

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Joint Application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC (U6878C) for Expedited Approval to Transfer Certain Assets and Customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, Pursuant to Public Utilities Code Section 851.

A.14-06-012

**PROTEST
OF THE OFFICE OF RATEPAYER ADVOCATES**

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I. INTRODUCTION

Pursuant to Rule 2.6 of the CPUC's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) Protests the Joint Application (Application) of Comcast Corporation (Comcast) on behalf of its prospective wholly owned subsidiary Time Warner Cable Information Services (CA), LLC (TWCIS), and Charter Fiberlink CA-CCO, LLC (Charter Fiberlink) (collectively, Joint Applicants) requesting that the California Public Utilities Commission (CPUC) authorize the transfer of a limited number of non-residential (business) customers and associated regulated assets of Charter Fiberlink to TWCIS under Public Utilities Code Section 851 (Section 851).¹

¹ Application at 2

As discussed below, based on information provided in the instant Application, Application (A.) 14-04-013, ² *Joint Application of Comcast, Time Warner Cable on behalf of its wholly owned subsidiary TWCIS and Bright House Networks Information Services (CA), LLC (Bright House) requesting that the CPUC authorize the transfer of indirect, ultimate control of Time Warner Cable's wholly-owned subsidiary, TWCIS to Comcast and the pro forma transfer of control of Bright House California to Comcast under Public Utilities Code Section 845(a)* (Merger Application or A.14-04-013), as well as what is commonly known, the proposed merger does not appear to be in the public interest or in compliance with existing laws and regulations.³ As noted in ORA's Protest to A.14-04-013 (Merger Protest)⁴ on the surface, these Applications concern only the merger of three existing competitive local exchange carriers (CLECs) and the transfer of limited amounts of business customers and assets from one CLEC to another. However, in reality, the proposed merger and transfer would unite three large providers of high-speed last mile broadband service in the State and further consolidate the resulting entity's operations, market share and control over content. The proposed consolidation will likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services and impact a larger number of consumers than claimed in the Application.

Because the details of this market are largely unknown, the CPUC should pause, gather data, and assess the effects of the merger on this crucial marketplace. As explained below, it is not only the Federal Communications Commission (FCC) that has delegated authority to regulate the deployment of advanced telecommunications. The 1996 Telecommunications Act delegated this authority equally to the FCC and each state

² Filed April 11, 2014.

³ Pub. Util. Code § 854; 47 U.S.C. § 1302(a) (Section 706).

⁴ Filed May 19, 2014.

commission.⁵ As it did in the AT&T-T-Mobile merger,⁶ the CPUC should robustly investigate the California-specific effects of the proposed merger on California consumers under both Section 851 and Section 706. It is for these reasons that ORA protests this application.

As discussed in its July 22, 2014 letter to ALJ Bemserfer and Niki Bawa in A.14-04-013 (ORA's Letter), ORA recommends that the CPUC recategorize this proceeding as adjudicatory and either open a fact-finding phase in the existing proceeding or open an Order Instituting Investigation (OII) into the planned purchase and acquisition by Comcast of Time Warner Cable in order to gather facts so that the CPUC may determine whether the proposed merger complies with applicable laws and regulations and is in the public interest.

II. BACKGROUND

A. Time Warner Cable Companies

Time Warner Cable is a publicly traded Delaware corporation.⁷ Its network facilities cover portions of 31 states, including California. Time Warner Cable is the second largest provider of cable service and third largest provider of broadband service in California.⁸ According to Time Warner Cable, it offers interconnected Voice over Internet Protocol (VoIP) services in the areas it serves.⁹

Time Warner Cable's residential broadband offerings consist of three tiers, differentiated by price and download/upload speeds. TWCIS is a wholly-owned

⁵ 47 U.S.C. § 1302(a).

⁶ I.11-06-009.

⁷ The information on Time Warner Cable Companies comes from A.14-04-013 and from the instant Application. ORA reserves the right to update this information later in this proceeding once it is able to obtain more information concerning the structure of the Time Warner Cable companies.

⁸ <http://www.consumerwatchdog.org/story/consumer-groups-want-government-reject-comcast-timewarner-cable-deal>.

