Commission has determined that the scope of its review of the proposed transaction includes broadband, VoIP and video services.[59] Thus, Joint Applicants' argument should be dismissed out of hand.

As *NCPA v. CPUC* clearly states, the Commission must take into account any antitrust implications and competitive considerations when it weighs the public interest and renders a decision on the proposed transaction.[60] This is consistent with the requirements of P.U. Code section 854.

III. Discussion

A. The Financial Impacts of the Proposed Transaction are Significant, Despite Joint Applicants' Claims to the Contrary

1. Criticism of ORA's Use of 2014 Data is Unfounded as it is the Same Data Joint Applicants Use in Their Testimony

P.U. Code section 854(c)(1) directs the Commission to affirmatively find that the proposed change of control will "[m]aintain or improve the financial condition of the resulting public utility doing business in the state." Charter has indicated that it will incur substantial additional debt in order to finance its acquisition of TWC and Bright House.[61] The testimony of ORA expert witness Dr. Lee L. Selwyn estimated that the increased debt will result in a far more

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[58] Joint Applicants' Opening Brief at 23-24.

[59] Scoping Ruling at 4-5.

[60] *See also*, *Phonetele, Inc., v. Public Util. Com*. (1974) 11 Cal. 3d 125; *Industrial Comm. Systems v. Public Util. Com.* (1978) 22 Cal. 3d 572; and *U.S. Steel Corp. v. Public Util. Com*. (1981) 29 Cal. 3d 603).

[61] *Joint Proxy Statement of Charter Communications, Inc. and Time Warner Cable, Inc. filed Pursuant to Section 14(a) of the Securities Exchange Act of 1934* dated August 20, 2015 ("*Proxy Statement*") at 98-99.

highly-leveraged New Charter entity than any of the pre-merger companies. This analysis was conducted utilizing financial data from the Joint Applicants that was referenced in their opening testimony.[62]

The Joint Applicants criticize Dr. Selwyn's use of 2014, rather than 2015, financial data in his analysis of New Charter's pro forma post-merger balance sheet.[63] In fact, Dr. Selwyn used the very same 2014 financial data that the Joint Applicants themselves relied upon in their Application and in their opening testimony. Specifically, Mr. Fisher's December 4, 2015 opening testimony refers to the 2014 financial results and pro forma analysis, results that the Joint Applicants now claim "are inaccurate and out of date," even though the Proxy Statement source of his later 2015 figures set forth in his rebuttal testimony dated January 25, 2016 was available to Mr. Fisher when his December 4, 2015 opening testimony was filed.[64] Indeed, Mr. Fisher's opening testimony makes no reference whatsoever to the 2015 data[65] that the Joint Applicants now argue that Dr. Selwyn should have used citing, as sole support for this contention, that the 2015 data was "publicly available."[66]

This criticism of Dr. Selwyn's testimony also fails to mention that the substitution of 2015 for 2014 data **neither alters nor undermines Dr. Selwyn's fundamental conclusion – that the transaction will have a material adverse impact upon New Charter's overall leverage ratio.** Under the 2014 numbers, total debt will increase by $21 billion or more, producing an overall increase in the post-merger entity's financial risk and cost of capital.[67] Without merging, Charter and TWC taken together would have only $37.14-billion in debt, for a

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[62] Fisher Opening Testimony at 2.

[63] Joint Applicants' Opening Brief at 32.

[64] *Id.* (citing Fisher Rebuttal Testimony at 1:14-3:5).

[65] *See* Fisher Opening Testimony at 2.

[66] Fisher Rebuttal Testimony at 2:10.

[67] Selwyn Reply Testimony at 15, ¶ 22. The $21 billion debt increase does not include the amount Charter would spend to acquire wireless spectrum, plans they discussed in several ex parte meetings with President Picker's office.

combined leverage of only 3.3 times, vs. $58.5-billion in debt and a leverage ratio of 4.5 times by joining forces into a single entity.[68]

When 2015 pro forma data is substituted for the 2014 figures that Mr. Fisher and the Joint Applicants had previously relied upon, the impact of the merger upon TWC's leverage ratio is even greater than as previously portrayed in Dr. Selwyn's Reply Testimony:

Selwyn Table 1, with 2015 DATA		
	Charter	TWC
EBITDA	$3.4-billion	$8.4-billion
DEBT	$14.28-billion	$22.5-billion
LEVERAGE	4.2X	2.8X

Instead of a leverage ratio of 3.3 based upon 2014 financial data, TWC's leverage ratio based upon Mr. Fisher's 2015 figures has actually *decreased* to only 2.8. Thus, the effect of the merger will be to increase TWC's leverage ratio from 2.8 to 4.5:

Selwyn Table 2, with 2015 DATA				
	Charter	TWC	BHN	ProForma New Charter
EBITDA	$3.4-billion	$8.4-billion	$1.427-billion[69]	$13.828-billion
DEBT	$14.28-billion	$22.5-billion		$62.226-billion
LEVERAGE	4.2x	2.8x		4.5x

Note, in particular, that substitution of 2015 for 2014 results does not affect the post-merger New Charter leverage ratio, which is still 4.5.

