

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).

A.15-07-009
(Filed July 2, 2015)

**THE OFFICE OF RATEPAYER ADVOCATES
COMMENTS ON THE PROPOSED DECISION
GRANTING APPLICATION SUBJECT TO CONDITIONS**

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I. INTRODUCTION & SUMMARY OF RECOMMENDATIONS

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA), files these comments on the April 12, 2016 Proposed Decision (PD) with the titled captioned above.

The PD finds New Charter's market power problematic, particularly in Southern California, but adopts insufficient conditions to address this concern. The Commission should adopt new conditions and strengthen existing conditions to ensure that adequate customer protections are in place. The Commission should recognize, and adopt as conditions all of the voluntary commitments Charter has accepted in its reply brief,¹ as well as all conditions the FCC and the U. S. Department of Justice adopted.² The Commission should also clarify conditions related to broadband enhancement and deployment, service quality commitments for Voice over Internet Protocol (VoIP) and broadband, and the requirement to offer LifeLine in all of New Charter's service territory. To further protect customers from potential abuses resulting from New Charter's market power, the PD should require New Charter to eliminate mandatory arbitration and class action waiver provisions in all of its customer contracts, and should not permit New Charter to impose usage-based billing or data caps on its broadband services. Lastly, the PD should adopt ORA's recommended enforcement language so that New Charter is monitored, audited, and investigated, as appropriate, to ensure compliance with all of the conditions the Commission adopts here.

II. DISCUSSION

A. The PD Should Adopt All of Charter's Commitments, with ORA's Recommended Modifications

The PD weighs the proposed transaction's effects on the public interest, and states that it must hold New Charter to its promises and require concrete commitments.³ The PD also identifies numerous Charter commitments, and acknowledges those commitments stating:

¹ March 11, 2016 Reply Brief of Charter Communications, Time Warner Cable, and Bright House Networks; Appendix A (Requested Conditions and the Joint Applicants' Responses).

² United States District Court for the District of Columbia. Proposed Final Judgement in *United States of America v. Charter Communications, Inc, Time Warner Cable Inc., Advanced/Newhouse Partnership, and Bright House Networks LLC*. Civil Action No. 16-CV-00759 (April 25, 2016).

³ PD at 53.

To the extent that those promises and assurances are responsive to the concerns of the protesters, we will reformulate them as explicit conditions of approval. In addition we will also impose conditions that are reasonably inferred from those promises and assurances.⁴

However, the PD errs in omitting to include each of the several voluntary commitments Charter made in this proceeding, and make those commitments explicit conditions of approval as further discussed below.

1. Broadband Enhancement and Deployment

The PD correctly concludes that it must address the topics of greatest concern to the public: broadband deployment and affordability.⁵ In doing so, the PD considers the transaction's effects on the quality and availability of broadband services, and identifies several of New Charter's commitments as prerequisites for approval so that potential benefits outweigh potential harm.

For example, the PD notes the Joint Applicants' assertion 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 in California."⁶ Then, Conditions E and F of Ordering Paragraph (OP) 2 require New Charter to increase broadband speeds to 60 Mbps for households in its California service territories.⁷

In their Reply Brief, however, the Joint Applicants voluntarily committed to the following more robust and long term broadband enhancements:

New Charter commits to deliver broadband speeds of at least 100 Mbps within 3 years of closing the Transaction to all homes passed within its service area, subject to completion of its commitment, *supra*, under which it will deploy 70,000 new broadband passings to current analog-only cable service areas in Kern, Kings, Modoc, Monterey, San Bernardino, and Tulare counties.

New Charter will offer broadband Internet Service with speeds of at least 300 Mbps download to all households with current broadband availability from New Charter in its California network by December 31, 2019. On December 31, 2016, and every year

⁴ PD at 61.

⁵ PD at 26.

⁶ PD at 45 to 46.

⁷ PD at Ordering Paragraph 2.

thereafter until December 31, 2019, New Charter shall submit a progress report to the Commission and ORA identifying progress made.

New Charter will allow existing Time Warner Cable and Bright House Networks customers to retain, without material changes that have the intent to discourage, the broadband services they subscribe to at the close of the Transaction for three years from the date of the closing.⁸

The PD must recognize these commitments, and require New Charter to fulfill them as a condition of approval. In order to do so, the PD should include additional conditions to require the full extent of broadband enhancement speeds that New Charter has committed to, as noted in Appendix (App.) A.

