Decision **ALTERNATE PROPOSED DECISION OF COMMISSIONER FLORIO (Mailed 4/10/2015)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application 14-04-013 (Filed April 11, 2014)
And Related Matter.	Application 14-06-012

DECISION DENYING APPLICATION TO TRANSFER CONTROL

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DECISION DENYING APPLICATION TO TRANSFER CONTROL

Summary

Through this decision, we deny Application (A.) 14-04-013 of Comcast Corporation (Comcast), Time Warner Cable Inc. (Time Warner), Time Warner Cable Information Services (California), LLC (TWCIS) and Bright House Networks Information Services (California), LLC (Bright House) for approval of the transfer of control of TWCIS, and "pro forma transfer of control" of Bright House,[1] to Comcast within the state of California. In addition, we deny A.14-06-012 of Comcast, TWCIS and Charter Fiberlink CA-CCO, LLC (Charter Fiberlink) for authority to transfer a limited number of business customers and associated regulated assets of Charter Fiberlink to TWCIS, upon completion of the A.14-04-013 transaction.[2]

We have reviewed the proposed merger and related transactions under the authority of the California Public Utilities Code (Pub. Util. Code) § 854,[3] and the limited delegated authority granted under Section 706(a) of the 1996 Telecommunications Act[4] to determine whether the merger is in the public interest. We have determined that §§ 854(a) and (c) and Section 706(a) of the 1996 Telecommunications Act apply to this transaction. We do not consider

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[1] We will refer to both transactions as a "transfer of control" to Comcast, although in the case of the Bright House transaction we acknowledge that Comcast describes it as an indirect and partial transfer, as discussed below

[2] Hereinafter, we refer to Comcast Corporation (Comcast), Time Warner Cable Inc. (Time Warner), Time Warner Cable Information Services (California), LLC (TWCIS), Charter Fiberlink CA-CCO, LLC (Charter Fiberlink) and Bright House Networks Information Services (California), LLC (Bright House) as Joint Applicants or Applicants

[3] Statutory references are to the Cal. Pub. Util. Code unless otherwise noted.

[4] Codified at 47 U.S.C. § 1302(a).

aspects of this merger, such as video programming, that are outside the delegated authority of Section 706(a), except to the extent that they affect the deployment of advanced telecommunications.

Review of the non-delegated aspect of the merger will fall under the purview of the Federal Communications Commission, the U.S. Department of Justice, and State Attorney Generals, which may come to their own conclusions on the advisability of the merger at the federal level or in other states. Based on our review, we find that the proposed transactions would not be in the public interest in California, and the negative effects of the merger cannot be mitigated effectively. As a result, we deny the Applications. This proceeding is closed.

1. Background

On April 11, 2014, Comcast Corporation (Comcast), Time Warner Cable Inc. (Time Warner), Time Warner Cable Information Services (California), LLC (TWCIS) (U6874C), and Bright House Networks Information Services (California), LLC (Bright House) (U6955C) filed an application for approval of the transfer of control of TWCIS and Bright House to Comcast. TWCIS and Bright House are regulated entities licensed by the Commission. The Application was filed under § 854(a) of the Public Utilities Code which provides, in relevant part, that transfers of control of regulated entities may only be made with the prior approval of the Commission. The Application also contained a brief analysis of the ways in which the Joint Applicants meet the factors set forth in Pub. Util. Code § 854(c).

Protests were filed on May 15 and May 19, 2014 by the following parties: Jesse Miranda Center for Hispanic Leadership, the Los Angeles Latino Chamber of Commerce, the Orange County Interdenominational Alliance, the National Asian American Coalition (NAAC), the Ecumenical Center for Black Church

Studies, Christ Our Redeemer AME Church, and the National Hispanic Christian Leadership Conference (collectively, Joint Minority Parties); the Commission's Office of Ratepayer Advocates (ORA); The Utility Reform Network (TURN); and The Greenlining Institute (Greenlining). Dish Network L.L.C. (DISH) filed a response to the Application on May 16, 2014.

Applicants filed a consolidated reply to the protests and responses on June 9, 2014. A prehearing conference (PHC) was held on July 2, 2014, and the assigned Commissioner issued a Scoping Memorandum by Ruling on August 14, 2014, making a preliminary determination that evidentiary hearings are not necessary.

In relation to the current application, Comcast, TWCIS and Charter Fiberlink (U6878C) filed Application (A.) 14-06-012 to transfer a limited number of business customers and associated regulated assets of Charter Fiberlink to TWCIS on June 17, 2014. Comcast, TWCIS, Charter Fiberlink and Bright House filed a motion on August 20, 2014 to consolidate A.14-06-012 with A.14-04-013, the Comcast-Time Warner merger application. The assigned Administrative Law Judge (ALJ) issued a Ruling on August 29, 2014 granting this motion and stated that the August 14, 2014 Scoping Memo Ruling would govern the consolidated proceeding.

On September 16, 2014, ORA filed a motion 1) to compel information and documents, including responses to the Federal Communications Commission (FCC) data requests, 2) for the production of the information in a format consistent with Rules 1.13(b)(1) and 1.10(c) of the California Public Utilities Rules of Practice and Procedure (Rules), and 3) for a Ruling on the handling of confidentiality issues in this proceeding. In a Ruling issued on September 23, 2014 the ALJ found that ORA's motion did not identify specific or actual areas of

dispute, or show that ORA had engaged in a good faith effort to resolve them. In addition, the ALJ ordered Joint Parties to produce confidential documents and documents subject to the FCCs protective order and stated that such documents would be subject to the standard that defines the scope of confidentiality under Pub. Util. Code § 583. On October 1, 2014, ORA filed a motion to reconsider the ALJ's September 23, 2014 Ruling and another motion to change the proceeding's schedule due to Joint Applicant's failure to timely and completely comply with parties' data request. ORA's motion to change the schedule was supported by the following parties: California Emerging Technology Fund (CETF), TURN, Greenlining, NAAC, Center for Accessible Technology (CforAT), DISH, Media Alliance and the Writers Guild of America, West Inc. (Writers Guild).

On October 4, 2014 the ALJ suspended the proceeding and scheduled a Law and Motion Hearing on October 16, 2014 to resolve parties' discovery disputes. At the hearing, Comcast proposed and ORA, Greenlining and TURN accepted a document production arrangement using specified software where Comcast would pay for software and training. Regarding programming materials requested by ORA and other parties that were in dispute at the FCC, the ALJ ruled that the FCC would decide this matter and ORA may determine whether to renew this part of its motion at a later date.

On November 26, 2014, the ALJ set a new briefing schedule whereby Joint Applicants were to file opening briefs on December 3, 2014, parties were to file Reply Briefs on December 10, 2014 and any motions for evidentiary hearings were to be filed on December 10, 2014. Briefs were required to include as attachments any admissible documents including prepared testimony, declarations and/or stipulations of facts by the parties. On December 10, 2014, only Joint Minority Parties filed a motion for evidentiary hearings. On

December 12, 2014, the ALJ denied Joint Minority Parties' motion because the motion failed to identify any material factual issue for the resolution of which evidentiary hearings are necessary. In addition, the ALJ provisionally admitted all attachments to expert declarations and/or briefs into the record. On December 16, 2014, Joint Applicants filed a motion for leave to file a reply to parties' Briefs. In an e-mail Ruling on December 23, 2014 the ALJ denied Joint Applicant's motion.

On January 16, 2015, Engine, a non-profit advocacy group representing Internet start-ups, filed a brief concurrently with a motion for party status and a motion to late file their brief. Engine explained it had not previously participated in Commission proceedings, and claimed that they did not have adequate notice to be aware of this proceeding and file their brief on time. On January 21, 2015, Joint Applicants filed a motion requesting the Commission deny Engine's late filed brief. On January 29, 2015 the ALJ denied Engine's motion for party status.

On January 20, 2015, ORA filed a motion to make ORA's brief and the exhibits attached to ORA's brief public. On February 6, 2015, CforAT filed a motion to request that the Commission take official notice of the following documents: (a) The FCC 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, adopted January 29, 2015, (b) The United States Circuit Court for the District of Columbia's Order setting the date for oral argument in the appeal regarding programming documents for February 20, 2015; (c) Comcast's 2015 Form 8-K, Current Report to the Securities and Exchange Commission (SEC) indicating that the merger agreement deadline has been extended to August 12, 2015.

On February 13, 2015, the ALJ issued a proposed decision (PD) recommending that the Commission grant the applications at issue in this

proceeding, subject to conditions intended to mitigate the harms that the PD identified would stem from the merger. Eleven parties or groups of parties[5] filed timely opening comments and nine parties or groups of parties[6] filed timely reply comments on that original PD. In addition, the Commission held an all-party meeting on February 25, 2015. A quorum of the Commission,[7] as well as most active parties to the proceeding, participated in this all-party meeting. Subsequently, parties filed several additional motions and related documents in this proceeding.

2. The Corporate Entities and the Financial Transaction

2.1. Comcast

Comcast Corporation is a publicly traded corporation organized under the laws of Pennsylvania with its principal offices located at One Comcast Center, Philadelphia, Pennsylvania 19103-2838. Comcast has network facilities covering portions of 39 states and the District of Columbia and is the largest provider of broadband and cable in the United States. Comcast Phone of California, LLC (Comcast Phone), an indirect subsidiary of Comcast, holds a Certificate of Public Convenience and Necessity (CPCN) from this Commission to provide facilities-based and resold local exchange and interexchange telecommunications

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[5] CalTel, Dish Network, The Center for Accessible Technology, CETF, the Greenlining Institute and Consumers Union (Jointly), the Joint Applicants, the Joint Minority Parties, Media Alliance, ORA, TURN, the Writer's Guild filed opening comments on the PD on March 5, 2015.

[6] CalTel, the Center for Accessible Technology, CETF, the Greenlining Institute and Consumers Union (Jointly), the Joint Applicants, the Joint Minority Parties, Media Alliance, ORA, and TURN filed reply comments on the PD on March 10, 2015.

[7] Commissioners Florio, Peterman, Randolph, and Sandoval attended some or all of the all-party meeting held at the Commission's office building in San Francisco on February 25, 2015.

services in California as a Competitive Local Exchange Carrier (CLEC). Comcast Phone is primarily a wholesale provider offering interconnection services to Comcast IP Phone II, LLC (Comcast IP), another Comcast subsidiary that provides voice services to Comcast customers in California. Comcast Phone does not offer any retail services to residential customers, but does have retail business customers. Comcast Phone and Comcast IP have the same Officers and principal place of business and share some employees. Business operations and staff from various Comcast entities support both Comcast Phone and Comcast IP.

2.2. Time Warner

2.2.1. Time Warner Cable Companies

Time Warner is a publicly traded Delaware corporation with its headquarters located at 60 Columbus Circle, New York, NY 10023. Time Warner has network facilities in 31 states, including California, and is the second largest provider of cable service and third largest provider of broadband service in California. Through its broadband infrastructure, Time Warner provides interconnected Voice over Internet Protocol (VoIP) services through its geographic footprint. Time Warner serves the five greater Los Angeles area counties of Ventura, Los Angeles, Orange, San Bernardino, and Riverside as well as the desert cities area surrounding Palm Springs, portions of San Diego County, and El Centro in Imperial County.

2.2.2. TWCIS

TWCIS is a wholly-owned indirect subsidiary of Time Warner whose principal offices are located at 60 Columbus Circle, New York, NY 10023. TWCIS is a public utility and a telephone corporation authorized to provide limited facilities-based and resold interexchange services and limited facilities-based and

resold local exchange services in California as a non-dominant interexchange carrier (NDIEC) and a CLEC. TWCIS has a CPCN issued by this Commission on March 16, 2004. TWCIS does not itself provide direct end-user voice services but offers wholesale telecommunications services, including switched access service and local interconnection service to retail VoIP providers including TWCIS's own non-carrier affiliate, TWC Digital Phone, LLC.[8] TWCIS was also recently designated as an Eligible Telecommunications Carrier (ETC) in D.14-03-038, adopted March 27, 2014, for the purposes of offering Lifeline services. As part of its application for ETC designation TWCIS stated that TWC Digital Phone LLC plans to transfer its retail customers to TWCIS well before it begins offering Lifeline services in California.[9]

2.3. Bright House

Time Warner holds an indirect ownership interest in Bright House, a Delaware corporation with its principal place of business located at 3701 North Silleet Ave., Bakersfield, CA 93308. In D.05-06-045, Bright House 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. Bright House operates as a wholesale telecommunications carrier providing telecommunications services to its direct parent, Bright House Networks, LLC (BHN) and other carriers, including backhaul services to wireless carriers. BHN utilizes those wholesale services to provide voice, video, and broadband services

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[8] *In The Matter of the Application of Time Warner Cable Information Services (California), LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resale Competitive Local, IntraLATA and InterLATA Voice Service*, Decision (D.) 04-03-032 (Mar. 18, 2004).

[9] *Application of Time Warner Cable Information Services (California), LLC (U6874C) for Designation as an Eligible Telecommunications Carrier,* A.13-10-019, filed on October 25, 2013 at 3, n.6.

to subscribers throughout its cable franchise areas, which include Bakersfield and Kern County. Time Warner holds 66.67 percent of Time Warner Entertainment Advance-Newhouse Partnership (TWE-A/N), which in turn is the sole member of BHN. Time Warner also provides certain services to BHN for an annual fee. Advance-Newhouse Partnership holds the remaining 33.33 percent of TWE-A/N and has exclusive day-to-day management responsibility for and de facto control over the operation of the BHN entities, including Bright House.[10]

2.4. Charter Fiberlink

Charter Fiberlink is a wholly-owned subsidiary of Charter Communications, Inc. (Charter). Charter is a publicly traded Delaware corporation that operates in 29 states, including California, and provides traditional cable video services (basic and digital), advanced video services, high speed Internet services, and voice services to more than six million residential and business customers. Charter Fiberlink is a limited liability company organized under the laws of the state of Delaware with its principal business office located at 12405 Powerscourt Drive, St. Louis, Missouri 63131. Pursuant to a CPCN issued by this Commission on May 6, 2004, Charter Fiberlink is authorized to do business in California as an NDIEC and CLEC that provides limited facilities-based and resold interexchange services and limited facilities-based and resold local exchange services. Under its CPCN, Charter Fiberlink provides interstate and intrastate telecommunications services to business customers, including private line and data/wide area network services. Charter Fiberlink does not provide residential end-user voice services itself, but it enables

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[10] A.14-04-013 at 6 (transaction "will effect a transfer of Time Warner Cable's indirect, legal interest in Bright House California to Comcast Corporation").

its VoIP affiliate to do so by providing network interconnection, telephone numbers, and other services. Charter Fiberlink also provides switched exchange access services to interconnection carriers who terminate calls on its network.

