

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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

Application 15-07-009
(Filed July 2, 2015)

COMMENTS OF CHARTER COMMUNICATIONS, INC., CHARTER FIBERLINK CA-CCO, LLC (U6878C), TIME WARNER CABLE INC., TIME WARNER CABLE INFORMATION SERVICES (CALIFORNIA), LLC (U6874C), ADVANCE/NEWHOUSE PARTNERSHIP, BRIGHT HOUSE NETWORKS, LLC, AND BRIGHT HOUSE NETWORKS INFORMATION SERVICES (CALIFORNIA), LLC (U6955C) ON APRIL 12, 2016 PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE BEMESDERFER

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INTRODUCTION

Pursuant to Rule 14.3 of the Rules of Practice and Procedure (“Rules”) of the California Public Utilities Commission (the “Commission” or the “CPUC”), Charter Communications, Inc. (“Charter”), on behalf of itself and its wholly owned subsidiary, Charter Fiberlink CA-CCO, LLC (“Charter Fiberlink”); Time Warner Cable Inc. (“Time Warner Cable”), on behalf of itself and its wholly owned subsidiary, Time Warner Cable Information Services (California), LLC (“TWCIS”); and Advance/Newhouse Partnership, on behalf of itself and its subsidiary Bright House Networks, LLC (“Bright House Networks”) as well as Bright House Networks’ wholly owned subsidiary, Bright House Networks Information Services (California), LLC (“Bright House California”) (jointly, “Joint Applicants”), respectfully submit these Comments on the April 12, 2016 Proposed Decision Granting Application to Transfer Control Subject to Conditions (“Proposed Decision”).

The Joint Applicants thank Administrative Law Judge Bemdeserfer for his efforts and prompt issuance of the Proposed Decision. This proceeding involved a significant number of submissions from the Joint Applicants and other interested parties, briefing and testimony spanning a large number of topics, and numerous proposed conditions from a variety of Protestors and Intervenors. Analyzing the submissions and competing requests; formulating the recommended Findings of Fact, Conclusions of Law, and Conditions; and balancing the various interested parties’ requests to arrive at a fair conclusion was a significant undertaking. The Joint Applicants appreciate the care that went into these efforts, as well as the issuance of the Proposed Decision in a manner that will allow the Commission to consider approval on May 12, 2016. Consideration of the Proposed Decision at the May 12 Commission meeting will reduce the risk that the Commission’s approval process will delay California communities’ ability to experience the benefits of the Transaction within the state.

The Proposed Decision's conditions are, in several places, more burdensome than the Joint Applicants had voluntarily agreed to undertake in their testimony and briefing. Fulfilling those obligations will require meaningful additional efforts and expense by New Charter, and will subject the company to additional regulation that the Joint Applicants do not face today. The Joint Applicants recognize that the Commission must balance numerous competing objectives and interests in its review of the Transaction, and despite the challenges posed by meeting the Proposed Decision's conditions, stand prepared to accept the Proposed Decision and to do the work necessary to meet its terms. Similarly, although the Joint Applicants believe that the Proposed Decision includes findings and conditions that they would be within their rights to challenge, they have balanced those potential challenges against the need to move forward with the Transaction and, with a few modest exceptions spelled out below, are willing to accept the findings and conditions without change.

First, Joint Applicants propose the following clarifications to the conditions as follows:

- Condition 2.d., which requires the parties to execute certifications under D.13-05-035, should reference Bright House *California*, Bright House Networks' California CLEC. It currently references the parent company, but this appears to be a drafting error.
- Condition 2.g., involving customer premises equipment, should be limited to broadband modems and exclude video related set-top boxes to conform it to the scope of the proceeding and the Commission's jurisdiction.
- Condition 2.h., which includes a condition related to the FCC's *Open Internet Order* as well as a condition related to practices such as data caps, usage-based pricing, and zero rating, should be clarified to specify that the *Open Internet Order*-related condition is subject to the same three-year timeframe as currently applied to data caps, usage-based pricing, and zero-rating.
- Condition 2.m., pertaining to customer education surrounding backup power, should be clarified to resolve implementation challenges that would be presented by the current wording.
- In addition, to address concerns that have been raised by other parties regarding Condition 2.j., the Joint Applicants would not object to the Commission clarifying

that TWCIS should maintain the status quo with respect to its LifeLine offering until the condition takes effect.

Second, there are two factual misstatements contained in the body of the Proposed Decision and the findings of fact that should be corrected. These relate to Time Warner Cable's current media properties and the status of Charter's and Bright House Networks' low-income broadband programs.

