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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)

And Related Matter.

Application 14-06-012

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION OF THE OFFICE OF RATEPAYER ADVOCATES TO LATE-FILE A SUPPLEMENTAL DECLARATION AND ATTACHED SUPPLEMENTAL EXPERT REPORT AND DECLARATION OF LEE L. SELWYN UNDER SEAL

1. BACKGROUND

On February 5, 2015 the Office of Ratepayer Advocates (ORA) filed its motion to late-file a supplemental declaration and attached supplemental expert report and declaration of Lee L. Selwyn under seal. In support of the motion, ORA offered two reasons, one procedural, the other substantive. The procedural reason is that ORA's expert Dr. Selwyn did not receive the discovery from Joint Applicants which constitutes the confidential attachments to his expert report

and declaration and upon which his report is based, until December 23, 2014, too late for it to be included in Selwyn's previously filed declaration and expert report. The substantive reason is that the discovered documents allegedly contradict Joint Applicants' assertion that they have no plans to compete with one another because the cost of overbuilding an existing cable network is prohibitive. On February 9, 2015 Joint Applicants responded to the motion and disputed both of the reasons advanced by ORA in support of its motion. Joint Applicants assert that, contrary to allegations in the Selwyn declaration, ORA received multiple copies of the referenced documents in October 2013, in ample time for their review and inclusion in the Dr. Selwyn's earlier testimony. As to the substantive point, Joint Applicants dispute that the discovered documents contradict their frequently repeated assertion that Comcast and Time Warner have no plans to compete with one another by overbuilding existing cable system footprints.

I consider these points in turn.

2. DISCUSSION

Resolution of the procedural dispute turns on an understanding of what constitutes making discovery production available to another party. In this case, Joint Applicants supplied ORA with software (Relativity) that enabled ORA to search Joint Applicants' document production electronically. This electronic search capability was essential to ORA's ability to review the documents produced by Time Warner Corporation (TWC) to the Federal Communications Commission (FCC). TWC produced two sets of documents to the FCC, a first production on or about October 20, 2014 and a supplemental production on December 22, 2014. In his supplemental declaration that accompanies the ORA motion, Dr. Selwyn asserts that the documents which ORA now seeks to include

in the record were part of the TWC supplemental document production to the FCC on December 22, 2014 and that he was unaware of them when preparing his original expert report dated December 10, 2014.

In response to the ORA motion and the Selwyn declaration, Joint Applicants assert that the documents that ORA now seeks to include in the record were first loaded into ORA's Relativity data base on October 20, 2014 in connection with TWC's first production to the FCC, and that ORA was provided with credentials and access to that data base beginning on October 23, 2014. Thus, according to Joint Applicants, Dr. Selwyn had adequate time to discover and analyze the documents prior to issuing his December 10, 2014 expert report. Joint Applicants further assert, via a declaration by its outside counsel Christopher Fawal, that none of the documents that ORA now seeks to put into the record were included in the December 22, 2014 TWC supplemental production to the FCC.

One seemingly uncontested point is that TWC's document production to the FCC was enormous, comprising more than 2 million documents. I am unclear from the pleadings how many of these documents were included in TWC's first production to the FCC, but for the sake of ruling on this portion of the motion I am going to assume that the first production included the bulk of the documents. Recognizing that ORA personnel had to be trained in the use of Relativity before they could effectively search electronic data production and given the enormous size of the TWC production to the FCC and the short timetable for filing an expert declaration in this proceeding, I find that the omission of the documents that are the subject of the motion from Dr. Selwyn's December 10, 2014 expert report and the pleadings based thereon was excusable and does not provide a basis for denying the instant motion.

With regard to the substance of the material that ORA seeks to introduce, different considerations apply. The material at issue, much of which is highly confidential, concerns so-called Video on Demand (VOD) and Over the Top (OTT) video services. Such services make designated content available to the customer over a broadband link and do not require a cable subscription. For example, you might be able to purchase HBO as a stand-alone offering that would come to you via your Internet enabled TV or your computer or laptop unpackaged with any other content. For purposes of this ruling, the important thing is that the Internet, unlike a cable franchise, has no geographic limits.

ORA argues that because TWC and Comcast recognize that VOD/OTT content may be sent from anywhere to anywhere and requires only an Internet connection to receive it and not a cable subscription, it follows that their claim that they have no intention of competing with each other in the future is false. To buttress this argument, ORA seeks to introduce into the record documents produced by Joint Applicants in response to discovery requests that allegedly demonstrate an intention on the part of Joint Applicants to enter the OTT market without building additional facilities. But this argument fails on two grounds. First, consideration of the video programming issues discussed in Selwyn's supplemental declaration is beyond the Commission's jurisdiction. Whatever the limits of the jurisdiction granted to the CPUC by Section 706(a) of the federal Telecommunications Act, it does not include video programming over the Internet that does not materially impact broadband deployment in California:

The Commission and each State commission with Regulatory jurisdiction over telecommunications 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.

As the DC Circuit noted in *Verizon vs. AT&T*:

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.”

The Telecommunications Act defines “advanced telecommunications capability” as follows:

The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enable users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

The arguments advanced by ORA’s expert have only the most tenuous relationship to the encouragement of broadband deployment in California. While video programming services require high speed broadband networks to function effectively, in themselves they promote the deployment of high-speed broadband only in the tenuous sense that potential demand for those services might stimulate the deployment of additional broadband capability. Reading the motion in the light most favorable to protesters, at most it demonstrates that Comcast and Time Warner have considered entering an interstate – or even an

international – market which would be per se beyond the Commission’s jurisdiction. Treating those expressed intentions as materially impacting broadband deployment in California stretches the English language to the snapping point. In short, video programming issues of the sort discussed in Dr. Selwyn’s supplemental declaration and the related attachments are beyond the Commission’s jurisdiction.

Second, consideration of such video programming issues is also outside the adopted scope of this proceeding. The Scoping Memo expressly limits the Commission’s review to the voice and backhaul services over which the CPUC has jurisdiction under state law and consideration of the effects of the merger on broadband deployment in California over which Section 706 confers jurisdiction via the narrow exemption in P. U. Code Section 710. As noted in the preceding paragraph, the video programming issues discussed in Selwyn’s supplemental declaration are too remote from broadband deployment in California to be considered within the scope of this proceeding even on the most generous interpretation of that scope.

Accordingly, **IT IS RULED** that the motion of the Office or Ratepayer Advocates to late-file a supplemental declaration and attached supplemental expert report and declaration of Lee L. Selwyn under seal is denied.

Dated April 1, 2015, at San Francisco, California.

/s/ KARL J. BEMESDERFER

Karl J. Bemederfer
Administrative Law Judge