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

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

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

**SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER  
AND ADMINISTRATIVE LAW JUDGE**

**Summary**

This ruling sets forth the scope, schedule, category, need for hearings, and *ex parte* communication rules for this proceeding pursuant to Rule 7.3 of the Commission's Rules of Practice and Procedure (Rules). The Rules are available on the Commission's website.<sup>1</sup>

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<sup>1</sup> See Commission's Web page ([www.cpuc.ca.gov](http://www.cpuc.ca.gov)), "Laws, Rules and Procedures."

## **1. Parties and Procedural Background**

Comcast Corporation (Comcast), Time Warner Cable Inc. (TWC), Time Warner Cable Information Services (California), LLC (TWCIS) and Bright House Networks Information Services (California), LLC (Bright House) (collectively, Joint Applicants) filed this application (Application) for approval of the transfer of control of TWCIS and Bright House to Comcast on April 11, 2014. TWCIS and Bright House are regulated entities licensed by the Commission. The Application was filed under Section 854(a) of the Public Utilities Code (Pub. Util. Code) which provides, in relevant part, that transfers of control of regulated entities may only be made with the prior approval of the Commission. The Application also contained a brief analysis of the ways in which the Joint Applicants meet the factors set forth in Pub. Util. Code § 854(c).

The Application was protested by a group of public interest organizations including the Jesse Miranda Center for Hispanic Leadership, the Los Angeles Latino Chamber of Commerce, the Orange County Interdenominational Alliance, the National Asian American Coalition, the Ecumenical Center for Black Church Studies, Christ Our Redeemer AME Church, and the National Hispanic Christian Leadership Conference (collectively, Joint Protestors); the Commission's Office of Ratepayer Advocates (ORA); The Utility Reform Network (TURN); and The Greenlining Institute (Greenlining). Dish Network L.L.C. (Dish) filed a response to the Application. Joint Protestors, ORA, TURN and Greenlining are hereafter sometimes collectively referred to as "Protestors."

The proposed transfer of control of TWCIS and Bright House is incident to a proposed merger between Comcast and TWC (Merger). Comcast is the largest cable company in northern California; TWC is the largest cable company in southern California. The Application recites that immediately following the

proposed change of control, customers of TWCIS and Bright House will continue to receive the same services at the same rates as were available to them prior to the change of control and that over time the Merger will result in enhanced services to these regulated entities' voice customers.<sup>2</sup> For these reasons, Joint Applicants urge the Commission to treat the Application as a routine matter and approve the change of control without delay and without the necessity for evidentiary hearings. Joint Applicants further maintain that the Commission's jurisdiction is limited to evaluating the impact of the proposed license transfer on the market for voice services in California. They argue that the transfer will enhance competition in the market for voice services and is *ipso facto* in the public interest.

Protestors have a different view of the matter. They urge us to adopt a broad public interest standard in reviewing the Application and look not just at the implications of the transfer for voice customers of TWCIS and Bright House but also at the implications of the proposed Merger for the cost and availability of broadband services in California. In particular, ORA expresses concern about what it views as the near-monopoly market power that will be possessed by the merged company. Joint Protestors and Greenlining worry that the Merger will widen the so-called digital divide between affluent and poor communities by restricting access to broadband services and making them more expensive. TURN argues that Joint Applicants have failed to demonstrate the claimed public

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<sup>2</sup> See, Joint Application at 14: "By permitting Comcast Corporation and Time Warner Cable to combine the best aspects of their robust and innovative voice services, and by adding scale to Comcast Corporation's overall business that will encourage more network investment in California, approval of this transaction will leave the merged company even better suited to offer an array of advanced voice services in competition with ILECs and other providers."

benefits of the Merger. Protestors in general ask that we adopt strict standards of review either by ruling that the Application is governed by Section 854(c), which requires that the change of control meet certain standards enumerated in the statute, or by looking to the Section 854(c) standards for guidance even if we conclude that the Application is governed by the less restrictive public interest standard of Section 854(a).

In addition to these arguments, based on provisions of the Public Utilities Code, ORA urges us to rule that we have jurisdiction to investigate the implications of the Merger on broadband deployment in California under Section 706 of the federal Telecommunications Act, citing to a recent decision of the District of Columbia (D.C.) Circuit Court on this topic. In that connection, ORA urges that we open a companion investigation into the Merger, a position supported by all other Protestors.

Joint Applicants dispute both the Section 854(c) argument under state law and the Section 706 argument under federal law, and strongly object to the opening of an investigation into the effects of the Merger, which they argue is an action beyond the jurisdiction of the Commission.

## **1. Discussion**

Comcast and TWC, through their California subsidiaries, would potentially combine the two largest providers of high-speed last mile broadband service in the state. The Merger would impact competition and consumer welfare in California's market for wholesale telecommunications, retail voice, backhaul and broadband services.<sup>3</sup> More importantly, the Merger would have

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<sup>3</sup> See, Joint Application at 2-7.

an impact on broadband deployment in California as two of the largest cable broadband providers in the state merge to form one entity. Therefore, while conducting ourselves under the limited authority granted by applicable law, the Commission will:

- Gather and analyze information relevant to the proposed merger to determine the specific impact of the merger on California under the public interest criteria enumerated in Sections 854(a) and 854(c) of the Public Utilities Code (Pub. Util. Code);
- Analyze what, if any, conditions related to California-specific effects of the merger may be appropriate; and
- Develop a record to inform additional comments that the Commission may file with regard to the merger application at the Federal Communications Commission (FCC).

Once a cable company has constructed a network in a geographic area and acquired a customer base, it is typically too expensive for a second such company to come in and overbuild the first company's network. For that reason, in the absence of regulation, a cable company can charge a monopoly price for individual customers to access its network. This is also why Comcast and TWC have argued that the Merger would not change the competitive landscape because the two companies do not currently compete for customers. As cable companies have branched out from offering television only to offering high speed Internet access, e-mail, texting, video conferencing, telephony and other broadband-based services, the consequences of being economically precluded from access to such services have become more severe.

Recognizing these facts, the Commission believes that it has a role to play in the discussion about the proposed Merger of the country's two largest cable

companies as it impacts California consumers. The FCC has opened a proceeding to look at the anti-trust and other market-related implications of the Merger and has invited comment from state regulatory commissions. In order to provide meaningful input to the FCC and inform the Commission's public interest analysis of the transfer of control under Pub. Util. Code § 854, the Commission will require significant factual data from Joint Applicants.

As part of this proceeding, the Communications Division shall formulate data requests that seek information from Joint Applicants about the implications of the Merger for those voice and backhaul services over which we have regulatory jurisdiction as well as for broadband deployment in California. The schedule below sets relatively short deadlines for data production. The data requests should address the implications of the Merger on broadband availability in California, including broadband deployment in elementary and secondary schools, libraries, unserved and underserved areas of California, as well as voice and backhaul services. Any confidential information submitted in response to data requests in this proceeding will be subject to the standard that defines the scope of confidentiality under Pub. Util. Code § 583.<sup>4</sup> Any party seeking confidentiality bears a strong burden of proof.<sup>5</sup>

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<sup>4</sup> Pub. Util. Code 583 states:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

<sup>5</sup> Decision (D.) 06-06-066 at 2.

Specifically, data requests should focus on, but are not necessarily limited exclusively to, the following topic areas:

- (1) Safety and reliability, such as the types of battery backups provided by Joint Applicants to protect consumers during emergencies;
- (2) Complaints and complaint procedures, such as avenues for recourse available to Joint Applicants' customers;
- (3) Terms and conditions, such as contracts customers must sign in order to receive service from Joint Applicants and contracts between Joint Applicants and content delivery networks for connection to Joint Applicants' network;
- (4) Customer Privacy, such as the amount and type of information Joint Applicants are permitted to gather and sell to third parties;
- (5) Public safety, such as 911 requirements and 911 services to customers as well as outages in California;
- (6) Integration of Joint Applicants' systems post-merger, such as cost savings and verifiable efficiencies;
- (7) Subscribers, such as how many subscribers Comcast and TWC have in California, how many homes Comcast and TWC pass through in California, how many homes subscribe to Comcast and TWC in California, and how many schools and libraries Comcast serves in California for E-Rate;
- (8) Voice services, such as whether Joint Applicants intend to provide Lifeline services to their customers;
- (9) Backhaul, such as whether the merger would limit competition in backhaul service in California;
- (10) Wholesale services, such as what services, if any, do carriers provide on a wholesale basis to third parties; and
- (11) Business services, such as how competition would be affected in the small business and large business segment of the market post-merger; and

Information compiled from Joint Applicants' responses will provide the factual basis for the Commission's comments to the FCC about the Merger and inform the Commission's public interest analysis of the transfer of control of the regulated entities.

Under Pub. Util. Code § 854, the Commission has jurisdiction to review the proposed change of control of TWCIS and Bright House. The Joint Applicants contend that the Commission, as part of its public interest analysis, cannot include a review of the broader aspects of the Merger that include Comcast and TWC affiliates. For the following reasons, Joint Applicants are incorrect.

As noted above, Joint Applicants have tied together the Merger with the change of control and asserted that the Merger will benefit TWCIS and Bright House and other affiliates of the merging companies.<sup>6</sup> At a minimum, therefore, the Commission may require Joint Applicants to provide factual data to back up these assertions of public benefit.

The ultimate test of a proposed change of control is whether or not it is in the public interest. The public interest is broader than the interest of the customers of the regulated entities in the price and quality of the services they receive from their providers. While the exact contours of the public interest may be vague, some indication of their breadth is given by the specific criteria listed in Section 854(c) of the Pub. Util. Code:

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<sup>6</sup> Joint Application at 14 fn 16: "The focus in this section is on benefits that will inure to Comcast Corporation, Time Warner Cable *and their affiliates*" (*Emphasis supplied*); See also, Joint Application at 14, where Joint Applicants state the merger will encourage more network investment by "permitting Comcast Corporation and Time Warner Cable to combine the best aspects of Comcast's and Time Warner's robust and innovative voice services, and by adding scale to **Comcast Corporation's overall business.**" (*Emphasis supplied*)



“Before authorizing the merger, acquisition or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars (\$500,000,000), the commission shall consider each of the criteria listed in paragraphs (1) to (8), inclusive, and find, on balance, that the merger, acquisition, or control proposal is in the public interest:

- (1) Maintain or improve the financial condition of the resulting public utility doing business in the state;
- (2) Maintain or improve the quality of service to public utility ratepayers in the state;
- (3) Maintain or improve the quality of management of the resulting public utility doing business in the state;
- (4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees;
- (5) Be fair and reasonable to the majority of all affected public utility shareholders;
- (6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility;
- (7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state; and
- (8) Provide mitigation measures to prevent significant adverse consequences which may result.”

Because Comcast meets the \$500 million California revenue threshold for entities spelled out in Section 854(c), this transaction is subject to that section and will require Joint Applicants to demonstrate that the proposed change of control satisfies the Section 854(c) criteria. Since Section 854(c) speaks explicitly of acquisition of a public utility by merger, Joint Applicants will also be required to provide evidence that the Merger satisfies those criteria.

In addition to its authority under the cited sections of the Pub. Util. Code, the Commission is also affected by a grant of authority to examine the implications of the Merger on broadband deployment pursuant to Section 706(a) of the 1996 Federal Telecommunications Act:

The Commission and each State commission with Regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely based 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.<sup>7</sup>

This section of the 1996 act was the subject of a recent opinion of the D.C. Circuit Court in which the question discussed was whether this language constitutes a grant of authority or is merely an expression of legislative intent.<sup>8</sup> The D.C. Circuit Court unambiguously found the former to be the preferred interpretation, saying that “the legislative history suggests that Congress may have, somewhat presciently, viewed the provision [Section 706(a)] as an affirmative grant of authority to the Commission...”<sup>9</sup> The D.C. Circuit Court rejected the argument that Section 706(a) was merely a statement of congressional policy: “the language [of Section 706(a)] can just as easily be read to vest the Commission with actual authority to utilize such ‘regulating methods’

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<sup>7</sup> 47 U.S. C. § 1302(a), *et seq.*

<sup>8</sup> *Verizon v. FCC* 740 F. 3d 623, 638 (D. C. Cir 2014).

<sup>9</sup> *Id.*, at 639.

to meet this stated goal.”<sup>10</sup> In essence, the D.C. Circuit Court found Section 706 to be an actual grant of authority to the FCC and the state commissions to take concrete steps by utilizing measures that “promote competition” and “remove barriers to infrastructure investment.” However, the D.C. Circuit Court also noted that Section 706’s delegation of authority is limited:

The FCC has identified at least two limiting principles inherent in § 706(a). First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the FCC’s subject matter jurisdiction to interstate and foreign communication by wire and radio. 47 U.S.C.S. § 152(a) ... Second, any regulations must be designed to achieve a particular purpose: to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>11</sup>

Therefore, two operative limitations on the FCC’s and states’ authority to act are that the regulatory measures chosen relate to transmission by wires or radio waves, and to the reasonable and timely deployment of broadband. In addition, the D.C. Circuit Court also precluded any common carrier regulation such as rate of return regulation: “We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.”<sup>12</sup>

While Joint Applicants maintain that reliance on § 706(a) is precluded by § 710 of the Pub. Util. Code, § 706(a) provides the express delegation of authority allowed by § 710:

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<sup>10</sup> *Id.*, at 637.

<sup>11</sup> *Id.*, at 640.

“The Commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol or Internet Protocol enabled services **except as required or expressly delegated by federal law...**” (*Emphasis supplied*)

In view of the D.C. Circuit Court’s conclusion that Section 706(a) is “an affirmative grant of authority” to the FCC and the state commissions, it appears to fall clearly within the highlighted exemption in Pub. Util. Code. § 710.

Therefore, the scope of the Commission’s current review of the Merger between Comcast and TWC, as stated in this Ruling, falls within the limited authority granted under Pub. Util. Code § 854 and Section 706(a) of the Telecommunications Act. The Commission is seeking information under the limited authority granted by state and federal law and protecting the public interest to promote state and federal goals, such as encouraging broadband deployment, promoting safety and furthering “innovation, consumer choice and protection, and economic benefits to California.”<sup>13</sup>

## **2. Scope of the Proceeding**

The scope of this proceeding includes all issues that are relevant to the proposed Merger’s impacts on California consumers in order to inform this Commission’s comments with the FCC, and determine whether any conditions should be placed upon a merged entity. Bearing in mind our limited resources and the FCC’s and Department of Justice’s concurrent review of the Merger, we intend to focus this proceeding on (but do not limit it to) the following limited issues that have the greatest impact on California consumers:

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<sup>12</sup> *Id.*, at 650.

<sup>13</sup> 47 U.S. C. § 1302(a), *et seq.*; *See also*, Senate Bill No. 1161, Section 1.

1. Does the proposed change of control and the Merger meet the criteria enumerated in Pub. Util. Code § 854(c)? Specifically, parties should focus their attention on the criteria enumerated in Pub. Util. Code § 854(c)(6) and (c)(8), with due consideration given to the merger's effect on safety, reliability, consumer protection, competition as well as voice, backhaul, wholesale and broadband services in California.
2. What are the implications of the Merger for broadband deployment in California including, in particular, deployment of broadband to elementary and secondary schools and classrooms and to unserved and underserved areas of the State?
3. Is the proposed change of control in the public interest, taking into account findings of fact related to topics 1 and 2?
  - a. Would the Merger enhance safety and reliability of California customers who receive voice and broadband services from the merged entity?
  - b. Would the merged entity result in greater buildout to unserved and underserved areas in California as well as to California schools and libraries?
  - c. How would the Merger benefit California consumers? For example, will the merger benefit low income outreach and adoption of broadband services that are accessible, affordable, and equitable in a manner that is enforceable and will help close the digital divide? Will the merger help educate consumers on using computers and the internet when service is provided? Will the merged entity offer standalone internet access and make sure consumers are aware of this offer?
  - d. Would the Merger maintain or improve the quality of service to California consumers?

- e. What Merger-specific and verifiable efficiencies would likely be realized by the merger?
- f. What impact would the Merger have on the market for special access or backhaul services?
  - i. What alternatives to the merging entities' special access backhaul facilities currently exist, and what alternatives would exist after the merger?
  - ii. Would the Merger increase the ability of the merging parties to impose exclusive or requirements contracts on purchasers of backhaul services?
- g. Would the Merger, which is planned as a nationwide transaction, have specific or different effects in California? For example, would the merger result in less competition in the California marketplace for broadband customers as compared to broadband customers nationally?

## **2.1. Timetable**

As stated above, this Commission intends to comment on the FCC proceeding. In order to do so, the Commission has targeted the end date of this proceeding so that it is around the time the FCC anticipates the conclusion of its proceeding. Moreover, a number of issues can only be decided by the FCC, including whether to approve the Comcast and Time Warner merger on a national basis. A lengthy proceeding here, which could continue long after the FCC has made its decision, could prevent us from having meaningful participation in the FCC process. Therefore, the scope adopted in this

proceeding allows a thorough consideration of the proposed merger within a schedule consistent with the FCC's anticipated timeline.