[68] *Id.* at 16 ¶ 22.

[69] Proxy Statement at 221-222. Calculated as the difference between the 2015 pro forma Adjusted EBITDA for Charter, TWC and Bright House combined ($13.328-billion) and the pro forma 2015 Adjusted EBITDA for Charter and TWC only ($11.901-billion). Information on existing Bright House debt, if any, does not appear to be available.

Thus, Joint Applicants' criticism of Dr. Selwyn's use of 2014, instead of 2015 data is unfounded. And Joint Applicants fail to address the underlying substance of ORA's argument: that because of its market share dominance in California, New Charter will be in the position to raise prices in order to service the debt it will incur to enact this merger.[70] Joint Applicants have failed to demonstrate how the proposed transaction will "[m]aintain or improve the financial condition of the resulting public utility doing business in the state" as required by P.U. Code section 854(c)(1). Therefore, on this basis alone the Commission should deny the merger.

2. P.U. Code section 854(c) Requires the Commission to Review the Merger's Impacts on All Parties to the Transaction, Not Just Charter

Dr. Selwyn compared pre-merger TWC's leverage ratio of 3.3 (or 2.8 based upon 2015 data) to post-merger New Charter's leverage ratio of 4.5 where the Joint Applicants instead divert attention to the impact of the merger upon Charter alone, whose pre-merger leverage ratio is already much higher than TWC's – at 4.2. Mr. Fisher, the Senior Vice President for Corporate Finance at Charter, focuses narrowly upon the financial impact of the merger specifically upon **Charter**. However, P. U. Code section 854(c) requires the Commission to assess the merger's impact upon **each** of the three entities. Both TWC and Bright House have considerably lower debt ratios than Charter, and Charter is, in effect, leveraging these companies' superior financial condition in order to acquire the considerable increase in debt Charter needs to finance these acquisitions.

The Joint Applicants mistakenly diminish the potential impact of the increased leverage by providing a forecast of purported Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) growth for some years in the future. They provide no pro forma comparison of such EBITDA growth as between New Charter, on the one hand, and the EBITDA growth that would occur were the three individual companies to continue to operate on their own, as required by P.U. Code section 854(c).

Moreover, the implication of this EBITDA growth scenario is that once the transaction has been closed, New Charter will acquire no further debt and will be paying down its existing

[70] Selwyn Reply Testimony at 22, ¶ 25.

debt. Not only is this unrealistic, it is belied by a simple comparison of the 2014 and 2015 financial data that the Joint Applicants have now put forward. Based on 2014 financial data, New Charter's pro forma (post-merger) debt is given as $58.05-billion; however, using the newly-released 2015 numbers, New Charter's pro forma debt will have escalated to $62.4-billion, an increase of $4.35-billion.[71] Moreover, in light of the Joint Applicants' purported intent to incur "more than $25 billion in capital expenditures from 2016 to 2019,"[72] it is inconceivable that a substantial portion of the funds required for such outlays will not come from additional debt. Indeed, Mr. Fisher's focus upon "operating cash flow," which he defines as "[a]djusted EBITDA less capital expenditures," as assurance of adequate debt service coverage,[73] expressly *excludes* these capital outlays. Notably, the pro forma EBITDA will have grown from $12.9-billion in 2014 to $13.8-billion in 2015 – a gain of only $0.9-billion. However, $0.6-billion of that is accounted for in projected 2015 EBITDA gains to be experienced by pre-merger Charter and TWC on a stand-alone basis. Assuming that BHN also experiences an increase in its stand-alone EBITDA between 2014 and 2015, any merger-driven EBITDA gain (based upon 2015 data) would be less than $0.3-billion, perhaps even zero.

Mr. Fisher claims that Dr. Selwyn is ignoring the promised EBITDA growth going forward. Mr. Fisher's figures show EBITDA growth of 5.58% from 2015 to 2016, 9.59% from 2016 to 2017, 11.25% from 2017 to 2018, and 9.55% from 2018 to 2019.[74] However, this projected growth does not result from the merger. Charter's 2015 10-K states that pre-merger Adjusted EBITDA increased 6.25% for the year ended December 31, 2015 compared to the corresponding period in 2014, and by 10.34% between 2013 and 2014. In other words, the growth that Fisher notes is actually occurring organically *even without the merger*, and the fact that projected 2015-2019 growth rates do not increase above pre-merger levels provides further evidence attesting to the fact that there are little to no synergies to be gained from the proposed merger.

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[71] Fisher Rebuttal Testimony at 3:4.

[72] Joint Applicants' Opening Brief at 30.

[73] *Id.* at 29.

[74] Fisher Rebuttal Testimony at 5:14-5:18.