⁹ A.14-04-013 at 3.

subsidiary of Time Warner Cable.¹⁰ TWCIS is a limited liability company organized under the laws of the state of Delaware authorized to do business in California.¹¹ TWCIS is authorized to provide limited facilities-based and resold interexchange services as a non-dominant interexchange carrier (NDIEC) and limited facilities-based and resold local exchange services as a CLEC in California pursuant to a Certificate of Public Convenience and Necessity (CPCN) issued by the CPUC on March 16, 2004.¹² According to the Application, TWCIS does not itself provide direct end-user voice services but offers wholesale telecommunications services, including switched access service and local interconnection service to retail VoIP providers including TWCIS's own non-carrier affiliate, TWC Digital Phone, LLC.¹³ In California, Time Warner Cable, through TWC Digital Phone LLC, currently provides its competitive voice services using VoIP technology to residential and business customers in Time Warner Cable's footprint in Southern California. Additionally, Time Warner Cable, through its cable and other subsidiaries, offers video and high-speed data services.

B. Comcast

Comcast is a publicly traded corporation organized under the laws of Pennsylvania. Comcast has network facilities covering portions of 39 states and the District of Columbia.¹⁴ Comcast is the largest provider of broadband and cable in the United States.¹⁵ Comcast offers broadband services differentiated by price and download/upload speeds to its residential customers.

¹⁰ *Id.*

¹¹ *Id.*

¹² *In The Matter of the Application of Time Warner Cable Information Services (California), LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resale Competitive Local, IntraLATA and InterLATA Voice Service*, D. 04-03-032.

¹³ Application at 5.

¹⁴ *Id.* at 6.

¹⁵ <http://articles.latimes.com/2014/apr/09/entertainment/la-et-ct-comcast-fcc-20140409>

Comcast Phone of California, LLC (Comcast Phone) holds a CPCN, U-5698-C, from the CPUC to provide facilities-based and resold local exchange and interexchange telecommunications services in California as a CLEC. According to Comcast, Comcast Phone is primarily a wholesale provider offering interconnection and other regulated services, of which Comcast IP Phone II, LLC (Comcast IP) receives through an interconnection agreement with Comcast Phone.¹⁶ Comcast further claims that Comcast Phone does not offer any retail services to residential customers, but does have retail business customers.¹⁷

Comcast maintains that it provides XFINITY Voice, a residential telephone service, through its affiliate Comcast IP.¹⁸ However, Comcast advertises XFINITY Voice on its website simply as a “Comcast” service, rather than one specifically provided by Comcast IP.¹⁹ Similarly, the telephone bill for XFINITYVoice does not list Comcast IP anywhere.²⁰ Rather, the bill indicates that it is from “Comcast.” Comcast Phone and Comcast IP have the same officers and principal place of business. Both entities also share some employees, though Comcast did not clarify the nature and extent of this commonality, generally stating that it is a complex question.²¹ Comcast also states that business operations staff from various Comcast entities supports both Comcast Phone and Comcast IP.²²

¹⁶ *Order Instituting Investigation into the Unauthorized Disclosure and Publication and Unlisted Telephone Numbers by Comcast* (Comcast OII), I. 13-10-003 at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.*

C. Charter Communications, Inc. (Charter)

Charter Fiberlink is a wholly-owned subsidiary of Charter Communications, Inc. (Charter).²³ Charter is a publicly traded Delaware corporation, operating in 29 states, including California, and providing traditional cable video services (basic and digital), advanced video services, high-speed Internet services, and voice services to more than six million residential and business customers. Charter Fiberlink is authorized to provide limited facilities-based and resold interexchange services as an NDIEC and limited facilities-based and resold local exchange services as a CLEC in California pursuant to a CPCN issued by the CPUC on May 6, 2004.²⁴ Under its CPCN authority, Charter Fiberlink provides interstate and intrastate telecommunications services to business customers, including private line and data/wide area network services. According to the Application, Charter Fiberlink does not provide residential end-user voice services itself, but it enables its VoIP affiliate to do so by providing network interconnection, telephone numbers, and other services. Charter Fiberlink also provides switched exchange access services to interconnection carriers who terminate calls on its network.

III. LEGAL BASIS FOR ORA'S PROTEST

A. Section 706 of the 1996 Telecommunications Act²⁵

The District of Columbia Circuit Court of Appeal (D.C. Circuit) recently issued a decision, *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014), which discusses Section 706(a) of the 1996 Telecommunications Act (Section 706) concerning advanced telecommunications capability. Section 706 provides:

The [Federal Communications] Commission and each State commission with regulatory jurisdiction over telecommunications

²³ The information on Charter Fiberlink and Charter comes from the Application. ORA reserves the right to update this information later in this proceeding once it is able to obtain more information concerning the structure of the Charter and Charter Fiberlink .

²⁴ Charter Fiberlink received its NDIEC CPCN in D.04-04-035, and its CLEC CPCN in D.04-05-011.

²⁵ ORA's Letter contains a more detailed discussion of the CPUC's jurisdiction under Section 706.

services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁶

Section 706 defines “advanced telecommunications services” to include broadband and VoIP.²⁷

In *Verizon v. FCC*, the D.C. Circuit determined that Section 706 was a grant of authority to the FCC and to each state commission to take concrete steps that will promote competition in broadband.²⁸ The D.C. Circuit also found that Congress, in passing the 1996 Telecommunications Act, most likely relied on the FCC’s continued oversight of broadband facilities.²⁹ Notably, the D.C. Circuit reasoned that “...legislative history suggests that Congress may have, somewhat presciently, viewed that provision [Section 706(a)] as an affirmative grant of authority to the [Federal Communications] Commission whose existence would become necessary if other contemplated grants of statutory authority were unavailable.”³⁰

²⁶ 47 U.S.C. § 1302(a).

²⁷ 47 U.S.C. § 1302(d)(1) states: “The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”

²⁸ *Verizon v. FCC*, 740 F.3d 623, 637-640 (D.C. Cir. 2014).

²⁹ The D.C. Circuit noted that “To the contrary, ... when Congress passed section 706(a) in 1996, it did so against the backdrop of the [Federal Communications] Commission’s long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet. Indeed, one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the [Federal Communications] Commission would continue regulating Internet providers in the manner it had previously.” *Verizon*, 740 F.3d at 639.

³⁰ *Verizon*, 740 F.3d at 639.

The D.C. Circuit also quotes the Senate Committee Report on the Telecommunications Competition and Deregulation Act of 1995 (Senate Committee Report).³¹ The Senate Committee Report states that Section 706 is “intended to ensure that one of the primary objectives of the [1996 Telecommunications Act]--to accelerate deployment of advanced telecommunications capability--is achieved,” and emphasized that Section 706 is “‘a necessary fail-safe’ to guarantee that Congress's objective is reached.”³² As the FCC observed, and the D.C. Circuit quoted in *Verizon v. FCC*, “[i]t would be odd indeed to characterize Section 706(a) as a ‘fail-safe’ that ‘ensures’ the [Federal Communications] Commission's ability to promote advanced services if it conferred no actual authority.”³³ Thus, the D.C. Circuit’s recent opinion underscores that Section 706 clearly delegates authority to the states to take concrete steps that will promote broadband competition.

The D.C. Circuit observed that Congress delegated authority to *both* the FCC and the state commissions in Section 706. In response to Verizon’s contention that “Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities”, the D.C. Circuit reasoned, “Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here.”³⁴ Because the language in Section 706 does not distinguish between the delegation to the FCC and to the state commissions, the CPUC may invoke Section 706 in its review of the merger of Comcast and Time Warner Cable

³¹ The Telecommunications Competition and Deregulation Act of 1995 was eventually adopted by Congress in 1996, and became known as the 1996 Telecommunications Act.

³² Senate Committee Reports, 104th Congress (1995-1996) Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 50-51 (1995). *See also Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *Verizon*, 740 F.3d at 639.

³³ *Open Internet Order*, 25 F.C.C.R. 17906, 17969-17970, ¶ 120 (2010). *See also Verizon*, 740 F.3d at 639.

³⁴ *Verizon*, 740 F.3d at 638.

as well as in its review in the instant proceeding of the transfer of customers and assets from Charter to Time Warner Cable.