2.5. Description of Financial Transaction

The proposed merger would create the largest broadband service provider in the United States. The merged company would control about 40 percent of the national broadband market, and may control a larger share if high speed broadband at 25 Megabits per second (Mbps) up and 3 Mbps down is calculated separately. In addition, the merger would more than double the size of Comcast's footprint in California, increasing the number of California households served by Comcast from approximately 34 percent to 84 percent.[11]

Under the proposal, Time Warner would merge into Tango Acquisition Sub, Inc., a newly formed wholly owned subsidiary of Comcast created for the specific purpose of this transaction. At that time, the separate corporate existence of Tango Acquisition Sub, Inc. will cease to exist and Time Warner will become a wholly owned subsidiary of Comcast. Comcast will acquire 100 percent of Time Warner's equity in exchange for Comcast Class A shares. Contemporaneously with the merger, each Time Warner share will be converted into the right to receive 2.875 shares of Comcast Class A shares. Upon completion of the transaction, TWCIS and all the other Time Warner subsidiaries will become indirect, wholly-owned subsidiaries of Comcast Corporation.

As part of the merger between Comcast and Time Warner, Comcast will divest approximately 3.9 million residential video customers to Charter,

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[11] *Brief of the Office of Ratepayer Advocates, Exhibit A, Declaration of Lee L. Selwyn* (Selwyn Declaration), filed on December 10, 2014 at 152-153.

apparently in other parts of the country, in exchange for Charter Fiberlink's transfer to TWCIS of its California business telecommunications service customers within certain franchise areas. This will only happen if the main transaction, the merger and transfer of TWCIS to Comcast, is consummated, and it is being done to "to rationalize both companies' footprints."[12]

3. Jurisdiction and Scope of Proceeding

The scope of this proceeding is governed by Pub. Util. Code §§ 851-856 and Section 706(a) of the 1996 Telecommunications Act.

3.1. Request for Exemption Under Section 852(b)

Because we conclude that Sections 854(a) and 854(c) apply to these license transfers, we also conclude that exemption of the license transfers under § 853(b) as requested by Joint Applicants is not appropriate.

3.2. Application of Section 854(a)

We conclude that § 854(a) of the Public Utilities Act applies to the A.14-04-013 transaction.[13] Pub. Util. Code § 854(a) specifies that, "[n]o 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 this Commission. The Commission may establish by order or rule the definitions of

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[12] A.14-06-012 at 10-11.

[13] Comcast requests permission for the A.14-06-012 transaction under § 851, which relates solely to transfer of a portion of a utility's assets, but concedes here also that the Commission's discretion is directed to whether the transaction is in the "public interest." A.14-06-012 at 12 ("not adverse to the public interest").

what constitute merger, acquisition, or control activities that are subject to this section of the statute."

There is no dispute as to the applicability of Pub. Util. Code § 854(a) to this transaction, and specifically to the transfer of utilities TWCIS and Bright House to Comcast. Parties dispute the applicability of § 854(a) to the broadband aspect of the merger that includes Comcast and Time Warner affiliates. This issue is addressed in Section 3.4 below.

3.3. Applicability of Sections 854(b) and (c)

3.3.1. Section 854(b)

We conclude that Pub. Util. Code § 854(b) does not apply to the current transaction. The plain language of § 854(b) guides our application of this statute. Pub. Util. Code § 854(b) states:

> 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, of 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 finding, 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.

Pub. Util. Code § 854(b) applies only where any one of the *utilities* that are parties to the proposed transaction has gross annual California revenues exceeding $500 million. In the present case, although Comcast and Time Warner have various entities within their organizations, they contend that the only two public utilities involved in this merger (i.e., the only two involved entities that hold CPCNs from this Commission) are TWCIS and Bright House, neither of which has intrastate California revenues exceeding $500 million.[14] Therefore, under the plain language of the statute, § 854(b) is inapplicable.

3.3.2. Section 854(c)

We conclude that Pub. Util. Code § 854(c) applies to this transaction. Joint Applicants maintain that the Commission's jurisdiction is limited to evaluating the impact of the proposed license transfer on the market for voice services in California. They contend that the Commission, as part of its public interest analysis, cannot include a review of the broader aspects of the merger that include Comcast and Time Warner affiliates.

ORA, TURN and Joint Minority Parties argue that the Commission should adopt a broad public interest standard and look at not only the implications of the transfer for voice customers of TWCIS and Bright House but also at the implications of the proposed merger for the cost and availability of broadband services in California. Joint Minority Parties and Greenlining argue that the merger will widen the digital divide between affluent and poor communities by restricting access to broadband services and making them more expensive.

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[14] Although we decline to apply the particulars of § 854(b), we also decline to endorse the view that there are only two utilities involved in this transaction. As described above, Comcast Phone of California, LLC (U-5698-C) is a subsidiary of Comcast and is thus implicated directly or indirectly in the proposed transaction.

TURN argues that the Joint Applicants have failed to demonstrate the claimed public benefits of the merger. ORA, TURN and Joint Minority Parties, therefore, argue that the Commission should judge the transaction by the standards of review established by Pub. Util. Code § 854(c).

§ 854(c) of the Pub. Util. Code provides:

> 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:
>
> (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;
>
> (7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state; and
>
> (8) Provide mitigation measures to prevent significant adverse consequences which may result."

In the present case, Comcast and Time Warner are *entities* that are parties to the proposed transaction and each entity has gross annual California revenues exceeding $500 million. Therefore, this transaction is subject by the plain language of Pub. Util. Code § 854(c) to Commission scrutiny, and Joint Applicants are required to demonstrate that the proposed change of control satisfies the § 854(c) criteria enumerated above.

The Commission may also look to the § 854(c) standards for guidance even if the plain language of § 854(c) did not apply to this transaction.[15] As the Commission explained in its decision rejecting the SDG&E and Edison merger, § 854(a) was the original authority, and the Legislature in 1989 added subsections (b) and (c), formalizing what had been the Commission's prior practice under § 854(a).[16] Historically, the Commission has sought more broadly to determine whether a change in control is in the public interest:

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[15] Over time, the Commission has used its discretion in different ways in reviewing mergers. In D.97-07-060 the Commission approved a transfer of control after determining that the transaction "would not be adverse to the public interest."See In the matter of the Joint Application of MCI Communications Corporation and British Telecommunications, D.97-07-060, Finding of Fact 3. In the SDG&E/SCE case several years earlier, the Commission used its discretion to arrive at the opposite result, denying the proposed merger of those utilities. See generally D.91-05-028.

[16] D.91-05-028, 1991 Cal. PUC LEXIS 253, *13-15 and fn. (40 CPUC2d 159, __)

> Under the previous statutes, the Commission had broad discretion to determine whether or not a proposed merger or acquisition was in the public interest. The 1989 amendments to § 854 require the Commission to make certain specific findings before a merger or acquisition can be approved. … Subsections (b), (c), and (d) set forth the Commission's statutory obligations when reviewing a proposed merger … Section 854(c) requires the Commission to consider seven specific criteria and to find, on balance, that the merger is in the public interest before it can approve the proposal…
>
> We note that the listed criteria of Subsection (c) evolved from Commissioner Wilk's testimony in the legislative hearings that eventually led to SB 52. Commissioner

Footnote continued on next page

> The Commission is primarily concerned with the question of whether or not the transfer of this property from one ownership to another...will serve the best interests of the public. To determine this, consideration must be given to whether or not the proposed transfer will better service conditions, effect economies in expenditures and efficiencies in operation.[17]

D.97-07-060 notes that over the years, our decisions have identified a number of factors that should be considered in making the determination of whether a transaction is in the public interest.[18] More recently, D.00 06-079 provided an overview of these factors:

1. Antitrust considerations are also relevant to our consideration of the public interest.[19] In transfer applications we require an applicant to demonstrate that the proposed utility operation will be economically and financially feasible.[20] Part of this analysis is a consideration of the price to be paid considering the value to both the seller and buyer.[21] We have also considered efficiencies and operating costs savings that should result from the proposed merger.[22] Another factor is whether a merger will produce a broader base for financing with more resultant flexibility.[23]

Wilk testified that the Commission would consider many of these criteria in evaluating the proposed merger even in the absence of a specific statutory requirement.

[17] *Union Water Co. of California*, 19 CRRC 199, 202 (1920) at 200.

[18] D.97-07-060, 1997 Cal PUC LEXIS 557 at 22-25.

[19] 65 CPUC at 637, n.1.

[20] R. L. Mohr (Advanced Electronics), 69 CPUC 275, 277 (1969). *See* also, Santa Barbara Cellular, Inc., 32 CPUC2d 478 (1989).

[21] *Union Water Co. of California*, 19 CRRC 199, 202 (1920).

[22] *Southern Counties Gas Co. of California*, 70 CPUC 836, 837 (1970).

[23] Southern California Gas Co. of California, 74 CPUC 30, 50, modified on other grounds, 74 CPUC 259 (1972).

2. We have also ascertained whether the new owner is experienced, financially responsible, and adequately equipped to continue the business sought to be acquired.[24] We also look to the technical and managerial competence of the acquiring entity to assure customers of the continuance of the kind and quality of service they have experienced in the past.[25]

D.00-06-079 assessed the proposed transaction against the seven criteria identified in § 854(c), and included a broad discussion of antitrust and environmental considerations.[26] Thus, even if a plain reading of § 854(c) did not apply to this transaction, it is reasonable to consider the § 854(c) factors in helping us determine if this transaction is in the public interest. Indeed, while urging the Commission to confine its analysis here to § 854(a), Applicants have provided the Commission with a wide-ranging discussion of why the merger is in the public interest.[27] The § 854(c) factors are a specification of "public interest" factors that the Commission may consider, but the Commission is not limited to these factors in determining whether a proposed utility merger is in the public interest.[28]

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[24] *City Transfer and Storage Co.*, 46 CRRC 5, 7 (1945).

[25] *Communications Industries, Inc. 13 CPUC2d 595, 598 (1993); See also, In the Matter of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S West Long Distance, Inc., and U S West Interprise America, Inc.*, D.00-06-079 (2000 Cal PUC LEXIS 645, *17-*20), footnotes included but renumbered into the current sequence.

[26] *Id*. at 17-38; *see* also D.01-06-007 (2001 Cal. PUC LEXIS 390 at 25-26) for a similar list of factors.

[27] *See, e.g.*, April 11, 2014 Joint Application, at 14-22 ("The proposed transaction is in the public interest under Section 854(a)").

[28] D.91-05-028, 1991 Cal. PUC LEXIS 253, at *15:

> We believe that it is reasonable to read the statute to require the Commission to consider the criteria listed in Paragraphs (1) to (7) but to permit evaluation of other factors in making its overall determination of whether the merger is in the public

Footnote continued on next page

The Commission has previously stated that competition is a relevant factor in weighing the public interest and is one of the factors that must be considered in the Commission's decision-making process.[29] Specifically, the Commission must take into account any antitrust implications and competitive considerations when it weighs the public interest.[30]

Therefore, a review of this transaction in terms of § 854(c), as well as a consideration of safety, consumer benefits, broadband infrastructure, and competitive issues, constitutes the appropriate scope of this proceeding.

In addition, Joint Applicants have tied together the merger between Comcast and Time Warner with the change of control and asserted that the merger will benefit TWCIS and Bright House and other affiliates of the merging companies.[31] The Commission, therefore, may review these assertions and

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interest. So construed, Subsection (c) complements the Commission's previous authority and practice in cases involving the acquisition or control of California utilities.

[29] Northern California Power Agency v. Public Utilities Com., 5 Cal. 3d 370, 377 (1971) at 380. See also, In the Matter of the Application of SCE Corp and its public utility subsidiary SCCE and SDG&E for Authority to Merge SDG&E into SCE, D.91-05-028, 40 CPUC2d 159; United States Steel Corp. v. Public Utilities Com., 29 Cal. 3d 603 (Cal. 1981); Industrial Communications Systems, Inc. v. PUC, 22 Cal. 3d 572; Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, D.99-02-085; 85 CPUC2d 158, February 18, 1999; Rulemaking on the Commission's own motion for the purpose of modifying existing tariff filing rules for telecommunications utilities, other than local exchange carriers and AT&T-C, and for the purpose of addressing other issues concerning the regulation of these utilities, D.92-06-069, 1992 Cal. PUC LEXIS 972, 2-3 (Cal. PUC 1992); Greenlining Institute v. Public Utilities Com., 103 Cal. App. 4th 1324, 1333 (Cal. App. 1st Dist. 2002); 1981 Cal. AG LEXIS 74, 11-13 (Cal. AG 1981).

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

[31] Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services

Footnote continued on next page

require Joint Applicants to provide factual data to verify these assertions of public interest benefits.

3.4. Our Jurisdiction to Monitor Broadband Competition, and Applicability of Section 706(a) of the 1996 Telecommunications Act

Applicants assert that any "review [of] the broadband-related aspects of the proposed transfers" is beyond the jurisdiction of this Commission.[32] We reject this assertion for several reasons: (i) as shown above, §§ 854(a) and (c) contain a broad "public interest" standard, and this Commission would be derelict in its duty to the people of California were it not even to consider the larger aspects of the utility transaction before it, a transaction that may in fact shape "the future of communications" in California;[33] (ii) broadband was described as an "advanced telecommunications service" in the 1996 Telecommunications Act,[34] and was recently reclassified as a telecommunications

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(California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a) (Joint Application), filed on April 11, 2014 at 14, n.16: "The focus in this section is on benefits that will inure to Comcast Corporation, Time Warner Cable and their affiliates; See also, Joint Application at 14, where Joint Applicants state the merger will encourage more network investment by "permitting Comcast Corporation and Time Warner Cable to combine the best aspects of Comcast's and Time Warner's robust and innovative voice services, and by adding scale to Comcast Corporation's overall business."

[32] *See*, e.g., Applicants' Reply to Protests, at 9-12; Comments on Proposed Decision at 4-9.

[33] ORA Opening Brief at 2 and 81.

[34] Verizon v. FCC, 740 F.3d 623, 635 (D.C. Cir., January 2014).

service by the FCC;[35] and (iii) both state and federal law, notably Section 706(a) of the 1996 Telecommunications Act and Section 709 of the Public Utilities Code, support the active monitoring of broadband competition in California, if not actions necessary to promote competition and remove barriers to investment.

In this Decision, we conclude that under Section 706(a) of the 1996 Telecommunications Act this Commission has limited jurisdiction to evaluate the broadband aspects of the merger between Comcast and Time Warner.

