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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES

(PUBLIC VERSION)

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BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES

(PUBLIC VERSION)

I. INTRODUCTION

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the February 10, 2016 ruling of the assigned Administrative Law Judge (ALJ), the Office of Ratepayer Advocates (ORA) files this Brief concerning the Joint Application (Application) of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable, Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) (collectively, the Joint Applicants) pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).

As discussed below, the Joint Applicants have not met their burden of proof to demonstrate, as required under Public Utilities (P.U.) Code section 854 and other applicable law, that the merger is in the public interest and that there are compelling merger-specific benefits to this transaction that would not otherwise be realized if the companies remained independent. Therefore, the California Public Utilities Commission (CPUC or Commission) should deny the proposed merger. In fact, the Joint Applicants' purported merger-specific benefits of the proposed transaction would apply to only a very small subset of the merged entity's (referred to in this Brief as "New Charter")[1] enterprise customers and lack California specific commitments. With regard to the proposed low-income broadband program, each Joint Applicant could adopt the same program independently outside the merger, as is the case for Bright House Networks, LLC (Bright House). Furthermore, the argument that this merger is not as bad as the previously-proposed and abandoned Comcast Corporation (Comcast)-Time Warner Cable, Inc. (TWC) merger is without merit. Indeed, as Jeff Blum, deputy general counsel for DISH Network has noted, "[i]f Comcast's deal for Time Warner Cable was a Category 5 hurricane, Charter-Time Warner is a Category 4."[2]

Nevertheless, if the Commission elects to approve the proposed consolidation, then it should adopt a minimum set of conditions, as discussed in this Brief, to partially mitigate the harms of the proposed transaction. However, even if the proposed conditions are adopted, the merger would still not be in the public interest.

II. BACKGROUND & PROCEDURAL HISTORY

On July 2, 2015, the Joint Applicants filed an Application seeking approval from the CPUC for the proposed merger. On its face the Application concerns only the merger of three existing competitive local exchange carriers (CLECs). If approved, Charter Communications,

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

[2] *Cable Acquisitions by Charter Communications Facing Rising Opposition,* by Emily Steele and Cecilia Kang, New York Times, January 22, 2016, http://www.nytimes.com/2016/01/22/business/big-merger-in-cable-faces-rising-opposition.html?_r=0

Inc., Time Warner Cable, and Bright House Networks will be consolidated into one company, New Charter. The proposed merger would make New Charter one of the largest providers of high-speed last mile broadband service in California, passing over 82% of households in Southern California[3] and the only provider satisfying the current Federal Communications Commission (FCC) definition of "broadband" at 25 megabits per second (Mbps) download and 3 Mbps upload for the vast majority of those households.[4]

On November 13, 2015, the Assigned Commissioner issued a Scoping Ruling (Scoping Ruling). In addition to the Commission's review under Public Utilities Code (P.U. Code) section 854, the Scoping Ruling lists the following topics included in the scope of this proceeding:

a. Does the Transaction meet some or all of the criteria enumerated in Pub. Util. Code § 854(c)?

b. How will the Transaction affect broadband deployment and/or affordability?

c. Is the proposed change of control in the public interest?

d. Are there any implications for public safety from the transaction?[5]

ORA conducted a review and analysis of the issues set forth in the Scoping Ruling, the Joint Applicants' Application, testimony from all parties, responses to data requests, the transcripts from the public participation hearing and the prehearing conference to determine whether the proposed transaction is in the public interest and meets the requirements of applicable law. ORA's analysis demonstrates that the Commission should not approve the proposed transaction as it is not in the public interest. The proposed transaction is anti-competitive, the Joint Applicants have not demonstrated that there will be public benefits to the merger and the merger would likely lead to higher prices and worse service quality.

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

[4] 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment issued on January 29, 2015 in GN Docket No. 14-126, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act.*

[5] Scoping Ruling at 5.

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

III. JURISDICTION

In addition to the Scoping Ruling, the scope of this proceeding is governed by P.U. Code sections 851-856, Section 706(a) of the Federal Telecommunications Act of 1996 and several other provisions of state and federal law. A 2014 opinion of the District of Columbia Circuit Court of Appeal (D.C. Circuit) in *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014), the California Supreme Court case *Northern California Power Agency (NCPA) v. CPUC*, 5 Cal. 3d 370 (1971) and the Federal Communications Commission's (FCC) 2015 Open Internet Order are also instructive here.

A. P.U. Code section 854

1. P.U. Code section 854(a)

P.U. Code section 854(a) specifies that:

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[6] 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment issued on January 29, 2015 in GN Docket No. 14-126, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*.

> No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from this Commission. The Commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities that are subject to this section of the statute.[7]

There is no dispute as to the applicability of P.U. Code section 854(a) to the proposed transaction, as the Scoping Ruling notes.[8]

2. P.U. Code Section 854(c)

P.U. Code section 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;

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[7] P.U. Code § 854(a).

[8] Scoping Ruling at 3.

> (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, Charter and TWC – parties to the proposed transaction – each have gross annual California revenues exceeding $500 million.[9] Therefore, consistent with the Scoping Ruling, this transaction is subject to the criteria in P.U. Code section 854(c), and the Commission must decide whether the proposed change of control satisfies the P.U. Code section 854(c) criteria enumerated above.[10]

The Commission's public interest review of the proposed transaction is not limited to the factors enumerated in P.U. Code section 854(c).[11] In the past, the Commission has sought more broadly to determine whether a change in control is in the public interest:

> 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.[12]

D.00-06-079 provided an overview of factors that should be considered in making the determination of whether a transaction is in the public interest:

> 1. Antitrust considerations are also relevant to our consideration of the public interest.[13] In transfer applications we require an applicant to demonstrate that the proposed utility

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[9] Scoping Ruling at 4.

[10] *Id.* at 3-5.

[11] The Commission has used its discretion in different ways in reviewing mergers. For example, 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 proceeding on the proposed merger of San Diego Gas & Electric Company and Southern California Edison, the Commission used its discretion to arrive at the opposite result, denying the proposed merger of those utilities. (D.91-05-028, 1991 Cal. PUC LEXIS 253, *13-15.)

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

[13] 65 CPUC at 637, n.1.

> operation will be economically and financially feasible.[14] Part of this analysis is a consideration of the price to be paid considering the value to both the seller and buyer.[15] We have also considered efficiencies and operating costs savings that should result from the proposed merger.[16] Another factor is whether a merger will produce a broader base for financing with more resultant flexibility.[17]
>
> 2. We have also ascertained whether the new owner is experienced, financially responsible, and adequately equipped to continue the business sought to be acquired.[18] 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.[19]

Thus, the elements of P.U. Code section 854(c) are a specification of "public interest" factors that the Commission must consider, but the Commission is not limited to these factors in determining whether a proposed utility merger is in the public interest.[20]

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.[21] In *Northern California Power Agency v. Public Utilities Com (NCPA v. CPUC*), the California Supreme Court stated:

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

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

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

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

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

[19] *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

[20] *See, e.g.*, D.91-05-028, 1991 Cal. PUC LEXIS 253, at *15.

[21] *Northern California Power Agency v. Public Utilities Com.* (*NCPA v. CPUC),* 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*

> As we have indicated above, the public interest in preventing monopolies is one facet of the larger public convenience and necessity which the Commission was established to protect. The Commission may and should consider *sua sponte* every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty, and where a private party has so clearly demonstrated the adverse impact of the proposed facilities, the Commission certainly cannot ignore the problem simply because it was not raised by one having impeccable credentials of legal standing. (*Marine Space Enclosures, Inc. v. Federal Maritime Com'n (1969) 420 F.2d 577, 585, 591-592 [137 App.D.C. 9]*.)[22]

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

> As we have seen, it is clear that the Commission must take into account the antitrust aspects of applications before it. It is equally obvious that the Commission failed to perform this essential duty in the instant case…The Commission must place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public. Here, the Commission did not perform this task.[23]

Thus, the Commission must take into account any antitrust implications and competitive considerations when it weighs the public interest and renders a decision on the proposed transaction and must, at a minimum, make appropriate findings regarding those anti-competitive issues.[24] This is consistent with the requirements of P.U. Code section 854. Therefore, a review of this transaction in terms of P.U. Code section 854(c), as well as a consideration of safety,

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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).

[22] *NCPA v. CPUC*, 5 Cal. 3d at 378.

[23] *Id*. at 379.

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

consumer benefits, financial details, broadband infrastructure, and competitive issues, constitutes the appropriate scope of this proceeding. In addition, Joint Applicants have highlighted that broadband is the most important benefit of the proposed transaction, emphasizing that the merger will advance broadband in California.[25] The Joint Applicants also claim that the transaction would not negatively impact content providers they compete with.[26] In fact, they say the transaction will help content providers even if they compete against them. The Commission, therefore, may review these assertions to determine whether the proposed transaction is in the public interest and adopt any conditions necessary to mitigate potential harms.

B. Section 706(a) of the 1996 Telecommunications Act

As set forth in the Scoping Ruling, the scope of this proceeding includes the question: "How will the Transaction affect broadband deployment and/or affordability?"[27] In considering this question from the Scoping Ruling and determining the effect of the proposed merger on the deployment of broadband, the Commission should look to Section 706(a) of the 1996 Federal Telecommunications Act which states, in relevant part:

> The Commission *and each State commission with regulatory jurisdiction over telecommunications services*[28] *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability*[29] *to all Americans* (including, in particular, elementary and secondary schools and classrooms) by

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[25] *See, e.g.,* Application at 7, 13.

[26] *See, e.g.,* Joint Applicants' Public Interest Statement filed at the FCC, In the Matter of Application of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorization, MB Docket No. 15-149 at 45-48.

https://transition.fcc.gov/transaction/charter-twc-bhn/charter-twc-bhn-public-interest.pdf

[27] Scoping Ruling at 5, § 3(b).

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

[29] Section 706 defines "Advanced Telecommunications capability" to include Voice over Internet Protocol (VoIP) and broadband. Federal statute provides at 47 U.S.C. § 1302(d)(1) that: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

> utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[30]

This section of the 1996 Act was the subject of a 2014 opinion of the D.C. Circuit 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.[31] The D.C. Circuit 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…"[32] 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."[33] At no point does the Court distinguish between the grant of authority to the FCC and the grant of authority to the states.

In essence, the D.C. Circuit 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."

Joint Applicants have claimed that P.U. Code section 710 prevents the Commission from invoking Section 706(a). In fact, P.U. Code section 710(a) specifically provides for an exemption for the Commission to take regulatory actions concerning VoIP and Internet protocol (IP)-

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[30] 47 U.S.C. § 1302(a) (emphasis added).

[31] *Verizon v. FCC*, 740 F. 3d at 638.

[32] *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.

