

**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 (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
(Filed June 17, 2014)

**JOINT APPLICANTS' RESPONSE TO THE EMERGENCY MOTION
OF THE UTILITY REFORM NETWORK TO TRANSMIT
A COPY OF THE CONFIDENTIAL RECORD TO THE
FEDERAL COMMUNICATIONS COMMISSION**

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, Comcast Corporation, Time Warner Cable Inc. ("TWC"), Time Warner Cable Information Services (California), LLC, Bright House Networks Information Services (California), LLC, and Charter Fiberlink CA-CCO, LLC ("Joint Applicants") submit this response in opposition to the Emergency Motion by The Utility Reform Network ("TURN") to Transmit a Copy of the Confidential Record to the Federal Communications Commission ("Motion").

I. INTRODUCTION

The Commission should deny TURN's motion to transmit a copy of the confidential record to the Federal Communications Commission ("FCC") for several reasons:

First, TURN's proposal to transmit the parties' arguments and discovery in this proceeding to the FCC – at this late juncture – is inconsistent with the process envisioned in the Scoping Memo and unnecessary. In the Scoping Memo, the Assigned Commissioner and ALJ

stated a goal of concluding this proceeding before the FCC issues its decision so that the findings of fact and analyses in the decision adopted by the full Commission (not the parties' briefs, declarations, exhibits, and discovery responses) could inform the FCC's decision. Once the Commission provides the FCC with its decision, the FCC is perfectly capable of asking Joint Applicants for any record document that it wants to see.

Second, the period for significant comments and new evidence to be filed in the FCC's proceeding closed months ago. At this stage of the FCC proceeding, parties are welcome to file *ex parte* communications following up on particular issues or documents in the record. TURN is *not*, however, entitled to dump an entirely new set of materials into the FCC record that have little relationship to anything in that proceeding to date.¹

Third, adopting TURN's proposal would contravene the nondisclosure agreements that it entered into with Comcast, TWC, and Charter to obtain access to their Confidential and Highly Confidential Information, which expressly prohibit the use of the information for any other purposes.² Indeed, the Comcast/TWC/TURN NDA specifically prohibits the use of the information in "any other administrative, regulatory or judicial proceedings."³

Finally, TURN's Motion would impose an unnecessary burden on the Commission if it were forced to gather and identify all of the documents that TURN proposes to submit to the

¹ The proposal is flawed from yet another procedural perspective: As a practical matter, there is no rule, statute, or protocol that establishes a process for the Commission to transmit Joint Applicants' Confidential and Highly Confidential Information to the FCC at all, much less in a manner that would ensure the confidentiality of the information pursuant to all applicable laws and agreements.

² Nondisclosure Agreement Between Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC and TURN ("Comcast/TWC/TURN NDA"), a true and correct copy of which is attached hereto as Exhibit A, at ¶ 3; Nondisclosure and Protective Agreement between Charter Fiberlink CA-CCO, LLC and TURN ("Charter/TURN NDA"), a true and correct copy of which is attached hereto as Exhibit B, at ¶ 2. All Intervenors who received Confidential or Highly Confidential Information in this proceeding did so pursuant to nondisclosure agreements that prohibit the use of the information in any other proceeding.

³ Comcast/TWC/TURN NDA at ¶ 3.

FCC (most of which are not in the formal record of this proceeding), and prepare them for submission according to the requirements of the FCC Protective Order. In light of the foregoing, and as explained more fully below, TURN's motion should be denied.

II. TURN'S MOTION DOES NOT ADVANCE THE COMMISSION'S GOAL

In the Scoping Memo, and other rulings in this proceeding, the Commission stated its goal of participating meaningfully in the FCC proceeding and informing the FCC's decision. The Commission stated its intent to "[d]evelop a record to inform additional comments that the Commission may file with regard to the merger application at the [FCC],"⁴ and to provide "meaningful input" in response to the FCC's invitation to "state regulatory commissions."⁵ The Commission made clear that its concern about this proceeding continuing after the FCC issued its decision is that it "could prevent us from having meaningful participation in the FCC process."⁶

TURN cites these statements as the bases for its Motion,⁷ claiming that confidential versions of the parties' briefs, declarations, exhibits, and discovery responses⁸ should be transmitted to the FCC now. TURN's request, however, conflates the Commission's goal of providing meaningful input to the FCC, in the form of its findings and analyses in this

⁴ Scoping Memo at 5; *see also* Scoping Memo at 6 (The Commission has said that Joint Applicants' responses to data requests "will provide the factual basis for the Commission's comments to the FCC about the Merger . . .").

⁵ Scoping Memo at 6.

⁶ Scoping Memo at 14 (emphasis added); *see also* ALJ's Ruling Resetting Schedule of Proceeding & Granting Official Notice, November 13, 2014 at 2 ("[I]f the Commission is to realize its objective of meaningfully participating in the FCC process then it will be necessary to adopt a final decision around the time the FCC anticipates the conclusion of its proceeding").

