



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

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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 (U-6874- C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013

(Filed April 11, 2014)

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.

Application 14-06-012

(Filed June 17, 2014)

**COMMENTS OF THE GREENLINING INSTITUTE AND CONSUMERS UNION ON  
THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE BEMESDERFER**

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## TABLE OF CONTENTS

I. THE PROPOSED DECISION’S ANALYSIS OF THE PUBLIC INTEREST HARMS IS CORRECT. ....	2
II. THE PROPOSED DECISION LACKS SOME REQUIRED ANALYSIS. ....	4
A. The Proposed Transaction Lacks Sufficient Analysis of the Enlarged Comcast’s Quality of Management. ....	4
B. The Proposed Transaction Lacks Sufficient Analysis of the Charter Transaction. ....	5
III. THE PROPOSED MITIGATION MEASURES WOULD NOT REMEDY THE MERGER’S HARMS. ....	6
A. The Proposed Conditions Do Not Effectively Address Even the Specific Harms to Which They Are Directed. ....	7
1. The Proposed Conditions Regarding the Internet Essentials Program Would Create Second Class Service For Low-Income Consumers. ....	7
2. Stand-alone Broadband Service and Other Conditions Would Expire in Five Years. .	8
3. Conditions Designed to Promote Internet Infrastructure to Unserved and Underserved Areas Do Not Ensure That Communities of Color and Other Historically Underserved Populations Will Receive these Benefits. ....	8
4. The Proposed Decision’s Condition Regarding Customer Privacy Is Too General and Vague to Offer Meaningful Protection. ....	9
5. The Proposed Decision’s Reporting Requirements Would Be of Limited Value. ....	10
6. The Commission Cannot Effectively Enforce Requirements That Comcast Submit Expansion and Deployment Plans. ....	10
B. The Commission, The Parties, and The Public Lack the Resources to Enforce the Proposed Decision’s Mitigation Measures, Especially When Comcast has Indicated that It Will Not Comply with Many of those Mitigation Measures. ....	11
1. The Proposed Conditions Are Vulnerable to Creative Interpretation and the Exploitation of Loopholes by Comcast. ....	12
2. Comcast’s Has Demonstrated That It Will Not Comply With Conditions of Which It Does Not Approve. ....	13
3. Even if the Proposed Conditions Were Effective and Enforceable, They Are Woefully Insufficient to Prevent or Counteract the Proposed Transaction’s Public Interest Harms. ....	14
C. There Are No Conditions Sufficient to Prevent the Public Interest Harms that would Result from the Commission’s Approval of this Transaction. ....	14
IV. CONCLUSION. ....	15

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Pursuant to Rule 14.3, the Greenlining Institute and Consumers Union file these comments on the Proposed Decision of ALJ Bemesderfer issued February 13, 2015. Greenlining and Consumers Union applaud the Assigned Commissioner, Administrative Law Judge and Commission staff for a thorough analysis of the record, and support the Proposed Decision’s findings of serious harms that would result from the proposed merger. However, Greenlining and Consumers Union take issue with the Proposed Decision’s finding that its 25 proposed

conditions would be sufficient to prevent or counteract these serious harms. Many of the proposed conditions are not specific, comprehensive, or robust enough to prevent or counteract these harms. Furthermore, there are inherent and intractable limits in the ability of any regulatory behavioral conditions to effectively address these harms in the face of the unprecedented market power that the merger would create. Additionally, the limited capacity of the parties, the public, and the Commission to enforce those conditions, coupled with Comcast's historical and well-documented refusal to comply with post-merger conditions, make many of the proposed conditions unenforceable. Finally, the proposed conditions focus on a narrow set of issues and do not address the wider public interest harms that the merger would cause. Finally, the Proposed Decision is deficient, because it fails to provide any meaningful analysis of the application submitted by Time Warner Cable and Charter, in consolidated matter A.14-06-012 ("the Charter transaction.") For these reasons, Greenlining and Consumers Union respectfully request that the Commission amend the Proposed Decision to (1) hold that there are no mitigation measures which would effectively prevent the significant adverse consequences of the proposed transactions, and (2) to deny the applications.

