

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013  
(Filed April 11, 2014)

And Related Matter.

Application 14-06-012  
(Filed June 17, 2014)

**MOTION OF THE OFFICE OF RATEPAYER ADVOCATES  
TO SET ASIDE SUBMISSION AND RECEIVE INTO EVIDENCE  
THREE DISCOVERY DOCUMENTS; [PROPOSED ORDER]  
[PUBLIC VERSION]**

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March 17, 2015

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**I. INTRODUCTION**

Pursuant to Rule 11.1 and Rule 13.14 of the California Public Utilities Commission's Rules of Practice and Procedure (Rules), the Office of Ratepayer Advocates (ORA) files this Motion to set aside submission and reopen the record for the purpose of receiving into evidence three discovery documents attached to this motion as Attachments A, B and C (Motion). ORA found these documents among the millions of e-discovery documents that Comcast Corporation (Comcast), Time Warner Cable, Inc. (TWC) and Charter Communications (Charter) produced in response to the Federal Communications Commission's (FCC) requests for information. These documents confirm that Comcast has plans to enter the over-the-top (OTT) video services market. This information is relevant to the California Public Utilities Commission's (CPUC) review of the proposed merger's effect on broadband because Comcast, TWC, Charter and

Bright House Networks, California (collectively, “Joint Applicants”) are each vertically integrated providers of broadband, multichannel video, and voice telephone services and each offers bundled services that include video, voice, and Internet for a bundled price. Comcast’s own Chief Financial Officer (CFO) recently stated that Comcast’s business plan going forward is for customers to subscribe to its “wire” and in return, customers will receive an OTT broadband package that it can use on other devices.<sup>1</sup> As described below, good cause exists for the CPUC to grant this Motion.

## II. DISCUSSION

The Joint Applicants’ stated in their opening comments on the PD that the Horizontal Merger Guidelines (HMG) are “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.”<sup>2</sup> They also claim that it would be cost-prohibitive and unprofitable for it and TWC “to make the major investments necessary to enter each other’s markets as an out-of-footprint OVD<sup>3</sup> [online video distributor].”<sup>4</sup> The Joint Applicants’ economic expert, Dr. Mark Israel, “expressly premised his support for this theory on the basis that entry by one of the Joint Applicants into the other’s operating area would require overbuilding a new network entirely from scratch, and that the costs of such an undertaking would be prohibitively expensive[.]”<sup>5</sup>

The documents attached to this motion undermine these claims in support of the proposed merger. They consist of plans by Comcast to enter into the over-the top (OTT) services market. OTT services refers to the delivery of audio, video, and other media over the Internet, such as Netflix, Amazon or Hulu delivered via a customer’s broadband connection. The significance of these documents cannot be underestimated as they show that competitive entry into the OTT

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<sup>1</sup> <http://www.sfgate.com/business/fool/article/Why-Comcast-Isn-t-Worried-About-Cord-Cutters-6127541.php>

<sup>2</sup> Joint Applicants’ Opening Comments on PD at 16.

<sup>3</sup> An OVD (online video distributor) provides an OTT (over-the-top) service.

<sup>4</sup> Joint Applicants’ Opening Comments on PD at 22.

<sup>5</sup> Supplemental Declaration and Expert Report of Lee L. Selwyn dated 2/5/15 at 4 (Supplemental Declaration), attached to ORA’s Motion to Late-File a Supplemental Declaration filed 2/5/15, which has not been ruled on, and also provided as Attachment A to ORA’s Reply Comments on the PD filed on 3/10/15.

services market can now be accomplished without overbuilding, and therefore, the economic barrier to an OTT service provider entering into an incumbent provider's operating area, such as Comcast competing head to head against TWC and vice versa, disappears.<sup>6</sup>

In a document provided as Attachment A titled [REDACTED], Comcast asks strategic questions such as [REDACTED] [REDACTED]”<sup>7</sup> Later in the document, in response to this strategic question, Comcast provides that [REDACTED] [REDACTED]”<sup>8</sup> Comcast also wants to [REDACTED] [REDACTED]”<sup>9</sup>

What this and other similar documents demonstrate is that post-merger, Comcast will act immediately to [REDACTED] [REDACTED] and that if the merger did not occur, Comcast would be much more likely to aggressively compete against TWC [REDACTED] [REDACTED].<sup>10</sup> Most significantly, Comcast states that it will only offer a [REDACTED] [REDACTED]” because of its “ [REDACTED]” post-merger. But if the merger does not occur, then it would much more likely be an [REDACTED]” versus a “ [REDACTED]” in the [REDACTED].<sup>11</sup> Because Comcast pre-merger only passes 33.7% to [REDACTED] % of California households, it is much more likely to aggressively enter the OTT market if the merger does not occur than if the merger does occur. A post-merger Comcast will pass 84% to [REDACTED] % of

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<sup>6</sup> Supplemental Declaration at 4.

<sup>7</sup> Attachment A, [REDACTED].

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, Attachment B, [REDACTED]; Attachment C, [REDACTED].

<sup>11</sup> Attachment A, [REDACTED]. *See also* Attachment B, [REDACTED]; Attachment C, [REDACTED].

California households and therefore, it will be more likely to enter the OTT market only in response to competition from other OTT market participants.<sup>12</sup>

These documents also highlight the rapidly changing OTT market,<sup>13</sup> and why, in [REDACTED], TWC reached the conclusion that entry into the [REDACTED] [REDACTED].<sup>14</sup> It is inconceivable that TWC would reach the same result at present, as a number of the core assumptions which TWC relied upon no longer apply.<sup>15</sup> As evidenced in the Supplemental Declaration and Expert Report of Lee L. Selwyn (Supplemental Declaration) and in Attachments A, B and C to this Motion, TWC’s analysis from [REDACTED] is obsolete.<sup>16</sup> Comcast itself observed nearly a year ago that [REDACTED] [REDACTED].”<sup>17</sup>

The Joint Applicants downplayed the significance of these documents in a recent letter to the FCC. But these documents speak for themselves – Comcast has specific plans on how and when to enter the OTT market. And Comcast’s own economist, Dr. Mark Israel, stated at the FCC’s recent Economist Analysis Workshop on the merger that “I think everyone here and everyone in the room would agree that the shift toward OVD video is the fundamental transformation of the industry and that any deck<sup>18</sup> would be expected and I think all of the Comcast decks see this as disruptive and the number one challenge to deal with and the number one thing to overcome.”<sup>19</sup> The

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<sup>12</sup> ORA’s confidential number is based on the Joint Applicants’ actual number of California homes passed, which is a much accurate number than the public number. *See* ORA Opening Comments on PD at 15.

<sup>13</sup> Attachment B, [REDACTED] at 2; Attachment C, [REDACTED].

<sup>14</sup> Supplemental Declaration at 10-13.

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

<sup>16</sup> *Id.* *See also* Attachment A, [REDACTED]; Attachment B, [REDACTED] at 2; Attachment C, [REDACTED].

<sup>17</sup> Attachment B, [REDACTED] at 2.

<sup>18</sup> The term “deck” is an industry term that refers to a slide deck or a slide show (i.e., a series of slides). Decks are used in high-level presentations, such as the ones attached to this motion.

<sup>19</sup> FCC’s Economic Analysis Workshop, Transcript at 179 (lines 16-22) to 180 (lines 1 -2);

bottom line is that OTT is another example of Comcast using its control of telecommunications facilities to leverage ancillary markets. This matters here because one of the California-specific effects of the merger will be Comcast's unparalleled dominance in the last-mile control of California consumers, i.e., "eyeballs," and in the content and OTT markets.

That Comcast plans to enter the OTT market is also supported by statements Comcast's CFO made on March 3, 2015 at a Morgan Stanley Investor Conference:<sup>20</sup>

Though many believe the trickle of customers leaving cable television behind for purely digital entertainment options will turn into a flood, Comcast CFO Michael Angelakis sees the changing landscape as an opportunity for his company.

While he expects definite changes in how the cable, Internet, and content giant will make its money, he showed no concerns that cord cutting would damage the bottom line when he addressed the Morgan Stanley Investor Conference earlier this month.

"The consumer is evolving, no surprise to anybody, millennials ... people on the go, people want to use tablets, just look around the room [to see] how many people have tablets and so forth," he said. "And our goal is to evolve with our customer base."