ORA, NAAC, and TURN argue that the Commission has jurisdiction to review the effects of the merger on broadband deployment in California under Section 706(a) of the federal Telecommunications Act, citing to a recent decision of the District of Columbia (D.C.) Circuit Court on this topic.[36] Joint Applicants dispute the Section 706(a) argument under federal law and strongly object to including an examination of the effects of the Merger on broadband deployment, which they argue is an action beyond the jurisdiction of the Commission.

Section 706(a) of the 1996 Federal Telecommunications Act states, in relevant part:

> 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

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

[36] Verizon v. FCC, supra, 740 F.3d 623 at 638.

> other regulating methods that *remove barriers to infrastructure investment.*[37] (Emphasis added.)

This section of the 1996 Act was the subject of a recent opinion of the D.C. Circuit Court in which the question discussed was whether this language constitutes a grant of authority to the FCC and the state commissions or is merely an expression of legislative intent.[38] The D.C. Circuit Court unambiguously found the former to be the preferred interpretation, saying that "the legislative history suggests that Congress may have, somewhat presciently, viewed the provision [Section 706(a)] as an affirmative grant of authority to the Commission…"[39]

To Verizon's objection that "Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications," the Court responded:

> Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here.[40]

At no point does the Court distinguish between the grant of authority to the FCC and the grant of authority to the states.

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[37] 47 U.S. C. § 1302(a), et seq.

[38] Verizon v. FCC, supra, 740 F. 3d at 638.

[39] *Id.* at 639. The D.C. Circuit Court rejected the argument that Section 706(a) was merely a statement of congressional policy: "the language [of Section 706(a)] can just as easily be read to vest the Commission with actual authority to utilize such 'regulating methods' to meet this stated goal." *Id*. at 637.

[40] *Id.* at 638, citing 47 USC 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); and 47 USC § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission).

In essence, the D.C. Circuit Court read the unambiguous language of Section 706(a) as an actual grant of authority to the FCC and the state commissions to take concrete steps by utilizing measures that "promote competition" and "remove barriers to infrastructure investment." However, the D.C. Circuit Court also noted that Section 706(a)'s delegation of authority is limited:

> The FCC has identified at least two limiting principles inherent in § 706(a). First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the FCC's subject matter jurisdiction to interstate and foreign communication by wire and radio. 47 U.S.C.S. § 152(a) … Second, any regulations must be designed to achieve a particular purpose: to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.[41]

Therefore, two operative limitations on the FCC's and states' authority to act are that the regulatory measures chosen relate to transmission by wires or radio waves, and to the reasonable and timely deployment of broadband. Here, we are concerned with the preservation of the most robust market possible for the provision of broadband telecommunications services in California, and are convinced that concern lies squarely within the purview of Section 706(a).

Joint Applicants maintain that reliance on Section 706(a) is precluded by § 710 of the Pub. Util. Code. We conclude, however, that Section 706(a) of the 1996 Telecommunications Act provides the express delegation of authority allowed by § 710:

> The Commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol or Internet Protocol enabled

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[41] *Id.* at 640.

> *services except as required or expressly delegated by federal law….* (Emphasis added.)

In view of the D.C. Circuit Court's conclusion that Section 706(a) is "an affirmative grant of authority" to the FCC and the state commissions, it appears to fall clearly within the highlighted exemption in Pub. Util. Code. § 710. Moreover, our scrutiny here of the competitive impacts of the proposed merger is entirely consistent with pro-competitive State policy embedded in other sections of the Public Utilities Code. Public Utilities Code § 709(f) affirms the State's resolve "(t)o promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct," and § 709(g) announces a policy to "remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."[42]

Therefore, this Commission may evaluate the broadband aspects of the merger between Comcast and Time Warner within the authority granted under Pub. Util. Code § 854 and Section 706(a) of the 1996 Telecommunications Act, *inter alia*.

3.5. Burden of Proof

To receive approval of this transaction, the Joint Applicants bear the burden of proving, by a preponderance of the evidence, that its proposed

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[42] Similarly, the State's Digital Infrastructure and Video Competition Act of 2006 provides that "[i]ncreasing competition for video and broadband services is a matter of statewide concern," and that "[i]ncreased competition in the cable and video service sector provides consumers with more choice, lowers prices, speeds the deployment of new communication nad broadband technologies, creates jobs, and benefits the California economy." Pub. Util. Code §§ 5810(a)(1) and 5810(a)(1)(B).

transaction meets the requirements of the § 854(a) and (c).[43] In addition, the Joint Applicants must also show that the transaction does not interfere with the deployment of broadband infrastructure, as provided in Section 706(a) of the 1996 Telecommunications Act.

4. Evidentiary Hearing

4.1. No Statute or Commission Rule Requires Evidentiary Hearings

No provision of law or Commission rule provides any party in this proceeding with a right to an evidentiary hearing. Pub. Util. Code § 1701.1(a) provides that this Commission "consistent with due process, public policy and statutory requirements, shall determine whether a proceeding requires a hearing." The Commission has previously addressed this issue of whether and when due process considerations require hearings. In *Re Competition for Local Exchange Service*, the Commission stated:[44]

> Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.
>
> The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing. (*Citing Consumers Lobby Against Monopolies v. Public Utilities Com*. (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal. 3d 288, 292).

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[43] Public Utilities Code Section 854 (e).

[44] *Re Competition for Local Exchange Service*, D.95-09-121, 1995 Cal. PUC LEXIS 788, at 13-14.

This proceeding is not a quasi-judicial proceeding in which a hearing is required as no vested interests of any party are being adjudicated. Rather, it is categorized as a ratesetting proceeding. Moreover, no party argued in its protest that the proceeding should be classified as adjudicatory for purposes of § 1701 of the Public Utilities Code or the Commission's rules.

For purposes of determining whether evidentiary hearings are necessary, ratesetting cases are treated like quasi-legislative proceedings. The California Court of Appeal has confirmed that the Public Utilities Code does not require the Commission to conduct public hearings concerning rates, but leaves the matter to the Commission's discretion,[45] noting that the Code expressly permits the Commission to determine whether or not to hold hearings.[46] The Commission has also affirmed that due process does not require a hearing that serves no useful purpose.[47] As set forth below, neither Comcast nor the Intervenors (save one) requested a hearing when given the opportunity to be heard.

4.2. There is Sufficient Evidence in the Record to Permit the Commission to Decide the Matter

The record in this proceeding is sufficient. This evidentiary record was developed through extensive discovery. Through the discovery process, intervenors had opportunity to discover the facts on which the Joint Applicants' positions are based and to present facts which support their own positions. The

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[45] *Pacific Gas & Electric Co. v. State Department of Water Resources*, 112 Cal. App. 4th 477, 500-502 (2003).

[46] *Id.* at 500-501.

[47] *In Touch Communications, Inc. and Inflexion California Comm. Corp., For the Sale and Purchase, Respectively of the Customer Base, Operating Authorities and other Assets,* D.04-09-027, 2004 Cal. PUC LEXIS 417 at 6-7.

parties presented their positions in many hundreds of pages of briefs and reply briefs, with attached testimony, declarations and/or any stipulations of facts by the parties. Moreover, certain material facts are beyond serious dispute: the merger will roughly double Comcast's share of broadband subscribers in California, leaving it with several times more broadband customers than all its competitors combined; Comcast's market dominance is even more dramatic if the market is defined as broadband above 25 Mbps; and given this substantial increase in market share, Comcast will have a concomitant increase in control over Californians' access to online content and services.

Because the Commission has sufficient information in this extensive record to determine whether the proposed transaction satisfies the requirements of law, no evidentiary hearings are needed.[48]

4.3. The Commission Can Resolve, and Has Frequently Resolved, Issues of Fact Without Evidentiary Hearings

The Commission on many occasions has decided complex and contentious proceedings without holding evidentiary hearings. Specifically, the Commission has approved a number of contested applications involving mergers or changes in control of telecommunications carriers without holding evidentiary hearings. Mergers or changes in control involving AT&T and Comcast (D.02-11-025), Qwest Communications Corporation (D.00-06-079), AT&T and Media One (D.00 05-023), MCI and WorldCom (D.98-08-068), and MCI and British Telecom (D.97-07-060) all were protested by one or more parties and all (except for AT&T/Comcast) were subjected by the Commission to an analysis of the public

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[48] *See, AT&T/MediaOne*, D.00-05-023, 2000 Cal. PUC LEXIS 355 at 17.

interest factors set forth in § 854(c). Despite extensive differences of opinion and disputes of facts presented and argued in the protests and the replies to protests in these cases regarding the public interest factors and other matters, the Commission elected not to hold evidentiary hearings, generally concluding that there was sufficient information in the record to determine whether the application complied with the requirements of §§ 851-856 and whether the application should be approved.[49]

The Commission's resolution of complex and contentious cases without holding evidentiary hearings is not restricted to telecommunications merger cases. In D.98-12-026,[50] the Commission made several significant modifications to the New Regulatory Framework (NRF) applicable to Pacific Bell and GTE. Although parties to the NRF proceeding differed greatly on whether such modifications should be made and the impact on ratepayers from making or not making such modifications, the Commission made its decision without holding evidentiary hearings.

In D.04-11-015,[51] the Commission resolved a number of contested issues regarding Pacific Gas and Electric Company's (PG&E) issuance of bonds related to its bankruptcy including the timing of the bond issuances, the permitted uses of bond proceeds, and the recovery of bond charges from departing load and new municipal load. Again, despite the fact that parties differed greatly on the

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[49] In *Re AT&T and Media One, supra*, 2000 Cal.PUC LEXIS 355 at 17.

[50] In *Rulemaking Re Third Triennial Review of the New Regulatory Framework*, D.98-10-026, 1998 Cal. PUC LEXIS 669.

[51] In *Re PG&E Energy Recovery Bonds,* D.04-11-015, 2004 Cal. PUC LEXIS 538

resolution of these issues and their impact on ratepayers and others, the Commission resolved these matters without holding evidentiary hearings.

The mere existence of disputed facts does not require that evidentiary hearings be held. As in the telecommunications merger cases cited above, the question of whether to hold evidentiary hearings depends on whether there is sufficient information in the record to enable the Commission to determine whether the Application should be approved. Here, the record is clearly sufficient. There are no factual disputes that we require evidentiary hearings to resolve. Thus, a hearing would serve no useful purpose.

4.4. Opportunity to be Heard and Motions for Evidentiary Hearings

The parties have had an adequate opportunity to be heard, consistent with due process. In a November 26, 2014 Ruling, the ALJ set a new briefing schedule and requested that any motions for evidentiary hearings be filed on December 10, 2014. Evidentiary hearings, if necessary, were scheduled for December 17-18, 2014. All parties except the Joint Minority Parties stated that evidentiary hearings were not necessary or declined to file a motion for evidentiary hearings. Joint Minority parties requested evidentiary hearings to require Comcast disclose the amount of compensation its experts received. However, the motion failed to identify any material factual issue for which evidentiary hearings are necessary. In addition, Joint Minority parties failed to demonstrate that a hearing or further discovery on expert compensation was necessary to develop an adequate record to render a decision in this proceeding. The fact that all parties except the Joint Minority Parties did not file a motion for evidentiary hearings further supports this Commission's decision that there are no factual disputes that would require evidentiary hearings.

5. Public Interest Criteria

As previously stated, in order to obtain approval of the proposed license transfers, Joint Applicants must satisfy the public interest criteria of § 854(c), and satisfy the Commission's concerns regarding safety, consumer benefits, broadband deployment, and competition set out in the Scoping Memorandum.

In sub-sections 5.1.1 through 5.1.6 below, we summarize the Joint Applicants' arguments that they have satisfied the § 854(c) criteria. In Subsections 6.1 through 6.6, we summarize Joint Applicants' arguments that they have satisfied the merger and broadband related concerns of the Scoping Memorandum. In Section 7 we summarize and discuss intervenors' objections to approval of the license transfer and/or their proposed conditions on approval. In Section 8, we discuss the reasons that the proposed transactions are not in the public interest, do not meet the standards for approval under either § 854(c) or under Section 706 (a) of the Telecommunications Act of 1996, and therefore should be rejected.

5.1. Applicants' Showing Regarding Section 854(c) Requirements

5.1.1. Maintain or Improve Financial Condition

Pub. Util. Code § 854(c)(1) requires that the merged company maintain or improve the financial condition of the resulting public utility. The Joint Applicants assert that Comcast's financial statements show a strong balance sheet with significant assets.[52] The proposed transfer involves a stock for stock transaction at the holding company level that does not entail the issuance of any additional debt or other obligations that might impair the financial condition of

[52] *Joint Application, Exhibit C (Comcast Corp. Annual Report Form 10-K)*, filed on April 11, 2015.

the new California entity.[53] Additionally, Applicants assert the transfer of control will generate substantial overall efficiencies and cost savings for the combined company. Comcast estimates approximately $1.5 billion in operating efficiencies and approximately $400 million in capital expenditures efficiencies by the third year resulting from the nationwide transaction, with operating expense efficiencies recurring at or above the $1.5 billion level each year thereafter.[54]

5.1.2. Effects on Quality of Service

Pub. Util. Code § 854(c)(2) mandates that the Commission consider, in its evaluation of a merger proposal, whether the merger maintains or improves service to public utility ratepayers in the state. Joint Applicants assert that the Merger will result in the extension of enhanced voice services currently available to Comcast customers to the customers of TWCIS. Such services include the ability of residential voice customers to access their voice services from different locations including wired and wireless connections provided by Comcast, as well as Wi-Fi connections and public Internet connections provided by third parties; and "Voice 2Go" which allows users to place outbound calls over a Wi-Fi or data connection using an application installed on a mobile device, and to receive calls to their home numbers through the mobile application; readable voicemail;

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[53] *Opening Brief of Joint Applicants, Exhibit A, Declaration of Christopher McDonald* (McDonald Declaration), filed on December 3, 2015 at 3.

[54] *Id.*

unlimited text messaging via a mobile device or a downloadable application; and expanded international calling options.[55]

5.1.3. Effects on Quality of Management

Section 854(c)(3) requires the Commission to consider whether the proposed merger will "[m]aintain or improve the quality of management of the resulting utility doing business in the state." Both the Comcast and Time Warner management teams will remain in place following the Merger, maintaining the existing quality of management at all levels.[56]

5.1.4. Effects on Public Utility Employees

Section 854(c)(4) requires that the merger be fair and reasonable to public utility employees. We have found this condition is satisfied when a transaction will not result in a combination of operating subsidiaries or when employees will benefit from the creation of a stronger California entity. Both conditions are satisfied by the Merger. Because the Merger will occur at the holding company level, it will have no effect on existing employment relationships.