The Joint Applicants also reject Dr. Selwyn's discussion of the "incremental leverage ratio," constituting the ratio between incremental Adjusted EBITDA and incremental debt, which they contend is "off base."[75] Dr. Selwyn's analysis showed a net increase in debt estimated at $20.91-billion and on this basis, he estimated that "New Charter's annual payments required to service this new incremental debt will be [redacted].[76] Substituting the 2015 financial results that the Joint Applicants belatedly set forth in their rebuttal testimony, the incremental debt would now be $25.36-billion, resulting in additional (incremental) annual debt service payments relative to pre-merger levels of [redacted] some 21% higher than Dr. Selwyn's original estimate. Either of these increments in annual debt service far exceeds even the claimed incremental efficiency gains that the Joint Applicants seek to ascribe to the merger.

The Joint Applicants do not actually challenge the accuracy of Dr. Selwyn's incremental debt and incremental leverage analysis, but seek simply to dismiss it by suggesting that "[t]his ratio is not a tool that finance professionals or investors find useful when evaluating a transaction; indeed, it is not a ratio that I [Fisher] have ever encountered."[77] According to Fisher's testimony, "[b]usinesspeople … consider (among other things) the serviceability of the pro forma company's debt in light of its pro forma operating cash flows, and whether the combined new company will be financially healthier than the merging entities."[78] But what the "businesspeople" may consider is not what the Commission is *required* by P.U. Code section 854(c) to consider, which is the specific *incremental* effects of the proposed transaction. New Charter can – and almost certainly will – increase its "operating cash flows" by raising prices above those that would be possible absent the merger. The public interest and economic impact considerations that are called for in P.U. Code section 854(c) are decidedly *not* from the point-of-view of "businesspeople," "finance professionals and investors," but from the perspective of consumers and of state and local economies. Dr. Selwyn's otherwise unchallenged analysis is

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[75] *Id.* at 7:13.

[76] Selwyn Reply Testimony at20, ¶ 24.

[77] Joint Applicants' Opening Brief at 33 (citing Fisher Rebuttal Testimony at 7:13-8:4).

[78] *Id.*

both appropriate and entirely accurate – even conservative when revised to reflect 2015 results – for this purpose, consistent with P.U. Code section 854(c).

3. The Joint Applicants data now suggest that merger-specific efficiency gains will be closer to zero.

The Joint Applicants take issue with Dr. Selwyn's calculation of a $1.7-billion increase in post-merger EBITDA, which Dr. Selwyn had attributed to a combination of synergy gains ($800-million) and price increases ($900-million), claiming instead that "the $12.9 billion figure for pro forma New Charter is simply the sum of pro forma Adjusted EBITDA for each of the Joint Applicants, and does not even include any of the synergies that the Joint Applicants expect the Transaction to achieve."[79] The various "efficiency gains" claimed by the Joint Applicants' outside experts are not supported by any hard factual data. The Joint Applicants have declined to reflect any efficiency gains in post-merger EBITDA in its post-merger pro forma results. Mr. Fisher's "correction" of Dr. Selwyn's calculation now suggests that the merger-driven efficiency gains will be much closer to zero than to $1.7-billion. Assuming the accuracy of Mr. Fisher's "correction," the disparity between the incremental debt service payments of [redacted] and the minimal incremental efficiency gains is actually far greater than Dr. Selwyn had estimated, and thus, the proposed merger estimated EBITDA net increase of $0.6 billion does not come close to covering the incremental debt service payment post-merger. This poses a significant risk and concern that New Charter will raise prices over and above an amount that would be possible absent the merger.

In that regard, Dr. Selwyn provided a detailed, fact-driven empirical analysis of audited and certified, publicly available financial data from the five largest publicly-traded multisystem cable operators (MSOs) demonstrating that per-subscriber costs are essentially constant irrespective of the size of the service provider. His study included firms ranging in size from Suddenlink to Comcast, a range of sizes that encompass the Joint Applicants both individually and post-merger. Notably, Dr. Selwyn's study was not challenged nor rebutted by any of the Joint Applicants' witnesses, who at best responded by a reiteration of the same speculations that they had previously advanced.

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[79] *Id.* at 35 (citing Fisher Rebuttal at 4:23).

If the merger does result in EBITDA gains as the Joint Applicants claim, those gains will necessarily come from price increases, not from synergies or efficiencies. The Joint Applicants note that in 2012, Charter adopted what it terms its "New Pricing and Packaging" (NPP) plan, and that by 2015 it has realized a strong gain in per-subscriber revenues.[80] Charter takes pains to portray its NPP as eliminating "many of the additional fees common in the industry."[81] While NPP may well eliminate a number of separate surcharges and fees, there are certainly no "free lunches" being offered to customers. NPP merely bundles these separate charges into a single fee, it does not give anything away for free ("with no additional charge") as the Joint Applicants suggest, for example, with respect to cable modems.[82] In fact, as ORA has noted, NPP actually reduces customer choice and works to deny customers opportunities to obtain their cable modem from a competitive source, substituting a one-time purchase for perpetual rental payments. NPP may also have a similar impact upon customer choice with respect to content, as additional OVD content becomes available for access over broadband. The FCC has recently issued a Notice of Proposed Rulemaking (NPRM) dealing with video set-top boxes, proposing rules that would enable customers to purchase, rather than rent, set-top boxes, and foster additional competition in this space. Yet the Joint Applicants portray their plan to "extend its customer-friendly pricing and packaging [NPP] model to current Time Warner Cable (and Bright House Networks) customers" as a "benefit" of the merger.

