

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
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April 12, 2016

**Agenda ID #14811**  
**Ratesetting**

TO PARTIES OF RECORD IN APPLICATION 15-07-009:

This is the proposed decision of Administrative Law Judge Bemesderfer. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's May 12, 2016 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, ex parte communications are prohibited pursuant to Rule 8.3(c)(4)(B).

/s/ KAREN V. CLOPTONKaren V. Clopton  
Chief Administrative Law Judge

KVC:avs

Attachment

Decision PROPOSED DECISION OF ALJ BEMESDERFER (Mailed 4/12/2016)

**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).

Application 15-07-009  
(Filed July 2, 2015)

**DECISION GRANTING APPLICATION TO TRANSFER  
CONTROL SUBJECT TO CONDITIONS**

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**DECISION GRANTING APPLICATION TO TRANSFER  
CONTROL SUBJECT TO CONDITIONS**

**Summary**

This decision grants the Joint Application of Charter Communications, Inc. (Charter); Charter Fiberlink CA-CCO, LLC (Charter Fiberlink); Time Warner Cable Inc. (TWC); Time Warner Cable Information Services (California), LLC (TWCIS); Advance/Newhouse Partnership (Advance/Newhouse); Bright House Networks, LLC (BHN); and Bright House Networks Information Services (California), LLC (Bright House California) (jointly, Applicants or Joint Applicants), pursuant to California Public Utilities Code Section 854<sup>1</sup> for the Transfer of Control of both Time Warner Cable Information Services (California), LLC and Bright House Networks Information Services (California), LLC to Charter Communications, Inc., and for Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (Application).

We find that, as amended by the conditions imposed herein, the requested transfers satisfy the applicable provisions of Section 854 and are in the public interest.

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<sup>1</sup> Unless otherwise indicated, all code citations herein are to the California Public Utilities Code.

## **1. Background**

### **1.1. Factual Background**

#### **1.1.1. The Transaction**

Through the transaction set forth in the July 2, 2015 Application (Transaction), Charter Communications, Inc. (Charter), Time Warner Cable Inc. (TWC), and Bright House Networks, LLC (BHN) will merge into New Charter. Joint Applicants assert that through the Transaction, they will create an advanced, growth-oriented company poised to better provide competitive, high quality voice and other communications services.<sup>2</sup> Following the Transaction, Time Warner Cable Information Services (California), LLC (TWCIS) and BHN will both be indirect subsidiaries of New Charter.

#### **1.1.2. Parties to the Transaction**

Charter is currently a communications company that provides voice and business as well as broadband Internet and video services. Charter markets its services under the *Spectrum* brand. Currently the seventh-largest multichannel video programming distributor (MVPD) in the United States, Charter serves 4.2 million residential Charter TV video customers over its network. Charter provides voice service to over 2.4 million residential customers via Voice over Internet Protocol (VoIP) technology. In total, Charter serves over 5.8 million residential customers and has 386,000 commercial relationships nationwide, operates in 28 states, including California, and employs over 23,500 people nationwide, including approximately 1,500 in California.

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<sup>2</sup> Application at 2.

Charter Fiberlink is a wholly owned subsidiary of Charter. Charter Fiberlink is a limited liability company that provides limited facilities-based and resold interexchange services as a non-dominant interexchange carrier (NDIEC) and limited facilities-based and resold local exchange services as a Competitive Local Exchange Carrier (CLEC) pursuant to Certificates of Public Convenience and Necessity (CPCNs) issued by this Commission in 2004 in Decision (D.) 04-05-011 (CLEC) and D.04-04-035 (NDIEC). Charter Fiberlink serves residential and business customers in Alhambra, Apple Valley, Atascadero, Big Bear Lake, Burbank, Calabasas, Ceres, Crescent City, Glendale, Hesperia, Long Beach, Los Angeles County, Malibu, Morgan Hill, Pasadena, Paso Robles, Pismo Beach, Porterville, Rancho Cucamonga, Red Bluff, Redding, Riverside City/County, San Benito County, San Bernardino City/County, the San Gabriel Valley, San Luis Obispo City/County, South Lake Tahoe, Stanislaus County, Tulare County, Turlock, Ventura City/County, Victorville, and Watsonville.

TWC delivers voice, video, and broadband services that reach over 15 million residential and business customers across portions of 30 states. TWC offers its business, commercial, and enterprise services under its Time Warner Cable Business Class brand. TWC also operates a facilities-based VoIP service in California on a common carrier basis under the TWCIS name. TWC provides cable services to approximately 10.8 million residential video customers, making it the fourth-largest MVPD in the United States, behind Comcast Corporation, DirecTV, and Dish Network. TWC offers high-speed broadband, reaching approximately 11.7 million residential customers in 30 states.

TWCIS, a wholly owned subsidiary of TWC, is a limited liability company authorized to provide limited facilities-based and resold interexchange services as an NDIEC and limited facilities-based and resold local exchange services as a



CLC pursuant to a CPCN issued by this Commission on March 16, 2004 in D.04-03-032.

Advance/Newhouse holds 33.3 percent of Time Warner Cable Entertainment-Advance/Newhouse Partnership (TWE-Advance/Newhouse; TWC holds the other 66.67 percent. Advance/Newhouse has exclusive day-to-day management responsibility for, and de facto control over, the operation of the BHN system.

BHN delivers video, home security, voice, and high-speed data services to approximately 2.5 million residential and business customers in six states- Florida, Alabama, Indiana, Michigan, California, and Georgia. Approximately 1.7 million of those customers are located in central Florida. BHN is the tenth-largest MVPD in the United States, with over 2 million video customers.

Bright House California was authorized to provide limited facilities-based and resold interexchange services as an NDIEC and limited facilities-based and resold local exchange services as a CLEC in 2005 in D.05-06-045. Bright House California operates as a wholesale telecommunications carrier providing telecommunications services to its parent, BHN and other carriers, including backhaul services to wireless carriers. BHN utilizes those wholesale services to provide VoIP, video, and broadband services to subscribers throughout its cable franchise areas, which include Bakersfield and Kern County.

Upon the Transaction's completion, New Charter will be the third-largest MVPD behind AT&T-DirecTV and Comcast. New Charter will own and/or manage systems serving approximately 19.4 million broadband customers,

17.3 million video customers, and 9.4 million voice customers across 41 states.<sup>3</sup> Tom Rutledge, Charter's President and CEO, will hold a board seat and will be offered the position of Chairman and CEO of New Charter.

Upon completion of the Transaction, Charter Fiberlink, TWCIS, and Bright House California will each be indirect subsidiaries of New Charter. The Application does not seek approval of the transfer of customers or for any changes in regulated rates, terms, or conditions of service. Applicants assert that the change in indirect ownership of TWCIS and Bright House California will be seamless to California customers, and that the pro forma change of control of Charter Fiberlink will not change actual control of the company.

### **1.1.3. Asserted Benefits of the Transaction**

Applicants assert that the Transaction will promote the deployment of advanced voice services, enhance competition and improve service and value in the voice marketplace. They assert a larger company will have better opportunities for investment in new technology. They allege the Transaction will have no adverse impact on the competitive market. In the voice market, they claim, competitors include traditional providers of phone service such as Incumbent Local Exchange Carriers (ILECs; e.g., AT&T, Verizon, and Frontier) and other CLECs, providers of fixed and nomadic VoIP services (including Vonage and many others), and wireless providers. Thus, they assert, residential and business customers will continue to have numerous competitive alternatives for telephone service and high-capacity business services. TWC and BHN voice customers will be able to retain their current phone numbers after the

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<sup>3</sup> *Id.* at 18.

Transaction. New Charter will also extend Charter's policy of not imposing early termination fees or requiring customers to sign long term contracts to all customers of the merged entities.

In the broadband market, Applicants assert that customers will benefit from higher broadband speeds (moving base speed tiers from 15 megabits per second (Mbps) to Charter's current standard minimum of 60 or 100 Mbps at uniform pricing in TWC and BHN territories). They promise better customer service and more "customer friendly contracting processes."<sup>4</sup> In addition, they promise "good corporate citizenship," with greater low income offerings, more diversity for employees and suppliers. They also state they will offer increased customer care capacity and future in-sourcing of customer support personnel.

Because Charter, TWC, and BHN serve distinct geographic areas, Applicants claim a combination of these companies will not reduce competition. They assert they do not compete in the same geographic markets, stating that fewer than 1% of the census blocks that make up New Charter's footprint contain customers of more than one of Charter, TWC, and BHN, and that even in those census blocks, each Applicant that is present likely serves different portions of the census block.

#### **1.1.4. Protests and Other Responses to the Application**

On August 7, 2015, several parties protested the Application: the Office of Ratepayer Advocates (ORA); the Center for Accessible Technology (CforAT), Common Cause, The Utility Reform Network (TURN), and The Greenlining Institute (Greenlining) (collectively, Joint Consumers); and the National Diversity

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<sup>4</sup> *Id.* at 25.

Coalition.<sup>5</sup> Joint Applicants filed a consolidated reply to the protests and responses on August 17, 2015.

On September 3, 2015, ORA filed a motion seeking an order requiring Applicants to pay for ORA's expert; Applicants opposed the motion on September 10, 2015.

By ruling dated February 16, 2016, the Administrative Law Judge (ALJ) granted the motions for party status of Dish Network Corporation; National Hispanic Media Coalition; National Asian American Coalition/National Diversity Coalition; City of Gonzales; Entravision Communication Corporation; Writers' Guild of America, West, Inc.; Los Angeles County; Media Alliance; International Brotherhood of Electrical Workers Locals 639 and 1245; and Stop the Cap!

On February 17, 2016, the ALJ granted the National Diversity Coalition's motion to withdraw its protest, reflecting a Memorandum of Understanding (MOU) the Coalition had entered into with Joint Applicants. The MOU contains merger conditions acceptable to both sides.

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<sup>5</sup> National Diversity Coalition members include the National Asian American Coalition (NAAC), African American Economic Justice Organization, Asian Journal, Chinese American Institute for Empowerment, Christ Our Redeemer AME Church, COR Community Development Corporation, Ecumenical Center for Black Church Studies, Jesse Miranda Center for Hispanic Leadership, Los Angeles Latino Chamber of Commerce, Latino Coalition for Community Leadership, Macedonia Community Development Corporation, MAAC Project, National Hispanic Christian Leadership Conference, OASIS Center International, Orange County Interdenominational Alliance, Templo Calvario CDC, and West Bay Pilipino Multi-Service Center.

#### 1.1.4.1. ORA's Protest

ORA asks the Commission to reject the application on the following grounds:

- Because pending litigation by the City of Los Angeles against TWC alleges TWC exercises monopoly power in that city, approval of the application is not in the public interest.
- Charter and TWC currently compete in the marketplace for last mile high-speed broadband access to consumers, and the proposed merger will therefore lessen competition;
- The proposed merger does not comply with Sections 854 (b) and (c) of the Public Utilities Code.<sup>6</sup>

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<sup>6</sup> Under Section 854(b), the Commission considers the Transaction's short-term and long-term economic benefits to ratepayers as well as the Transaction's effect on competition. Under Section 854(c), the Commission considers the Transaction's compliance with eight additional requirements. In determining whether the transaction is in the public interest under Section 854(c), the Commission "need not find that each criterion is independently satisfied," but it must find that, "on balance .... [the transaction] is in the public interest." The specific criteria include whether the Transaction will:

- (1) Maintain or improve the financial condition of the resulting utility;
- (2) Maintain or improve the quality of service to ratepayers;
- (3) Maintain or improve the quality of management of the utility;
- (4) Be fair and reasonable to affected utility employees, both union and nonunion;
- (5) Be fair and reasonable to the majority of utility shareholders;
- (6) Be beneficial on an overall basis to state and local economies, and to the communities in areas served by the utility;

*Footnote continued on next page*

- The Commission should not approve the Transaction until it obtains data allowing it to determine if the merger will adversely impact public safety

The merger will lower customer satisfaction. Both Charter and TWC have below average customer satisfaction ratings compared with other communications companies in the western United States.