Subject to these proposed corrections and clarifications, which are discussed in more detail below, the Joint Applicants express their support for the Proposed Decision, and respectfully urge the Commission to adopt it at its May 12, 2016 meeting.

I. THE COMMISSION SHOULD MAKE MODEST REVISIONS TO CERTAIN OF THE ORDERING PARAGRAPHS.

A. Condition 2.d. Should Reference Bright House California.

Ordering Paragraph 2.d. requires that “[w]ithin thirty days of the closing of the Transaction, executive officers of Charter Fiberlink, TWCIS and *Bright House Networks* shall cause their respective companies to comply with the certification requirements imposed by the Commission in Decision (D.) 13-05-035 by executing, on behalf of their respective companies, the certification required by D.13-05-035.”¹ The Joint Applicants do not challenge this condition, but believe that the Assigned ALJ likely intended it to reference Bright House California, rather than Bright House Networks. Bright House California is the relevant California CLEC and is similarly situated to TWCIS and Charter Fiberlink, the other two entities listed in Condition 2.d. Nothing in the text of the decision suggests that this requirement was intended to apply at the parent level to Bright House Networks. Rather, Joint Applicants presume that this condition was intended to apply at the CLEC level in the same manner as it

¹ Proposed Decision at 68 (emphasis added).

applies to the other two Joint Applicants at the CLEC level. The Joint Applicants, therefore, respectfully suggest that this was likely a drafting error that can be corrected in the final decision.

B. Condition 2.g. Should Be Revised to Remove Cable Set-Top Boxes Consistent with the *Scoping Ruling* and the Commission’s Jurisdiction.

Consistent with the absence of any statutory authority for this Commission to regulate the terms and conditions of cable video services in California, the *Assigned Commissioner’s Scoping Ruling* dated November 13, 2015 (“*Scoping Ruling*”) did not include the terms and conditions of New Charter’s cable video services within the scope of this proceeding. Accordingly, New Charter’s policies regarding cable set-top boxes were not considered as part of this proceeding. The Proposed Decision, however, includes a Condition 2.g. that “New Charter shall offer all customers the option of acquiring their own modems *and cable set-top boxes* without any associated increase in the price of services.”²

Cable video providers’ policies involving third-party navigation devices operating on their networks is the subject of long-running regulation by the FCC, which has an open rulemaking currently in progress on this precise subject, and which involves numerous complicated questions surrounding network security, engineering specifications, and the ability to ensure that third-party navigation devices honor licensing terms set by copyright owners.³ Not only are such policy questions highly complex, but the Joint Applicants respectfully submit that this Commission also does not have before it a record sufficient to impose conditions relating to New Charter’s cable set-top box policies. This issue was not presented by the

² Proposed Decision at 69 (emphasis added).

³ See generally Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices, Proposed Rule, 81 Fed. Reg. 14,033 (Mar. 16, 2016).

Scoping Ruling, and the Joint Applicants, in reliance on this topic’s absence from the *Scoping Ruling*, did not submit testimony on the subject—nor, for that matter, did other parties to the proceeding.⁴ To conform the Proposed Decision to the *Scoping Ruling* and to avoid unnecessary conflict with any rules and policies arising out of the FCC’s ongoing rulemaking related to the navigation device market, the Joint Applicants respectfully request that the phrase “and cable set-top boxes” be removed from Condition 2.g. (See Appendix A.)

C. The Condition Relating to the FCC’s *Open Internet Order* (Condition 2.h.) Should Be Limited to Three Years.

The Joint Applicants also respectfully request that the first sentence of Condition 2.h. in the Proposed Decision be amended to correct what the Joint Applicants believe to be a drafting error. The first sentence of Condition 2.h. in the Proposed Decision states that “New Charter shall fully comply with all the terms and conditions of the Federal Communications Commission’s *Open Internet Order*, regardless of the outcome of any legal challenge to the *Open Internet Order*.”⁵ The second sentence, meanwhile, states that “*for a period of not less than three years from the closing of the Transaction*, New Charter (a) will not adopt fees for users to use specific third-party Internet applications; (b) will not engage in zero-rating; (c) will not engage in usage-based billing; (d) will not impose data caps; and (e) will submit any Internet interconnection disputes not resolvable by good faith negotiations on a case-by-case basis.”⁶ Petitioners do not seek modification of the second sentence, which matches their voluntary commitments, but believe that the three-year limitation in the second sentence was intended to—and should—apply to the first sentence as well.

⁴ Although ORA proposed a similar condition regarding set-top boxes in its brief, neither ORA nor any other party offered any testimony or put any evidence into the record on this point.

⁵ Proposed Decision at 69.

⁶ *Id.* (emphasis added).