In fact, the strong increases in year-over-year post-merger EBITDA being proffered by the Joint Applicants cannot be explained by even the modest, and highly speculative, efficiency gains they claim will arise. Cable TV and broadband prices have continued to experience significant and sustained increases, easily outpacing economy-wide inflation rates and price movements in other telecommunications sectors. Moreover, cable and broadband prices are

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[80] *Id.* at 27-28.

[81] *Id.*

[82] *Id.* at 106. *See also, e.g.,* Joint Applicants' Opening Brief at 43, stating: "Charter offers its residential services under its customer-friendly NPP methodology, and does not separately charge users incremental fees that other providers commonly add on to the advertised price, such as modem fees, federal Universal Service Fund ("USF") fees, state USF fees, subscriber line fees, and E911 fees. Charter has committed that, within a year of closing, it will make services available under rates and terms consistent with its NPP methodology in territories that are currently all-digital."

typically community-specific; there is no uniform national pricing such as that prevalent in the wireless market. New Charter will be able to adjust its prices town-by-town to reflect local competitive conditions; with the significant jump in market concentration in Southern California that will emerge post-merger, customers in Southern California may subject to price/revenue increases unobtainable in other areas of New Charter's nationwide operating territory.

B. The Merger of Charter, TWC and Bright House Will Lead to Less Competition and A More Highly Concentrated Broadband Market in California in Contravention to P.U. Code section 854(c)

As ORA noted in its Opening Brief, it submitted unchallenged testimony that a merger of TWC, Charter and Bright House will create a broadband entity that will dominate the Southern California market. Post-merger New Charter will pass approximately 82%[83] of all households in census blocks within the 10-county Southern California area.[84] 69.4% of those New Charter-passed households will have no other broadband service provider capable of supporting download speeds of at least 25 Mbps and upload speeds of 3 Mbps (25/3), the FCC's definition of broadband.[85] While Joint Applicants' witness Dr. Scott Morton argues that broadband service at 25/3 Mbps is "not a specific threshold for identifying relevant broadband options for viewing streaming video services"[86] despite the FCC's recent redefinition of broadband, she also claims that "[i]n order to continue to use OVD services into the future, subscribers will need more and faster broadband services from ISPs like New Charter."[87] And she fails to make any mention of the New York Public Service Commission's condition for approval that requires New Charter to

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[83] Selwyn Reply Testimony at 107-108, ¶ 97, Table 13.

[84] *Id.* at 100, ¶ 93. The 10 Southern California Counties are: San Diego, Orange, Imperial, San Bernardino, Los Angeles, Ventura, Riverside, Kern, Santa Barbara, and San Luis Obispo (Selwyn Declaration at 99-100, ¶ 92). Although both Charter and TWC serve small areas in Northern California, the Joint Applicants pass only 257,562 households in these areas, or about 5.13% of the total Northern California households with access to broadband of 5,021,498. In the ten Southern California counties, however, New Charter will pass 6,127,257 households, or 82.05% of the total 7,467,974 households with access to broadband in these ten counties.

[85] *Id.* at 124, ¶ 111.

[86] Scott Morton Rebuttal Testimony at ¶ 7.

[87] *Id.*, Exhibit B at 25, ¶ 78.

offer 100 Mbps or 300 Mbps statewide. 25/3 broadband is a crucial threshold in these proceedings (beyond the FCC definition) because no other provider comes close to offering broadband coverage comparable to what the Joint Applicants offer, so any claims that the Joint Applicants face significant competition are simply an exaggeration.

The Joint Applicants have minimal presence outside of these ten Southern California counties as only an estimated 258,000, about 4%, of the 6.4-million total New Charter households are outside of the ten Southern California counties.[88] Yet, the Joint Applicants take issue with the definition of a Southern California market.[89] Not only is New Charter's presence primarily in Southern California (96% of New Charter households are in Southern California), but Southern California contains more households that the entire state of New York. Compared to neighboring states impacted by the transaction, Oregon and Washington combined have far fewer households than Southern California. The same is true for Nevada and Arizona combined.

Southern California household count comparison to other states:

Southern California (10 counties)	New York State	Oregon and Washington State (Combined)	Nevada and Arizona State (Combined)
7,433,504	7,255,528	4,168,384	3,393,204

New Charter's dominance of and monopoly over most of the Southern California 25/3 broadband market will allow it to offset MVPD revenue losses by increasing the pricing to its captive broadband customers.[90] Furthermore, as a result of its extreme dominance of the Southern California broadband Internet access market, New Charter will have both the incentive and the opportunity to limit its broadband customers' ability to access competing online video distribution (OVD) services by implementing such devices as "throttling" of high-speed content data streams and by establishing "data caps" with usage-based overage charges where the "cap"

[88] Selwyn Reply Testimony at 10, ¶ 15.