#### **1.1.4.2. Joint Consumers' Protest**

In addition to joining ORA in contending that the Commission should apply the Section 854 (b) and (c) factors to the Transaction, Joint Consumers allege that Applicants have failed to show that:

- The Transaction will maintain or improve the quality of management of the new company;
- The Transaction will not harm competition;
- The Transaction will provide economic benefit to residential customers;
- The Transaction will result in a company with a commitment to diversity;
- The Transaction will result in customer-friendly contracting processes;
- The Transaction will result in state and local economic benefits;
- Joint Consumers also urge the Commission to investigate the effect of the Transaction on customers

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- (7) Preserve the jurisdiction of the Commission and the capacity of the Commission to effectively regulate and audit the utility; and
  - (8) Provide mitigation measures to prevent significant adverse consequences that may result from the Transaction.

with unique needs such as limited English proficiency, disabilities, and low incomes; and

- Finally, Joint Consumers claim the asserted benefits of the Transaction are vague and speculative, and that the Application does not contain enough information for the Commission to verify those benefits.

Joint Consumers therefore ask the Commission either to deny the Application, or in the alternative, impose mitigating conditions to offset the harms they assert will come about as a result of the Transaction.

#### **1.1.4.3. National Diversity Coalition MOU**

Joint Applicants and the National Diversity Coalition entered into an MOU that was accepted into the record by the ALJ on February 17, 2016. In the MOU, Joint Applicants agree to accept certain conditions in exchange for National Diversity Coalition's withdrawal of its protest. The MOU provides that New Charter will increase the diversity of its Board of Directors; create a Chief Diversity Officer filled from a diverse pool of candidates; establish a 12-person External Diversity Council comprised of non-employees to facilitate open communication with regard to the development, monitoring and evaluation of diversity initiatives; work with the National Diversity Council to increase the diversity of its workforce to reflect the diversity of the communities in which it will operate, including California; partner with the External Diversity Council, the National Diversity Coalition and others to improve diversity in the merged company's procurement of goods and services; develop a framework for enhancing the carriage of programming networks owned and operated by African-Americans; explore opportunities to expand its programming offerings for Asian-American communities; expand its carriage of Latino-targeted English language programming; offer a low-cost high-speed broadband option to households with children enrolled in reduced or free school lunch programs or

households with low-income seniors; increase its philanthropic efforts to support minority-led and minority-serving organizations and institutions; offer internships and scholarships; increase its workforce diversity and training; offer the National Diversity Coalition opportunities to raise public awareness about their organizations and services through public service announcements; and develop a benchmark study to monitor the MOU's initiatives.

#### **1.1.4.4. Monterey and Gonzales Agreement**

In February 2016 Monterey County and the City of Gonzales reached parallel agreements with Charter and Charter Fiberlink for the latter to complete upgrades to Charter cable systems in the Salinas Valley region of the County. The agreed-to upgrades will make broadband Internet access services (with speeds of at least 60 Mbps download and 4 Mbps upload), VoIP services, and enhanced video and cable services available in the portions of Monterey County and the City of Gonzales served by those systems.

#### **1.1.4.5. CETF MOU**

On April 7, 2016, New Charter and CETF entered into a memorandum of understanding with a term of 5 years commencing at the closing of the Transaction that contains, among others, the following commitments by New Charter:

1. New Charter will offer low-income broadband service with speeds of at least 30 Mbs download and 4 Mbs upload at a price of \$14.99 per month to all households in its California service territory with either a child enrolled in the National School Lunch Program or a senior citizen 65 years or older receiving Supplemental Security Income. This pricing will remain in effect for three years from the commencement of the low income broadband service offering, following



- which New Charter may raise the price to not more than \$17.99 per month for the remaining term of the MOU.
2. New Charter will provide service to new broadband passings<sup>7</sup> for approximately seventy thousand (70,000) homes and businesses within its service area that currently are capable of receiving analog-only cable television services from Charter, BHN or TWC in the following counties in the New Charter service area within three (3) years following the close of the Transaction: Kern, Modoc, Monterey, San Bernardino, and Tulare.<sup>8</sup>
  3. New Charter will provide service to new broadband passings for eighty thousand (80,000 additional homes and businesses within its California service area with 4 years following the Close of the Transaction. At least fifty percent (50%) of those new broadband passings must be in communities where more than twenty-five percent (25%) of households speak a language other than English at home, based upon data derived from the United States Census for the period 2012-2014. The priority areas for the 80,000 additional broadband passings shall include the following counties: Monterey, Tulare, Kern (including California City), Stanislaus, San Bernardino, Riverside, Imperial, and Modoc.<sup>9</sup>

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<sup>7</sup> "Passing" means that a cable installed by New Charter passes close enough to a home or business that New Charter may provision broadband service to that home or business from that cable.

<sup>8</sup> The 3-year time frame is subject to the timely receipt of all permits, easements and other right-of-way authorizations, including but not limited to utility make-ready and may be extended for good cause shown by New Charter.

<sup>9</sup> See FN 2.

4. New Charter will deploy twenty-five thousand (25,000) out-of-home wireless broadband hotspots within its California service area within 4 years of the close of the Transactions. At least fifty percent (50%) of those wireless hotspots will be in communities where more than twenty-five percent (25%) of households speak a language other than English at home based upon data derived from the United States Census for the period 2010-2014.<sup>10</sup>
5. New Charter and CETF will collaborate to identify by January 30, 2018 seventy-five (75) anchor institutions to which New Charter has committed to provide free broadband. These locations will be in rural areas and low-income urban areas so users may access the Internet, including wireless capabilities, from these locations, at download and upload speeds comparable to the New Charter network and capable of supporting, in the aggregate, at least 1,875 users simultaneously at those speeds from the 75 locations combined.
6. As an aspirational goal, New Charter agrees that over a period of five (5) years from the close of the Transaction, it will seek to enroll 350,000 broadband customers.
7. New Charter shall provide CETF \$6.5 million for each of the five (5) consecutive years of the MOU for a total commitment of \$32.5 million.

## **1.2. Procedural Background**

On September 17, 2015, the ALJ set a prehearing conference (PHC) for September 28, 2015. At the PHC, the parties discussed the potential scope of the proceeding. On November 13, 2015, the ALJ and the assigned Commissioner issued a Scoping Ruling. The Scoping Ruling found that the applicable legal

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<sup>10</sup> See FN 2.

standard for review of the Application is Section 854 (b) and 854(c) of the Public Utilities Code. The Scoping Memo scheduled an evidentiary hearing on February 17-18, 2016, and set June 10, 2016 as the proposed date for a Commission decision on the Application. On January 13, 2016, Joint Applicants filed a motion to move the evidentiary hearings to February 8-10, 2016 and to otherwise shorten the schedule so that the Commission could decide the case by April 21, 2016. The motion asserted that the Federal Communications Commission (FCC) and U.S. Department of Justice (DOJ) were going to review the proposed merger on that timetable and that this Commission should strive to complete its review on the same timetable. On January 22, 2016, Greenlining, ORA, CforAT, the Writers' Guild of America West (WGAW) and Monterey<sup>11</sup> opposed the motion, asserting that there was no proof the FCC and DOJ would act as Joint Applicants claimed, and that even if they did, California has a right to review the Transaction on its own schedule.

On February 11, 2016, the ALJ ruled, in response to a stipulation by the parties, that a) Evidentiary hearings would not be required; b) Joint Applicants would withdraw their pending motions to strike; and c) No party would object to the admission of any testimony; objections to relevance, if any, would be outlined in briefs.

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<sup>11</sup> WGAW and Monterey filed motions for party status on August 19, 2015 and December 8, 2015, respectively.

The ALJ set a public participation hearing (PPH) for January 26, 2016 in Los Angeles and ordered Charter and TWCIS to provide notice to their respective customers of the PPH not less than 5, nor more than 30 days, prior to the PPC. The ALJ and Assigned Commissioner attended the PPH. More than 100 people spoke at the PPH, including representatives of Charter, ORA, Greenlining, the Writer's Guild of America, Common Cause, and Dish Network; staff of Senator Bob Huff and Assembly members Miguel Santiago and Chris Holden, and Jerome Horton, Chairman of the State Board of Equalization; local government office holders; companies that do business with one or more of the Applicants; competitors and other market participants; minority professional and business organizations; the California Emerging Technology Fund (CETF); Media Alliance Northern California; consumer group "Stop the Cap"; community-based organizations serving disadvantaged youth and other underrepresented communities; groups promoting diversity; minority press outlets; local Chambers of Commerce; a local community college district; LGBT advocacy groups; museums and arts organizations; the Southern Christian Leadership Conference, the NAACP branches in North San Diego County, Los Angeles, Beverly Hills/Hollywood, the Los Angeles Urban League, and other civil rights organizations; a police officers' association; religious congregations; and one or two individuals appearing on their own behalf.

On February 16, 2016, the ALJ granted Monterey's motion to withdraw as a party.

On February 17, 2016, the ALJ granted the joint motion of Applicants and the National Diversity Coalition to reflect a change in the latter's position regarding the Transaction in view of the MOU and accepted the MOU into the record.

On March 10, 2016 the ALJ granted the motions of the City of Gonzales and the Town of Apple Valley to withdraw previously submitted testimony and/or withdraw as parties.

### **1.3. Jurisdiction and Standard of Review**

Applicants claim that the Commission should review the merger pursuant to § 854(a) of the Public Utilities Code.<sup>12</sup> They assert that §§ 854(b)<sup>13</sup> and 854(c)<sup>14</sup>

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<sup>12</sup> Pub. Util. (a) No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. [*Additional text intentionally omitted.*]

<sup>13</sup> 854(b) Before authorizing the merger, acquisition or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars (\$500,000,000) the commission shall find that the proposal does all of the following:

- (1) Provides short-term and long-term economic benefits to ratepayers.
- (2) Equitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, off the proposed merger, acquisition or control between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.
- (3) Not adversely affect competition. In making this find, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.

<sup>14</sup> 854(b) Before authorizing the merger, acquisition or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars (\$500,000,000), the commission shall consider each of the criteria listed in paragraphs (1) to (8) inclusive, and find, on balance, that the merger, acquisition, or control proposal is in the public interest.

*Footnote continued on next page*

are inapplicable because the Transaction is occurring at the holding company level and none of the utilities at issue in the Joint Application has gross annual California revenues exceeding \$500 million, a prerequisite to § 854(b) and (c) applicability. They further claim that the *pro forma* transfer of control of Charter Fiberlink to New Charter does not require review under § 854 on the ground that it is simply a “change in legal control,” and that “the change in legal control is not a change in actual control.”<sup>15</sup>

Joint Applicants also claim that regardless of whether the Commission applies § 854(a) or §§ 854(b) and (c), the Transaction should be approved. They claim it will deliver financial benefits to customers, improve service quality, result in stronger company management, cause no harm to employees, benefit shareholders, and improve deployment of innovative services.

- 
- (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.
  - (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.
  - (5) Be fair and reasonable to the majority of all affected public utility shareholders.
  - (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. Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.
  - (7) Provide mitigation measures to prevent significant adverse consequences which may result.