5.1.5. Effects on Public Utility Shareholders

Section 854(c)(5) requires the Commission to consider whether the proposed merger will "[b]e fair and reasonable to the majority of all affected public utility shareholders." In evaluating this factor we consider whether all pertinent information regarding the proposed transaction has been disclosed and whether the transaction is supported by the relevant Boards of Directors,

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[55] *Opening Brief of Joint Applicants, Exhibit B, Declaration of Shane Portfolio* (Portfolio Declaration), filed on December 3, 2015 at 3.

[56] *Id*. at 45. (*See* also, Opening Brief of Joint Applicants, Exhibit M, Selected Management Biographies, filed on December 3, 2014.)

financial advisors and/or shareholders. In this transaction, Time Warner shareholders will receive 2,875 shares of Comcast Class A common stock for every share of Time Warner stock owned. An overwhelming majority of the shareholders of both companies has approved the proposed transfer of control.[57]

5.1.6. Effects on State and Local Economies and Communities of Interest

Section 854(c)(6) requires that the merger be beneficial to state and local economies and to local communities. To demonstrate compliance with this provision of the statute, Joint Applicants point to Comcast's commitment to diversity including voluntary full compliance with the Commission's General Order 156 supplier diversity program,[58] its commitment to enhanced access for persons with disabilities,[59] and its extensive energy conservation programs,[60] all of which will be extended to the customers of Time Warner upon completion of the Merger. With particular regard to the impact of the Merger on broadband availability in underserved communities, Joint Applicants point out that Comcast has already extended low-cost Internet access to nearly 1.4 million

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[57] *Opening Brief of Joint Applicants*, filed on December 3, 2014 at 47; Press Release, Comcast. Corp. "Comcast Shareholders Overwhelmingly Approve the Stock Issuance for Merger with Time Warner," (October 8, 2014), http://corporate.comcast.com/newsinformation/news-feed/comcast-shareholders-overwhelmingly-approve-the-stock-issuance-for-merger-with-time-warner-cable?print=1 ; Press Release, Time Warner Cable Inc., "Time Warner Cable Stockholders Approve Merger with Comcast Corporation," (Oct. 9, 2014), http://www.timewarnercable.com/content/twc/en/about-us/press/twc-shareholders-approve-merger-withcomcast.html.

[58] *Id.* at 15-18.

[59] *Id*. at 18-19.

[60] *Id*. at 19-20.

qualifying low-income individuals through its "Internet Essentials" (IE) program, which it will continue to maintain and expand following the Merger.[61]

6. Applicants' Showing Regarding the Effects of the Merger in California

6.1. Broadband Deployment and Build-Out of Broadband Networks to Unserved Areas

While continuing to insist that Section 706(a) of the 1996 Telecommunications Act does not confer jurisdiction on the Commission to review the broadband-related aspects of the Merger, Joint Applicants assert that the Merger will have beneficial impacts on broadband deployment in California. In support of this assertion they make the following arguments:

> --Comcast has an all-digital network for its Internet services. Time Warner does not. After the acquisition, Comcast will add existing Time Warner customers to that network, providing them with higher speeds and other technical advancements which they do not presently enjoy.[62]
>
> --Comcast is building out a nationwide Wi-Fi network which is available to its customers at no additional charge. The Time Warner customers who become Comcast customers as a result of the Merger will receive no-cost access to this network.[63]
>
> --Comcast will achieve economies of scale that will allow it to build out its network faster and "to consider greater build out of network facilities, with CASF support, to unserved and underserved areas in the State."[64]

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[61] *Id. a*t 50-52; See also, McDonald Declaration at 7-14 for a detailed description of the *Internet Essentials* program.

[62] *Opening Brief of Joint Applicants* at 77-83.

[63] *Id*. at 83-87.

[64] *Id*. at 76 and 88-92.

In summary, Joint Applicants assert that if the Merger is approved, existing Time Warner customers in southern California will receive all-digital Internet service with higher upload and download speeds and access to a much larger complementary Wi-Fi network. Schools and low-income communities throughout California will continue to qualify for the Internet Essentials program and may receive additional low-cost Internet access, depending on a variety of factors including the availability of CASF funding.[65]

6.2. Safety and Reliability

Joint Applicants assert the combined system will create increased reliability for the current customers of Time Warner by migrating them to a technically superior all-digital platform. With regard to safety during power outages and similar events, Comcast asserts that it presently "offers its residential customers reasonably priced backup batteries for use in power outages and other emergencies. The batteries have an average standby life of eight hours of telephony service."[66] Comcast "fully expects" to follow the same procedures in the California systems acquired from Time Warner.[67] Following the merger, Comcast will continue to provide service to LifeLine customers of TWCIS unless and until Comcast files and the Commission approves an application to relinquish the TWCIS LifeLine certification.[68]

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[65] *Id*. n. 343.

[66] *Id*. at 43; Portfolio Declaration at 11.

[67] *Id.*

[68] Portfolio declaration at 3.

6.3. Effects of the Merger on California Consumers

As noted above, Comcast currently makes its "Internet Essentials" program available to approximately 1.4 million people nationwide. The basic criterion for inclusion in IE is being a household that has at least one child enrolled in a school lunch program. IE provides Internet access at minimal speeds of 5 Mbps download and 1 Mbps upload for $9.95/month, plus the opportunity to acquire an Internet-ready computer for $150. Comcast does not promise to extend the reach of IE either through broadening the eligibility criteria or increasing minimum speeds. It will make IE available to qualifying households in the Time Warner service territory if the Merger is approved.[69]

Joint Applicants assert that "the transfer of control will bring together the best aspects of Comcast's and Time Warner's innovative voice and data transport services, resulting in 'best in class' products and offerings that improve the quality of services for residential and business customers in California. This will enhance competition with Incumbent Local Exchange Carriers (ILECs) and other large providers (e.g., Level 3) that have long dominated the provision of wireline telephone and data transport services in the State, resulting in lower prices, higher quality offerings, and other immediate economic benefits."[70] In addition, Joint Applicants assert that the transfer of control will give the combined company the greater scale and geographic reach necessary to compete effectively for large business customers.[71]

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[69] *Opening Brief of Joint Applicants* at 51; McDonald Declaration, at 8-13.

[70] *Opening Brief of Joint Applicants* at 4.

[71] *Id.*

6.4. Merger-Specific and Verifiable Efficiencies

In response to an ORA data request, Comcast stated that it expects to achieve significant national operating efficiencies as a result of the merger, including "approximately $1.5 billion in operating expenses and $400 million in capital expenditures by the third year, with operating expense efficiencies reoccurring at or above the $1.5 billion level each year thereafter." Comcast "expects to achieve $750 million of the $1.5 billion in operating efficiencies in the first year after closing, another 25 percent in year two and the remaining 25 percent in year three."[72] As a result, Joint Applicants assert that "the additional investments and innovations that will be needed to deliver the services consumers are demanding in the future will be more effectively and efficiently achieved by the combined company than either company could achieve alone."[73] Generally, Joint Applicants make four general claims about efficiencies: 1) Joint Applicants argue that Comcast offers consumers superior products and services to what Time Warner Cable offers, so that Time Warner subscribers would be "upgraded"; 2) Joint Applicants argue that Comcast needs to be even larger than it is today in order to gain economies of scale and scope and spread its fixed costs; 3) Joint Applicants argue that the two companies together could offer consumers "the best of both" in terms of products and services; and 4) Joint Applicants claim that through the merger they would be able to take additional steps to help bridge the digital divide.[74]

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[72] *Opening Brief of Joint Applicants, Exhibit K, Comcast Response to ORA data request 3:61*, filed on December 3, 2014.

[73] *Opening Brief of Joint Applicants* at 75-76.

[74] *Id.*

6.5. Effects of the Merger on Special Access and Backhaul Services

Joint Applicants assert that the Merger will create a more effective competitor for the provision of wireless backhaul and special access services. A majority of these wholesale services are currently provided by a handful of national facilities-based providers. The merged entity will be in a stronger position to compete with these existing providers in offering backhaul services to wireless networks, resulting in better service at lower rates.[75]

6.6. Effects of the Merger on Competition in the California Marketplace for Broadband Customers

Comcast and Time Warner do not compete with one another for the provision of broadband Internet services in any local market in California. According to Joint Applicants, there is no reasonable likelihood that they would do so in the future, given the prohibitive cost of overbuilding an existing cable company's service territory.[76] Accordingly, Joint Applicants claim that the merged company will be a stronger competitor against other providers of broadband Internet services, including ILECs, satellite companies and local Internet Service Providers (ISPs) and will increase competition for the business of "super-regional" companies to the ultimate benefit of such businesses and their customers.[77]

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[75] *Opening Brief of Joint Applicants* at 70-73.

[76] *Opening Brief of Joint Applicants, Exhibit D, Declaration of Mark A. Israel*, et al (Israel et al Declaration) at 35.

[77] *Id.* at 15.

7. Intervenors' Arguments Against Approval of the License Transfers

ORA, TURN, Joint Minority Parties, Common Cause, Greenlining, Consumers Union, Media Alliance, Writers Guild, CforAT, and DISH oppose granting the license transfer applications. Most of these parties further suggest the imposition of conditions in the event that the merger is approved, while arguing that no conditions could entirely mitigate the harm that would be created by the merger.

7.1. Arguments Against Approval

All opponents of approving the application share the belief that the merged company will increase its markets share to such an extent that it will cause significant adverse consequences and, therefore, not be in the public interest. Below, we discuss each argument as it relates to the issues presented in the proceedings' Scoping Memorandum.

7.1.1. Effects of the Merger on Competition in the California Marketplace for Broadband Customers

ORA cites the testimony of Dr. Lee Selwyn to show why approval of the merger will result in competitive harms to California consumers. For example, ORA points out that Comcast will increase its post-merger footprint from 33.7 percent to 84 percent of California households.[78] This number is even higher when we measure Comcast's footprint by homes passed.[79] The numbers are in stark contrast to national numbers where the equivalent post-merger footprint of

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[78] Selwyn Declaration at 13 and 153.

[79] *Id*. at 13-15.

the combined companies will increase to approximately 60 percent.[80] Dr. Selwyn uses the U.S. Census Bureau definitions of households and homes. As a result of this increased footprint, ORA states that concentration of the market for fixed broadband, as measured by the Herfindahl-Hirschman Index (HHI),[81] will increase by 4,927, from 2,968 to 7,895. Under the U.S. Department of Justice and Federal Trade Commission's 2010 Horizontal Merger Guidelines, a market with an HHI in excess of 2,500 is defined as "highly concentrated."[82] The Horizontal Merger Guidelines also state that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."[83] Therefore, according to ORA, just based on the significant increase in HHI this merger should be denied.

Further, ORA states that in the market for fixed high speed broadband, recently defined by the FCC as measuring service at download speeds of 25 Mbps and above, the majority of post-merger Comcast customers will have no or limited competitive options other than the merged entity.[84] ORA cites the tables

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[80] *Id*. at 19.

[81] The U.S. Department of Justice, the Federal Trade Commission, and state attorneys general have used the HHI since 1982 to measure market concentration. The HHI measures market concentration by summing the squares of market share enjoyed by various competitors. For example, an HHI of 10,000 indicates a monopoly. If that market had ten participants each supplying 10 percent of demand, the HHI would be 1,000 (10 share of market squared = 100; 10 times 100 = 1,000). An HHI of 1,000 indicates a competitive market.

[82] United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 2010* edition at § 5.3, Market Concentration; *see* also Selwyn Declaration at 15, ¶ 13.

[83] *Id*.

[84] We take official notice of the fact that on January 29, 2015, the FCC adopted the 2015 Broadband Progress Report and updated its broadband benchmark speeds to 25 Mbps for downloads and 3 Mbps for uploads.

below in Dr. Selwyn's testimony to bolster the argument that a post-merger Comcast will become the single dominant provider of last-mile broadband access in California.[85] For high speed broadband Internet access offering download speeds of 25 Mbps and above in California, Comcast will have a monopoly in approximately 78 percent of census blocks, except in those few areas where Verizon's Fiber Optic Service (FiOS) or a high speed version of AT&T's U-Verse is deployed.[86] This limited choice is exacerbated by price stickiness in the market due to high switching costs that include early termination fees and equipment rental fees.[87] As FCC Chairman Tom Wheeler recently observed:

> Counting the number of choices the consumer has on the day before their Internet service is installed does not measure their competitive alternatives the day after. Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees. And, if those disincentives to competition weren't enough the media is full of stories of consumers' struggles to get ISPs to allow them to drop service.[88]

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[85] Selwyn Declaration at 19.

[86] *Id.*

[87] Selwyn Declaration at 88.

[88] Prepared Remarks of Chairman Wheeler, "Facts and Future of Broadband Competition" presented at the 1776 Headquarters, Washington, D.C., September 4, 2014 at 4 (emphasis in original). http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadbandcompetition. (*See* also, *Id.*)

Table 1
CENSUS BLOCKS PASSED WITH AT LEAST ONE COMPETING PROVIDER AT EACH DOWNLOAD SPEED TIER[89]

SPEED TIER	CBs served by Jt. Applic.	CBs with one competitor	CBs with two competi-tors	CBs with at least three competi-tors	Pct of CBs with One Competitor	Pct of CBs with two competi-tors	Pct of CBs with at least three competitors
1 ≤200 kbps	354,729	297,689	27,914	1,601	83.92%	7.87%	0.45%
2 >200 kbps and <768 kbps	354,729	297,689	27,914	1,601	83.92%	7.87%	0.45%
3 ≥768 kbps and <1.5 Mbps	354,729	297,689	27,914	1,601	83.92%	7.87%	0.45%
4 ≥1.5 Mbps and <3 Mbps	354,729	290,991	27,452	1,591	82.03%	7.74%	0.45%
5 ≥3 Mbps and <6 Mbps	354,729	265,405	25,145	1,439	74.82%	7.09%	0.41%
6 ≥6 Mbps and <10 Mbps	354,729	243,398	23,975	1,390	68.62%	6.76%	0.39%
7 ≥10 Mbps and <25 Mbps	354,729	220,620	23,332	1,379	62.19%	6.58%	0.39%
8 ≥25 Mbps and <50 Mbps	354,729	74,824	2,589	161	21.09%	0.73%	0.05%
9 ≥50 Mbps and <100 Mbps	354,729	55,941	280	6	15.77%	0.08%	0.00%
10 ≥100 Mbps and <1 gbps	354,729	44,562	223	0	12.56%	0.06%	0.00%
11 ≥1 gbps	354,729	1,281	25	0	0.36%	0.01%	0.00%
Source: California Broadband Availability Database, Round 10 data (as of June 30, 2014) as submitted by ISPs.							

[89] Selwyn Declaration at 71.