I. THE PROPOSED DECISION'S ANALYSIS OF THE PUBLIC INTEREST HARMS IS CORRECT.

Greenlining and Consumers Union agree with most of the Proposed Decision's Analysis. For example, Greenlining and Consumers Union agree that the Commission should properly evaluate the proposed transactions under the standard of review set forth in Public Utilities Code section 854, subdivision (c), and that the Commission has the authority to look to the section 854(c) criteria for guidance even if 854(c) does not apply.<sup>1</sup> Greenlining and Consumers Union

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<sup>1</sup> Greenlining Protest at 5. It should be noted that while the Proposed Decision mentions, ORA, TURN and Joint Minority Parties, it does not explicitly name Greenlining. Proposed Decision at 14 (hereafter, PD).

similarly agree with the Commission’s findings that among the serious harms that the proposed transactions would cause are the following:

- Causing harms to consumers generally, including causing customers of the enlarged Comcast to experience “poorer customer service, fewer service offerings, and fewer program choices”<sup>2</sup> and causing Time Warner Cable customers to lose access to Time Warner Cable content<sup>3</sup> and being forced to deal with Comcast’s terrible customer service;<sup>4</sup>
- Giving Comcast increased (and unprecedented) market power over the ISP market,<sup>5</sup> and giving Comcast “terminating monopoly” power and the ability to restrict content providers’ access to streaming video services;<sup>6</sup>
- Causing significant harms to low income customers, particularly the elimination of LifeLine offerings for Time Warner Cable customers,<sup>7</sup> and the insufficiency of the Internet Essentials program;<sup>8</sup>
- Eliminating Time Warner Cable as a “maverick provider,” resulting in consumers’ loss of an important option for comparing performance and prices;<sup>9</sup>
- Eliminating Time Warner Cable as a leading “policy competitor;”<sup>10</sup> and
- Causing significant harms to supplier diversity.<sup>11</sup>

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<sup>2</sup> Proposed Decision (hereafter, PD) at 64.

<sup>3</sup> *Id.* at 63.

<sup>4</sup> *Id.* at 62-63.

<sup>5</sup> *Id.* at 63.

<sup>6</sup> *Id.* at 67-68.

<sup>7</sup> *Id.* at 64-65.

<sup>8</sup> *Id.* at 68-69.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Similarly, Greenlining and Consumers Union support the Proposed Decision's finding that Comcast's "weak" performance in offering the Internet Essentials program is a further reason not to consider that program as a mitigating factor in the Commission's public interest analysis.<sup>12</sup>

## II. THE PROPOSED DECISION LACKS SOME REQUIRED ANALYSIS.

While, as discussed above, Greenlining and Consumers Union agree with much of the Proposed Decision, there are parts of that decision that lack sufficient analysis. The Proposed Decision does not sufficiently address the proposed transaction's effect on the quality of management of the enlarged Comcast. Additionally, the Proposed Decision does not appear to contain any section 854(c) analysis of the Charter/Comcast/Time Warner Cable transaction in A.14-06-012.

### A. The Proposed Transaction Lacks Sufficient Analysis of the Enlarged Comcast's Quality of Management.

The Proposed Decision does not provide any specific analysis of section 854, subdivision (c)(3), which requires the Commission to examine whether the proposed merger will "[m]aintain or improve the quality of management of the resulting utility doing business in the state." The Proposed Decision notes Joint Applicants' argument that "both the Comcast and Time Warner management teams will remain in place following the Merger, maintaining the existing quality of management at all levels."<sup>13</sup> However, the Proposed Decision does not note Greenlining's evidence that the proposed transaction would reduce the quality of management of the enlarged Comcast.<sup>14</sup>

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<sup>12</sup> PD at 69.

<sup>13</sup> *Id.* at 27.

<sup>14</sup> Greenlining Protest at 10-12.

Specifically, while Comcast admits that it released the unlisted names, phone numbers, and addresses of 74,000 California customers over a period of 2 and a half years, Comcast management delayed reporting that disclosure until after Public Utilities Code section 710—which Comcast argues eliminates the Commission’s jurisdiction to investigate those privacy breaches—took effect.<sup>15</sup> Comcast attempts to characterize Greenlining’s concerns as concerns about Comcast’s regular engagement in the legislative process. However, Greenlining’s concerns do not involve Comcast’s right to advocate in front of the legislature, but rather Comcast’s management’s failure to disclose the customer information releases in a timely manner in an attempt to avoid the Commission’s jurisdiction.

The proposed decision contains no discussion of the impact of the proposed transactions on the enlarged Comcast’s quality of management other than the mention of Comcast’s position discussed above. As a result of this lack of discussion, the Proposed Decision does not acknowledge or discuss relevant concerns about quality of management that Greenlining expressly raised in its pleadings. A proper discussion of these concerns would provide the Commission with yet another reason to reject the merger.

#### B. The Proposed Transaction Lacks Sufficient Analysis of the Charter Transaction.

The Proposed Decision acknowledges the Charter transaction in consolidated proceeding A.14-06-012<sup>16</sup> and recites merger opponents’ points against that transaction.<sup>17</sup> Opponents noted that the Commission’s approval of the Charter transaction would eliminate a company that provides better customer service than Comcast<sup>18</sup> --that unlike Comcast, for example, tracks

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<sup>15</sup> Greenlining Protest at 11.

<sup>16</sup> PD at 10-11.

<sup>17</sup> *Id.* at 47-48.

<sup>18</sup> *Id.*

broadband outages and has formalized systems for assessing and improving service quality.<sup>19</sup> Despite these considerations, the Proposed Decision's discussion section does not mention Charter, nor does it appear to discuss any of the effects of the Charter transaction. The Proposed Decision's failure to address the Charter transaction renders that decision's ruling defective to the extent that the Proposed Decision approves the application in A.14-06-012. A proper discussion of the Charter transaction would provide the Commission with yet another basis to deny the proposed transactions.

### III. THE PROPOSED MITIGATION MEASURES WOULD NOT REMEDY THE MERGER'S HARMS.

The most fundamental reason to deny the proposed transactions is that the proposed mitigation measures, while well-intended, are simply insufficient to prevent or counteract the serious harms that the proposed transactions would cause. Given the limited resources of the Commission, consumers, and other stakeholders, as well as Comcast's documented refusal to comply with similar measures in the past, many of the measures would be unenforceable. Furthermore, there are inherent and intractable limits in the ability of any regulatory behavioral conditions to effectively address these harms in the face of the unprecedented market power that would be created. Conditions of this sort may be useful in providing guidance to business in a generally competitive market; they are utterly ineffective to rein in the anticompetitive incentives and powers of a behemoth monopoly. Finally, the enumerated measures focus on only a small fraction of the proposed merger's serious significant harms.

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<sup>19</sup> PD at 48.



A. The Proposed Conditions Do Not Effectively Address Even the Specific Harms to Which They Are Directed.

Greenlining and Consumers Union appreciate that the Proposed Decision contains strongly worded behavioral conditions. But this proposed merger is an extraordinary transaction, causing harms that defy even the most strongly worded behavioral directives to prevent or cure or effectively mitigate them. In the paragraphs below, we highlight just a few of those conditions and briefly describe some of their shortcomings. In doing so, we do not mean to suggest that if the specific shortcomings we highlight could somehow be remedied, that this would be sufficient to effectively address the harms the merger would cause.

1. The Proposed Conditions Regarding the Internet Essentials Program Would Create Second Class Service For Low-Income Consumers.

The Proposed Decision notes the insufficiency of the existing Internet Essentials program, particularly the low speeds that the program offers.<sup>20</sup> Condition 11 requires that Comcast increase the speed of its Internet Essentials program to 10 Mbps down and 1 Mbps up router at no cost.<sup>21</sup> While Greenlining and Consumers Union appreciate the Proposed Decision's efforts to increase the Internet speeds Comcast offers to its low-income customers, this metric is far below the 25 Mbps down/5 Mbps up requirement for broadband set by the FCC.<sup>22</sup> Setting the minimum speeds so far below the now-recognized federal minimum standard would condone the creation of a "second class" service, which is unacceptable.

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<sup>20</sup> PD at 68-69.

<sup>21</sup> PD, Appendix A, Condition 11.

<sup>22</sup> Federal Comm. Comm'n., *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment* ¶ 45 (Feb. 4, 2015).

2. Stand-alone Broadband Service and Other Conditions Would Expire in Five Years.

While some of the conditions do not appear to expire, many of the conditions self-terminate after five years. As a result, if the Commission approves the proposed transaction, in five years Comcast will no longer, for example, be under any requirement to offer stand-alone broadband,<sup>23</sup> or to allow customers to use devices of their choosing,<sup>24</sup> or improve its customer service.<sup>25</sup> As the Proposed Decision notes, if the Commission approves the transaction, Comcast will be handed a potentially permanent monopoly in California.<sup>26</sup> At the end of the five-year condition period, these conditions would evaporate, and there would be neither competitive pressure nor consumer protections that ensure that consumers can bring their own devices, order stand-alone broadband, or obtain even minimally acceptable customer service from Comcast. The proposed conditions, which would automatically sunset without any Commission review despite the fact that Comcast would still have monopoly power on the sunset date, would not effectively ensure that consumers will not be seriously harmed by the merger.

3. Conditions Designed to Promote Internet Infrastructure to Unserved and Underserved Areas Do Not Ensure That Communities of Color and Other Historically Underserved Populations Will Receive these Benefits.

The Proposed Decision also requires that the enlarged Comcast connect and/or upgrade Internet infrastructure for K-12 schools and public libraries in unserved and underserved areas in Comcast's combined California service territory so that it is providing high speed Internet to at least the same proportion of K-12 schools and public libraries in such unserved and underserved

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<sup>23</sup> PD, Appendix A, Condition 17.

<sup>24</sup> PD, Appendix A, Condition 9.

<sup>25</sup> PD, Appendix A, Condition 24.

<sup>26</sup> PD at 61.

areas as it provides to the households in its service territory within four years,<sup>27</sup> and build at least ten new broadband facilities within the next three years that are adjacent to or near areas that Comcast currently serves by broadband, or that within the next three years Comcast will serve by broadband, and are in areas that are currently unserved or underserved by broadband.<sup>28</sup>

These conditions requiring build-out to currently unserved and underserved communities do not guarantee that build-out will occur in working class communities, farmworker communities, and communities of color, and not in the Los Gatos hills or other wealthy vacation communities. Thus, these conditions do not reliably help close the digital divide. It actually masks the digital divide, by claiming progress where none has actually been made. The proposed conditions will not ensure that Comcast's connections, upgrades and facilities expansions actually reach communities of color and other historically unserved and underserved communities. Accordingly, those proposed conditions fail to effectively help counteract or compensate for the proposed merger's serious public harms.

4. The Proposed Decision's Condition Regarding Customer Privacy Is Too General and Vague to Offer Meaningful Protection.

Condition 20 requires that Comcast report "any complaints about violation of customer privacy such as, but not limited to, publication or directory listing of unlisted phone numbers."<sup>29</sup> The one specific reference refers only to publication or directory listing of phone numbers, and does not include, for example, the publication or directory listing of customer names or addresses. The general vagueness of this condition would invite Comcast, for each complaint, to question and contest whether the complaint is covered by the condition and thus required to be

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<sup>27</sup> PD, Appendix A, Condition 14.

<sup>28</sup> PD, Appendix A, Condition 15.

<sup>29</sup> PD, Appendix A, Condition 20

reported. Condition number 20 is too general and vague to offer meaningful privacy protections, and is an example of why behavioral conditions cannot be relied upon to actually change Comcast's behavior for the better, and why the proposed merger is unsalvageable.

5. The Proposed Decision's Reporting Requirements Would Be of Limited Value.

Conditions 20, 21, 23, and 24 all impose periodic reporting requirements on the enlarged Comcast. Based on past experience, Comcast would likely file those reports as confidential documents, depriving the public, the public, elected representatives, and stakeholders, including parties to this proceeding, from seeing the full impact of the merger as well as Comcast's level of compliance with any conditions. These reporting requirements will therefore be of limited value. Comcast could hide behind spurious claims of "competitively sensitive information" as a supposed basis for redacting portions (or the entirety) of any report, thereby shielding its conduct from the public, the media, and other stakeholders. Given Comcast's past behavior, Comcast would predictably devote significant time and resources to prevent public access to those documents. This lack of transparency would seriously undermine the usefulness of these reporting requirements for purposes of meaningful oversight over Comcast post-merger, and the public interest benefits from those reporting requirements would be negligible.

6. The Commission Cannot Effectively Enforce Requirements That Comcast Submit Expansion and Deployment Plans.

A number of the conditions in the Proposed Decision require Comcast to submit plans regarding the expansion of Internet Essentials,<sup>30</sup> and the deployment of broadband<sup>31</sup> within 90 days after consummating the merger. Unfortunately, based on Comcast's past behavior, with the

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<sup>30</sup> PD, Appendix A, Condition 13.

<sup>31</sup> PD, Appendix A, Conditions 14, 18.

merger behind it, Comcast is likely to provide the Commission with plans that lack any meaningful detail or accountability. The plans will likely omit important information, requiring extensive efforts by Commission staff to get Comcast to correct those omissions, delaying Commission approval of those plans and Comcast's implementation of those plans. Conditions that require plans to be submitted only after the merger is consummated can therefore be of no help in providing any basis for the Commission to conclude that, with these and other conditions, the merger is in the public interest.

B. The Commission, The Parties, and The Public Lack the Resources to Enforce the Proposed Decision's Mitigation Measures, Especially When Comcast has Indicated that It Will Not Comply with Many of those Mitigation Measures.

While Greenlining and Consumers Union appreciate the Commission's efforts to create meaningful conditions to address some of the serious harms it has identified, the Proposed Decision's enforceability provisions are insufficient to ensure Comcast's compliance. Condition 25 provides that in the event of Comcast's failure to comply with the conditions, "then parties, the public, or the Commission may take enforcement action against Comcast."<sup>32</sup> Given the Commission's current resources and capacity, it is highly unlikely the Commission would be able to effectively monitor Comcast's compliance over time with the conditions. Similarly, it is highly unlikely that any of the opposing parties or the public at large will have the capacity and resources to monitor and pursue enforcement actions against Comcast. The Commission, the public, and the parties will not be able to effectively enforce the conditions against Comcast.

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<sup>32</sup> PD, Appendix A, Condition 25.

1. The Proposed Conditions Are Vulnerable to Creative Interpretation and the Exploitation of Loopholes by Comcast.

This inability to effectively enforce conditions would be exacerbated by the fact that Comcast will find ways to exploit loopholes and creatively interpret many of the conditions. As previously noted by Greenlining and Consumers Union, it would be extremely difficult for the Commission to describe required or prohibited conduct with sufficient specificity and comprehensiveness to ensure Comcast's compliance.<sup>33</sup> Additionally, as Greenlining and Consumers Union have previously noted, "the Commission will experience difficulty in detecting noncompliance and in resolving complaints, because companies who have complaints but must rely on ongoing business relationships with Comcast will be hesitant to come forward."<sup>34</sup>

For example, Condition One requires that Comcast extend LifeLine service to all eligible customers in the enlarged Comcast's service territory.<sup>35</sup> However, this condition does not guarantee that Comcast will ever actually offer LifeLine service. 47 U.S.C § 214, subdivision (e)(4) states that "a State commission (or the Commission in the case of a common carrier designated under paragraph (6)) **shall** permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier."<sup>36</sup> If the Commission approves the proposed transaction, Comcast could move to withdraw its ETC status at any time after it consummates the merger, thereby eliminating its eligibility to act as a LifeLine provider. While the Commission might try to structure Condition One to prevent Comcast from doing so, Comcast would tie up the issue in court. Any perception

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<sup>33</sup> Greenlining and Consumers Union, Reply Brief at 50.

<sup>34</sup> *Id.*

<sup>35</sup> PD, Appendix A, Condition 1.

<sup>36</sup> 47 U.S.C. § 214, subd. (e)(4) (emphasis added).

that the condition could help compensate for the merger's harms is illusory, because the Commission cannot ensure that Comcast will offer LifeLine service post-merger.

2. Comcast's Has Demonstrated That It Will Not Comply With Conditions of Which It Does Not Approve.

Enforcement by the Commission, the parties, and the public will be all the more predictably difficult given Comcast's past failure to comply with merger conditions, as well as statements by Comcast's counsel in this very proceeding indicating that Comcast will not comply with conditions of which it does not approve. At the February 25, 2015 all party meeting, Comcast's counsel stated that Comcast wished the Commission's final decision to include only those conditions that Comcast was willing to comply with, thereby implying that if the merger were approved, Comcast would not comply with merger conditions if it did not wish to. Additionally, in multiple instances, Comcast's counsel stated that it wished to modify or eliminate some conditions in order to end up with a set of conditions that "Comcast can live with." These are not the statements of a company that plans to cooperate with the Commission post-merger. In fact, Comcast has flat-out ignored conditions related to the mergers in the past.<sup>37</sup> In the instant proceeding, Comcast has likewise indicated that it will not meaningfully comply with mitigation measures that it finds distasteful.

