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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application 14-04-013 (Filed April 11, 2014)
And Related Matter.	Application 14-06-012 (Filed June 17, 2014)

JOINT APPLICANTS' CONSOLIDATED OPENING COMMENTS ON ADMINISTRATIVE LAW JUDGE'S PROPOSED DECISION

(PUBLIC VERSION)

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC") on behalf of itself and its wholly-owned subsidiary Time Warner Cable Information Services (California), LLC (U-6874-C) ("TWCIS (CA)"), Bright House Networks Information Services (California), LLC (U-6955-C) ("Bright House"), and Charter Fiberlink CA-CCO, LLC ("Charter Fiberlink") (collectively, "Joint Applicants") respectfully submit these opening comments on the Decision Granting With Conditions Application to Transfer Control ("Proposed Decision" or "PD") in the above-captioned proceedings.[1]

INTRODUCTION

The Proposed Decision grants approval of the Applications for the transfer of control of TWCIS (CA) and Bright House to Comcast and for Charter Fiberlink to transfer a limited number of business customers and associated regulated assets to Comcast (the "Transaction"). Joint Applicants agree that the Transaction is in the public interest and will result in benefits to California consumers, and that the Applications should be granted. The Proposed Decision also recommends numerous conditions to be imposed on Comcast. While some conditions may be appropriate to ensure that the public interest benefits of the Transaction will be realized, many of the suggested conditions are unnecessary and inappropriate and should not be adopted. As required by Rule 14.3, these comments focus on "factual, legal [and] technical errors" in the Proposed Decision and explain why certain conditions are variously based on the incorrect standard of review; exceed the Commission's authority; conflict with Commission precedent; are based on factually-flawed findings; or involve issues that are not transaction-specific and more properly considered in industry-wide proceedings rather than imposed solely on the merged

[1] In an email ruling issued on February 19, 2015, Administrative Law Judge Bemesderfer granted Joint Applicants' request to file consolidated opening comments totaling 45 pages.

entity. Notwithstanding these legal and factual objections, Joint Applicants are committed to finding an equitable resolution with the Commission to ensure that the substantial public interest benefits promised by the Transaction are realized for Californians, without creating an unfair and unduly burdensome regulatory regime on a single provider in the State which could very well thwart these public interest benefits. Thus, as was reflected in their comments at the All Party meeting, and apart from this filing, Joint Applicants plan to work through the ex parte process with the Commission toward a set of conditions that address concerns identified by the Proposed Decision – including conditions that Comcast would agree to voluntarily.

I. SECTION 854(a) (NOT SECTION 854(c)) IS THE PROPER STANDARD OF REVIEW.

Section 854(a) of the P.U. Code is the proper review standard for the portion of the Transaction involving TWCIS (CA) because it governs indirect changes in control of a public utility.[2] In this proceeding, indirect control of TWCIS (CA) is changing from TWC to Comcast.[3] The Proposed Decision correctly determines that Section 854(a) applies,[4] requiring the Commission to determine whether the Transaction is "adverse to the public interest."[5] Joint Applicants have demonstrated substantial public interest benefits of the Transaction to California consumers, businesses, and institutions that easily satisfy this standard.[6]

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[2] *See* TWCIS (CA) Appl. at 12. No party disputes that the appropriate standard of review for the portion of the Transaction involving Charter Fiberlink is Section 851, which examines whether the proposed transaction is in the public interest. *See, e.g.*, D.00-08-001 (Kernville Water Co. transfer), 2000 Cal. PUC LEXIS 566, at *8.

[3] *See* TWCIS (CA) Appl. at 12.

[4] PD at 12.

[5] *See* D.07-03-047, mimeo at 4 (citing D.00-06-079).

[6] *See* TWCIS (CA) Appl. at 12-13; Opening Br. at 8-20.

The Proposed Decision goes on to conclude, erroneously, that Section 854(c) also applies to the Transaction.[7] It does not. Under Section 854(c), the Commission must consider each of eight factors and find, on balance, that the control proposal is in the public interest.[8] The Commission has interpreted Section 854(c) to apply to transfers of control where the affected utility, as opposed to the parent company, has gross California revenues over $500 million.[9] This Transaction does not involve a California utility meeting this threshold.[10] Further, the Commission has specifically found that the "Legislature intended to grant the Commission significant flexibility in deciding whether to apply §§ 854(b) and (c) to telecommunications transactions."[11] The Commission has consistently exempted NDIEC and CLEC mergers from Sections 854(b) and (c) review when, as here, there is competition, benefits to California consumers, and the utility is not subject to traditional cost of service regulation.[12] The Proposed Decision errs by disregarding this Commission's precedent and applying the Section 854(c) standard and factors to the Transaction, rather than considering those factors only as part of its Section 854(a) analysis (i.e., that the Transaction is not adverse to the public interest). It also errs by failing to analyze the Charter Fiberlink Application separately under Section 851.[13]

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[7] PD at 13.

[8] P.U. Code § 854(c).

[9] *See, e.g.*, D.05-11-028, mimeo at 11 ("The § 854(c) inquiry only applies to transactions where any utility that is a party to the transaction has gross annual California revenues exceeding $ 500 million."); D.12-06-005, mimeo at 10 n.5 (CalPeco transfer) ("Sections 854(b) and 854(c) apply only when a transacting utility has annual California revenues exceeding $500 million."); D.97-05-092, 1997 Cal. PUC LEXIS 340, at *6, 15, 22 (MCI-British Telecom) (Commission only considered gross annual California revenues of California-certificated subsidiaries).

[10] *See* TWCIS (CA) Appl. at 12; PD at 7-10.

[11] D.05-11-028, mimeo at 17, 19, 20 nn.25, 26 (cataloging Commission Decisions in which NDIEC and CLEC mergers were exempted from section 854(b) and (c) review).

[12] *See* TWCIS (CA) Appl. at 12-13; Opening Br. at 8-20.

[13] *See* Opening Brief at 3 n.5 (cataloging applicable case authorities). The Proposed Decision also commits legal error by reviewing the broadband aspects of this transaction under sections 851 and 854.

II. THE PROPOSED DECISION IMPROPERLY EXPANDS THE SCOPE OF THE PROCEEDING BEYOND THE COMMISSION'S JURISDICTION AND AUTHORITY.

A. The Proposed Decision Would Impose Sweeping Common Carrier-Utility Type Regulation On The Merged Entity's Broadband And VoIP Services In Derogation Of Federal And State Law.

Joint Applicants have maintained throughout this proceeding that the Commission lacks jurisdiction to regulate broadband services. The Proposed Decision's findings with respect to the broadband aspects of the Transaction, and the suggested broadband conditions, contravene state and federal law, are factually erroneous, and wrongly intrude into matters that are properly and exclusively before the FCC.[14]

More specifically, the expansive and unprecedented jurisdictional construct of the Proposed Decision would result in common carrier/utility-type regulation of the merged California entity's broadband and other IP-enabled services, in blatant disregard of the California Legislature's determination to prohibit the Commission from regulating in this field. In enacting Section 710 of the P.U. Code, the Legislature expressly determined that the best way to encourage deployment of IP-enabled services to Californians was to strictly limit the regulation of such services. Section 710 thus decrees that "[t]he 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 . . . ."[15]

The residential broadband services of Joint Applicants are provided pursuant to franchises held by the ***cable affiliates*** of Comcast, TWC, and Charter. The Commission's authority to review the transfer of control of a statewide cable franchisee offering broadband is set forth in DIVCA statute (P.U. Code § 5810 *et seq*.), in which the Legislature precluded any substantive evaluation of the transfer, requiring only that notice of the transfer be provided to the Commission. P.U. Code § 5840(m)(1).

[14] *See* TWCIS (CA) Reply to Protests at 9-12; Opening Br. at 74-75.

[15] P.U. Code § 710(a). Broadband Internet access is an "Internet protocol enabled service."

The Proposed Decision mistakenly views *Verizon v. FCC* as interpreting Section 706 of the Telecommunications Act to provide an "affirmative grant of authority" to state commissions to regulate broadband services.[16] But that expansive reading of Section 706 and the *Verizon* decision is clearly erroneous. Section 706(a), by its plain terms, applies to "[t]he Commission and each State commission *with regulatory jurisdiction* over telecommunications services" and only permits state commissions to use "regulating methods" already available to them.[17] Section 706 is not itself a source of any organic authority to state commissions. Because the California Legislature has determined that the Commission may not regulate broadband services, the Proposed Decision improperly abrogates the Legislature's determination and plainly invites the Commission to act *ultra vires*.[18]

Beyond this fundamental error, *Verizon* clearly held that Section 706 is not a grant of unlimited authority to the FCC or state commissions. Rather, any regulatory action under the provision must be "designed to achieve a particular purpose: to 'encourage the deployment . . . of advanced telecommunication capability to all Americans.'"[19] Even under the most generous interpretation of Section 706, therefore, any federally-delegated authority to the Commission would be restricted to particularly (i.e., narrowly) tailored, non-common carrier-like measures to promote the goal of broadband deployment in California. Thus, even if it were a viable grant of

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[16] PD at 21 (citing *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014)).

[17] 47 U.S.C. § 1302(a) (emphasis added).

[18] Moreover, any claimed inconsistency between Section 706(a) and Section 710(a) would be subject to the statutory rule of construction dictating that statutes with conflicting general and specific provisions must be reconciled to give effect to the specific statutory directive. *See Pac. Lumber Co. v. State Water Res. Control Bd.*, 37 Cal. 4th 921, 942-43 (Cal. 2006); *see also* Cal. Civ. Proc. Code § 1859 ("[W]hen a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."). Thus, the general policy of Section 706 provides no basis for the Commission to expand its regulatory jurisdiction in contravention of the very specific and express limitation on its authority under Section 710.

[19] *Verizon*, 740 F.3d at 640.

authority, nothing in Section 706 authorizes the sweeping utility-type regulations over broadband services suggested in the Proposed Decision.

Notably, the Scoping Memo and the Proposed Decision take official notice of the "operative limits" of any Commission authority under Section 706, concluding that the Commission would "*violate* the Communications Act were it to regulate broadband providers as common carriers."[20] Yet, that is precisely what many proposed conditions would do, if adopted.

For example, in California, common carrier regulations for telecommunications services include "standards regarding network technical quality, customer service, installation, repair, and billing."[21] Conditions 5 (customer bills and communications), 15 (mandating minimum broadband speeds), 16 (mandating increased broadband speeds), 21 (customer service requirements), 22 (911/e911 service and technical requirements), and 23 (system improvements and reporting requirements) in the Proposed Decision purport to impose these exact same kind of standards for broadband services offered by the merged California entity post-transaction. And Condition 17 would require the merged entity to maintain current TWC standalone broadband offerings at existing specified speeds and at promotional rates for five years. None of these requirements meet the limited purpose of Section 706, which is to promote broadband development. Moreover, these are the very type of common carrier/utility-type regulations that the Scoping Memo recognized are beyond the "operative limits" of the Commission's jurisdiction, even under an expansive view of Section 706.

Similarly, Conditions 11 (extension of *Internet Essentials* program to TWC customers at specified broadband speeds), 12 (extension of program to households with incomes at or below 150% of federal poverty level), and 13 (program penetration/outreach spending requirements)

[20] Scoping Memo at 11 (quoting *Verizon*, 740 F.3d at 650) (emphasis added); PD at 20-21.

[21] P.U. Code §§ 2895-2897.

relate to broadband *adoption* by low-income households and would likewise impose additional costly and burdensome utility-type regulations on these broadband services. These Conditions are not "narrowly tailored" measures to promote the goal of broadband *deployment*, and again exceed the "operative limits" of any Commission authority under Section 706.

