



**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)

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

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March 10, 2015

Pursuant to Rule 14.3, the Greenlining Institute and Consumers Union file these joint¹ reply comments on the Proposed Decision of ALJ Bemesderfer issued February 13, 2015. Comcast's Opening Comments already explain that the proposed conditions are insufficient to prevent the merger's serious public interest harms—that they will not, and cannot, prevent the expanded Comcast from using its monopoly power to harm consumers, forestall the deployment of broadband, and engage in anti-competitive conduct. Accordingly, the Commission should modify the Proposed Decision, and deny the proposed transactions outright.

I. COMCAST'S FLAWED ARGUMENTS REGARDING PUBLIC UTILITIES CODE SECTION 710 INDICATE THAT THE EXPANDED COMCAST WILL NOT COMPLY WITH THE PROPOSED CONDITIONS.

Joint Applicants continue to claim in their comments that the CPUC does not have authority under Section 706 of the 1996 Telecommunications Act (Section 706) to review the impact of the proposed merger on broadband and VoIP deployment. Joint Applicants further argue that Public Utilities Code Section 710 (Section 710) precludes the CPUC from relying on Section 706. This legal analysis is flawed.

Section 706 provides a specific grant of regulatory authority to both the FCC and to state commissions to “encourage the deployment of advanced telecommunications capabilities on a

¹ On March 9, 2015, ALJ Bemesderfer authorized Greenlining and Consumers Union's joint filing of reply comments not exceeding ten pages in the following email:

Dear Mr. Goodman,

By this email I am confirming that Consumers Union and Greenlining may file consolidated reply comments having a total length of 10 pages.

Karl J. Bemesderfer
Administrative Law Judge

reasonable and timely basis” and to take necessary action.² Section 706 applies to “each State commission with regulatory jurisdiction over telecommunications services,” and the CPUC is the state commission in California with regulatory jurisdiction over telecommunications services. Under Section 706, the CPUC has an obligation to review the impact of the merger on broadband deployment in California as it contains, in the D.C. Circuit’s words, “a direct mandate.”³

Joint Applicants’ claim that Section 706 “only permits state commissions to use ‘regulating methods’ already available to them” would render the entire purpose of the statute meaningless.⁴ Indeed, the Senate Committee Report on the 1996 Telecommunications Act characterizes Section 706 as “a necessary fail-safe” in achieving Congress’ goal in accelerating the deployment of advanced telecommunications capability.⁵ Congress would not have added Section 706 if it did not actually confer any authority on the states and the FCC.

Joint Applicants also conveniently overlook the explicit exemptions to Section 710’s limitation on regulating VoIP and IP-enabled services:

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).⁶

In enacting Section 710, the Legislature acknowledged the CPUC’s subject matter jurisdiction over VoIP and IP-enabled services, while placing limits on that authority. The legislative limits

² *Verizon v. FCC*, 740 F.3d 623, 635, 638. *See also Verizon*, 740 F.3d at 649 (finding “section 706 grants the [Federal Communications] Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers . . .”).

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

⁴ Joint Applicants’ Comments at 5.

⁵ 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.

⁶ Pub. Util. Code § 710(a).

on CPUC authority in Section 710 contain exceptions, and one of those exceptions is federally delegated authority. If the CPUC never had authority over VoIP and IP-enabled services, then the need for Section 710 would have never arisen.

Despite the Commission's clear authority under Section 706 and Section 710, Comcast continues to stridently argue that authority does not exist. These repeated assertions, coupled with Comcast's position that it can successfully challenge the Commission's authority in court,⁷ are symptomatic indicators of a company that will not comply with the Commission's directives, even when the Commission has the clear authority to make those directives. If the Commission approves the merger, it is highly likely that the enlarged Comcast will accordingly consider itself to be above the jurisdiction of the Commission, and will ignore any of the proposed conditions.

II. COMCAST'S OPENING COMMENTS SUPPORT THE VIEW THAT THE PROPOSED CONDITIONS ARE INSUFFICIENT TO PROTECT CONSUMERS OR THE PUBLIC INTEREST.

Despite the Commission's clear authority to impose conditions, Comcast objects to all of the proposed conditions, arguing that ten of the conditions somehow constitute "common carrier regulation,"⁸ that twelve more are in excess of the Commission's authority or otherwise unlawful,⁹ and that the remainder are unnecessary.¹⁰ Greenlining and Consumers Union maintain that no number of conditions is sufficient to prevent or counteract the merger's significant public interest harms. Comcast's position that all but three of the proposed conditions are unenforceable only further supports the view that the Commission cannot draft conditions that will effectively protect against the merger's severe public interest harms. If Comcast prevails on its challenge, only three of the twenty-five proposed conditions would apply, and

⁷ Joint Applicants' Opening Comments at 44-45.

⁸ *Id.* at 9.

⁹ *Id.* at 15.

¹⁰ *Id.* at 36, 42.

under any analysis, the miniscule impact of those conditions would be insufficient to counteract the proposed merger's harms. Based on the Commission's findings that the proposed transactions would harm consumers, hand the expanded Comcast a potentially permanent monopoly in California, and harm low-income consumers and diversity,¹¹ under California Public Utilities Code section 854(a) and (c), the Commission must deny the proposed transactions.

Comcast further states that while it has concerns about those 22 conditions, it "hopes" that Comcast will not have to challenge those conditions in court, stating that "Joint Applicants hope that the [objectionable conditions are] moot because they do not expect the final decision to include objectionable conditions."¹² Comcast then states its intent to negotiate satisfactory conditions and negotiate voluntary commitments, specifically referencing a settlement agreement between Greenlining and SBC in the SBC/AT&T merger.¹³ These statements raise two concerns.

First, Greenlining and Consumers Union are concerned that the Commission will interpret Comcast's references to "voluntary commitments" as an indication that parties are willing to enter into settlement discussions. This would not be the first time Comcast has misrepresented the position of the merger's opponents—for example, Comcast appears to have previously made claims that opponents supported the merger with conditions, necessitating that opponents provide an ex parte letter clarifying that they did not.¹⁴ Greenlining and Consumers Union wish to state, in no uncertain terms, that there is no basis to Comcast's claims—that they,

¹¹ Proposed Decision at 84-86.

¹² Joint Applicants' Opening Comments at 45.

¹³ *Id.* at 45, note 167.

¹⁴ *See* Ex Parte Notice of The Greenlining Institute (Greenlining), The Utility Reform Network (TURN), the Center for Accessible Technology (CforAT), Media Alliance, Writers Guild of America, West Inc., California Common Cause and the Office of Ratepayer Advocates (ORA) (Feb. 5, 2015).

Center for Accessible Technology, Common Cause, Media Alliance, ORA, TURN, and Writers Guild of America—West have absolutely no intention of entering into settlement agreements or voluntary conditions with Joint Applicants in this proceeding.¹⁵

Second, the fact that Comcast appears likely to litigate any “unsatisfactory” conditions provides yet another reason the Commission should deny the merger. Comcast cites *Hempy v. Pub. Utils. Comm’n*, 56 Cal.2d 214, 218-219 (Cal. 1961), noting that case held that the Commission cannot impose conditions where it lacks the jurisdiction to do so.¹⁶ In that case, the court struck down a Commission condition while leaving the Commission’s order **approving the merger otherwise intact**.¹⁷ If Comcast appeals the Commission’s conditions, there is a genuine risk that a court could strike down some or all of those conditions, further weakening the already inadequate protections against the merger’s harms.

III. COMCAST’S OPENING COMMENTS SUPPORT THE VIEW THAT IT WILL NOT COMPLY WITH THE PROPOSED CONDITIONS.

Comcast states that it wishes to pursue a set of conditions that is "equitable,"¹⁸ i.e., a set of conditions that Comcast is willing to claim it will follow. Comcast states that it intends to “work through the ex parte process with the Commission toward a set of conditions that address concerns identified by the Proposed Decision—including conditions that Comcast would agree to voluntarily.”¹⁹ As discussed above, Comcast has indicated that if it is not happy with one or more conditions, it will litigate in an attempt to have the condition or conditions removed. As Greenlining and Consumers Union have previously noted, Comcast has a significant history of

¹⁵ Greenlining contacted CforAT, Common Cause, Media Alliance, ORA, TURN, and WGAW to confirm their positions on March 9, 2015.

¹⁶ 56 Cal. 2d at 219.

¹⁷ *Id.*

¹⁸ Joint Applicants’ Opening Comments at 2.

¹⁹ *Id.*

exploiting loopholes in conditions or failing to comply with conditions outright.²⁰ Comcast's attitude that its compliance should be voluntary, combined with its threats of litigation and its history of noncompliance, demonstrate a substantial risk that any conditions imposed by the Commission will prove to be meaningless. The Commission simply cannot trust Comcast to comply with **any** conditions.

Additionally, as Greenlining and Consumers Union have previously noted, Comcast's "voluntary commitments" are simply repetition of conditions from the Comcast-NBCU merger. Comcast touts its Internet Essentials offering²¹ and its offering stand-alone broadband service as merger benefits,²² but does not meaningfully acknowledge that these purported merger benefits were conditions of the Comcast-NBCU merger.²³ In essence, Comcast is only willing to voluntarily commit to actions which it is **already required to perform**, and opposes any expansion or extension of those requirements.

Finally, Joint Applicants' proposal to negotiate with the commissioners is an attempt to undermine CPUC processes and procedures. Allowing Comcast to dictate conditions it finds acceptable, in a process occurring outside of the evidentiary record, behind closed doors and with no certainty that the ex parte notice filed will include all of the nuances of the discussions²⁴ would run completely counter to recent efforts by President Picker to "move the agency forward

²⁰ Greenlining and Consumers Union, Opening Comments at 13.

²¹ Joint Applicants' Opening Comments at 31.

²² *Id.* at 37.

²³ Fed. Comm. Comm'n, Memorandum Opinion and Order, Appendix A, In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56 (Jan. 20, 2011).

²⁴ Ex parte notices cannot include what the commissioners and their staff say is not proper under CPUC processes and procedures. Commission Rules of Practice and Procedure, Rule 8.4, subd. (c).

with openness and transparency.”²⁵ The Commission should follow the lead of President Picker, who recently declared, in testimony at a hearing of the Senate Energy, Utilities and Communications Committee that Commission decisions should be "based on the record developed in public" and not in private dinners, meetings and messages.²⁶ The Commission should issue a decision on the proposed decisions that is based on the record and developed in public.

IV. CONCLUSION

Comcast’s Opening Comments only further substantiate that there are no conditions sufficient to prevent or counteract the significant public policy harms that the proposed merger would cause. An expanded Comcast would cause serious harms to consumers and the public interest. Comcast’s Opening Comments further indicate that Comcast believes itself beyond the Commission’s jurisdiction, believes that it can dictate the terms of the merger, and believes that it can delay, obstruct, or avoid altogether its compliance with any conditions. Under these circumstances, the Commission cannot ensure that the proposed conditions, or any conditions, will effectively prevent or counteract the merger’s harms.

²⁵ Introductory Remarks of President Picker, January 14, 2015 CPUC meeting at 5, *available at* <http://www.amslawyers.com/Breaking-News/Comments-of-Michael-Picker-1-15-2015.pdf> (last accessed March 10, 2015).

²⁶ Marc Lifsher, PUC President Michael Picker calls emails with utilities 'troubling', LA Times (March 3, 2015), *available at* <http://www.latimes.com/business/la-fi-puc-hearing-20150304-story.html> (last accessed March 10, 2015).

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 amend the Proposed Decision and deny the proposed transactions.

Respectfully submitted,

Dated: March 10, 2015

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