[89] Joint Applicants' Opening Brief at 101.

[90] Selwyn Reply Testimony at 165, ¶ 150. Even where New Charter will confront competition in the MVPD space, its control over certain highly desirable content that it will inherit from TWC – the LA Dodgers – afford it a substantial competitive advantage over MVPD rivals that have thus far been unwilling to accede to TWC's terms for carriage of such content. *Id.*

is exceeded.[91] Because the overwhelming majority of New Charters' customers will not be able to switch to a competing broadband provider, there is little risk that New Charter will lose its highly profitable broadband revenue if it were to intentionally attempt to frustrate or foreclose OVD competition by, for example, imposing data caps, engaging in speed throttling, or using other service degradation tactics.[92]

In their opening brief, Joint Applicants claim for the first time in this proceeding that "[m]any of the homes within Charter's, Time Warner Cable's, and Bright House Networks' footprints receive service from other broadband providers, or may opt to forgo wired Internet access in favor of wireless options."[93] As set forth Table 19 in Dr. Selwyn's Reply Testimony, New Charter will pass a total of 6,127,257 households in the relevant market (the ten county Southern California area) with 25/3 or better service.[94] Of these households, only 1,064,060, i.e., 17.37%, would have a competitive alternative to New Charter at speeds of 25/3 or greater. Joint Applicants' discussion in their opening brief regarding DirecTV or DISH is a red herring since neither company offers 25/3 or greater broadband.[95]

Joint Applicants' references in their opening brief to "wireless options" is also inapposite.[96] FCC data suggests that a very small percentage of broadband subscribers nationwide use fixed wireless broadband.[97] Due to its lower speed, bandwidth caps, and usage-based pricing, mobile wireless broadband is not a competitive alternative to or a substitute for the Joint Applicants' wired broadband services. Mobile wireless broadband also cannot fulfill the rising demand for functionalities such as: the ability to do homework and to participate in remote

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[91] *Id.* at 75, ¶ 69. The Joint Applicants have voluntarily "committed" not to introduce "data caps" and overage charges for a period of three years following the effective date of their merger. By implication, the post-merger New Charter entity can be expected to introduce "data caps" and overage charges as soon as that three-year "commitment" has run its course.

[92] Selwyn Reply Testimony at 76, ¶ 71.

[93] Joint Applicants' Opening Brief at 100.

[94] Selwyn Reply Testimony at 123, ¶ 110, Table 19.

[95] *Id.*

[96] *Id.*

[97] FCC Internet Access Service Status as of December 31, 2013: https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329973A1.pdf

video "virtual classrooms," streaming HD video at a quality level sufficient for viewing on a large screen, telemedicine, and, running applications that require high bandwidth capacity in one or both directions. Fixed wireless broadband is also not a substitute for the Joint Applicants' fixed wireline broadband services because of its limited availability, technological and geographical constraints, substantially higher price. It may involve data caps as well.

The fact is, as the record unequivocally shows, that if the merger is approved, over 69% of households passed by New Charter in Southern California will have no alternate source of high-speed broadband. The FCC has deemed that *having "advanced telecommunications capability" requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps*.[98] If approved, the merger will result in a more highly concentrated broadband market in California, in violation of P.U. Code section 854(c), which requires that the transaction be in the public interest, Section 706(a), as approval of the merger would frustrate the deployment of broadband in California, and would certainly raise anti-competitive issues that the Commission is required to address pursuant to *NCPA v. CPUC*.

C. Broadband Service Quality

If the merger is approved, Charter's broadband subscriptions will grow by [redacted] percent in California.[99] Joint Applicants have not provided any evidence in the proceeding as to how service quality and reliability will be maintained or improved post-merger as required by P.U. Code section 854(c), and continue to fail to provide this information in their opening brief. Rather, the evidence in this proceeding indicates that service quality and reliability will worsen after the merger. Charter and TWC are at or near the bottom of virtually every independent evaluation of service quality for cable broadband providers. Making a poorly performing company much larger is not a recipe for success, but instead puts consumers at risk for continued poor quality of service. The Joint Applicants provided minimal evidence and insufficient commitments to support their claim that the proposed merger will maintain or raise the quality and reliability of broadband services in California. The Joint Applicants failed to provide

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[98] FCC *2015 Broadband Progress Report*, *supra,* at 3, ¶ 3 (footnote references omitted, emphasis added).

[99] Clark Reply Testimony at III-1.

concrete, measurable, performance-based commitments that will ensure the proposed merger maintains or raises the quality of broadband services, and continue to object to any conditions in this arena.