The breadth and nature of the Proposed Decision's regulatory conditions on the merged entity's broadband services are also improper because they effectively treat Comcast Corporation (the holding company, not the California affiliate) as a telephone corporation.[22] This is further legal error because "[t]he [Commission] determines whether a service provider is a telephone corporation through the issuance of a CPCN . . . under [P.U. Code §§] 1001-1013."[23] For broadband, the residential service provider affiliate here is the cable franchisee, not the certificated CLEC. Comcast Phone of California, LLC is the only Comcast entity that has been issued a CPCN by the Commission – and the only Comcast telephone corporation under California law.

Finally, the Proposed Decision takes official notice of "the FCC's [then] pending reworked net neutrality rules."[24] Despite this reference, the suggested conditions in the Proposed Decision are expressly based on Section 706, and thus are bounded by that rationale.[25] Even so, the FCC has now adopted an Open Internet Order, and it further confirms the Proposed

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[22] *See* PD at 2, 7 (defining entities as "Comcast Corporation (Comcast)," "Comcast Phone of California, LLC (Comcast Phone)," and "Comcast IP Phone II, LLC (Comcast IP)"), App. A (stating "Comcast shall" comply with the relevant condition and so placing the obligation on Comcast Corporation directly); *see also* PD at 18 & n.20 ("Joint Applicants have tied together the merger between Comcast and Time Warner with the change of control and asserted that the merger will benefit TWCIS, Bright House, and other affiliates of the merging companies. The Commission, therefore may review these assertions and require Joint Applicants to provide factual data to verify these assertions of public interest benefits.").

[23] D.14-01-036, mimeo at 166 (Lifeline order).

[24] PD at 68.

[25] "[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *PG & E Corp. v. Pub. Utils. Comm'n*, 85 Cal. App. 4th 86, 96-97 (Ct. App. 2000) (holding that a court has no authority to consider *post hoc* justifications for agency ruling) (citations omitted).

Decision's regulatory overreach. Although the FCC has adopted a common carrier classification for broadband services, it has also announced that it is using a "light-touch Title II approach" and that it has aggressively forborne from enforcing most provisions of Title II and hundreds of regulations to prevent "burdening broadband providers with anachronistic utility-style regulations such as rate regulation [and] tariffs."[26] The FCC has made clear that, under the Order, "broadband providers **shall not** be subject to utility-style rate regulation, including rate regulation, tariffs, and last-mile unbundling . . . and burdensome administrative filing requirements or accounting standards."[27] The Proposed Decision directly conflicts with this new federal policy by imposing a host of requirements pertaining to rates, service terms, and wholesale offerings, as well as burdensome reporting obligations. Further, broadband services are defined by the FCC to include transmissions and interconnection arrangements that extend far beyond California's borders and are inherently interstate, national, and in fact global in nature.[28] These are necessarily interstate offerings, and as such, the Commission is preempted under long-established principles of federal law from regulating broadband services in the ways suggested in the Proposed Decision.[29]

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[26] Press Release, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet at 2-5 (Feb. 26, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf ("February 26, 2015 FCC Press Release"). The order itself has not yet been issued. *See* http://www.fcc.gov/blog/process-governance-fcc-open-internet-order (explaining additional steps remaining before the order is final and ready for public release).

[27] February 26, 2015 FCC Press Release at 4-5 (emphasis in original).

[28] The FCC has plenary authority over interstate telecommunications services. *See* 47 U.S.C. §§ 151-152; *see also Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 490 (2d Cir. 1968) ("this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law").

[29] In a recent briefing on the FCC's preemption of two state laws limiting municipal broadband, the agency explained that: "Broadband is an interstate service, and the preempted provisions impose state restrictions, impose economic costs, and delay the deployment of interstate communications." *See* John Eggerton, *Wheeler to Propose Granting Pre-emption Petitions* (Feb. 2, 2015), http://www.multichannel.com/news/fcc/wheeler-propose-granting-pre-emption-

For these reasons, Conditions 5, 11, 12, 13, 15, 16, 17, 21, 22, and 23 in the Proposed Decision are plainly improper, as a matter of law, and should be removed.

B. Other Conditions In The Proposed Decision Exceed The Commission's Authority Or Are Otherwise Unlawful.

The Proposed Decision includes other conditions that exceed the scope of the proceeding, are beyond the jurisdiction of the Commission (as to services other than telecommunications services offered by the regulated CLEC), or are otherwise unlawful. These conditions should also be removed.

Lifeline Services. Condition 1 of the Proposed Decision purports to require the merged company to (a) continue to offer Lifeline in the TWC territory, and (b) extend Lifeline services to all eligible customers of the Joint Applicants, as a tariffed service, on the same basis as set forth in TWC's draft tariff filing. Comcast has already committed to continue to provide Lifeline services in the TWC territory and does not object to that portion of the condition. However, the extension of this requirement beyond TWC territory is problematic. Under current Commission rules, there is no requirement that a VoIP provider (such as Comcast's VoIP provider entity) offer Lifeline, and such a requirement would plainly contravene Section 710, which expressly prohibits the Commission from exercising "regulatory jurisdiction or control over" VoIP services in this manner.[30] Moreover there is nothing in section 706 that gives the Commission authority over

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petitions/387528#sthash.oSX9UOki.dpuf. Because "it is not possible to separate the interstate and intrastate aspects" of broadband Internet access service, state regulation is preempted where it "would conflict with federal regulatory policies." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (same); *So. Cal. Edison Co. v. Pub. Utils. Comm'n*, 121 Cal. App. 4th 1303, 1309-10 (Ct. App. 2004) (observing that "state law is pre-empted to the extent that it actually conflicts with federal law," and that "[f]ederal regulations have no less pre-emptive effect than federal statutes") (citations omitted).

[30] *See* D.14-01-036, mimeo at 5 (Lifeline order) (deferring to Phase II of the LifeLine rulemaking "any discussion of Voice over Internet Protocol service (VoIP)" and how VoIP providers may voluntarily offer Lifeline); *see also* D.05-11-028, mimeo at 42 ("VoIP services are under the exclusive jurisdiction of the FCC.").

VoIP services. It would also be arbitrary and commercially unreasonable for the Commission to impose such a requirement on a single voice provider in lieu of developing a rule applicable to all providers in the State, to the extent the Commission had authority to do so.[31]

General Order ("GO") 156 Diversity Requirements. Comcast has a strong commitment to diversity and voluntarily reports pursuant to GO 156. In fact, Comcast is the first cable company in California history to file a fully compliant GO 156 supplier diversity report, and has committed to extend GO 156 reporting to the TWC and Charter territories.[32] Nonetheless, Condition 2 in the Proposed Decision would require Comcast to *achieve* specified diversity goals within two years and to report its compliance with these numbers for five years.[33] Mandating that Comcast or any other provider achieve GO 156 diversity goals is unlawful. GO 156 sets voluntary targets – not mandatory quotas – and the Commission has consistently recognized that it cannot mandate actual performance to meet specific rates or goals because that would violate state law (which, for example, precludes race-based quotas)[34] and the U.S. Constitution.[35] GO 156 has been a successful effort to promote supplier diversity in California, but only on a voluntary basis that comports with the "constitutional guidelines imposed by *City of Richmond v.*

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[31] The Commission just released a scoping ruling in its LifeLine proceeding, establishing a schedule for considering rules for Lifeline participation by VoIP-enabled providers without a CPCN. *See* Assigned Commissioner's Ruling and Amended Scoping Memo Regarding Phase II, R.11-03-013 (Feb. 3, 2015) (Assigned Commissioner LifeLine Ruling) (noting that Staff's proposal would be issued for comment in 2015). A proposed decision is not expected until July or August of 2015, and the Commission has not yet established rules for requiring a non-certificated VoIP provider to offer Lifeline voluntarily, let alone mandated such participation. *Id.*, mimeo at 5.

[32] Opening Br. at 16-17; McDonald Decl. ¶ 16; *see also* TWCIS (CA) Reply to Protests at 25.

[33] PD at 75-76.

[34] P.U. Code § 8283(b) ("These annual plans shall include . . . goals . . . but not quotas."); GO 156, § 8.12 ("No penalty shall be imposed for failure of any utility to meet and/or exceed goals.").

[35] D.96-04-018, 1996 Cal. PUC LEXIS 166, at *19-20 (noting that the law and GO 156 is "race-neutral" and "does not mandate any result" that would violate the Equal Protection Clause of the U.S. Constitution).

J.A. Croson, 488 U.S. 469 (1989)."[36] The Commission clearly stated – twice – that GO 156 only establishes long-term goals and "does not mandate any result."[37] Yet, Condition 2 would do just that, and accordingly is unconstitutional.

Website Information Requirements and Practices. Condition 4 of the Proposed Decision requires website design standards and certification. Mandating website design standards for non-regulated services exceeds the Commission's jurisdiction and expertise. It is also outside the scope of this proceeding. The Commission has not imposed this requirement on any telephone company in California,[38] and there is no justification to do so here, particularly when the requirement apparently applies to Comcast's entire website (i.e., even for those services not regulated by the Commission).

Backup Batteries. Condition 6 of the Proposed Decision would require Comcast to offer free or at-cost backup batteries to present and future customers. These proposed requirements likewise exceed the Commission's authority. Section 710 only preserves "[t]he commission's authority to enforce *existing* requirements regarding backup power systems established in Decision 10-01-026, adopted pursuant to Section 2892.1."[39] Decision 10-01-026, in turn, provides the minimum parameters for customer education programs and customer outreach regarding backup power on the customer's premises. It does not authorize or require provision of free or at-cost batteries. Requiring free and at-cost batteries would thus exceed the requirements in Decision 10-01-026 and the Commission's limited authority over VoIP.

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[36] *Id.* at *9-20.

[37] *Id*.

[38] In fact, the Commission did not mandate website design standards in its Limited English Proficiency ("LEP") order when it permitted regulated telephone corporations to make available on their websites (in lieu of other options) certain information in the language(s) in which the carrier markets services. *See* D.07-07-043, App. A, Rule V.A.

[39] P.U. Code § 710(c)(6) (emphasis added).

Video Programming. Condition 9 of the Proposed Decision purports to require the merged company to allow the use of Roku and "other video programming platforms" on the "same basis that [TWC] did prior to the merger." As indicated in the condition itself, these services are platforms for accessing video programming. TWC runs its cable applications on the Roku device so the customer can get linear programming, video on demand ("VOD"), and the TWC programming guide on the Roku. It is essentially a replacement for a set-top box ("STB").[40] The Commission has no authority to regulate video programming, as the Proposed Decision itself makes clear.[41] Indeed, even if the Commission could otherwise regulate video, it would have no authority in this respect because the Cable Act clearly grants the FCC exclusive authority over equipment compatibility and STB-related issues[42] – further demonstrating how far afield this suggested condition is from the Commission's jurisdiction.

Non-Interference with Voice Services. Condition 10 of the Proposed Decision imposes a requirement that Comcast not interfere with or degrade voice services. Comcast does not engage in such practices, and is the only ISP legally bound by the protections against such conduct in the FCC's original Open Internet rules (and, for that matter, by *any* rules until the FCC's new Open Internet Order goes into effect, which will not be for at least 60 days following release of the

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[40] *See, e.g.*, Applications and Public Interest Statement, MB Docket No. 14-57, at 120 & n.292 (Apr. 8. 2014), http://apps.fcc.gov/ecfs/comment/view?id=6017611309 ("Comcast-TWC Public Interest Statement").

[41] PD at 2 (acknowledging that video programming is "outside the delegated authority of Section 706(a)").