The FCC's *Open Internet Order* imposes three bright-line rules, prohibiting providers of broadband internet access service ("BIAS") from blocking lawful content, from "throttling" lawful content, and from engaging in paid prioritization.⁷ The Joint Applicants voluntarily committed to abide by these three requirements of the *Open Internet Order* for a period of three years, regardless of the outcome of the ongoing litigation challenging reclassification of broadband as a Title II service.⁸ Thus, if the *Open Internet Order* remains in effect, New Charter will be subject to its requirements for as long as other providers (*i.e.*, until the FCC modifies the no-blocking, no-throttling, and no-paid-prioritization requirements); however, if the *Open Internet Order* were struck down in the courts, New Charter would *still* comply with these requirements for up to three years, notwithstanding its peers and competitors not facing the same restrictions.

Based on the three-year limitation in the second sentence of Condition 2.h, Joint Applicants believe that the Assigned ALJ's intent was to track the Joint Applicants' voluntary commitments pertaining to Internet openness generally, which were to disclaim certain specific practices (blocking, throttling, paid prioritization, data caps, usage-based pricing, and zero-rating) for three years, and thus to apply the three-year limitation to both sentences of the condition.⁹ Nothing in the Proposed Decision's reasoning indicates an intent to apply the conditions in the first sentence *indefinitely*. And in any event, holding New Charter indefinitely

⁷ *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5607–08, ¶¶ 15–18 (2015) ("*Open Internet Order*").

⁸ See Joint Applicants' Opening Brief at 11; Joint Applicants' Reply Brief at 76 (Mar. 11, 2016); Testimony of Falk, JA-1(C) at 19:12–19:25.

⁹ In the unlikely event that the Proposed Decision was *intended* to impose more onerous conditions than the Joint Applicants' voluntary commitments based on the mistaken belief that Time Warner Cable owns HBO and Turner Movies, such concerns would be misplaced for the reasons set forth in Part II below.

to FCC rules *even after the FCC's rules are invalidated or modified*, and irrespective of future market conditions or the practices or rules governing New Charter's competitors, would be a highly unconventional requirement.

For that reason, Joint Applicants propose that the first sentence of Condition 2.h be modified to incorporate a three-year limitation, as follows:

New Charter shall fully comply with all the terms and conditions of the Federal Communications Commission's *Open Internet Order*, regardless of the outcome of any legal challenge to the *Open Internet Order*, **for a period of three years from the closing of the Transaction.**

The Joint Applicants further note that the FCC, which exercises jurisdiction over the *Open Internet Order* and related requirements, is currently considering conditions related to usage-based pricing and data caps in connection with its review and approval of the Transaction. These practices are not prohibited by the *Open Internet Order*, but New Charter has made voluntary commitments not to engage in them for three years in connection with the review of the Transaction, which commitments are reflected in the second sentence of Condition 2.h. To the extent a forthcoming FCC order incorporates such conditions, the FCC's conditions would apply to New Charter equally in California, and for the same time period. Therefore, the Joint Applicants do not believe that a modification of the second sentence of Condition 2.h is necessary, but would not object to this Commission's order incorporating any timeline set forth in a comparable FCC condition, as follows:

In addition, for a period of not less than three years from the closing of the Transaction, **or such period as required by the FCC in connection with its review of the Transaction, if such period exceeds three years**, New Charter (a) will not adopt fees for users to use specific third-party Internet applications; (b) will not engage in zero-rating; (c) will not engage in usage-based billing; (d) will not impose data caps; and (e) will submit any Internet interconnection disputes not resolvable by good faith negotiations on a case-by-case basis.

D. The Backup Power Condition (Condition 2.m.) Should Allow New Charter to Provide Customer Education Materials by Means Other than Paper.

In Condition 2.m., the Proposed Decision requires New Charter to supply each existing or new VoIP customer with a “separate paper document” that provides information about the need for back-up power.¹⁰ It further requires New Charter to “make this and similar information available in alternate formats including large print, Braille, and audio” and to “provide this [information] to new customers at the time of sale.”¹¹ The Joint Applicants do not intend to challenge the disclosure requirement, but are concerned that this condition could be read to require that a paper document always be provided to new customers at the time of sale, which would not be possible in the cases of telephonic and online sales, where the vast majority of these transactions are completed. The Joint Applicants do not object to a requirement to provide disclosures in paper form to existing customers, or to new customers at the time of sales made via an in-person transaction. However, because of the impossibility of providing paper documents during telephonic or online sales, the Joint Applicants request that the wording be revised to reflect options available under existing Commission or FCC rules. Under the Commission’s rules, service providers must supply customers with information about back-up power “no later than the time of installation, in a format the customer can utilize.”¹² The FCC requires certain disclosures regarding back-up power to be provided at the point of sale, but its rules provide “flexibility regarding the manner in which providers inform their subscribers, while

¹⁰ Proposed Decision at 69, Condition 2.m.