As it relates to broadband deployment, New Charter should expand broadband services to new customers who currently do not have access to Joint Applicants' service. Condition F of OP 2 contemplates this result. At a minimum, the Commission should require New Charter to expand broadband availability to no less than 98% of households within New Charter California franchise and operating service areas by end of year 2019 without New Charter imposing line extension charges on customers. The record shows that New Charter currently provides broadband availability to 95% of households in its service area;⁹ thus a 98% broadband deployment target is reasonable and attainable within the specified timeframe. Charter has committed to new broadband deployment for 150,000 California households,¹⁰ which falls short of an estimated 182,000 households needed to achieve a 98% broadband deployment target.¹¹

2. Service Quality for VoIP and Broadband

The PD notes that service quality levels for Joint Applicants' voice service and broadband customers are low in comparison with levels of service received from other providers.¹² Thus, the PD requires New Charter to improve service quality "within a reasonable time after closing of the transaction, provide voice and broadband service levels that are comparable to the average service

⁸ Joint Applicants Reply Brief at 98.

⁹ Selwyn Reply Testimony at 110.

¹⁰ PD at 13.

¹¹ Selwyn Reply Testimony at 93.

¹² PD at 36.

levels of competitors.”¹³ The PD provides that “New Charter shall meet all service quality standards for voice communication established in General Order 133-C.”¹⁴ Because the voice service Joint Applicants provide is VoIP service,¹⁵ the Commission should require New Charter’s voice service, including VoIP, to meet all five of the service quality standards included in General Order 133-C (and its successor), and all reporting requirements. Without this modification, the PD’s proposed condition would be meaningless since General Order 133-C currently applies only to traditional, circuit switched voice service.

In addition, the PD notes evidence on the record related to the frequency and severity of the Joint Applicants’ voice and broadband service outages.¹⁶ The PD should note that Joint Applicants’ service outages poses significant risk to public safety and require New Charter to decrease the quantity and severity (as measured by duration and number of customers affected) of voice and broadband service outages. The Joint Applicants have accepted to provide to the Commission and ORA specific data regarding service outages involving voice and broadband.¹⁷ Furthermore, New Charter accepted to create and conduct a customer satisfaction survey in conjunction with ORA.¹⁸ The Commission should adopt these commitments that Joint Applicants already agreed to in their Reply Brief as conditions to transaction approval, as indicated in App. A, otherwise it will be difficult for the Commission to enforce these commitments.

3. Backup Power Educational Material

The PD errs by not requiring as a condition of approval the full extent of the Joint Applicants’ voluntary commitments concerning backup power educational material. Currently, the PD requires, at Condition L of OP 2, that New Charter comply with the guidelines for consumer education programs regarding backup power systems the Commission adopted in D.10-01-026. However, Charter also voluntarily committed to, “[i]mprove New Charter's customer education surrounding battery backup power systems and install such batteries at cost to disabled customers

¹³ *Id.*

¹⁴ PD at 69 (Order 2.k.).

¹⁵ PD at 3 to 5.

¹⁶ PD at 33 to 35.

¹⁷ Joint Applicants Reply Brief at 119-120.

¹⁸ *Id.* at 120-121.

that may have difficulty installing them.”¹⁹ The Commission must revise Condition L to require the full extent of Charter’s voluntary commitment, as shown in App. A.

B. The PD Errs in Ignoring the Impact of Price Increase Resulting from the Significant Additional Debt New Charter will Require to Finance the Transaction.

The PD correctly observes that in order to finance its acquisition of TWC, the much smaller Charter will be required to incur additional debt obligations amounting to some \$21 billion.²⁰ As ORA stated in its reply brief, when using 2015 pro forma data, the impact is even greater.²¹ The PD, however, focuses on New Charter’s creditworthiness and concludes that New Charter will be “adequately capitalized.”²² The PD’s conclusion is expressly premised upon the merger-driven increase in New Charter’s market power and the resulting ability and incentive to raise prices to offset the increase in its cost of debt.

In responding to ORA’s concern regarding the potential adverse financial impact of the merger, the PD suggests that as long as New Charter will be in a position to increase its prices without confronting any competitive (or regulatory) constraint, its financial strength post-merger is not a concern.²³ It is here where the PD errs by narrowly focusing upon Section 854(c)(1) in isolation from the broader public interest concerns of Section 854(c) and of Section 854 in general.

