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 Matters.	A.14-04-013 April 11, 2014 A.14-06-012 June 17, 2014

MEDIA ALLIANCE OPENING COMMENTS ON PROPOSED DECISION

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I – INTRODUCTION

Media Alliance wishes to begin by thanking the Commission, including the presiding Commissioner Carla Peterman and ALJ Bemesderfer, for careful consideration of the points raised by many of the Intervenors and what is clearly an attempt to craft merger conditions that are responsive to the concerns raised. The long list of conditions clearly acknowledges the many public interest challenges presented by the proposed merger.

In these opening comments, we will firstly address some general points with regard to the proposed decision and then sequentially address four specific conditions of particular relevance to the constituencies we represent in this proceeding.

II – THE CONDITIONS PROPOSED BY THE COMMISSION DO NOT MEANINGFULLY ADDRESS TERMINATING MONOPOLY ISSUES

The Commission's proposed decision rightfully states that despite the numerous issues presented for end users of Internet services, a paramount concern related to the merger application is the terminating monopoly impact on edge providers.

The proposed decision states:

> *This is precisely the "terminating monopoly" power that intervenors fear. The power of the terminating monopolist to discriminate or otherwise act anti-competitively vis-a-vis edge or content providers could increase the cost and reduce the attractiveness of that competing content. This, in turn, lessens the demand for high-speed broadband access to the Internet, and thus runs counter to Section 706(a)'s mandate to promote competition in broadband services.*

The Commission itself provides no conditions in the Proposed Decision to address what it clearly recognizes as a severe problem. The Proposed Decision makes reference to federal reclassification of broadband services as a Title 2 Telecommunications Service as a mitigating factor and while that decision is to be celebrated with full awareness of upcoming Congressional initiatives (H.R. 1212) and legal efforts to overturn it, it also cannot be relied upon in toto to prevent all terminating monopoly effects.

For one example, Joint Applicant Comcast's treatment of HBO Go, not only on Roku, which the Commission has addressed via condition, but also on Sony Play Station consoles as detailed in this Techdirt article published March 5, 2015: (https://www.techdirt.com/blog/netneutrality/articles/20150303/12433530200/comcast-blocks-hbo-go-working-playstation-4-wont-coherently-explain-why.shtml)

The article's closing line is prophetic: "*This is a good example of how crafting net neutrality rules is only part of the conversation. It's great to have rules, but they don't mean much if bad or outright anti-competitive behavior can just be hidden behind half-answers and faux-technical nonsense for years on end without repercussion"*

Marketplace hyper-concentration, as the proposed merger creates in the provision of high-speed broadband services in California with close to 80% of consumers limited to one choice of provider, cannot necessarily be ameliorated by regulators when edge provider discrimination can take many forms, not all of them addressed by prohibitions on paid prioritization. This example is useful as it demonstrates that while the Commission can identify a problem with Roku and address it specifically via condition, the nine-headed hydra resurfaces with Sony PlayStation, which was not addressed in the proposed decision although it to represents a scenario where Time Warner Cable and Comcast provided different outcomes. The Commission risks playing a game of "swat the visible head", only to have another head to present itself moments later, rendering the merger conditions insufficient to address new specific anti-competitive behaviors.

III – THE COMMISSION'S MERGER CONDITIONS EXPIRE AFTER FIVE YEARS WITHOUT A NECESSARILY COMMENSURATE REDUCTION IN PUBLIC INTEREST HARMS IN 2020

The twenty-five conditions proposed by the Commission to accompany the approval of the proposed merger of the Joint Applicants largely sunset after a five year period. The Proposed Decision does not contain, in Media Alliance's view, an analysis of the reduced public interest harms projected to exist approximately five years from now and whether the

enforcement of the proposed twenty-five conditions for the mandated five year period would result in a permanent reduction of all or some of the projected public interest harms or merely a temporary reduction for the period of time they would be in effect. While Media Alliance realizes that not all aspects of future market competition can be projected five years into the future in a rapidly changing technology industry, we do believe it is incumbent upon the Commission under Section 854(c) of the Public Utilities Code to affirmatively consider whether the public interest standard will continue to be met absent the application of the twenty-five conditions and whether the resulting market conditions will "*be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility*" per paragraph 6 of Section 854(c) (and the corresponding delegated authority in Section 706).

The proceeding record has already noted the slow rate of deployment of the competing high-speed broadband services offered by Verizon (FIOS) and AT&T (U-verse) in many local markets throughout the State of California as well as the current uncertainty as to the trajectory of Google Fiber over the next few years. Can the Commission assure that the affirmative public interest standards will be met on the expiration of many of the proposed mitigation measures? If not, then Media Alliance considers it questionable that the Joint Applicants have met the standard for merger approval in the public interest and whether the Commission's Proposed Decision brings the application into full compliance with the presiding regulatory code informing the Commission's decision making process.

Media Alliance would point specifically to conditions mandating the provision of standalone broadband services at affordable prices, provision of full carriage to edge providers like Roku, provisions for digital inclusion programmatic expansion and Lifeline programs, and mandates for supplier diversity and customer service improvements.

IV – **PUBLIC INTEREST HARMS REQUIRE PROACTIVE NOT REACTIVE ENFORCEMENT**

As a final general concern before moving into specific proposed conditions, Media Alliance wishes to suggest that the Commission has set an extraordinarily high bar for itself in proposing such a long list of conditions and tasking itself with the enforcement of each and every one of them with the limited resources available to the Commission.

This is not a statement indicating a lack of belief in the Commission's good intentions, but it is a reminder that the mitigation of the significant public interest harms described in ALJ Bemesderfer's Proposed Decision can only be avoided with proactive actions and regulatory enforcement on the part of the Commission, not merely by the reactive application of fines or other punitive measures after the recognition of non-compliance post-merger, be it deliberate or simply circumstantial, on the part of the Joint Applicants.

California consumers and edge providers may suffer impacts that cannot be ameliorated after Commission review of six month and annual reports and while enforcement action can be launched by parties and by the Commission itself, such proceedings as we know can be

extremely lengthy and do not always deliver timely or sufficient relief to the most gravely impacted parties.

Additionally, although it will not be possible to address this issue in specific terms until we are able to review the opening comments submitted by the Joint Applicants in response to the proposed decision, our attendance at the February 25th All-Parties Conference revealed significant objections posed by the Joint Applicant's counsel to several of the conditions, none of which, in Media Alliance's analysis, were particularly disposable within the context of the Proposed Decision's parameters for mitigating public interest harms.

The Commission cannot and should not approve the proposed merger without the consent and cooperation of all three Joint Applicants to all of the conditions placed upon them, as well as a considered review of the Commission's capacity to proactively enforce all conditions for the duration of time they are in effect.

V – CONDITION TWO'S TIMELINE ENCOURAGES SUPPLIER DUPLICATION

Media Alliance now turns to a discussion of some of the specific conditions applied to the Proposed Decision. In so doing, we do not want the Commission to conclude that we no longer object to the Commission's approval of the merger. We continue to state for the record that Media Alliance does not believe that any set of conditions, including the many laid out in the Proposed Decision, are sufficient to mitigate the public interest harms that will be

caused by the merger.

Condition Two addresses the poor record of Joint Applicant Comcast in supplier diversity and mandates per General Order 156, that the merged entity shall by no less than two years after the date of the merger, demonstrate supplier diversity in three GO-156 defined sub-categories (minority-owned businesses, women-owned businesses, and disabled veteran-owned businesses) equal to the average of competitors AT&T and Verizon in the prior year.