[42] 47 U.S.C. §§ 544a, 549. In fact, Comcast has an authentication agreement with Roku, and has authenticated more than 90 network apps on up to 17 different devices. *See* Press Release, Comcast Corp., HBO Go & Showtime Anytime on Roku Players and Roku TV: Now Available for Xfinity TV Customers (Dec. 16, 2014), http://corporate.comcast.com/comcast-voices/hbo-go-showtime-anytime-on-roku-players-and-roku-tv-now-available-for-xfinity-tv-customers. Moreover, Comcast does not block or interfere with a customer's use of Roku or other devices to access Internet content, for the same reasons discussed above, which eliminates any legitimate competitive concerns on that separate issue, as well.

order).[43] Nonetheless, this proposed condition plainly conflicts with Section 710 to the extent that it seeks to impose obligations on the operations of Comcast's IP-enabled network or its VoIP services.

Buildout Requirements. Conditions 14 and 18 in the Proposed Decision would require Comcast to connect or upgrade K-12 school and public library networks in unserved and underserved areas of its new footprint proportional to household broadband penetration levels, and build at least 10 new broadband facilities in adjacent unserved or underserved areas. Comcast shares the goal of these suggested conditions, and has been an active participant in providing broadband facilities and services to schools and libraries – through competitive bidding processes – in California. Aspects of the suggested conditions are also unnecessary and problematic. California already has in place voluntary, intrastate programs that support high-speed Internet deployment to new geographic areas, as well as to schools and libraries.[44] In effect, conditions 14 and 18 would mandate that Comcast, alone among ISPs in California, bear the cost of building out new high-speed connections and facilities. Implementation of these mandates may also require review under the California Environmental Quality Act. The sheer breadth of the obligation imposed by Condition 14, and the accompanying financial burdens, are commercially unreasonable and underscore the inappropriateness of the proposed mandate.

Public Participation Restrictions. Condition 19 in the Proposed Decision restricts Comcast for five years from opposing, directly or indirectly, or funding opposition to, any municipal broadband development plan in California or any CASF or CTF application. This

[43] Press Release, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet (Feb. 26, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf.

[44] *See* P.U. Code § 884 (CTF); P.U. Code§ 281 (CASF).

proposed condition is unconstitutional.[45] The government cannot "deny a benefit to a person because of his constitutionally protected speech . . . [as] [t]his would allow the government to 'produce a result which (it) could not command directly.'"[46] Indeed, the Commission itself has rejected similar proposed conditions as "*unlawful and . . . in any case very bad public policy.*"[47] Rather than suppressing voices, the Commission should encourage parties to provide data and other information about their service territories within the context of CASF applications and municipal broadband deployment. Comcast does not reflexively oppose all municipal broadband entry or advocate for state laws precluding such entry. Instead, like other providers, analysts, and policy makers, Comcast has judiciously challenged past CASF applications in ways that have contributed to the public dialogue. Condition 19 contravenes the policy and practice of the Commission, would harm the public interest, and violates the U.S. Constitution.

Privacy Complaint Reporting. Condition 20 of the Proposed Decision would impose reporting requirements for customer privacy complaints. This proposed condition exceeds the Commission's authority insofar as it relates to broadband or VoIP services. The Commission does not have authority to require reports of complaints or to prosecute privacy complaints regarding VoIP and broadband services; nor does the Commission have authority to impose such conditions on unregulated cable affiliates' offerings. Section 710 only permits the Commission to require reports from carriers in one circumstance. Specifically, Section 710(c)(4) preserves the

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[45] *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("The First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Moreover with respect to the restriction on CTF challenges, the condition appears unnecessary as, to the best of Joint Applicants' knowledge, there is no process for challenging CTF applications.

[46] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), *overruled on other grounds by Rust v. Sullivan*, 500 U.S. 173 (1991) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

[47] D.97-03-067, 1997 Cal. PUC LEXIS 629, at *159 (*In re Pacific Telesis Group*) (rejecting mitigation measure proposing a moratorium on Applicants' ability to propose legislation reducing regulation: "We consider it our duty to encourage participation in the processes of government and will continue to do so even when the position or lawful activity of a party is distasteful to us.") (emphasis added).

Commission's authority to "require data and other information pursuant to Section 716," which in turn authorizes the Commission to request data from all providers of voice services (including VoIP) in the context of an ILEC's forbearance petition regarding unbundled network elements at the FCC.[48] Beyond that, the Commission is only allowed to collect information on and report on consumer complaints as to VoIP services when a *consumer* reports an issue to the Commission. And, in such a case, the only action that that Commission is authorized to undertake is an informal response to the consumer, referring the consumer to available options under state and federal law for addressing complaints.[49]

Accordingly, for the reasons shown above, all or portions of Conditions 1, 2, 4, 6, 9, 10, 14, 18, 19, and 20 are *ultra vires* or otherwise unlawful and should be removed.[50]

III. THE PROPOSED DECISION ADOPTS INTERVENORS' FLAWED ANALYSES AND CLAIMS REGARDING MARKET SHARE AND COMPETITION.

Even putting aside the Commission's lack of jurisdiction to regulate broadband services as discussed above, the factual findings in the Proposed Decision relating to these aspects of the Transaction are clearly erroneous and do not support remedial conditions.

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[48] P.U. Code § 716.

[49] Section 710(f) expressly prohibits enforcement by the Commission providing that the "section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and *to respond informally* to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints." (Emphasis added.)

[50] Conditions 24 and 25 of the Proposed Decision would require the merged entity to report on its compliance with Conditions 1 through 23, and also to accede to the Commission's enforcement jurisdiction for each of these conditions. Joint Applicants' legal objections to proposed conditions, as set forth in Section II above, are fully incorporated by reference in response to Conditions 24 and 25. To the extent that the Commission adopts any lawful conditions in the final decision that are within the scope of its authority, and consistent with other applicable state and federal laws, the merged entity would comply with reasonable reporting requirements and agree to Commission enforcement of such lawful conditions.

A. The Transaction Will Not Increase Market Power Or Reduce Consumer Choice.

The Proposed Decision wrongly finds that the merged entity's larger statewide footprint post-transaction will result in greater market power and "concentration" for broadband services, and thus create risks of potential competitive harms.[51]

The record evidence conclusively demonstrates that there will be no loss of consumer choice or competition in any relevant market, much less the creation of market power. Well-established FCC, DOJ, and Commission precedent makes clear that the relevant market for broadband services is local.[52] The Horizontal Merger Guidelines are likewise clear that relevant markets are geographically bounded when, as here, voice and broadband providers lack facilities to service voice or broadband customers outside of their geographically-limited footprints.[53] To properly evaluate horizontal competitive effects, therefore, a consumer's choice between Internet access providers is limited to those providers that serve the consumer's household – regardless of where else in a city or state the provider may have a presence.[54] This means that the relevant market for purposes of Transaction review is necessarily a local one, not a national or statewide market, as the Proposed Decision wrongly concludes.

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[51] The Proposed Decision raises concerns about the Transaction's effect on competition and market concentration; besides making factually incorrect conclusions, its consideration of these competitive issues under either a Section 854(a) or 854(c) analysis is outside the scope of review of this proceeding and not required under state law. Whether Section 854(a) or (c) applies to the transaction, the factors identified in (c) may be used to inform the public interest analysis, but none of the factors listed in (c) expressly refer to the effect of a transaction on competition. *See* D.01-06-007 (conducting Section 854(a) "not adverse" analysis using 854(c) factors).

[52] Opening Br. at 9-11 & nn.16, 25, 26 (citing to Commission and FCC precedent concluding that the relevant product market for analysis is local); Israel et al. Decl. ¶¶ 31, 34-38, 39 (citing, among other state and federal authorities, the DOJ and FTC Horizontal Merger Guidelines).

[53] Israel et al. Decl. ¶ 31.

[54] *Id.* ¶¶ 31-33.

Joint Applicants have shown that they each serve separate and distinct areas.[55] The Proposed Decision cites ORA's erroneous contention that the Transaction will eliminate TWC as a competitor for thousands of Charter subscribers in Los Angeles.[56] In fact, Joint Applicants carefully analyzed this aspect of the Transaction and, as shown in the record, are not aware of any actual overlap in their service areas even when evaluated down to zip+4 areas.[57] Although Comcast will serve all of TWC's and portions of Charter's existing footprints in California, the record shows that the Transaction will *not* reduce the number of competitive choices that any individual customer has today in any local market, which is the relevant question for competitive analysis.[58]

The Proposed Decision further cites to an ORA analysis using the Horizontal Merger Guidelines on the Herfindahl-Hirschman Index ("HHI") and U.S. Census Bureau data to calculate a purported change in "market concentration" for the entire state of California. This analysis supposedly shows that the statewide market for fixed broadband would become "even more highly concentrated" as a result of the Transaction.[59] The Proposed Decision then adopts ORA's theory that "[m]ergers resulting in highly concentrated markets that involve an increase in the

[55] Opening Br. at 68, 72-73; *see* Charter-to-Comcast Exchange Public Interest Statement at 13 n.31; Comcast-TWC Public Interest Statement at 127 n.307.

[56] PD at 40; ORA Br. at 33; *see also* Selwyn Decl., fig. 5 (showing map of TWC and Charter systems, apparently by census block, without any analysis of whether systems in the same census block actually overlap and can serve the same households).

[57] *See* Opening Br. at 9 n.17, 68 n.314, 72-73; NAAC 1:3; McDonald Decl. ¶ 12; Leddy Decl. ¶ 6; Israel et al. Decl. ¶¶ 9, 39; Comcast-TWC Public Interest Statement at 127 n.307; Charter-to-Comcast Exchange Public Interest Statement at 13 n.31; TWCIS (CA) Appl. at 2 n.3.

[58] Opening Br. at 7-16, 68, 72-73; TWCIS (CA) Appl. at 14-16; Israel et al. Decl. ¶¶ 32, 39.

[59] PD at 36-37.

HHI of more than 200 points will be presumed to be likely to enhance market power;" and incorrectly finds that this Transaction will result in an increase of more than 200 points.[60]

Although the Proposed Decision cites to the Horizontal Merger Guidelines as the basis for claiming that HHIs are high, it utterly ignores the Guidelines' threshold parameters for defining relevant markets for purposes of an HHI analysis. As discussed above, based on a proper application of the Horizontal Merger Guidelines, there is no question that the relevant market is geographically bounded, since facilities-based voice and broadband providers cannot serve voice or broadband customers outside their footprints. The Proposed Decision also uses "homes passed" as the denominator in its analysis, but that is an improper metric to measure market share. Under that approach, for example, DirecTV and DISH would each have nearly 100% market shares since they pass virtually all homes in the country. For these reasons, the ORA analysis adopted in the Proposed Decision is fundamentally flawed and meaningless. If the Guidelines are applied correctly, the change in HHI from the Transaction is *zero*.[61] California consumers, businesses, and institutions will have the same competitive choices post-transaction as they do today – and, as the record shows, the number of those choices continues to grow.

B. The FCC's New Definition Of "Advanced Telecommunications Capability" Has No Relevance To This Proceeding.

The Proposed Decision takes official notice of the FCC's recent Section 706 Report, which revised the definition of "advanced telecommunications capability" to mean 25 Mbps or higher downstream speeds. Based on this new definition, the Proposed Decision wrongly finds that Comcast will be the "only provider" for a majority of Californians.[62]

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[60] *Id.* at 36-37, 61 n.166; Findings of Fact 13, 14.

[61] Israel et al. Decl. ¶¶ 30-32.

[62] PD at 37-38; *see also id.* at 38 n.68 (taking official notice of the adoption of the FCC's 2015 Broadband Progress Report).

