BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
12-10-14
04:59 PM

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)
And Related Matters.	Application 14-06-012 (Filed June 17, 2014)

BRIEF
OF THE OFFICE OF RATEPAYER ADVOCATES
(PUBLIC VERSION)

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BRIEF
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Pursuant to Rule 13.11 of the CPUC's Rules of Practice and Procedure and the *ALJ Ruling Granting in Part and Denying in Part Motion of the Office of Ratepayer Advocates to Reconsider the Nov. 13, 2014 Administrative Law Judge Ruling Resetting Schedule of Proceeding* (Nov. 26, 2014 ALJ Ruling), the Office of Ratepayer Advocates (ORA) submits this brief addressing the issues set forth in the Scoping Memo adopted for this proceeding and the Joint Applicants' December 3, 2014 Brief.

In accordance with the November 26, 2014 ALJ Ruling, ORA is attaching, as part of its brief, Exhibits as admissible documents on which declarants relied and/or referenced in their declarations. Given the volume and size of the number of documents relied upon and/or referenced in the declarations, ORA is not attaching all the material but also includes a list of documents (Exhibit 18) that can be made available on a CD-ROM upon request.

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

The proposed merger of the Comcast Corporation (Comcast), Time Warner Cable Inc. (TWC), Charter Communications (Charter) and Bright House Networks (Bright House) at both a national level and as it may affect their respective California affiliates, should not be approved.[1] ORA urges the California Public Utilities Commission (CPUC) to reject any authorizations sought or required by the merging parties and convey its opposition to the Federal Communications Commission (FCC).

The decision at issue here is really about the future of communications. This merger poses significant harm to California consumers and will perpetuate and expand what is, even today, a virtual monopoly in which most Californians do not have any reasonable alternative providers of Internet service at speeds deemed necessary for the essentials of contemporary life. If this merger is approved, Comcast will more than double the size of its footprint in California, serving from 33.7% to [redacted] pre-merger, to serving between 84% up to [redacted] of Californians post-merger.[2] Allowing this merger to go forward will ensure that the vast majority of residents of California will have no effective choice. It will also, by virtue of the effective monopoly power achieved, allow the resulting merged entity to increase prices without effective restraint, and constrain the ability of other entrants to provide competitive services at reasonable prices and offer comparable content to their customers.

In terms of the quality and reliability of service to customers, Comcast, the dominant acquiring entity, has among the worst service records of any provider of broadband or related services. This is demonstrated in the data of Comcast, TWC and

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[1] In this brief, "Comcast" refers to Comcast Corporation, Comcast IP Phone II, Comcast Phone of California, LLC, Comcast Cable, and all affiliates, subsidiaries, and Comcast entities providing service in California; "TWC" refers to Time Warner Cable Inc., and its Subsidiaries and affiliates; "Charter" refers to Charter Communications, Inc., and its Subsidiaries and affiliates; "Bright House" refers to Bright House Networks LLC, and its Subsidiaries and affiliates.

[2] Exhibit A, Expert Report and Declaration of Lee L. Selwyn (Selwyn Declaration) at 13, ¶ 12.

Charter, as well as that of independent survey organizations. There is every expectation, as the CPUC has itself noted, that it is the culture of the acquiring entity that will pervade the post-merger structure.[3]

As with most mergers, once executed, they cannot be undone. Accordingly, the CPUC must take all feasible steps to ensure that this merger not take place. This merger, if allowed to happen, will be detrimental to the people of California and to the economic prospects of this state, a state that has thrived on technological innovation and competition as the driving force for that innovation.

Comcast's and TWC's claim that consumer choice will not be diminished post-merger because they do not compete against each other ignores the harmful effect of one combined company having an overwhelmingly large market share of all broadband subscribers. Indeed, "a more extensive footprint increases the opportunities for Comcast to leverage its control of content to raise rivals' costs and/or diminish the value of their competing services."[4]

By reason of both its limited resources and the unique time constraints of this proceeding, ORA has focused its efforts and those of its consultant on the topics it considered to be of most critical concern and impact to California consumers. That is not to say that there are not other issues ORA might have pursued if time and resources allowed.

It should be noted that the Comcast's, TWC's, Charter's and Bright House's (hereinafter "Joint Applicants") showing in this proceeding remains problematic. Joint Applicants' Brief, which was received one week ago, contains the Joint Applicants' first discussion that parties have seen on issues set forth in the August 14, 2014 Scoping

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[3] In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc.(MCI) to transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI, D. 05-11-029, November 18, 2005 at 87.

[4] Exhibit 1, Expert Report and Declaration of Lee L. Selwyn (Selwyn Declaration) at 149, ¶ 123.

Memo and Ruling of Assigned Commissioner and Administrative Law Judge (Scoping Memo) that goes beyond the transfer of authority of competitive local exchange carrier (CLEC) affiliates contained in the consolidated applications. Yet, even in its Brief, the Joint Applicants continue to denigrate the Scoping Memo and challenge the CPUC's clear authority and obligation to use all the tools at its disposal, including Section 706(a) of the Federal Telecommunications Act of 1996, to protect the interests of the people of the State of California.[5] To say that the CPUC has no interest or authority in this merger beyond CLEC transfers is mistaken and contradictory to the Scoping Memo at best, and misleading and disingenuous at worst.

II. HISTORY OF THE CONSOLIDATED PROCEEDINGS

For a proceeding of this magnitude and of such potential importance and impact to the people of the State of California, the process of getting us to this point has been highly unusual.

The initial application in this proceeding was filed nearly eight months ago. Yet, the current schedule, from when the Joint Applicants' made their initial showing on some of the issues set out in the Scoping Memo[6] (in the Brief of Joint Applicants filed only a week ago on December 3, 2014) to when ORA and other interested parties must file their "Opening" and "Reply" briefs with attached declarations and anything else intended to be considered as evidence, and through the request for and conduct of any hearings, and the filing of post-hearing briefs (due December 22, 2014 under the current schedule) is only 19 days.

On April 11, 2014, Comcast, TWC and Bright House filed Application (A.)14-04-013 at the CPUC seeking approval for "the transfer of indirect ultimate control of Time Warner Cable's wholly-owned subsidiary, TWCIS [Time Warner Cable

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[5] Joint Applicants' Brief at 5, 75.

[6] There were many issues in the Scoping Memo that the Joint Applicants did not address.

Information Services (California) LLC] (U-6874-C) to Comcast Corporation under Public Utilities (P.U.) Code section 854(a)."[7]

ORA timely protested the application.[8] Other interested parties did the same. The first basis for ORA's Protest is the significance of the overall merger of the two largest cable and broadband companies in the United States and its potential detrimental impact on California consumers.[9]

In addition, ORA asserted in its Protest that the CPUC's jurisdiction with respect to the merger and, therefore, the applicable standards for evaluating it, is much broader than the Joint Applicants represented in the filed applications. Specifically, ORA noted Section 706(a) of the Federal Telecommunications Act of 1996[10] (Section 706) and a recent opinion of the District of Columbia Circuit Court of Appeal (D.C. Circuit) in *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014).

Section 706 defines "advanced telecommunications services" to include broadband. ORA noted in its Protest the history of Section 706, including *Verizon v. FCC's* discussion of Section 706. The D.C. Circuit determined that Section 706 was a grant of regulatory authority to the FCC and, independently, *to the state commissions* to take concrete steps that will promote broadband competition.[11] Further discussion and detail on the application of Section 706 to these consolidated proceedings is provided in Exhibit 5, ORA Section 706 Jurisdiction Letter.

ORA also showed in its Protest that the broader considerations of P.U. Code sections 854(b) and (c) are applicable to these applications.[12] At this early point the Joint

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[7] A.13-04-013 at 1.

[8] ORA Protest, May 19, 2014.

[9] *Id.* at 2-3.

[10] 47 U.S.C. § 1302(a).

[11] *See* ORA Protest at 8-10; *see also* Exhibit 5 to this brief, ORA Section 706 Jurisdiction Letter.

[12] *Id.* at 10-12.

Applicants were formally put on notice as to what the potential scope of this proceeding could be.

On June 17, 2014 (nearly six months ago), Charter, Comcast and TWC filed A.14-06-012 to transfer Charter's assets in California to Comcast. Charter, Comcast and TWC claimed that they did not file A.14-06-012 because it changed anything dramatic in the overall merger proposal. Rather, they alleged that they filed it out of an abundance of caution due to the relatively minor impact of some service area exchanges. The application states that as a result of the broader transaction between Comcast and TWC, "Comcast Corporation will acquire Charter [Fiberlink] systems in a number of states including California. ... As part of this transaction, Charter Fiberlink will transfer to TWCIS (CA) all of its business telecommunications service customers within certain franchise areas, excluding those customers in Charter Fiberlink's operating territory in the Lake Tahoe area."[13] According to the application, "[f]ewer than 1,000 customers will be affected, along with any and all related regulated assets used to serve those customers."[14] This does not include the hundreds of thousands of customers that Charter provides voice and broadband services to throughout California. Charter has an estimated 595,000 customer relationships in California, as listed in Charter's 2013 10K Annual Report.[15]

A prehearing conference was held on July 2, 2014. The Scoping Memo was issued in this proceeding on August 14, 2014. The Scoping Memo adopted virtually all of the expanded scope recommended by ORA, including the consideration of most elements of public interest under P.U. Code section 854(c) and Section 706. A Scoping Memo is not a

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[13] A.14-06-012 at 9-10.

[14] *Id.*

[15] Charter Communications Inc. Form 10-K Annual Report for Fiscal Year Ending Dec. 31, 2013, A.14-06-012, Attachment 4.

minor item. It is issued to "determine the schedule…and issues to be addressed." [16] Surprisingly, the Joint Applicants did nothing to bolster their showing in response to the Scoping Memo.

Shortly after issuance of the Scoping Memo, the Joint Applicants moved for consolidation of A.14-04-013 and A.14-06-012. In their Motion for Consolidation, Joint Applicants stated:

> Consolidation is requested because the two applications involve substantially similar issues of law and fact, and there is substantial identity of parties. Consolidation will promote administrative efficiency, ensure consistent treatment of common issues, and enable these two related applications to be addressed expeditiously, on the same schedule.[17]

While that might have been viewed as a step in the right direction, in that same Motion the Joint Applicants stated that consolidation made sense because:

> Application 14-04-013 and Application 14-06-012 both involve the transfer of public utility telecommunications operations, in one instance via a transfer of control and in the other instance via an asset acquisition . . . Aside from a similarity in the factors the Commission might consider in making its public interest determinations, the two applications also present common (and novel) issues of law. The Commission's assertion of authority to consider impacts on broadband in connection with its approval of the specific transactions at issue, whether under Section 706(a) of the federal Telecommunications Act of 1996 or the Public Utilities Code, and its authority to take affirmative actions to promote broadband deployment in connection with approval of transactions under Public Utilities Code §§ 851-854 were addressed, for the first time, in the recently issued Scoping

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[16] Rule 7.3 of the CPUC's Rules of Practice and Procedure.

[17] Joint Motion by Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6873C) Charter Fiberlink CA-CCO, LLD (U6878C), and Bright House Networks Information Services (California), LLC (U6955C) to Consolidate Proceedings (Consolidation Motion), August 20, 2014 at 1-2.

> Ruling issued in Application 14-04-013. Consequently, the precise scope of that authority and what steps the Commission may take are still open issues that the parties may be required to address in both applications.[18]

Thus, rather than responding to the expanded scope with additional information, