

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



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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 No. 15-07-009

(Filed July 02, 2015)

**THE NATIONAL DIVERSITY COALITION'S PROTEST OF THE
CHARTER/TIME WARNER/BRIGHT HOUSE JOINT MERGER APPLICATION**

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**NATIONAL
DIVERSITY
COALITION**

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I. INTRODUCTION

Pursuant to Rule 2.6 of the Rules of Practice and Procedure of the California Public Utilities Commission (“CPUC” or “Commission”), the National Diversity Coalition¹ (“NDC”) hereby protest the above-captioned application (“Joint Application”) filed July 2, 2015 by Charter Communications, Inc. (“Charter”), Charter Fiberlink (“Fiberlink”), Time Warner Cable Inc. (“TWC”), Time Warner Cable Information Services California (“TWCIS”),

¹ National Diversity Coalition members include the National Asian American Coalition (NAAC), African American Economic Justice Organization, Asian Journal, Chinese American Institute for Empowerment, Christ Our Redeemer AME Church, COR Community Development Corporation, Ecumenical Center for Black Church Studies, Jesse Miranda Center for Hispanic Leadership, Los Angeles Latino Chamber of Commerce, Latino Coalition for Community Leadership, Macedonia Community Development Corporation, MAAC Project, National Hispanic Christian Leadership Conference, OASIS Center International, Orange County Interdenominational Alliance, Templo Calvario CDC, and West Bay Pilipino Multi-Service Center. Please note, in prior proceedings before this Commission, NDC members have appeared under the name “Joint Minority Parties”.

Advance/Newhouse Partnership (Advance/Newhouse), Bright House Networks, LLC (“BHN”), and Bright House Networks Information Services California (“Bright House CA”) (collectively, “Joint Applicants”). The Application first appeared on the Commission’s Daily Calendar on July 8, 2015. Thus, this protest is timely.

II. BACKGROUND

Charter Communications, Inc. (Charter), Time Warner Cable, Inc. (TWC), and Advance/Newhouse Partnership (Advance/Newhouse) propose a series of transactions to create what will be referred to in these proceedings as “New Charter”, (although the newly merged company will eventually assume the name Charter Communications, Inc).² Charter Fiberlink (Fiberlink) is a wholly owned subsidiary of Charter³; Time Warner Cable Information Services (TWCIS) is a wholly owned subsidiary of TWC⁴; and Bright House Networks Information Services California, LLC (Bright House CA) is a wholly owned subsidiary of Bright House Networks LLC (BHN)⁵, which is wholly owned by Time Warner Cable Entertainment-Advance/Newhouse Partnership (TWE-Advance/Newhouse)⁶.

The proposed transaction will combine Charter, TWC, and BHN into a single company⁷, New Charter. A current subsidiary organization of Charter will be designated as New Charter⁸. TWC will merge to become a subsidiary of New Charter, with current TWC shareholders receiving cash and stock in New Charter⁹. Next, Charter will merger to become a subsidiary of

² Joint Application at 2, see footnote 2.

³ *Id.* at 7.

⁴ *Id.* at 9.

⁵ *Id.* at 11.

⁶ *Id.* at 10-11.

⁷ *Id.* at 15.

⁸ *Id.* see footnote 14.

⁹ *Id.* at 16.

New Charter, with Charter shareholders receiving stock in New Charter¹⁰. (After this, New Charter will assume the name and stock symbol of Charter Communications, Inc¹¹.) Finally, New Charter will acquire BHN, and Advance/Newhouse will receive cash and stock in New Charter, as well as stock in a partnership subsidiary of New Charter that holds all of BHN's assets¹².

Throughout the merger phases, the members of the board of directors and officers of TWC (TWC is referred to as the "Company" in the "Agreement and Plan of Mergers")¹³, the managers and officers of a company (referred to as "Merger Subsidiary Two")¹⁴ that is wholly owned by New Charter, and the officers of Charter Communications, Inc. (Parent)¹⁵ will retain/share control of the surviving post-merger entities. Upon completion of all transactions, approximately 67%-69% of New Charter will be publically held, and controlled by a 13-person board¹⁶. Advance/Newhouse will nominate two board members, Liberty Broadband will nominate three board members, and Charter President and CEO Tom Rutledge will hold a board seat¹⁷.

III. STANDARD OF REVIEW

A. Joint Applicants Bear the Burden to Prove that the Merger Meets Public

Interest Requirements

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Joint Application Exhibit G: Agreement and Plan of Mergers (Exhibit G) at 3; Exhibit G, section 3.02(i) and (iii) at 30.

¹⁴ Exhibit G, section 3.02(ii) at 30.

¹⁵ Exhibit G, section 3.02(iv) at 30.

¹⁶ Joint Application at 18.

¹⁷ *Id.*

The Joint Applicants seek Commission approval of their merger plan, and therefore must demonstrate clearly how the proposal will protect and promote the public interest. Relevant factors to evaluate the impact on the public interest are provided in Public Utilities Code § 854(b) and (c), discussed more below. Section 854(e) affirmatively mandates that the applicants bear the burden to prove that the requirements of section (b) and (c) are met¹⁸. Vague and general statements alone, such as abound in the Joint Application (discussed more below), do not fulfill the statutory requirements of 854(e).