The FCC's revised definition of "advanced telecommunications capability" in the 706 Report does not redefine "broadband" globally. The FCC adopts broadband definitions in different proceedings for different purposes. For example, the FCC voted in December 2014 to provide federal Connect America Fund support for the deployment of "broadband" defined at 10 Mbps downstream speeds.[63] The 706 Report made no change to that decision. Nor did the 706 Report change providers' reporting obligations under Section 706, which still require reporting "broadband connections" at 200 kbps per second or above in either direction.[64]

All that is at stake in the 706 Report is a revised aspirational policy. It does not purport to set 25 Mbps speeds as a separate product market for purposes of competitive analysis. As Chairman Wheeler explained, "'advanced' [in the term "advanced telecommunications capability"] means at the forefront, progressive, cutting-edge. It doesn't mean the average or the happy medium."[65] In other words, the new 25 Mbps definition "will hopefully serve as *an impetus* for meaningful improvements in the speed and availability of true high-speed networks for all Americans."[66] FCC Commissioner Clyburn also referred to the new 25 Mbps speed benchmark as "forward-looking," noting that "we should always aspire to deliver the very best."[67]

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[63] *Connect America Fund*, Report and Order, 29 FCC Rcd. 15644 ¶ 15 (2014).

[64] *See* FCC Form 477, § 5.3, *available at* http://transition.fcc.gov/form477/477inst.pdf.

[65] Statement of Chairman Tom Wheeler, GN Docket No. 14-126, at 1 (Jan. 29, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331760A2.pdf.

[66] *Id.* at 3 (emphasis added).

[67] Statement of Commissioner Mignon Clyburn, GN Docket No. 14-126, at 1 (Jan. 29, 2015), http://www.fcc.gov/article/doc-331760a3. Commissioners Pai and O'Rielly both referred to the 25 Mbps speed benchmark as "arbitrary" and "artificially high," respectively, explaining that the standard was not based on an analysis of common broadband uses or adoption rates. *See* Dissenting Statement of Commissioner Ajit Pai, GN Docket No. 14-126, at 1-2 (Jan. 29, 2015), http://www.fcc.gov/article/doc-331760a5; Dissenting Statement of Commissioner Michael O'Rielly, GN Docket No. 14-126, at 1 (Jan. 29, 2015), http://www.fcc.gov/article/doc-331760a6.

Excluding all broadband services below 25 Mbps based on this new aspirational policy, as the Proposed Decision does, wrongly eliminates entire parts of the broadband market as consumers experience and enjoy it today. Indeed, the FCC, in recently raising the broadband speed requirement for recipients of federal subsidies in rural areas to only 10 Mbps, recognized that 71% of Americans who can purchase fixed 25 Mbps service today *choose not to do so* and instead are satisfied using lower speeds for their everyday broadband needs.[68] In its decision, the FCC specifically reported that the overall adoption rate for at least 10 Mbps in both urban and rural areas is 52%, whereas the adoption rate for at least 25 Mbps is only 29%. Many customers of Comcast, TWC, and other broadband providers choose services at lower speeds, even when higher speeds are available, based on factors such as pricing and their particular needs as broadband users.[69] And the record evidence further shows that some consumers elect to choose mobile services alone to meet their broadband needs.[70] Surely the Commission cannot adopt the view that all these customers are not part of the broadband market today, as the Proposed Decision erroneously posits.

The Proposed Decision also wrongly dismisses DSL, wireless, and legitimate overbuilder alternatives from the broadband market. Any analysis of consumer choice for Internet access is fatally incomplete unless it also accounts for the broad and increasing competition from DSL,

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[68] *See* PD at 81 n.202 (taking official notice of this decision).

[69] Citing to the Tenth 706 Report, Commissioner Pai noted that "71% of consumers who can purchase fixed 25 Mbps service—over 70 million households—choose not to." Dissenting Statement of Commissioner Ajit Pai, GN Docket No. 14-126, at 1 (Jan. 29, 2015), http://www.fcc.gov/article/doc-331760a5.

[70] *See* Ex. ORA/Comcast-2:1 (showing in a survey of over 1,000 broadband users that a full 10 percent of respondents use wireless as a substitute for fixed broadband service, answering that they *always* opt to use their wireless or mobile broadband service, even for accessing high-bandwidth streaming services like Netflix, YouTube, and Hulu (slightly more always use wireless service for low-bandwidth activities)).

growing competition from overbuilders like Google Fiber, and ubiquitous wireless choices.[71] For example, AT&T offers 24 Mbps U-verse services in parts of the country. This is clearly a substitutable product for consumers – the difference between 24 and 25 Mbps is virtually imperceptible. Yet, the Proposed Decision inexplicably ignores these U-verse offerings. It defies reality to assume that only the 25 Mbps or higher services from AT&T U-verse or Verizon FiOS qualify as competitive substitutes. The Proposed Decision simply disregards all of this substantial record evidence in its flawed competitive analysis.

Based on its misunderstanding of the FCC's 25 Mbps announcement, the Proposed Decision also endorses Intervenor arguments that Comcast and TWC have effective monopolies on providing broadband services in their existing areas, and that the Transaction will create a single state-wide Internet access "monopolist."[72] These "monopoly" theories fundamentally misconstrue basic economic principles (including the definition of "monopoly") and – for all the reasons just shown – are likewise clearly erroneous. As the record amply demonstrates, Joint Applicants are not "monopolists." Nor will the Transaction create one. There are numerous options for Internet access in the relevant local markets, and more are coming every day. Consumers have, and post-transaction will continue to have, a large and growing set of competitive broadband alternatives, including those offered by telco competitors, Google Fiber, municipal overbuilds, and fixed wireless providers.[73]

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[71] Opening Br. at 13; Israel et al. Decl. ¶ 47. For example, Commissioner Pai has highlighted the increasingly competitive mobile and overbuilder options available to consumers, noting that "98.5% of Americans now live in areas covered by 4G LTE networks," up 97.99 million people from two years ago, and that Google has just announced the expansion of Google Fiber into 18 new cities. Dissenting Statement of Commissioner Ajit Pai, GN Docket No. 14-126, at 2-3 (Jan. 29, 2015), http://www.fcc.gov/article/doc-331760a5.

[72] PD at 61, 74.

[73] Israel et al. Decl. ¶¶ 59-60. The Proposed Decision also alleges that the supposed lack of choice is "exacerbated" by costs including early termination fees and equipment rental fees. PD at 38. But

C. Concerns Regarding Future Overbuilding Are Baseless And Unsupported By The Record.

The Proposed Decision erroneously concludes that the Transaction will preclude any prospect of future overbuilding by Joint Applicants and thus potential competition between Comcast and TWC.[74] In fact, there is simply no record basis to conclude that either firm has ever planned *any* geographic expansion through overbuilding – or indeed that incumbent cable operators in general build out networks in this way.[75] Comcast and TWC have each determined that it would be both cost-prohibitive and ultimately unprofitable to build new cable systems outside their existing geographic footprints, or to make the major investments necessary to enter each other's markets as an out-of-footprint OVD.[76] And neither Comcast nor TWC has any plans to overbuild one another's current footprints.

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consumers will – and regularly do – switch broadband providers when dissatisfied with their services. A recent survey found that one-third of respondents switched providers in at least the past two years, and nearly one-half switched providers within the past four years; a 2010 FCC survey found that over the prior three years 36 percent of Internet users indicated that they had switched their ISP, and Comcast's churn data indicate that, over the course of a single year, a significant portion of Comcast's broadband subscribers switch from its service. *See* Comcast's Response to ORA's Second Set of Data Requests 2:2, FCC Request No. 74. Dr. Selwyn acknowledges that the importance of this concern is inflated, noting that "broadband providers will frequently offer various promotions and other inducements . . . to help offset switching costs that might otherwise apply." Selwyn Decl. at 92. Further, the overwhelming majority of Comcast's customers are not subject to early termination fees, and can and often do use their own modems. Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 137, 205 (Sept. 23, 2014), http://apps.fcc.gov/ecfs/comment/view?id=6019379465 ("FCC Opp'n").

[74] PD at 65-69.

[75] Israel et al. Decl. ¶ 45 ("Indeed, to our knowledge, no incumbent cable operator has ever overbuilt another incumbent cable operator's footprint.").

[76] *Id.* ¶¶ 44-48; *see also* Opening Br. at 12-14, Ex. R ¶ 33 (Rosston/Topper FCC Reply Decl.). ORA recently moved to late file a supplemental declaration, based on Dr. Selwyn's discovery of documents in the Joint Applicants' October production. Even a cursory review of the documents shows that **BEGIN TWC HIGHLY CONFIDENTIAL** [redacted] **END TWC HIGHLY CONFIDENTIAL** Accordingly, as Dr. Selwyn himself notes, TWC's **BEGIN TWC HIGHLY CONFIDENTIAL** [redacted] **END TWC HIGHLY CONFIDENTIAL** The record in this

The Proposed Decision simply disregards this substantial record evidence. Something cannot be a transactional harm if it would not have occurred absent the transaction. It is thus clearly erroneous for the Proposed Decision to include this unsupported theory in its competitive analysis.

D. The Transaction Presents No Risk To Edge Providers, The Highly Competitive Internet Backbone, Or Consumers' Access To Broadband Content.

The Proposed Decision adopts several theories based on the potential anti-competitive effects stemming from Comcast's share of the "Internet Service Provider market" or market for "last-mile" access to consumers.[77] The Proposed Decision also appears to be concerned with the Internet backbone and interconnection market, referring to the Comcast-Netflix agreement and the "terms on which Comcast will carry [a] content provider's material."[78] These same broadband issues are squarely before the FCC, and plainly exceed the Commission's jurisdiction and authority here.[79] Even so, the factual findings underlying these concerns are in clear error.

First, as discussed above, the relevant geographic market for this analysis is local.[80] Comcast and TWC each offer broadband platforms to connect Internet content providers to only those consumers within Comcast's and TWC's distinct footprints, meaning that the Comcast and TWC platforms are not substitutes for the distribution of content to any consumer. There is no

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proceeding further shows that Comcast (and other cable MSOs) have independently reached the same conclusion. Israel et al. Decl. n.81 (citing Israel FCC Reply Decl. § IV.B.2.).

[77] PD at 43-45, 62-63, 66-67.

[78] *Id.* at 63.

[79] As discussed *supra* at 6 & note.

[80] PD at 36-41, 61-62.

overlap between Comcast's and TWC's last-mile networks, so the Transaction does not eliminate any horizontal competition in the last mile.[81]

Second, Comcast is the only ISP in the country that is currently legally bound by the FCC's original Open Internet rules, which include "no blocking" and non-discrimination protections.[82] These protections – which remain in place now even if the FCC's new rules are appealed – will be extended to millions of additional TWC customers as a result of the Transaction, including consumers in TWC's California footprint.[83] These legally-binding commitments prevent selective degradation of particular traffic in the last mile – effectively eliminating any reasonable concern about this alleged harm.[84] Meanwhile, the FCC's new rules for the first time assert FCC jurisdiction over backbone interconnection,[85] emphasizing the degree to which the Commission not only *may* not, but need not, concern itself with matters such as the Netflix-Comcast dispute.

Third, the Commission has no call to believe that Comcast would degrade its service by blocking or interfering with some edge provider traffic. The record evidence shows that broadband customers are immensely valuable to ISPs, making it irrational to expect ISPs to harm the edge providers whose content, applications, and services help drive demand for broadband services.[86] Survey and consumer data indicate that customers can and will switch ISPs, even to those offering lower speeds, if they become dissatisfied with their service.[87] Broadband

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[81] Israel et al. Decl. ¶ 54.

[82] *Id.*

[83] TWCIS (CA) Reply to Protests at 12, Israel et al. Decl. ¶ 54.

[84] Israel et al. Decl. ¶ 54.

[85] Press Release, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet at 3 (Feb. 26, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf.