<sup>15</sup> *Id.* at 20.

Protesters argue that the Commission should review the Transaction under §§ 854(b) and 854(c). They also argue that the commission has the authority and the obligation to review the Transaction pursuant to § 706(a) of the federal Telecommunications Act. Indeed, protesters base a majority of their objections to the Transaction on its presumed implications for broadband deployment and affordability, subjects over which they assert § 706(a) gives us jurisdiction.<sup>16</sup> Although § 710 of the Public Utilities Code explicitly exempts VoIP and other Internet-enabled services from Commission jurisdiction, it contains an exception in favor of express delegations<sup>17</sup> of regulatory authority. Protesters argue that the requisite express delegation can be found in § 706(a), which has recently been the subject of an extended interpretation by the D.C. Circuit in the case of *Verizon v. FCC*, 740 F. 3d 623 (D.C. Cir. 2014). There, the court held that the FCC had correctly interpreted § 706(a) as a grant of regulatory authority on which the FCC could base its proposed Open Internet rules. The Court also noted that § 706(a) also operated as a delegation to “each state with

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<sup>16</sup> 706(a) 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. (Section 706(a) (47 U.S.C. § 1302(a), *et seq.*.)

<sup>17</sup> Pub. Util. Code § 710(a) “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....”

regulatory jurisdiction over telecommunications services” of authority to “encourage the deployment” of broadband by utilizing measures that “promote competition” in local markets and “remove barriers to infrastructure investment.” (740 F.3d at 637-739.) Citing this ruling, protesters argue that § 706(a) provides a basis for Commission consideration of the implications of the Transaction for broadband deployment and affordability in California notwithstanding the prohibitions of Pub. Util. Code § 710.

Joint Applicants dispute that the Commission has authority to review the transaction under § 706(a) of the federal act. They state that California has a longstanding policy of allowing innovative IP-enabled services (including broadband) to flourish without the burden of traditional state utility regulation. They claim that Public Utilities Code § 710 prohibits the Commission from exercising jurisdiction over VoIP and other IP-enabled services except where the Commission is “expressly” authorized by statute to so exercise jurisdiction, and argue that § 706(a) is not such express authorization. They claim California’s § 710 must be interpreted as a broad prohibition with a limited exception, not a narrow prohibition swallowed whole by an expansive exception.

In the Scoping Memo, the ALJ and the Assigned Commissioner ruled that the standard of review is whether or not the transaction is in the public interest and that in making that determination the Commission should evaluate the Transaction in accordance with the criteria enumerated in §§ 854(a) through 854(c) of the Pub. Util. Code. We concur. Joint Applicants have stated that the allegedly beneficial effects of the Transaction on broadband deployment and affordability are key reasons that we should approve the Application. Having placed those alleged benefits in issue, Joint Applicants cannot complain if we examine the evidence supporting that claim as part of our public interest analysis



under § 854. For that reason, we find it unnecessary to address the claimed applicability of § 706(a) of the federal Telecommunications Act to the Transaction or analyze its relationship to § 710 of the Pub. Util. Code.

## **2. Issues Before the Commission**

The Scoping Memo for the proceeding lists the following issues for determination in this proceeding:

- a. Does the Transaction meet some or all of the criteria enumerated in Pub. Util. Code § 854(c)?
- b. How will the Transaction affect broadband deployment and/or affordability?
- c. Is the proposed change of control in the public interest?
- d. Are there any implications for public safety from the transaction?

### **2.1. Positions Regarding Compliance with Applicable Provisions of the Public Utilities Code**

#### **2.1.1. Applicants' Position**

While Applicants dispute the applicability of §§ 854(b) and (c), as noted above, they nonetheless lay out how their Transaction meets those provisions' basic requirements. Even if they do apply, Applicants contend, the Commission should waive review under those sections, given the highly competitive marketplace in which the subject utilities operate. To the extent Applicants offer assertions about the way in which the Transaction provides the type of benefits required under § 854(b), we discuss them below.

### **2.1.1.1. Short and Long Term Economic Benefits of the Transaction, § 854(b)(1)**

Applicants claim<sup>18</sup> the transfers may result in significant economic benefits for California consumers and local economies. Among other things, they assert, the transfers may yield significant synergy savings, which may be spread across a variety of platforms and services and can result in increased investment and improved and expanded voice and enterprise services.

### **2.1.1.2. Allocation of the Economic Benefits of the Transaction, § 854(b)(2)**

Because they do not agree that § 854(b) applies to the Transaction, Applicants do not state how the transaction “equitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted benefits of the transaction, “ with “[r]atepayers ... receiv[e] not less than 50 percent of those benefits.” (§ 854(b)(2).)

### **2.1.1.3. Effects of the Transaction on Competition, § 854(b)(3)**

Applicants contend the Transaction will promote the deployment of advanced voice services and enhance competition in the voice marketplace. One mechanism through which these benefits will be achieved is the increased scale of New Charter. They claim the combined company will realize substantial savings through scale, and it will be able to invest in and attract a top-tier research and development team, to build facilities for innovation, and to drive standard-setting policies. New Charter will also be a more robust voice competitor because it will draw on each of Charter’s, TWC’s, and BHN’s experience as a premier voice service expert. New Charter will continue

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<sup>18</sup> See generally Applicants’ Reply to Protests, filed Aug. 17, 2015.

Charter's tradition of implementing consumer-friendly policies for its voice services – including not imposing early termination fees and not requiring long-term contracts. They assert that allowing a company to obtain greater scale and scope can advance the public interest by spurring investment.

Further, Applicants note that they made a series of binding commitments in their federal filing regarding the broader Transaction of which the instant transfers are a part. First, when it comes to voice services, New Charter has committed to the build-out of one million line extensions of network to homes in franchise areas; these new facilities will either provide service to currently unserved areas or will increase competition with existing providers.

Second, Applicants have made a specific binding commitment that, within four years of close, New Charter will invest at least \$2.5 billion in the build-out of networks into currently unserved commercial areas within the combined company's footprint. They claim that this commitment and other synergies related to the Transaction will increase the competitiveness of the enterprise services market for business customers whose locations span the Applicants' current territories.

Additionally, although they claim it is not the subject of the instant proceeding or within this Commission's jurisdiction, the Applicants note they have committed to deploy over 300,000 out-of-home Wi-Fi access points throughout the country within 4 years of closing the Transaction. Applicants claim that establishing a more robust Wi-Fi network will offer a valuable convenience to New Charter's California subscribers by extending the reach of New Charter's wired broadband service on mobile devices.

In another commitment Applicants cite as beyond the scope of this proceeding or the Commission's jurisdiction, Applicants state they have committed to develop and deploy advanced broadband capabilities throughout the New Charter footprint. Within 12 months of closing New Charter will market services consistent with Charter's current packaging and pricing strategies, including its base 60 Mbps broadband service, to consumers in TWC and BHN's areas where the cable systems are all-digital at closing. In TWC and BHN service areas that are not yet all digital, New Charter will make those same offerings available once the systems are taken all digital. New Charter has also pledged to be bound by the Open Internet requirements for three years, regardless of the ongoing litigation surrounding the FCC's *Open Internet Order*.<sup>19</sup>

As we discuss more fully below in our analysis of the relationship of the Transaction to the public interest requirements of Pub. Util. Code § 854(c), by advancing the alleged economic benefits outlined above as reasons for this Commission to approve the Transaction, Joint Applicants have opened the door to our evaluation of the implications of these changes on the public interest of California. Citing general improvements to the Charter network as a whole without a showing of specific benefits to California is not providing a reason for us to approve the Transaction. In a similar vein, arguing that the merger will make New Charter a more substantial competitor in some markets without also acknowledging that New Charter will become a larger monopolist in other markets is also not providing a reason for us to approve the Transaction.

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<sup>19</sup> *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015).

#### **2.1.1.4. Public Interest Factors, § 854(c) Categorization and Need for Hearing**

Pursuant to § 854(c), the Commission must consider seven statutory criteria and find, on balance, that the merger, acquisition, or control proposal is in the public interest.” Section 854(c) does not require the Commission to find that each of the seven criteria is met on its own terms.

#### **2.1.2. Protestors’ Position**

Protestors ask generally that the Commission either deny the application, or impose conditions designed to mitigate what they contend are ill effects from allowing Applicants to consummate the Transaction.

##### **2.1.2.1. ORA**

### **3. Discussion and Analysis**

#### **3.1. Compliance with Section 854(b) and (c)**

We turn to an analysis of the factors §§ 854 (b) and (c) before we may approve a merger of the magnitude presented here.

##### **3.1.1. Overview**

Even if they do not agree that the § 854(c) factors apply to the Transaction, Applicants contend the merger satisfies both §§ 854(a) and (c):

The Transaction is in the public interest. It will bring substantial benefits to customers and to the State of California, with no countervailing harms, and thus meets the standard of review under both Section 854(a) and Section 854(c).<sup>20</sup>

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<sup>20</sup> Errata Opening Testimony of Adam Falk, Senior Vice President for State Government Affairs, Charter Communications, Inc. on Behalf of Joint Applicants, served Jan. 4, 2016, at 2 (Applicant Falk Testimony).

In evaluating this argument, we first of all bear in mind that the actual Transaction over which we have jurisdiction is the indirect transfer of control of licensed entities that is appendant to the merger of the parent companies. The merger itself is not before us. Nonetheless, we can weigh the probable effects of the merger on the public interest in making our determination of whether or not to approve the transaction. The specific requirements of §§ 854(b) and 854 (c) provide an outline for making that public interest determination but they do not exhaust the considerations that bear on determining the public interest.

Joint Applicants, the protesters and the public alike see the matter in this light. Much of the testimony offered by Joint Applicants addresses the effects of the Transaction on broadband deployment and affordability. The majority of the testimony offered by protesters addresses the same issues. Similarly, of the more than 100 speakers at the public participation hearing in Los Angeles, only two addressed the Transaction's implications for telephone service; all other speakers addressed the implications of the Transaction for broadband deployment and affordability or else the commitment of the Joint Applicants to diversity in hiring, contracting and programming. Finally, it is worth noting that both the MOU between Joint Applicants and the National Diversity Council and the agreement between Joint Applicants and the County of Monterey are overwhelmingly devoted to the same two issues, broadband deployment and affordability, on the one hand, and diversity in hiring, contracting and programming on the other. Thus, as we consider whether the Transaction complies with the specific requirements of §§ 854(b) and 854(c), we do so with the understanding that a decision that does not address, within the limits of our jurisdiction, the topics of the greatest concern to the public, will be an inadequate examination of the public interest.

**3.1.2. Does the Merger Maintain or Improve the Financial Condition of the Resulting Public Utility Doing Business in California – Section 854(c)(1)?**

**3.1.2.1. Parties' Positions**

Applicants' witness Fisher contends that the Transaction will have benefits for the resulting entity's financial health:

As a result of the proposed Transaction, New Charter [the merged entity] will serve more subscribers, generate more revenue, and earn more adjusted EBITDA.<sup>21</sup> Nationwide, total video subscribers will increase to 17.3 million; broadband subscribers will increase to 19.4 million; and voice subscribers will increase to 9.4 million. Pro forma revenue is expected to nearly quadruple, rising from \$9.1 billion to \$35.7 billion, and pro forma adjusted EBITDA is expected to increase from \$3.2 billion to \$12.9 billion. These increases will substantially strengthen Charter's financial position.<sup>22</sup>

Regarding the regulated public utilities in California, (Charter Fiberlink, TWCIS and Bright House California) Fisher says:

Although Charter's regulated state affiliates recognize certain revenues and costs for accounting and reporting purposes, they are ultimately wholly owned Charter subsidiaries and part of the same corporate family, and do not issue bonds or take on bank debt independently from the other entities in Charter's corporate structure. Therefore, the effects of the Transaction on the financial health of Charter's state affiliates such as Charter Fiberlink CCA-CCO,

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<sup>21</sup> EBITDA refers to "Earnings Before Interest, Tax, Depreciation and Amortization." The concept is a widely-used measure of a company's operating cash flow.

<sup>22</sup> Opening Testimony of Charles Fisher, Senior Vice President for Corporate Finance, Charter Communications, Inc. on Behalf of Joint Applicants, served December 4, 2015, at 2 (Applicant Fisher Testimony).

LLC are best understood by looking to the financial health of Charter as a whole, as I have described.<sup>23</sup>

ORA's witness Selwyn, by contrast, asserts that the resulting entity will take on more debt to finance the transaction, resulting in a more highly leveraged post-merger entity. The increased debt service payment obligations to which New Charter will be subject may exceed the net increase in EBITDA that the Applicants attribute to the Transaction. One component of the increase in EBITDA that the Applicants anticipate may be post-merger price increases for services that confront little or no effective competition.<sup>24</sup>

Selwyn contends the increase in EBITDA for the merged company is at most \$1.77 billion, while total debt will increase by \$21 billion or more.

"... Charter and TWC taken together (but without merging) would only have \$37.14-billion in debt, for a combined leverage of only 3.3x, vs. \$58.5-billion in debt and a leverage ratio of 4.5x by joining forces into a single entity.

A lower leverage ratio is better for a number of reasons. ... New Charter's and its subsidiaries' indebtedness could have negative consequences to New Charter after the mergers (and, if completed, the BHN transactions)...."<sup>25</sup>

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<sup>23</sup> *Id.* at 7-8.

<sup>24</sup> Reply Testimony of Lee L. Selwyn on behalf of ORA, served Jan. 15, 2016, at 12-13 & 19-20 (ORA Selwyn Reply Testimony).

<sup>25</sup> *Id.* at 16-17.



Regarding his opinion that price hikes are possible after the merger, Selwyn states:

“... New Charter post-merger will dominate the Southern California broadband market, passing at least 82% of all households in the 10 Southern California counties, and by the Joint Applicants’ own testimony, some 87% of all households in the Los Angeles [Designated Market Areas,] DMAs.... With this level of market dominance, it is entirely reasonable to ascribe a substantial portion of the projected \$1.7-billion increase in post-merger EBITDA to price increases that would – and that could – be put into effect by New Charter.”<sup>26</sup>

In rebuttal to ORA’s testimony, Applicants’ witness Fisher claims that ORA’s claims about EBITDA and debt are “out of date, do not accord with the numbers that have been publicly reported, and do not provide a basis for Dr. Selwyn’s assertions regarding New Charter’s financial condition.”<sup>27</sup> Further, he states, “New Charter’s expected leverage ratio compares favorably with that of other [Multi-channel Video Programming Distributors,] MVPDs. It is true that New Charter will be somewhat more leveraged [than the pre-merger entities]... [b]ut that does not mean that New Charter will be less creditworthy... or that its financial condition will be worse.”<sup>28</sup>

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<sup>26</sup> *Id.* at 22.

<sup>27</sup> Rebuttal Testimony of Charles Fisher, Senior Vice President, Corporate Finance, Charter Communications, Inc. on Behalf of Joint Applicants, served Jan. 25, 2016, at 1 (Applicants Fisher Rebuttal Testimony).

<sup>28</sup> *Id.* at 6.

### **3.1.2.2. Discussion Section 854(c)(1)**

After reviewing the detailed testimony of the competing experts, we conclude that New Charter, though somewhat more highly leveraged than any of its constituents, will be adequately capitalized. The financial condition of the regulated utilities that will be owned by New Charter is essentially identical to the financial condition of New Charter itself, as its witness Fisher testified, so we conclude that they will also be adequately capitalized after the merger.

Dr. Selwyn's argument that the enhanced market power of New Charter will permit it to raise rates without competitive constraint proves too much, at least in the context of a § 854(c)(1) analysis. Enhanced market power translates directly into greater financial strength and thereby satisfies, rather than contradicts, the requirements of § 854(c)(1).

### **3.1.3. Does the Merger Maintain or Improve the Quality of Service to Public Utility Ratepayers in the State – Section 854(c)(2)?**

#### **3.1.3.1. Parties' Position**

Applicants assert that the quality of service to the merged entity's California public utility ratepayers will improve as a result of the merger, and that the Transaction therefore satisfies § 854(c)(2). Those ratepayers are the customers of TWCIS, Bright House California and Charter Fiberlink,<sup>29</sup> the three public utilities that are subject to this proceeding. Charter Fiberlink provides telecommunications services to enterprise business customers, including private line and data wide area network (WAN) services. It also provides network interconnection telephone numbers to an unregulated VoIP affiliate, as well as switched exchange services to interconnecting carriers who terminate calls on its

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<sup>29</sup> Application at 26.

network.<sup>30</sup> TWCIS provides retail VoIP as a regulated service to consumers and businesses in California. It also provides commercial and wholesale telecommunications services, including switched and high capacity transmission services (e.g., Metro Ethernet), to businesses in California. Bright House California provides telecommunications services primarily to its parent (Bright House Networks) and other carriers, including backhaul services to wireless carriers.

The services provided by these three public utilities to their ratepayers are appropriately the focus of a § 854(c)(2) inquiry. Those ratepayers are:

(1) enterprise customers of services offered by TWCIS, Charter Fiberlink, and Bright House California, such as private line, data WAN, and exchange access; and (2) persons and businesses subscribing to the voice services provided by TWCIS.

Joint Applicants claim that the combination of New Charter's geographic reach and more rationalized footprint will position New Charter to better compete for enterprise customers, and thus improve competition in that sector. By combining the Joint Applicants' existing service areas, New Charter will be able to provide a more competitive regional service option.<sup>31</sup> This effect of the Transaction is especially pronounced in Los Angeles, where the Joint Applicants currently estimate that New Charter will be able to extend Charter's highly competitive terms and pricing to thousands of business locations where none of the Joint Applicants could otherwise economically provide service on a standalone basis. A similar expansion of potential business customers is

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<sup>30</sup> Falk Direct Testimony at 6.

expected in other locations to which none of the Joint Applicants could individually provide such services at competitive prices. As Joint Applicants' expert Morton explains, the combination of the Joint Applicants' networks will better serve small and medium-size businesses (SMBs) by offering a "one-stop shopping benefit" and the reduced costs accruing from it, a clear benefit of the Transaction.<sup>32</sup>

Second, Joint Applicants claim that the increased competition from New Charter will also provide immediate benefits in the commercial and enterprise marketplace. When compared with competitors such as CenturyLink Business, AT&T and Verizon, Charter's *Spectrum* business services for SMBs are highly competitive in terms of price, Internet speed, and ease of switching. New Charter, with its integrated systems and enlarged footprint, will be an even more effective competitor in this sector and can be expected to put downward price pressure on the other companies serving this market.

With regard to the voice services provided by TWCIS, Joint Applicants claim the Transaction will promote the deployment of advanced voice services, allow the new entity to make significant fixed-cost investment by spreading those investments over a larger customer base, and allow expansion of Charter's research and development team. They claim customers will benefit from Charter's "customer-friendly, simple billing practices." They pledge to build at least one million new line extensions to service residential and small business locations, with a significant number of these line extensions deployed in

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<sup>31</sup> *Id.* at 13-14.

<sup>32</sup> Morton Direct Testimony, Ex. A, ¶ 20.

California. They assert this buildout will improve voice as well as mass-market broadband Internet access and voice and data services for small business.

In regard to broadband deployment and affordability, Joint Applicants contend that Charter already delivers high-quality broadband, has a track record of investing resources in infrastructure to “reliably deliver data-hungry content.” They state that Charter will continue to invest to provide enhanced broadband service to its existing and new customers whom it will serve as a result of the merger. Charter’s broadband Internet service delivers an industry-leading base 60+ Mbps to the vast majority of its 5.1 million residential broadband customers nationwide. Charter is fully digital in virtually all of its footprint.<sup>33</sup> Further, Applicants promise customer benefit in the TWC and BHN footprints through “the rollout of Charter’s customer-friendly practices.... [T]here are no data caps or usage-based billing. There are no contracts with early termination fees. There are no modem lease fees.”<sup>34</sup>

ORA’s witness Gallardo contends that Applicants’ statements and plans regarding voice service quality lack specific performance-based outcomes in California. He alleges Applicants have received poor customer satisfaction and performance reliability ratings from third-party rating services such as J. D. Power. He alleges a significant risk to public safety of Applicants’ high number of service outages, poor response time to outages, especially the most significant outages (those that affect the largest number of subscribers).<sup>35</sup> In

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<sup>33</sup> *Id.* At 12-18.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> These VoIP outages are termed NORS outages – outages of at least 30 minutes duration that potentially affect at least 900,000 user minutes of interconnected VoIP

*Footnote continued on next page*

addition to slow repair times, he alleges that certain geographic locations experience a disproportionate impact from significant voice service outages. He asserts the record lacks adequate data on service outages for BHN. He critiques other aspects of Applicants' voice service performance (installation intervals, high numbers of service "trouble reports" as well as noting several data inconsistencies and caps for the companies that will be combined into the merged entity. For voice as well as broadband and cable television, he alleges inadequate responses to customer complaints, using data from the Commission's Consumer Affairs Branch.<sup>36</sup>

With regard to broadband, ORA's witness Selwyn contends that there is no basis upon which to expect that any post-merger scale or merger-driven efficiency gains will be flowed through to customers. He argues that broadband price increases likely will result from the absence of effective competition for high-speed broadband within the new Southern California footprint of the merged entity and that New Charter will produce no improvement in the availability of high-speed broadband access. He concludes that Applicants have failed to identify any *bona fide* public interest benefit that can be legitimately attributed to the proposed merger.<sup>37</sup>

ORA's second witness on broadband service quality, Adam Clark, states that the Applicants provide minimal evidence and insufficient commitments to

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service and results in complete loss of service, or affects large capacity lines or special facilities. ORA Testimony and Recommendations Regarding Voice Service Quality and Backup Power (Enrique Gallardo), served Jan. 15, 2016, at I-19 (ORA Gallardo Reply Testimony).

<sup>36</sup> *Id.*, *passim*.

