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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Application of Bandwidth.com CLEC, LLC (U-7038-C) For Approval to Transfer Control of Bandwidth.com CLEC, LLC to David A. Morken Pursuant to California Public Utilities Code Section 854(a)	A.17-09-007 (Filed September 13, 2017)

NOTICE OF EX PARTE COMMUNICATIONS

Pursuant to Rule 8.4 of the Commission's Rule of Practice and Procedure, Bandwidth.com CLEC, LLC (U-7038-C) ("Bandwidth CLEC"), David A. Morken, and Bandwidth Inc. (collectively, "Applicants") hereby provide notice that John Murdock, President, Bandwidth Inc., Greg Rogers, Deputy General Counsel, Bandwidth Inc. and Margaret Tobias, outside counsel, met with the following on Thursday, July 5, 2018 (a) John Reynolds, Advisor to Commissioner Peterman at approximately 1:30 pm; (b) Elizabeth Podolinsky, Advisor to President Picker at approximately 2:00 pm; and (c) Simi George, Advisor to Commissioner Rechtschaffen at approximately 3:30 pm. These meetings were initiated by the Applicants and were held at the Commission, 505 Van Ness Avenue, San Francisco, California. Applicants provided each advisor listed above with a copy of the Applicant's comments on the Proposed Decision, attached hereto.

During each meeting the Bandwidth Representatives stated that the purpose of the meeting was to discuss the Proposed Decision issued in the above-captioned proceeding as it does not address the proposed transfer, and instead, would erroneously revoke Bandwidth CLEC's CPCN. Mr. Rogers provided background on Bandwidth CLEC's operations, including a description of its corporate structure being similar to other CLECs in the industry. Mr. Murdock described

Bandwidth CLEC's current operations and explained that the Commission adopting the Proposed Decision would adversely affect customers as it threatens to interrupt their services in California. The Bandwidth Representatives described the various ways the Proposed Decision errs and emphasized that revocation of Bandwidth CLEC's CPCN was disproportionate to the alleged violations, even if they could be deemed accurate. The Bandwidth Representatives explained that Bandwidth CLEC not installing officers in 2007 when it was formed was and continues to be consistent with applicable law, and that Bandwidth CLEC did install officers and a director to address the concerns of the assigned Administrative Law Judge.

The Bandwidth Representatives requested that the Commission modify the Proposed Decision to incorporate the Findings of Fact and Conclusions of Law included in Applicants' Comments on the Proposed Decision. If the Proposed Decision cannot be promptly modified, then Bandwidth Representatives stated they would like the Commission to hold the Proposed Decision from being voted out on July 26, 2018. Bandwidth Representatives also stated that if the Proposed Decision is not modified, they would like to have an Alternate Decision issued. Finally, Bandwidth Representatives stated that in light of the proposed CPCN revocation in the Proposed Decision that they may seek follow-up meetings.

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Dated at San Francisco, CA, this 10th day of July, 2018.

Respectfully submitted,

/s/ Margaret L. Tobias

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COMMENTS ON PROPOSED DECISION

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July 3, 2018

Summary of Recommendations

- The Proposed Decision should be modified to incorporate the findings of fact, conclusions of law, and ordering paragraphs attached to these comments.
- If the Proposed Decision is not timely revised, then Applicants respectfully request that it not be voted on at the July 26, 2018 meeting.

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Pursuant to the Commission's Rules of Practice and Procedure ("Rules"), Bandwidth.com CLEC, LLC (U-7038-C) ("Bandwidth CLEC"), David A. Morken, and Bandwidth Inc. (collectively, "Applicants") timely submit these comments in response to the Proposed Decision of the Administrative Law Judge, dated June 20, 2018 ("Proposed Decision" or "PD).

I. Introduction.

This proceeding concerns an uncontested, non-complex, indirect transfer of control request that has been approved by the Federal Communications Commission ("FCC")[1] and all other states with jurisdiction over the transfer[2] – 16 in total.[3] Yet, the PD includes critical, substantive and procedural errors that would result in legal error and could have unexpected and severe ramifications for Applicants and their California customers if adopted. Contrary to the last ruling issued in this proceeding,[4] the PD reverses course and now proposes revoking the certificate of public convenience and necessity ("CPCN") of Bandwidth CLEC. Even more problematic, this proceeding concerns a transfer of control request, and the Commission cannot lawfully address issues related to Bandwidth's CPCN as set forth in the PD.

Bandwidth Inc. is and has always been the parent company of Bandwidth CLEC (the CPCN-holder). Mr. Morken, as the founding CEO, is and always has been the CEO of Bandwidth Inc. Bandwidth Inc. is not acquiring Bandwidth CLEC; nor is Mr. Morken. Bandwidth CLEC is not seeking approval to transfer its CPCN to its parent company or to Mr. Morken; nor has it transferred its CPCN in the past. The transfer of control pending before the Commission is thus

[1] Public Notice International Authorizations Granted, File Nos. ITC-T/C-20170905-00149, ITC-T/C-20170905-00150, DA 17-1003 (rel. Oct. 12, 2017); Public Notice of Domestic Section 214 Authorization Granted, WC Docket No. 17-230, DA 17-1014 (rel. Oct. 16, 2017).

[2] The last of the state approvals, from the state of Hawaii, was obtained on March 16, 2018. No protests to any of the FCC and state applications have been filed by any entity in any forum.