Joint Applicants assert in their opening brief that the Commission's "public interest" consideration should not include effects of the transaction on the market for broadband services.[100] As ORA stated in its Opening Brief and earlier in this Reply Brief, the Scoping Ruling made it clear that service quality and reliability of broadband is a part of the review of the proposed transaction. Furthermore, the Commission has the jurisdiction to review the impact of the proposed merger on the broadband service quality. Moreover, the Joint Applicant's contradict the arguments they made in their Application, in testimony and in their opening brief pertaining to the various ways in which the transaction will benefit the public interest due to improved broadband services.[101] It is essential, and a matter of public safety, to ensure service quality is maintained or improved for the millions of California consumers impacted by this transaction.

Joint Applicants also argue in their opening brief that their broadband network availability exceeds the industry norm, and states only "…a small percentage of subscribers will experience downtime or an outage for a longer [than 22 minutes] duration."[102] This argument is misleading for two reasons. First, the analysis is far too limited in scope. The Joint Applicants' analysis of network availability focuses only on **Charter's** network. The analysis does not extend to the networks of TWC or Bright House. This is problematic because Charter's network and customers represent a relatively small percentage of the network and customers affected by the transaction. For this argument to carry any weight, the analysis must include the network availability of each of the Joint Applicants.

Next, the Joint Applicant' s state that only "a small percentage of subscribers" are negatively affected by network unavailability, i.e., service outages. This notion is misleading, and probably incorrect. In 2015 alone, Charter's broadband outages affected a cumulative total

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[100] Joint Applicants' Opening Brief at 24.

[101] A.15-07-009 at 24; Joint Applicants' Opening Brief at 6, 59-61, 77-80, 91-109.

[102] Joint Applicants' Opening Brief at 48.

of [redacted] customers.[103] As of October 2015, Charter had approximately [redacted] residential broadband customers. Clearly, a *very significant* percentage of Charter's broadband subscribers experienced service outages.

Joint Applicants also claim that "[t]he fact that Charter has added subscribers to both its voice and broadband services while also reducing disconnects indicates that prospective customers and current subscribers view Charter's network as reliable."[104] In fact, Charter's increasing subscribership is more likely a result of the *lack of alternatives* due to insufficient competition.

Joint Applicants also assert that Charter has seen a substantial decrease in network outages per 10,000 lines from 2010 to 2015.[105] Similar to their analysis of network availability, Joint Applicants' analysis is far too limited in scope as it does not extend to broadband outages for customers of TWC or Bright House. This is problematic because Charter's network and customers represent a relatively small percentage of the network and customers affected by the transaction. TWC has not experienced the same trends. Furthermore, this data is not consistent with the outage data that Charter submitted in response to ORA Data Requests.[106] Previously, Charter disclosed only 137 outages for 2010.[107] However, in their Opening Brief, Joint Applicants states that Charter experienced 359 outages *per 10,000* lines. Finally, Joint Applicants' analysis does not incorporate the number of customers affected by the outages and the duration of the outages. To assess any trends related to service outages, Charter should assess the total severity of outages for all the Joint Applicants.

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[103] 351,478 is the sum of the number of customers affected by each broadband outage that occurred in 2015. A customer is counted more than once if they were affected by more than one outage. (*See,* Clark Testimony at III-18).

[104] Joint Applicants' Opening Brief at 48.

[105] *Id.* at 49.

[106] Charter Response to ORA Data Request No. 3, Question 13. *See also* Clark Testimony at III-17 to III-18.

[107] Charter's response to ORA Data Request 4-14. November 6, 2015. See Charter - CONFIDENTIAL Exhibit ORA 3-13.

Joint Applicants contend in their opening brief that Charter has invested substantially in its broadband network.[108] This is not a transaction specific benefit, as these network upgrades should reasonably be expected to occur even if the merger is not approved. Both TWC and Bright House are currently performing similar enhancements irrespective of and apart from the proposed merger. For example, TWC currently has underway a project dubbed "Time Warner Cable Maxx" to upgrade their network in order to enhance both their TV and broadband services.[109]

Lastly, the Joint Applicants assert that Charter's customer satisfaction rating is trending up in recent years.[110] First, Joint Applicant's claimed progress for their customer satisfaction ratings is debatable or even non-existent according to some customer satisfaction studies. The American Customer Satisfaction index, for example, says that Charter's customer satisfaction has declined in recent years.[111] Second, Joint Applicants entirely miss the point of ORA's testimony and discussion in its Opening Brief on Charter's low customer satisfaction ratings. In fact, Charter's customers display troubling low levels of satisfaction. Even Charter's internal customer satisfaction data, which they acquired from the Leichtman Research Group, reveals Charter has an overall customer satisfaction rating of [redacted].

D. Service Quality of Voice Communications

ORA stated in its Opening Brief that in reviewing service quality metrics and performance, there is insufficient data provided by the Joint Applicants to demonstrate that New Charter will maintain or improve service quality. Moreover, where data was provided by the Joint Applicants, poor service quality is evident. The Joint Applicants have not presented any plans or concrete, performance-based commitments to address these voice service quality issues, and therefore, they have not demonstrated that voice service quality and reliability will be maintained or improved, as required by P.U. Code section 854(c).