Table 2
HOUSEHOLDS PASSED WITH AT LEAST ONE COMPETING PROVIDER AT EACH DOWNLOAD SPEED TIER[90]

SPEED	HHs passed by Joint Applicants	Hhs with one competitor	HHs with two competi-tors	Hhs with at least three competi-tors	Pct of HHs with one competitor	Pct of HHs with two competi-tors	Pct of HHs with at least three competitors
1 ≤200 kbps	10,604,329	10,262,602	1,512,400	115,510	96.78%	14.26%	1.09%
2 >200 kbps and <768 kbps	10,604,329	10,262,602	1,512,400	115,510	96.78%	14.26%	1.09%
3 ≥768 kbps and <1.5 Mbps	10,604,329	10,262,602	1,512,400	115,510	96.78%	14.26%	1.09%
4 ≥1.5 Mbps and <3 Mbps	10,604,329	10,127,518	1,487,884	114,113	95.50%	14.03%	1.08%
5 ≥3 Mbps and <6 Mbps	10,604,329	9,319,406	1,358,894	103,877	87.88%	12.81%	0.98%
6 ≥6 Mbps and <10 Mbps	10,604,329	8,816,949	1,324,113	102,352	83.14%	12.49%	0.97%
7 ≥10 Mbps and <25 Mbps	10,604,329	8,236,633	1,300,984	101,193	77.67%	12.27%	0.95%
8 ≥25 Mbps and <50 Mbps	10,604,329	2,384,780	88,132	8,700	22.49%	0.83%	0.08%
9 ≥50 Mbps and <100 Mbps	10,604,329	2,019,187	12,680	46	19.04%	0.12%	0.00%
10 ≥100 Mbps and <1 gbps	10,604,329	1,590,864	8,201	0	15.00%	0.08%	0.00%
11 ≥1 gbps	10,604,329	47,257	421	0	0.45%	0.00%	0.00%
Source: California Broadband Availability Database, Round 10 data (as of June 30, 2014) as submitted by ISPs.							

Finally, ORA states that by including the transfer of Charter customers to Comcast in California, the merger will eliminate another competitor in a market that is already lacking in competition.

TURN also states that the proposed merger will harm competition in the residential consumer market and cites the testimony of its expert witness, Dr. Susan M. Baldwin. While Dr. Baldwin acknowledges that Comcast and Time Warner do not currently compete in each other's market, she nonetheless states in her testimony that the merger would still have anticompetitive consequences. First, Dr. Baldwin asserts that the merger would eliminate a valuable industry

[90] *Id.* at 72.

benchmark.[91] Currently, the Commission can compare the reliability, customer service, prices, and service offerings of Comcast and Time Warner in California in order to gauge the companies' relative performances and contribution to the state. Once this benchmark is eliminated, it harms the Commission's ability to consider "best practices," prepare for and respond to emergencies, and promote advanced telecommunications services.[92] Further, eliminating this benchmark will harm consumers' ability to compare suppliers' relative performance and prices and enhance Comcast's already substantial ability to set the bar for consumers' expectations. Knowledge of a different supplier's superior version of a product (even if it is offered outside the consumer's geographic market) may assist consumers in advocating on their own behalf with their suppliers if they are dissatisfied.[93] Second, Dr. Baldwin states that the merger will eliminate potential competition whereby Comcast or Time Warner could, at a future date, decide to enter each other's territory.[94] Third, Dr. Baldwin notes that the merger will increase Comcast's overall scale and scope, thus entrenching Comcast's dominance in the broadband Internet access market and increasing its share of the total voice market in California.[95] TURN cites statistics that show cable companies like Comcast and Time Warner have approximately 61 percent of

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[91] *Reply Brief of the Utility Reform Network, Opening Testimony of Susan M. Baldwin* (Baldwin Opening Testimony), filed on December 10, 2014 at 33.

[92] *Id.*

[93] Baldwin Opening Testimony at 33.

[94] *Id.* at 34.

[95] *Id.* Josh Lowensohn, "Comcast could mandate a monthly data cap on all customers in the next five years," *The Verge*, May 14, 2014, http://www.theverge.com/2014/5/14/5718746/comcast-says-it-could-bring-data-caps-to-home-internet-service-for-all.

California's broadband Internet access market for connections at least 3 Mbps downstream. This compares to a 28.1 percent market share for Digital Subscriber Lines (xDSL) and 9 percent for fiber, both provided by Independent Local Exchange Carriers like Verizon and AT&T.[96] TURN also states that AT&T and Verizon are on record as either stopping or slowing down any further investment in fiber to residential consumers.[97]

The Writers Guild also points to the anti-competitive harms of the merger and claims that removing Time Warner as a potential competitor will harm benchmark competition, limit the chances of overbuilding, and reduce the quality of broadband offerings.[98] For example, Writers Guild cites comments from Comcast's Executive Vice President that envision Comcast moving to a "usage based billing model" for all customers in the next five years.[99] In contrast, Time Warner's customers face no limitations or added costs for data usage on any of Time Warner's plans and Time Warner has stated that its customers will always have access to unlimited broadband.[100]

Joint Minority Parties assert that due to a lack of effective competition and a lack of government regulations, Americans are currently paying higher prices

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[96] *Id.* at 48-53; Reply Brief of the Utility Reform Network (TURN Brief), filed on December 10, 2014 at 18.

[97] *Id.*

[98] *Brief of the Writers Guild of America, West Inc.* (Writers Guild Brief), filed on December 10, 2014 at 13-20.

[99] *Id.* at 16; Josh Lowensohn, "Comcast could mandate a monthly data cap on all customers in the next five years," The Verge, May 14, 2014, http://www.theverge.com/2014/5/14/5718746/comcast-says-it-could-bring-data-caps-to-home-internet-service-for-all.

[100] *Id.*

for slower Internet service when compared to the rest of the world.[101] The current transaction, therefore, would hurt competition by forcing mergers among competitors who will need to increase their scale in order to remain relevant.[102] As an example, the Joint Minority Parties cite AT&T's pending merger with DirecTV. Further, Joint Minority Parties point to data showing that the addition of Time Warner territories would give a post-merger Comcast a new presence in 12 of the top 50 designated market areas (DMA) nationally, including the second and 28th ranked markets in the country, Los Angeles and San Diego.[103]

ORA, TURN, Greenlining, Writers Guild, Media Alliance, and Joint Minority Parties also raise the concern that a combined Comcast and Time Warner will have enormous capacity to damage startup activity, online content, and new innovations through exploiting their terminating access monopoly power as a result of the post-merger entity's significant increase in market share. DISH's opposition is based on the asserted negative impact that the merger would have on video programming and competing video providers by foreclosing or degrading their offered services, imposing discriminatory data

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[101] *Reply Brief of the Joint Minority Parties, filed on December 10, 2014 at 5; Rick Karr, Why is European Broadband Faster and Cheaper? Blame the Government,* ENGADGET, June 28, 2011, http://www.engadget.com/2011/06/28/why-is-european-broadband-faster-and-cheaper-blame-the-governme/.

[102] Reply Brief of the Joint Minority Parties at 7.

[103] *Id.* at 8; *Investor Presentation*, Comcast and Time Warner Cable, February 13, 2014 at 6, http://files.shareholder.com/downloads/CMCSA/2671320491x0x725713/781d73e7-0635-47b4-b25e-34e5c7ea4ff9/Comcast%20Investor%20Presentation.pdf; *See DMA Regions*, NIELSEN, http://www.nielsen.com/us/en/campaigns/dma-maps.html. "DMA regions are the geographic areas in the United States in which local television viewing is measured by The Nielsen company. The DMA data are essential for any marketer, researcher, or organization seeking to utilize standardized geographic areas within their business."

caps on them, favoring content provided by Comcast affiliates, and withholding online rights from DISH.[104]

7.1.2. Effects of the Merger on Special Access and Backhaul Services

The California Association of Telecommunications Companies (CALTEL) addresses the harmful impacts that the proposed merger would have on the availability of special access and backhaul services.[105] CALTEL argues that the proposed merger would significantly diminish competitive choice in the market for wholesale inputs needed by CALTEL members and other Competitive Local Exchange Carriers (CLECs).[106] CALTEL's expert, Ms. Sarah DeYoung, argues that CLECs will be uniquely affected by the proposed merger because they simultaneously purchase and receive wholesale inputs from cable companies while competing against them in the retail telecommunications and Internet service markets.[107] Unlike Time Warner, Comcast is not committed to continuing to provide resold voice and Internet or last mile carrier Ethernet services to CLEC customers and is unlikely to continue offering wholesale inputs to carriers, thus diminishing competition in this area.[108] According to Ms. DeYoung, until the merger with Time Warner was announced, Comcast offered wholesale carrier

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[104] *Brief of Dish Network Corporation in Opposition to Proposed Merger* (DISH Brief), filed on December 10, 2014 at 2.

[105] *Opening Brief of the California Association of Telecommunications Companies* (CALTEL Brief), filed on December 10, 2014 at 2.

[106] *Id*. at 3; *Opening Brief of the California Association of Telecommunications Companies, Testimony of Sarah DeYoung* (DeYoung Testimony), filed on December 10, 2014 at 4.

[107] DeYoung Testimony at 5.

[108] *Id*. at 14.

Ethernet on a take-it-or-leave-it basis with onerous terms and conditions.[109] In contrast, Time Warner offers valuable wholesale inputs to CLECs and wireless carriers that otherwise would only be available from ILECs, thereby providing critical pricing and terms-and-conditions discipline on the emerging Ethernet wholesale market. For example, Time Warner currently provides three primary categories of wholesale products: 1) business voice and Internet access products for Value Added Resellers, 2) Carrier Ethernet Last Mile Access used by facility-based competitive carriers, and 3) Carrier Ethernet Transport used by CLECs, ILECs, cable companies, interexchange carriers (IXCs), wireless carriers and others. Eliminating such competitive discipline, Ms. DeYoung asserts, would lead to a decrease in competitive services offered to business customers.[110]

7.1.3. Merger-Specific and Verifiable Efficiencies

Greenlining and Consumers Union, ORA, and Media Alliance question Comcast's claims regarding merger specific efficiencies, especially as they relate to California.

Greenlining and Consumers Union claim that Joint Applicants' assertions of merger efficiencies are unverifiable, vague, selective, not merger-specific and do not hold up to scrutiny.[111] Greenlining and Consumers Union point out, for example, that if the merger is accepted, Time Warner customers will likely lose access to Lifeline and the ability to use Roku as an independent video

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[109] *Id*. at 6.

[110] *Id*. at 17-20.

[111] *Reply Brief of the Greenlining Institute and Consumers Union* (Greenlining and CU Brief), filed on December 10, 2014 at 41.

programming platform.[112] In addition, Greenlining and Consumers Union claim that past experience shows that the transaction would cause significant disruptions and substantial diversion of resources to integration efforts. As an example, a small boundary realignment between Comcast and Time Warner resulted in years of transition problems, including a customer who waited three years to get a malfunctioning exterior installation corrected.[113]

Further, Greenlining and Consumers Union claim that the proposed transaction will result in a combined company that maintains Comcast's insufficient commitment to diversity. For example, while California telecommunications providers reported spending over $2.6 billion on supplier diversity in 2013, Comcast's share was only $24 million, the lowest amount of any provider. Comcast received an F+ grade in Greenlining's 2014 Supplier Diversity Report Card and did not move above 1 percent in African American and Minority Women-Owned Business Enterprise contract spending. In the Native American and the Disabled Veteran-Owned Business Enterprise categories, spending remained at zero.[114]

ORA states that Joint Applicants have failed to demonstrate that the merger efficiencies could not be achieved absent this merger.[115] In addition, ORA claims that Joint Applicants have failed to demonstrate that any of these

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[112] *Id.* at 42.

[113] *Id.* at 47.

[114] *Id.* at 39; *Stephanie Chen and Noemi Gallardo, Supplier Diversity Report Card: Unexpected Achievements and Continuing Gaps* at 10 (June 2014), available at http://greenlining.org/wp-content/uploads/2014/06/2014Supplier-Diversity-Report-Card-printer-friendly.pdf.

[115] *Brief of the Office of Ratepayer Advocates* (ORA Brief), filed on December 10, 2014 at 53

efficiencies will flow through to consumers or result in best practices.[116] In fact, ORA points out that Comcast Executive Vice President David L. Cohen has publicly stated that "We're certainly not promising that customer bills are going to go down or even increase less rapidly."[117]

Media Alliance asserts many of these same points and states that the planned reductions in network operations and corporate overhead are likely to result in significant job loss, with resulting costs to the California economy as workers relocate to other jobs in other industries.[118]

7.1.4. Service Quality

ORA, CforAT, Media Alliance, Greenlining and Consumers Union claim that the merger bodes poorly for broadband and voice customers because it represents a merger of companies that have an objectively poor track record in providing customer service.

ORA claims that the Joint Applicants have simply provided a corporate public relations package without providing detailed plans and commitments of direct benefits to consumers.[119] ORA points out that Comcast claims to have no standards or metrics for ascertaining how well they are servicing their customers.[120] However, ORA claims that objective data shows that consumers are generally unhappy with Comcast's and Time Warner's broadband service,

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[116] *Id*.

[117] *Id*. at 54.

[118] Reply Comments of the Media Alliance, filed on December 10, 2014 at 13.

[119] ORA Brief at 61.

[120] *Id*. at 62-63; *Brief of the Office of Ratepayer Advocates, Exhibit 3, Declaration of Adam J. Clark* (Clark Declaration), filed on December 10, 2014 at 16-17.

with both companies consistently ranking near the bottom of virtually every independent evaluation of service quality for cable broadband providers.[121] For example, ORA cites to J.D. Powers' 2014 Residential Internet Service Provider Satisfaction Study – West where Comcast's Xfinity service ranks seventh among the nine largest companies, achieving the lowest available scores in 4 of the 5 categories. Time Warner is slightly above at #6, while Charter was closer to the top at #4.[122] Looking back over a longer period from 2009-2014, in five of the last six years J.D. Power's studies assigned Comcast and Charter Communications a sub-average score for Overall Customer Satisfaction. In each of the six years from 2009-2014, Time Warner failed to earn one average mark for overall customer satisfaction.[123] ORA further cites the American Customer Satisfaction Index (ACSI) where Comcast, Time Warner and Charter "received the lowest scores of all Internet service providers in the study," and their scores went down from 2013-2014.[124]

ORA also points to a University of Michigan study where Comcast and Time Warner are the lowest rated companies compared to not only Internet service providers, but across all industries and companies included in the study.[125] In addition, there has been an upward trend in the number of broadband complaints to the Joint Applicants. Comcast escalated many more complaints (per broadband connection) than Time Warner between January 1,

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[121] *Id*.