[3] *See e.g.*, Colorado Public Utilities Commission, Docket No. 17A-0618T, rel. Oct. 27, 2017; Georgia Public Service Commission, Docket No. 24850, rel. Oct. 18, 2017; Hawaii Public Utilities Commission, Docket No. 2017-0231, rel. Mar. 16, 2018; Indiana Utilities Regulatory Commission, CSP Tracking No. 1709-6, rel. Oct. 19, 2017; Louisiana Public Service Commission, Docket No. S-34664, rel. Oct. 10, 2017; Maryland Public Service Commission, ML #216806, rel. Jan. 10, 2018; Minnesota Public Utilities Commission, Docket No. 17-678, rel. Nov. 11, 2017; Mississippi Public Service Commission, Docket No. 2017-UA-144, rel. Nov. 7, 2017; New Jersey Board of Public Utilities, Docket No. TM17090971, rel. Dec. 1, 2017; New York Public Service Commission, Matter No. 17-01918, rel. Dec. 6, 2017; Ohio Public Utilities Commission, Case No. 17-1974-TP-CIO, rel. Sept. 12, 2017; Pennsylvania Public Utilities Commission, Docket No. A-2017-2623798, rel. Oct. 31, 2017; Texas Public Utilities Commission, Docket No. 47631, rel. Oct. 23, 2017; Utah Public Service Commission, Docket No. 17-2494-01, rel. Nov. 16, 2017; Virginia State Corporation Commission, Case No. PUR-2017-00124, rel. Nov. 13, 2017; West Virginia Public Service Commission, Case No. 17-1292-T-PC, rel. Oct. 31, 2017.

[4] *See* Administrative Law Judge Ruling, at 2-3, (April 13, 2018) ("April Ruling").

limited in scope as it strictly concerns David Morken gaining more than 50% voting control of the parent Bandwidth Inc., and in the logistics of doing so, he would indirectly gain control of Bandwidth CLEC. The PD errs by failing to evaluate the foregoing pending transfer of control before it, and instead creates an issue that lies outside the scope of this proceeding and which, in any event, prior Commission decisions have nevertheless decided in favor of the Applicants. Specifically, and as just one example, in an application in which the to-be-CPCN holder did not submit any information to demonstrate its own qualifications, the Commission inferred that the applicant would rely on its parent company's management and technical qualifications and approved the application.[5]

The Proposed Decision also contains numerous errors in its findings of fact that lead to several inaccurate conclusions of law. The PD's denial of the proposed transfer of control is derived from an erroneous belief that Bandwidth CLEC misrepresented its qualifications over a decade ago during the original licensing proceeding ("2007 CPCN Proceeding"). Not only is there no support for this erroneous belief, it concerns a matter that is outside the scope of this proceeding. The record demonstrates that Bandwidth CLEC accurately represented its qualifications in the 2007 CPCN proceeding. In response to the Assigned Administrative Law Judge's Order to Show Cause,[6] Applicants acknowledged that with the benefit of hindsight, the CPCN application could have been more clear in stating that Bandwidth CLEC would rely on the managerial resources of its parent company – despite the fact that the parent company was fully disclosed in the original application.

As part of a Section 854(a) review,[7] the Commission should consider whether the proposed transfer of control is in the public interest, and yet, the Proposed Decision fails to address this issue. Instead, it proposes not only denying the Application, but also revoking the CPCN of Bandwidth CLEC, who has been operating for years without incident, due to a purported technical violation that has been remedied. Denying the Application and revoking the CPCN of an active, compliant CLEC would be an unlawful, erroneous result and adverse to the public interest.

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[5] *Application for Expedited Approval of the Transfer of Assets and Certificate of Public Convenience Necessity of Seren Innovations, Inc. (U-6184-C) to WaveDivision Holdings, LLC.*, A. 05-07-008, Decision 05-10-039 at 3 (hereafter "Decision 05-10-039").

[6] Administrative Law Judge's Order to Show Cause and Ruling Requiring the Joint Applicants to Amend the Application, (Jan. 31, 2018).

[7] All Section references are to the California Public Utilities Code, unless stated otherwise.

Even assuming the proposed findings in the PD were correct (which they are not), Bandwidth CLEC has not harmed any customer or competitor, nor gained any advantage or benefit. Removing Bandwidth CLEC from the marketplace in California as proposed by the PD would cause substantial harm to its customers and to the competitive market in general, thereby harming the public interest. The Commission would be interfering with the competitive telecommunications marketplace, and singling out one competitor, while allowing others that are similarly situated to continue to operate. Moreover, Bandwidth CLEC took prompt action to install officers and a sole director of Bandwidth CLEC who are now managing Bandwidth CLEC and have resolved the issue identified by Assigned Administrative Law Judge ("ALJ").

Applicants therefore respectfully request that the Commission modify the PD to incorporate the findings of fact, conclusions of law, and ordering paragraphs attached to these comments, and issue a decision that expeditiously approves the pending transfer of control. If a modified proposed decision approving the transaction is not promptly issued, Applicants respectfully request that the PD not be voted on at the July 26, 2018, meeting to allow time for further consideration.

II. Bandwidth CLEC and the Proposed Transfer of Control.

The record in this proceeding shows that Bandwidth CLEC operates nationwide, including in California, as a provider of telecommunications services. Since obtaining Commission approval for its CPCN, Bandwidth CLEC has "operated [in California] without incident." PD at 19. Bandwidth CLEC has a proven track record of over a decade demonstrating its managerial and technical expertise to operate in compliance with applicable rules and regulations, not just in California, but nationwide.