#### **Change can be good**

While many view cord cutting as a potential death blow to cable providers, Angelakis sees the move toward digital services as a way to sell more broadband Internet.

"Having over the top or other different types of services are not necessarily competitive to our core services; if [sic] fact, I'd argue they're complementary to the video service [and] actually help our broadband service," he said.<sup>21</sup>

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<http://apps.fcc.gov/ecfs/document/view?id=60001031131>

<sup>20</sup> <http://www.cmcsk.com/eventdetail.cfm?eventid=156363>

<sup>21</sup> <http://www.sfgate.com/business/fool/article/Why-Comcast-Isn-t-Worried-About-Cord-Cutters-6127541.php> (brackets in original).

What Comcast's CFO states is exactly what ORA explained in its Brief – that Comcast's business plan is to have customers subscribe to its "wire" and in return, customers will receive an OTT broadband package that it can use on other devices.<sup>22</sup>

Moreover, Comcast's argument that entering the OTT market would be cost-prohibitive is not reflected in its own actions. Comcast already offers OTT-like products, such as TVEverywhere, which allows Comcast's customers to access content anywhere that a broadband connection is available on any device. That Comcast only offers these products to customers who are also pay TV subscribers is a business decision; it would not require Comcast to build out its network infrastructure in order to expand the reach of the program outside of its existing footprint. While Comcast has claimed that the cost of programming could make entry into the OTT market more expensive, if Comcast wins approval of the proposed merger with TWC, Charter and Bright House, then Comcast, which is itself a provider of content, will be in a much better bargaining position with the programmers post-merger when it will pass 84% to █% of California households, 2.5 times the number of California households that it passes pre-merger, 33.7% to █%. And as the PD noted, nearly 80% of California households within Comcast's post-merger service area will have only one choice for a high-speed broadband provider – Comcast.<sup>23</sup> Nearly all of the remaining 20% of California households will have at most one other choice of provider.<sup>24</sup> The bottom line is that OTT services are another example of Comcast using its control of telecommunications facilities to leverage ancillary markets.

### **III. GOOD CAUSES EXISTS FOR THE CPUC TO ACCEPT THESE DOCUMENTS INTO THE RECORD**

Due to the sheer volume of documents involved in in initial and supplemental discovery responses and the challenges in searches detailed in ORA's letter to the Comcast, TWC and

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<sup>22</sup> See, e.g., ORA Brief at 40-51 and Exhibit 1 to ORA's Brief, Expert Report and Declaration of Lee L. Selwyn at 95-154.

<sup>23</sup> PD at 61.

<sup>24</sup> Exhibit 1 to ORA Brief, Expert Report and Declaration of Lee L. Selwyn at 71 to 72. Less than 1% of customers in Comcast's footprint post-merger will have a choice of two other providers.

Charter on January 29, 2015,<sup>25</sup> ORA did not become aware of these specific documents until very recently.

On February 10, 2015, DISH Networks (DISH) filed a letter with the FCC on the proposed merger. Although that letter was heavily redacted, it was clear to ORA that DISH had found some documents in the millions of discovery documents produced that were relevant to ORA's competition analysis, and, perhaps more significantly, relevant to the Joint Applicants' statements in its opening comments on the Proposed Decision (PD) Approving, With Conditions, Transfer of Control. For example, the Joint Applicants' claimed in their opening comments on the PD that "Comcast and TWC have each determined that it would be both cost-prohibitive and ultimately unprofitable . . . to make the major investments necessary to enter each other's markets as an out-of-footprint OVD [online video distributor]."<sup>26</sup>

While ORA filed its Brief in this matter on December 10, 2014, ORA has continued its laborious and cumbersome review of the documents Comcast, TWC and Charter produced to ORA via e-discovery, which include all of their responses to FCC requests for information (FCC Documents). ORA was unable to find the documents referenced in the DISH Letter due to the heavy redactions and the millions of FCC Documents in the e-discovery databases. ORA's counsel reached out to DISH for assistance in locating these documents. Because DISH obtained the documents via the FCC's Joint Protective Order and ORA received them via Public Utilities

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<sup>25</sup> ORA originally requested all of Joint Applicants responses to the FCC Requests for Information (FCC Documents) in data requests issued on August 29, 2014. All of the Joint Applicants initially protested providing ORA with the FCC Documents. Eventually, the disagreement with Comcast and TWC focused on the format of those documents. Charter continued to object to providing ORA with the FCC Documents until it was ordered to do so at the October 16, 2014 Law & Motion Hearing (Hearing).