<sup>37</sup> ORA Selwyn Reply Testimony at 73, 75, 92 & 95.

support their claim that the proposed merger will raise the quality of broadband service in California; criticizes Charter's and TWC's "extremely poor" customer satisfaction ratings and rankings; points out TWC's missing of several of its broadband service metric targets for most of 2015; notes Applicants' lack of performance-based commitments to improve network availability; states that each of the Applicant entities experiences frequent and/or severe broadband outages that negatively impact service reliability (citing confidential numbers); states that customer complaints about Applicants' broadband services indicate serious deficiencies in the quality of such services; and asserts that Charter and TWC fail to fulfill a satisfactory percentage of requests for new broadband services. He concludes by stating that the Commission should not view New Charter's promise to convert acquired networks to an all-digital platform and increase broadband speeds as evidence that the Transaction will benefit California, because TWC and BHN are already performing similarly enhancements independent and irrespective of the merger. He concludes that the Commission should not view New Charter's promises to not block Internet traffic, throttle Internet traffic or engage in paid prioritization as evidence of the merger's benefit, since the law already requires Internet service providers to follow these practices.<sup>38</sup>

Joint Consumers challenge Applicants' claim that if the merger is consummated, consumers will benefit from Charter's "customer-friendly contracting practices." They note that the Application contains no specific

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<sup>38</sup> Testimony and Recommendations Regarding Broadband Service Quality (Adam Clark), served Jan. 15, 2016, at 2-4.

commitment regarding maintaining Charter's practices of no contracts with early termination fees, no data caps, and no usage-based billing.<sup>39</sup>

### **3.1.3.2. Discussion of Section 854(c)(2)**

In evaluating the conflicting claims of Joint Applicants and Protesters with regard to the § 854(c)(2) standard, we bear in mind that this section of the Pub. Util. Code deals specifically with the effect of the Transaction on current ratepayers of the regulated public utilities that are subject to this proceeding. Those ratepayers, whom we identified above, are the business and residential customers of Charter Fiberlink, TWCIS and Bright House California. Joint Applicants' witnesses are persuasive that the enlarged footprint of the combined companies will permit New Charter to compete effectively for commercial accounts that are currently unavailable to any of the individual companies. They are also persuasive that Charter's current offerings to its enterprise customers are highly competitive when compared with similar offerings from other companies serving that space. ORA's witnesses Gallardo and Clark are persuasive that current service levels for the voice service customers of TWCIS and Bright House California and the broadband customers of Charter Fiberlink are low in comparison with levels of service received from other providers. If New Charter merely maintains the current service levels of its constituent companies, it may technically satisfy the statutory requirement but it is difficult to conclude that such a result is in the public interest when current service levels are unsatisfactory. At a minimum New Charter should, within a reasonable time after the closing of the Transaction, provide voice and

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<sup>39</sup> Joint Consumers' Protest, filed Aug. 7, 2015, at 13.



broadband service levels that are comparable to the average service levels of its competitors.

According to Joint Applicants, the parent company merger will lead to significantly improved services to the customers of the licensed subsidiaries. We will hold them to that statement and require, (as a condition) of approving the Transaction, a concrete plan for remedying the service deficiencies of their licensed subsidiaries as soon as possible following completion of the Transaction. With that proviso, we conclude that, as modified herein and spelled out more fully in the ordering paragraphs of this decision, the Transaction meets the requirements of § 854(c)(2).

**3.1.4. Does the Merger Maintain or Improve the Quality of Management of the Resulting Public Utility Doing Business in the State – Section 854(c)(3)?**

**3.1.4.1. Parties' Position**

With regard to the third § 854(c) factor – whether the merger will maintain or improve the quality of management of the resulting public utility – Applicants note that all regulated public utilities will be managed by New Charter and its management team. They state that Charter Fiberlink, the only Charter entity that holds a California Certificate of Public Convenience and Necessity (CPCN), does not have independent management, and that the same is true for TWCIS and Bright House California, who obtain services from their respective parents and/or affiliates. They extol in general terms the capability of the merged company's proposed CEO, Tom Rutledge, and Charter's management generally, citing Charter's infrastructure investment during 2012, 2013 and 2014. They provide confidential information about other company investments which they

claim is very significant.<sup>40</sup> They conclude with the generality that “Our record demonstrates Charter’s senior leadership’s commitments to continually innovating in our delivery of products and services and to making the investments necessary to ensure that Charter’s network is not only robust for the needs of today, but is also positioned to evolve to meet consumer and business demands of the future.”<sup>41</sup>

Joint Consumers claim that Applicants have failed to show that the Transaction will maintain or improve the quality of management of the new company. They state that Applicants have failed to comply with the certification requirements imposed by the Commission in Decision 13-05-035, which requires communications providers certify, under oath, the following:

Neither applicant, any of its affiliates, officers, directors, partners, agents, or owners (directly or indirectly) of more than 10% of applicant, or anyone acting in a management capacity for applicant: (a) held one of these positions with a company that filed for bankruptcy; (b) been personally found liable, or held one of these positions with a company that has been found liable, for fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (c) been convicted of a felony; (d) been (to his/her knowledge) the subject of a criminal referral by judge or public agency; (e) had a telecommunications license or operating authority denied, suspended, revoked, or limited in any jurisdiction; (f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of criminal or civil claims involving violations of Sections 17000 et seq., 17200 et seq., or 17500 et seq.

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<sup>40</sup> Applicant Falk Reply Testimony at 32-33.

of the California Business & Professions Code, or of any other statute, regulation, or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; or (g) been found to have violated any statute, law, or rule pertaining to public utilities or other regulated industries; or (h) entered into any settlement agreements or made any voluntary payments or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general.

Joint Consumers challenge Applicants' claim they are exempt from these certification requirements because it is too burdensome to so certify and that only some of the Applicant group need provide the certification. Further, Joint Consumers challenge the adequacy of the certification provided.<sup>42</sup>

#### **3.1.4.2. Discussion Section 854(c)(3)**

Joint Applicants have demonstrated that there is a seasoned and professional management team in place that is capable of managing the affairs of the merged companies and their licensed subsidiaries. We agree with Joint Consumers that the management of the licensed subsidiaries is subject to the certification requirement of D.13-05-035 and we will require, as a condition of approving this transaction, that Joint Applicants provide such a certification for each of TWCIS, Bright House California and Charter Fiberlink. We conclude that, modified herein, the Application meets the requirements of § 854(c)(3).

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<sup>41</sup> *Id.* at 34.

<sup>42</sup> Joint Consumers' Protest, filed Aug. 7, 2015, at 9-10.

### **3.1.5. Is the Merger Fair and Reasonable to Affected Public Utility Employees – Section 854(c)(4)?**

#### **3.1.5.1. Parties' Position**

The next prong of the Section 854(c) test focuses on the affected public utility employees. There is little in the record on this point. Charter states that because it does not yet have approval for the Transaction, it is unable to make representations about the impacts of the Transaction on specific employees. Applicants expect that New Charter will create more United States jobs as a result of the Transaction. Charter has grown by 7,000 employees since 2012, and, as previously stated, expects to bring TWC jobs back to the United States, adding thousands of jobs to the American economy. New Charter asserts it will bring many if not most of these jobs in-house, where it will provide significant training, benefits, and opportunities for advancement, adding to the skill level and economic fabric of local communities, while developing its own high-skilled, well-paid workforce devoted to delivering improved customer service in California and across the country.

In connection with impact on employees, Applicants also state that the Transaction will build on each individual company's commitments to good corporate citizenship, including by expanding TWC's commitment to diversity and inclusion. Finally, Applicants "certify" that all Charter, TWCIS, and Bright House California employees will be treated fairly during the integration process.<sup>43</sup>

In connection with its discussion of expanding its "customer care capacity," Applicants state that New Charter will bring overseas TWC jobs back

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<sup>43</sup> Application at 29-30.

to the United States by hiring and training thousands of new employees for its customer service call centers and field technician operations. New Charter will bring many if not most of these jobs in-house, where it will provide significant training, benefits, and opportunities for advancement, adding to the skill level and economic fabric of local communities, while developing its own high-skilled, well-paid workforce devoted to delivering improved customer service in California and across the country.<sup>44</sup>

Joint Consumers – in connection with an argument asserting that Applicants have failed to show that the Transaction will economically benefit residential customers – highlight Applicants’ statement that they are “unable to make representations about the impacts of the Transaction on specific employees.”<sup>45</sup> In reply, Joint Applicants reiterate that they cannot precisely identify if the transfers will have any effect on any utility employees, and restate that New Charter will create more United States jobs by insourcing jobs and will treat all current utility employees fairly.<sup>46</sup>

Charter’s record of employee relations is attacked by the International Brotherhood of Electrical Workers (IBEW) who point out that Charter has failed to place any evidence in the record that is responsive to the concerns of this sub-section of § 854(c). Since the burden of proof rests with Joint Applicants, the failure to produce responsive testimony equates to a determination that Joint Applicants have not met the requirements of this section. IBEW also alleges that

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<sup>44</sup> Application at 26.

<sup>45</sup> Joint Applicants’ Protest, filed Aug. 7, 2015, at 11.

<sup>46</sup> Applicants’ Reply to Protests, filed Aug. 17, 2015, at 31 n. 103.

Charter has a history union-busting and that union complaints about Charter's behavior are currently before the National Labor Relations Board.<sup>47</sup>

**3.1.5.2. Discussion Section 854(c)(4)**

Charter has failed to carry its burden of proof on this sub-section of § 854(c).

**3.1.6. Is the Merger Fair and Reasonable to the Majority of all Affected Public Utility Shareholders – Section 854(c)(5)?**

We conclude that § 854(c)(5) is inapplicable in this situation.

**3.1.7. Is the Merger Beneficial on an Overall Basis to State and Local Economies, and to the Communities in the Area served by the Resulting Public Utility – Section 854(c)(6)?**

**a. Applicants**

Applicants generally assert that the Transaction will generate substantial pro-consumer and pro-competitive benefits including accelerated deployment of existing and new innovative products and services for millions of customers, including existing Charter, TWC, and BHN customers in California. As evidence, they cross-reference their discussion about the general alleged benefits of the transaction and discussed elsewhere in this decision: improved voice service, improved enterprise services, improved broadband service, good corporate citizenship, no change for customers, and no horizontal concerns. These arguments can be summarized as follows.

*Improved voice service.* Applicants assert that the Transaction will promote the deployment of advanced voice services and enhance competition in the voice marketplace. Approval of the Transaction will provide customers in California

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<sup>47</sup> IBEW Opening Brief 1-7.

with a more robust competitor, leading to better service and value. The increased scale of the merged company will enable it to more effectively make significant fixed-cost investments by spreading those investments over a larger customer base. This scale will also better enable the merged company to invest in and attract a top-tier research and development team, to build facilities for state-of-the-art technological testing and experimentation, and to play an important role in developing proposed standards for standard-setting bodies. Each of these benefits of increased scale will enable New Charter to serve customers with its own technological innovations, as opposed to relying on purchasing whatever the largest players in the industry develop.

Joint Applicants assert that Charter, TWC, and BHN are recognized as premier voice service experts with advanced systems. The Transaction will allow the companies to integrate the best features of their respective voice offerings, resulting in improved service for residential and business customers. By combining these companies' voice expertise and advanced services, New Charter will be able to offer the best service and products available, with significant synergistic advantages that will ensure New Charter continues to develop the best new technology well into the future.

Joint Applicants further allege that Charter will continue its proud tradition of implementing consumer-friendly policies for its voice services. For example, TWC and BHN voice customers will be able to retain their current phone numbers after the Transaction. New Charter will also extend Charter's policy of not imposing early termination fees or requiring customers to sign long term contracts to all customers of the merged entities.

Finally, Applicants argue that, while there are strong indications that the Transaction will enhance competition in California, there is no countervailing

adverse impact to competition. Within the residential voice market, competitors include traditional providers of phone service such as Incumbent Local Exchange Carriers (ILECs; e.g., AT&T, Verizon, and Frontier) and other CLECs, providers of fixed and nomadic VoIP services (including Vonage and many others), and wireless providers, and the strong trend in telephony continues to be toward wireless substitution of fixed telephone lines. Other providers of high capacity business and wireless backhaul services include the ILECs as well as large CLECs.