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[108] Joint Applicants' Opening Brief at 50.

[109] *See* Clark Testimony at IV-1 to IV-3.

[110] Joint Applicants' Opening Brief at 51.

[111] *See* Clark Testimony at III-7.

Charter did not provide any specific information regarding its plans to improve voice service quality and reliability should the transaction be approved and Charter makes no specific commitments to invest resources in California. Charter did not even specifically address service quality issues, even though many issues were raised in protests and the Commission is required under P.U. Code section 854(c) to determine whether the transaction will maintain or improve voice service quality. For this reason alone, the Commission cannot approve the proposed merger.

Joint Applicants claim in their opening brief that TWC will maintain TWC's voice service quality because there will be no change in TWCIS's voice rates, terms and conditions.[112] The Joint Applicants completely ignore the many problems with service quality raised by ORA.[113] Currently, the Joint Applicants, including TWCIS, offer substandard voice service. If approved, Charter will be grow its voice subscribers by almost five-fold in California, and it is difficult to imagine that this could have anything but a negative impact on the service quality of voice services in California.[114]

Joint Applications also assert in their opening brief that a post-merger New Charter will have the "incentive" to invest in service quality[115] and that Charter has a history of investing in its network.[116] These statements are meaningless as Joint Applicants make no specific commitments for investment in California or for meeting any service quality standards.

In their opening brief, Joint Applicants continue to fail to provide any specific plans to improve voice service quality and make no specific commitment of resources in California for the resulting combined entity to meet specific performance targets for improving VoIP service quality, reliability and customer satisfaction. The Joint Applicants did not meet their burden of proof in showing that the merger will maintain or improve service quality, and therefore, it should be denied. However, if the Commission elects to approve the merger, it should adopt

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[112] Joint Applicants' Opening Brief at 42.

[113] ORA's Opening Brief at 38-40.

[114] *Id.* at 38.

[115] Joint Applicants' Opening Brief at 44.

[116] *Id.* at 45-46.

specific, measurable performance-based targets for VoIP service quality, reliability and customer satisfaction for New Charter as noted in the list of ORA's conditions in Appendix A to this Reply Brief.

E. Low Income Programs

1. LifeLine

As ORA noted in its Opening Brief, TWC is the only one of the Joint Applicants that currently participates in Lifeline.[117] Charter Fiberlink previously offered Basic service and LifeLine discounts to residential customers but on November 14, 2014, Charter Fiberlink filed Advice Letter (AL) 142, a Tier 1 Advice Letter, requesting authority to remove Basic and LifeLine services and rates from its tariffs "as they were previously transferred to Company affiliate, Charter Advanced Services (CA), LLC, an interconnected Voice over Internet Protocol (VoIP) company."[118] The Advice Letter currently remains suspended and the CPUC's records indicate that Charter Fiberlink has still not received approval to remove Basic and LifeLine services and rates from its tariffs, even though it did so over 15 months ago.[119] According to LifeLine records, Charter Fiberlink, which is an authorized LifeLine provider, is identified as the carrier that is still providing LifeLine service to existing LifeLine customers.[120] However it seems that Charter Advanced Services, which is not an authorized LifeLine provider, is the entity that is actually providing the LifeLine service to those customers formerly served by Charter Fiberlink.[121] Furthermore, Charter Advanced Services does not offer LifeLine discounts to new residential customers, in violation of General Order (G.O.) 153.[122]

The Joint Applicants failed to address any of these violations in its opening brief. Rather, Joint Applicants make the nonsensical argument that ORA's proposed conditions concerning

[117] D.14-03-038, Decision Granting Request for Eligible Telecommunications Carrier Status.

[118] Odell Reply Testimony at 5.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Charter Response to ORA Data Request Set 5, Question No. 1; Odell Reply Testimony at 2, 5-7.

New Charter's LifeLine program are irrelevant because they do not mitigate a transaction-related harm. Joint Applicants state:

> Indeed, with respect to Charter's VoIP operations, ORA's witness, Ms. Odell, effectively concedes that these conditions lack a nexus to the Transaction and that she is merely critiquing Charter's existing interpretation of § 710 and G.O. 153: "Regardless of the Commission's determination regarding the proposed merger," she says, "the Commission should require Charter to satisfy its current obligations to provide Lifeline discounts and to comply with G.O. 153." Nor have the parties opposing approval pointed to any respect in which the Transaction is likely to harm access to Lifeline services where they are already offered: as Charter has stated, it has no current plans to discontinue TWCIS's existing Lifeline service. And to the extent New Charter were to consider any such a change in the future, it would be subject to the same notice or approval requirements as TWCIS would face as a separate entity today. Given the absence of nexus between these parties' Lifeline-related proposed conditions and the Transaction, the Commission has no basis to subject New Charter to any Lifeline requirements different from those imposed by generally applicable state or federal law.[123]

Joint Applicants are completely wrong on the law, facts and policy. As an initial matter, ORA's point in the Odell Reply Testimony with regard to the above-quoted statement is that even if the Commission denies the proposed transaction, it still needs to address Charter's flagrant lack of compliance of Commission rules and regulations.