After extensive discussions about the format in which the Joint Applicants would provide ORA with the FCC Documents, the ultimate resolution was that Joint Applicants would provide ORA the FCC Documents via an online eDiscovery platform where ORA could review the documents. ORA received credentials and training for eDiscovery in late October and November, 2014. ORA continued to have difficulty in utilizing the eDiscovery platform due to a variety of problems such the lack of functionality in the set-up of Relativity and the difficulty downloading software.

While the Joint Applicants had committed to giving ORA the same access as the FCC,<sup>25</sup> as ORA noted in its letter to the Joint Applicants dated January 29, 2015, the FCC uses additional software for its review, which provides a more detailed and robust search of documents, thereby dramatically improving and accelerating the review as compared to only using Relativity.<sup>25</sup> ORA's review of the FCC Documents has been severely hampered and slowed down by the search limitations ORA encountered.

<sup>26</sup> Joint Applicants' Opening Comments on PD at 22.



Code Section 583 and has not signed the FCC's Joint Protective Order, there was some ambiguity about whether DISH could provide ORA with the Bates numbers of the documents or other information to assist in ORA's search of the documents. On February 27, 2015, DISH informed ORA that Comcast and TWC had given permission to give the Bates numbers to ORA. ORA was then able to locate most of the documents. Two of the documents, however, do not appear to be in the e-discovery online database, which is a separate matter, not a part of this motion.<sup>27</sup>

Good cause exists for the CPUC to accept these documents into the record. As ORA has outlined in motions, in its Brief and in other documents in this proceeding, ORA received limited functionality of the e-discovery access from Comcast, TWC and Charter. While ORA received the documents in the same format as the FCC, ORA did not receive the full range of searching capabilities that the FCC uses, namely Relativity Analytics. There is also an extraordinarily large number of documents (millions) that was included in Comcast's, TWC's and Charter's FCC disclosures. There was no practical means by which ORA could examine more than a very small fraction of the entire FCC production.

The CPUC has committed to having transparent proceedings and building robust records.<sup>28</sup> In this case, ORA's recent finding is an important and critical development in this proceeding that demonstrates that TWC and Comcast must be considered as direct potential, if not actual, competitors going forward. This information should be included in the record for the CPUC to make an informed decision on this proceeding. In addition, ORA's discovery efforts have been severely hampered due to timing and lack of full and complete access to discovery documents, due process requires the CPUC to accept this Motion to include the attached documents as part of the record.

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<sup>27</sup> The Comcast documents ORA was unable to locate have Bates Numbers [REDACTED] and [REDACTED].

<sup>28</sup> See, e.g., Introductory Remarks, January 15, 2015 CPUC Voting Meeting.

#### **IV. CONCLUSION & REQUESTED RELIEF**

For the aforementioned reasons, ORA requests that the CPUC set aside submission and allow to be received into evidence three documents that Comcast and TWC produced in discovery in this proceeding, copies of which are provided as Attachments A, B and C to this Motion.

Respectfully submitted,

/s/ LINDSAY BROWN

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**[PROPOSED] ORDER**

Having considered the arguments of the parties, and good cause appearing,

It is **THEREFORE ORDERED**:

1. ORA's motion to set aside submission and receive into evidence three discovery documents is granted; and
2. All objections are overruled.

**SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
**ADMINISTRATIVE LAW JUDGE**

ATTACHMENT A  
(PUBLIC VERSION)

*NOT INCLUDED BECAUSE ENTIRE  
DOCUMENT IS CONFIDENTIAL*

ATTACHMENT B  
(PUBLIC VERSION)

*NOT INCLUDED BECAUSE ENTIRE  
DOCUMENT IS CONFIDENTIAL*

**ATTACHMENT C  
(PUBLIC VERSION)**

***NOT INCLUDED BECAUSE ENTIRE  
DOCUMENT IS CONFIDENTIAL***