Bandwidth CLEC is a limited liability company ("LLC"), and unlike corporations, entities formed as LLCs are not required to have officers and directors. Instead, LLC entities generally designate manager(s) who are authorized to transact business on behalf of the LLC (*i.e.* sign contracts and other documents, just like an officer of a corporation). Since the Commission's rules do not expressly require CPCN-applicants that are formed as LLCs to install officers and directors in addition to having a Manager, Bandwidth CLEC did not then install officers and directors. Similarly, since the Commission's rules do not expressly require CPCN applicants that are formed as LLCs to have a natural person (as compared to another corporate entity) be designated as a Manger, Bandwidth CLEC's parent company was designated as its Manager. *See* Applicants' November 1, 2018 Response ("November Response") at 3; Applicants' Response to Order to Show Cause at 6, 10-11 ("February Response"); March 30, 2018 Status Conference, Tr. at 10-12.

During the 2007 CPCN Proceeding, Bandwidth CLEC noted that it was relying on its parent company's qualifications when it submitted the financial information about the parent company as a sealed exhibit to its application. February Response at 4. While with the benefit of hindsight, as the Applicants conciliatorily acknowledged, Bandwidth CLEC's CPCN application could have been more clear in stating that the bios that were provided as an exhibit to the application were those of officers of its parent company. *See* February Response at 6.

The record reflects that Bandwidth CLEC has been operating continuously as a fully compliant competitive carrier in California in the same corporate structure as originally represented in its CPCN application. Bandwidth CLEC filed tariffs, obtained numerous interconnection agreements, established interconnection with incumbent local exchange carriers ("ILECs"), exchanged local traffic with ILECs, billed and paid intercarrier compensation for the traffic exchanged, obtained numbering resources, filed applicable compliance reports regularly to the Commission and is otherwise operating as a telecommunications carrier.[8] PD at 9; November Response at 2; February Response at 8, 15-16, Exhibit 1. And while Bandwidth Inc., the managing member parent company, may in fact control Bandwidth CLEC, nothing in the record would support the Commission finding that the managing member, and not the licensed company, is providing the telecommunications services, as the PD inaccurately concludes. PD at 13.

It is confounding to the Applicants, as to why they would now – given the nature of the request in juxtaposition to the extreme and negative consequences of the PD – be singled out when the Commission has routinely approved numerous other CPCN applications and transfer of control applications for other entities that operate in the same or a very similar manner. *See* February Response at 11-14. Like many other competitive carriers in California and nationwide, Bandwidth CLEC, the regulated entity granted a CPCN by the Commission, is a subsidiary within a family-of-companies. Its parent company, Bandwidth Inc., provides management and other services to the CPCN-holder. Nothing in the record identifies any statutory or regulatory requirement prohibiting the corporate structure Applicants have put in place. To the contrary, as discussed in the record of the proceeding, and below, the Commission routinely approves of CLEC CPCN-holders being part of a corporate structure or family of companies where affiliated entities provide management, employees and support services to the CLEC. *Id.*

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[8] *See e.g.*, Resolution T-17153 (approving interconnection agreement between AT&T California and Bandwidth CLEC) (May 29, 2008); Bandwidth CLEC Advice Letter Nos. 1 and 3 (tariffs).

III. The PD's Section 854(a) analysis is neither complete, accurate nor otherwise reasonable.

In reviewing transfer of control applications under Section 854(a), the Commission considers whether the proposed transfer is in the public interest. Decision 17-11-026 at 7 (citing San Jose Water Co. (1916) 10 CRC 56)). To make that determination, the Commission will look to the relevant facts of the given application, and then make a case-by-case determination. The PD errs in at least three ways with respect to the Section 854 review. First, the PD errs by finding that a "transfer of authority" occurred between the parent company (Bandwidth Inc.) and the CLEC subsidiary (Bandwidth CLEC). Second, the Proposed Decision fails to include any specific findings or analysis as to the public interest in the context of the proposed transfer of control described in the Application.[9] Third, and closely related, the PD fails to make findings of fact and conclusions of law on issues based on the record that are material to a Section 854 review.

A. The PD should be revised to address the proposed "transfer of control," and not a "transfer of authority."

Bandwidth CLEC has always been a subsidiary of Bandwidth Inc., and this corporate structure was disclosed in Bandwidth CLEC's CPCN application. As such, the Commission cannot undertake a Section 854 as to these two entities since there is no merger, acquisition or change of control taking place that the Commission has not already approved. The Proposed Decision, nonetheless, suggests that a parent company's operational and managerial control of a CLEC subsidiary "is a *transfer of authority* under Pub. Util. Code § 854(a)." PD at 10, *emphasis added*. Yet a "transfer of authority," is a distinct type of transaction, and not the transfer of control transaction Applicants have proposed. The former concerns the transfer of a CPCN (and possibly customers and assets) from one entity to another; whereas a transfer of control request concerns a change in either direct or corporate ownership of a CPCN-holder (*i.e.* a merger, an acquisition a change in stock ownership). Significantly, while the PD suggests a transfer of authority took place, (PD at 10) the cases cited in the Proposed Decision do not address an applicant seeking to transfer a CPCN (*i.e*. "transfer of authority").[10] Just as important, Applicants are not seeking approval for a "transfer of authority" and there is no legal or factual basis for the PD making findings about a transfer of authority.

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[9] The PD does reference a public interest determination in the context of the Commission issuing fines, but this is a separate public interest review, and not specific to Section 854(a).

[10] Notably, the decisions cited in the PD address the type of change of control pending in this proceeding – namely, a change of ownership in an entity that either directly or indirectly controls the CPCN-holder.