[86] Israel et al. Decl. ¶¶ 57-58.

[87] *Id.* ¶¶ 59-60; *see also supra* note 73 (rebutting PD concern with "high switching costs").

subscribers are also likely to downgrade from or forgo upgrading to higher broadband tiers in reaction to attempts to degrade or foreclose OVDs; and users dissatisfied with OVD access could even choose to switch to video rivals.[88] Comcast has invested tens of billions of dollars in its high-growth broadband service, and edge providers drive consumer demand for broadband by offering attractive content, applications, and services.[89] Given its significant past investment, and plans to sink even more capital into its networks and provision of broadband services, Comcast plainly has no incentive to then curtail the attractiveness of those services by hampering user access to lawful content (and, in all events, is precluded from doing so by the FCC's original Open Internet rules).

Fourth, any edge provider can have its traffic delivered to any ISP's customers through myriad paths and without any direct commercial relationship with that ISP. Comcast's network is no exception.[90] Many edge providers can and do use multiple links to send their traffic onto Comcast's network, without the need for any direct interconnection with Comcast.[91] In addition, ISPs need interconnection arrangements to get their customers' traffic to other sites on the Internet, which gives ISPs yet another reason to deal fairly and responsibly with interconnecting parties. Given the multitude of paths an edge provider can use, Comcast could not prevent particular edge provider traffic from getting onto the network without massively degrading its connectivity with the overall Internet, denying its customers access to much of the Internet and cutting off the ability for Comcast or its customers to send traffic to the broader Internet.[92] Such a

[88] Israel et al. Decl. ¶ 59.

[89] Opening Br. at 75-82; Portfolio Decl. ¶¶ 49-50; *see also* Comcast-TWC Public Interest Statement at 30.

[90] Israel et al. Decl. ¶ 56.

[91] *Id.*

[92] *Id.* And, as described in the record, the Internet backbone is highly competitive. Any edge provider can choose from myriad interconnection paths into the Comcast network.

strategy is clearly infeasible. It would be enormously costly and directly counter to Comcast's primary mission to provide a service its customers value and want to retain.

The record, therefore, fully refutes each of these purported concerns in the Proposed Decision. They are not a proper basis for any conditions, even assuming the Commission had jurisdiction over these broadband aspects of the Transaction (which it does not).

IV. OTHER FACTUAL FINDINGS IN THE PROPOSED DECISION ARE INVALID AND DO NOT SUPPORT THE SUGGESTED CONDITIONS.

The Proposed Decision contains other factual findings that are unsupported by the record and give undue weight to Intervenors' erroneous arguments. These findings are likewise an improper basis for any conditions to the Transaction.

A. TWC Is Not A "Policy Competitor" To Comcast.

Comcast has committed to provide Lifeline to customers in communities currently served by TWC if TWC offers Lifeline, and will also honor discounted rates for certain "grandfathered" Charter customers who used to receive Lifeline services from Charter.[93] Nonetheless, in suggesting Condition 1, the Proposed Decision cites TWC's Lifeline application as an example of how the Transaction may result in the loss of a "policy competitor" whose different positions and business models affect Commission decisions.[94]

The perceived loss of TWC as a "policy competitor" is unfounded. As the record demonstrates, Comcast and TWC serve separate geographic areas. There is simply no evidence that either company considered the other's actions in making its own policy decisions, or that Comcast customers without access to TWC's services ever viewed them as providing policy

[93] Opening Br. at 15-16 n.52; *id.* at 67-68; Portfolio Decl. ¶¶ 28-29.

[94] PD at 64.

alternatives.[95] Moreover, nothing about the Transaction will affect the Commission's jurisdiction to evaluate public policy, make decisions in the public interest, and regulate within the bounds of its enabling statutes. This theory also arbitrarily ignores that Verizon, AT&T, Cox, and other providers will continue to operate in California, offering multiple points of comparison among services and offerings.[96]

B. Mandatory Diversity Measures Are Unnecessary.

The Proposed Decision purports to justify Condition 2, which imposes mandatory achievement of supplier diversity goals, based on Comcast's allegedly "poor performance in regard to increasing both workplace and supplier diversity."[97] This conclusion ignores substantial record evidence demonstrating that Comcast has an exceptionally strong record on diversity in all areas.[98] Indeed, Comcast is recognized nationally for its comprehensive commitment to promoting diversity and has received over 100 awards from a wide array of organizations in the past three years in recognition of its leadership in this area.[99] California organizations

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[95] Israel et al. Decl. ¶¶ 49-51; *see also* Israel FCC Reply Decl. § VII.B (explaining why the elimination of one competitive "benchmark" provides no basis to allege competitive harms from the Transaction).

[96] *See* TWCIS (CA) Appl. at 20-21; Opening Br. at 31-32 & n.127; Israel et al. Decl. ¶¶ 16-17 & n.22.

[97] PD at 64. Intervenors presented no evidence of lack of workplace diversity.

[98] *See* Opening Br. at 16-18; *see also* McDonald Decl. ¶ 16; TWCIS (CA) Appl. at 15; TWCIS (CA) Reply to Protests at 25-26; FCC Opp'n at 8-9.

[99] Some features and successes of Comcast's diversity initiatives include a unique Joint Diversity Advisory Council that provides external advice from many diverse communities; as of the end of 2013, Comcast's total workforce was 59% diverse and its Board was one-third diverse; Comcast and NBCUniversal have spent billions of dollars over the past three years with diverse vendors; Comcast's supplier diversity program has been recognized by Black EOE Journal, Hispanic Network Magazine, Professional Women's Magazine, and U.S. Veterans Magazine; and ongoing support of minority entrepreneurship through the $20 million Catalyst Fund, which provides training and seed funding to minority start-ups. These and other industry-leading diversity programs will extend to the acquired TWC systems, resulting in greater diversity in each of five focus areas: governance, employment, suppliers, programming, and community investment. *See Comcast Diversity Report*, http://corporate.comcast.com/images/Comcast_Diversity_Report_060214.pdf; Comcast Corp., *2013 Supplier Diversity Annual Report & 2014 Annual Plan*, http://www.cpuc.ca.gov/NR/rdonlyres/E5E76D2D-1C77-4FF8-9DE4-CA6DCAD128AC/0/Comcast2013GO156Report.pdf (GO 156 Report); FCC Opp'n, Ex. 7, http://apps.fcc.gov/ecfs/document/view?id=7522909787.

representing many diverse communities have further attested to this strong record. Representative comments from these organizations, like many of those made by participants at the Commission's recent All-Party Meeting, note that:

- Comcast has taken "strong steps toward fulfilling commitments to diversifying its procurement and workforce" and made consistent investment in programs that "support diversity in corporate affairs [and] supplier diversity" and that DiversityBusiness.com named Comcast and NBCUniversal among its "Top 50 Organizations for Multicultural Business Opportunities."[100]

- Comcast's "efforts to support small and minority owned businesses have been exemplary," and that "Comcast's business model, which values supplier diversity, would be a great addition to our community, especially to the growth and success of minority-owned service companies, suppliers and programmers."[101]

- While "many companies struggle with inclusion at Comcast people of color account for 40% of the employee population," and Comcast "hires and develops . . . minority business leaders [who] are committed to excellent supplier contracts from diverse sources."[102]

The Proposed Decision also errs in using other Commission-regulated entities, which are not comparable to Comcast, as benchmarks for the suggested condition. The required diversity quotas appear to stem from the ILEC-only portions of AT&T's and Verizon's businesses in California. As shown in the record, Comcast's voluntary GO 156 reporting is much broader and covers *all* of its business segments, including cable, voice, and broadband.[103] TWC and Charter do not participate at all in GO 156.[104] There is no reason for the condition to arbitrarily use a diversity figure based on combined data from one business unit of two other communication providers, particularly when the GO 156 Order itself sets 21.5% as the supplier diversity goal – a

[100] Opening Br., Ex. N at 0001 (Asian & Pacific Islander Legislative Caucus), 0002 (Asian American Education Institute).

[101] *Id.* at 0023 (California Asian Pacific Chamber of Commerce), 0013 (Black Business Association).

[102] Opening Br., Ex. P at 9 (African American Mayors Association); *id.*, Ex. N at 0048 (Latino Journal).

[103] McDonald Decl. ¶ 16; *see also* TWCIS (CA) Reply to Protests at 25.

[104] Opening Br. at 16-17; TWCIS (CA) Appl. at 15; TWCIS (CA) Reply to Protests at 25-26.

goal which Comcast met in 2013.[105] In all events, and perhaps most important, these issues are plainly not transaction-specific.

C. Concerns Regarding Comcast's Battery Backup Program And Other Network Safety Issues Are Based On Inaccurate Assertions.

Condition 3 of the Proposed Decision would require Comcast to provide "improved" backup battery information on the mistaken finding that Comcast has failed to make this type of information sufficiently available.[106] This ignores record evidence that Comcast makes information about backup power available on FAQ and website help pages that are accessible using screen readers with direction keys to disabled persons, consistent with D.10-01-026.[107] Further, Comcast submitted its Advice Letter to the Commission on July 21, 2010, describing its D.10-01-026 compliance plans and providing information about its customer educational program information concerning backup power on the customer premises. Since that filing, Comcast has received no indication that its compliance plans do not satisfy D.10-01-026.[108] There is likewise no basis in the record for the requirement that Comcast provide its backup power notices in all of the languages specified. The Commission's rules governing backup power notices require only that such notices be provided to a customer in the language (other than English) in which the customer was marketed.[109]

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[105] Comcast Corp., *2013 Supplier Diversity Annual Report & 2014 Annual Plan*, http://www.cpuc.ca.gov/NR/rdonlyres/E5E76D2D-1C77-4FF8-9DE4-CA6DCAD128AC/0/Comcast2013GO156Report.pdf.

[106] PD at 63, 76 (referring to CforAT Br. at 4-18).

[107] Opening Br. at 18-19, 43; *see also* McDonald Decl. ¶ 17; Portfolio Decl. ¶ 41; Opening Br., Ex. K at 3:55-3:57 (Comcast Corporation Responses to ORA's Third Set of Data Requests).

[108] Comcast's Advice Letter No. 129; *see also* Ex. CforAT/Comcast-1:9.

[109] D.10-01-026, mimeo at 40 (Order ¶ 7). There is no record evidence that Comcast markets in these languages.

Finally, while Comcast has a proven record and goal of improving services for customers with modified accessibility needs,[110] the suggested requirements in Conditions 4 through 6 (including the provision of free backup batteries) exceed those in D.10-01-026. If the Commission is unsatisfied with Decision 10-01-026, its concerns should be addressed in an industry-wide proceeding, and not as part of this company-specific transaction.

D. The Transaction Will Not Harm Wholesale Offerings.

Conditions 7 and 8 would require Comcast to offer specific legacy TWC business services products, on TWC's prices, terms and conditions, for a period of five years. In support of these conditions, the Proposed Decision points to CALTEL's claim that the Transaction could harm competitive local exchange carriers ("CLECs") by potentially eliminating TWC's wholesale offerings.

As a preliminary matter, this concern is unfounded since Comcast has voluntarily agreed to maintain the existing wholesale business services arrangements that TWC has established.[111] Nor is there any reason to think the Transaction would lead to Comcast eliminating such offerings in the TWC service areas. TWC's business decisions have reflected (like Comcast's) the market conditions present in the areas it serves. Comcast will face those same market conditions in those areas post-transaction, along with the competitive incentives in those markets that led TWC to design its wholesale offerings in the first place.[112] But beyond that, TWC today is, and the combined company post-transaction will still be, a relatively small player in the wholesale

[110] Opening Br. at 43; Portfolio Decl. ¶ 43.

[111] FCC Opp'n at 193-94.