The PD correctly concludes that New Charter’s market power will indeed be enhanced by eliminating separate TWC and BHN entities from the market.²⁴ New Charter will be “passing at least 82% of all households in the 10 Southern California counties, and by the Joint Applicants’ own testimony, some 87% of all households in the Los Angeles [Designated Market Areas,] DMAs.... With this level of market dominance, it is entirely reasonable to ascribe a substantial portion of the projected \$1.7 billion increase in post-merger EBITDA to price increases that New Charter would – and could – put into effect.”²⁵ The PD’s conclusion that Section 854(c)(1) is

¹⁹ *Id.* at 4.

²⁰ PD at 28.

²¹ ORA Reply Brief at 19.

²² PD at 30.

²³ PD at 30.

²⁴ PD at 52 to 53.

²⁵ PD at 29, quoting Dr. Selwyn’s Reply Testimony at 22.

satisfied because New Charter can simply raise its prices to overcome the financial consequences of \$21-billion in additional debt cannot be squared with the PD's overarching conclusion that the merger is in the public interest. Indeed, the rationale the PD offers for its finding as to Section 854(c)(1) actually compels the conclusion that the proposed transaction is decidedly not in the public interest precisely because the only way in which the proposed transaction will not adversely affect New Charter's financial condition is the Company's enhanced ability to raise its prices by, for example, instituting data caps and usage-based billing, or by simply raising monthly broadband prices overall. At minimum, the Commission should adopt mitigating measures such as no data caps/no usage-based pricing/no zero rating until the presence of effective competition in the California broadband market or, if the Commission prefers to set a time-based limit, it should be no less than seven years (as the FCC recommended); whichever is later.²⁶

C. New Charter's Enhanced Market Power in California Requires further Consumer Protections

As stated above, with a combined distribution infrastructure that passes 82% of all households in the ten Southern California counties and by the Joint Applicants' own admission that it passes 87% of households in the Los Angeles Designated Market Area (DMA), a near-geographically-ubiquitous New Charter will possess both the *incentive and ability* to foreclose entry by rival service providers throughout the entire Southern California region. The PD intends to "hold the merging companies to their promises of increased service, fairer pricing, less onerous contracts, and equal access and require them to translate those vague promises into concrete commitments."²⁷ The Commission must do just that and require strong consumer protections, particularly given the lack of consumer choice as specified below and supported by the evidence on the record.

1. Elimination of Mandatory Arbitration/Class Action Waiver Provisions in Customer Adhesion Contracts

Prior to the deregulation of telecommunications services, consumers had the ability to bring disputes to the CPUC and/or the FCC for resolution, including the ability to file formal

²⁶ Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks. April 25, 2016. Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0425/DOC-339028A1.pdf

²⁷ PD at 53.

complaints addressing practices common to many subscribers for adjudication by the regulatory authority. Following deregulation, customers have largely lost the ability to seek redress from regulatory agencies, but still have the ability to bring actions against service providers in court. Class action lawsuits provide a means by which disputes involving small dollar amounts for individual customers could still be litigated by spreading the often high costs of legal actions across a large population of similarly situated customers. State courts have blocked initial efforts by telecommunications carriers and cable service providers to insert mandatory arbitration clauses and class action waivers into their adhesion contracts. For example, the California Supreme Court, in *Discover Bank v. Superior Court of Los Angeles, Respondent*, 36 Cal.4th 148, held that:

although adhesive contracts are generally enforced, class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code Section 1668: “*All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.*” (Italics added)

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because ... damages in consumer cases are often small and because “[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit’ ”, “ ‘the class action is often the only effective way to halt and redress such exploitation.’ ” Moreover, such class action or arbitration waivers are indisputably one-sided. “Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.” Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.²⁸

In 2011, the U. S. Supreme Court ruled that the Federal Arbitration Act pre-empted state law or court determinations as to unconscionability of mandatory arbitration/class action waiver

²⁸ California Supreme Court, *Discover Bank v. Superior Court of Los Angeles, Respondent*, 36 Cal.4th 148 at 160-161. Citations omitted. Emphasis in original.

provisions in such adhesion contracts.²⁹ However, that ruling applied to contracts *containing* such provisions; it does not *require* that such provisions be included in consumer contracts. Nothing in the *Concepcion* ruling would preclude the Commission from finding that including such provisions in New Charter’s customer contracts would not be in the public interest. Nor is the CPUC precluded from adopting, as a Section 854(c)(8) mitigation condition, a requirement that such provisions be removed from New Charter retail customer contracts.