Therefore, Applicants assert, upon consummation of the Transaction, residential and business customers will continue to have numerous competitive alternatives for telephone service and high-capacity business services.<sup>48</sup>

*Improved enterprise services.* Applicants allege that the Transaction will enable New Charter to serve more communities within particular regions, including in California. The combination of New Charter's greater geographic reach and more rationalized footprint following the Transaction will position New Charter to better compete for enterprise customers, and thus improve competition in that sector. The market for enterprise services is currently led by national players such as Level 3, AT&T, Verizon, and CenturyLink. These companies are thriving because a provider typically must have a broad regional footprint without significant gaps in coverage areas to serve large enterprises with multiple sites across given geographic regions effectively. Customers typically prefer a single network, with a single set of technical standards and a single point of contact for customer support-benefits that Charter, TWC, and

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<sup>48</sup> Application at 21-23.



BHN operating as independent companies cannot provide to many multi-location – when some of the locations are out of footprint – and regional businesses. Because the Transaction will increase the size and density of New Charter's footprint, the business case for advanced services will be easier to make. In turn, enterprise customers in New Charter's territories, including Charter's, TWC's, and BHN's respective current footprints in California, will benefit from access to those advanced services. The Transaction will allow New Charter to increase competition for enterprise customers across a broad footprint, and within its denser market areas. It will also facilitate increased investment in enterprise capabilities, including investment to bring more locations on network and to develop and deploy the advanced platforms needed to manage vast amounts of data.<sup>49</sup>

*Improved broadband service.* Joint Applicants assert that New Charter will continue Charter's pursuit of its existing strategy to increase the reach, speed, reliability, and consumer-friendliness of broadband offerings, and New Charter will be better equipped to compete with telco and wireless broadband providers in the expanding high speed broadband marketplace. Charter's investments over the past 3.5 years have enabled it, within its present footprint, to offer download speeds of 60 or 100 Mbps as the minimum speeds it sells in almost all service areas. Charter's track record of investment in broadband speed increases includes the deployment of DOCSIS 3.0, which at least quadrupled the number of channels available for downstream transmission over its network. Under Charter's leadership team, New Charter will soon bring base speed tiers from

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<sup>49</sup> Application at 23-24.

15 Mbps to Charter's current standard minimum of 60 or 100 Mbps at uniform pricing in TWC and BHN territories, including in California.

In addition, Applicants allege, TWC and BHN consumers in California will be further served by the rollout of Charter's customer-friendly contracting practices, discussed elsewhere in this decision. They also claim that New Charter will continue to ensure that broadband customers receive high-quality service no matter how data-intensive their consumption choices are. New Charter's ability to do so will be complemented by the continued expansion of TWC's highly advanced 300 Mbps service offering in certain cities like Los Angeles – an initiative New Charter will continue as these markets go all-digital.<sup>50</sup>

*Good corporate citizenship.* Under the rubric of “good corporate citizenship,” Applicants assert, as discussed previously, that New Charter will preserve and expand programs across all of Charter, TWC, and BHN that establish their strong corporate citizenship. First, and critically, New Charter will recognize the vital importance of promoting diversity and inclusion strongly rooted in the communities it serves. TWC has recognized best practices with respect to diversity and inclusion for employees, suppliers, and corporate governance, and New Charter will incorporate and build upon these. New Charter also will significantly build upon and enrich BHN's broadband program for low-income customers by making a broadband offering available with higher speeds and expanded eligibility while continuing to offer the service at a significant discount, and will make the offer available across the New Charter footprint, including Charter's and TWC's current California

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<sup>50</sup> Application at 24-25.

footprints that do not currently have access to such a program. Applicants also allude to their plan to create new jobs in the U.S.<sup>51</sup>

*No change to customers.* Applicants state that because TWCIS will continue to provide retail voice services to its current customers and Bright House California and Charter Fiberlink will each continue to provide telecommunications inputs to their respective unregulated affiliates, the proposed transfers of control will be seamless to customers. The Application does not request approval of the transfer of customers, any changes in rates, terms, or conditions of service, or the assignment or discontinuance of any certificates.<sup>52</sup>

*No horizontal concerns.* Because Charter, TWC, and BHN serve distinct geographic areas, a combination of these companies would not reduce competition.<sup>53</sup>

#### **b. Protesters**

The protestors dispute many of the assertions collected under the broad heading discussed here. ORA's expert Selwyn asserts that (1) there is no basis upon which to expect that any post-merger scale or merger-driven efficiency gains will be flowed through to customers; (2) the proposed merger will produce no improvement in the availability of high-speed broadband access throughout Joint Applicants' California franchise areas; (3) Joint Applicants have failed to identify any bona fide public interest benefit that can be legitimately attributed to

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<sup>51</sup> Application at 25-26.

<sup>52</sup> Application at 26.

<sup>53</sup> Application at 27.

the proposed merger;<sup>54</sup> (4) competition for broadband services exists in only a small portion of the New Charter California operating areas; (5) Joint Applicants face no competition at the 25 mbps speed level in the majority of the areas they serv.; and (6) New Charter will exercise overwhelming dominance of the relevant Southern California high-speed residential broadband access market.<sup>55</sup>

Regarding voice and broadband service, ORA witnesses Enrique Gallardo and Adam Clark testify as noted in Section 3.1.3.1. ORA's witness O'Dell argues that there is a lack of information on how Joint Applicants will deliver their claimed benefits or utilize efficiencies from the merger to increase access and advance telecommunications services for low-income consumers. She recommends that New Charter should be required to provide the Lifeline discount to all eligible customers across its entire footprint. She cites a California Emerging Technology Fund study showing that home broadband adoption rates have stagnated over the past few years, "leaving the hardest-to-reach Californians without an essential tool to access the educational, employment and civic engagement opportunities that lead to self-sufficiency." She asserts that Charter's proposal for its low-income broadband program is deficient, because it is available only to households with children eligible for free or reduced lunch that attend schools that partner with an existing program. This eligibility requirement excludes elderly, people with disabilities, and low-income childless adults from an affordable option for broadband service.<sup>56</sup>

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<sup>54</sup> ORA Selwyn Reply Testimony at 73, 92 & 95.

<sup>55</sup> *Id.* at 98, 109, 116 & 125.

<sup>56</sup> Testimony of Eileen Odell, served January 15, 2016, at 1, 4 & 10.

Joint Consumers assert that the Application contains only vague promises that the proposed transaction “will generate substantial pro-consumer and pro-competitive benefits “and does not include any meaningful support for these promises. Accordingly, the Application does not include sufficient information to allow the Commission to conclude that the purported state and local benefits will be in the public interest.<sup>57</sup>

Greenlining’s Stephanie Chen offers testimony whose purpose is to provide factual background regarding the telecommunications needs of California’s communities of color and to discuss the effect of the proposed transaction on those needs. She states that if telecommunications providers are to truly serve the needs of communities of color, there must be meaningful dialogue between them including regular opportunities for communities of color to provide input regarding their telephone, video, and broadband needs, as well as the provider’s policies regarding diversity, economic investment, and customer service. However, Chen states, “to my knowledge, Charter has made no assurances that this will be the case if the Commission approves the transaction.”<sup>58</sup>

Chen also challenges Charter’s public benefit commitments in the Application. She notes that while Charter states that New Charter will build “at least one million new line extensions to service residential and small business locations,” the Application does not indicate how many of those will be in

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<sup>57</sup> Joint Consumers’ protest, at 13.

<sup>58</sup> Prepared Reply Testimony of Stephanie Chen, Energy and Telecommunications Policy Director, Greenlining Institute, served January 15, 2016, at 3 (citations omitted) (Greenlining Chen Reply Testimony).

California. Similarly, she notes that while Charter has committed to deploy 300,000 out-of-home Wi-Fi access points within four years of the proposed transaction's approval, it "has not yet determined where the additional access points will be located." Finally, she notes that as a condition of approval of the Transaction in New York, the New York Public Service Commission is requiring New Charter to offer speeds of 100 Mbps across its network. Charter has made no such commitment in California.<sup>59</sup>

Chen offers several conditions for the Commission's consideration: providers must ensure that services are affordable; providers should price low-income offerings to maximize enrollment; providers' low-income offerings should not be "second class" service; providers' low-income programs should not artificially restrict eligibility (e.g., by limiting eligibility to families with children receiving free or reduced lunch); providers should offer free broadband to community "anchor institutions" in low-income or underserved areas of the state, at least 60% of which should be in communities where more than 25 percent of households speak a language other than English at home; providers should ensure that upgrades and changes to the network do not interrupt service; providers should ensure that customers have reliable, efficient access to technical, customer, and billing support (with service quality improvements and in-language customer service); and the merger should improve supplier diversity and philanthropy to communities of color.<sup>60</sup>

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<sup>59</sup> *Id.* at 5 (citations omitted).

<sup>60</sup> *Id.*, *passim*.

### 3.1.7.2. Discussion Section 854(c)(6)

In assessing whether the merger is beneficial on an overall basis to the state and local economies and the communities which New Charter would serve, we are engaging in a cost-benefit analysis where the factors being weighed are, to a significant degree, not quantifiable in dollar terms. Any conclusion that we reach thus has an unavoidable element of subjectivity. But to be true to the obligation imposed on us by the legislature, we have no choice but to make those judgments.

On the benefit side, the commitments to faster Internet speeds, more wireless hot spots, and less burdensome contracts that Joint Applicants have made in the Application, as well as the MOU with the National Diversity Council and CETF and the understanding reached with the County of Monterey, and the City of Gonzales are benefits that flow to some or all customers of the merging entities. Likewise, we are persuaded that the merger will create a more robust competitor in the enterprise space that will have an ability to compete for customers that none of the constituent parts possesses.

But there are also costs to be considered. Protesters are unanimous that those costs outweigh the benefits and that we should deny the Application. As ORA's witness Dr. Selwyn states, "[I]t is my considered opinion that the proposed merger of TWC, Charter and Bright House is not in the public interest and would not support the public interest finding that is expressly required by [Section] 854(c)."<sup>61</sup>

One result of the proposed merger of great concern to the protesters is that New Charter will have an effective monopoly on the provision of high speed

Internet service in its southern California footprint. While considerations of market concentration and monopoly pricing power are, in the first instance, the concern of the Department of Justice, we would be disingenuous if we did not recognize the potential negative effects of such concentrated market power. Since we are independently charged by the legislature with removing barriers to open and competitive markets<sup>62</sup> we would be remiss if we did not weigh the negative consequences of monopolization of a key component of advanced telecommunications services against the benefits of the Transaction in reaching a final judgment about the applicability of § 854(c)(6). The legislature has also charged us with taking steps to eliminate the so-called “digital divide”<sup>63</sup> so that an examination of Charter’s promises to expand access to high-speed broadband, especially among low-income and minority consumers, must also be part of our review under § 854(c)(6).

With regard to the negative effects of increased concentration in the market for high-speed broadband, we note that the market is already highly concentrated. Throughout their respective southern California footprints, the customers of Charter and TWC are effectively foreclosed from obtaining high speed broadband from other than their local provider. To the extent that monopoly, or near-monopoly, power translates into the ability to engage in monopolistic pricing and other anti-competitive practices, existing customers of the merging cable companies already face that reality. The merger of smaller monopolists into a bigger monopoly does little to worsen the situation of

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<sup>61</sup> ORA Selwyn Reply Testimony, Executive Summary at x.

<sup>62</sup> Pub. Util Code § 709(f)

<sup>63</sup> Pub. Util. Code § 709(d)



customers who are already faced with take-it-or-leave-it offers from their local cable service provider. Thus while we may deplore the situation in which the existing customers of the merging companies find themselves we cannot say that they are materially worse off as a result of the merger. What we can do is hold the merging companies to their promises of increased service, fairer pricing, less onerous contracts, and equal access and require them to translate those vague promises into concrete commitments.