B. P.U. Code Section 854(c) Applies To This Merger

Section 854(c) and its listed criteria apply to applications “...where *any of the entities* that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars...” (*emphasis added*)¹⁹. Joint Applicants claim only that the subsidiary companies TWCIS, Fiberlink, and Bright House CA each have California revenue under \$500 million, although they cite to Exhibit F for support, which was filed under seal.²⁰ However, Joint Applicants make no representations about the annual California revenue of Charter, TWC, Advance/Newhouse, BHN, TWC-Advance/Newhouse Partnership, or any of the other “Amazon I, II, III” subsidiaries of Charter involved in the multiple stage merger. Instead, Joint Applicants first reference their assertion of TWCIS, Fiberlink, and Bright House CA’s annual incomes, then discuss why they believe 854(c) is not applicable.²¹ Joint Applicants appear to have confused

¹⁸ P.U. Code Section 854(e): “The person or corporation seeking acquisition or control of a public utility organized and doing business in this state shall have, before the commission, the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met.”

¹⁹ P.U. Code Section 854(c).

²⁰ Joint Application at 19, footnote 27. On July 29, 2015, NAAC requested access to Exhibit F from Joint Applicants. On August 4, 2015 Joint Applicants provided copies of a non-disclosure agreement. NAAC reviewed the NDA, and as of the writing of this footnote, provided signed copies to Joint Applicants on August 6, 2015.

²¹ *Id.* at 19.

the revenue requirement of 854(b), which applies only to *utilities* that are party to the transaction, with the requirement of 854(c) which applies to *all entities* involved.

Additionally, Joint Applicants argue that the Commission has exempted mergers from the requirements of 854(c) in the past. Joint Applicants state some characteristics of those exempted mergers and claim that their application is similar, but do not set out specific facts to support their assertion.²²

Joint Applicants must prove that the requirements of 854(c) are met, which includes proving any defense they raise against application of the statute. Joint Applicants fail to provide sufficient information to demonstrate that the threshold revenue requirements of 854(c) are not met. Even if Joint Applicants are able to show that no entity involved has annual CA revenue above \$500 million, it would still be reasonable to apply the criteria of 854(c) to determine whether the proposed merger is in the public interest. As will be discussed more below, the Commission has an affirmative responsibility to evaluate whether a proposed transaction is in the public interest, and the 854(c) criteria provide guidance for the Commission to make such a determination.

C. P.U. Code Section 854(b) May Apply To This Merger

Section 854(b) requires the Commission to find that a merger provides certain public interest benefits and protections, if any involved utility has annual California revenue above \$500 million. As previously discussed, Joint Applicants only assert without providing support that TWCIS, Fiberlink, and Bright House CA do not meet the revenue requirement²³. But there is no discussion as to which parties involved in the proposed merger should properly be considered utilities or not. Joint Applicants have failed to prove that other involved entities are

²² Joint Application at 19-20.

²³ Joint Application at 19, footnote 27.

not utilities, or that other involved entities have annual CA revenue below the requirements of 854(b).

In the Pacific Telesis/SBC Merger²⁴, the Commission rejected a narrow interpretation of 854(b) which implied that only when a utility is signatory to the merger documents do the parties bear the burden of proving compliance with 854(b)²⁵. Instead, the Commission reiterated that 854(e) places the burden of proving compliance with 854(b) on “the person or corporation” seeking acquisition of a utility²⁶, without needing to first determine which entity is a utility or has sufficient revenue. Joint Applicants therefore must first prove with sufficient evidence whether or not the 854(b) revenue criteria are met.

In determining which entities’ revenues are relevant to consider, the Commission should look beyond the technical corporate structure of parent and subsidiary companies, and consider which entities are the real parties involved. In PacTel/SBC, the Commission held that “[a]lthough the transaction is technically structured as a merger between SBC and Telesis, the practical result of the proposed transaction, if it is consummated, is that it involves Pacific.”²⁷ The Commission chose to “focus on substance rather than form in determining whether Pacific [was] a party within the meaning of § 854”²⁸ and “pierc[ed] the corporate veil”²⁹ to find that the requirements of 854(b) applied to proposed transaction.

However, if Joint Applicants are able to demonstrate that all relevant entities have sufficiently low revenue, the criteria in 854(b) are still important guidance for the Commission to consider. The Commission must evaluate the impact on the public interest of all proposed

²⁴ *Re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC)*, D.97-03-067 (March 31, 1997) (PacTel/SBC).

²⁵ *Id.* at 20.

²⁶ *Id.*

²⁷ *Id.* at 17.

²⁸ *Id.* at 19.

²⁹ *Id.*

transactions, and in this case it is reasonable to draw upon statutory guidelines for transactions involving utilities that may have higher revenue than the utilities involved here. The Commission should look beyond the strict application of 854(b) only to utilities above a certain amount of revenue, and consider the substantial economic power and overall revenue of the multiple parent companies and numerous subsidiaries involved in the current application.

It appears paradoxical that large parent companies would try to evade 854(b) which applies to large companies, by relying on creative corporate structuring to claim low annual revenue for their subsidiaries, in an application to become an even larger company. The policy considerations that target application of 854(b) to higher revenue entities should reasonably apply in the mergers proposed here, which will create the second largest cable operator in the country, in what could be the largest U.S. merger of the year, and the second largest globally³⁰.