ORA’s proposed Condition 5 would require, as a condition for approval of the merger, that New Charter commit to discontinue the use of such contract terms – terms that are “onerous” – and that such provisions be removed from existing contracts affecting customers in California.³⁰ The California Supreme Court has clearly articulated the intent of Civil Code Section 1668, and the PD has recognized the need to address such “onerous contracts” as one means of mitigating the effects of the expanded monopoly position of the post-merger New Charter and its enhanced ability to impose “take-it-or-leave-it” terms and conditions upon its customers. Accordingly, ORA’s proposed condition should be included in the PD’s OP 2, as follows:

New Charter shall discontinue the inclusion of mandatory arbitration/class action waiver provisions in its consumer agreements. Within 90 days from closing, New Charter shall provide all of its customers a written notice detailing out the discontinuance of arbitration/class action waiver provisions. The written notice shall be available in multiple languages to New Charter multilingual customers. New Charter shall provide the Commission and ORA a copy of the customer notice within 90 days from the time of closing of the transaction. In addition, New Charter shall include a letter from one of its officers certifying compliance with this condition.

2. A Time-Based Sunset of Portions of Conditions H and I is Inappropriate.

Conditions H and I of OP 2 would impose, for a period of no less than three years, requirements on New Charter’s conduct with respect to its broadband Internet access services. These requirements are intended to foster competition in the market for broadband services, including development of layered applications and content that would compete with third-party stand-alone offerings delivered over New Charter broadband services. The required provisions

²⁹ *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011).

³⁰ Selwyn Reply Testimony at 146.

would sunset (expire) three years after the effective date of the merger. The sunset of these requirements, however, should not be triggered by the mere passage of time, but by the actual presence of effective competition in the market, as noted in App. A to these comments.

For example, ORA's proposed Condition 3, referenced in its opening and reply briefs, directly addresses this situation.³¹ It would prohibit New Charter from imposing data caps and engaging in zero-rating until such time as competition in the Southern California broadband market is sufficient so that marketplace forces would preclude such discriminatory practices – *practices that the PD itself acknowledges New Charter is likely to pursue*.³² In contrast, the mitigation condition the PD proposes would cause this prohibition to end after three years *irrespective of the extent to which actual and effective competition will have developed by that time*. But, nothing in the record that supports a conclusion that the concerns warranting adoption of these conditions would have materially changed during the coming three years or, for that matter, within any specific time frame. The Commission should prohibit data caps/ usage-based pricing/ zero rating until effective competition emerges in the California broadband market or, if the Commission prefers to set a time-based limit, it should be no shorter than seven years (as the FCC recommended);³³ whichever comes later.

D. Condition G Should be Revised to Require the Unbundling of New Charter's Service Charges from Customer Premises Equipment Rental Fees.

While still maintaining that the Joint Applicants had failed to meet their burden of proof that the proposed merger satisfies the relevant provisions of Section 854 or that the transition is in the public interest, in its March 11, 2016 Reply Brief, ORA enumerated specific conditions the Commission should adopt to at least partially mitigate the adverse consequences of the proposed transaction if the Commission approves it. One of these conditions concerns the unbundling of customer premises equipment (CPE) – specifically, set-top boxes used for video services and cable modems used for broadband Internet access.³⁴

³¹ *Id.* at 46.

³² PD at 52 and 53.

³³ Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks. April 25, 2016. Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0425/DOC-339028A1.pdf

³⁴ ORA Opening Brief. Appendix A at Condition 4.

The PD recounts the various mitigating conditions ORA and other protesting parties proposed. The PD's description of ORA's CPE unbundling condition (Condition 4), however, overlooks a central focus of ORA's concern regarding the "unbundling" of CPE from the monthly charges for broadband access and video services. ORA's recommended condition seeks to address Charter's current (pre-merger) practice of bundling the customer's cable modem charge into the monthly recurring charge for broadband access, and the potential for this practice being extended to existing TWC and BHN customers post-merger.³⁵

When TWC customers elect to purchase their own cable modem, their total monthly TWC bill for broadband service is reduced by \$10, the amount that TWC would otherwise charge for the rental of the device. But when a Charter customer makes the same election, there is no reduction in the customer's monthly bill. The Reply testimony of ORA witness Dr. Lee L. Selwyn states that "Consumer-grade wireless gateways and cable modems are readily available from a number of sources, typically at prices in the \$100 to \$150 range."³⁶ Thus, for customers who purchase their own cable modems, the payback period is in the range of 10 to 15 months. As noted by Dr. Selwyn, "[t]hese devices have a useful life of 3, 4 or more years, so the customer can realize a good return on his or her investment."³⁷

The PD requires only 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."³⁸ The PD does not require New Charter to *lower its price* to eliminate the equipment rental component for customers who elect to purchase and provide their own CPE. In fact, Charter is essentially *already* doing exactly what the proposed language of OP 2(g) provides. Charter currently "offer[s] all customers the option of acquiring their own modems and cable set-top boxes without any associated increase in the price of services" but without any associated *decrease* in the price of services³⁹ Charter now, and New Charter post-merger, should also offer all customers the option of acquiring their own modems and cable set-top boxes *and give such customers a reduced*

³⁵ Selwyn Reply Testimony at 149.