This analysis of the effects of the merger on market concentration differs in one respect from a similar analysis made in the abortive merger of Comcast with Time Warner. In that transaction, Comcast, the acquiring company, was itself a major content creator through its ownership of NBC-Universal, as was Time Warner, the acquired company, through its ownership of HBO and Turner Movies (among other properties). Charter is the acquiring company here, and is not itself a content creator, so even transfer of Time Warner is a content creator the enlarged footprint of the merged companies does not present a censorship risk of the same magnitude as was presented by the proposed merger of Comcast and Time Warner. There is still a potential conflict, however, between the content created by Time Warner which New Charter will be distributing, and content distributed by online video distributors (OVDs) like Netflix, Amazon, Hulu and Crackle, so incentives still exist for the merged company to prefer its own content to that of other content creators through its near-monopoly control of the distribution channel.<sup>64</sup>

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<sup>64</sup> See, generally, Opening Brief of the Writers Guild of America, West.

Weighing Charter's commitments to increased Internet speeds, increased numbers of wireless access points, less onerous contracts, more effective competition in the enterprise space, unbundling of services, equal treatment of content providers and greater diversity in hiring, contracting and programming, all of which will be made explicit conditions of approval of the Transaction, against the increase in concentration of the market for broadband Internet access without the threat of discrimination against competing content creators, we conclude that the benefits of the Transaction outweigh its drawbacks and the Transaction satisfies § 854(c)(6).

**3.1.8. Does the Merger Preserve the Jurisdiction of the Commission and the Capacity of the Commission to Effectively Regulate and Audit Public Utility Operations in the State – Section 854(c)(7)?**

**3.1.8.1. Parties Positions**

Applicants assert that the Transaction, if approved, will have no effect on the Commission's jurisdiction. Charter Fiberlink, TWCIS, and Bright House California will continue to operate in accordance with the CPCNs issued to them by the Commission, and will continue to be subject to regulation under the Public Utilities Code and the Commission's rules and regulations. Furthermore, they note, if New Charter elects to make any changes in its regulated services or rates, terms, and conditions, New Charter, through its regulated affiliates, will follow applicable California filing and notice requirements associated with such changes.<sup>65</sup> If anything, Applicants claim, it will be easier for the Commission to exercise jurisdiction over the three utilities operating under one large umbrella

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<sup>65</sup> Application at 30-31.

than over three entirely separate companies, each with independent reporting requirements, footprints, etc. They claim the Commission should not be concerned that they assert that the Commission lacks jurisdiction over some of their products, because jurisdiction cannot be waived – *i.e.*, that there is nothing problematic about a party’s asserting valid or even merely colorable jurisdictional arguments. They conclude by stating there are no current plans to transfer TWCIS’s retail VoIP customers to any unregulated affiliate entity, and New Charter would, through its regulated affiliates, follow applicable rules before effectuating any such transfer.<sup>66</sup>

ORA does not dispute Joint Applicants’ statements regarding continuing Commission jurisdiction over the holders of CPCNs.

### **3.1.8.2. Discussion Section 854(c)(7)**

For purposes of this decision, we find it unnecessary to evaluate ORA’s argument regarding the relationship between the state and federal statutes.<sup>67</sup> We believe that we have clear authority under state law to make the jurisdictional determination required by § 854(c)(7). Nothing in the proposed merger negatively impacts the jurisdiction of the commission to regulate and audit public utilities and the Transaction accordingly satisfies § 854(c)(7).

### **3.1.9. Can the Commission Impose or Does the Merger Proposal Contain Mitigation Measures to Prevent Significant Adverse**

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<sup>66</sup> Applicants’ Reply to Protests, filed Aug. 17, 2015, at 30 n. 101.

<sup>67</sup> While our analysis of the public interest in the Transaction does not rely on the grant of jurisdiction from the federal government in § 706(a), it is informed by the legislative judgment embedded in the federal statute, namely, that both state and federal regulators have roles to play in assuring the development of a robust and competitive market for Internet- enabled services.

## **Consequences Which May Result – Section 854(c)(8)?**

### **3.1.9.1. Parties' Position**

One of the key aspects of any merger proceeding before the Commission – codified in § 854(c)(8) – is mitigation measures to prevent “significant adverse consequences which may result” from the merger. There are two sets of mitigation measures at issue in this proceeding: those to which Applicants have agreed, and those raised by protestants to which Applicants have not agreed.

#### **3.1.9.1.1. Agreed-Upon Conditions**

As discussed in the background section of this decision, Joint Applicants have reached MOUs with the National Diversity Council and CETF and agreements with the County of Monterey and the City of Gonzales. The principal provisions of these MOUs and agreements have been outlined in Sections 1.1.4.3 through 1.1.4.5 and will not be repeated here.

#### **3.1.9.1.2. Proposed Conditions**

Generally speaking, protestors challenge the lack of specific commitments in the Application to assure the Transaction achieves the benefits it promises. Greenlining, IBEW and Dish Network all urge the Commission to reject the Application outright. ORA, Writers Guild, Stop the Cap! and CforAT also recommend rejection but propose the following mitigating conditions if the Commission approves the Transaction:

#### **A. ORA**

- 1. Increased Broadband Speeds.** Noting that the New York Public Service Commission conditioned its approval of the merger-related transaction in that state on Charter increasing broadband speeds to its existing customers, ORA proposes that New Charter should be required to offer broadband Internet Service with speeds of at least 300 Mbps download to all households with current broadband

- availability from New Charter in its California network by December 31, 2019,<sup>68</sup> with annual reports to the Commission of its progress toward that goal.
2. **Increased Broadband Deployment.** By December 31, 2019 New Charter shall be able to provision requests for broadband service within 10 business days to 98% of the households within each census block within New Charter's franchise and operating service areas at speeds of not less than 25 Mbps download and 3 Mbps upload and without imposing line extension charges on customers,<sup>69</sup> with annual reports to the Commission on progress toward that goal.
  3. **Data Caps and Usage Based Pricing.** New Charter shall not impose and data caps or usage based pricing on its broadband service until the Commission determines that there is competition for fixed wireline broadband service, at comparable speeds, for at least 80% of the households in 10 southern California counties.<sup>70</sup>
  4. **Unbundling of Customer Premises Equipment.** New Charter shall be required to offer its customers the option of acquiring their own modems and cable set-top boxes without any associated increase in the price of services.<sup>71</sup>
  5. **Remove Mandatory Arbitration Clauses and Class Action Waivers.** Within 90 days of approval of the Transaction, New Charter shall discontinue the inclusion of mandatory arbitration clauses and class action waivers in its standard written contracts and notify its customers via a separate mailing that it is discontinuing mandatory arbitration clauses and class action waivers. New Charter shall

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<sup>68</sup> Selwyn Reply Testimony at 95-95.

<sup>69</sup> *Id.*

<sup>70</sup> *Ibid.* at 88.

<sup>71</sup> *Ibid.* at 154.

- separately certify to the Commission compliance with this condition.<sup>72</sup>
6. **Lifeline.** New Charter shall be required to offer Lifeline discounts to all eligible households (in accordance with CPUC Lifeline rules) within its service territory.<sup>73</sup>
  7. **Low Income Broadband.** New Charter shall expand its Low Income Broadband program to all low-income households in its California service territory, enroll at least 45% of the low-income households in each census block within its service territory within three years of the closing of the Transaction; and provide an annual report to the Commission and ORA detailing its progress toward meeting the 45% enrollment target.<sup>74</sup>
  8. **Service Quality Metrics.** Within one year of closing of the Transaction, New Charter shall meet all service quality standards for voice communication established in General Order 133-C. For three years following the closing of the Transaction, New Charter shall furnish quarterly reports to the Commission and ORA on its performance on five (5) specific service quality measures.<sup>75</sup>
  9. **Reduction of Broadband and Voice Outages.** During the two years following the closing of the Transaction, New Charter shall reduce service outages as much as possible. For a period of not less than 3 years, beginning June 30, 2016, New Charter shall furnish the Commission and ORA semi-annual reports detailing, on a monthly basis, all service outages during the prior six months as reflected in 15 separate reporting categories. New Charter shall furnish the Commission and ORA copies of its NORS

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<sup>72</sup> Ibid. at 161.

<sup>73</sup> Odell Reply Testimony at 2, 7.

<sup>74</sup> ORA Opening Brief, at 49 at FN 163: "The Commission should adopt the eligibility requirements for its LifeLine program to the low-income broadband program."

<sup>75</sup> Gallardo Reply Testimony at I-27 to I-34.

- reports to the FCC within three business days of their filing at the FCC.<sup>76</sup>
10. **Customer Satisfaction Survey.** Within six months of the closing of the Transaction, New Charter shall engage an independent expert in survey research. Such expert shall design, in conjunction with ORA, customer satisfaction surveys to be administered to random samples of New Charter customers to determine their satisfaction with the service they receive from New Charter. Final results of the surveys would be made available to the Commission and ORA shortly after their completion but in no case more than twenty-four (24) months after commencement of the surveys.<sup>77</sup>
  11. **Consumer Education for Battery Back-up Systems.** New Charter shall comply with the guidelines for consumer education programs regarding backup power systems adopted by the Commission in D.10-01-026. Customer notices developed in conjunction with the Commission's Communications Division shall be distributed to all New Charter customers with six months of the closing of the Transaction and annually thereafter.<sup>78</sup>
  12. **Enforcement of Conditions.** The Commission should adopt an enforcement condition to ensure that New Charter complies with all conditions imposed by the decision.<sup>79</sup>

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<sup>76</sup> Clark Reply Testimony at III-27 to III-23; Gallardo Reply Testimony at 2-3 and I-12 to I-24.

<sup>77</sup> Clark Reply Testimony at III-3 to III-6; Gallardo Reply Testimony at I-5 to I-11, I-38 to I-47.

<sup>78</sup> Gallardo Reply Testimony at 2-4 to 2-5.

<sup>79</sup> ORA Opening Brief at 52.

**B. Writers Guild of America, West Inc.**

1. **Broadband Pricing.** New Charter shall honor TWC's existing pricing and service offerings with material changes for three years following the closing of the Transaction.<sup>80</sup> New Charter shall offer a standalone broadband product for \$30/month for 10 years with a speed of at least 25 Mbps down, to be increased in accordance with future modifications of the FCC's threshold speed for "advanced telecommunications services" or alternatively at the Commission's discretion.<sup>81</sup> New Charter shall extend its commitment not to impose data caps or usage-based billing on its Internet service or to charge consumers for use of specific applications for 10 years.<sup>82</sup>
2. **Low Income Broadband Program.** New Charter should expand eligibility in the program so that any low-income household with income lower than 300% of the federal poverty level and any household including persons with disabilities is eligible to enroll. In addition, current customers of Charter, TWC or BHN should be eligible to participate and New Charter should consider debt forgiveness for existing qualifying customers who choose to participate. The Commission should set enrollment benchmarks such as requiring New Charter to enroll at least 40% of eligible households within two years of the closing of the Transaction.<sup>83</sup>
3. **Open Internet Protection.** New Charter shall adhere to the entirety of the FCC's Open Internet rules for a period of 10 years.<sup>84</sup>

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<sup>80</sup> Chen Reply Testimony (Greenlining) at 9:10-12.

<sup>81</sup> Writer's Guild Opening Brief at 54.

<sup>82</sup> *Id.*

<sup>83</sup> *Ibid.* at 55; Chen Reply Testimony at 7:22 to 8:2.