Substantively, there is nothing improper with Bandwidth Inc. providing management and technical support to Bandwidth CLEC. The Commission has either directly or indirectly approved of CLEC CPCN-holders, as well as other public utilities, having management, technical support and other services being provided by affiliated entities.[11] In 2005, for example, in a decision, just two years before the Commission granted Bandwidth CLEC a CPCN, the Commission approved a newly formed limited liability company ("LLC") purchasing the assets of an existing CPCN-holder even though the new company "did not submit an exhibit of its own to demonstrate technical and managerial qualifications, but [ ] apparently relie[d] upon the qualifications" of its parent company. Decision 05-10-039 at 3. In approving the application, the Commission "infer[red]" that the newly formed LLC would rely upon the same management and technical expertise that its parent company provided in the given application.[12] *Id.* at 4. This decision is on point for two primary reasons. Most notably, the Commission is clear that an LLC CPCN applicant may rely on the management qualifications of its parent company for purposes of satisfying applicable CPCN requirements – which is exactly what Bandwidth CLEC has done here. Second, it is yet another example of the Commission's routine approval of a LLC CPCN-holder and parent company corporate structure.

More recently, the Staff Report underlying the Order Instituting Investigation concerning Comcast Phone of California, LLC, a regulated CLEC, reflects that it shared officers, a principal place of business and employees with its unregulated affiliate Comcast IP. OII, I.13-10-003 (Sept. 25, 2013),[13] Appendix A at 5-7. The arrangement between Comcast Phone (the CPCN-holder) and Comcast IP did not appear to be in dispute or at issue in that Investigation. Additionally, the

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[11] February Response at 11-14. In this response, Applicants refer to the following decisions and corresponding applications as examples: Decision 16-04-008, Decision 17-11-026 and Decision 14-12-049. Applicants inadvertently cited Decision 16-8-004 in its February response in lieu of Decision 16-04-008.

[12] The Commission stated, "In recognition of Astound's wholly-owned subsidiary relationship to Wave and its very recent creation, *we infer that Astound will rely upon the same management and technical expertise in providing the services encompassed by its application* after the proposed transfer." *See* Decision 05-10-039 at 4, *emphasis* added. Also, Decision 05-10-039, Finding of Fact No. 7 states in full, "Astound, through its parent, Wave, satisfies the Commission's requirement for managerial and technical expertise to provide the service."

[13] Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, California Public Utilities Division Safety and Enforcement Division Staff Report http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M078/K432/78432338.pdf.

Commission did not consider as part of the Investigation or since then whether a "transfer of authority" took place between the Comcast affiliated entities.[14]

Further, there as here, the regulated LEC provides wholesale services that enabled its unregulated affiliate to offer VoIP services that interconnect with the public switched telephone network and the regulated LEC stipulated to the jurisdiction of the Commission over it. Comcast Order at 16. In approving the settlement in that Investigation, the Commission refers to the Comcast entities jointly as "Comcast" and finds that the settlement is consistent with law and in the public interest. Decision 15-09-009, at 1, 10. In sum, the Comcast case establishes that a regulated CPCN holder may rely on employees and management of its unregulated affiliates and still be deemed the entity that provides telecommunications services subject to a CPCN granted by the Commission's jurisdiction.

In light of the long history of Commission decisions approving corporate structures similar to that of the Applicants and approving of CLECs relying on the resources of parent and affiliate companies, the PD must be revised accordingly.

B. The pending transfer of control is the public interest.

The PD fails to address and make any findings as to whether the proposed transfer that is detailed in the Application is in the public interest. Applicants submit that through their Application and other supplemental filings, the record shows that the proposed transfer is in the public interest. *See* Application at 8.

Moreover, Applicants submit that even under the PD, the Commission should find that the proposed transfer is in the public interest and that the Commission denying the Application would be harmful and adverse to the public interest. Even assuming solely for argument sake that Bandwidth Inc. providing management to Bandwidth CLEC was somehow improper (which it is not), the Commission must nonetheless consider the record as a whole and find that the proposed transfer satisfies Section 854(a) and the public interest standard. Specifically, there has been no harm to consumers since Bandwidth CLEC commenced operations. Indeed, having Bandwidth CLEC operating in California has provided an additional competitive option. As such, Bandwidth CLEC has enhanced competition in California.

As discussed herein, Bandwidth CLEC has operated without incident and has been adhering to applicable Commission rules. Further, the Commission must take into consideration that

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[14] *See* Decision 15-09-009, Decision Approving Settlement Regarding Unauthorized Disclosure and Publication of Unlisted Telephone Numbers (Sept. 17, 2015).

Bandwidth CLEC's CPCN application did include information about its parent company and who would be included on the management team. *See* February Response at 6-7. Again, in hindsight that presentation could have been more clear, and Bandwidth CLEC regrets that there was any confusion caused by an inadvertent lack of specificity. Importantly, once the issue was raised in this proceeding, Bandwidth proposed remedying the issue by promptly installed officers and directors – just as it would have done had the issue been identified in the CPCN application proceeding.

A fair and reasonable reading of the whole record in this proceeding weighs in favor of the Commission finding that the proposed transfer is in the public interest and will not harm or be adverse to the public interest. Accordingly, the Commission should revise the PD to grant the Application.

C. The PD lacks findings of fact and conclusions of law on all issues material to the Commission reviewing the Application pursuant to Section 854(a).

Section 1705 requires the Commission to adopt decisions that "contain, separately stated, findings of fact and conclusions of law . . . on all issues material to the order or decision."[15] Additionally, a court will overturn Commission decisions that are not supported by the findings in the record and are not supported by substantial evidence in light of the whole record.[16] While the PD

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[15] Section 1705 in relevant part states, "Except for decisions filed after hearings held under Section 1702.1, the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."

[16] Section 1757(a) states: (a) No new or additional evidence shall be introduced upon review by the court. In a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following occurred:

(1) The commission acted without, or in excess of, its powers or jurisdiction.

(2) The commission has not proceeded in the manner required by law.