The plain language of Section 706 directs states to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³⁵ Thus, the CPUC has the authority to adopt some regulations and conduct a detailed review of advanced telecommunications services in California. ORA contends that under Section 706, the CPUC has the authority to promote the deployment of advanced services by means such as issuing data requests to ascertain who owns telecommunications infrastructure in California; monitoring broadband service quality; protecting consumer from fraudulent and unfair business practices and imposing relevant rules if needed; monitoring market concentration; and adopting strong reporting requirements so that states may assist federal agencies in monitoring and promoting competition. Furthermore, under Section 706, the CPUC has an obligation to review the impact of the merger on broadband deployment in California as Section 706 contains, in the D.C. Circuit’s words, “a direct mandate.”³⁶

B. Public Utilities Code Section 710 (Section 710)³⁷

Section 710 (Section 710) does not prohibit the CPUC’s review of the impact of the proposed merger on advanced telecommunications capabilities. Section 710 contains clear exceptions to the limitation on regulating VoIP and Internet Protocol (IP)-*enabled* services:

³⁵ 47 U.S.C. § 1302(a).

³⁶ *Comcast v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010).

³⁷ ORA’s Letter contains a more detailed discussion of Section 710.

The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services *except as required or expressly delegated by federal law* or expressly directed to do so by statute or as set forth in subdivision (c).³⁸

The CPUC is an agency created by the California Constitution,³⁹ and as such, has broad, far-reaching discretionary authority, though the Legislature can limit such authority, as it did with passage of SB 1161. However, even in enacting Section 710, the Legislature has acknowledged the CPUC's subject matter jurisdiction over VoIP and IP-enabled services, while placing limits on that authority. The legislative limit on CPUC authority contains exceptions, and, one of those exceptions is federally delegated authority. If the CPUC had never had authority over VoIP and IP-enabled services, the need for Section 710 would have never arisen. In addition, Section 706 applies to "each State commission with regulatory jurisdiction over telecommunications services",⁴⁰ and the CPUC is the State commission in California with regulatory jurisdiction over telecommunications services.⁴¹ Thus, clearly, the "advanced telecommunications capability" referenced in Section 706 is within the CPUC's subject matter jurisdiction, consistent with Section 710. Because Section 706 both requires and expressly delegates the CPUC to encourage the deployment of advanced services, including broadband, consistent with Section 710(a), the CPUC must review the proposed merger under Section 706.

The CPUC's review of the proposed merger must ensure that if approved, the merger will promote rapid deployment of advanced communications and competition, and reduce barriers to infrastructure investment, which are the stated goals of Section

³⁸ Pub. Util. Code § 710(a) (emphasis added).

³⁹ California Constitution, Art. XII.

⁴⁰ 47 U.S.C. § 1302(a).

⁴¹ See, e.g., Pub. Util. Code §§ 216, 233-236, 270-285, 871-887, 2871-2897.

706. This policy is in harmony with the California Legislature’s stated intent in California SB 1161⁴², codified as Section 710, which provides that the purpose of SB 1161 is to achieve the following goals:

- (1) Preserve the future of the Internet by encouraging continued investment and technological advances and supporting continued consumer choice and access to innovative services that benefit California.
- (2) Ensure a vibrant and competitive open Internet that allows California’s technology businesses to continue to flourish and contribute to economic development throughout the state.⁴³

It is clear that the intent of Section 710 is consistent with Section 706. There is no conflict between the stated goals of Senate Bill 1161, Section 706, and the CPUC’s review of the merger to further those goals.

Furthermore, because Section 706 delegates specific authority to “each State commission with regulatory jurisdiction over telecommunications services,” the CPUC does not need additional authority granted by the Legislature to have regulatory authority over deployment of advanced telecommunications.⁴⁴ Under the Supremacy Clause of the United States Constitution, federal law may preempt state law.⁴⁵ However, because Section 710 contains exceptions to accommodate federal law requirements, the issue of Section 706’s preemption over Section 710 is not at issue here.

⁴² The Legislature passed SB 1161 when the FCC’s *Open Internet* rules (i.e., net neutrality rules) were still in effect. The D.C. Circuit rejected the legal basis for the FCC’s *Open Internet* rules in *Verizon v. FCC*, and currently, there are no net neutrality rules in place.

⁴³ Legislative Counsel’s Digest, SB 1161, Ch. 733, § 1(b).
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1161

⁴⁴ 47 U.S.C. § 1302(a).

⁴⁵ U.S. Const. Art. VI., § 2. ORA notes that under Article 3.5(c) of the California Constitution, an administrative agency, such as the CPUC, does not have the authority “to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.” However, because Section 710(a) provides an exception, it is not necessary to have a Supremacy Clause inquiry.

C. Public Utilities Code Section 851 (Section 851)

Section 851 provides that no public utility “shall... sell [or] lease...[property] necessary or useful in the performance of its duties to the public...without first having secured from the Commission an order authorizing it to do so.” The CPUC has decided that “[t]he relevant inquiry for the Commission in Section 851 proceedings is whether the proposed transaction is ‘adverse to the public interest.’”⁴⁶ Therefore, the CPUC has also an obligation to consider the public interest in its review of the Application under Section 851.

IV. DISCUSSION

A. The CPUC’s Interest in this Transaction is Much Broader than Applicants’ Characterization

Applicants characterize the proposed transfer as a simple “transfer [of] a limited number of business customers and associated regulated assets of Charter Fiberlink to TWCIS (CA) under PU Code Section 851.”⁴⁷ The Joint Applicants claim that Charter Fiberlink will transfer to TWCIS all business telecommunications service customers, which is estimated to be fewer than 1,000 customers.

This characterization is misleading. In fact, there is a much larger transfer occurring in the transaction. Joint Applicants concede that “[t]he regulated assets and customers that are the subject of this Application represent only a small proportion of the overall value of the assets being transferred, which consist mostly of cable systems subject to the jurisdiction of other regulators.”⁴⁸ The impact to California customers is

⁴⁶ Application at 12, n.11, citing *Decision Granting Approval Under Public Utilities Code Section 851 for Conveyance of a Lease by Southern Edison Company to the City of Lakewood*, D.13-10-063 *mimeo* at 9, citing *Universal Marine Corporation*, D.84-04-102, 14 CPUC2d 644 (“[W]e have long held that the relevant inquiry in an application for transfer is whether the transfer will be adverse to the public interest”); see also D.89-07-016, 32 CPUC2d 233.

⁴⁷ Application at 2-3.

⁴⁸ *Id.* at 10.

larger than stated in the application. What the Joint Applicants fail to disclose is that Charter has an estimated 595,000 “customer relationships” in California alone as listed in the company’s 2013 10K Annual Report. A Customer Relationship is defined as “the number of customers that receive one or more levels of services, encompassing video, Internet, and voice services, without regard to which service(s) such customers received.”⁴⁹

According to news reports, Charter’s customers in California would be switched to Comcast if the two proposed merger deals are approved.⁵⁰ The CPUC has an affirmative obligation review the impact of the proposed merger on the deployment of advanced communications under Section 706, as well as on Section 851. The Joint Applicant’s characterization of the CPUC’s appropriate level of review of the proposed merger ignores the requirement of Section 706 to encourage the deployment of advanced telecommunications services in a manner consistent with the public interest.

B. The Proposed Transfer Is Not in the Public Interest Because It Will Support Comcast’s Stranglehold on Broadband Access, in Contravention to Section 706

Section 706 grants the CPUC the authority to examine whether this requested action promotes the deployment of advanced communications. As noted above, Charter delivers high-speed Internet, phone service and video to more than 5.7 million customers in 29 states.⁵¹ Charter is currently a competitor to Time Warner Cable in the Los Angeles area. Charter was initially an outspoken critic of the proposed merger.⁵² Charter stated in a filing at the Securities and Exchange Commission on March 28, 2014 that “[f]rom

⁴⁹ Charter Communications Inc. Form 10-K Annual Report for Fiscal Year Ending Dec. 31, 2013, A14-06-012, Attachment 4