D. P.U. Code Section 854(a) Applies To This Merger

Under section 854(a), Commission approval is required before any merger, acquisition, or change in control is accomplished involving any California public utility. As the proposed merger in the Joint Application involves California public utilities, 854(a) clearly applies, and Commission approval is needed before the merger can proceed. In determining whether it is appropriate to grant approval, the Commission must consider the effect of the merger on the public interest. The Commission should find that sections 854(b) and (c) are independently applicable to the instant proceeding and make rulings under the criteria specified therein. But if the Commission finds either section 854(b) or (c) technically inapplicable, the factors are still relevant for consideration of the public interest under 854(a). The Commission has previously

³⁰ Chen, Liyan, *\$55 Billion Charter-Time Warner Cable Deal Would Be Biggest U.S. Merger Of 2015*, FORBES, May 26, 2015, <http://www.forbes.com/sites/liyanchen/2015/05/26/55-billion-charter-time-warner-deal-would-be-biggest-u-s-merger-of-2015/>.

considered 854(c) factors under an evaluation of 854(a)³¹, and the Joint Applicants acknowledge as much.³²

E. The Commission Has An Affirmative Responsibility to Consider Every Element of the Public Interest in All Applications

In addition to the requirements of any applicable statutes, the Commission has its own “active and independent duty to guard the public interest”³³. In referring to this duty, the California Supreme Court stated that, “The Commission may and should consider *sua sponte* every element of public interest affected by facilities which it is called upon to approve.”³⁴ This duty to guard *every* element of public interest when evaluating all proposed transactions means that the Commission must consider a wide range of aspects, including the consequences to telecommunications, video, and internet markets and services.

Section 706 of the Telecommunications Act³⁵ specifically grants each State Commission that regulates telecommunication services the delegated power also to regulate advanced telecommunications technology, including broadband internet access and IP-enabled services. Public Utilities Code Section 710 grants the CPUC jurisdiction over IP-enabled services to the extent “required or expressly delegated by federal law”, such as the delegation found in Section 706 of the Federal Telecommunications Act. This authority requires the Commission “to adopt pro-competitive conditions that encourage the deployment of broadband Internet capability to

³¹ See *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation*, D.05-11-028 (November 18, 2005).

³² Joint Application at 20.

³³ *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577 (1969) (*Marine Space*) at 585.

³⁴ *Northern California Power Agency v. Public Utilities Commission*, 5 Cal. 3d 370 (1971) (NCPA) at 381.

³⁵ Codified at 47 U.S.C. § 1302(a), *et seq.* (Section 706).

underserved communities, schools and libraries³⁶. Section 706 further provides that deployment of advanced telecommunications capability must be done “in a manner consistent with the public interest”.

Therefore, the Commission’s evaluation of all aspects of the instant application must include the effects on all markets that the involved entities participate in, including broadband, and ensure that the results of the merger protect and promote the public interest.

IV. DISCUSSION

A. The Application Fails to Demonstrate That the Merger is in the Public Interest

i. Joint Applicants Rely Upon Claims That Are Either Too Vague to Specifically Apply in This Merger or Are So General as to Apply to Any Merger

The Joint Applicants make broad claims about the alleged benefits that will result if the merger is approved, but do not adequately specify the nature of the benefits, nor provide details on how such benefits may be achieved. For example, in the introduction paragraph to the public interest discussion under section 854, the Application states that “the Transaction will yield significant *synergy savings*, which would be spread across a variety of platforms and services, resulting in *increased investment* and improved and expanded voice and enterprise services, as well as other services...”³⁷ (*emphasis added*).

³⁶ A.14-04-013, *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)*, April 11, 2014 (Comcast/TWC proceeding), Proposed Decision of ALJ Bemserfer (February 13, 2015) (Bemserfer PD).

³⁷ Joint Application at 21.

The Application fails to explain the anticipated *synergy savings* or *increased investments*, or quantify how those will be calculated. The Application later discusses expanded voice and enterprise services, but only in general notions, with no definite or measurable terms or details (discussed below).

ii. Unsubstantiated Boilerplate Claims of Improvements to Voice Service

The Joint Application states in boilerplate language that the transaction will “promote the deployment of advanced voice services and enhance competition in the voice marketplace.”³⁸ However, no information is given as to what “advanced voice services” will be deployed as a result of the transaction. Neither is any analysis offered as to how the merger will enhance competition. Instead, the Application goes on to assert that, “Approval of the Transaction will provide customers in California with a more robust competitor, leading to better service and value.”³⁹ A large provider of voice services may indeed be a more robust competitor, but that does not necessarily “enhance competition” or lead to “better service and value”.

The anti-competitive harms from mergers that produce large monopolistic companies are far more dangerous and far more likely to occur in a proposal such as this, which would create the second largest cable company in the country⁴⁰. But instead of addressing the specific dangers in the present proposal, the Application continues to state only general concepts that may apply to any merger. “The increased scale of the merged company will enable it to more effectively make significant fixed-cost investments by spreading those investments over a larger customer

³⁸ Joint Application at 21.

³⁹ *Id.* at 21. The statement references footnote 36 which indicates that the FCC typically considers cable VoIP and ILEC’s competitors.

⁴⁰ Chen, Liyan, *\$55 Billion Charter-Time Warner Cable Deal Would Be Biggest U.S. Merger Of 2015*, FORBES, May 26, 2015, <http://www.forbes.com/sites/liyanchen/2015/05/26/55-billion-charter-time-warner-deal-would-be-biggest-u-s-merger-of-2015/>.

base.”⁴¹ Any larger company *could* spread the cost of investments over a larger customer base, but no *particular* investments that will be made to improve voice services are identified in this Application. The section similarly mentions greater ability to attract a research and development team, to build state-of-the-art testing and experimentation facilities, and “to play an important role in developing proposed standards for standard-setting bodies” but fails to explain any of these benefits, or specify how they will be applied and achieved in this particular proposed transaction.

Joint Applicants assert numerous times regarding their voice offerings that they have “advanced systems” and “best features” which will be offered with “advanced services” and “best services” through New Charter, again resulting in “synergistic advantages”. But notably not one single feature or service that will *actually* be offered is identified.⁴²

Regarding policies for their voice service, the Joint Applicants state that “New Charter will also extend Charter’s policy of not imposing early termination fees or requiring customers to sign long term contracts to all customers of the merged entities.”⁴³ While this is the only time the Joint Applicants appropriately identify a specific term of New Charter’s voice offering, they fail to state what the policies of TWC and BHN regarding these matters are currently. According to the FAQ on Time Warner Cable’s website, TWC does not currently offer contracts.⁴⁴ Reviews of Bright House Network offerings also indicate that they do not use long term contracts, and have no early termination fees.⁴⁵ Therefore, this one specific condition, among many vague

⁴¹ Joint Application at 22.