The following timetable is adopted:

EVENT	DEADLINE
Application Filed	April 11, 2014
Protests Due	May 19, 2014
Response to Protests Due	June 9, 2014
Prehearing Conference	July 2, 2014
Scoping Memo	August 14, 2014
Conclusion of Discovery by Parties	October 1, 2014
Opening Briefs	October 20, 2014
Reply Briefs	October 27, 2014
Proposed Decision	December, 2014
Decision Adopted	January, 2015

**3. Assigned Commissioner; Presiding Officer**

Carla J. Peterman is the assigned Commissioner. Pursuant to Rule 13.2, Administrative Law Judge Karl J. Bemserfer is designated as the presiding officer.

**4. Categorization and Need for Hearings**

This ruling confirms the Commission's preliminary categorization of Application 14-04-013 as Ratesetting and its determination that evidentiary hearings are not necessary. This ruling, only as to categorization, is appealable under the provisions of Rule 7.6 of the Commission's Rules of Practice and Procedure (Rules).

**5. Ex Parte Communication**

Since this proceeding is categorized as Ratesetting, *ex parte* communications with the assigned Commissioner, other Commissioners, their advisors, and the ALJ are only permitted as described at Pub. Util. Code. § 1701.3(c) and Rules 8.2, 8.3 and 8.5.

**6. Discovery**

Discovery will be conducted according Article 11 of the Rules. If the parties have discovery disputes they are unable to resolve through meet-and-confer sessions, they shall raise these disputes under the Commission's Law and Motion procedure as soon as possible to avoid unnecessary delay in the proceeding. (*See* Rule 11.3)

**7. Filing, Service and Service List**

The official service list was discussed and agreed to at the July 2, 2014 PHC and is now on the Commission's website. Parties should confirm that their information on the service list is correct, and serve notice of any errors on the Commission's Process Office, the service list, and the judge. Prior to serving any document, each party must ensure that it is using the most up-to-date service list. The list on the Commission's web site meets that definition.

Electronic service is now the standard under Rule 1.10. All parties to this proceeding shall serve documents and pleadings using electronic mail, whenever possible, transmitted no later than 5:00 p.m., on the date scheduled for service to occur. Parties are reminded that, when serving copies of documents, the document format must be consistent with the requirements set forth in Rule 1.10(a).

Rules 1.9 and 1.10 govern service of documents only and do not change the Rules regarding the tendering of documents for filing. All documents formally



filed with the Commission's Docket Office must include the caption approved by the Docket Office and this caption must be accurate.

Other documents, including prepared testimony, are served on the service list but not filed with the Docket Office. This proceeding will follow the electronic service protocols adopted by the Commission in Rule 1.10, whether formally filed or just served. This Rule provides for electronic service of documents, in a searchable format, unless the appearance or state service list member did not provide an e-mail address. If no e-mail address was provided, service should be made by United States mail. Additionally, parties shall serve paper copies of all filings on the presiding officer and assigned Commissioner.

E-mail communication in this proceeding should include, at a minimum, the following information on the subject line of the e-mail: A.14-04-013 Comcast-TWC Merger. In addition, the party sending the e-mail should briefly describe the attached communication; for example, *Brief*.

Any person interested in participating in this proceeding who is unfamiliar with the Commission's procedures or who has questions about the electronic filing procedures should contact the Commission's Public Advisor at (866) 849-8390 or (415) 703-2074, or (866) 836-7825 (TTY-toll free), or send an e-mail to [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov).

## **8. Final Oral Arguments**

Any party wishing to exercise the right under Rule 13.13 to make a final oral argument before the Commission must make a written request in the Opening Briefs, file it, and serve it on all parties, the assigned Commissioner and assigned ALJ.

**IT IS RULED that:**

1. The scope of this proceeding is as set forth above.

2. The schedule of this proceeding is as set forth above, unless amended by the assigned Commissioner or the assigned Administrative Law Judge.
3. The presiding officer in this proceeding is Administrative Law Judge Karl J. Bemesderfer.
4. This proceeding is categorized as Ratesetting.
5. Evidentiary hearings are preliminarily determined not to be necessary.
6. *Ex parte* communications, if any, shall comply with Article 8 of the Commission's Rules of Practice and Procedure.
7. Any settlements reached between parties shall be filed and served in writing as discussed above.
8. The procedure for accessing the service list and for the filing and service of documents and testimony in this proceeding is as set forth above.

Dated August 14, 2014, at San Francisco, California.

/s/ CARLA J. PETERMAN

Carla J. Peterman  
Assigned Commissioner

/s/ KARL J. BEMESDERFER

Karl J. Bemesderfer  
Administrative Law Judge