⁵⁰ <http://www.sanluisobispo.com/2014/04/29/3042891/charter-customers-in-slo-county.html>

⁵¹ <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-homeProfile>

⁵² <http://www.nytimes.com/2014/03/29/business/media/charter-urges-time-warner-cable-shareholders-to-reject-comcast-deal.html>

the regulatory perspective, it is difficult to imagine a transaction that could concentrate the industry more than the proposed Comcast merger....”⁵³ However, Comcast appears to have silenced Charter’s criticism by striking a deal with Charter that seems to be favorable to both companies, but may be harmful to the deployment of advanced telecommunications.⁵⁴

Comcast’s proposed deal with Charter is contingent upon Comcast’s completing its acquisition of Time Warner Cable and receiving all the necessary regulatory approvals.⁵⁵ One aspect of the deal involves Charter’s acquisition of about 1.4 million subscribers previously served by Time Warner Cable in Ohio, Kentucky, Wisconsin, Indiana, and Alabama.⁵⁶ Then, the two companies would “swap” about 1.6 million subscribers, allowing each company to serve more adjacent subscribers.⁵⁷ Comcast would acquire Charter’s customers’ in Southern California,⁵⁸ New England, the South and the Northwest, while Charter would pick up some of Comcast’s subscribers in the Midwest, clustering with those subscribers acquired from Time Warner Cable.⁵⁹ Finally, Comcast would move about 2.5 million of its current subscribers in the Midwest and the South into a new publicly traded company.⁶⁰ Charter would take a 33 percent stake in the new company, paying a mix of cash and stock. Charter would also have a path to eventually control the new company.⁶¹

⁵³ *Id.*

⁵⁴ http://dealbook.nytimes.com/2014/04/27/charter-said-to-finalize-deal-with-comcast-for-subscribers/?_php=true&_type=blogs&_r=0

⁵⁵ http://dealbook.nytimes.com/2014/04/27/charter-said-to-finalize-deal-with-comcast-for-subscribers/?_php=true&_type=blogs&_r=0

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Comcast may acquire all of Charter’s customers throughout California.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

While Joint Applicants state that “[i]n this transaction, Charter Fiberlink only seeks to transfer a small number of intrastate business customers,”⁶² the transaction actually appears to entail Comcast divesting an estimated 3.9 million subscribers overall, and also swapping customers with Charter, apparently resulting in a consolidation of its market share in certain parts of the country, such as in California.⁶³ At its basest level, this transfer is an elimination of one source of broadband competition in California, subsuming Charter Fiberlink into its competitor, Time Warner Cable. As noted in ORA’s Merger Protest, should the CPUC, the FCC and the United States Department of Justice approve the proposed merger and related transactions, then three broadband, cable, and telephone providers in California will merge into one company – Comcast. Pre-merger, Comcast is already the largest broadband, VoIP and cable provider in the Unites States, with a 40 percent market share of homes with broadband Internet.⁶⁴ Post-merger, Comcast’s market share and influence would become even greater.

Applicants have failed to clearly identify how the proposed transfer of assets and customers and the resulting consolidation of market power to one company creates benefits for California consumers. More information is required before the CPUC can make a finding that the proposed transfer is not adverse to the public interest. The CPUC cannot merely accept the Applicants’ statements of the benefits of the merger,⁶⁵ but rather, must evaluate the merger based on data and facts.

⁶² Application at 12.

⁶³ http://dealbook.nytimes.com/2014/04/27/charter-said-to-finalize-deal-with-comcast-forsubscribers/?_php=true&_type=blogs&_r=0.

⁶⁴ <http://www.latimes.com/business/la-fi-ct-att-directv-deal-20140519-story.html>

⁶⁵ Application at 10-11.

C. Joint Parties Have Failed to Establish that the Proposed Transfer Is Not Adverse to the Public Interest in Contravention to Section 851

When evaluating a proposed transfer under Section 851, the CPUC will permit the transfer only if it is not adverse to the public interest. Aside from the role this transfer plays in the context of the larger transfer and merger, Joint Applicants have failed to produce evidence that even the minimal transfers of business customers and assets disclosed in the Application are not adverse to the public interest. Joint Applicants state that the transfer will allow Comcast a “greater ability to compete with incumbent local exchange carriers (ILECS) and serve regional, super-regional, and enterprise businesses located in these markets.”⁶⁶ This transfer removes Comcast’s largest competitor from the Los Angeles area. Without additional data or information, Comcast’s assertion that the simple replacement of one entity (Charter/Charter Fiberlink) with another (the proposed Comcast /Time Warner Cable company) will “enhance consumer welfare and competition and deliver substantial public interest benefits” is not supported.