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<sup>37</sup> "Thus, when the condition required Comcast to locate its rival Bloomberg News on a channel in a 'news neighborhood' in close proximity to other news stations, the result was that Comcast fought the condition tooth and nail for more than two years. Here, it seems clear that if Comcast did not own NBCU, its incentive would have been to give maximum exposure to Bloomberg News, to satisfy its subscribers who watch Bloomberg News. But its ownership of NBCU programming, in particular MSNBC and CNBC, fundamentally altered that incentive. That the behavioral condition did not deter Comcast even when its discrimination against Bloomberg News was so highly visible to regulators suggests how much more difficult it is to require less visible good behavior when the company's incentives run in the other direction." Greenlining and Consumers Union Reply Brief at 51.

3. Even if the Proposed Conditions Were Effective and Enforceable, They Are Woefully Insufficient to Prevent or Counteract the Proposed Transaction's Public Interest Harms.

Greenlining and Consumers Union appreciate the Proposed Decision's suggested conditions, as those conditions would be appropriate for the Commission to impose on every broadband provider in California. However, in the context of this proceeding, the conditions only address a number of "niche" issues. While we would support efforts by the Commission to address those issues in a general proceeding, the Decision's focus on only a small, specialized set of issues ignores the enormous general public interest harms that would result if the Commission were to approve the merger. Even if each condition was a perfect solution for the problem that condition was drafted to resolve, and even if the parties, public and the Commission had the resources to effectively enforce those conditions, the conditions are still woefully insufficient to prevent the significant adverse consequences which would result from the proposed transaction.

C. There Are No Conditions Sufficient to Prevent the Public Interest Harms that would Result from the Commission's Approval of this Transaction.

The proposed transactions would cause such colossal public interest harms that no number of mitigation measures could tip the balance in favor of the public interest. The Commission would have enormous potential difficulty crafting mitigation measures that could hold the combined company accountable. Furthermore, there is a significant likelihood that Comcast will effectively ignore or seek to circumvent any mitigation measures that it does not care for.

Behavioral conditions of the sort contained in the Proposed Decision will not be effective in preventing or counteracting the serious harms that will result from the merger, as the proposed conditions are simply no match for the monopoly power and incentive to exploit that power that



would be handed to Comcast under the merger. Efforts to make Comcast comply with those conditions against its own self-interest would require constant monitoring and litigation by all those affected. And even then, with the disparity of resources, and Comcast's ability to find and exploit and litigate every uncertainty and loophole, those efforts would be doomed to fail.

For these reasons, Greenlining and Consumers Union are in agreement that it is impossible to create mitigation measures sufficient to ensure that the proposed transactions are in the public interest.

#### IV. CONCLUSION

While the proposed conditions are well-intended, they simply cannot rehabilitate a merger which would hand Comcast a potentially permanent monopoly in virtually all of the largest markets in both California and the United States, giving Comcast unprecedented power to raise prices, decrease service quality, and harm consumers. The Commission's approving these transactions would also set a disturbing precedent for approving any merger, no matter how large or how serious the competitive harms it creates.

Greenlining and Consumers Union could have easily spent our entire page limit explaining further how the proposed transactions would cause severe harm to the public interest. However, the Proposed Decision has already made that determination. Our Concern is that, despite that determination, the Proposed Decision mistakenly concludes that the proposed conditions are sufficient to prevent or counteract the serious and enduring harms that would be caused by handing Comcast a permanent monopoly in California. They are not. And as we have explained, no conditions would be sufficient.

Accordingly, The Greenlining Institute and Consumers Union respectfully request that the Commission amend the Proposed Decision to act consistent with the requirements of Public Utilities Code section 854(c) and deny the proposed transactions.

Respectfully submitted,

Dated: March 5, 2015

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