(3) The decision of the commission is not supported by the findings.

(4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.

(5) The order or decision of the commission was procured by fraud or was an abuse of discretion.

(6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(b) Nothing in this section shall be construed to permit the court to hold a trial de novo, to take evidence other than as specified by the California Rules of Court, or to exercise its independent judgment on the evidence.

(c) Notwithstanding subdivision (a), the standard of review in this section shall not apply to ratemaking or licensing decisions of specific application addressed solely to water corporations.

includes several incorrect findings of fact unrelated to whether the proposed indirect transfer of control is in the public interest, it also fails to include findings relevant to the Commission reviewing and approving the Application.

For example, as explained above in Section II (Bandwidth CLEC and Proposed Transfer of Control) and as Applicants explained in the record, Delaware law (which governs the corporate organization of Bandwidth CLEC) permits a limited liability company such as Bandwidth CLEC to operate without officers of its own and to rely on the managing member entity. February Response at 10. These facts are relevant and material to the Commission reviewing the Application as they demonstrate that Applicants are in good standing and have been complying with applicable law.

As additionally detailed in Section II above, the record reflects that Bandwidth has been operating successfully as a telecommunications carrier in California and the PD must include those findings from the record. These facts are relevant and critical in refuting the PD's erroneous finding that Bandwidth Inc. has been providing telecommunications service.

Further, the Proposed Decision suggests that Bandwidth Inc. sought to avoid direct Commission jurisdiction throughout the course of this proceeding. That is simply not the case. While Applicants did state that Bandwidth Inc.'s (*i.e.* parent company) VoIP services are not subject to the Commission's jurisdiction (which the Proposed Decision acknowledges at page 7), Applicants also acknowledged that Bandwidth Inc. is subject to the reasonable and lawful exercise of the Commission's jurisdiction with respect to parent companies of public utilities. Bandwidth Response, dated April 19, 2018, at 5, n. 4 ("April Response") March 30, 2018 Status Conference, Tr. at 12:16-23. This is materially important information since it again demonstrates that Applicants are not avoiding or seeking to avoid Commission jurisdiction, but rather, are complying with applicable law.

When all the relevant facts are considered, the record demonstrates that Bandwidth CLEC (and not its parent company) has been operating as the provider of telecommunications services for years and that the transfer of control is in the public interest.

IV. The PD commits legal error by addressing issues that are not within the scope of the proceeding.

The PD commits legal error because it addresses issues that are not within the scope of the proceeding. Both Section 854(a) and the Scoping Memo limit the issues that the Commission will consider when evaluating the proposed transfer of control. The Scoping Memo identifies two issues to be resolved concerning whether the Applicants satisfied the requirements of Section 854 and Rule 3.6 (the Commission rule for Transfers and Acquisitions).[17] The issue that the Commission must consider here is whether David A. Morken gaining more than 50% voting control of Bandwidth Inc., and thereby gaining indirect control of Bandwidth CLEC, is in the public interest. Since Mr. Morken is the co-founder of both companies, the proposed transaction is one of the least complicated and most straight-forward types of change of control transactions that the Commission evaluates. Nonetheless, the PD fails to substantively address this issue, and instead addresses other matters that are not within the scope of the proceeding – namely, unsupported allegations related to the proposed revocation of Bandwidth CLEC's CPCN and the imposition of a fine on Bandwidth CLEC and Bandwidth Inc.

The Commission cannot adopt a decision that addresses subjects outside the statutory scheme or the Scoping Memo. *Southern California Edison v. Pub. Util. Comm'n*, 140 Cal.App.4th 1085, 1106 (2006). Where the Commission has "violated its own rules *by considering [a] new issue*," it "fail[s] to proceed in the manner required by law." *Id., emphasis* added. Nor can the PD rely on the improper expansion of the proceeding by an assigned ALJ — as such action would constitute a failure to "proceed[] in the manner required by law." Section 1757(a)(2). An administrative law judge cannot expand a proceeding by issuing an order to show cause on issues unrelated to the relief requested in the Application. Specifically, Section 311(b) states that "administrative law judges may administer oaths, examine witnesses, issue subpoenas, and receive evidence, under rules that the commission adopts." Further, the Assigned Commissioner is charged with issuing a Scoping Memo which identifies the issues that will be determined in a given proceeding.[18] Section 1701.1(b)(1); Rule 7.3.

In short, the Commission may not investigate or otherwise make determinations concerning allegations about Bandwidth CLEC's CPCN application, which was processed and approved

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[17] The Scoping Memo identified two issues: "1. Does the Application meet all Commission requirements such that the Commission should grant authorization to transfer control of Bandwidth CLEC from Bandwidth CLEC to Bandwidth, including compliance with Pub. Util. Code § 854 and Rule 3.6? 2. Does the Application meet all Commission requirements such that the Commission should grant authorization to transfer control of Bandwidth CLEC from Bandwidth to David A. Morken, including compliance with Pub. Util. Code § 854 and Rule 3.6?" The Scoping Memo went on to state, "There appear to be no safety issues associated with the transfer of authority in this proceeding." Scoping Memo and Ruling of Assigned Commissioner at 2, (Nov. 17, 2017).

[18] Section 1701.1(b)(1) states in relevant part, "The assigned commissioner shall schedule a prehearing conference and shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable timetable for resolution." Rule 7.3 states in relevant part, "The assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed."

almost eleven years ago, since those issues are not identified in the Scoping Memo and not part of the Section 854(a) review. Adopting the procedurally improper PD would be an "abuse of discretion" by the Commission and a failure to "proceed[] in the manner required by law." Sections 1757(a)(2), 1757(a)(4).