[112] Opening Br. at 27-28, 68, 72; *see also* Israel et al. Decl. ¶¶ 9, 17.

marketplace relative to ILECs.[113] To the extent that CLECs add incremental value, Comcast will have an incentive to work with them.

Further, the marketplace for business services is competitive. In 2008, the Commission deregulated rates for most telecommunications services – including the rates for all retail business services.[114] Re-imposing rate regulation on Comcast's business offerings, when the rest of the industry remains deregulated, is unnecessary, unjustified, and would impede Comcast's ability to compete.

For these reasons, the factual assumptions underlying Conditions 7 and 8 are clearly erroneous. The conditions should be removed.

E. *Internet Essentials* Is Successful By Any Objective Metric And The Program's Extension To TWC And Charter Areas Will Provide Substantial Public Interest Benefits.[115]

Conditions 11, 12 and 13 in the Proposed Decision, which impose sweeping requirements related to the *Internet Essentials* program, are entirely unjustified. Comcast has already committed to extend *Internet Essentials* to the TWC and Charter communities, and this is a core *benefit* of the Transaction, not a basis to impose conditions. Whether or not there might be ways to make *Internet Essentials* an even better program, there is no defensible argument that its introduction to the TWC markets would be a transactional *harm*. Even more fundamentally, the Proposed Decision misconstrues the program's origin, performance, and mission.[116]

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[113] Opening Br. at 8-9, 32-33, 71-72; Israel et al. Decl. ¶ 17.

[114] D.06-08-030, mimeo at 2, Conclusion of Law ¶ 33 (the only rates that continue to be regulated are rates for Lifeline and carrier of last resort services).

[115] Because the Scoping Memo specifically identified broadband access, outreach and adoption as issues for consideration, Joint Applicants included evidence regarding the success of Comcast's *Internet Essentials* program, and the benefits of the program that would extend to TWC and Charter customers who were eligible to participate in it. In doing so, Comcast expressly reserved, and did not waive, its objections to the Commission regulating in this area.

[116] PD at 51-57, 68-69, Finding of Fact 18.

Contrary to Intervenor claims adopted in the Proposed Decision, *Internet Essentials* was voluntarily proffered by Comcast in the NBCUniversal transaction and then extended indefinitely by Comcast's own initiative after the program's original term expired at the end of the 2014 school year.[117] Comcast has also voluntarily expanded the program's eligibility criteria four times, increasing the population of eligible students and their families by nearly 30 percent.[118] And, while the original commitment specified a speed of 1.5 Mbps for the program, Comcast has voluntarily increased speeds twice, and now offers 5 Mbps.[119] This speed is more than sufficient to access educational videos, such as those available through Khan Academy,[120] and service other core needs, which is the key objective of the program.

Further, *Internet Essentials* has never been intended as a universal service program. It was designed to address systematically the primary barriers to broadband adoption for low-income students and their families.[121] Based on that clear mission, the program is enormously successful by any objective measure.[122] Although *Internet Essentials* has only been in place since the back-to-school season in 2011, one quarter of the overall broadband adoption growth for low-income families with children nationally since 2009[123] can be credited to *Internet Essentials*.[124]

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[117] PD at 51-52; McDonald Decl. ¶ 39.

[118] Among other program enhancements, families with NSLP-eligible children of any age may participate, and families may continue to participate so long as there is one child living in the household who is eligible to participate in the NSLP. Comcast has also simplified enrollment in the program, including instant approvals for certain families, an enhanced online application process, and a dedicated call center for *Internet Essentials* inquiries. Opening Br. at 56-58, 88-89; McDonald Decl. ¶¶ 43-45, 47.

[119] McDonald Decl. ¶ 50.

[120] *See* Khan Academy Help Center, https://khanacademy.zendesk.com/hc/en-us/articles/202487500-Why-can-t-I-play-the-videos-.

[121] McDonald Decl. ¶ 25.

[122] *See id*. ¶¶ 25-29.

[123] This is the earliest date for which national broadband adoption rates have been publicly reported.

[124] McDonald Decl., Attach. A at 4.

Over 46,000 low-income households, or more than 185,000 people, have been connected in Comcast's existing California footprint, and more than 350,000 households, or over 1.4 million low-income Americans, nationally.[125]

Similar broadband adoption efforts by other entities do not come close to the success of *Internet Essentials*. Collectively, these other programs have not been able to reach even a quarter of the number of households connected by *Internet Essentials*. For example, CenturyLink's Internet Basics signed up less than 28,000 families nationwide in three years, offers lower speeds, requires a host of fees, and the price increases after the first year.[126] Cox's low-cost Internet service is only available to students eligible for free lunch on the National School Lunch Program ("NSLP") and has signed up 15,000 families in its service areas.[127] The FCC-sponsored Connect2Compete program did not leave the trial phase in the few TWC areas where it was launched, and has never reported any enrollment data.[128] The Proposed Decision (and CETF) utterly fail to account for the difficulties encountered by these other broadband adoption programs, which further underscore the incredible success of *Internet Essentials*.

Moreover, *Internet Essentials* is a *national*, not a California-specific offering. And that is a critical part of its appeal and success: Eligible customers who subscribe in California may keep the service if they relocate anywhere else in Comcast's footprint. This assures that students and families in the target income brackets have a simple, constant, reliable, and portable offering. The Proposed Decision wrongly disregards these facts, as well, in suggesting state-specific modifications to what is indisputably the nation's most successful broadband adoption program.

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[125] Opening Br. at 51; McDonald Decl. ¶ 25; *see also* Opening Br. at 54-55 (cataloging praise for *Internet Essentials* from wide range of community organizations, public officials, educators, and others).

[126] Opening Br. at 56 n.259.

[127] *Id.*

[128] *Id.*; Leddy Decl. ¶ 10.

Proposed Expansion And Penetration Requirements (Conditions 11-13). Because the expansion of *Internet Essentials* to the acquired TWC communities is a clear public interest benefit of the Transaction, there is simply no justification for suggested conditions that would require Comcast to radically change the program and replace it with a new broadband universal service program offered solely by a single provider in California – even assuming the Commission had jurisdiction in this area (which it does not).

In any event, given the well-documented barriers to broadband adoption, which go far beyond price and include lack of interest or desire for broadband services and other factors, the penetration target proposed by Condition 13 is unrealistic and simply unattainable. The proposed 45% penetration rate in Condition 13 is greater than what Comcast has been able to achieve for broadband service to the general population, market-wide (less than 40%), with over 20 years of investment and aggressive marketing to consumers.[129] Due to the substantial efforts of Comcast and its extensive network of community partners, the penetration rate of *Internet Essentials* for low-income households with school-age children (a subset of all low-income households) in Comcast's existing service area is increasing by approximately 4% per year. The program's growth rate is outpacing both national and Comcast's own growth trends for Internet service, based on Research by the Pew Internet and American Life Project (August 2013), as well as an industry expert.[130] This real-world growth rate is the only verified and credible evidence of actual connected households that should be used as a baseline for understanding potential increased penetration of the program.

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[129] McDonald Decl. ¶ 55. Comcast has achieved less than 40% broadband penetration for households in its service territory – representing a 2% increase in Internet adoption per year.

[130] *See also id.* ¶ 55 & Attach. A (Letter from John B. Horrigan, Independent Consultant, to Chairman Wheeler, FCC (Sept. 18, 2014), reporting adoption rates at 3-4).

The proposed $275 per household funding requirement in Condition 13 is also inappropriate and wasteful. In setting this amount, the Proposed Decision relies on CETF's estimates and justifications for outreach and marketing spending.[131] According to CETF, this results in "bare minimum" outreach expenditures per household of $250, which CETF later claimed should be upwardly "adjusted." From this, the suggested condition in the Proposed Decision sets a $275 per household funding obligation – without any further explanation of the basis for this upward "adjustment." Yet, it would obligate Comcast to spend $315,562,500 in California alone just for "outreach" efforts.[132] Condition 13 goes on to require that 10% of the funding must be allocated to an "independent" administrator of the outreach fund, plus another 10% for "consumer advocate organizations to independently monitor progress and provide policy analysis."[133] These suggested funding obligations would needlessly detract resources from the mission of *Internet Essentials* and inject outside groups and state agencies into the program's administration – with CETF leading the charge to receive the lion's share of this funding. CETF's blatant attempt to capitalize on the Transaction for its own benefit is inappropriate and certainly not in the public interest. The record shows that *Internet Essentials* already has sufficient transparency, accountability, and third-party support. Among other things, Comcast regularly reports program activities to the FCC, and provides comprehensive information to its existing, extensive network of community partners to facilitate their efforts and to address any questions or concerns as they arise on the ground.

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[131] PD at 133-34 & n.205.

[132] According to the Communications Division's February 2015 Lifeline Program Update, there are approximately 3 million Lifeline-eligible low-income households in California. Using the market assumptions adopted by the PD (showing a post-transaction market share of 84%), approximately 2,520,000 of these households would be in Comcast's territory; a 45% penetration rate would be 1,147,500 households. *California Lifeline Program Update* at 9 (Feb. 2015).

[133] CETF Br. at 14-15; CETF Ex Parte, Attach. C at 2 (Comments of CETF) (Aug. 28, 2014).

Finally, the Commission clearly lacks the jurisdiction to mandate a specific broadband offering or to regulate broadband issues generally, which undermines the legitimacy of these and other *Internet Essentials*-related conditions. But even leaving that aside, and assuming the Commission could legitimately pursue the objective of designing a universal broadband adoption program, that is plainly not a transaction-specific concern. Rather, it is the kind of initiative that should be addressed as part of an industry-wide proceeding – not imposed on single provider who is indisputably doing more to address broadband adoption *than any other entity* in the country – as a condition to a merger approval.[134]

F. The Proposed Decision Imposes Unlawful Rate And Performance Regulations Based On Inaccurate Assumptions About TWC Services And Is In All Events Unjustified.

The Proposed Decision adopts a "standalone" broadband offering requirement in Condition 17, which would effectively impose utility-style rate and service performance regulations on the merged company based on inaccurate and inappropriate TWC benchmarks. Leaving aside the core jurisdictional flaws with any such condition, this one is also based on erroneous findings.

- First, the condition incorrectly states the Internet access options provided by TWC. TWC's entry-level offering presented in Appendix A is 3 Mbps, when it is actually a 2 Mbps offering.[135]

- Second, except for the entry-level 2 Mbps service,[136] the TWC prices specified in the Proposed Decision for other services reflect promotional pricing, which are

[134] The FCC has a proceeding examining such initiatives on a federal level. *The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82.

[135] *See* WGAW Reply Brief at 17-18 (citing Time Warner Cable, High Speed Internet Plans and Packages showing 2 Mbps offering, http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html (last visited Feb. 27, 2015)). Some limited markets have been upgraded to 3 Mbps, but the standard offering of this package remains at a speed of 2 Mbps downstream.

[136] This speed is 4 Mbps below the California definition for qualifying as "served" by broadband, and is 3 Mbps below the speeds offered by *Internet Essentials*.