[122] *Id*. at 10-11.

[123] *Id*.

[124] *Id.* at 11.

[125] *Id.* at 16-17.

2010 and August 31, 2014.[126] According to ORA, if Comcast acquires Time Warner there is a risk that the merged entity will adopt less effective quality assurance processes and protocols than what Time Warner currently employs today. Further, Comcast takes much longer than Time Warner to complete broadband installations.[127] Finally, ORA points out that, unlike Time Warner and Charter, Comcast does not track broadband outages in California.[128]

In regard to voice service, ORA claims that the service quality challenges this merger faces are not just a simple litany of a few things that need to be fixed but are extensive and pervasive.[129] In contrast to Comcast, both Time Warner and Charter have existing plans to improve service quality and reliability of voice service and both Time Warner and Charter have relatively systematic approaches to assessing service and improving service quality.[130] At the same time, both Comcast and Time Warner fell below the Commission's minimum service quality standards on metrics related to voice service installation intervals and service orders completed out of those received.[131] According to the J.D. Power and Associates survey, among eight large western telephone service providers in 2014, both Comcast and Time Warner are two of three companies

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[126] *Id*. Escalated complaints are complaints that are not resolved after the first point of contact by the customer. Time Warner and Comcast have different processes to resolve escalated complaints.

[127] *Id*.

[128] *Id*.

[129] ORA Brief at76.

[130] *Brief of the Office of Ratepayer Advocates, Exhibit 2, Declaration of Ayat Osman* (Osman Declaration), filed on December 10, 2014 at 16-17 at 7-8.

[131] *Id*. at 13.

ranked in the lowest rung, getting "two power circles." Charter is one above with "three power circles" while Cox, AT&T and Verizon are at the top.[132] On the subject of customer complaints, ORA cites data showing that Comcast has higher complaint rates than Time Warner. In some instances these rates are dramatically higher.[133]

Greenlining and Consumers Union also assert that the proposed transaction will not improve service quality for consumers. According to a 2014 survey of Consumers Union members, respondents who were current and former Comcast customers complained of: service that "cuts in and out constantly;" download and upload speeds that "change erratically" and "are sometimes fast and sometimes very slow;" "[f]requent interruption in Internet services without explanation;" inadequate bandwidth; blocked channels and unreliable phone service.[134]

Media Alliance points out that the Customer Satisfaction Index ranked the Joint Applicants dead last in customer service benchmarks among hundreds of major US corporations. At ConsumerAffairs.com, 2,513 comments are recorded about Comcast, 88 percent of them giving the company 1 star out of 5, the lowest possible rating. Also, in Worcester, Massachusetts, the City Council voted not to approve a Charter to Comcast franchise transfer on the basis of poor customer service.[135]

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[132] *Id.* at 17.

[133] *Id.* at 24-26.

[134] Greenlining and CU Brief at 31; Greenlining and CU Brief, Exhibit A

[135] Reply Comments of the Media Alliance at 7.

CforAT states that to the extent Comcast has attempted to show that its service is "less bad" than others, it has not affirmatively demonstrated that it can or will provide effective customer service following a merger.[136]

7.1.5. Effects of the Merger on California Consumers

CETF, ORA, TURN, Greenlining, Consumers Union, Media Alliance, Writers Guild, CforAT, and Joint Minority Parties all commented on the inadequacies of the Internet Essentials (IE) program and the effect of the merger on California's consumers.

ORA claims that the merger will jeopardize Lifeline and other low-income programs. Comcast stopped participating in the California Lifeline program in 2008.[137] While Time Warner is able to offer Lifeline service to its voice customers because the Commission recently designated Time Warner an Eligible Telecommunications Carrier (ETC), according to ORA's expert witness, Eileen Odell, it does not currently offer Lifeline.[138] In addition, Ms. Odell points out that, post-merger, Comcast will be under no obligation to provide Lifeline nor has Comcast expressed an intention to do so.[139]

ORA also states that while the Internet Essentials Program, a FCC condition of Comcast's prior merger with NBC Universal, is a step in the right direction towards fulfilling California's universal service goals, its progress has

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[136] *Brief of the Center for Accessible Technology* (CforAT Brief), filed on December 10, 2014 at 20.

[137] ORA Brief at 80; *Brief of the Office of Ratepayer Advocates, Exhibit 4, Declaration of Eileen Odell* (Odell Declaration), filed on December 10, 2014 at 3; *CPUC Decision Granting Request for Eligible Telecommunications Carrier Status,* D.14-03-038, adopted March 27, 2014.

[138] Odell Declaration at 4.

[139] *Id.*

been slow.[140] According to ORA, the program has the following limitations: 1) a subscription rate of only a small minority of eligible consumers in California, 2) a speed offering that does not qualify as "served" under California benchmarks of 6 Mbps down and 1.5 Mbps up, and 3) eligibility that is limited to only low income families with school-age children.[141] It does nothing to bridge the digital divide for other underserved communities such as the elderly, the disabled, and non-elderly low-income childless adults.[142] In addition, according to ORA, Comcast has provided no plans to increase the 5 Mbps offered to its low-income customers to California's minimum served speed of 6 Mbps or the high speeds touted by FCC Chairman Tom Wheeler.[143]

TURN also claims that Comcast's promises of benefits to consumers are empty because they include no binding, enforceable commitments. TURN asserts that "Joint Applicants provide no commitments for any benefits to consumers aside perhaps from the notion that some benefits will trickle down."[144] In regard to the Internet Essentials program, TURN's expert witness Ms. Baldwin references the low numbers of participants in California, both in

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[140] *Id*. at 6; Pub. Util. Code § 709(d), that calls for: bridging the 'digital divide' by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians"; Pub. Util. Code § 281(b)(1), referring to the goals of the California Advanced Services Fund program, created "to encourage deployment of high-quality advanced communications services to all Californians."; Pub. Util. Code § 281(a).

[141] Odell Declaration at 8.

[142] *Id.* at 9.

[143] *Id.* at 11; Tom Wheeler, Chairman, FCC, *Remarks at National Digital Learning Day: The Facts and Future of Broadband Competition* (Sept. 4, 2012).

[144] TURN Brief at 20; *Reply Brief of the Utility Reform Network, Reply Testimony of Susan M Baldwin* (Baldwin Reply Testimony), filed on December 10, 2014 at 32-33.

absolute and percentage terms.[145] In addition, Ms. Baldwin asserts that the IE program does not provide flexibility to address specific access issues in California.[146] In conclusion, Ms. Baldwin states that her main concern with the Internet Essentials program is that it fails to provide Internet access to other underserved demographic groups like the elderly.[147]

CETF filed comments primarily to provide the Commission with data on Comcast's Internet Essentials performance in California and to request the Commission order significant program improvements. CETF asserts that in three years through December 2013, Comcast signed up just 14.7 percent of the eligible population in California for the Internet Essentials program.[148] If the merger is approved then 87 percent of all California students on the free-and-reduced-lunch program will reside in Comcast service territory.[149] For this reason, CETF claims it is essential that the Commission hold Comcast accountable for making public verifiable data available to accurately measure the company's performance in reaching Internet Essentials eligible households.[150] Based on CETF's relationship with partner Community Based Organizations (CBOs) who have worked alongside Comcast, CETF has found the following to be key problems with the program:

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[145] Baldwin Opening Testimony at 73.

[146] *Id.* at 74.

[147] *Id.* at 75.

[148] Comments of the California Emerging Technology Fund (Comments of the CETF), filed on October 19, 2014 at 4.

[149] *Id.*

[150] *Id.*

1. Comcast imposes obstacles that restrict sign-ups. First, the waiting period between the initial call to Comcast and the IE application arriving can be 8-12 weeks and sometimes the application fails to arrive at all. After submitting the application, another 2-4 weeks elapse before the computer equipment arrives at the family's home. Second, the lack of a Social Security Number (SSN) means IE applicants often must travel long distances via public transportation to verify their identities. Third, Comcast IE representatives also sometimes will enroll only the eldest child in the family in the program, even if there are younger eligible children in the family.[151]
2. Comcast Denies Service Contrary to program rules. For example, contrary to program rules, CBOs have observed that Comcast has conducted credit checks for some prospective customers which can negatively impact a consumer's creditworthiness. Early on in the program, some IE customer service representatives told potential customers they could pay a $150 deposit to avoid a credit check, contrary to program rules.[152]
3. Comcast IE Advertising is Ineffective and Questionable in Motives. Comcast began running ads in 2014 that appeared to be more aimed at impressing policymakers and federal regulators than in signing up new IE participants. For example, one full-page newspaper ad listed only a website, which is useless for families who are not yet online. Another broadcast ad simply touted Comcast and IE without stating who is eligible and how to sign-up.[153]
4. Comcast Fails to Provide a Public List of Auto Enrollment Schools, where at least 70 percent of the students are on the National School Lunch program thus making them eligible for the IE program.[154]

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[151] *Id.* at 13.

[152] *Id.* at 14.

[153] *Id*. at 17

[154] *Id.*

Greenlining and Consumers Union claim that extending the Internet Essentials program to low income customers in Time Warner's territory will not help educate consumers on using computers and the Internet when service is provided. For example, only 29 percent of IE customers took advantage of IE in person or online training.[155] Greenlining and Consumers Union point out that expanding Comcast's digital literacy training to current Time Warner customers is not likely to result in a meaningful increase in digital literacy, particularly in light of the fact that Applicants appear unwilling to make a binding commitment to continue the Internet Essentials program.[156]

CforAT asserts that the Internet Essentials program has not effectively reached the disability community, which is not directly targeted and which has not been directly recruited for enrollment. CforAT states that the greatest limitation of the program is that low income households that do not include a school-aged child are ineligible. Households are also excluded if they are already Comcast customers or have an outstanding balance owed to Comcast.[157] In addition, CforAT describes in detail experiences with otherwise eligible households who were unable to enroll in the program due to arbitrary eligibility restrictions.[158] In one instance, a family that was a Comcast customer was told that they would have to give up their existing Comcast Internet for at least

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[155] *Opening Brief of Joint Applicants*, Exhibit A, Attachment A, John B. Horrigan, PhD, "The Essentials of Connectivity: Comcast's Internet Essentials Program and a Playbook for Expanding Broadband Adoption and Use in America," March 21, 2014 at 21

[156] Greenlining and Consumers Union Brief at 26

[157] CforAT Brief at 16; *Brief of the Center for Accessible Technology*, Declaration of Dmitri Belser (Belser Declaration), filed on December 10, 2014 at 5

[158] Belser Declaration at 6-7.

90 days to become eligible for the program.[159] In other instances, families who were eligible for the program were not recognized by Comcast as eligible for the program.[160] Even for families that Comcast recognized as eligible, there were significant delays between the time that the family applied for the program and the time they actually obtained access.[161] As a consequence, Comcast managed to sign up only 11 percent of eligible families from CforAT's pool of applicants in California.[162] In contrast, CforAT points out that Comcast spent $3.2 million in California alone on Public Service Announcements[163]

Media Alliance's main criticism of the IE program is in the program's strong performance in the area of public relations and weak performance in relation to closing the digital divide. Media Alliance cites to the mere 46,000 California households who are part of the IE program.[164] In order to achieve these numbers, Media Alliance reports that Comcast made 88 million media impressions, 2.3 million telephone calls, and 242,000 public service announcements.[165] Despite this media blitz, Media Alliance points out that Comcast does not serve 87 percent of the eligible population for the program.[166] Media Alliance also urges the Commission to look at the level of service offered

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 8.

[164] Reply Comments of the Media Alliance at 5.

[165] *Id.*

[166] *Id.*

by the IE program, contrasting the low speeds offered under IE to the 25 Mbps Comcast is intending to offer California residents under a standard plan.[167] Finally, Media Alliance states that the modems provided under the IE program do not provide in-house Wi-Fi service, thus preventing households from using more than one computer and limiting access to tablet devices that are provided to students in many educational assistance programs.[168]

The Joint Minority Parties concur with the issues raised above regarding the Internet Essentials program and point out that the speeds for the IE program are inadequate. For example, while IE offers download speeds of 5 Mbps, Comcast's nationwide average download speed is about 32 Mbps.[169]

7.1.6. Broadband Deployment and Build-Out of broadband Networks to Unserved and Underserved Areas

Greenling and Consumers Union assert that Joint Parties' claims of upgrading Time Warner's customers is contradicted by the fact that Time Warner was already planning to speed up service in New York and Los Angeles to give its "standard" subscribers a full 50 Mbps download speed, higher than Comcast's standard of 25 Mbps.[170] In addition, Greenlining and Consumers

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[167] *Id.* at 6.

[168] *Id.*

[169] *Id.* at 14.

[170] *Id.* at 43; Adi Robertson, *Comcast Has Very Bad Reasons for Wanting to Buy Time Warner Cable: Defending the Massive Takeover to the FCC Requires Some Leaps of Logic,* The Verge, April 9, 2014 http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cabletakeover; See also D'Orazio, *supra* note 10; Time Warner Jan. 30, 2014 Press Release, supra note 101 ("Time Warner Cable customers in New York City and Los Angeles will be the first to benefit from major enhancements that will transform their service as they know it.").

Union state that the benefit the combined company would gain in being able to take further advantage of "network effects," by which the attractiveness of a product increases with the number of people using it, would come at the expense of increasing barriers to entry and further entrenching Comcast's dominance.[171]

ORA points to the problems with extending Comcast's home "Wi-Fi gateways" to Time Warner's service territory. While Comcast heralds the expansion of its Wi-Fi service by converting its customers' home Internet routers into public Wi-Fi hotspots, ORA points to issues related to privacy, security, service degradation, energy use, notification to customers and a lack of customer authorization for this service.[172] Essentially, Comcast proposes to use people's home Wi-Fi routers as public gateways to allow others who have a Comcast account to access the Internet as long as they are within the vicinity of a Comcast customer's Wi-Fi router. ORA cites to a recent case where Comcast was sued by its customers for failing to obtain authorization prior to engaging in this use of the customer's equipment and Internet service for public, non-household use.[173]

7.1.7. Safety and Reliability

CETF's concerns with the merger rely primarily on the merger's impact on safety and reliability in California, especially as those impacts affect disabled customers who are disproportionately low income and highly dependent on effective, reliable and affordable telecommunications service. From CforAT's perspective, the public safety issue most implicated for residential customers of a

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[171] *Id*. at 46.

[172] ORA Brief at 54-57.