Moreover, as part of its P.U. Code section 854 review of the proposed transaction, the Commission has an obligation to preserve its jurisdiction by addressing Charter's failure to comply with Lifeline rules. Charter has violated Commission rules and regulations by switching its LifeLine customers from its CLEC service to a VoIP affiliate without first securing Commission approval. And Charter still does not have approval from this Commission to switch those LifeLine customers to its VoIP service, so Charter has already been in violation of Commission regulations for at least 15 months. Furthermore, Charter's past performance in

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[123] Joint Applicants' Opening Brief at 76-77.

failing to support services for low income consumers does not bode well for their stewardship of TWC's Lifeline.

These issues are absolutely relevant to the Commission's review of the proposed merger, in terms of preserving the Commission's jurisdiction under P.U. Code section 854(c)(7) and in maintaining or improving service quality under P.U. Code section 854(c)(2), but also in determining whether, on the whole, the transaction is in the public interest. Joint Applicants' argument, that addressing these harms is not merger-specific, is completely off-base; the Commission cannot, as a matter of law or of good public policy, sanction Charter's flagrant violation of Commission rules and regulations.

Joint Applicants claim that:

> It should go without saying that Charter is committed to complying with federal and state law in all respects. There is no need for conditions to independently require as much. Nor would it be appropriate for conditions to impose any compliance mechanism (such as benchmarks or reporting requirements) beyond those for which federal and state law already provide.[124]

ORA agrees that in a perfect world "[i]t should go without saying that Charter is committed to complying with federal and state law in all respects."[125] But the fact of the matter is that Charter is not complying with state laws and regulations with regard to its LifeLine program, and has been out of compliance for quite some time. Because of Charter's clear record of violating applicable rules and regulations with regard to its LifeLine offering, the Commission should not approve the proposed merger without adopting some safeguards to ensure New Charter's compliance and to give the Commission effective tools to monitor New Charter's compliance. As stated in its Opening Brief, should the Commission approve this merger, it should require, as a condition of approval, that New Charter offer LifeLine discounts to its entire service territory, not only to the existing TWC service area, and that it follow and adhere to its Lifeline obligations, which Charter is currently failing to do.

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[124] *Id.* at 77.

[125] *Id.*

2. Low Income Broadband Program

As ORA noted in its Opening Brief, on January 8, 2016, Charter provided supplemental testimony detailing updates to its proposed low income broadband program. Charter's new proposal is to offer speeds of 30 Mbps download at $14.99 per month, with eligibility expanded to low-income seniors. The proposal continues to exclude many low income adults from eligibility and fails to set benchmarks for adoption. Under Charter's plan, the eligibility criteria leave many vulnerable populations in New Charter's service territory, including elderly (except seniors over age 65 who receive Social Security Insurance benefits), people with disabilities, and low-income childless adults, without an affordable option for broadband service. At a minimum, the program should be expanded to include all customers who are eligible to receive LifeLine discounts. Furthermore, the requirement that applicants not be in arrears on Charter accounts may effectively exclude many of those individuals such a program is designed to assist.

Furthermore, Charter's proposal fails to set enforceable adoption benchmarks. After establishing expanded eligibility requirements, Charter must identify the number of potentially eligible customers within its expanded footprint. ORA proposed that the Commission require New Charter to demonstrate to the Commission a minimum adoption of 45 percent of customers eligible for LifeLine within each census block within the New Charter California franchise area and operating service area within three years after roll out in order to ensure that New Charter will proactively work on improving enrollment numbers. This benchmark will help ensure that New Charter will employ effective outreach to market the program to low-income customers.

Joint Applicants state in their opening brief that the proposed condition of 45% adoption rate for its new low-income program is unreasonable.[126] In fact, the 45% adopting figure is reasonable and achievable. The 45% low-income adoption rate is not significantly higher compared to Charter's overall broadband penetration rate, which is estimated to be at [redacted][127] In fact, it is only a [redacted] point difference. The 45% adoption rate is also reasonable given that it is targeting at a smaller customer base compared to New Charter's overall customers. If Joint Applicants are concerned that New Charter could not improve the adoption rate for the low-

[126] *Id.* at 82-83.

[127] *See* responses of Charter, TWC and Bright House to ORA Data Request No. 1, Questions 1 and 2.

income by a mere [redacted] points over Charter's existing broadband penetration rate, then this should ring an alarm for the Commission in terms of the actual benefit that the proposed New Charter low-income broadband program would bring to Californian consumers.

IV. CONCLUSION

For the reasons set forth in ORA's Opening Brief and this Reply Brief, the Commission should deny the proposed merger. The Joint Applicants have not met their burden of proof and have not demonstrated that approval of the transaction would result in merger-specific benefits. However, if the Commission elects to approve the proposed transaction, then it should, at a minimum, adopt the mitigation measures that ORA proposed.

Respectfully submitted,

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