⁴² Joint Application at 22.

⁴³ *Id.*

⁴⁴ <http://www.timewarnercable.com/en/support/faqs/faqs-account-and-billing/policies/am-i-on-a-contract-with-my-tim.html> (viewed July 29, 2015). There may be an optional “Price Lock Guarantee” service that customers can voluntarily enroll in, which may carry an early termination fee. http://help.twcable.com/twc_terms_service.html (viewed July 29, 2015).

⁴⁵ <http://www.reviews.com/cable-internet/bright-house-networks/> (viewed July 29, 2015).

statements regarding improvements to voice service offerings resulting from the merger, rings hollow.

iii. Unspecified Claims of Improvement to Enterprise Services

Joint Applicants allege that the larger service area of New Charter will allow it to better attract and serve businesses that have multiple locations, and that New Charter will then be more likely to increase investment in enterprise capabilities, “including investment to bring more locations on network and to develop and deploy the advanced platforms needed to manage vast amounts of data.”⁴⁶ While it may be generally true that a larger corporation could potentially better serve other larger corporations, the Joint Applicants do not give examples of any specific multi-location businesses that cannot currently be served by the Applicants separately that would likely contract with New Charter after the merger. No market research data or surveys are provided to indicate any market demand or need for a larger service provider such as New Charter. The application fails to specify the amount or type of investments Joint Applicants plan to develop, or in any particular enterprise capability or advanced platform, nor what locations those investments will help bring onto the network. Without specifics, the statements as to improved enterprise capability could apply to any merger, and have no specific application to this proposal.

iv. Ambiguous Improvements to Broadband Service

The Joint Applicants state that New Charter will “soon bring base speed tiers from 15 Mbps to Charter’s current standard minimum of 60 or 100 Mbps at uniform pricing in TWC and BHN territories, including California.”⁴⁷ This commitment may provide some benefits, but needs considerable additional information to be meaningful. The application does not say how long it

⁴⁶ Joint Application at 23-24.

⁴⁷ *Id.* at 24.

will take before the minimum bandwidth level is implemented throughout California, nor does it state the current minimum bandwidth provided by TWC and BHN or how many customers subscribe at that minimum service level. It is difficult to measure what improvement this commitment offers without understanding the current services provided.

More concerning is the fact that no mention is made of retaining affordable internet service for low-income households. If New Charter increases minimum speed offerings to 60Mbps and prices it according to a uniform structure, this could eliminate affordable internet for low-income households in the service area. TWC currently offers a very low-speed budget Internet service called “Everyday Low Price Internet” for \$15 a month at 2Mbps download and 1Mbps upload speeds⁴⁸. While this speed is extremely slow, it is one of the least expensive stand-alone internet services available from major providers, it is offered with no pre-qualification or contract terms, and is an important option for low-income households. BHN participates in a low-income internet offering called Connect2Compete for \$10 a month at 1Mbps download/384Kbps upload speed⁴⁹. With graphic and video intensive modern websites, this speed is essentially useless. Further, confusing and extensive eligibility and enrollment hurdles make this program all but impossible to obtain anyway. Enrollment forms are only provided through schools, only families with a child receiving free school lunches (not reduced lunches) are eligible, and the reduced price is only good for a two year period, with no option to extend the program⁵⁰. One account of attempts to navigate the enrollment process for Connect2Compete categorized it as an “Olympic-style playing field of hoops to jump through”,

⁴⁸ <http://www.timewarnercable.com/content/twc/en/plans-packages/internet/internet-service-plans.html/> (viewed August 3, 2015).

⁴⁹ Connect2Compete Frequently Asked Questions, http://brighthouse.com/static/documents/Frequently_Asked_Questions_for_Connect_2_Compete.pdf (viewed August 3, 2015).

⁵⁰ *Id.*

including ineligibility of current BHN customers, an annual enrollment period open only between mid-August to mid-September (one month of the year), and an automated phone enrollment system that did not work⁵¹.

In their FCC filing, the Joint Applicants stated that New Charter intends to build upon the low-income broadband program offered through *BHN*⁵², not the TWC program. A later section of the Joint Application also mentions that New Charter will build upon BHN's low-income broadband program⁵³. Continuing the BHN Connect2Compete program in its current state would be an entirely inadequate replacement for the current TWC program, much less a meaningful provision to meet the vital need for low-cost internet. New Charter must include specific plans in their application to offer affordable internet service at useable speed and commit to help bridge the "digital divide" (discussed more below).

Additionally, the application states that New Charter will not have data caps, usage-based billing, or fee restrictions tied to the use of particular internet applications or internet services.⁵⁴ This again holds some promise for public benefit, but is not very meaningful without more information. TWC does not appear to have any data caps currently⁵⁵, nor does BHN⁵⁶. If no such restrictions are in place, not imposing any is no improvement. Neither is this commitment against restrictions meaningful without a specified time period during which it will be in force.

⁵¹ Dampier, Phillip, *Bright House's Mysterious Internet Discount Program Charter Wants to Adopt Nationwide*, STOP THE CAP!, June 25, 2015, <http://stopthecap.com/2015/06/25/bright-houses-mysterious-internet-discount-program-charter-wants-to-adopt-nationwide/>.