> short-term, discounted arrangements. It makes no sense to compare TWC promotional pricing to Comcast everyday pricing, especially since approximately half of Comcast customers are on promotional rates at any given time, reducing their monthly rates below Comcast's standard advertised prices.[137] And, even then, the quoted TWC services and prices are simply wrong.[138]

In all events, the record demonstrates that Comcast offers standalone broadband services at reasonable market-based rates and is committed to continuing to offer standalone broadband in California post-transaction.[139] Comcast customers are also consistently getting more value for their money when it comes to Internet services. Comcast has increased broadband speeds 13 times since 2002, and Comcast customers now pay 92 percent less than they did in 2002 for each Mbps of speed that they receive, even before adjusting for inflation.[140]

Accordingly, there is no need for the suggested standalone broadband condition since nothing about the Transaction suggests that customers in the former TWC markets will enjoy anything less than robust standalone offerings. In fact, the proposed condition would actually *deprive* TWC customers of one of the Transaction's primary benefits by making TWC's existing, slower offerings the "benchmarks" for customers in former TWC service areas for five years.[141]

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[137] *See* FCC Opp'n at 292 ("[N]early 50 percent of Comcast's customers take advantage of promotional or multi-product discounts, neither of which are factored into price surveys (which are based solely on rate cards)"); Comcast Corp., Quarterly Report (Form 10-Q), at 34 (Oct. 23, 2014), *available at* http://www.cmcsa.com/secfiling.cfm?filingID=1193125-14-379913.

[138] In making affordability claims that were used as the basis for this condition, WGAW compared TWC promotional prices with Comcast's standard (non-promotional) prices. *See* WGAW Br. at 16-18. Further, the rates and services cited by WGAW are not the same rates and services offered on the identified TWC website link (*see* n.137 above).

[139] Opening Br. at 92-93.

[140] *Id.* at 77; FCC Opp'n at 37; *see also* Israel et al. Decl. ¶ 26 (citing Israel FCC Reply Decl. ¶ 221) (showing that a one Mbps increase in speed translates into as much as $5.86 in value per subscriber per month; each one Mbps increase in average speed spread over just TWC customers in California would be worth roughly $21 million per year to consumers).

[141] Pegging customer offerings for five years to existing TWC prices and speeds will deprive customers of the natural upward speed increases that Comcast has consistently offered. Over the last two years, Comcast customers on average were receiving speeds of at least double, and up to six times, that of the average speed received by TWC customers. Opening Br. at 79 n.358. Currently, TWC's most widely-

It would also prevent effective integration of the companies and the associated operating efficiencies that are other key benefits of the Transaction.

G. The Proposed Decision Adopts Incorrect Data Regarding Comcast's Quality Of Service And Network Safety And Reliability.

Condition 23 establishes reporting requirements regarding outages, customer service improvements, and customer privacy based on assertions that Comcast's services may be inferior to TWC's current offerings and that Comcast's provision of Wi-Fi service presents safety and privacy concerns.[142] These assertions are incorrect and the condition is inappropriate.

Network Quality. Objective measures of network quality are an area where Comcast has clearly excelled in comparison to TWC. Strides in Comcast's network investments and upgrades include: completion of all-digital rollout two years ahead of schedule; rollout of twenty times the amount of Wi-Fi hotspots as TWC; deployment of DOCSIS 3.0-capable modems; CCAP technology; technologies and procedures enabling self-installations; automatic upgrade of the speed received by customers as the costs of Comcast's network decline; and multiple other improvements and investments that inure to the benefit of Comcast customers, as laid out in detail in the prior record.[143] Thus, network quality or performance reporting is entirely unjustified as a response to the Transaction, which will only *improve* the quality of the TWC network facilities.

Service Standards and Metrics. The Proposed Decision also seeks to impose service standards on Comcast that are simply inapplicable to Comcast's services, and thus are inappropriate benchmarks. For example, the Proposed Decision adopts in Condition 21 a requirement that Comcast meet GO 133 installation standards, based on ORA's claims that

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subscribed speed tier is 15 Mbps downstream in most areas, whereas Comcast's most widely-subscribed speed tier is at a minimum 25 Mbps downstream and in many places 50 Mbps, with over one-third of all Comcast customers subscribing to speeds between 50 and 105 Mbps. *Id.* at 78-79.

[142] PD at 62, 82-83.

[143] Opening Br. at 37-38, 78-87; Israel et al. Decl. ¶¶ 21-26 & n.45.

Comcast's (and TWC's) averages for service installation intervals and completion of service orders are deficient in this area.[144] But the referenced GO 133 standards would not apply even to the regulated Comcast and TWC CLECs – they apply only to GRC ILECs – much less to VoIP providers.[145]

The Proposed Decision similarly adopts inaccurate portrayals of Comcast's customer service survey results. Since 2010, Comcast's J.D. Power Satisfaction Ranking in the West Region and in California increased by more than 35 points in voice services and over 50 points in broadband services.[146] To the extent the 2013 J.D. Power survey data is considered, it shows that Comcast generally performs substantially better than Charter and TWC in ISP and voice services in the West Region.[147] In the 2014 version of the J.D. Power survey, Comcast performs approximately the same as TWC in both voice and Internet service, with a slightly higher rating in voice service and a slightly lower rating in Internet service, and below Charter for voice and Internet service. Given that TWC has many more subscribers in California than Charter, as well as inconsistencies between the 2013 (and prior years') and 2014 survey results, the impact of the Transaction on customer service suggested by these survey results is ambiguous at best.[148]

More generally, the notion of imposing conditions based on survey results, which say nothing about how the Transaction will affect customer service, makes no sense. This is not to say that addressing customer service is not a legitimate Commission concern, but that is an industry-wide (and as much a TWC as a Comcast) issue, not a transaction-related harm.

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[144] The fact that the Proposed Decision discusses TWC service issues also undermines any conclusion that these are transaction-specific harms.

[145] D.09-07-019.

[146] Opening Br. at 39-40; Opening Br., Ex. K at 3:49 (Comcast Corporation Responses to ORA's Third Set of Data Requests); Israel et al. Decl. ¶ 28.

[147] Israel et al. Decl. ¶ 28.

[148] *Id.*

Outage Data. The Proposed Decision further adopts Intervenor concerns about service quality and outages, as a basis for imposing Condition 22 (911 and e911 services) and other aspects of Condition 23 (relating to service "reliability" and outage reporting). But the record shows that, when outages have occurred, Comcast quickly became aware of the issue, engaged the appropriate teams, and began repairs to restore service as soon as possible.[149] The Proposed Decision does not account for any of this evidence in adopting Intervenors' inaccurate assertions regarding Comcast's service reliability.[150] Further, the data cited by Intervenors are from reports that Comcast is already submitting to the FCC as part of the Network Outage Reporting System (NORS). And California has petitioned the FCC for state access to the database.[151]

The reporting obligation in subpart (a) of Condition 23 is also superfluous, as Comcast currently files with the Commission reports of outages for intrastate Metro Ethernet private line services (i.e., special access) only (while Section 710 prohibits the Commission from imposing such conditions on VoIP services).

While it is unclear exactly what result subpart (b) of Condition 23 seeks, it is likewise superfluous in the sense that, post-transaction, the regulated CLECs will already be subject to Commission rules, orders, decisions, and requirements of the P.U. Code, including as to requests for change or discontinuation of service. Section 710 restricts the Commission from imposing the other requirements listed by subpart (b).

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[149] Ex. ORA/Comcast-3:35 (voice service outage reports submitted to the FCC); Entry 14-16502454 (noting a third-party construction crew inadvertently cut the cable); Entry 14-23677919 (noting earthquake caused customer outages).

[150] *See* PD at 49, 62, 71-72 (discussing outages and service reliability).

[151] *See* Petition of the California Public Utilities Commission and the People of the State of California for Rulemaking on States' Access to the Network Outage Reporting System ("NORS") Database and a Ruling Granting California Access to NORS, ET Docket No. 04-35 (Nov. 12, 2009).

Similarly, it is unclear what specific laws and requirements subpart (c) of Condition 23 is meant to reference. Comcast's regulated affiliates will continue to comply with all Commission rules and orders, including the only General Order relating to "privacy" in the telephony context, GO 107-B. To the extent this condition seeks to extend Commission jurisdiction over Comcast's non-state regulated affiliates offering VoIP services, again, the Commission is specifically restricted from regulating in this area under Section 710.

In all events, these kind of reporting requirements are plainly not transaction-specific and thus inappropriate as suggested conditions to the Transaction.

Wi-Fi Security and Consumer Information. Even if Wi-Fi were legitimately within the Commission's jurisdiction, which it is not, the record shows that Comcast has invested significant time and energy in developing and putting into place measures and safeguards to protect the security, reliability, and resiliency of its network.[152] These investments include provision of Wi-Fi hotspots, which are secure and provide substantial benefits to consumers.

The Proposed Decision incorrectly concludes that Comcast's public internet Wi-Fi hotspots raise potential issues of privacy and service quality. These conclusions are almost entirely based on ORA's summary of allegations from a class action filed in the Northern District of California on December 4, 2014 concerning the Wi-Fi routers.[153] Instead of weighing evidence presented by Joint Applicants in the record, the Proposed Decision improperly relies on the uncorroborated allegations contained in that adversarial, unrelated proceeding, which Comcast vigorously denies.[154]

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[152] Opening Br. at 18-19, 43; Ex. CforAT/Comcast-1:7-1:9.

[153] *See* PD at 63; ORA Br. at 53-55.

[154] Cal. Gov't Code § 11513(d); D.05-06-033, mimeo at 53 ("[H]earsay . . . cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue.").

The record demonstrates that the public Wi-Fi hotspots are safe, reliable, and bring substantial benefits to consumers.[155] Contrary to the Proposed Decision's finding, Comcast fully informs consumers about the public Wi-Fi hotspot feature, including the security and functionality of the in-home Wi-Fi signal.[156] Among other secure features, the public hotspot is completely separate from a customer's private hotspot, and provides Xfinity customers with enhanced security because they do not have to share their secure, private home network password with visitors, who can instead log onto the public hotspot with their own secure credentials.[157] In addition, Comcast provides an opt-out feature for customers who do not want to participate in the Wi-Fi hotspot program, and informs customers how to turn off the public component of the hotspot if they wish.[158]

H. The "Benchmark" Competition Theory Adopted In The Proposed Decision Is Refuted By The Record Evidence.

The Proposed Decision concludes that the Transaction will eliminate the ability to compare the merging companies' relative performance and prices, thereby harming both the Commission and consumers.[159] Condition 24 is apparently intended to "mitigate" the loss of TWC as an alleged "benchmark" by requiring the merged entity to file annual reports covering a wide range of topics, including FCC Form 477 data.[160]

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[155] Opening Br. at 84 n.386; Portfolio Decl. ¶¶ 60-65.

[156] Opening Br. at 84 n.386; Israel Decl. ¶ 192 & n.256.

[157] Israel Decl. ¶ 192 & n.256.

[158] Opening Br. at 84 & n.386.

[159] PD at 64.

[160] *Id.* at 83-84. Notably, Form 477 data is already available to the Commission, as long as it agrees to protect the information consistent with protections afforded under Federal confidentiality statutes and rules (e.g., FOIA, the Trade Secrets Act). *See Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd. 7717 ¶ 95 (2000); FCC, *Process for State Regulatory Commissions to Obtain State-Specific FCC Form 477 Data*, http://www.fcc.gov/encyclopedia/process-state-regulatory-commissions-obtain-state-specific-fcc-form-477-data (last visited Feb. 26, 2015).

The factual conclusions underlying this suggested condition are based on idle speculation by Intervenors, and are not supported by any coherent economic theory or empirical evidence indicating that more benchmarks lead to lower prices and/or higher quality. Instead, this theory conflates the standard analysis of potential harms resulting from a horizontal merger; namely, absent the merger, the merging parties would place significant constraints on one another's behavior and thus, by eliminating this supposed "constraint," the merger would make it easier for the merging parties to raise prices or otherwise harm competition.[161] That concern is irrelevant here because, as shown, the Transaction is not a horizontal merger. Despite Intervenors' repeated claims that Comcast and TWC compete with each other, the substantial record evidence clearly shows they do not. They serve separate and distinct areas, and there is no horizontal effect – at all – from this Transaction.

I. Other Suggested Conditions Are Unauthorized And Unnecessary.

Non-Interference with Voice Service. Condition 10 of the Proposed Decision seeks to impose non-interference obligations on the operations of Comcast's IP-enabled network or its VoIP services. This condition is beyond the Commission's jurisdiction for the reasons already shown. Further, no Intervenor proposed this condition, it does not address any allegedly anticompetitive (or other allegedly harmful) practice raised in the proceeding, and it is unnecessary because Comcast does not interfere with voice services or degrade customers' ability to complete calls. The company utilizes its own managed network for interconnected VoIP calls. Presumably, this condition is meant to protect OTT VoIP providers, like Vonage, that use the public Internet by prohibiting Comcast from blocking or discrimination against such entities. If so, Comcast is the only ISP legally bound by the FCC's original Open Internet rules, which

[161] Israel et al. Decl. ¶ 40.

include "no blocking" and non-discrimination provisions. Imposing this seemingly remedial condition is thus unfair and unjustified – and could raise interpretive questions in the future as parties try to inflate it with meaning and justification it does not have.

Comcast's Website Already Benchmarks to Best Practices for Accessibility. Condition 4 of the Proposed Decision purports to require Comcast to meet "best in practice web access standards." Leaving aside the jurisdictional objections to this condition outlined above, it bears noting that Comcast already offers a comprehensive and user-friendly website that benchmarks to best practices for website accessibility based on Web Content Accessibility Guidelines 2.0 AA standards.[162] And Comcast continues to make further incremental progress with the goal of AA conformance in mind. But regardless of Comcast's ability to meet the standard, adopting this condition would implicitly suggest that the website was wanting in some way – an unjustified conclusion that the record does not support and the Commission should not countenance.

V. POTENTIAL CHALLENGES TO CONDITIONS

Condition 25 would require Joint Applicants to waive jurisdictional challenges to the Commission's authority.[163] An applicant is entitled to challenge conditions that are outside the scope of a proceeding and exceed the Commission's jurisdiction.[164] If such conditions are found

[162] *See* CforAT Br. at 10 n.17 (commending Comcast's work in this area and acknowledging Comcast will have improved accessibility as compared to TWC).

[163] This section also responds to Commissioner Sandoval's request during the February 25, 2015 All-Party Meeting that parties address potential appeal issues.

[164] *See* Cal. Pub. Util. Code § 1757 (The court may review a decision by the Commission to determine whether "the commission acted without, or in excess of, its power or jurisdiction. . . . [or] the commission has not proceeded in the manner required by law."); *see also Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1570-71 (Ct. App. 1996) (noting § 1759 "deprives the courts of jurisdiction only as to acts undertaken by the commission 'in the performance of its official duties' and not acts in excess of its jurisdiction.") (citation omitted).

to be *ultra vires*, they would be null and void as a legal matter.[165] Nor can the Commission take the position that the public interest factors under Section 854 give it authority to impose conditions beyond its jurisdiction.[166] Even so, Joint Applicants hope that the previous point is moot because they do not expect the final decision to include objectionable conditions. Joint Applicants are confident that they can satisfy the Commission's legitimate public interest objectives without there having to be any disputed conditions and without the need to appeal or otherwise challenge the order. As noted above this could be accomplished through a combination of conditions that are clearly within the scope of the CPUC's jurisdiction and voluntary commitments. Parties can and have frequently agreed to voluntary conditions in merger dockets,[167] and in certain voluntary programs, both of which are routinely enforced by the CPUC.[168]

[165] *See, e.g.*, *Hempy v. Pub. Utils. Comm'n*, 56 Cal. 2d 214, 218-19 (Cal. 1961) ("but the commission's approval has now been given, and it had no power as a condition of that approval to determine . . . rights it had no jurisdiction to adjudicate"); *see also Burlington N. & Sante Fe Ry. Co. v. Pub. Utils. Comm'n*, 112 Cal. App. 4th 881, 891-92 (Ct. App. 2003) (annulling a decision by the Commission per P.U. Code § 1757 because it violated a state statute and the record did not support the Commission's findings).

[166] *Hempy*, 56 Cal. 2d 214 (noting that while the commission may consider the public interest impacts of a transfer of highway operating rights, it had no jurisdiction to impose conditions as to rights among a utility's creditors).

[167] *See, e.g.*, D.05-11-028, mimeo at 110-112 (Ordering ¶¶ 1-2, 6) (approving SBC's settlement agreement with Greenlining which included a commitment by SBC to increase corporate philanthropy by $47M, making that a condition of the merger and finding that a "failure to comply with any element of this order shall constitute a violation of a Commission order, and subject applicants to penalties and sanctions consistent with law").

[168] *See, e.g.*, D.07-12-054, mimeo at 35 ("by accepting CASF funding, any carrier comes under the Commission's jurisdiction with respect to monitoring and enforcement of any conditions attached to approval of the CASF funding").

Respectfully submitted March 5, 2015, at San Francisco, California.

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APPENDIX A
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING CLAUSES

Findings of Fact

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

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

3. Comcast, Charter and Time Warner Cable do not compete with one another.

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

5. Comcast and Time Warner Cable compete with other providers of ~~so-called "~~business services, special access and backhaul~~"~~ services in their respective service territories including incumbent local exchange carriers and owners of dedicated fiber optic systems.

6. The merged company will have enhanced ability to compete for the provision of voice and data transport services, and special access and backhaul services to customers that operate in both northern and southern California. Comcast has voluntarily agreed to maintain the existing wholesale business services arrangements that TWC has established.

7. Comcast has an all-digital platform for its broadband services.

8. Time Warner Cable does not have an all-digital platform for its broadband services.

9. Upon completion of the merger, Comcast will extend its all-digital platform to Time Warner Cable customers.

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

11. Time Warner Cable provides stand-alone broadband Internet services on a sliding scale to customers throughout its service territories. Comcast also offers standalone broadband services and has voluntarily committed to continuing to offer standalone broadband in California post-transaction throughout the merged territories.

12. Time Warner Cable is able to offer Lifeline service to its voice customers based on D.14-03-038, adopted March 27, 2014, that designated Time Warner Cable's subsidiary TWCIS-CA as an Eligible Telecommunications Carrier. Comcast has committed to provide Lifeline to customers in communities currently served by TWC if TWC offers Lifeline, and will also honor discounted rates for certain "grandfathered" Charter customers who used to receive Lifeline services from Charter.

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

14. ~~ORA presented calculations of the HHI with respect to the concentration of the market for fixed broadband. This analysis showed that the HHI was already highly concentrated before the merger, and becomes more highly concentrated as a result of the Comcast acquisition.~~The relevant geographic market for analyzing the Transaction with regard to residential voice and broadband services is local. Because California consumers, businesses, and institutions will have the same number of competitive choices post-transaction on this local market level as they have today, the change in HHI from the Transaction is zero.

15. As of June 30, 2014, according to the California Broadband Availability Database, ~~76.6~~69% of households in Joint Applicants' territory have no competitors for broadband service at download speed tiers greater than or equal to 25 Megabits per second. However, many customers of Comcast, Time Warner Cable, Charter and other broadband providers choose services at lower speeds, even when higher speeds are available, based on factors such as pricing and their particular needs as broadband users

16. Post-merger, Comcast will ~~serve~~pass 84% of the households in California.

17. ~~Deficiencies in Comcast's customer notification and battery backup program have a negative impact on safety and reliability in California.~~Comcast submitted its Advice Letter to the Commission on July 21, 2010, describing its D.10-01-026 compliance plans and providing information about its customer educational program information concerning backup power on the customer premises. Since that filing, Comcast has received no indication that its compliance plans do not satisfy D.10-01-026.

18. Comcast's Internet Essentials program has ~~had a weak performance in closing the digital divide in California and fulfilling universal service goals.~~connected over 46,000 low-income households, or more than 185,000 people to broadband in Comcast's California footprint. On a nationwide basis Comcast's *Internet Essentials* program can be credited with one quarter of the overall broadband growth since 2009 for low-income families with children. Comcast has voluntarily committed to expand Internet Essentials to the acquired TWC territories in connection with the Transaction

19. The ~~anti-competitive effects of the merger, absent any mitigation measures, will hinder broadband development in California.~~ efficiencies and economies of scale resulting from the Transaction will promote investment in advanced technologies and result in benefits to California consumers, which benefits will be enhanced through the voluntary commitments of Comcast enumerated above and the mitigation measures set forth in Exhibit ___.

Conclusions of Law

1. The Commission examines proposed mergers, acquisitions, or transfers of control on a case-by-case basis to determine the applicability of Pub. Util. Code § 854. The Commission examines transfers of assets and customers under Pub. Util. Code § 851.

2. To obtain approval of the proposed transfers, Applicants must demonstrate that they meet the requirements of §§§ 854(a) and (c).851.

3. Section 854(c) requires that the Applicants must prove by a preponderance of the evidence that the requirements of § 854(c) are met.The Commission may consider the Section 854(c) standard and factors as part of its Section 854(a) analysis.

4. In enacting Section 710 of the P.U. Code ("Section 710"), the Legislature expressly determined that the best way to encourage deployment of IP-enabled services to Californians was to strictly limit the regulation of such services. The authority granted to the Commission in Pub. Util. Code § 710 cannot be expanded without an express statutory directive.

5. Section 706(a) of the 1996 Telecommunications Act, codified inas 47 United States CodeU.S.C. § 1302(a) is a, does not grant of authority to the Commission to examine the implications of the proposed merger of the parent companiestransfers on broadband deployment in California andnor to impose pro-competitive conditions that enhance broadband deployment, especially to schools, libraries and underserved communities.5. The authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act satisfies the requirement of express delegation under federal law set out in § 710 of the Pub. Util. Codebroadband-related conditions.

6. Issues excluded from consideration in this proceeding by the Scoping Memorandum include: (a) cable operations, services and related equipment issues; (b) programming-related issues; (c) issues related to the Internet backbone, content delivery networks, and the Open Internet rules; and (d) certain other non-transaction specific matters.

7. As modified by this decision, the proposed transfers meet the requirements of §§§ 854(a) and (c)851 and are in the public interest.

~~7. The approval of the transfer of control between parties to this merger and the conditions applied herein is consistent with the requirements of Section 710 of the Public Utilities Code and consistent with the Commission's jurisdiction expressly delegated by applicable federal law and statute.~~

O R D E R

IT IS ORDERED that:

1. The application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for the transfer of control of Time Warner Cable Information Services (California), LLC; and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC, to Comcast Corporation, is approved with the conditions set forth in Appendix A of this decision.

2. The application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC for approval to transfer certain assets and customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, is approved with the conditions set forth in Appendix A hereto.

3. Within 30 days of the issuing date of any decision by another jurisdiction which materially changes the terms of the proposed transaction as it affects any of Applicants'' California utility operations, Applicants shall file a copy of that decision with the Commission, with a copy served on the service list in this proceeding and the Director of the

~~Telecommunications~~Communications Division. The filing shall also include an analysis of the impact of any terms and conditions contained therein as they affect any of Applicants~~'~~' California utility operations.

4. Applicants shall notify the Commission, with a copy served on the service list in this proceeding and the Director of the Communications Division, of the date the ~~merger is~~transfers described in Ordering Paragraphs 1 and 2 are both consummated. The notice shall be served within 30 days of ~~merger~~said consummation.

5. Comcast Corporation, Time Warner Cable Inc. and Charter Fiberlink CA-CCO, LLC shall each submit a written notice to the Director of the Commission~~'~~'s Communications Division of their agreement~~, evidenced by a duly authenticated resolution of their respective Boards of Directors, Board of Managers, or the equivalent authority,~~ to each of the conditions in Appendix A. The Conditions in Appendix A do not apply to Bright House.

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

This order is effective today.

Dated _____, at San Francisco, California.