⁷ Motion at 3-4.

⁸ Although ambiguously worded, the TURN Motion appears to seek transmittal of *all* of the discovery responses produced by the Joint Applicants in this proceeding, not simply those that were included as attachments to briefs or declarations. If so, that would require the Commission to mark thousands of pages of discovery responses as confidential, likely filling multiple bankers' boxes, prior to any transmission to the FCC.

proceeding, with an entirely different objective of having the parties' arguments, opinions discovery responses in this proceeding transmitted to the FCC. Nothing in the relief requested by TURN advances the Commission's goal of participating in the FCC proceeding itself. That goal can be accomplished simply, efficiently, and effectively by (a) the Commission filing comments in the FCC docket (something that the Commission has already done) and (b) by providing the FCC with a copy of the full Commission decision that includes its findings of fact and conclusions of law. TURN's reliance on the Commission's objectives stated in the Scoping Memo and other rulings is misplaced.

III. TURN'S MOTION WOULD UNREASONABLY INTERFERE WITH THE FCC'S PROCEEDINGS

The FCC knows how to request data and documents that it deems relevant to its proceeding. It has engaged in extensive discovery with Joint Applicants during its review of the proposed transaction, and has issued requests for information to a number of third parties.⁹ If the FCC wanted to review the parties' briefs, declarations, exhibits, and discovery requests in the Commission's California proceeding, it could and would ask Joint Applicants and other parties to provide them. It has not done so, notwithstanding the fact that it is clearly aware of this public proceeding.¹⁰ It is inappropriate for TURN to supersede the FCC's process, and request that this Commission unilaterally insert documents from this proceeding into the FCC record.¹¹

Further, TURN's contention that the Commission should transmit these materials to the FCC now in order to "inform the FCC of California's perspective" ignores that the FCC has

⁹ See, e.g., Request for Information to AT&T, Inc., MB Docket No. 14-57 (Oct. 7, 2014); Request for Information to Sony Network Entertainment International LLC, MB Docket No. 14-57 (Dec. 19, 2014); Request for Information to Google, Inc., MB Docket No. 14-57 (Dec. 23, 2014).

¹⁰ As noted below, the Commission and a number of Intervenor have filed comments in the FCC proceeding. See n. 14, *supra*.

¹¹ Of course, when a decision is issued in this proceeding, the FCC may request that Joint Applicants and other parties provide the public versions of information considered by the Commission to reach its decision.

provided interested parties with ample opportunities to submit comments and documents in its proceeding.¹² The period for significant comments and new evidence to be submitted in the FCC proceeding closed two months ago, on December 23, 2014. Several parties in this proceeding, including TURN and the Commission itself, availed themselves of that process.¹³ It is a matter of FCC policy that new arguments and evidence filed even at the *reply* stage of the formal pleading cycle are “discouraged.”¹⁴ That same policy clearly applies to efforts to add new arguments and evidence to the record *well after the pleading cycle has closed*. As the FCC’s informal timeline for reviewing complex merger cases makes clear, the later stage of a transaction review (days “52-180”) are slated for “*Analysis of Record*” and “*Discussions with Parties*,”¹⁵ not enormous, unwelcome supplements to the record. Applying this policy in the instant transaction, the FCC clearly stated in its Public Notice announcing the pleading cycle: “To allow the Commission to consider fully all substantive issues regarding the applications referred to in this Public Notice in as timely and efficient a manner as possible, petitioners and commenters should raise all issues in their initial filings. New issues may not be

¹² *Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SPINCO to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Public Notice, DA 14-986 (rel. July 10, 2014) (“July 10 Public Notice”).

¹³ *See, e.g.*, Comments of the California Public Utilities Commission, MB Docket No. 14-57 (Aug. 25, 2014); Comments of California Emerging Technology Fund, MB Docket No. 14-57 (Aug. 25, 2014); Reply of the Greenlining Institute to Oppositions to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Dec. 23, 2014); Reply Comments of The Media Alliance, MB Docket No. 14-57 (Dec. 23, 2014). Indeed, as its comments, TURN submitted the public version of its brief and supporting documents in this proceeding to the FCC. *See* Comments of The Utility Reform Network, MB Docket No. 14-57 (Dec. 23, 2014).

¹⁴ *See* Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers, *available at* <http://www.fcc.gov/encyclopedia/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or-autho> (last visited Feb. 24, 2015).

¹⁵ *Id.* (emphasis added).

raised in responses or replies.”¹⁶ While there is a limited “good cause” exception to this rule, no good cause exists in this instance that would justify such an unwarranted submission.