Media Alliance supports the intent of this condition, but wishes to raise issues about the provided time line. Should the merger go forward, it is safe to say that the large companies merging their operations will have a great deal of administrative work and large company purchasing processes are not rapid under the best of circumstances. Using the sample figures provided in the Proposed Decision by the Administrative Law Judge, the nominal changes required for the merged entity would require a 100% increase or doubling of purchases from vendors meeting the minority-owned business standard and a 400% increase or quadrupling of purchases from vendors meeting the disabled veteran-owned business standard. These are not inconsequential amounts.

Media Alliance feels the likelihood is quite high that given a two-year deadline to manifest significant vendor changes, that the merged entity will simply utilize the identical vendors used by their competitors AT&T and Verizon, and while these changes

will benefit the existing pool of suppliers in those categories, the condition as imposed may fall slightly short of the most impactful public policy improvements envisioned by the General Order which is certainly to expand the vendors used by major utility and telecom providers outside of the current incumbents and provide opportunities for those not currently providing products to do so.

Hence Media Alliance would suggest that the condition could be best applied for the benefit of under-represented communities in California if imposed on a five year schedule (or at least a slightly less expedited one) as with many of the other conditions in order to permit an open and expansive bidding process that would permit companies not currently supplying one or more of the large telecom companies to consider entering the marketplace. Media Alliance considers supplier diversity to not just be a Commission imperative to direct more business to incumbent suppliers, but as a public policy directive to build a larger, broader and more inclusive supplier pool within California. We encourage the Commission to consider carefully the time line most likely to create the outcome of new minority, women and disabled veteran-owned businesses able to enter the supplier chain.

VI – CONDITION THIRTEEN MORE THAN TRIPLES INTERNET ESSENTIALS PENETRATION RATE

Media Alliance addressed the shortcomings of the *Internet Essentials* program at some length in our December comments in this proceeding and we were far from the only party to do so. We appreciate the ALJ's attention to this part of the proceeding and the acknowledgment of many of the points presented, including the specific issues with Comcast's failure to provide wifi access inside the home to *Internet Essentials* recipient households, many of which can be assumed to have more than one school-age child in residence.

At the February 25th All-Parties conference, we were disturbed by several verbal comments made by Joint Applicant's counsel, specifically statements that the 45% penetration rate provided in the Proposed Decision (pegged to the merged entity's broadband penetration rate among non-subsidized Internet users, now projected as 40% in the State of California) was unachievable. While obviously we have no access to the Applicant's more detailed argument with regard to this condition which will likely be filed today, on the basis of the verbal comments presented by counsel, it does not appear the merged entity considers it realistic to match their market penetration into affluent communities with their market penetration into low-income communities, which is a problem for a provider requesting approval for a de facto monopoly on 80% of the marketplace. In fact, it calls into question the Joint Applicants commitment to serve the entire State of California and all of its residents, not all of whom are financially able to subscribe to lucrative triple play packages.

Media Alliance encourages the Commission on two counts with regard to this conditions. We encourage the Commission to stand firm on the public interest standard that market penetration into affluent communities can and should match market penetration into low income communities with products and services designed for the financial capacity and needs of lower income communities.

Also as mentioned at the All-Parties conference, we would ask the Commission to desist from instructing the Joint Applicants to specifically contract for services with other parties to the proceeding. We do not mean this, in any way, to propose any sort of judgment whatsoever regarding the work and efficacy of the California Emerging Technology Fund and its grantees. We just don't consider it appropriate from a public policy point of view for the Commission to endorse within its Proposed Decision specific consulting contracts or funding be directed to any party to the proceeding or their grantees within a merger approval condition applied by the Commission.

VII – PRIVACY VIOLATIONS ARE NOT SUFFICIENTLY ADDRESSED IN CONDITION TWENTY

. Media Alliance has been active in the Bay Area community on issues of digital surveillance and privacy rights, specifically because it ranks among the foremost concerns of our members, many of whom identify as professional or citizen journalists, whistle blowers and /or community activists.