[33] *Id.* at 638, citing 47 U.S.C. 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).

enabled services as an express delegations of federal authority. Section 706(a) clearly falls under this exception.[34] While Joint Applicants and other parties may dispute the applicability of Section 706(a), certainly if the FCC has the authority to adopt Open Internet Rules pursuant to Section 706(a), then this Commission, which has parallel authority to the FCC under Section 706(a), may adopt similar conditions to promote broadband deployment and competition in the advanced telecommunications market in California. Maintaining adequate service quality and reliability is necessary for public health and safety, and it is an essential condition for growing this market, and the Commission must consider it in its review of the proposed transaction of Charter, TWC and Bright House.

C. The CPUC's Authority over Advanced Telecommunications Services

The Commission must find, as a critical criteria of the Commission's P.U. Code section 854(c) public interest review, that the proposed merger "[p]reserve[s] the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state."[35] The Commission must exercise the full authority at its disposal to ensure that the proposed merger is in the public interest, including advancing health and safety. Regardless of technology, a safe, secure and reliable telecommunications network is necessary for public safety.

As the Scoping Ruling notes, the scope of this proceeding includes the issues of how the merger will affect broadband deployment and/or affordability and whether there are there any implications for public safety from the transaction? The Commission has a duty to ensure that entities over which is has regulatory jurisdiction provide safe and reliable service, and these entities include the Joint Applicants. In addition to Section 706(a), the Commission has other sources of authority over advanced communications capabilities. The California Constitution places "line, plant or system for … the transmission of telephone and telegraph messages" under

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[34] P.U. Code § 710(a) provides: "The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services *except as required or expressly delegated by federal law* or expressly directed to do so by statute or as set forth in subdivision (c)."

[35] P.U. Code § 854(c)(7).

the jurisdiction of this Commission.[36] Notwithstanding P.U. Code section 710, VoIP and broadband providers clearly fit within the definition of regulated telephone corporations.[37] The FCC's *2015 Open Internet Order* supports this conclusion with respect to broadband, in that it reclassified broadband as a telecommunications service under the Telecommunications Act (47 U.S.C. 153(50) and (53)).[38]

Pursuant to P.U. Code section 709, and particularly subsections (f) and (h), the stated goals of California telecommunications policy are "(t)o promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct," particularly in regard to "new" and "state-of-the-art-technologies,"[39] and 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."[40] P.U. Code section 709 also sets universal service goals of "affordability" and "widespread availability"[41] And it links "economic growth" with the deployment of "advanced information and communications technologies."[42]

P.U. Code section 882 of the Moore Universal Telephone Service Act,[43] which created the California LifeLine program, specifically contemplates broadening the definition of Basic Service to incorporate advanced technologies, and directs the Commission to "reevaluate prior

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[36] Cal. Const., Article XII, Section 3.

[37] P.U. Code § 234.

[38] 47 U.S.C. 153(50) and (53) provide as follows:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
>
> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content of the information as sent and received.* (Emphasis added).

[39] P.U. Code §§ 709 (f) & (h); *see also* §§ 709(b) & (c).

[40] *Id.* at § 709(g).

[41] *Id.* at § 709(a).

[42] *Id.* at § 709(e)

[43] The Moore Act is codified at P.U. Code §§ 871 et seq.

definitions of basic service in a manner that will, to the extent feasible, effectively incorporate the latest technologies to provide all California residents with … [e]xpanded access to public and private resources for education, training, and commerce, [and] increased access to public resources enhancing public health and safety."[44] When considered with the description of broadband as an "advanced telecommunications service" in the 1996 Telecommunications Act, this mandate requires that the Commission consider broadening the definition of basic services to include broadband.[45]

The CPUC is responsible for creating and running the California Teleconnect Fund under P.U. Code section 280:

> The commission shall develop, implement, and administer a program to advance universal service by providing discounted rates to qualifying schools maintaining kindergarten or any of grades 1 to 12, inclusive, community colleges, libraries, hospitals, health clinics, and community organizations, consistent with Chapter 278 of the Statutes of 1994.[46]

The Legislature also charged the CPUC with developing and administering all aspects of the California Advanced Services Fund (CASF) pursuant to P.U. Code section 281:

> The commission shall develop, implement, and administer the California Advanced Services Fund program to encourage deployment of high quality advanced communications services to all Californians that will promote economic growth, job creation, and the substantial social benefits of advanced information and communications technologies, consistent with this section.[47]

Section 275.6 of the Public Utilities Code authorizes the CPUC to oversee the California High Cost Fund-A and to impose surcharges on California customers in order to:

> (5) Promote customer access to advanced services and deployment of broadband-capable facilities in rural areas that is reasonably

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[44] P.U. Code § 882.

[45] *Verizon v. FCC,* 740 F.3d at 635.

[46] P.U. Code § 280.

[47] P.U. Code § 281(a).

> comparable to that in urban areas, consistent with national communications policy.
>
> (6) Include all reasonable investments necessary to provide for the delivery of high-quality voice communication services and the deployment of broadband capable facilities in the rate base of small independent telephone corporations.[48]

The Legislature has also directed the CPUC to collect surcharges from VoIP providers for Public Purpose Programs under P.U. Code section 285.

The CPUC also established the California Emerging Technology Fund (CETF) in its decisions approving the mergers of SBC-AT&T[49] and Verizon-MCI in 2005.[50] As a condition of approval of the mergers, AT&T and Verizon were required to contribute to CETF a total of $60 million over five years "for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies . . . ."[51] The CPUC also directed that at least $5 million should be used for telemedicine projects.[52]

The catalog of statutory and other CPUC programs that directly involve broadband reflect[53] the CPUC's breadth of experience regulating and monitoring broadband access in California. The CPUC has the skills and capability to gather, analyze, and reflect on relevant data concerning the deployment of broadband in California, and determine what, if any, steps it should take consistent with Section 706(a) in response to the data. While ORA acknowledges that the FCC plays a critical role in evaluating broadband competition, Section 706(a) makes it clear that state commissions are also empowered to play a key role in encouraging the deployment of advanced communications.

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[48] P.U. Code § 275.6(c).

[49] D.05-11-028 at 79-83, 113-114, Ordering Paragraph 8.

[50] D.05-11-029 at 129, Ordering Paragraph 3(c).

[51] D.05-11-028 at 79.

[52] *Id.* at 81.

[53] This also includes P.U. Code §§ 2892.1 and 2889.8.

IV. BURDEN OF PROOF

To receive approval of this transaction, the Joint Applicants bear the burden of proving, by a preponderance of the evidence that their proposed transaction is in the public interest. The term burden of proof is often used to describe multiple components of the obligations on parties to present evidence, the required level of a showing, and the topics on which a showing is required. As noted by Witkin, "[t]he term 'burden of proof' is often used loosely in two senses: (1) the secondary meaning of the burden of *initially producing or going forward* with the evidence; and (2) the primary meaning of the burden of *proving the issues* of the case."[54]

In this proceeding it is clear that the Joint Applicants bear the burden of proof on both bases. The Joint Applicants have filed an Application, categorized as ratesetting, to seek approval of a proposed change of control, changes in their structure and the manner in which services are provided to California customers. They clearly have the burden to establish all of the elements necessary to the CPUC rendering a decision.

It is also clear that the standard for the degree of proof is by a preponderance of the evidence. This standard, prevalent in civil proceedings, including administrative proceedings, and adopted by the CPUC, is generally viewed to require that the evidence presented on one side of an issue is more persuasive than that in opposition.[55]

Both who bears the burden and the standard of proof are explicitly set forth in P.U. Code section 854(e), which states: "The person or corporation seeking acquisition or control of a public utility organized and doing business in the state shall have, before the commission, the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met."[56] While this may well mean that the burden falls exclusively to Charter as the "…corporation seeking acquisition or control…," it may be that TWC, Bright House and Charter will jointly take on this responsibility.

Finally, as previously discussed, P.U. Code section 854(c) provides the CPUC with the threshold standard to determine if the applicants have made a sufficient showing. The standard

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[54] Witkin, California Evidence 5th Edition (2012), Burden of Proof §1.

[55] California Administrative Hearing Practice 2nd Ed. (CEB) § 7.51.

[56] Pub. Util. Code § 854(e).

the CPUC must use to determine if a sufficient showing has been made is whether on both individual topics and overall the merger is "in the public interest." P.U. Code section 854(c) is explicit on its requirement that the CPUC must determine that the appropriate standard is whether, on both individual topics and overall, the merger is "in the public interest."

There is, beyond the specific statutory authority of P.U. Code section 854 and Section 706(a), a further requirement imposed on any CPUC consideration of this merger that the Scoping Memo did not mention. As *NCPA v. CPUC* held, the CPUC has a long-standing obligation to always consider the potential anticompetitive impacts of matters before it, whether or not raised by the parties. As is clear from the contents of this brief and its testimony and exhibits, ORA is raising issues concerning competition implicating antitrust considerations and the resulting effect this transaction will likely have on existing and potential competitors and their respective customers.[57]

In rendering its decision on the Joint Applicants' proposed acquisition, consistent with *NCPA v. CPUC*, the Commission "must make specific findings of fact and conclusions of law relevant to all materials issues" of this proceeding. This encompasses findings of fact dealing with antitrust considerations, including defining the relevant market, determining the impact of the proposed acquisition on competition, and making findings "as to the reasonableness of any restraint."[58]

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[57] Though as *NCPA v. CPUC* holds, ORA is not required to make this showing: "The Commission may and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty, and where a private party has so clearly demonstrated the adverse impact of the proposed facilities, the Commission certainly cannot ignore the problem simply because it was not raised by one having impeccable credentials of legal standing." *NCPA v. CPUC*, 3 Cal. 3d at 380.

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

V. DISCUSSION

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

If approved, the merger will result in a more highly concentrated broadband market in California, in violation of P.U. Code section 854(c) (which requires that the transaction be in the public interest), Section 706(a) (as approval of the merger would frustrate the deployment of broadband in California) and would certainly raise anti-competitive issues that the Commission is required to address pursuant to *NCPA v. CPUC*.

ORA submitted unchallenged testimony from its expert, Dr. Lee L. Selwyn, in this proceeding that a merger of TWC, Charter and Bright House will create a broadband entity that will dominate the Southern California market. Post-merger New Charter will pass approximately 82%[59] of all households in census blocks within the 10-county Southern California area.[60] 69.4% of those New Charter-passed households will have no other broadband service provider capable of supporting download speeds of at least 25 Mbps and upload speeds of 3 Mbps (25/3), the FCC's definition of broadband.[61] The Joint Applicants have minimal presence outside of these ten Southern California counties as only an estimated 258,000, about 4%, of the 6.4-million total New Charter households are outside of the ten Southern California counties.[62]

The Joint Applicants' own expert has conceded that "[t]he post-merger New Charter would serve 87% of cable [multi-system operators] MSO video subscribers in the Los Angeles

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

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

[61] *Id.* at 124, ¶ 111.

[62] *Id.* at 10, ¶ 15

Designated Market Area ('DMA')."[63] New Charter will face competition for the provision of its Multi-Channel Linear Video Distribution (MVPD) services. However, it will face little competition in its provision of voice telephone service and high-speed broadband access, particularly because most California consumers purchase their broadband Internet access service via a bundle. The Joint Applicants' two largest MVPD rivals (DirecTV[64] and DISH Network) do not provide high-speed broadband access at all, and most of AT&T's *U-verse* broadband that is available in California does not meet the current FCC minimum threshold of 25/3.[65]

The implication of these numbers should not be underestimated. New Charter's dominance of and monopoly over most of the Southern California 25/3 broadband market will allow it to offset MVPD revenue losses by increasing the pricing to its captive broadband customers.[66] Furthermore, as discussed in greater detail below, as a result of its extreme dominance of the Southern California broadband Internet access market, New Charter will have both the incentive and the opportunity to limit its broadband customers' ability to access competing online video distribution (OVD) services by implementing such devices as "throttling" of high-speed content data streams and by establishing "data caps" with usage-based overage charges where the "cap" is exceeded.[67] Because the overwhelming majority of New Charters' customers will not be able to switch to a competing broadband provider, there is little risk that New Charter will lose its highly profitable broadband revenue if it were to intentionally

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[63] Opening Testimony of Scott Morton, Exhibit A (Fiona Scott Morton June 25, 2015 FCC Declaration hereinafter, "Scott Morton June 25, 2015 FCC Decl."), at 2, ¶ 18, Table 2.

[64] DIRECTV traditionally provides home satellite television services. Recently it has merged with AT&T. Following the DIRECTV acquisition, DIRECTV MVPD and AT&T *U-verse* DSL and voice services are now bundled into in a single package, although the MVPD and *U-verse* services remain physically separate and distinct.

[65] Verizon in 2010 shut down further *FiOS* investment; the companies fiber-to-the-home product.

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

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

attempt to frustrate or foreclose OVD competition by, for example, imposing data caps, engaging in speed throttling, or using other service degradation tactics.[68]

The Herfindahl-Hirschman Index (HHI) numbers, which the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), and state attorneys general have used since 1982 to measure market concentration for purposes of antitrust enforcement, are very telling in this proceeding. Under the U.S. DOJ/FTC 2010 Horizontal Merger Guidelines (Merger Guidelines), a market with an HHI in excess of 2,500 is defined as "highly concentrated." The Merger Guidelines 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."[69]

ORA's expert conducted a detailed analysis of the HHI in this case and used highly conservative assumptions in making those calculations.[70] The increase in the HHI in the ten counties in Southern California at broadband speeds of both 25/3 and 10/1,[71] where the majority of New Charter service will be located after its acquisition of TWC's and Bright House's operations, indicates that the relevant market has an HHI greater than 2,500 and that the merger would result in an increase in the HHI of more than 200 points. This demonstrates that the broadband market is overly concentrated in Southern California and that the proposed merger is anti-competitive, as set out in the Merger Guidelines.[72]

While the overall weighted average HHI for 25/3 broadband access within the Joint Applicants' combined service area is 8,466, even in the few (0.23% of) census blocks where three providers are offering service, the HHI for those census blocks is still well in excess of the 2,500 highly concentrated threshold. For the 30.38% of households where two providers are available (for the most part, New Charter and an ILEC), the HHI is still at least 5,000. And for the overwhelming 69.39% of households that confront only a single broadband provider, New

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[68] Selwyn Testimony at 76, ¶ 71.

[69] United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 2010 edition* (Merger Guidelines), at §5.3, Market Concentration; *see also* Selwyn Testimony at 13, ¶ 12.

[70] Selwyn Testimony at 140-142, ¶ 124.

[71] FCC 25/3 definition of "broadband" and broadband speeds of 10/1 which is the threshold that the FCC has accepted as a minimum service level needed to qualify for Connect America Fund (CAF) support.

[72] Selwyn Testimony at 15, ¶ 13.

Charter, the HHI is at 10,000, the absolute maximum.[73] Even at the much lower 10/1 speeds, New Charter will have an HHI of 5,838, greater than the 2,500 Merger Guidelines threshold, and in the areas where there are alternative choices for broadband providers, the HHI is, with four competitors at 2,500, with three competitors at 3,300, with two competitors at 5,000 and with one competitor, New Charter, at 10,000.[74]

The Merger Guidelines are not just an "advisory" set of rules. In reaching its recent decision to oppose the Staples/Office Depot merger, the FTC stated:

> Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-merger market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Merger market concentration would be more than 4900, and would increase HHIs in an already concentrated market by well over 200 points. Thus, the Merger is presumptively unlawful.[75]

At the 25/3 speed level, the proposed merger exceeds both of these Merger Guidelines criteria for its rejection. Pre-merger, Charter's HHI within its current Southern California geographic service area is 8,036. The post-merger New Charter's weighted average HHI would be 8,466, an increase of 430, well in excess of the 200-point Merger Guidelines threshold. Not only is the post-merger New Charter HHI of 8,466 greater than the 2,500 "highly concentrated" Merger Guidelines threshold, it is also considerably higher than the 4,900 post-merger Staples/Office Depot HHI cited by the FTC as one of the bases for its decision to block the transaction.[76]

The Joint Applicants fail to address the extreme level of market concentration that already exists in Southern California and they do not propose specific conditions to mitigate the resulting harms. They simply assert that since the merger partners do not overlap each other's

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[73] *Id.* at 140-142, ¶ 124 and Tables 23 & 24.

[74] *Id.* at 142, Table 24.

[75] *Id.* at 143, ¶ 125 (quoting FTC *Staples/Office Depot Complaint*, at 3-4, ¶ 14).

[76] *Id.*

geography, the merger has no impact upon market concentration.[77] This superficial analysis ignores two key elements:

> (1) going forward, the three companies are likely to enter the online video distributor (OVD) business and, absent their merger, are potential competitors in the OVD space; and
>
> (2) their increased footprint and coverage, particularly in Southern California, when combined with their content ownership and exclusive distribution arrangements (e.g., the Los Angeles Dodgers), can limit competition in the content segment and potentially foreclose OVD entry by refusing to make certain content available to OVDs (other than those who agree to "partner" with New Charter).

The extreme dominance of New Charter in the Southern California broadband market that would exist post-merger will surely make further competitive entry more difficult and, to the extent that New Charter owns or maintains exclusive distribution rights relative to highly-demanded content (such as LA Dodgers games), competing OVDs seeking to attract "cord-cutters" face effective foreclosure if access to New Charter owned or controlled content is denied outright or offered at terms that are not acceptable to competing providers.

Dr. Selwyn's HHI analysis measured concentration within each cable company's service area, and not within an arbitrary geographic region; therefore, the HHI estimates presented in Dr. Selwyn testimony in fact measure changes in market concentration from the perspective of the consumers, which is the correct analysis as Joint Applicants' own expert notes.[78]

Finally, the idea that the geographic scope of the individual Joint Applicant physical cable network limits the extent of their respective geographic market is no longer a valid notion. Each one of the Joint Applicants can, on its own, become an OVD anywhere outside of its own network's physical geographic footprint, and thus all three of these companies, absent the merger, are potential competitors with one another.

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[77] *See* Scott Morton Rebuttal Testimony at ¶ 6, fn. 6.

[78] *Id.* at ¶ 6.

B. The Joint Applicants have Failed to Demonstrate that the Proposed Merger Meets the Requirements of P.U. Code section 854 and Applicable Law

1. The Joint Applicants Have Not Demonstrated that There will be California-Specific Public Benefits to the Proposed Merger

P.U. Code section 854 requires that the Commission recognize and distinguish between (a) benefits that are directly created by the merger itself, that could not exist in its absence, from (b) benefits that the Joint Applicants are advancing as inducements for Commission approval but which the individual merger parties could readily implement on their own if the merger does not go forward. For example, each of the three merging companies is capable, on its own, of expanding its services targeted at low-income customers, of committing not to implement usage-based broadband pricing or data caps for a specified period of time, of expanding broadband availability into presently unserved or underserved areas, of improving its customer service, of unbundling customer premises equipment from its pricing, or even of eliminating onerous arbitration and class action waiver provisions from its customer service agreements.

Real benefits arise where a genuine efficiency can be achieved as a result of the increased scale of the post-merger entity's operations, efficiencies that could not occur if the companies remained separate. Examples of efficiencies include increased purchasing power relative to content and other inputs, and possibly through its adoption of the "best practices" drawn from the three merging companies. Under P.U. Code section 854, the Commission must find that the proposed merger provides these types of benefits in order to approve the transaction.

Furthermore, the Merger Guidelines are quite specific as to what types of evidence regarding "merger-specific" efficiency gains will be considered and echo the requirements of P.U. Code section 854:

> Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.[79]

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[79] Merger Guidelines at §10, Efficiencies.

The Merger Guidelines also require that claims of increased efficiencies must be demonstrated to be ***merger-driven***, i.e., the merging firms are not capable of achieving these efficiencies on their own in the absence of the merger. The "efficiency" evidence offered by the Joint Applicants in this proceeding does not come close to satisfying these requirements. In fact, virtually all of their "public interest" or "public benefit" claims are largely unsupported by actual facts or evidence, are vague, speculative, and are incapable of being verified by reasonable means.

Indeed, in reviewing the Joint Applicants' filings both at the CPUC and the FCC, as well as the parties' testimony, one would be hard-pressed to discern what the benefits of this proposed merger actually would be. Joint Applicants rely on hypothetical and non-committal statements to press their case that there are tangible public benefits to the merger.[80] For example, in the FCC Declaration of Dr. Fiona Scott Morton the words "likely" or "unlikely" appear approximately 39 times.[81] Statements about what is "likely" or "unlikely" to occur if the merger is approved are mere conjecture, not facts or empirical evidence.

The Joint Applicant's identify only two concrete merger-specific public interest "benefits" concerning the post-merger entity's purported improved ability to compete in the "enterprise market," which they attribute to its expanded geographic scope relative to that of any of the individual merger partners standing alone,[82] and a low-income broadband program.[83] While there may be a merger-specific benefit with regard to the enterprise market in California, that benefit is extremely small when compared to the harms that the merger will cause. Furthermore, each Joint Applicant could adopt the same proposed low-income broadband program. Indeed, Bright House already has adopted this program and New Charter's proposed low-income program will take up to three years to become available in all of its service

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[80] Selwyn Reply Testimony at 6-7, ¶ 11.

[81] *Id*. at 27, ¶ 29.

[82] Scott Morton Opening Testimony at 5 (excluding the two incorporated Exhibits -- her two FCC Declarations).