[173] *Id*. at 55; Grear v. Comcast, Case No. 4:14-cv-05333, U.S. District Court for the Northern District of California.

potential merged entity is the availability and reliability of service in an emergency, particularly during a power outage. Unlike an ILEC provided telephone that has an independent power source, a cable phone requires a battery backup in order to work in a power outage. A phone that works during a power outage is especially important for members of the disabled community. CforAT claims that deficiencies in Comcast's battery backup program would be harmful to consumers if the merger were to be accepted. Currently, Comcast voice customers must personally check and replace back-up batteries, which must be purchased from Comcast at substantial expense, and which require 7-10 business days for delivery.[174] In addition, education and information provided to Comcast customers is extremely limited.[175] In general, CforAT claims that improvements are needed in Comcast's provision of battery back-up information to customers, battery monitoring so customers are aware of changes in battery performance such as audible alerts for the blind, and increased 911 location information.[176] CforAT claims Comcast has significant improvements to make in providing accessibility and communications for customers with disabilities.[177] CforAT also points out that many of Comcast's materials are not accessible to people with disabilities. For example, while customer bills are accessible in Braille for the totally blind, Comcast does not provide information in large print for the sight impaired.[178] In comparison, CforAT asserts that other entities under

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[174] CforAT Brief at 4.

[175] *Id.* at 5.

[176] *Id.* at 4-8.

[177] *Id.* at 10.

[178] *Id.* at 11.

the Commission mission's jurisdiction, such as PG&E, have taken steps to provide greater accessibility to materials for the disabled.[179]

7.2. Intervenors Assert That Harms Cannot be Mitigated

ORA, Common Cause, Greenlining, Consumers Union, CforAT, Media Alliance and DISH oppose granting the license transfer applications, arguing that the harms that would be caused by the merger cannot be ameliorated through the imposition of conditions on the license transfers. All opponents of approving the application share the belief that the merged company will be so powerful that it will constitute a de facto state-wide monopoly in the provision of broadband Internet services, allowing, as the ORA brief puts it, "the merged entity to increase prices without effective restraint, and constrain the ability of other entrants to provide competitive services at reasonable prices and offer comparable content to their customers."[180] DISH's opposition is based on the asserted negative impact that the merger would have on competing video providers by foreclosing or degrading their offered services, imposing discriminatory data caps on them, favoring content provided by Comcast affiliates, and withholding online rights from them.[181] The protests based on the allegedly increased market power of the merged company are within the scope of the proceeding and are addressed below. DISH objections based on video content agreements are considered only to the extent that they illustrate a way

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[179] *Id.* at 12.

[180] ORA Brief at 2-3.

[181] DISH Brief at 2.

that the merger will retard advanced telecommunications deployment in California.

8. Analysis

Applicants' affirmative case for the projected benefits of the proposed merger, and why it is in the public interest, is set forth above. On balance, however, we find it less convincing than the harms – ranging from possible to probable or certain – advanced by Intervenors.

Comcast and Time Warner each have an effective monopoly on providing broadband services within its local geographic area. According to figures from the Communications Division's California Broadband Availability Index, a post-merger Comcast will have a monopoly on speed tiers of 25 Mbps and above in approximately 78 percent of California census blocks, with only one competitor in almost all the rest. Merger of the parent companies creates a single company that is capable of serving over 84 percent of the homes in California.[182] Under the Federal Trade Commission's merger guidelines, which the Commission has invoked in the past when evaluating proposed transfers of control, the resulting market for cable-based Internet service is extremely concentrated with an HHI in excess of 5,000.[183] In the provision of broadband speeds at or above 25 Mbps, which represents Comcast's standard broadband offering and is considered the FCC's benchmark broadband speed, almost 80

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[182] The public number is 84 percent; confidential data suggest that the number may actually be higher. See ORA's confidential testimony.

[183] United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines 2010 edition at § 5.3, Market Concentration: defines a market with an HHI in excess of 2500 as "highly concentrated," and suggests that mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.

percent of Californians will have Comcast as their only provider.[184] Comcast argues that we should disregard this extreme degree of market concentration because, from the point of view of former Time Warner customers, the license transfer per se does nothing other than to change the name of the southern California entity from Time Warner to Comcast. Comcast contends that in spite of the extreme increase in market concentration, former customers of Time Warner will face the same competitive landscape for voice and broadband services after the merger as they faced before the merger. That is, after the merger they will have the same choice between continuing to receive services from Comcast/Time Warner or switch to services from the same alternate service providers as were available to them before the merger. Such alternatives to Comcast/Time Warner service include CLECs for voice services, small local Internet Service Providers (ISPs) for broadband, and the ILECs for (potentially) both types of services.

Comcast argues that a similar logic applies to the protestors' and intervenors' concerns about the allegedly enhanced ability of the merged company to compete for business from super-regional customers, i.e., businesses with locations in both northern and southern California. Pre-merger such businesses could obtain cable-based services from Comcast in northern California and from Time Warner in southern California. Post-merger, such businesses will also face the same competitive landscape as they faced before the merger. In summary, Comcast argues that because the merger does not materially change the choices available to existing and potential customers of the

[184] Selwyn Declaration at 71-72.

merged companies, their allegedly enhanced ability to compete for customers is not a sufficient reason to reject the license transfer applications. But the merger does more than simply change the name of the southern California cable company from Time Warner to Comcast, as discussed below.

8.1. The Transaction is Not in the Public Interest

There are a number of concerns about post-merger scenarios, ranging from possible to the probable or certain, that lead us to conclude that this transaction is not in the public interest. These include (but are not limited to) the potential lowering of quality of service and customer service standards to a lower common denominator, an increasing monoculture in the fixed broadband market in California, concerns about privacy, less competition in the special access market, and -- most importantly - less competition in the broadband market, both the retail segment of that market and the segment that allows edge or content providers to reach retail subscribers.

Quality of Service. As Comcast has acknowledged, the corporate policies and practices of Comcast will supplant the policies and practices of Time Warner. To the extent that Time Warner customers have enjoyed better, more reliable service than Comcast's customers, they could see the quality of their service decline as a result of the merger if this transaction is approved without conditions. Comcast's record of customer service has been heavily criticized by protesters,[185] yet it will now become the standard of service for the former customers of Time Warner, absent any conditions that require Comcast to

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[185] *See*, ORA Brief at 61-63, 76; Clark Declaration; Osman Declaration; Greenlining and CU Brief at 31.

improve its customer service standards. In these ways, the merger has an effect on customers in Time Warner territory beyond merely a change of name.

Content and Services Generally. Content that customers may have received from Time Warner may not be available to them any longer if the content provider and Comcast are unable to agree on the terms on which Comcast will carry the content provider's material. This may be true for Internet content as Comcast's share of the Internet Service Provider market is increased. The ability to exercise that increased market share on Internet content could perhaps be constrained by conditions placed upon Comcast, however Comcast has taken the position that the Commission lacks the jurisdiction to impose such conditions.

The merger presents Time Warner customers with the real possibility that they will receive poorer customer service, fewer service offerings, and fewer program choices from Comcast after the merger than they received from Time Warner before the merger. At the same time, the merger may undermine existing CLEC's telephone service offerings, reducing competition for voice services and constraining consumer options for those services.

Special Access. In addition, CalTel argues that the merger, in removing Time Warner as a source of wholesale inputs (special access and backhaul services) to CLECs, may have a deleterious effect on competing providers of voice service. Currently, CLECs purchase and receive wholesale inputs from Time Warner that enable them to offer voice services directly to customers. In the event that post-merger Comcast either ceases to provide such access in the former Time Warner territory, or provides it at higher prices or with more onerous terms (as CalTel asserts is Comcast's current practice), this would affect the ability of CLECs to provide their services to consumers. As a result, and contrary to Comcast's claim that the merger would have no effect on

competition, the merger could have a significant negative effect on competition for voice services, by reducing the availability or increasing the cost of alternate customer options. The difficulty of effectively remediating these effects is described in the following section.

Privacy. We are also skeptical that Comcast's plan to turn each subscribing customer's home router into a public Internet Wi-Fi hot spot is in the public interest. As ORA has pointed out, such a plan, particularly if it is undertaken without the knowledge or prior approval of the customer, raises serious issues of privacy and potentially degrades service quality. In addition, we note that Comcast is currently under investigation by this Commission for alleged violations of customer privacy in Investigation (I.) 13-10-003. A plan that, at least on the surface, fails to address privacy concerns does not supply us with a reason to approve the transaction to which it is related.

Battery Backup. We are also persuaded by CforAT's discussion of the merger's impact on safety and reliability in California, in particular the deficiencies in Comcast's customer notification and battery backup program. As noted by CforAT, Comcast has been subject to battery backup requirements for several years, since the adoption of D.10-01-026.[186] Based on information provided by CforAT, it appears that Comcast may not be in compliance with existing requirements, and certainly has not succeeded in making its battery backup program simple or accessible for customers with disabilities.[187] Comcast has failed to explain why the company should be allowed to expand into and

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[186] CforAT Opening Brief at 7.

[187] CforAT Opening Brief at 4-8.

apply its policies and practices in new territory, given its apparent lack of compliance with this, and other, Commission mandates that affect the safety and privacy rights of its customers.

Diversity. We are also troubled by Comcast's poor performance in regard to increasing both workplace and supplier diversity. As Joint Minority Parties[188] and Greenlining[189] point out, Comcast's record in this regard is substantially poorer than that of other communications companies and Commission regulated entities.

Post-Merger Monoculture. Further, as TURN and Writers Guild point out, the Commission and the ratepayers it represents will lose the ability to compare 'best practices' of both companies' relative benchmarks and the ability to compare both companies' relative performance and prices. For consumers, knowledge of a different provider's superior version of a product, even if it is offered outside the consumer's geographic market, can assist those consumers in advocating on their own behalf if they are dissatisfied with a providers' product. Elimination of such a benchmark would have the effect of harming both the Commission and consumers.

The Commission and the parties to Commission proceedings also lose "policy competitors" whose different positions and business models affect Commission decisions.[190] For example, Time Warner has applied to the

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[188] Joint Minority Parties' Reply Brief at 12.

[189] Greenlining and CU Brief at 39.

[190] The Commission notes that, prior to mergers eliminating them as stand-alone competitors, AT&T (the IXC/CLEC) and MCI WorldCom often provided viewpoints and policy alternatives different to those of the incumbents.

Commission to offer Lifeline as a tariffed service, while Comcast has not. Time Warner argued in the Lifeline proceeding that the Commission decision should ensure that companies that offer VoIP as a tariffed service should be able to offer Lifeline in Phase I of the program rollout.

Facilities-based Competition. TURN and ORA also mention that although neither Comcast nor Time Warner currently compete in each other's geographic area, there may come a time in the future when it becomes in either company's interest to overbuild into an adjacent provider's service area. A merger between Comcast and Time Warner at this point in time would preclude any chance of future facilities-based competition between these two entities.

Direct and Indirect Effects of the Proposed Merger on Broadband Competition & Deployment. As discussed above, potentially negative impacts of the proposed merger on broadband deployment are also within our jurisdiction under Section 706(a) of the 1996 Telecommunications Act, to the extent they relate to broadband competition and deployment. The immediate focus here is not the last mile from the cable head-end to retail subscribers, which – as discussed above – is now and will remain under the control of one provider. The focus is on the leverage that a twice-as-large, post-merger Comcast will be able to exercise on the edge-provider content that those subscribers may want to access, and the effect that leverage may have on the availability, price, and selection of such content. As the D.C. Circuit observed in its review of the 2010 Open Internet Order:

> The Commission could reasonably have thought that its authority to promulgate regulations that promote broadband deployment encompasses the power to regulate broadband providers' economic

> relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users.[191]

Since Section 706(a) by its terms confers parallel powers on state commissions and the FCC, this is our concern as well as the FCC's. The broadband platform is becoming a converged marketplace where different voice and related services, and different content, can compete. As ORA and the Writers Guild (among others) have pointed out, the online video distribution (OVD) model is a direct threat to Comcast's traditional cable programming.[192] Similarly, voice (VoIP) can also now be offered "over the top" in competition to the incumbents.

Were the post-merger Comcast to exploit its bottleneck position between its retail subscribers and edge providers, as it has shown the inclination to do, it would likely make broadband less attractive to a mass audience, make the investment in and provision of online services (VoIP competitors) and content

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[191] *FCC vs. Verizon*, 740 F.3d. 623, 48-49 (D.C. Circuit 2014).

[192] *See, e.g.*, Writers Guild Brief at 10

> Comcast's growing dominance in the broadband Internet market threatens to stifle the development of the burgeoning OVD market, which is an important new industry segment. Comcast is a vertically-integrated distributor with significant content holdings, which provides incentive to use its control of broadband distribution to harm competing OVDs. Comcast has a history of engaging in such behavior and these acquisitions would allow it to expand harmful practices across a greater share of the broadband market. Such an outcome could halt the positive progress that has been made by the OVD market, which contributes to the state's economy and enhances consumer choice.

(Netflix, Amazon, etc) less attractive to edge providers, and dampen the "virtuous cycle" of innovation, investment, and broadband deployment.[193]

Even if we may not regulate the terms and conditions on which Comcast sells Internet access to content providers, we may take note of the potentially adverse consequences of Comcast's use of its market power against content providers on the deployment of broadband in California as part of our public interest analysis.

We may also take note of the merger's likely enhancement of that market power. From an edge provider's perspective, its choices in reaching California consumers through high-speed broadband in California will be substantially curtailed, if the merger is consummated. Instead of the choice between two large cable systems delivering high speed broadband to upwards of 80 percent of the households in California, the edge or content provider will have only one choice, Comcast. Even figuring Verizon's FIOS and the high-end AT&T U-Verse products into the mix, Comcast will have significantly expanded market power to act anti-competitively if it so chooses. The Comcast-Netflix contract at least suggests that Comcast could compel competing content providers to enter into contracts with it in order to ensure timely delivery of their competing content to Comcast subscribers.[194] As the D.C. Circuit put it:

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[193] *Verizon v. FCC, supra*, 740 F3d at 644 (quoting Verizon's assertion that "the infrastructure enabling the development and dissemination of Internet-based services and applications, with the demand and use of those services . . . driving improvements in the infrastructure which, in turn, support further innovations," and concluding that the "Commission's finding that Internet openness fosters the edge-provider innovation that drives this 'virtuous cycle' was likewise reasonable and grounded in substantial evidence").

[194] *See* ORA Brief at 42-47.