<sup>84</sup> *Id.*



4. **Broadband Expansion.** New Charter shall build at least 150,000 of its projected one million line extension in the state of California.<sup>85</sup> New Charter shall offer speeds of at least 100 Mbps in all of its California service territory.<sup>86</sup>
5. **Platform Neutrality Protection.** New Charter will maintain neutrality on its set-top boxes and user interface and will not prioritize specific OVD services through those mechanisms.<sup>87</sup>

### C. Stop the Cap!

This intervenor limited its comments to a single recommended mitigation, that the Commission should permanently prohibit New Charter from employing either data caps or usage based pricing, pointing out that TWC has publicly made such commitments.<sup>88</sup>

### D. Center for Accessible Technology

CforAT made detailed recommendations for mitigation conditions relating to battery back-up for VoIP phone systems and other safety-related issues which are listed in more detail in the following section of this decision. In addition CforAT made the following more general recommendations:

1. All households with income below 150% of the federal poverty level should be eligible for participation in New Charter's low income broadband program.<sup>89</sup>

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<sup>85</sup> Chen Reply Testimony at 5:9-11.

<sup>86</sup> *Ibid.* at 5:16-17.

<sup>87</sup> Citing Proposed Decision in A.14-04-013 (Comcast-Time Warner) at 78.

<sup>88</sup> Comments of Stop the Cap! January 26, 2016, 10-12.

<sup>89</sup> *Ibid.* at 5-7.

2. Low income broadband program participants should receive modems and routers at no additional cost.<sup>90</sup>
3. The Commission should set enrollment goals and timetables for the low-income broadband program and monitor its progress.<sup>91</sup>
4. New Charter should offer California LifeLine to all eligible subscribers across its expanded service territory.<sup>92</sup>
5. The commission should require New Charter to make financial investments in service quality improvements for California, and set specific metrics for achieving a reduction in complaints following the close of the transaction, with additional investment requirements to come into effect if complaint reduction targets are missed.<sup>93</sup>

### **Discussion of Proposed Conditions**

Many of the conditions proposed by protesters are reflected in the promises made and assurances given by Joint Applicants. To the extent that those promises and assurances are responsive to the concerns of the protesters, we will reformulate them as explicit conditions of approval. In addition we will also impose conditions that are reasonably inferred from those promises and assurances.

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<sup>90</sup> *Ibid.* at 7-8

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Ibid.* at 14.

#### 4. Public Safety

ORA Witness Gallardo, citing both the Scoping Memo and Pub. Util. Code § 321.1(b)<sup>94</sup> introduced unrebutted evidence regarding the necessity for back-up power systems in VoIP telephone systems and 911 service. After reviewing Joint Applicants' practices in regard to backup power systems, he concluded that they generally meet applicable guidelines.<sup>95</sup> However, he criticized the adequacy of Joint Applicants' consumer education programs regarding the necessity for backup power systems and found them out of compliance with Commission decision D.10-01-026 and a forthcoming FCC rule on the same subject.<sup>96</sup> To correct this deficiency, he recommends that if the Transaction is approved, New Charter should supply each VoIP customer with a separate paper document devoted exclusively to providing information about the need for back-up power.<sup>97</sup>

CforAT witness Belser made detailed recommendations for safety-related mitigation measures particularly geared to people with disabilities including the following:

1. Customer disclosure regarding battery back-up should clearly state that the phone will only work during a power outage with appropriate battery back-up power. The disclosure should be made at the time of sale.<sup>98</sup>

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<sup>94</sup> The commission shall take all necessary and appropriate actions to assess the economic effects of its decisions and to assess and mitigate the impacts of its decisions on customer, public and employee safety.

<sup>95</sup> Gallardo Reply Testimony at 2-2 to 2-4.

<sup>96</sup> *Ibid.* at 2-5.

<sup>97</sup> *Id.*

<sup>98</sup> Belser Testimony at 9.

2. Printed information (including information about the functionality of medical alerts and alarms during a power outage and 911 location information) should be in large print. The same information should be prominently displayed on the carrier's website. Annual reminders should be provided.<sup>99</sup>
3. Battery backup power units should allow for customer maintenance. The battery indicator should be visible and include audible alerts. Finally, the provider should include alternative methods of alerting customers.<sup>100</sup>
4. Charter should provide information on the cost and availability of replacement batteries and offer assistance to any customer who is unable to change the battery without help.<sup>101</sup>
5. Bills and all other customer information, specifically including safety-related disclosures, should be provided in alternative formats including large print, Braille, electronic format and audio format.<sup>102</sup>

### **Discussion of Public Safety Issues**

We have previously adopted requirements for consumer education regarding back-up batteries in VoIP telephone systems and we will reiterate them as conditions of approval of the Transaction. We will also adopt certain of the recommendations of protesters for enhancement to our existing requirements.

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<sup>99</sup> *Id.*

<sup>100</sup> *Ibid.* at 10

<sup>101</sup> *Id.*

<sup>102</sup> *Ibid.* at 11.

## 5. Conclusion

Section 854(c) does not require us to make an affirmative finding regarding each of its sub-sections; rather it requires us to find, on balance, that the Transaction, as measured by the specific criteria enumerated in the sub-sections, is in the public interest. Although Charter has failed to carry its burden of proof with regard to § 854(c)(4) and we have found § 854(c)(5) inapplicable to this Transaction, we conclude that with the mitigation measures that we will require, the Transaction, on balance, meets the requirements of § 854(c) and is in the public interest.

## 6. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were received from \_\_\_\_\_ on \_\_\_\_\_ and reply comments were received from \_\_\_\_\_ on \_\_\_\_\_.

## 7. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

### Findings of Fact

1. TWC is the dominant supplier of cable-based Internet access in Southern California.
2. Charter provides voice and business as well as broadband Internet and video services to 5.8 million residential customers and 386,000 commercial accounts in 28 states including California.
3. Charter and TWC do not compete with one another in the provision of residential cable-based Internet access and voice services in California.

4. Charter and TWC compete with other providers of Internet access services in their respective service territories including incumbent local exchange carriers, satellite companies, municipalities, and local Internet Service Providers.

5. Through its subsidiaries TWC competes with other providers of video content.

6. Because of the already concentrated market for broadband services, and the possible increased concentration particularly in the market for high-speed broadband, we can reasonably entertain doubts as to how robust the competition for Internet access services will be.

7. Charter and TWC compete with other providers of so-called “backhaul” services in their respective service territories including incumbent local exchange carriers and owners of dedicated fiber optic systems.

8. Charter and TWC compete with other providers of services to the enterprise market in their respective service territories including incumbent local exchange carriers and owners of dedicated fiber optic systems.

9. The merged company will have enhanced ability to compete for the provision of backhaul services and enterprise services in southern California.

10. Charter has an all-digital platform for its broadband services.

11. TWC does not have an all-digital platform for its broadband services.

12. Charter provides low-cost Internet access to low and moderate income families throughout its service territories.

13. TWC provides stand-alone broadband Internet services on a sliding scale to customers throughout its service territories.

### **Conclusions of Law**

1. The Commission examines proposed mergers, acquisitions, or transfers of control on a case-by-case basis to determine the applicability of Pub. Util. Code § 854.

2. To obtain approval of the proposed transfers, Applicants must demonstrate that they meet the requirements of § 854(c).

3. Section 854(e) requires that the Applicants must prove by a preponderance of the evidence that the requirements of § 854(c) are met.

4. As modified by the ordering paragraphs of this decision, the proposed transfers meet the requirements of § 854(c) and are in the public interest.

### **O R D E R**

IT IS ORDERED that:

1. The Joint Application of Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, Advance/Newhouse Partnership, Bright House Networks, LLC and Bright House Networks Information Services (California), LLC pursuant to California Public Utilities Code Section 854 for the Transfer of Control of both Time Warner Cable Information Services (California), LLC and Bright House Networks Information Services (California), LLC to Charter Communications, Inc., and for Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC is granted with the conditions set forth herein upon the new parent company, New Charter, and its subsidiaries.

2. The approval granted herein is subject to the following conditions:
  - a. New Charter, and its regulated entities operating in California, shall abide by all the terms and conditions of the Memoranda of Understanding (MOUs) with the National Diversity Council and CETF.
  - b. New Charter shall abide by all the terms and conditions of the agreements with the County of Monterey, and the City of Gonzales.
  - c. Commission staff or any party to the MOUs with the National Diversity Council or CETF or the agreements with the County of Monterey or the City of Gonzales may, at any time during the duration of the MOUs or the agreements, as the case may be, apply to this Commission for an order directing New Charter to perform one or more promises contained in the MOUs or the agreements. Additionally, Commission staff may monitor the performance of community beneficiaries who receive funds pursuant to the MOUs or the agreements. New Charter consents to the jurisdiction of this Commission to enter an order enforcing the MOUs or the agreements.
  - d. .Within thirty days of the closing of the Transaction, executive officers of Charter Fiberlink, TWCIS and Bright House Networks shall cause their respective companies to comply with the certification requirements imposed by the Commission in Decision (D.) 13-05-035 by executing, on behalf of their respective companies, the certification required by D.13-05-035.
  - e. Within one year of the closing of the Transaction, New Charter shall increase broadband download speeds for those households in its California service territory that are currently on an all-digital platform to not less than 60 Mbps.
  - f. Within 30 months of the closing of the Transaction, New Charter shall convert all households in its California service territory to an all-digital platform with download speeds of not less than 60 Mbps.



- g. New Charter shall offer all customers the option of acquiring their own modems and cable set-top boxes without any associated increase in the price of services.
- h. New Charter shall fully comply with all the terms and conditions of the Federal Communications Commission's *Open Internet Order*, regardless of the outcome of any legal challenge to the *Open Internet Order*. In addition, for a period of not less than three years from the closing of the Transaction, New Charter (a) will not adopt fees for users to use specific third-party Internet applications; (b) will not engage in zero-rating; (c) will not engage in usage-based billing; (d) will not impose data caps; and (e) will submit any Internet interconnection disputes not resolvable by good faith negotiations on a case-by-case basis.
- i. For a period of not less than three years from the closing of the Transaction, New Charter shall continue its settlement-free interconnection policy.
- j. Within six months of the closing of the Transaction, New Charter's certificated carriers shall offer Lifeline phone service discounts to all eligible households (in accordance with CPUC Lifeline rules) within its service territory.
- k. Within one year of the closing of the Transaction, New Charter shall meet all service quality standards for voice communication established in General Order 133-C.
- l. New Charter shall comply with the guidelines for consumer education programs regarding backup power systems adopted by the Commission in D.10-01-026.
- m. New Charter shall supply each existing or new Voice over Internet Protocol customer with a separate paper document devoted exclusively to providing information about the need for back-up power. New Charter shall make this and similar consumer information available in alternate formats including large print, Braille and audio. New Charter shall provide this disclosure to new customers at the time of sale.

n. The motion of the Office of Ratepayer Advocates for an Order requiring Joint Applicants to pay the costs of its expert witness Dr. Lee Selwyn is granted.

3. Good cause having been shown, all pending motions for confidential treatment of information produced in response to data requests, or contained in briefs or in expert testimony including the exhibits thereto, are granted for a period of three years from the effective date of this decision. During this period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If parties believe it is necessary for this information to remain under seal for longer than three years, they may file a new motion showing good cause for extending this order no later than 30 days before the expiration of this order.

4. Application 15-07-009 is closed.

This order is effective today.

Dated \_\_\_\_\_, at Sacramento, California.