[83] Application at 11.

territories in California.[84] Therefore, the low-income broadband program cannot qualify as a P.U. Code section 854(c) merger-specific benefit.[85]

Focusing specifically upon voice services and consumer broadband, Joint Applicants offer no California-specific merger-drive benefits. The Joint Applicants' claimed benefits for the proposed merger are based almost entirely on the concept that the increased scale of New Charter's operations relative to those of any of the three companies standing alone will benefit from increased economies of scale and, in so doing, will produce significant efficiency gains, lower marginal costs of inputs, and additional incentives both for New Charter and for third-party "partners" whose services would utilize the New Charter broadband service platform to invest in innovation.[86] Joint Applicants have not provided any data or evidence to support their assertions concerning the purported public interest benefits of the proposed merger. If economies of scale are present in the cable industry, then per-subscriber costs should decrease as a firm increases in size. However, Dr. Selwyn's analysis shows that total Operating Costs and Expenses are increasing in direct proportion with number of subscribers, which demonstrates that per-subscriber costs remain constant as a firm increases in size. The chart below demonstrates that there is very little variation in the per-subscriber costs across publically traded MSOs from the smallest (Suddenlink) to the largest (Comcast).[87]

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[84] *See, e.g.,* Charter's Supplemental Response to ORA Data Request No. 005, Question No. 12, in which Charter states: "New Charter will begin making its low-income service offering available within six months after the Transaction closes in some portions of the country, and will offer it in all areas of the New Charter footprint in which the company offers broadband service within three years of closing. Charter has not yet established a deployment schedule for the three-year rollout of the program."

[85] It should also be noted that the FCC is currently considering adopting a national broadband program for low income customers which, if adopted, each of the Joint Applicants would be required to provide.

[86] Joint Applicants' FCC Application, at 31; Scott Morton Rebuttal Testimony at ¶50.

[87] *See* Selwyn Reply Testimony at 54-68, ¶¶ 49-60.

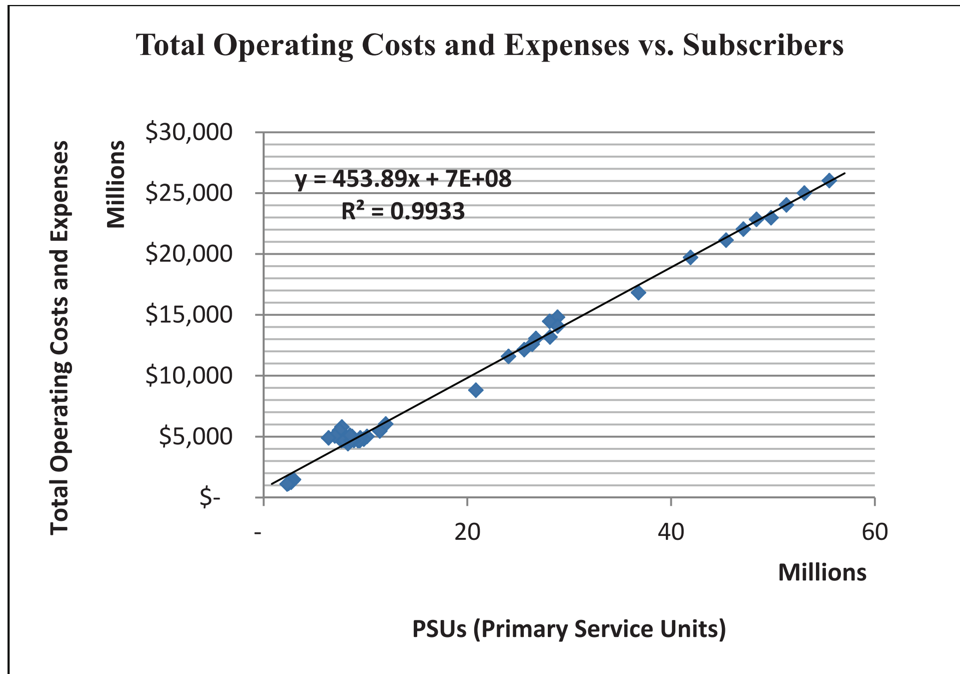

Figure 1. Cable Multi-System Operatory (MSO) Total Operating Costs and Expenses vs. Primary Service Units

The basis for the Joint Applicants' claim that New Charter's marginal costs will be lower post-merger rests on the assumption that economies of scale are present in the cable industry. Without this unsubstantiated assumption, their cost-savings estimates cannot be relied upon, and may, in fact, be nonexistent.[88]

The evidence in the record of this proceeding demonstrates that cable multi-system operators (MSOs) within the size range of the three Joint Applicants and their post-merger New Charter entity exhibit constant, rather than increasing, returns to scale.[89] The one exception to this lack of economies of scale arises with respect to programming costs – license fees that the cable MSOs pay to content providers (including local over-the-air broadcast TV stations) for the right to carry and distribute their signals to the MSOs' customers. However, it is also clear that

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[88] *Id.* at 55-56, 65, 66-67, ¶¶ 50, 56, and 58. Dr. Selwyn's econometric evidence is robust to several model specifications, and his conclusion does not change when firm-specific and time-specific effects are controlled for.

[89] *Id.* at 54-68, ¶¶ 49-60.

the highly concentrated nature of the cable MSO market makes it unlikely that any such programming cost savings would be flowed through to consumers in the form of lower cable TV prices.[90]

Joint Applicants take issue with this assessment, arguing that "[i] t is a well-established principle taught in freshman economics courses that even a monopolist… has incentives to pass through marginal cost savings to consumers in whole or in part."[91] But other than these general references to economic theory Joint Applicants' expert Dr. Katz offers no actual facts or evidence that would back up his claim. For example, if larger MSOs' costs for programming are lower than those confronting smaller MSO and if programming cost savings are being passed through to consumers, then Comcast and TWC customers should already be paying less for their video service than their counterparts in Suddenlink and (pre-merger) Charter service areas. The Joint Applicants have offered no facts or evidence that any of this is actually taking place. In the absence of any hard factual evidence that should be readily available to the Joint Applicants and that would confirm Joint Applicants' otherwise unsupported speculations that lower programming costs will be passed on in the form of lower retail prices, there is simply no basis upon which the Commission can afford any weight or credence to Joint Applicants' claim – the Joint Applicants have not even made any commitment to lower prices to California customers. The claimed benefits of increased size and scale simply do not exist and will not arise in this proposed merger.

Moreover, in order for any public benefits to result from such efficiency gains (if, in fact, any would actually materialize), some significant portion of these gains would need to flow through to California customers, or to the broader California economy or local economies within the State, e.g., Southern California. However, the complete lack of effective competition for most of the Joint Applicants' services will enable a post-merger New Charter to retain most or all of any gains without being compelled either to reduce prices or to make needed infrastructure upgrades.

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[90] *Id.* at 96-98, ¶¶ 87-90.

[91] Katz Rebuttal Testimony, Attachment A, "Reply Declaration of Michael L. Katz" at ¶ 36.

In sum, the Joint Applicants have not met the requirements of P.U. code section 854 because they have failed to show that their proposed transaction will actually provide any substantive "benefits" or otherwise serve the public interest.

2. There is no evidence that the Proposed Merger will "[m]aintain or improve the financial condition of the resulting public utility doing business in the state" required by P.U. Code section 854(c)(1)

P.U. Code section 854(c)(1) directs the Commission to affirmatively find that the proposed change of control will "[m]aintain or improve the financial condition of the resulting public utility doing business in the state." Charter has indicated that it will incur substantial additional debt in order to finance its acquisition of TWC and Bright House.[92] Dr. Selwyn estimated in his testimony that the increased debt will result in a far more highly-leveraged New Charter entity than any of the pre-merger companies. This analysis was conducted utilizing financial data from the Joint Applicants that was referenced in their opening testimony.[93] Total debt will increase by $21 billion or more, producing an overall increase in the post-merger entity's financial risk and cost of capital.[94] Without merging, Charter and TWC taken together would have only $37.14-billion in debt, for a combined leverage of only 3.3 times, vs. $58.5-billion in debt and a leverage ratio of 4.5 times by joining forces into a single entity.[95] Even if one uses end of 2015 financial numbers, data that did not become available until February 10, 2016 after filing of ORA's January 15, 2016 reply testimony), the 2015 data does not have a material impact on the analysis and conclusions that annual payment for the new debt of the resulting entity is a lot more than the estimated net increase in Earnings Before Interest, Taxes,

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

[93] Fisher Opening Testimony at 2.

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

[95] *Id.* at 16 ¶ 22.

Depreciation and Amortization (EBITDA).[96] Upon completion of the transaction, New Charter will be somewhat more leveraged – i.e., will have a larger proportion of debt in its financial structure – than the existing pre-merger company, and will be significantly more leveraged than the existing pre-merger TWC.[97] Notably, New Charter is not using the additional debt to finance a major capital investment, innovation, infrastructure expansion or improvement, purchase of equipment, or other activity that would operate to increase the post-merger firm's real output. Rather, the new debt is being used primarily to finance a cash purchase of TWC and Bright House stock, the various merger implementation costs, as well as "golden parachute" severance payments estimated at $170 million[98] to be given to several TWC senior executives. Because of its market share dominance in California, New Charter will be in the position to raise prices in order to service the debt it will incur to enact this merger.[99] Furthermore, if current debt amounts increase, the related risks that Charter now faces may intensify.[100]

The Joint Applicants attempt to dismiss these concerns by arguing that a firm's capital structure – its debt-to-equity ratio, does not really matter.[101] As authority for this notion, Joint Applicants' expert cites a 1958 paper by Modigliani and Miller, which is of no relevance here. As Dr. Scott Morton herself notes in her rebuttal testimony, the Modigliani and Miller theory

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[96] When utilizing 2015 financial numbers provided by Charter's witness Charles Fisher during rebuttal testimony on January 25, 2016, including Bright House Networks, it suggests an EBITDA net increase of $0.6 billion ($600 million), far less than the $1.7-billion estimated by Dr. Selwyn based upon 2014 financial data. In addition, the Joint Applicant's promised synergies are not present. As stated by Charles Fisher: "Once Bright House Networks' 2014 Adjusted EBITDA is included, the 2014 figures show no "net increase" in Adjusted EBITDA to be accounted for—as publicly available documents clearly show—the $12.9 billion pro forma figure for New Charter is simply the sum of 2014 Adjusted EBITDA for the three merging companies." (Fisher Rebuttal Testimony at 4.) In 2015, the remaining EBITDA balance is only $600 million, far less than the promised synergies, and far less than the incremental amount of money necessary to service the new debt.

[97] Selwyn Reply Testimony at 13, ¶ 20.

[98] Charter/TWC Proxy Statement, August 20, 2015 at 308.

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

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

[101] Scott Morton Rebuttal Testimony at ¶ 76.

relies upon "strong assumptions like efficient markets and no taxes, among others,"[102] assumptions that do not come close to existing in the real world.[103]

The Joint Applicants did not provide information in this proceeding on precise effects of this increased debt and leverage upon the California CLEC affiliates of the merging parent companies. Because the Joint Applicants failed to make an adequate showing in this proceeding that the merger will maintain or improve the financial condition of the resulting public utility doing business in the State, the Commission cannot make the required P.U. Code section 854(c)(1) finding.