⁵² Federal Communications Commission, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, Public Interest Statement, June 25, 2015, Exhibit C at 14-15.

⁵³ Joint Application at 25-26

⁵⁴ *Id.* at 25.

⁵⁵ Dampier, Phillip, *Time Warner Cable Continues Commitment to Keep Unlimited Data, Expand Maxx Upgrades*, STOP THE CAP!, July 30, 2015. <http://stopthecap.com/2015/07/30/time-warner-cable-continues-commitment-to-keep-unlimited-data-expand-maxx-upgrades/>.

⁵⁶ <http://support.brighthouse.com/Article/Unlimited-Internet-Data-Usage-6942/> (viewed August 3, 2015).

As it is, the Joint Application does not demonstrate the benefits from, nor mitigate harms caused by, their alleged improvements to broadband service.

v. Unclear Claims of Good Corporate Citizenship

Joint Applicants state that they will “incorporate and build upon” the “recognized best practices with respect to diversity and inclusion for employees, suppliers, and corporate governance” at TWC⁵⁷, but no specific practices or policies that will be implemented at New Charter are identified. No metrics pertaining to current levels of employee or supplier diversity, or diversity of the board and executive officers is provided for any of the entities involved in this application, and no target goals are set for these aspects of New Charter. Vague statements are made about enriching BHN’s woefully inadequate low-income broadband offering⁵⁸ and hiring “thousands” of new employees. But no specifics are given on how many new employees are anticipated, or target percentages to hire from minority groups or disadvantaged local communities. It is not even specified if any of the jobs created will be in California and benefit California ratepayers and the local economy.

Further, no reporting mechanism is offered to measure and track any such benefits. The Joint Applicants do not voluntarily file GO-156 reports, unlike other similar utility companies, such as AT&T, Verizon, and Comcast. Without disclosure and transparency of efforts to support the minority community, these lofty statements on diversity and inclusion are not likely to have much impact.

vi. Unsupported Claims of No Horizontal Concerns

Based on claims that Charter, TWC, and BHN serve distinct areas and do not compete in the same geographic markets, Joint Applicants allege that the proposed merger would not reduce

⁵⁷ Joint Application at 25.

⁵⁸ *Id.* at 25-26.

competition. Again, no data is provided to show the distinct service areas of each company and prove that they do not compete in the same areas. However, just because the companies may currently choose not to compete, does not mean that merging will not reduce competition. Combining three service providers into one company eliminates the possibility of any company expanding to compete into another area and create a more competitive market. Also, the offerings of one company will no longer foster competition and innovation when compared to the others. The separate companies, if merged, will no longer provide pressure upon each other to improve, in order to protect and increase their market share.

The Application further states without providing any supporting data that the “relevant industries are competitive and dynamic”, that “customers will continue to have numerous alternatives”, and that the combined company will not hold a “dominant share of the market in California”.⁵⁹ Such unsubstantiated assertions do not provide the Commission with useable information upon which to evaluate the public interest impact of this merger, and do not meet the Joint Applicants’ burden of proof.

B. Joint Application Fails to Meet the Requirements of 854(c)

As discussed above, the Commission should apply the requirements of 854(c) specifically in considering approval of the proposed merger, and as part of a general public interest evaluation under 854(a). The Commission must consider each of the criteria listed in 854(c)(1) through (8), and find on balance that the proposal is in the public interest.

i. 854(c)(1) - Maintain or Improve the Financial Condition of the Utility

In order to demonstrate that the proposed merger will maintain or improve the financial condition of the utilities, the Joint Applicants must provide information on the current financial

⁵⁹ Joint Application at 27.

condition of the involved utilities, and then prove how the merger will maintain or improve those conditions. The Joint Application states that Charter is in “strong” financial condition, and references “Exhibit D” which is a 233 page document comprised of Charter financial reports⁶⁰. Nowhere does the Joint Application link specific information on Charter’s financial condition to the undefined statement that it is “strong”. No information or even conclusory statements are offered as to the financial condition of TWC or BHN. The application goes on to state the anticipated increase in subscribers of voice, broadband, and video services for Charter versus New Charter, and expected increases in pro forma revenue⁶¹, but does not provide the calculations used to determine these amounts. Without additional information on the financial condition of all involved utilities, and an explanation of how the anticipated changes in subscribers and earnings affect the larger context of the utilities’ overall financial health, the Commission will not be able to determine how the merger will likely affect the financial condition of the utility. Therefore, the Joint Applicants have not met their burden of proof regarding this factor.

Also of concern is the fact that Charter filed for bankruptcy in March 2009. The Application indicates in a footnote that it was part of a financial restructuring⁶², but does not further explain the circumstances or situation surrounding the bankruptcy. The New York Times reported that Charter was driven to bankruptcy in 2009 after amassing \$21.7 billion of debt, and had not made a profit since 1999.⁶³ The effect of this bankruptcy on the current or future

⁶⁰ *Id.*

⁶¹ Joint Application at 28.

⁶² *Id.* at 33, footnote 51.