V. The PD includes findings and conclusions that are arbitrary and capricious.

As described herein, the PD is "arbitrary and capricious." If adopted by the Commission, it would constitute an "abuse of discretion" and a violation of Section 1757(a)(5).[19] Relying in substantial part on the incorrect Findings of Fact, the PD reaches several erroneous findings and conclusions. The PD is arbitrary and capricious in that it adopts findings and conclusions of law without sufficient record evidence. Specifically, the record does not support the PD concluding that Bandwidth CLEC failed to meet the Commission's CPCN requirements and that its CPCN should be revoked (draft Conclusion of Law No. 9 and Ordering Paragraph No. 2), that Bandwidth CLEC violated Section 854(a) and the imposition of a corresponding fine on both Bandwidth CLEC and Bandwidth Inc. (draft Conclusion of Law No. 5 and Ordering Paragraph No. 2), or that Bandwidth CLEC violated Rule 1.1 (draft Conclusion of Law No. 6).

First and foremost, the proposed revocation of Bandwidth CLEC's CPCN contradicts the guidance and directives set forth in the April Ruling. While Applicants do not agree with the allegations in the April Ruling concerning lack of disclosure in the 2007 CPCN Proceeding,[20] the April Ruling directed Bandwidth CLEC to install officers and directors and required "it to operate its telecommunications services directly, rather than through Bandwidth.com Incorporated." April Ruling at 1. As such, the April Ruling made clear that Bandwidth CLEC is allowed to operate as a certificated telecommunications carrier. It is therefore arbitrary and capricious for the PD to now propose revoking Bandwidth CLEC's CPCN when Applicants complied with the April Ruling's directive.[21]

Second, the record establishes that Bandwidth CLEC's 2007 CPCN Application was *sufficiently explicit* as to Bandwidth CLEC's corporate structure. Bandwidth CLEC demonstrated its

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[19] *Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421 (2003) (if agency interpretation of a law or regulation is "arbitrary and capricious," that action constitutes an abuse of discretion).

[20] To be clear, Applicants have and continue to contest that Bandwidth CLEC misrepresented its managerial qualifications in its CPCN application and annual filings, as well as the corresponding allegation of a rule 1 violation.

[21] Even if there were a record to revoke a CPCN (which there is not in this proceeding), it would be arbitrary and capricious for the Commission to make any revocation effective on the date it adopts such decision as that would almost certainly result in service disruptions to customers, among other adverse consequences. *See* PD, Ordering Paragraph No. 2.

managerial qualifications to provide telecommunications services by describing its management team, which included Mr. Morken and several other officers and directors of its parent and managing member, Bandwidth Inc. February Response at 6-7. The assigned administrative law judge in the CPCN application (CPCN ALJ) proceeding did not request any supplemental information about the CPCN Application and approved the application as presented. As a matter of precedent, and identical to Applicant's LLC-parent structure here (which is the same as the original 2007 CPCN application), in 2005 the Commission granted a CPCN to a then-newly formed LLC that relied on its parent company's managerial and technical qualifications to satisfy CPCN requirements.[22] As such, the Commission is now precluded from retroactively re-evaluating Bandwidth CLEC's CPCN application in this proceeding, or otherwise. Even if it could address this issue in this proceeding (which it cannot), the PD is arbitrary and capricious in adopting conclusions of law about the adequacy of the CPCN application, including without limitation, Bandwidth CLEC's candor, or allegation of lack thereof.

Third, the PD suggests that the 2007 application would have been denied because of the reliance on the parent company's officers. PD at 14-15. There is neither factual or legal support for this finding. The PD's reliance on Decision 95-12-056 and Decision 13-05-035 (PD at 15) is misplaced. While it is true that Commission precedent requires an applicant to identify its managerial qualifications to operate a competitive carrier, as Decision 05-10-039 shows, there is no requirement that the qualification must come from the applicant itself, and not the resources of a manager. In addition, last year the Commission approved the request for indirect transfer of control of Astound Broadband, LLC ("Astound"), a certificated CLEC (and a wholly-owned indirect subsidiary of Wave Holdco). That application stated that upon approval, Patriot Media Consulting, LLC, would assume managerial control of Astound. In other words, Astound would be managed by a third party rather than its officers and directors. Decision 17-11-026, p. 3. See April Response at 13.

The PD applies an overly narrow and strict application of the requirements in Decision 95-12-056, in contravention to decisions granting CPCN and transfer of control applications interpreting such requirements. Decision 95-12-056 does not expressly require a CPCN-applicant to identify "its" directors and offices but requires an applicant to "possess the requisite managerial qualifications, financial resources, and technical competence to provide local exchange telecommunications services." Decision 95-12-056, Appendix C, Rule 4A. As discussed at the March 30,

[22] *See* Decision 05-10-039.

2018 status conference, the Commission has permitted other CPCN-applicants to make this showing by relying on the resources of an affiliated company. And as noted above, the Commission very recently acknowledged in the Comcast and Astound Cases that CPCN-holders may be managed by and share resources with affiliated entities. Moreover, even if Decision 13-05-035 or a later decision were to include a more explicit requirement, it would be arbitrary and capricious for the PD to rely, even in part, on a decision issued after 2007 to retroactively evaluate a CPCN application granted by the Commission in 2007.