3. Joint Applicants' Voice, Broadband and Video Businesses are Highly Integrated

The Joint Applicants' voice, data and video distribution businesses are jointly produced through a common network and organizational infrastructure. In this proceeding, the Joint Applicants seek to portray their video program distribution and content business as entirely separate and distinct from their local voice services (CLEC) operations and from their broadband Internet access business. In fact, the three lines of business – voice, broadband and multichannel video programming distributor (MVPD) – are jointly produced by a highly integrated organization utilizing common network infrastructure, common installation, maintenance and repair personnel and resources, joint marketing, advertising and sales operations, bundled pricing, customer service adhesion agreements that embrace all three service categories, and a common customer service support organization. And because each of the three categories of the Joint Applicants' business confront distinctly different competitive conditions, the Joint Applicants both pre- and post-merger are in a position to, and do, exploit those aspects of their combined operations confronting the least competitive challenge – broadband – to gain a competitive advantage in those segments where customers do confront realistic alternatives to

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[102] *Id.* at ¶ 77.

[103] *See, e.g.,* Farrar, Donald E. and Lee L. Selwyn, "Taxes, Corporate Financial Policy and Return to Investors," National Tax Journal, Vol. XX, No.4, December 1967, at pp. 444-454 (demonstrating that the different corporate and personal tax treatments of dividends, interest and capital gains distorted the neutral effects of capital structure as posited by Modigliani and Miller.

the Joint Applicants' services. These concerns relate directly to issues (b) and (c) in the Scoping Ruling.

The opportunity afforded to the Joint Applicants – individually and post-merger – to engage in such inter-service control and handling is highlighted in the Joint Applicants' testimony which contains data purporting to demonstrate that all three of the Joint Applicants enjoy a gross operating margin with respect to their broadband services of at least , a gross margin with respect to their voice services of , but for their far more competitive *video services,* gross margins of .[104] That the Joint Applicants are able to generate a gross operating margin of on their broadband services would be unthinkable but for the lack of meaningful competition in this segment, and demonstrates that this pervasive overpricing of broadband is being used to subsidize the most competitive segment of their overall business – MVPD.[105] The extraordinarily high profit margins that the Joint Applicants generate in voice services relative to those coming from MVPD operations are clearly of concern to the Commission and fall well within the scope of this proceeding. The Joint Applicants' use of bundled pricing enables them to extend their market power in the noncompetitive broadband sector over to the far more competitive voice market, as the high profit margins they are receiving from voice services confirm.

4. The Joint Applicants have the Incentive to Impose Barriers to Entry to Online Video Distributors (OVD), which competes directly with the Joint Applicants' MVPD services

The Joint Applicants argue that they have no incentive to foreclose or otherwise frustrate an online video distributor's (OVD) entry due to the risk of losing the extraordinarily high profits they are able to generate from broadband, profits that they portray as being much greater than

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[104] Scott Morton June 25, 2015 FCC Decl. (Exhibit A to her December 4, 2015 CPUC testimony), at 15, Table 4.

[105] Scott Morton's data confirms this: The Joint Applicants' broadband services generate average monthly gross profit per customer of out of total average monthly broadband revenue per broadband customer of $47.42. (Exhibit A to Scott Morton Opening testimony , Scott Morton June 25, 2015 FCC Decl. at 15, Table 4.)

those available from their MVPD operations.[106] Another perspective that can be gleaned from this argument and profitability data is that the Joint Applicants can and do successfully exploit their near-monopoly control of the Southern California broadband market to protect themselves against potential revenue losses from video service "cord-cutting" by shifting revenues that had in the past come from video over to broadband. Cord-cutters who substitute OVD services streamed over a broadband connection for the Joint Applicant's MVPD service must still buy their broadband service from the same provider – one of the three Joint Applicants pre-merger or from New Charter post-merger. The Joint Applicants' ability to shift revenues away from competitive MVPD services over to non-competitive broadband, confirmed by their own expert, clearly falls within the Scoping Ruling's second issue – "How will the Transaction affect broadband deployment and/or affordability?"

The ability of consumers to access content of any sort over their broadband Internet access service also falls squarely within the Scoping Ruling's second issue area.[107] Streaming video was primarily responsible for creating the current demand for, and interest in, broadband. In setting its current 25/3 minimum standard for consumer broadband, the FCC's focus was specifically directed toward ensuring that consumers could access streaming video content, noting that "the speeds required to use high quality video, data, voice, and other broadband applications" were among the factors leading the FCC to "find that, having 'advanced telecommunications capability' requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps (25 Mbps/3 Mbps)."[108]

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[106] Scott Morton Opening Testimony, Exhibit A, Scott Morton November 2, 2015 FCC Decl., at ¶¶ 15-16.

[107] Scoping Ruling at 5.

[108] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry of Immediate Action to Accelerate Deployment, FCC 15-10 (rel. February 4, 2015), at ¶ 3. New Charter's ability to foreclose or frustrate OVD entry, or discourage customers' use of certain OVDs that have not entered into a "partnership" with a post-merger New Charter then able to control as much as 82% of the Southern California broadband market, is at odds with Congress's and the FCC's explicit objectives with respect to "advanced telecommunications services" (a/k/a "broadband") and with Congress's specific delegation of jurisdiction with respect to "advanced telecommunications services" to state PUCs.

The Joint Applicants' own expert concedes that New Charter will have the potential to engage in selective discrimination with respect to individual OVDs, claiming that [redacted]

[redacted]

[redacted]

[redacted][109] This notably excludes OVDs that do not offer "the most sought after content" or those OVDs that offer content that Charter or New Charter offers via the same Set Top Box or Enhanced Program Guide. By offering access to its Set Top Box and Enhanced Program Guide platforms only to those OVDs willing or able to enter into "partnerships" with New Charter, the Joint Applicants are able to extend their traditional MVPD gatekeeper role over into broadband, disadvantaging competing content providers unwilling or unable to play by New Charter's self-created "partnership" qualifications and requirements.[110]

The Joint Applicants also argue that the complementary relationship between the demand for OVD services and the demand for broadband gives New Charter no incentive to suppress OVD services.[111] However, the Joint Applicants fail to recognize that because New Charter would essentially face no competition within its broadband service area, the company has the potential to extract rent payments from OVDs by throttling[112] OVDs that refuse to comply with New Charter's demands.[113] And the potential, following the expiration of New Charter's

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[109] Scott Morton Opening Testimony, Exhibit A, Scott Morton November 2, 2015 FCC Decl., at ¶ 31.

[110] *See* Scott Morton's own description of the "Spectrum Guide" and "world Box. Scott Morton expressly also describes "zero rating," another anticompetitive device that is potentially available to New Charter (but which it has offered a time-limited "commitment" to refrain from implementing for three years only) as a "discriminatory exemption from a data cap." Selwyn Reply Testimony at 35, ¶ 36 (citing Scott Morton Opening Testimony, Exhibit A, Scott Morton November 2, 2015 FCC Decl., at ¶ 13). .

[111] Scott Morton Reply Testimony at ¶ 17.

[112] Throttling is the intentional slowing of Internet service by an Internet service provider, such as Charter.

[113] Scott Morton's financial analysis purporting to demonstrate that New Charter would lose more broadband profit by foreclosing OVD access than the MVPD profits that it would protect by foreclosing OVD entry, even if true, certainly does not require that *all* OVDs be afforded similar "partnerships" or other accommodations. In fact, New Charter's "incentives" would apply only to those OVDs that do not compete or that minimally compete with New Charter's MVPD programming; As long as compatible OVDs are accommodated, New Charter has no further incentive to accommodate or "partner" with those OVDs that offer the same or otherwise equivalent content to what is available from New Charter or from one of its OVD "partners." Scott Morton's financial analysis misses this point altogether.

purported "three-year commitment" not to impose data caps or engage in "zero rating" of selected content, for discrimination favoring some and foreclosing other OVDs from gaining advantageous access to New Charter broadband customers certainly undermines any claim that the post-merger entity will facilitate all OVD competition.

In summary, as discussed previously, this merger, if approved, will lead to a more highly concentrated market in California in contravention to P.U. Code section 854(c), Section 706(a) and *NCPA v. CPUC*. New Charter will pass 82% of the Southern California market and will be the monopoly provider for high-speed broadband in 69.4% of the Southern California market. These numbers, in and of themselves, demonstrate that the merger is anti-competitive and not in the public interest. Joint Applicants suggest that these high numbers do not matter as they have no incentive to frustrate or interfere with competition in Southern California. Joint Applicants avoid two key points in their misleading statements. First, to qualify as providing a P.U. Code section 854(c) public interest benefits, the merger must provide a more competitive environment for broadband in California, not less competitive. Joint Applicants have not provided empirical evidence to demonstrate that the relevant California market will be more competitive post-merger. Second, New Charter will absolutely have the incentive and the ability to discriminate against and prevent OVDs from obtaining access to New Charter's broadband customers.

5. The Joint Applicants High Market Concentration Provides Lack of Consumer Protections Relating to Arbitration Clauses and Class Action Provisions

Customer protections must be considered in the public interest review of the proposed merger, especially given the large presence of New Charter in Southern California. The Joint Applicants' non-negotiable, mandatory arbitration clauses and class action waiver provisions in their consumer agreement terms and conditions result from lack of competition in the marketplace. These practices are onerous and prevent consumers from seeking recourse against illegal or anticompetitive actions.[114] To put it succinctly, consumers have no bargaining power. Charter and TWC both include mandatory arbitration clauses and class action waivers in their consumer and small business customer agreements and all indications are that New Charter will

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[114] Selwyn Reply Testimony at 155, ¶¶ 136-137.

continue this practice.[115] The substantial increase in concentration and market power from the Joint Applicants in their core Southern California operating areas will only exacerbate these provisions' anti-consumer effects. A positive consumer benefit would be for New Charter to agree to discontinue the use of mandatory arbitration clauses and class action waiver provisions in its consumer agreements.[116]

C. Broadband Service Quality

The Commission should evaluate the proposed transaction in a manner consistent with the evolving landscape of the communications industry, including carefully examining the quality and reliability of the broadband services offered by the Joint Applicants. The Joint Applicants provide broadband services that are essential to everyday life and the quality and reliability of those services is vital to California customers. Broadband is an indispensable means of communication, and poor service quality or insufficient reliability is detrimental to the public's health and safety, education and the State's economy. Joint Applicants included an entire section of their Application titled, "Improved Broadband Service,"[117] and also discuss broadband in much of their testimony.[118] Clearly, broadband is a key component of the proposed transaction. Furthermore, as discussed above, the Commission has jurisdiction to review the effects of the proposed transaction on the deployment of broadband, which includes the impact on service quality.

ORA outlined the problems with Charter's, TWC and Bright House's broadband service quality in the January 15, 2016 testimony of Adam Clark (Clark Testimony). As presented in the Clark Testimony, ORA has sought out and analyzed the objective data, to the extent such data is available. ORA was successful in obtaining data from independent survey organizations such as J.D. Power (provided by TWC in the Comcast proceeding) and the American Customer

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[115] *Id.* at 156, ¶¶ 138-140.