Comcast and Time-Warner Cable’s current practices, management, and customer service record leave open the question of whether allowing the transfer of *more* customers to their care is adverse to the public interest. When it comes to customer satisfaction of services provided by the Joint Applicants, for the most part, Comcast, Time-Warner Cable, and Charter rank below the industry average on Internet customer satisfaction and telephone service.⁶⁷ In addition, as described in ORA’s Merger Protest, Comcast is currently embroiled in litigation at the CPUC concerning its apparent violation of privacy-related laws.⁶⁸ The CPUC’s Order Instituting Investigation (OII)

⁶⁶ Application at 13.

⁶⁷ <http://www.jdpower.com/press-releases/2013-us-residential-internet-service-provider-satisfaction-study>
<http://www.jdpower.com/press-releases/2013-us-residential-telephone-service-provider-satisfaction-study>

⁶⁸ ORA Merger Protest at 12; I.13-10-003.

into Comcast's conduct calls into question whether Comcast is a good corporate citizen and whether Comcast has operated in a transparent and open manner since the discovery of the alleged breach of privacy-related laws.⁶⁹ The City of Los Angeles has also instigated litigation against Time-Warner Cable for breach of franchise agreement terms and related statutory provisions.⁷⁰

The CPUC must investigate the customer service records of both companies as well as whether both companies are good corporate citizens. The CPUC cannot make a finding that the transfer of assets and customers is not adverse to the public interest without investigating the customer service/corporate citizen aspects of both companies and how the merger will have an impact on those issues.

V. CONCLUSION

For the aforementioned reasons, ORA protests the application as Joint Applicants have not demonstrated that the proposed transfer of customers and assets complies with Section 851, 854, or Section 706 and have failed to provide sufficient information to determine if such transfer is in the public interest. Under Section 706, the CPUC must review the effects of the proposed transaction on the deployment of advanced services capabilities in California. There is much at stake in this Application and Merger Application for California. The CPUC, in its great efforts and work in encouraging the deployment of advanced telecommunications capability infrastructure, including broadband infrastructure, to further economic growth through the State, can continue to further such benefits by closely examining the impact of the transfer of assets and customers from Charter to Time Warner Cable as well as the Merger Application on broadband availability, access, and competition.

ORA respectfully requests that the CPUC re-categorize this proceeding as

⁶⁹ I.13-10-003 at 7, 9, 18.

⁷⁰ ORA Merger Protest at 15-17; *City of Los Angeles v. Time Warner Cable, Inc.*, Case No. CV-14-1984, Central Dist. CA, Complaint for Damages and Injunctive Relief, Demand for Jury Trial.

adjudicatory, and either open up a fact-finding phase in the current proceeding or issue an OII to gather information to determine whether the proposed merger comports with Section 851 and Section 706.

Lastly, ORA respectfully requests that the CPUC consolidate this proceeding with A.14-04-013, the Time Warner Cable/Comcast merger proceeding pursuant to Rule 7.4 of the CPUC's Rules of Practice and Procedure. Rule 7.4 provides that "[p]roceedings involving related questions of law or fact may be consolidated." A.14-04-013 and the instant Application present many related questions of law and fact and therefore should be consolidated. The Application is contingent upon approval of A.14-04-013 and directly implicates a number of the public interest, legal and factual concerns raised in ORA's Protest to A.14-04-013. A combined proceeding increases efficiencies by allowing information pertinent to both matters at hand to be presented only once. Because a consolidated proceeding involves common questions of law and fact, it also allows greater consistency. Further, and in this case in particular, a combined proceeding will allow the CPUC to evaluate readily the implications of cumulative actions of the involved entities.

Respectfully submitted,

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