Fourth, and closely related, the PD arbitrarily and capriciously finds that Bandwidth failed to exercise its CPCN on the mistaken grounds that Bandwidth Inc., rather than Bandwidth CLEC was offering the regulated services. The PD uses this alleged "expiration" as the basis to declare that the CPCN is revoked effective with the adopting of the decision. As discussed herein, a review of the entire record demonstrates that Bandwidth CLEC has been operating for years in compliance with the Commission's rules and regulations. Adopting a finding or conclusion of law otherwise would be arbitrary and capricious. Finally, the PD is arbitrary and capricious in suggesting that Bandwidth CLEC violated Section 854 and that both Bandwidth CLEC and Bandwidth Inc. should be fined. As discussed above, the 2007 CPCN application disclosed that Bandwidth Inc. is the parent company, and thereby, has control of Bandwidth CLEC. As such, the PD alleging a violation of Section 854 and imposing a penalty is arbitrary and capricious.[23]

VI. The PD violates Section 1708.

The PD violates Section 1708 by modifying a prior Commission decision without providing adequate due process. Specifically, the PD concluding that the CPCN would never have been issued in the first place for failure to demonstrate adequate managerial experience (PD at 13) is tantamount to rehearing or modifying the Commission's prior decision in Decision 07-09-035. To make such a modification, the Commission must give notice and opportunity to be heard under Section 1708, and it has not done so in this proceeding.[24] Bandwidth CLEC had no notice of this possible outcome.[25]

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[23] Moreover, the February Ruling did not indicate the Commission would impose penalties for any alleged violation of Section of 854.

[24] CA Rule of Prac. and Proc. Rule 16.1(a) provides that an application for rehearing of a commission order or decision shall be filed within **30 days** after the date the order/decision is mailed. CA Rule of Prac. and Proc. Rule 16.4(d) provides that a Petition for Modification must be filed and served within **1 year** of the effective date of the decision.

[25] Moreover, the April Ruling reflects that Bandwidth CLEC would be allowed to continue operating as a CLEC upon installing directors and officers. April Ruling at 1.

If the concerns raised in the PD were apparent on the face of Bandwidth CLEC's 2007 Application (as they appear to be to the Assigned ALJ in this proceeding) and the Commission nevertheless approved that application, it was reasonable for Bandwidth CLEC to believe that its then-existing management by Bandwidth Inc. complied with Commission rules as interpreted at that time. It was also reasonable for Bandwidth CLEC to believe that its ongoing management by Bandwidth Inc. complied with Commission rules given that the Commission has continued to view Bandwidth CLEC as a telephone corporation and a public utility subject to the Commission's jurisdiction. PD at 7.

The PD compounds the error of a *de facto* rehearing by analyzing the 2007 application using the standards for reviewing CPCN applications adopted by the Commission six years later. The Commission cannot apply the "standardized informational requirements and checklist for CPCN applications" adopted in 2013 to Bandwidth CLEC's 2007 CPCN application. But, even if such *ex post facto* application was permissible (which it is not), the PD incorrectly applied the 2013 standard. The 2013 Decision did not require existing CPCN holders to install officers and directors if they had not already done so.

VII. Revocation of the CPCN of Bandwidth CLEC Is Neither Reasonable Nor in the Public Interest.

To the extent the record is unclear, Bandwidth CLEC reiterates that its officers and director are managing Bandwidth CLEC now and will do so going forward. Bandwidth Inc. remains Bandwidth CLEC's managing member under Delaware corporate law, as it has since before the company received a CPCN.

Even assuming that Bandwidth did not completely satisfy CPCN requirements in 2007 (which is not the case), revocation of the CPCN would fail the Commission's primary objective of protecting the public interest. Such a revocation could create service disruptions and hardships for Bandwidth CLEC, its customers, and its customers' customers. Bandwidth CLEC provides intrastate telecommunications to its customers ("Customers") who incorporate Bandwidth CLEC's services as inputs in the services the Customers provide to their customers. The Customers would need to seek alternative suppliers, and such suppliers may not be able to accommodate the traffic of the Customers, and not at the same rates, terms and conditions currently enjoyed by Customers. Ultimately such harms could inure to the detriment of further downstream customers of the Customers, who include small and medium-sized business and even individual consumers.

Contrary to the PD's implication that it would have been a simple matter to grant Bandwidth Inc. a CPCN, migrating the services Bandwidth CLEC provides under its CPCN to Bandwidth would be extraordinarily complex and burdensome and would take months and a tremendous, wasteful expenditure of resources to accomplish. Bandwidth CLEC has interconnection agreements, local exchange telecommunications trunking arrangements, service offerings, California numbering resources, and telecommunications carrier codes assigned to it. These agreements, trunks, numbers, and codes cannot be transferred to a different CLEC without extensive planning and process. During such transfers, it is possible that routing and rating information would change, creating potential connectivity issues and service interruptions for the Customers and their customers. Moreover, there would need to be arrangements made for Bandwidth Inc. to acquire the equipment of Bandwidth CLEC. *See* February Response at 10.

VIII. Conclusion.

This proceeding should have been relatively straight-forward. Applicants sought approval under Section 854 for the indirect transfer control of a licensed carrier. Similar approvals were timely granted by the FCC and numerous other state commissions. Rather than analyzing whether the proposed transfer of control was in the public interest, the proceeding became a reconsideration of a 2007 CPCN decision that had never been called into question before. During this proceeding, Applicants agreed to requests to amend the application and install officers and directors that were not founded in statute, regulation or precedent. None of these actions bear any relevance to the analysis of the proposed transaction.

Notwithstanding this cooperation, the PD reaches several findings of fact that are unsupported by the record, which lead directly to incorrect conclusions of law. Moreover, rather than merely approving the Application as is, or with conditions, the PD exceeds the scope of the proceeding, and without notice or opportunity to offer evidence, proposes to revoke a lawfully-granted CPCN to a competitive carrier that has operated ever since without incident. Such actions violate the Commission's rules of procedure as well as the Applicants' due process rights.