[116] *Id.* at 160-161, ¶ 146.

[117] Application at 24-25.

[118] Falk Opening Testimony at 30-31. Scott Morton Opening Testimony, Exhibit A at 2-4., and Exhibit B at 68.

Satisfaction Index (publicly available). The results were much less successful when asking the Joint Applicants how they measure their service to their customers.

Charter and TWC consistently receive extremely poor customer satisfaction ratings and rankings in J.D. Power and the American Consumer Satisfaction Index (ACSI).[119] For example, in 2014, TWC and Charter received two of the three lowest scores among *all companies across all industries* studied by ACSI.[120] Bright House receives average to above-average customer satisfaction rankings.[121] These results are concerning because Charter, the acquiring entity, has not demonstrated that it is able to provide customers with high-quality (or even average-quality) broadband services. Furthermore, out of all of the Joint Applicants, TWC currently provides broadband services to the most broadband customers in California, and Charter has not made any commitments to raise the satisfaction levels of these customers. In addition, the proposed Transaction threatens the satisfaction levels of Bright House's current customers because its consumer satisfaction ratings are much higher than those of Charter and TWC, and as the smallest merging company, it is unlikely to set company culture or the rules for the combined New Charter. The Joint Applicants did not provide commitments to improve customer satisfaction ratings and rankings.

Furthermore, as the American Customer Satisfaction Index notes, in general, things get worse, not better after mergers.

> Mergers and acquisitions have a generally negative effect on customer satisfaction, particularly among service industries. ACSI-measured service companies that have engaged in frequent, large acquisitions typically experience significantly lower ACSI scores in the period following a merger when the 'customer as asset' often takes a backseat to reorganization and consolidation via cost cutting.[122]

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[119] Clark Reply Testimony at III-3 to III-10.

[120] *Id.* at III-7 to III-8.

[121] *Id.*

[122] *Id.* at III-9, citing ACSI. *Key ACSI Finding*. ACSI, LLC. See, http://www.theacsi.org/about-acsi/key-acsi-findings.

Each of the Joint Applicants has frequent and/or severe broadband outages that negatively impact service reliability. Charter has experienced approximately [redacted] broadband outages per year in California since 2010.[123] The frequency of Charter's broadband outages is [redacted] over the past six years.[124] TWC had an average of [redacted] broadband outages just in California per year since 2010.[125] [redacted] are the primary cause of broadband outages for TWC and Charter.[126] Bright House experiences several outages per year that affect over [redacted] customers each.[127] Again, the Joint Applicants did not provide specific, performance-based commitments to lessen the frequency and severity of broadband outages.

There are other broadband service quality issues that were evident from the data Joint Applicants provided to ORA. For example, the Joint Applicants also receive many complaints from customers that indicate serious deficiencies in the quality of their broadband services, and the Joint Applicants have not provided any proposed improvements or solutions to address the litany of complaints.[128] Charter and TWC also failed to fulfill a satisfactory percentage of requests for new broadband services.[129] Both companies consistently fall short of the 95% benchmark applicable to telephone service providers under the Commission's G.O. 133-C; a source of benchmarks and metrics useful to analyze the quality of the Joint Applicants' broadband services.[130] The Joint Applicants do not provide any detailed, performance-based commitment to improve their performance with regard to installing new broadband service connections. Charter and TWC have not augmented their customer service and technical workforce to keep pace with the increasing number of broadband customers they serve.[131]

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[123] *Id.* at III-17.

[124] *Id.*

[125] *Id.* at III-19.

[126] *Id.* at III-20.

[127] *Id.* at III-21.

[128] *Id.* at III-23 to III-30.

[129] *Id.* at III-31 to III-32

[130] *Id.*

[131] Other broadband service quality issues in the Clark Testimony include: (1) TWC found that, for its PacWest market, several of its broadband service metrics *missed* the associated target performance value

In sum, if the merger is approved, Charter's broadband subscriptions will grow by [redacted] percent in California.[132] Charter has not provided any evidence in the proceeding as to how service quality and reliability will be maintained or improved post-merger as required by P.U. Code section 854(c). Rather, the evidence appears to indicate that service quality and reliability will worsen after the merger. The objective data shows that consumers are not happy. In fact, large numbers of customers are unhappy and as a result, Charter and TWC are at or near the bottom of virtually every independent evaluation of service quality for cable broadband providers. Making a poorly performing company much larger is not a recipe for success, but instead, continues to put consumers at risk for continued poor quality of service. The Joint Applicants provided minimal evidence and insufficient commitments to support their claim that the proposed merger will raise the quality and reliability of broadband services in California. The Joint Applicants failed to provide concrete, measurable, performance-based commitments that will ensure the proposed merger maintains or raises the quality of broadband services.

The Commission should not view New Charter's promise to convert acquired networks to an all-digital platform and increase broadband speeds as evidence that the proposed transaction will benefit California because both TWC and Bright House are currently performing similar enhancements irrespective of and apart from the proposed merger. Furthermore, the Commission should not regard Charter's promise that New Charter will not block Internet traffic, throttle Internet traffic, or engage in paid prioritization as evidence that the proposed transaction will benefit California. These so-called benefits of the proposed merger are not merger specific because Internet service providers such as Charter and new Charter are already required, by law,

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for every month from January 2015 through October 2015. Those consistently underperforming metrics include: the percentage of modems and embedded multimedia terminal adapters out of specification; the percentage of new modems out of specification; the percentage of US ports experiencing an uncorrectable forward error connection exceeding 1%; and, the percentage of downstream ports with utilization that peaked at greater than 80%. The Joint Applicants did not provide specific, performance-based commitments to improve upon TWC's substandard performances. (2) Charter and TWC fail to achieve a network availability score of 99.999%, which is the traditional "Five Nine" standard of telephone service providers. The Joint Applicants did not provide specific, performance-based commitments to improve network availability.

[132] Clark Reply Testimony at III-1.

to follow those practices. Agreeing to abide by existing law can hardly be considered a benefit of the proposed merger.

D. Service Quality of Voice Communications

ORA's analysis found a number of areas where all or some of the Joint Applicants demonstrate poor voice service quality. All three of the Joint Applicants have large gaps in the service quality data they provided in response to data requests, often having no data at all for certain voice service quality topics, or only providing data for limited time periods. Thus, in reviewing service quality metrics and performance, there is insufficient data provided by the Joint Applicants to demonstrate that New Charter will maintain or improve service quality. Moreover, where data was provided by the Joint Applicants, poor service quality is evident. The Joint Applicants have not presented any plans or concrete, performance-based commitments to address these voice service quality issues, and therefore, they have not demonstrated that voice service quality and reliability will be maintained or improved, as required by P.U. Code section 854(c).

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

All three Joint Applicants currently provide voice services in California exclusively through VoIP service. Charter would rapidly increase the number of its voice subscribers by almost five times its current size in California by the proposed transaction. This is very concerning because, as detailed below, Charter has problems addressing service quality, reliability, and public safety issues within its current service territory at its current small size, and it would be inheriting a TWC network that is fraught with service quality problems.

J.D. Power's Telephone Customer Satisfaction Studies, Performance and Reliability ranked both Charter and TWC at or near the bottom in the West Region from years 2012 to 2015. Nationwide customer survey data reveals that all three of the Joint Applicants have elevated levels of voice service outages. For each year between 2013 and 2015, the Joint

Applicants had the three highest percentages of customers that experienced general service outages, out of the 13 or 14 service providers ranked nationwide.[133]

In response to ORA data requests, both Charter and TWC provided data that show a high number of voice service outages in California. For example, from 2011 to 2015, Charter, the acquiring entity, had ██████ voice service outages, while TWC had █████ voice service outages.[134] Based on the data Joint Applicants provided to ORA, Charter's acquisition of TWC may lead to more voice service outages in the newly acquired service territory. Charter has not presented any concrete, performance-based commitments to address its high number of voice service outages.

ORA also examined data on the duration of Charter's and TWC's voice service outages. Charter has excessively long outage durations, averaging ████████ to repair its voice service outages from 2011 to 2015.[135] TWC averages ███████ to restore voice service during the same time period, a much quicker response time.[136] If the proposed merger is approved, Charter's extremely poor performance in repairing service outages may be extended to the newly acquired service territory.

Voice service providers are required to provide reports regarding their most significant voice service outages – lasting at least 30 minutes and impacting at least 900,000 user minutes, 911 facilities or other special facilities – through the FCC's Network Outage Reporting System (NORS) system. Charter averaged ███ hours and TWC averaged ███ hours to repair their NORS voice service outages in years 2011to 2015.[137] In 2015, both Charter and TWC had

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[133] Charter states that its customer satisfaction is trending up, but it still remains below average. Essentially, Charter is trending from extremely poor customer satisfaction, to merely very poor customer satisfaction. (Dering Rebuttal Testimony at 4-5, 9). As the Gallardo Testimony shows, Charter's VoIP service remained consistently below average compared to the West Region average in customer satisfaction and performance and reliability from 2012 to 2015. (Gallardo Reply Testimony at 1-6 to 1-9).

[134] Gallardo Reply Testimony at 1-14 to 1-15. Moreover, as Charter has a much smaller number of voice subscribers, the number of voice service outages per subscriber is even greater compared to TWC. When factoring in the size of the voice subscriber base, Charter averaged 6.3 times as many voice service outages as TWC over five years from 2011 to 2015.

[135] *Id.* at 3.

[136] *Id.* at 1-16.

[137] *Id.* at 1-23.

particularly long NORS voice service outages. Charter's average repair time of its NORS outages in 2015 was [REDACTED].[138] TWC also demonstrated a long repair time in 2015, averaging [REDACTED] to repair its NORS outages. These slow repair times raise serious concerns on public safety.[139]

Furthermore, a significant number of Charter's NORS voice outages from 2011 to 2015 were located in the Los Angeles Designated Market Area ("DMA").[140] The strong market position that the proposed New Charter would have in the Los Angeles DMA coupled with the disproportionately high number of NORS outages there poses serious concerns of public safety and the ability of consumers in the Los Angeles DMA to have access to emergency services.

Other service quality issues that ORA found in its analysis of Joint Applicants' data include that TWC meets a relatively low percentage of its installation commitments, missing the applicable standard of a minimum of 95% installation commitments met by a wide margin for [REDACTED].[141] Bright House's data reveals a high percentage of its working lines with trouble reports, exceeding the applicable standard of a maximum of 6% of lines with trouble reports by a wide margin for [REDACTED].[142]

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[138] *Id.*

[139] Charter states that the number of its Network Outages per 10,000 lines has greatly declined from 2010 to 2015. Despite this trend, Charter continues to have an excessive number of outages. Charter consistently had more "No Dial Tone" outages from 2011-2015, as compared to TWC reported outages, even though TWC has a much larger subscriber base. (Gallardo Reply Testimony at 1-14 to 1-15). Moreover, the duration of Charter's outages (both Network Outages (Hayes Testimony at 14) and No Dial Tone has not declined. (Gallardo Reply Testimony at 1-14). In fact, the duration of Charter's NORS outages has greatly increased in recent years, and is much longer than TWC's NORS outages. (Gallardo Reply Testimony at 1-23).