> Because all end users generally access the Internet through a single broadband provider, that provider functions as a "'terminating monopolist,'" with power to act as a "gatekeeper" with respect to edge providers that might seek to reach its end-user subscribers. As the Commission reasonably explained, this ability to act as a "gatekeeper" distinguishes broadband providers from other participants in the Internet marketplace--including prominent and potentially powerful edge providers such as Google and Apple--who have no similar "control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers."[195]

This is precisely the "terminating monopoly" power that intervenors fear.[196] The power of the terminating monopolist to discriminate or otherwise act anti-competitively vis-a-vis edge or content providers could increase the cost and reduce the attractiveness of that competing content. This, in turn, lessens the demand for high-speed broadband access to the Internet, and thus runs counter to Section 706(a)'s mandate to promote competition in broadband services:

> The Commission's theory, to reiterate, is that its regulations protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.[197]

Although Verizon derided this theory as a "triple cushion shot," the Circuit Court found that such a triple-cushion shot "counts the same as any other shot," and that the FCC had presented a reasonable theory of competition.[198]

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[195] 743 F.3d at 647 (citations omitted).

[196] *See, e.g.*, ORA Brief at 46-47.

[197] 740 F.3d at 643

[198] *Id*.

In more concrete terms, the proposed merger between Comcast and Time Warner reduces the possibilities for content providers to reach the California broadband market. Many of these content providers are located in California, and a reduction in their ability to reach their intended markets would likely to have a negative impact on the California economy.[199] Such a negative effect on the economy is, itself, likely to discourage the deployment of broadband.[200] While the FCC's reworked net neutrality rules may mitigate some of this effect,[201] the sheer dominance of Comcast's post-merger position causes us concern.

Comcast claims that such perceived harms are speculative.[202] The FCC and D.C. Circuit Court of Appeals apparently disagree:

> Equally important, the Commission has adequately supported and explained its conclusion that, absent rules such as those set forth in the Open Internet Order, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment. First, nothing in the record gives us any reason to doubt the Commission's determination that broadband providers may be motivated to discriminate against and among edge providers. The Commission observed that broadband providers--often the same entities that furnish end users with telephone and television services--"have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services." As the Commission noted, Voice-over-Internet-Protocol (VoIP) services such as Vonage increasingly serve as substitutes for traditional telephone services, id., and broadband providers like AT&T and Time Warner have

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[199] *See,* for example, Writers Guild Opening Comments on the PD.

[200] WGAW Opening Comments on the PD at 6-7, *passim.*

[201] 2015 Open Internet Order, Supra.

[202] *See, e.g.*, Comments on PD, at 43 ("based on idle speculation by Intervenors").

> acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own "core video subscription service."[203]

The Court agreed with the FCC that the carriers not only have the motivation, but also the means ("increasingly sophisticated network management tools") and the opportunity (as "terminating monopolists") to act as "gatekeepers" with respect to "edge providers that might seek to reach [the carrier's] end-user subscribers." *Id.* at 38 (citations omitted). Indeed, this gatekeeper power is multiplied by the inability of many consumers to switch ISPs, due to factors like the cost of switching, early termination fees, "possible loss of a provider-specific email address or website," and the dearth of facilities-based competition. *Id.* at 39-40. Alluding to the Netflix issue explored in ORA's Comments, inter alia, the Court notes:

> [A] broadband provider like Comcast would be unable to threaten Netflix that it would slow Netflix traffic if all Comcast subscribers would then immediately switch to a competing broadband provider. But we see no basis for questioning the Commission's conclusion that end users are unlikely to react in this fashion.

To the extent that the contemplated merger would increase this terminating monopoly power, it could have a negative impact on demand for broadband services and content, and in turn on the California economy and broadband deployment. These concerns are not ameliorated by the recently issued 2015 Open Internet Order. At critical points, including the broadband Internet access provider's relationship with edge providers, the FCC's Order

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[203] Verizon v. FCC, *supra* 740 F.3d at 645.

utilizes a reasonableness standard for discrimination, which history shows is likely to lead to prolonged litigation, with an uncertain outcome.

Parties have made a convincing showing in this proceeding of the anti-competitive consequences that Comcast's post-merger market power may have on the deployment of broadband in California, and of anti-competitive harms that would occur in California if the merger is consummated.[204]

8.2. Harms Caused by the Merger Cannot be Fully Mitigated

Section (c)(8) asks whether the transaction(s) will "Provide mitigation measures to prevent significant adverse consequences which may result." We determine that neither the conditions proposed by the PD, nor the mitigation measures espoused by Comcast, are adequate to prevent such adverse consequences.

Evidence offered by the protesters and intervenors suggests that Comcast does not have a good record of abiding by applicable Commission orders and directions, including those that may impact customer safety and privacy. We are mindful of Comcast's lackluster history in this regard, as well as Comcast's comments on the original Proposed Decision in this proceeding, which contest all 25 of the PD's proposed conditions intended to address and mitigate the harms caused by the transaction if it were approved.

Indeed, Comcast argues that this "Commission is preempted under long-established principles of federal law from regulating broadband services in the

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[204] We are persuaded by the following parties' arguments that are summarized in Section VI above: ORA, TURN, Greenlining, Consumers Union, CETF, Media Alliance, Joint Minority Parties, Writers Guild, CETF, DISH and CALTEL.

ways suggested in the Proposed Decision."[205] Specifically, as to the PD's proposed conditions 7 and 8, relating to wholesale inputs for competitive carriers, Comcast reminds the Commission that, even under the FCC's 2015 Open Internet Order, "broadband providers **shall not** be subject to utility-style rate regulation, including … last-mile unbundling."[206] CalTel similarly notes "AT&T's unwillingness to commit to offering a replacement product following the industry's transition from TDM to IP-based end user services," suggesting that there may be no way to ensure access to certain wholesale inputs in an all IP world.[207]

Comcast claims that no mitigation measures are appropriate or allowable to protect against its bottleneck power, as it has pledged to abide by the FCC's 2010 Open Internet Order, an Order that has been largely overturned by the D.C. Circuit.[208] However, if Comcast fails to abide by this pledge, its enforcement is questionable, and the pledge only extends through 2017 in any event. Similarly, the PD's conditions appear difficult to enforce, and even if fully implemented, could last for five years at most. We find that conditions that only temporarily or incompletely mitigate identified harms to the public interest are not sufficient to offset those harms. Such conditions also do not "preserve the jurisdiction of the commission," as required by § 854(c)(7).

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[205] Comments on PD at 8.

[206] *Id.* citing FCC Feb. 26, 2015 Press Release (emphasis in original); *see also 2015 Open Internet Order*, at ¶ 37, *passim.*

[207] *See* Testimony and Declaration of Sarah DeYoung, at 6-7, and fn. 4.

[208] *See, e.g.*, Comcast Comments on PD, at 24.

Similarly, Comcast's Internet Essentials program – although it is a laudable initiative, notwithstanding evidence of the program's weak performance in closing the digital divide in California and fulfilling universal service goals – is not capable of mitigating the harms described above.

In sum, we find that placing conditions on the merger, even assuming that those conditions could address all of the potential harms associated with the merger, is unlikely to succeed in doing so. And based on our review, it is not clear that any conditions, however well designed, well intended, well enforced and fully implemented, could mitigate the harms associated with the merger.[209]

8.3. Denial of Applications

By this Decision, we deny the pending Applications for authority to consummate the transfer and merger-related transactions described in A.14-04-013 and A.14-06-012.

In our determination of whether the merger is in the public interest, we look first to the standard of review we are applying to the applications. With regard to issues of safety, reliability, competition and benefit to consumers, we are guided by the public interest standard of § 854(c) of the Public Utilities Code. With regard to issues relating to the effect of the proposed transactions on broadband deployment, we are guided by the language of Section 706(a) of the 1996 Telecommunications Act.

Turning first to the public interest standard under state law, a threshold question we address is whether, in evaluating the applications for compliance

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[209] Another example of our concern in this regard is the loss of a California-specific price benchmark and policy competitor, a loss that simply cannot be mitigated, nor can the potential harm to the California economy or the deployment of broadband.

with the Public Utilities Code, we may take into account the likely effects of the parent corporation merger on the post-merger operations of the licensed entities to the extent that we are able to evaluate them. The answer to that question is "Yes."

As discussed at length in Section 8.1, above, we have concluded that Comcast has failed to meet its burden of showing by a preponderance of evidence that the proposed merger is in the public interest. To the contrary, parties have identified many potential negative impacts of the merger. The merger, as proposed, has the potential to reduce consumer choice in voice services due to Comcast's increased market power in the sale of special services and backhaul to other companies, harm the California economy, and impede the deployment of broadband in California.

We therefore deny the pending Applications, seeking to transfer and merge telephone corporations TWCIS (U6874C) and Bright House (U6955C), and certain assets of telephone corporation Charter FiberLink (U6878C), into Comcast Corporation.[210] We find, under Pub. Util. Code § 854(a) and (c), that these transfers would facilitate a merger which, on balance, is not in the public interest. Thus the telephone corporations must continue to operate as separate affiliates.

We also disapprove of the merger under our delegated authority under Section 706(a), based on our finding that the merger, if consummated, would

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[210] There are in fact four competitive telecommunications corporations involved here – TWCIS, Bright House, Charter FiberLink, and Comcast Phone of California LLC. They facilitate the telecommunications operations of their broadband and IP-based affiliates and parents. *See, e.g.*, discussion, *supra* ("Comcast Phone is primarily a wholesale provider offering interconnection services to Comcast IP Phone II, LLC (Comcast IP)").

frustrate competition in the local telecommunications market and create barriers to broad-based infrastructure investment.

9. The Record of this Proceeding Should be Transmitted to the FCC

On February 18, 2015, TURN filed a motion requesting that the record of this proceeding, including confidential materials, should be transmitted to the FCC to assist that agency in its own review of this transaction. Most intervening parties filed a response in support of this motion.[211] On February 25, 2015, Comcast filed a response opposing this motion. In its opposition, the Joint Applicants assert that the record should not be transmitted to the FCC because it would interfere with the FCC's own review, is prohibited by disclosure agreements, would impose an undue burden on the Commission, and would not advance the Commission's goals.

The Scoping Ruling issued in this proceeding on August 14, 2014, explicitly includes within the scope of this proceeding "all issues that are relevant to the proposed Merger's impacts on California consumers in order to inform this Commission's comments with the FCC."[212] Contrary to Comcast's claim that transmitting this record would not advance the Commission's goals, the scoping memo specifically states the Commission's attention to provide to provide California-specific information on the merger's potential impacts to the FCC. Given that the FCC proceeding is ongoing, it is not clear how providing

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[211] Response to TURN Motion to Transmit a Copy of the Confidential Record to the Federal Communications Commission, filed February 25, 2015 We reiterate that any transmission to the FCC will be made confidentially, at least as to those parts of our record so designated.

[212] Scoping Memo and Ruling of the Assigned Commissioner and Assigned Administrative Law Judge at 12.

additional information to the FCC would interfere with the FCC's own analysis of this transaction, or how doing so would place an undue burden on this Commission. The non-disclosure agreement referred to by Comcast applies to parties to the proceeding, but does not bind the Commission itself, which may make a confidential filing with another agency such as the FCC.

For these reasons, we are not persuaded by Comcast's concerns about this request. TURN's motion to transmit the record of this proceeding to the FCC is granted, and Commission staff will ensure the information is transmitted as expeditiously as possible after the adoption of this decision

10. Comments on Proposed Decision

The alternate proposed decision of Commissioner Florio 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 filed on _____, and reply comments were filed on _____ by _____.

11. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Comcast is the dominant supplier of cable-based Internet access in northern California.

2. Time Warner is the dominant supplier of cable-based Internet access in southern California.

3. Comcast and Time Warner do not compete directly with one another in the same territory.

4. Comcast and Time Warner 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. Comcast and Time Warner compete with other providers of wholesale services in their respective service territories including incumbent local exchange carriers and owners of dedicated fiber optic systems.

6. The merged company will have enhanced ability to compete for the provision of backhaul services to customers that operate in both northern and southern California.

7. Comcast provides low-cost Internet access to low and moderate income families throughout its service territories by means of its so-called "Internet Essentials" program.

8. Time Warner provides stand-alone broadband Internet services on a sliding scale to customers throughout its service territories.

9. Time Warner is able to offer Lifeline service to its voice customers based on D.14-03-038, adopted March 27, 2014, that designated Time Warner's subsidiary TWCIS as an Eligible Telecommunications Carrier.

10. Under traditional market analysis, market power is usually measured in terms of concentration, or market share. This is a statistical analysis using the Herfinhdahl-Herschman Index (HHI) which calculates the sum of the squares of each firm's market share.

11. ORA presented calculations of the HHI with respect to the concentration of the market for fixed broadband. This analysis showed that the HHI was already highly concentrated before the merger, and becomes more highly concentrated as a result of the Comcast acquisition.

12. As of June 30, 2014, according to the California Broadband Availability Database, 76.6 percent of households and 78 percent of census blocks in Joint Applicants' territory will have no other competitors for broadband service at download speed tiers greater than or equal to 25 Mbps.

13. Post-merger, Comcast would serve 84 percent of the households in California.

14. Deficiencies in Comcast's customer notification and battery backup program have a negative impact on safety and reliability in California.

15. Comcast's Internet Essentials program has had a weak performance in closing the digital divide in California and fulfilling universal service goals.

16. The anti-competitive effects of the merger will hinder broadband development in California in that it will substantially increase Comcast's market power to exclude, degrade, and/or make more expensive and less attractive edge provider content that subscribers demand.

17. The merger will likely reduce competition in the markets for wholesale inputs such as special access used by competitive service providers, constraining consumer options for those competitive services.

18. No conditions could mitigate all of the negative impacts of the proposed transaction.

19. TURN's motion to transmit the record of this proceeding to the FCC is reasonable.

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(a) and (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. Section 706(a) of the 1996 Telecommunications Act, codified in 47 United States Code § 1302(a) is a grant of authority to the Commission to examine the implications of the proposed merger of the parent companies on broadband deployment in California.

5. The authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act satisfies the requirement of express delegation under federal law set out in § 710 of the Pub. Util. Code.

6. Comcast has not met its burden of showing that the proposed merger is in the public interest under applicable state law.

7. If the requested transfers and merger were consummated, it would result in harms and potential harms to broadband competition and deployment.

8. Because of the merger's adverse impacts on competition in the local telecommunications and broadband markets, the merger should be denied.

O R D E R

IT IS ORDERED that:

1. The application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for the transfer of control of Time Warner Cable Information Services (California), LLC; and the Pro Forma

Transfer of Control of Bright House Networks Information Services (California), LLC, to Comcast Corporation, is denied.

2. The application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC for approval to transfer certain assets and customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, is denied.

3. The Utility Reform Network's motion to transmit the record of this proceeding to the Federal Communications Commission (FCC) is granted. Commission staff will transmit relevant information from the record of this proceeding to the FCC as expeditiously as possible after the adoption of this decision.

4. Application (A.) 14-04-013 and A.14-06-012 are closed.

This order is effective today.

Dated _____, at San Francisco, California.