⁶³ *Charter Emerges From Bankruptcy*, THE NEW YORK TIMES, Dealbook, November 30, 2009, http://dealbook.nytimes.com/2009/11/30/charter-emerges-from-bankruptcy/?_r=0.

financial condition of the parties is not addressed in the application, but a history of bankruptcy is not a positive indicator of future financial strength.

ii. 854(c)(2) - Maintain or Improve the Quality of Service to Ratepayers

Only a brief paragraph is offered under this section that again relies upon vague and general statements, such as using undefined “best practices” and “experiences in an array of communications and broadband services”, that are expected benefit customers⁶⁴. As the subsidiary companies are acquired and new leadership, employees, and policies are integrated throughout New Charter, it is likely that changes and adjustments will be made that will affect day to day operation of services. However, no anticipated challenges to maintaining service quality are discussed in the application, and no specific plans, policies, or investments that will maintain or improve service quality are identified. Accordingly, Joint Applicants fail to meet their burden to prove this factor as well.

iii. 854(c)(3) - Maintain or Improve the Quality of Management of the Utility

The management team for New Charter is said to have experience, focus, and familiarity with California⁶⁵, yet it is never stated who will actually be on the management team, except for Charter CEO Tom Rutledge. New Charter is expected to “utilize Charter’s, TWC’s and BHN’s significant managerial capability”⁶⁶ which presumably means that some managers of the merged companies will keep their positions, but it is not clear who or how many will be able to continue to serve at New Charter. Joint Application Exhibit G, section 3.02 indicates that during the merger transactions, board members, officers, and managers from TWC, Charter and Charter subsidiaries will retain control over the surviving merged entities until successors can be elected

⁶⁴ Joint Application at 28.

⁶⁵ Joint Application at 28.

⁶⁶ *Id.* at 29.

or appointed⁶⁷. But ultimately, New Charter will have a 13 member Board of Directors, an increase from Charter's current 11 person board, with two members nominated by Advance/Newhouse and three by Liberty Broadband.⁶⁸ Aside from Mr. Rutledge, it does not appear settled at this time who will serve on New Charter's board and what members of TWC and Charter's current management will manage New Charter. Therefore, the sufficiency of the qualifications and experiences of New Charter's management cannot be assumed at this time. The effectiveness of Charter's current management team may not be of any relevance to New Charter if current managers are not retained in positions of authority. Additionally, as discussed above, the 2009 Charter bankruptcy filing raises concerns regarding financial health as well as managerial strength.

Further, the different entities involved in the merger, which will each contribute managers to the final management team, may have different business philosophies, as evidenced in the different types of service offerings available through the companies (for example the character of low-income broadband service offered through TWC versus BHN discussed above). How these managers and styles will coexist to maintain or improve the quality of leadership at the utilities is not demonstrated in the application. No overarching corporate policies or philosophies are discussed that will help maintain managerial quality at New Charter.

Finally, NDC is concerned with the lack of diversity on the current Boards of Directors at Charter and TWC. The Joint Applicants have not disclosed specific information on this point in their merger documents, but it appears that the diversity of California is not adequately reflected in the representation of minority communities on either board. Improving the quality of management must include appointing leaders from minority communities who can understand

⁶⁷ Exhibit G, section 3.02.

⁶⁸ Joint Application at 18. See also footnote 24.

the unique perspectives, experiences, and needs of the diverse groups where New Charter's employees and customers will come from.

iv. 854(c)(4) - Be Fair and Reasonable to Utility Employees

Joint Applicants claim that because transition efforts have not yet begun, they are “therefore unable to make representations about the impacts of the Transition on specific employees”⁶⁹. This is not a reasonable assertion, as there must be at least some plans for how certain departments will be combined and duplicate positions will be addressed, or how benefit plans will be transitioned from former company policies to New Charter policies. The Application does not provide any of this information, and instead discusses expected job creation. While job creation is an important benefit for California, it does not relate to or ensure fair and reasonable treatment of employees, as required under this 854(c)(4).

NDC applauds the Joint Applicants for identifying diversity issues as a significant consideration in the fair and reasonable treatment of employees, and pledging to expand TWC's commitment to diversity and inclusion⁷⁰. This pledge would be more meaningful with information on TWC's current diversity commitment level, and details on establishing tangible diversity goals for New Charter. As it is, Charter, TWC, and BHN do not appear to disclose their diversity efforts in GO-156 reports⁷¹. For at least the last 6 years⁷², the Greenlining Institute (GL) in its annual Supplier Diversity Report Card has called upon TWC to follow the industry practices of other major telecommunications and cable companies (such as AT&T,

⁶⁹ Joint Application at 29.

⁷⁰ *Id.*

⁷¹ These companies are not listed on the CPUC Supplier Diversity Procurement Reports site:

http://www.cpuc.ca.gov/PUC/SupplierDiversity/2014_Utility_Supplier_Diversity_Procurement_Reports.htm.

⁷² 2009 Supplier Diversity Report Card, THE GREENLINING INSTITUTE, (June 2009), <http://greenlining.org/wp-content/uploads/2013/02/2009GreenliningSupplierDiversityReportCard.pdf>.

Verizon, and Comcast) and file GO-156 reports, but TWC has consistently failed to do so. In their 2015 report, GL stated:

Time Warner Cable must end its continuing apathy towards supplier diversity. Time Warner again failed to file any report with the CPUC in 2014, reiterating its lack of interest in diversity efforts. This is unacceptable in a state like California where communities of color are the majority, and where other companies' efforts have made such remarkable progress. With another merger recently announced, Time Warner Cable must take strong steps to demonstrate that it is committed to the communities it serves.⁷³

An important step toward ensuring fair and reasonable treatment of their employees would be for New Charter to establish strong employment diversity goals and commit to transparency and disclosure through the filing of GO-156 reports.

v. 854(c)(5) - Be Fair and Reasonable to Utility Shareholders

While Fiberlink, TWCIS, and Bright House CA are subsidiaries and do not have traditional shareholders, it is not reasonable for Joint Applicants to claim that 854(c)(5) is not relevant to the Commission's analysis⁷⁴. Because these subsidiaries represent significant assets of the parent companies which are owned by shareholders, the proposed merger directly affects those shareholders' interests and should be evaluated for fairness and reasonableness by the Commission. The Commission should not allow the technical structure of a transaction to override the purposes behind evaluating and protecting the public interest. As in the Pacific Telesis/SBC merger discussed previously, the Commission should "focus on substance rather than form"⁷⁵ to determine what entities and shareholders are really involved.

vi. 854(c)(6) - Be Beneficial to State and Local Economies, and to the Communities in Service Areas

⁷³ 2015 Supplier Diversity Report Card, THE GREENLINING INSTITUTE, (June 2015) at 21, <http://greenlining.org/wp-content/uploads/2015/07/2015-SDRC-to-post-spreads1.pdf>.