¹¹ *Id.*

¹² See *Order Instituting Rulemaking on the Commission’s Own Motion into Reliability Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems Pursuant to Assembly Bill 2393*, R.07-04-015, Decision Adopting Guidelines for Customer Education Programs Regarding Backup Power Systems Pursuant to Assembly Bill 2393, Decision 10-01-026 at 39 (Jan. 21, 2010).

also honoring any preferences expressed by customers.”¹³ To that end, the FCC has required only that a service provider supply the information “in a manner reasonably calculated to reach individual subscribers, with due consideration for subscriber preferences.”¹⁴

To implement this clarification, Joint Applicants propose the following modification to Condition 2.m.:

~~New Charter shall supply each existing or new Voice over Internet Protocol customer with a separate paper document devoted exclusively to providing information about the need for back-up power. New Charter shall make this and similar consumer information available in alternate formats including large print, Braille and audio.~~ New Charter shall provide this ~~disclosure information~~ to new customers at the time of sale, **through a separate paper document if practicable, but in any event, New Charter shall make this information available in a manner reasonably calculated to reach individual subscribers, and shall make this and similar consumer information available in alternate formats including large print, Braille and audio.**

E. Joint Applicants Have No Objection to Clarifying the LifeLine Condition (Condition 2.j.) to Maintain the Status Quo of TWCIS’s Existing LifeLine Offering.

Finally, Joint Applicants are prepared—in the interest of moving forward with the Transaction and towards a May 12, 2016 approval—to meet the Proposed Decision’s requirement to begin offering LifeLine phone service discounts in their respective California territories within six months.¹⁵

The Joint Applicants have become aware of concerns that Condition 2.j. might be construed as permitting TWCIS to discontinue its existing LifeLine service discounts during the six months before the condition takes effect. To the extent the Commission shares these

¹³ See *In re Ensuring Continuity of 911 Communications*, Report and Order, 30 FCC Rcd 8677, 8709 ¶ 74 (2015).

¹⁴ *Id.* at 8739–31 Appendix C, § 12.5(d)(2).

¹⁵ See Proposed Decision at 69, Condition 2.j.

concerns, the Joint Applicants would have no objection to a clarification that Condition 2.j. does not alter TWCIS's current participation in the LifeLine program:

Within six months of the closing of the Transaction, New Charter's certificated carriers shall offer Lifeline phone service discounts to all eligible households (in accordance with CPUC Lifeline rules) within its service territory. **This condition shall not be construed as altering TWCIS's current participation in the Commission's LifeLine program during the six months before the condition takes effect.**

II. THE COMMISSION SHOULD MAKE MINOR CORRECTIONS TO THE BACKGROUND DISCUSSION AND TO FINDINGS OF FACT.

In addition to the substantive modifications and clarifications set forth above, the Joint Applicants also recommend two corrections. Although the Proposed Decision ably marshals the voluminous record in this proceeding, it contains two incorrect statements that should be modified prior to adoption.

First, the Proposed Decision attributes to Time Warner Cable "ownership of HBO and Turner Movies (among other properties)" and otherwise refers to Time Warner Cable as a "content creator."¹⁶ Although Time Warner Cable does own some limited local and regional media properties, Time Warner Cable does not hold any ownership interest in Home Box Office, Inc. ("HBO") or Turner Broadcasting System, Inc. ("Turner"). This statement appears to be a misunderstanding based on Time Warner Cable's previous corporate affiliation with Time Warner, Inc. ("TWI"), which holds significant media assets, including HBO, Turner, and others. However, Time Warner Cable formally separated from TWI in 2009, and is no longer affiliated with TWI's corporate family.¹⁷ Joint Applicants recommend correcting this portion of the

¹⁶ See Proposed Decision at 53.

¹⁷ See Time Warner Cable Separation Information, <http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-twseparation>; Press Release, Time Warner, Time Warner Inc. Distributes Time Warner Cable Shares to Its Stockholders of Record and Effects One-for-Three Reverse Stock Split (Mar. 27, 2009), <http://media.corporate->

Proposed Decision by deleting on Page 53 the references to HBO and Turner Movies, and to Time Warner Cable as a “content creator.” Finding of Fact 5 should similarly be corrected. (See Appendix A for specific proposed redline edits.)

Second, in the Findings of Fact section, the Proposed Decision states that “*Charter* provides low-cost Internet access to low and moderate income families throughout its service territories.”¹⁸ Charter has committed to adopting such a program in the future, contingent upon the closing of the Transaction.¹⁹ However, as of today, it is Bright House Networks, rather than Charter, that is operating such a program. Joint Applicants recommend replacing “Charter” with “Bright House Networks” in Finding of Fact No. 12. (See Appendix A.)

CONCLUSION

Subject to the requested clarifications and modifications set forth above, the Joint Applicants support the Proposed Decision and urge its prompt adoption by the Commission at the May 12, 2016 Commission meeting.

Respectfully submitted May 2, 2016 at San Francisco, California.

ir.net/media_files/irol/70/70972/reports/separation/Final_TWX-TWC_SeparationFINALPR_032709.pdf.

¹⁸ See Proposed Decision at 66, Finding No. 12 (emphasis added).

¹⁹ See, e.g., Joint Applicants’ Opening Br. at 106 (Mar. 1, 2016) (“As a direct result of the Transaction, qualifying low-income customers in California will also benefit from New Charter’s low-income broadband offering, which New Charter will introduce within six months after the Transaction closes.”).

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APPENDIX A

**JOINT APPLICANTS’ PROPOSED REVISIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERING CLAUSES**

<p>3.1.7.2 Discussion Section 854(c)(6), page 53.</p>	<p>This analysis of the effects of the merger on market concentration differs in one respect from a similar analysis made in the abortive merger of Comcast with Time Warner. In that transaction, Comcast, the acquiring company, was itself a major content creator through its ownership of NBC-Universal, as was Time Warner, the acquired company, through its ownership of HBO and Turner Movies (among other properties). Charter is the acquiring company here, and is not itself a content creator so even transfer of Time Warner is a content creator the enlarged footprint of the merged companies does not present a censorship risk of the same magnitude as was presented by the proposed merger of Comcast and Time Warner. There is still a potential conflict, however, between the content created by Time Warner which New Charter will be distributing, and content distributed by online video distributors (OVDs) like Netflix, Amazon, Hulu and Crackle, so incentives still exist for the merged company to prefer its own content to that of other content creators through its near-monopoly control of the distribution channel.</p>
<p>Finding of Fact 5.</p>	<p>Through its subsidiaries TWC competes with other providers of video content.</p>
<p>Finding of Fact 12.</p>	<p>CharterBright House Networks provides low-cost Internet access to low and moderate income families throughout its service territories.</p>
<p>Condition 2.d.</p>	<p>Within thirty days of the closing of the Transaction, executive officers of Charter Fiberlink, TWCIS and Bright House NetworksCalifornia shall cause their respective companies to comply with the certification requirements imposed by the Commission in Decision (D.) 13-05-035 by executing, on behalf of their respective companies, the certification required by D.13-05-035.</p>
<p>Condition 2.g.</p>	<p>New Charter shall offer all customers the option of acquiring their own modems and cable set-top boxes without any associated increase in the price of services.</p>
<p>Condition 2.h.</p>	<p>New Charter shall fully comply with all the terms and conditions of the Federal Communications Commission’s <i>Open Internet Order</i>, regardless of the outcome of any legal challenge to the <i>Open Internet Order</i>, for a period of three years from the closing of the Transaction. In addition, for a period of not less than three years from the closing of the Transaction, or such period as required by the FCC in connection with its review of the Transaction, if such period exceeds three years, New Charter (a) will not adopt fees for users to use specific third-party</p>

	<p>Internet applications; (b) will not engage in zero-rating; (c) will not engage in usage-based billing; (d) will not impose data caps; and (e) will submit any Internet interconnection disputes not resolvable by good faith negotiations on a case-by-case basis.</p>
<p>Condition 2.j.</p>	<p>Within six months of the closing of the Transaction, New Charter's certificated carriers shall offer Lifeline phone service discounts to all eligible households (in accordance with CPUC Lifeline rules) within its service territory. This condition shall not be construed as altering TWCIS's current participation in the Commission's LifeLine program during the six months before the condition takes effect.</p>
<p>Condition 2.m.</p>	<p>New Charter shall supply each existing or new Voice over Internet Protocol customer with a separate paper document devoted exclusively to providing information about the need for back-up power. New Charter shall make this and similar consumer information available in alternate formats including large print, Braille and audio. New Charter shall provide this disclosure information to new customers at the time of sale, through a separate paper document if practicable, but in any event, New Charter shall make this information available in a manner reasonably calculated to reach individual subscribers, and shall make this and similar consumer information available in alternate formats including large print, Braille and audio.</p>