³⁶ *Id.* at 150.

³⁷ *Id.*

³⁸ PD at 69.

³⁹ PD at Ordering Paragraph 2.

price to reflect the avoided monthly rental value of the equipment that Charter (and New Charter) will not be providing. The language of Ordering Paragraph 2(g) should be revised to include all of the text as proposed by ORA as noted in App. A to these comments.

E. New Charter Should Offer LifeLine Phone Service Discounts Throughout All of its Service Territory.

The PD's proposed condition 2(j) correctly requires New Charter to offer LifeLine discounts throughout its entire service area. The PD fails, however, to address ORA's full analysis of Charter's history of noncompliance with LifeLine obligations. As ORA notes in the Direct Testimony of Eileen Odell, Charter Fiberlink withdrew LifeLine and basic service from its territory without Commission approval.⁴⁰ Given Charter's track record with regard to meeting its LifeLine obligations, it is imperative that the Commission require New Charter to participate in California's LifeLine program and comply with all attendant LifeLine regulations. Charter's proposes, in contrast, as a condition to offer "discounted rates equivalent to those available under the California LifeLine program[.]"⁴¹ ORA's edits to the proposed condition, attached hereto in App. A, clarify this requirement and would ensure that customers have the benefits and customer protections of the LifeLine program. A condition that requires New Charter to participate in the LifeLine Program, comply with the LifeLine Program rules, and actively promote LifeLine in its service territory is necessary to serve the public interest.

F. New Charter's Proposed Low-Income Broadband Program Should be Expanded to Benefit all Low-Income Residents in its Service Territory

The California Emerging Technology Fund ("CETF")/Charter Memorandum of Understanding ("MOU") (which the PD adopts) proposed low-income broadband program condition is insufficient to ensure that all low-income Californians will benefit from the proposed transaction. The PD mischaracterizes ORA's testimony, failing to note that ORA finds inadequate the expansion of New Charter's proposed program to include only seniors aged 65 and over who receive supplemental Security Income (SSI) benefits. New Charter should expand the eligibility criteria of the program to include all low-income households.

⁴⁰ Odell Direct Testimony at 5.

⁴¹ Charter Reply Brief, Appendix A at 6.

The low-income broadband proposed condition is also inadequate because it establishes no minimum performance-based targets for enrollment. Without a minimum performance target, New Charter will have little incentive to actively promote low-income broadband. Charter committed to “seek to enroll 200,000 broadband customers which, the company will endeavor in good faith to achieve.”⁴² Compliance with such a loose commitment will be difficult to monitor and enforce.

The PD should instead adopt, within three years of the close of the transaction, ORA’s proposed minimum enrollment benchmark of 45% of eligible households in each census block (along with ORA’s proposed expanded eligibility criteria).⁴³ This recommendation is concrete, performance-based, and can more easily be monitored and enforced.

Finally, CETF and Charter agreed in their MOU that “upon request,” New Charter would furnish CETF with progress reports pertaining to the low income broadband program’s enrollment statistics. The parties to that MOU agreed that these reports would be confidential. CETF is not a part of the Commission, and is not a governmental entity with any enforcement authority. These progress reports should to also be made automatically available to the Commission (including ORA) and other parties to this proceeding on an annual basis. The Commission should require New Charter to annually report to the Commission on the enrollment progress of its low-income broadband program.

G. Additional Clarifications Needed on the Proposed Conditions.

1. Condition H Should be Split in Two to Address Open Internet Order Rules and Timelines Apart from Other Conditions and Timelines.

At Condition H of OP 2, the PD requires New Charter to comply with the terms and conditions of the FCC’s *Open Internet Order (OIO)*, and also comply with additional conditions and timelines not included in the FCC’s *OIO*. For example, within Condition H, sub-condition (c) regarding usage based billing, and sub-condition (d) regarding data caps, are not included in the *OIO*’s terms and conditions. The Commission should require the sub-conditions (c) and (d), separate and apart from the remainder of Condition H. Then, in order to ensure the necessary benefits are realized by consumers, the Commission should revise the compliance requirement to a minimum of seven years or until there is sufficient competition, whichever comes later.