For the reasons described herein, the Applicants request that the PD be modified to adopt the alternative findings of fact, conclusions of law and ordering paragraphs attached hereto.

Dated at Washington, DC, this 3rd day of July, 2018.

Respectfully submitted,

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of Bandwidth.com CLEC, LLC (U-7038-C) For Approval to Transfer Control of Bandwidth.com CLEC, LLC to David A. Morken Pursuant to California Public Utilities Code Section 854(a)	A.17-09-007 (Filed September 13, 2017)

COMMENTS ON PROPOSED DECISION

EXHIBIT 1

Proposed Findings of Fact and Conclusions of Law

Findings of Fact

1. Bandwidth.com CLEC, LLC ("Bandwidth CLEC") is a limited liability company organized under the laws of the state of Delaware and is headquartered at 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606.

2. Bandwidth CLEC was issued a certificate of public convenience and necessity ("CPCN") in Decision No. 07-09-035. Under that CPCN, Bandwidth CLEC is authorized to provide facilities-based and resold local exchange and interexchange telecommunications services as a CLEC throughout much of the state. Bandwidth CLEC has been operating without incident since 2007.

3. Bandwidth Inc. is a corporation organized under the laws of Delaware, is headquartered at 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606, and is the sole owner and manager of Bandwidth CLEC.

4. Bandwidth Inc. is registered with the Commission to provide VoIP services and was assigned U-1362. Bandwidth Inc. does not provide any intrastate wireline telecommunications services in California.

5. David A. Morken is the Cofounder, Chief Executive Officer and Chairman of Bandwidth Inc. and may be contacted at 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606. He does not hold a CPCN authorization to provide telecommunications services in California and is not currently the parent or subsidiary of an entity holding a CPCN authorization.

6. Bandwidth CLEC filed A.17-09-007. Subsequently, David A. Morken and Bandwidth Inc. joined the proceeding as parties.

7. A.17-09-007 seeks authorization to transfer control of Bandwidth CLEC from Bandwidth Inc. to David A. Morken in connection with a planned restructuring of stock by Bandwidth Inc., the sole owner and parent of Bandwidth CLEC, and related to an initial public offering ("IPO") by Bandwidth Inc. (the "Transaction"). Following the transfer of control, Bandwidth CLEC would continue to operate its CPCN; the proposed change in control would not result in a transfer of Bandwidth CLEC's CPCN to a new entity.

8. Notice of the application appeared on the Daily Calendar on September 22, 2017. No protests were filed. An evidentiary hearing is not required.

9. None of Bandwidth CLEC, Bandwidth Inc. or David A. Morken has gross annual California revenues exceeding $500 million.

10. On August 16, 2017, Bandwidth Inc. filed with the Securities and Exchange Commission ("SEC") a registration statement on SEC Form S-1 for an IPO. Mr. Morken is expected to obtain a majority of the voting power of the outstanding stock of Bandwidth through a post-IPO stock restructuring. As a result, Mr. Morken will control Bandwidth Inc. and will indirectly control Bandwidth CLEC.

11. Because the proposed transfer of control is a parent-level transaction: (a) customers will experience no changes in day-to-day operations in California of Bandwidth CLEC; (b) the transaction will be transparent to Bandwidth CLEC's customers; and (c) the Commission will retain the same regulatory authority over Bandwidth CLEC as existed prior to the transaction.

12. The proposed transfer will result in a change of control of Bandwidth CLEC but will not result in the transfer of any certificates, assets or customers.

13. The proposed transfer will not result in any change to the services provided by Bandwidth CLEC, or to the rates or terms and conditions under which services are provided.

14. The proposed transaction will have no significant impact on competition or the marketplace.

15. The proposed transaction will not have an adverse effect on the public interest.

16. The proposed transaction will not have any adverse impact on safety.

17. Bandwidth CLEC will continue to be bound by the terms and conditions prescribed by the Commission in D.07-09-035.

18. The change in control will have no significant effect on the environment.

19. Applicants have filed financial documents under seal showing they meet the Commission's financial requirements for issuance of a CPCN.

20. Applicants have demonstrated sufficient managerial and technical expertise to meet the Commission requirements as Bandwidth CLEC will retain the managerial and technical expertise of its manager, Bandwidth Inc., and has installed its own officers and directors.

21. Pursuant to Commission Rules of Practice and Procedure 11.4, Applicants filed a motion for leave to file confidential materials contained in Exhibit C to the application under seal.

Conclusions of Law

1. Pub. Util. Code § 854(a) provides that no person or corporation shall merge, acquire, or directly or indirectly control a public utility organized and doing business in California without first securing authorization from the Commission.

2. The transaction proposed constitutes a change of control within the meaning of Pub. Util. Code § 854.

3. The standard generally applied by the Commission to determine if a transaction should be approved under Section 854(a) is whether the transaction will be "adverse to the public interest."

4. The Application should be granted under Pub. Util. Code § 854(a).

5. Pub. Util. Code § 854, subsections (b) and (c) do not apply to this transaction.

6. Bandwidth CLEC should continue to be bound by the terms and conditions imposed on it as part of the CPCN granted in D.07-09-035.

7. This change of control qualifies for an exemption from CEQA under CEQA guidelines §15061(b)(3) and therefore, additional environmental review is not required.

8. The Applicants' motion for leave to file Exhibit C to the application as confidential materials under seal should be granted for three years.

9. Evidentiary hearings are not necessary. The preliminary determinations in Resolution ALJ 176-3405 should be changed to reflect that no hearings are needed.

10. Since this matter is uncontested, the decision should be effective on the date it is signed.

11. A.17-09-007 should be closed.