⁷⁴ Joint Application at 30.

⁷⁵ See *supra* note 25.

The discussion under this heading of the Joint Application is only one sentence, and references vague statements regarding general improvements to products and services mentioned in previous sections⁷⁶. Of note, the heading in the Application states simply “State and Local Economic Benefits”⁷⁷. The heading, much less the supporting sentence, does not properly address the issue of benefits to the local communities, as required by the statute. Competitive and consumer benefits are assumed in the application, not demonstrated, and new product offerings are not necessarily beneficial to the economy, especially if the products and services are not affordable. No information is provided about affordable services to benefit local disadvantaged communities, or diversity hiring goals to address disproportionate unemployment rates among minority groups. Establishing supplier and employment diversity goals for New Charter that are comparable to other telecommunications, video, and internet providers would substantially benefit state and local economies, and the communities in their service areas.

vii. 854(c)(7) - Preserve Commission Jurisdiction and Capacity to Effectively Regulate and Audit the Utility

Joint Applicants claim that the proposed transaction will have no effect on the Commission’s jurisdiction⁷⁸. Again, even in the heading, the application fails to address the full requirement of the statute, which includes preserving the “capacity of the commission to effectively regulate and audit public utility operations in the state”⁷⁹. A substantially larger company will have a much broader market area and larger scale operations, and therefore require more time and effort to review. Increased disclosure of information and reporting commitments, such as committing to file GO-156 reports, and ensuring that general company audits are

⁷⁶ Joint Application at 30.

⁷⁷ *Id.*

⁷⁸ Joint Application at 30.

⁷⁹ Section 854(c)(7)

conducted by independent and reputable firms, can help alleviate some of the increased demands on the Commission to regulate New Charter, and met the requirements of 854(c)(7).

A concerning aspect of the Joint Application is the multiple references to “non-jurisdictional” information, products, and topics that the Joint Applicants believe are beyond the scope of the Joint Application and of the Commission’s jurisdiction⁸⁰. If Joint Applicants currently believe that so much relevant information is outside the Commission’s jurisdiction to regulate, they will likely assert those same reservations pertaining to a larger service area and greater number of customers once the merger is complete, thus hindering the jurisdiction of the Commission over a larger geographic and population area.

viii. 854(c)(8) – Provide Mitigating Measures to Prevent Significant Adverse Consequences Which May Result

No discussion of any mitigating measure under 854(c)(8) is included in the Joint Application. Mitigating measures are an important consideration of the public interest impact under 854(c)(8), as well as under P.U. Code section 854(d) which requires the Commission to consider “reasonable options to the proposal recommended by other parties”.

Many of the same significant adverse consequences which may result from the proposed merger here were also of concern in the recently abandoned proposed merger between Comcast, TWC, and BHN⁸¹. In that proceeding, before the applicants filed to withdraw their request for approval, a proposed decision on the matter was issued by ALJ Bemserfer approving the merger with conditions⁸². Based in part on the appropriate mitigating measures proposed in the

⁸⁰ See for example Joint Application page 3, footnote 4; page 24, footnote 37; page 21, footnote 34; and page 25, footnote 41.

⁸¹ Comcast/TWC proceeding.

⁸² Bemserfer PD.

Comcast/TWC proceeding, NDC hereby encourages the Commission to adopt the following mitigating measures for the instant application:

a. Improve Quality and Expand Eligibility for Low-Income Telephone and Internet Service

New Charter should extend the Lifeline program to all eligible customers of the merged companies. Basic phone service is a necessary tool not only for emergency situations, but to allow interaction with the outside world. Low-income households should have such an essential service at a price they can afford.

However, in the modern technological age, meaningful interaction with the outside world is increasingly dependent upon having access to the internet. The vast majority of cultural content such as music, art, and entertainment, is accessed through the internet. Obtaining jobs, education, healthcare, as well as government, non-profit, and community services often requires internet access. Because “[b]roadband has become essential to participation in modern society”⁸³, the Federal Communications Commission (FCC) has already taken steps to modernize the Lifeline program to include broadband internet service, stating that “While over 95% of households with incomes of \$150,000 or more have access, only 48% of those making less than \$25,000 have service at home”⁸⁴. This “digital divide” prevents underserved communities from realizing the full benefits of the internet, and is caused by barriers to obtaining internet service, including high costs and a lack of technological understanding (“digital literacy”). Requiring a large state-wide internet service provider to “expand its offerings to

⁸³ *FCC Takes Steps to Modernize and Reform Lifeline for Broadband*, FCC NEWS FROM THE FEDERAL COMMUNICATIONS COMMISSION, (June 18, 2015), <https://www.fcc.gov/document/fcc-takes-steps-modernize-and-reform-lifeline-broadband>.