⁴² Charter Reply Brief, Appendix A at 7.

⁴³ ORA Brief at 49.

The PD should split Condition H into two distinct mitigating conditions, to clarify its purpose and realize the full extent of the condition’s intentions, as shown in App. A.

2. Conditions L Should Require New Charter to Provide Backup Power Education Materials in English and the Top Three Non-English Languages in its Service Area.

The PD states that ORA Witness Gallardo, “[I]ntroduced unrebutted evidence regarding the necessity for back-up power systems in VoIP telephone systems and 911 service.”⁴⁴ The PD also notes Gallardo’s criticism regarding the adequacy of the Joint Applicants’ consumer education programs. The PD includes a mitigating condition intended to address consumer education regarding backup power. The PD errs, however, by not addressing the full extent of Mr. Gallardo’s unrebutted evidence. The Commission should augment Condition L of OP 2 to require New Charter to provide the backup power educational material in English as well as the top three non-English languages of its service area, as set forth in App. A of these comments.

H. Enforcement of Conditions

1. PD Lacks a Discussion of how the Commission will Enforce the Conditions.

The PD does not discuss the Commission’s enforcement of mitigating conditions. The PD concludes that the proposed transfer meets the requirements of § 854(c) and is in the public interest, *if New Charter fulfills certain mitigating conditions*.⁴⁵ The PD proposes some, but not all, of the necessary mitigating conditions, but does not discuss or include any plan to monitor or enforce those conditions. If the conditions are a requisite for the merger to satisfy the requirements of § 854(c) and serve the public interest, then the Commission should explicitly identify effective mechanisms to monitor and enforce those conditions. Failure to do so would undermine the purpose of the mitigating conditions, and thus fail to ensure the public interest benefits and protections are fully realized.

The PD correctly recognizes the necessity of monitoring and enforcement, as demonstrated by Condition C of OP 2, which states, “New Charter consents to the jurisdiction of this Commission to enter an order enforcing the MOUs or the agreements.”⁴⁶ That condition, however,

⁴⁴ PD at 63.

⁴⁵ PD at Conclusion of Law 4.

⁴⁶ PD at Condition C of Ordering Paragraph 2.

pertains only to certain agreements and MOUs, and does not address the full range of mitigating conditions. Still, each mitigating condition is equally indispensable. Accordingly, the Commission should address the issue of monitoring and enforcement of *all* conditions, rather than only for certain agreements and MOUs.

ORA presented the Commission with a set of recommended conditions (should the Commission approve the merger), one of which specifically pertains to the enforcement of conditions.⁴⁷ For example, the Commission should adopt a condition containing general enforcement language as follows:

Commission staff and ORA have the authority to audit and verify New Charter's compliance with all conditions set forth herein. New Charter must provide all data requested by the Commission and ORA to conduct the audit and verification. If New Charter fails to perform and comply with the set forth conditions, the Commission will pursue appropriate enforcement remedies, including the imposition of fines.

New Charter means the Joint Applicants' successor company or future parent that will result from the proposed transaction/merger; whatever that name may be; i.e. "Charter Communications, Inc.". In accordance with the Joint Applicant's CPUC Application A.15-07-009, the new reorganized parent company is referred to as "New Charter". However, the parent entity resulting from the Transaction and Reorganization will ultimately assume the name "Charter Communications, Inc.,")

The PD should address the imperative issue of the monitoring and enforcement of mitigating conditions, as set forth in App. of these comments.

I. Other Factual, Legal, or Technical Errors in the PD

The PD in section "2.1.2.1 ORA" includes a heading but no text in referencing ORA's position on the proposed transaction. In addition, the discussion of other parties positions; including those of the Center for Accessible Technology (CforAT) and the Writers Guild of America, West, are missing. These omissions constitute factual, legal and technical errors that must be fully addressed to accurately reflect the evidentiary record of the proceeding.

⁴⁷ ORA Opening Brief at 52.

III. CONCLUSION

The PD seeks to approve the Transaction, with certain conditions. The PD must clarify current conditions, reflect Charter's voluntary commitments, and include additional recommended conditions necessary to ensure that strong consumer protections are in place. Appendix A provides the necessary changes required to correct these factual and legal errors.

Respectfully submitted,

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