We would therefore be remiss if we did not expand upon the concerns presented at the All-Parties conference with regard to Comcast's Xfinity wifi hotspot network. In brief, this service turns broadband consumers into involuntary wifi hotspots by imbuing Comcast provided Xfinity routers with both private and public networks, the public network capacity allowing any other Xfinity subscriber within range to access the connection at will.

Condition twenty in the Proposed Decision "loosely" addresses privacy violations in toto but does not speak to the Xfinity wifi hotspot at all in direct terms, nor does it provide any remedy short of general enforcement action. Here is the proposed language:

"Comcast shall take action to respect customer privacy and report to the Commission within six months of the effective date of the parent company merger any complaints about violation of customer privacy such as but not limited to, publication or directory listing of unlisted phone numbers. Comcast shall not contest Commission jurisdiction regarding any customer privacy complaints for its California voice or broadband customers.

Media Alliance considers this language inadequate to protect the privacy of Californians using high speed broadband services from the Joint Applicants. We note that "opt-out" requirements for such a service are problematic given the low level of public awareness of the WiFi network, the obvious opacity of the http://www.comcast.com website for customers trying to locate opt-out forms, and the documented customer service tendency to be less than helpful when customers attempt to discontinue services.

In fact, a class action lawsuit was filed in Alameda Superior Court in December of 2014 on exactly this issue (*Grear vs Comcast – http://www.scribd.com/doc/249643502/11210574-0-30265),* obviously constituting a complaint about a violation of customer privacy as described in the relevant condition. While Media Alliance supports the Commission's exhortation to the Joint Applicants to "take action" on the complaint, we do wish to point to the lack of specificity in the condition about the action the Commission wishes the post-merger entity to take in the event (already occurring) of a complaint about a violation of customer privacy. Or a complaint about the violation of thousands of customer's privacy.

The facts are that while Comcast does make some attempt to separate public traffic from private traffic on Xfinity connections, the State of California, as one of the centers of the tech industry, is filled with individuals with the training and the capacity to breach firewalls and hack into Internet accounts. This can be done for purposes of identity theft, blackmail, access to protected information of various kinds or simply entertainment and the excess exposure imposed upon Xfinity customers should not happen without their explicit consent. While nominal opt-out privileges are offered, both by persistence via customer service and by the scenario of replacing the rented Xfinity router provided by Comcast with a separately purchased and installed router, such solutions require an affirmative effort on the part of the customer and a certain amount of technical and financial capacity to obtain and install

one's own equipment. It is probably not a reach to say that many of the most likely to be victimized may well lack one of both of the required capacities to opt out of the program.

Media Alliance would ask of the Commission that in order to protect the privacy rights of California's broadband users that condition twenty be rewritten or an additional condition be added introducing one of the following restrictions: either a) the practice of the Internet Service Provider using residential customers as WiFi hotspots available to any other Xfinity customer be discontinued for the merged entity as the purchase of an Internet connection should entitle the owner of that connection to share it only with those they choose to share it with or b) that the Commission require the provision of public WiFi-enabled routers to be accompanied by an explicit "opt-in" waiver to be signed by every Xfinity customer allowing their Internet connection to be used as part of a public/private WiFi network for Xfinity customers and the option to request an alternate rental router from the merged entity that does not contain the public network capacity at no additional cost to the subscriber.
Only with such action by the Commission, does Media Alliance believe the privacy rights of Xfinity subscribers can be adequately protected post-merger in the public interest.

VIII – CONCLUSION

In conclusion, Media Alliance thanks the Commission for reviewing these comments and asks the Commission to conclude that the Joint Applicants request to merge does not serve the public interest and that despite the best efforts of the Commission, there are not conditions

sufficient enough to prevent short and long-term harms to the public interest that far outweigh any benefits to California residents. We encourage the Commission to reconsider the merits of rejecting the Application entirely and maintaining Time Warner Cable as an independent company able to perform as a maverick in the cable and broadband markets to the overall benefit of Californians and cable and internet subscribers across the country. Thank you for your consideration.

Respectfully submitted,

Dated March 5, 2015

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