⁸⁴ *Id.*

unserved and underserved communities is the simplest and most effective means available to bridge the digital divide.”⁸⁵

Therefore, New Charter must address this pressing public interest need by committing to provide a low-cost internet access option. As discussed above, the current BHN low-cost internet program (Connect2Compete) is entirely inadequate, with its unusably low speeds (1Mbps upload/385Kbps download) and overly complicated eligibility and enrollment policies. The current TWC program (Everyday Low Price Internet) at least has a simple no-contract, no pre-qualification enrollment process, but the speeds offered are still far too insufficient.⁸⁶ New Charter must develop a low-cost, stand-alone internet service option with a minimum 15 Mbps download/2Mbps upload speeds within 18 months of the merger, and upgrade the service to 25Mbps/3Mbps within 3 years to meet FCC minimum broadband speeds (as may be adjusted by the FCC).

Eligibility for subsidized broadband service should be inclusive and simple, available to all households with incomes at or below 150% of the Federal Poverty level. With less than half of low-income households having internet access, plans and programs must be developed to achieve a target enrollment rate of 75% of all eligible households within 18 months of the merger. And within 3 years of the merger, New Charter should connect and/or upgrade internet infrastructure for K-12 schools and public libraries in unserved and underserved areas of New Charter’s combined California service territory, to provide high speed internet to at least the same proportion of K-12 schools and public libraries in such unserved and underserved areas as it provides to the households throughout its service territory.

⁸⁵ Bemserderfer PD at 74-75.

⁸⁶ Comcast has upgraded its “Internet Essentials” low-cost internet program to 10Mbps download speeds and expanded eligibility. See *Comcast to Speed Up Discount Internet Service*, SFGATE, Associated Press, (August 4, 2015), <http://www.sfgate.com/business/article/Comcast-to-speed-up-discount-Internet-service-6424999.php>.

b. Develop Robust Supplier and Employment Diversity Programs and Goals

New Charter must seriously address the public interest factors of 854(c) by committing to high aspirational goals for employment and supplier diversity, and developing aggressive programs and policies to achieve those goals. As discussed above, the Joint Applicants have not yet provided facts or data demonstrating that the companies seeking to merge have current commitments to diversity, nor that New Charter will develop plans or goals for diversity in the future. Clear and robust goals for supplier diversity and employment diversity at all levels of New Charter can help ensure improvements in the quality of service (854(c)(2)), the quality of management (854(c)(3)), fairness and reasonableness to employees (854(c)(4)), benefits to the local economies and communities (854(c)(6)), and preserve Commission capacity to regulate (854(c)(7)).

New Charter must commit to filing annual GO-156 reports, and set supplier diversity targets in line with other advanced telecommunication, internet, and video service providers. These targets should be supported by dedicating funding to technical assistance programs provided by local minority chambers of commerce, community colleges, and universities, designed to build the capacity of small minority-owned business. New Charter must also set high aspirational goals for employment diversity, including among their Board of Directors and management. They should reach out to local minority communities and business chambers in their expanded service area to solicit applications for new job openings that are created as a result of this merger. Diversification of employment and the supply chain at New Charter and investing in developing small businesses in the community will greatly increase the public interest benefits of this merger, mitigating the likely adverse consequences.

c. Strengthen Service to Customers in the Minority Community

Given that in California, individuals from minority groups make up the majority of the population, meeting the needs of minority groups greatly benefits the public interest, and is sound business sense. New Charter should commit to providing customer service and communication media in multiple major languages that are dominant within their service areas. This should include Spanish, Chinese, Japanese, Korean, Tagalog, Vietnamese, and other languages spoken by more than 100,000 members of the community.

Additionally, New Charter should make efforts to support the development and distribution of more ethnic programming that presents realistic and positive portrayals of minority groups. They should increase the offerings and availability of channels that understand and celebrate the distinct cultures found in Latino, Black, and separate pan-Asian (including Chinese, Japanese, Korean, Filipino, Vietnamese, Pacific Islander, Cambodian, and Hmong) minority communities. Meeting the needs of the diverse communities in California is good for the public and good for New Charter.

V. PROCEDURAL ISSUES

A. Proposed Schedule

NDC defers to the judgment of the Commission to set an appropriate schedule for these proceedings. We respectfully suggest that the schedule take into consideration an opportunity for the Commission to provide input into the related FCC investigation⁸⁷. We also note that the Joint Applicant's proposed schedule incorrectly indicates that the Notice of Application of Filing appeared on the Commission's Daily Calendar on July 6, 2015, and the Period for Submission of

⁸⁷ FCC MB Docket No. 15-149.

Protest Expired on August 6, 2015. The correct date the Notice appeared on the daily calendar was July 8, 2015, and pursuant to Commission rule 2.6(a), the period for protest ended 30 days later on August 7, 2015.

B. Categorization

NDC has no objection to the proposal of the Joint Applicants to categorize this proceeding as ratesetting.

C. Hearings

The Joint Application requested expedited approval and claimed that hearings are unnecessary⁸⁸. However, as discussed above, the Joint Application does not provide information specific enough for the Commission to make an assessment of the public interest impact of the merger under the requirements of P.U. Code Section 854(a), 854(b), 854(c), or Section 706 of the Telecommunications Act. The Commission should either reject the Joint Application as failing to meet the statutory burden of proof to show that the merger is in the public interest, or hearings should be scheduled to obtain additional information.

NDC respectfully requests scheduling extensive public participation hearings, and providing parties advanced notice to maximize ratepayer participation. To further encourage public participation, statements given at public participation hearings should be made a part of the record, and given appropriate weight considering they are not subject to cross examination. Finally, interpreters should be made available in any major languages spoken within the service area where public participation hearings are held.

⁸⁸ Joint Application at 34.

VI. CONCLUSION

For the reasons set forth herein, NDC protests the Joint Applicants' request for approval of their merger transaction, as they have not provided sufficient information to prove that the transaction is in the public interest, nor have they included mitigating measures to prevent significant adverse consequences which may result.

August 06, 2015

Respectfully Submitted,

/s/ _____
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