At this late date in the process, parties that wish to follow up on particular issues or documents in the record of the FCC proceeding should avail themselves of the FCC’s *ex parte* process, which provides an appropriate opportunity to make such communications.¹⁷ They are not, however, entitled to unilaterally dump an entirely new set of documents into the record that have little relation to the proceeding to date.

IV. TURN’S MOTION SEEKS RELIEF THAT IS PROHIBITED BY THE APPLICABLE NONDISCLOSURE AGREEMENTS

TURN’s Motion requests that the Commission transmit Joint Applicants’ Confidential and Highly Confidential Information to the FCC for use in its proceeding.¹⁸ In making this request, TURN ignores that, consistent with the Commission’s discovery guidelines,¹⁹ it obtained the Confidential and Highly Confidential Information in discovery by negotiating and executing nondisclosure agreements with Comcast, TWC and Charter. These nondisclosure agreements expressly limit TURN’s right to use the information to this proceeding only, and any direct judicial review of this proceeding.²⁰ The Comcast/TWC/TURN NDA specifically prohibits TURN from using the information “in any other administrative, regulatory or judicial proceedings.”²¹ Accordingly, the relief sought by TURN’s Motion is prohibited by its

¹⁶ July 10, 2014 Public Notice at 10 (emphasis in original).

¹⁷ Of course, any information that parties may seek to share with the FCC through its *ex parte* process must comply with the terms of the nondisclosure agreements they have executed with Joint Applicants, as discussed herein.

¹⁸ Motion at 3-4, 5-6.

¹⁹ Discovery: Custom and Practice Guidelines, *available at* http://docs.cpuc.ca.gov/word_pdf/REPORT/117475.pdf (last visited Feb. 22, 2015).

²⁰ See Comcast/TWC/TURN NDA at ¶ 3; Charter/TURN NDA at ¶ 2.

²¹ Comcast/TWC/TURN NDA at ¶ 3. Similarly, the Charter/TURN NDA prohibits the disclosure or use of Confidential Information “for any purpose” beyond participation in the instant proceeding.

nondisclosure agreements with Comcast, TWC, and Charter – a prohibition that extends to disclosure of Confidential and Highly Confidential Information produced in this proceeding to any party.²²

Further, TURN’s attempts to prompt the Commission to disclose Confidential and Highly Confidential Information are inconsistent with its obligations under the nondisclosure agreements to “take all reasonable steps to prevent any unauthorized use, disclosure, publication, or dissemination” of the information,²³ and to ensure that the information is only used as authorized by the nondisclosure agreement.²⁴ The relief sought by TURN’s Motion, therefore, would violate the nondisclosure agreements under which parties received Confidential and Highly Confidential Information from Joint Applicants in this proceeding.

V. TURN’S MOTION, IF GRANTED, WOULD IMPOSE AN UNDUE BURDEN ON THE COMMISSION

TURN’s Motion asks the Commission to undertake a process that would involve (a) gathering and identifying the voluminous documents and (b) filing them with the FCC under the terms of the FCC’s Protective Order. This process would require Commission staff to first engage in the time-consuming task of gathering all of the documents that TURN has requested be produced – the largest volume of which (the discovery responses) are not in the record. Then, because the FCC Protective Order requires that all Confidential and Highly Confidential Information submitted into the FCC’s record be marked and designated in a specific manner,²⁵

²² All of the nondisclosure agreements that Joint Applicants executed with parties in this proceeding contain comparable limitations on the use and disclosure of Confidential and Highly Confidential Information.

²³ Comcast/TWC/TURN NDA at ¶ 3.

²⁴ Comcast/TWC/TURN NDA at ¶ 3; Charter/TURN NDA at ¶¶ 2, 7.

²⁵ *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Second Amended Modified Joint Protective Order, MB Docket No. 14-57

the Commission would need to undertake the further time-consuming and burdensome task of ensuring that all of Joint Applicants' Confidential and Highly Confidential Information in the documents that it has gathered are so marked and designated.

The documents at issue, including the parties' briefs, exhibits, declarations, and discovery responses, constitute thousands (and perhaps even millions) of pages. The scope of work necessary to properly gather and mark all of the documents would be enormous (not to mention be an exercise in essentially returning to the FCC a substantial volume of discovery which was produced by virtue of its being a part of the FCC production in the first place). Since TURN's request is wholly unnecessary for the Commission to achieve its goal of informing the FCC's decision, and would be an inappropriate intrusion on the FCC's process for its proceeding, it is patently unreasonable for TURN to ask the Commission to expend such extraordinary resources.

VI. CONCLUSION

For the foregoing reasons, Joint Applicants respectfully request that the Commission deny TURN's Motion.

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(rel. Nov. 12, 2014) ("FCC Protective Order"), at ¶ 12. A true and correct copy of the FCC Protective Order is attached hereto as Exhibit C.

Respectfully submitted,

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