[140] The Los Angeles Designated Market Area constitutes the five counties of Los Angeles, Orange, Riverside, San Bernardino and Ventura. In the Los Angeles DMA area, there were a total of 22 of the 40 outages accounting for 59.0% of Charter's affected users and 54.2% of affected user minutes in California. Moreover, the vast majority of Time Warner Cable's NORS outages in 2014 and 2015 in California were also located in the Los Angeles DMA. These outages constituted 15 of Time Warner Cable's 17 outages in California and accounted for 83.6% of Time Warner Cable's affected users and 79.1% of affected user minutes. Thus, a large majority of the Joint Applicants' NORS voice outages were in the Los Angeles DMA.

[141] Gallardo Reply Testimony at 1-29.

[142] *Id.* at 1-33. Charter demonstrates extremely poor performance in all standardized metrics regarding the occurrence and repair of service outages. Rather than propose solutions, Charter urges the Commission in

Moreover, Charter and Bright House provided only a small subset of complaints which did not provide a representative sample of all of Charter's and Bright House's complaints. Charter's data showed an exceedingly long time to resolve complaints. While Joint Applicants claim that ORA presented "cherry picked" data,[143] in fact, ORA simply accurately presented the entirety of complaint data that it received from Charter, including the fact that it is only a subset of all actual Charter complaints and may not be fully representative of all of Charter's complaints.[144] ORA made numerous attempts to receive fuller, more representative complaint data from Charter, but Charter failed to provide it.[145] Contrary to ORA's request, Charter decided to provide only a sub-set of their California complaints, "formal complaints" received by a company employee outside of the customer care department. Nonetheless, in years 2010 to 2015, the company received hundreds of millions of Customer Service Representative (CSR) calls nationwide where many of the call categories CSR's are able to select include topics related to complaints: [redacted],

[redacted]

[redacted].[146] Moreover, Charter makes no commitments to improve its complaint resolution processes. TWC provided more comprehensive complaint data. Given the limited data provided by Charter and Bright House, Joint Applicants do not demonstrate that they will maintain or improve customer service quality or the handling of complaints regarding voice services.

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its Hayes Rebuttal Testimony to disregard the standardized metrics and rely instead on its own measurements.

[143] Kuthyar Rebuttal Testimony at 5, 8.

[144] *See* Gallardo Reply Testimony at 1-38, 1-40.

[145] Charter chose to provide the data reported in ORA's Testimony "because Charter believes such contacts are the best proxy for 'complaints' or 'customer-initiated complaints.' Charter now complains that ORA "cherry-picked" the data that it stated was the best proxy for complaints. After receiving an inadequate response to its initial Data Request (see Response by Charter to the Third Set of Data Requests by ORA [Exhibit C-1 to Gallardo Testimony], Response to Data Requests 3-18; 3-21 & 3-23), ORA issued Meet and Confer letters on Nov. 23, 2015 and Dec. 22, 2015 to Charter seeking customer complaint data. ORA also had two separate Meet and Confer Conference Calls with Charter seeking complaint data. ORA finally received some additional data on February 22, 2016, however it is far from complete.

[146] Charter Feb. 22, 2016 Supplemental Response to ORA Data Request 11-30, *CONFIDENTIAL - ORA Exhibit 11-30.xlsx*

Finally, the FCC recently instituted rules regarding the provision of backup power for VoIP service, which became effective in February 2016. The Joint Applicants are implementing processes to come into compliance with these new rules, but have not yet complied with them. In Decision 10-02-026, the California Public Utilities Commission instituted certain requirements regarding the provision of information about backup power to VoIP subscribers. One of these requirements is that the information be "in a format the customer can utilize."[147] Whether or not the Commission decides to approve the proposed merger, it should ensure that the Joint Applicants separately, or a combined New Charter, follow the rules adopted in D.10-02-026.

In summary, Charter provided no specific plans to improve voice service quality and makes no specific commitment of resources in California for the resulting combined entity. Charter also fails to make a commitment to meet specific performance targets for improving VoIP service quality, reliability and customer satisfaction. The Joint Applicants did not meet their burden of proof in showing that the merger will maintain or improve service quality, and therefore, it should be denied. However, if the Commission elects to approve the merger, it should adopt specific, measurable performance-based targets for VoIP service quality, reliability and customer satisfaction for New Charter as discussed in Section F below.

E. Low Income Programs

1. LifeLine

The LifeLine program provides discounts on phone services to qualifying low income consumers in California. TWC is the only one of the Joint Applicants that currently participates in Lifeline.[148] Charter Fiberlink previously offered Basic service and LifeLine discounts to residential customers but on November 14, 2014, Charter Fiberlink filed Advice Letter (AL) 142, a Tier 1 Advice Letter, requesting authority to remove Basic and LifeLine services and rates from its tariffs "as they were previously transferred to Company affiliate, Charter Advanced Services (CA), LLC, an interconnected Voice over Internet Protocol (VoIP) company."[149] The

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[147] *See* D.10-01-026 at 14, Conclusion of Law 20, Ordering Paragraphs 6, 9.

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

[149] Odell Testimony at 5.

Advice Letter currently remains suspended and the CPUC's records indicate that Charter Fiberlink has still not received approval to remove Basic and LifeLine services and rates from its tariffs, even though it did so over 15 months ago.[150] According to LifeLine records, Charter Fiberlink, which is an authorized LifeLine provider, is identified as the carrier that is still providing LifeLine service to existing LifeLine customers.[151] However it appears that Charter Advanced Services, which is not an authorized LifeLine provider, is the entity that is actually providing the LifeLine service to those customers formerly served by Charter Fiberlink.[152] Furthermore, Charter Advanced Services does not offer LifeLine discounts to new residential customers, in violation of General Order (G.O.) 153.[153]

ORA has serious concerns because Charter has been operating LifeLine service in clear violation of Commission rules and regulations, specifically not offering LifeLine to new eligible customers. Charter has not provided any evidence to support the notion that post-merger, New Charter will be a good steward in offering LifeLine services. Regardless of the Commission's determination concerning the proposed merger, the Commission should, at a minimum, require Charter (or New Charter, if the merger is approved) to satisfy its current obligations to provide LifeLine discounts and to comply with G.O. 153. The discount should be offered to all eligible households, including households which have not previously received LifeLine service, immediately. Due to Charter's failure to properly administer its LifeLine program, the Commission should require Charter to submit detailed plans on how it informs new consumers about LifeLine service and its terms and conditions, including specific information pertaining to the form, quantity, distribution method and content of information. The Commission should further set in place minimum subscribership benchmarks and reporting requirements so it can verify that Charter is serving eligible new customers with the LifeLine discount. Charter's obligation to provide the LifeLine discount to all eligible customers across its entire footprint, to

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[150] *Id.*

[151] *Id.*

[152] *Id.*

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

actively inform new customers of the program, and to demonstrate achievement of cognizable subscribership benchmarks should not change should the merger be approved.

As discussed in Section F below, should the Commission approve this merger, it should require, as a condition of approval, that New Charter offer LifeLine discounts to its entire service territory, not only to the existing TWC service area, and that it follow and adhere to its Lifeline obligations, which Charter is currently failing to do.

2. Low Income Broadband Program

In its Application, Charter proposes very limited plans to expand Bright House's Connect2Compete broadband program across the proposed footprint of New Charter. The program as presented in the Application has limitations similar to Comcast's Internet Essentials program in that it has limited eligibility that leaves out a significant, underserved group of California consumers such as the elderly. Further, Connect2Compete speeds are slower than those identified by the Commission as "served" in California.[154] On January 8, 2016, Charter provided supplemental testimony detailing updates to its proposed low income broadband program. Charter's new proposal is to offer speeds of 30 Mbps download at $14.99 per month, with eligibility expanded to low-income seniors. The proposal continues to exclude many low income adults from eligibility and fails to set benchmarks for adoption. Under Charter's plan, the eligibility criteria leave many vulnerable populations in New Charter's service territory, including elderly (except seniors over age 65 who receive Social Security Insurance benefits), people with disabilities, and low-income childless adults, without an affordable option for broadband service. At a minimum, the program should be expanded to include all customers who are eligible to receive LifeLine discounts. Furthermore, the requirement that applicants not be in arrears on Charter accounts may effectively exclude many of those individuals such a program is designed to assist.

Furthermore, Charter's proposal fails to set enforceable adoption benchmarks. After establishing expanded eligibility requirements, Charter must identify the number of potentially eligible customers within its expanded footprint. The Commission should require New Charter to

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[154] Served speeds in California are currently 6 Mbps download and 1.5 Mbps upload. (*See* D.12-02-015, Decision Implementing Broadband Grant and Revolving Loan Program at 17.)

demonstrate to the Commission a minimum adoption of 45 percent of customers eligible for LifeLine within each census block within the New Charter California franchise area and operating service area within three years after roll out. Requiring a minimum adoption target will ensure that New Charter will proactively work on improving enrollment numbers.

F. Proposed Mitigation Measures

For all of the reasons outlined in this Brief, the Commission should reject the proposed merger of Charter, TWC and Bright House. However, if the Commission elects to approve the transaction it should, at a minimum, adopt the twelve conditions proposed below to at least partially mitigate some of the harms of the proposal. The twelfth condition is an enforceability clause. This condition is necessary if the Commission adopts any mitigation measures as the conditions will be meaningless if they are not easily enforceable by the Commission.

1. Increase Broadband Speeds

Because of consumers' needs for increased speeds and the need for public benefits to California consumers if this merger is approved, the first condition would increase broadband speeds to existing households with broadband availability from New Charter. The New York Public Service Commission required similar speed increases as a condition of approval of the Charter-TWC transaction in its decision approving the merger, with conditions, issued in January, 2016.[155] Charter should be required to offer broadband Internet Service with speeds of at least 300 Mbps download to all households with current broadband availability from New Charter in its California network by December 31 2019.[156] On December 31, 2016, and every year thereafter until December 31, 2019, New Charter shall submit a progress report to the Commission and ORA identifying progress made for the increased broadband speeds as set forth

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[155] https://www.governor.ny.gov/news/10th-proposal-governor-cuomo-s-2016-agenda-dramatically-expandand-improve-access-high-speed (accessed 1/10/16). See also, New York State Public Service Commission, Case No. 15-M-0388- Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, *Order Granting Joint Petition Subject to Conditions*, issued January 8, 2016, at Appendix A.

[156] Selwyn Reply Testimony at 94-95, ¶ 85.

above to existing households with broadband availability from New Charter in its California network.

2. Broadband Deployment

The second proposed mitigation measure would expand broadband availability (meaning any customer service order for broadband service can be provisioned/installed within 10 business days) to no less than 98% of households within each census block within the New Charter California franchise and operating service areas by end of year 2019 at speeds of no less than 25 Mbps download and 3 Mbps upload without imposing line extension charges to customers.[157] The Commission should require New Charter to provide the CPUC and ORA, within 60 days of the close of the transaction, an updated spreadsheet listing all census blocks within New Charter's California franchise territory and operating service area with the number of households in each of those census blocks with current broadband availability from New Charter, and an updated number of households in each of those census blocks that currently lack broadband availability from New Charter. The New York Public Service Commission as a condition of approval required network investment expansion (broadband build-out) in the state without New Charter imposing payment of line extension fees on new customers.[158]

It is estimated that New Charter currently provides broadband availability to 95% of households in its service area; therefore the following broadband deployment targets are reasonable and attainable within the specified timeframe:

Broadband Deployment Targets:

Year	% complete of households with Broadband Availability w/in each Census Block
Dec. 31, 2016	-
Dec. 31, 2017	96%
Dec. 31, 2018	97%
Dec. 31, 2019	98%

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[157] *Id.*

[158] State of New York Public Service Commission Charter/TWC Order Granting Joint Petition Subject to Conditions, January 8, 2016, Appendix A at 1-2. http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={DEE1823A-AADD-48D4-94BD-B96BAC096DAA}

As part of this condition, ORA recommends that the Commission adopt the following reporting requirements: On July 1, 2016, and every year thereafter until July 1, 2019, New Charter shall submit a progress report to the Commission and ORA identifying the progress made for deployment of broadband availability and the work completed to meet the interim deployment milestones set forth above. At minimum, the report shall identify the number of households within New Charter's California franchise territory and operating area, by census block, with New Charter Broadband Availability; the number of new households in each of those census blocks with new deployment of broadband availability from New Charter at speeds of no less than 25 Mbps download and 3 Mbps upload. On December 31, 2017, and every year thereafter until December 31, 2019, New Charter shall submit a progress report certifying if it is meeting the percentage of households identified in the deployment milestones set forth above, for each census block in its franchise territory and operating area.

3. Data Caps and Usage-Based Pricing

Under this condition, to help address the lack of competition for high-speed broadband in Southern California, New Charter shall not impose any data caps or usage-based-pricing/billing on its broadband service until the Commission determines that competition of fixed-wireline broadband at speeds no less than 25 Mbps download and 3 Mbps upload is present for at least 80% of households in Southern California (10 counties - San Luis Obispo, Kern, Santa Barbara, San Bernardino, Los Angeles, Ventura, Orange , Riverside, San Diego, Imperial).[159]

4. Unbundling to Customer Premises Equipment

ORA proposes in this condition that New Charter be required to unbundle its Customer Premise Equipment (CPE) for all of its customers, including cable modems and cable set-top boxes, affording customers the choice of buying or renting their equipment and benefitting from competition in the manufacture and retailing of such devices.[160] New Charter shall not pass

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[159] Selwyn Reply Testimony at 88, ¶ 79.

[160] *Id.* at 154, ¶ 135. *See also* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf ORA notes that the FCC has recently adopted measures facilitating customer-ownership of video set-top boxes and New Charter must comply with any FCC requirements regarding customer ownership of set-top boxes.

through the price of CPE (i.e. by increasing prices of voice, broadband, and video services) to consumers who choose to buy or rent their equipment from a third-party vendor.

5. Remove Mandatory Arbitration Clauses and Class Action Waivers

Given the substantial increase in concentration and market power from the Joint Applicants in their core Southern California operating areas that will only exacerbate anti-consumer effects, New Charter shall discontinue the inclusion of mandatory arbitration/class action waiver provisions in its consumer agreements. Within 90 days from the time of close of the transaction, New Charter will provide all of its customers in the form of a separate notice, not a billing insert, detailing the discontinuance of arbitration/class action waiver provisions.[161] The written notice shall be available in multiple languages to New Charter multilingual customers. New Charter shall provide the CPUC and ORA a copy of the customer notice within 90 days from the time of closing of the transaction. In addition, New Charter shall include a letter from one of its officers certifying compliance with this condition.

6. Lifeline

Because Charter is violating Commission rules regarding Lifeline, New Charter should be required to offer LifeLine discounts to all eligible households (in accordance with CPUC Lifeline Rules) within its service territory; not only to the existing TWC service area. Within 60 days from the close of the transaction, and semiannually thereafter, for a period of no less than three years, New Charter should be required to provide to the Commission and ORA detailed plans on how it informs new consumers about LifeLine service and its terms and conditions, including specific information pertaining to the form, quantity, distribution method and content of information. As part of this condition, New Charter should provide the CPUC and ORA counts of new customers signing up for the Lifeline program.[162]

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[161] *Id.* at 161, ¶ 146.

[162] Odell Reply Testimony at 2, 7.

7. Low-Income Broadband

New Charter shall extend its low-income broadband offering program to include all low-income households[163] in California and enroll no less than 45% of eligible households within each census block within the New Charter California franchise area and operating service area within three years from the close of the transaction.

The reporting requirements for the low income broadband program shall be as follows: Beginning on June 30, 2016 and December 31 of , 2016, and every year thereafter until December 31, 2018, New Charter shall submit a progress report to the Commission and ORA identifying the progress made in reaching 45% adoption within each census block or portions thereof within the New Charter California franchise area and operating service area of New Charter's low-income broadband offering program.

8. Reporting of Service Quality Metrics for Voice Services

For a period of three years, commencing 60 days from the close of the transaction, New Charter shall report to the Commission and ORA, on a quarterly basis, on the following service quality metrics for New Charter voice services in California, including VoIP services, consistent with the reports under G.O. 133 (C) (or subsequent updated rules. Within one year from the close of the transaction, and for subsequent years thereafter, New Charter will meet all service quality standards of G.O. 133 (C) (or subsequent updated rules) for VoIP services (or equivalent voice service):

a. Installation Intervals (5 business days)

b. Installation Commitment (95% of commitments met)

c. Customer Trouble Report (less than 6 per 100 working lines)

d. Out of Service Report (90% within 24 hours)

e. Answer Time (80% of calls in less than 60 seconds)[164]

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[163] The Commission should adopt the eligibility requirements for its LifeLine program to the low-income broadband program.

[164] *See* Gallardo Reply Testimony at 1-27 to 1-34.

9. Reduction of Broadband and Voice Outages

In order to improve service quality for broadband and voice services, within two years from the time of close of the transaction, New Charter shall decrease the quantity and severity (as measured by duration and number of customers affected) of voice and broadband service outages and for a period of no less than three years provide the Commission and ORA, beginning June 30, 2016, with semiannual reports containing monthly service reliability data and outage information. The report shall include the following data elements:

i. Service Type (VoIP, Broadband, or Both VoIP and Broadband)

ii. Number of customers affected

iii. Number of residential customers affected

iv. Number of Small Business customers affected

iv. Number of Large Business customers affected

v. Outage Start Date and Time

vi. Service Restoration Date and Time

vii. Duration of outage in total minutes

Ix Location of outage

x. Description of the Cause

xi. Description of the Root Cause

xii. Description of the Incident

xiii. Description of the equipment that failed (if any) and location within the network that was impacted

xiv. Methods used to restore the outage (Resolution Method)

xv. Steps taken to prevent the outage from re-occurring

In addition, New Charter shall provide a copy of FCC NORS reports for New Charter's California VoIP services to the Commission and ORA within three business days after such filing with the FCC.[165]

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[165] Clark Reply Testimony at III-17 to III-23; Gallardo Reply Testimony at 2-3, 1-12 to 1-24.

10. Customer Satisfaction Survey

To address concerns with low JD Powers customer satisfaction ratings and high numbers of consumer complaints, no later than 180 days from the closing of the transaction, New Charter, in consultation with ORA should select and retain an independent expert Survey Consultant (Survey Consultant). This Survey Consultant will not have previously provided any services or contract work with Charter, TWC, or Bright House in California and shall act independently to develop the survey design and survey questions for a multi-lingual customer satisfaction survey in the New Charter California service area. The Survey Consultant should solicit input from stakeholders, including Commission staff, New Charter, ORA and other consumer groups in jointly held meetings facilitated by the Survey Consultant. The survey design and questions must be finalized no later than nine months from the closing of the Transaction. The survey design must include customers identified as having limited English proficiency, and must include some customers who speak at least the top three languages spoken in New Charter service territory. The survey must measure customer satisfaction for broadband and voice services (including VoIP), and the effectiveness of efforts to educate customers on the limitations of VoIP during power outages and the necessity for maintaining battery back-up. New Charter shall cooperate with all reasonable requests from the Survey Consultant, including supplying the Survey Consultant on a monthly basis the list of existing customers, closed and/or completed installation orders, and closed/completed trouble report tickets from which the Survey Consultant will generate its survey sample. The Survey Consultant shall solicit input, through meetings with Commission staff, New Charter, and ORA to design the structure and content of its reports containing the survey results on an ongoing basis. The surveys will commence 12 months from the closing of the transaction and will continue for two years. The Survey Consultant shall issue a survey Report to Commission staff, New Charter, ORA and other groups that participated in the planning process containing the results of the survey every quarter. The final report shall be submitted 24 months from the commencement of the surveys.[166]

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[166] Clark Reply Testimony at III-3 to III-6, III-23; Gallardo Reply Testimony at 1-5 to 1-11, 5-6, 1-38 to 1-47.

11. Consumer Education for Battery Backup Systems

New Charter will comply with the guidelines for customer education programs regarding customer backup power systems adopted by this Commission in Decision (D.) 10-0I-026. This customer education program will be made available in multiple language versions as well as in accessible formats for visually impaired customers. New Charter shall work with staff of the Commission's Communications Division to develop the form and language of such notices. The customer education will be communicated to all customers of New Charter no later than 180 days following the effective date of the transaction and annually thereafter.[167]

12. Enforcement of Conditions

In order to ensure that any conditions the Commission approves are meaningful, the Commission should adopt an enforcement condition to ensure that the mitigations measures are in fact followed. ORA proposes the following General Enforcement Language: "Commission staff and ORA have the authority to audit and verify New Charter's compliance with all conditions set forth herein. New Charter must provide all data necessary and requested by the Commission and ORA to conduct the audit and verification. If New Charter fails to perform and comply with the set forth conditions, the Commission will pursue appropriate enforcement remedies, including the imposition of fines."

VI. CONCLUSION

For the aforementioned reasons, the Commission should deny the proposed merger. The Joint Applicants have not met their burden of proof and have not demonstrated that approval of the transaction would result in merger-specific benefits.

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[167] Gallardo Reply Testimony at 2-4 to 2-5.

However, if the Commission elects to approve the proposed transaction, then it should, at a minimum, adopt the mitigation measures that ORA proposed.

Respectfully submitted,

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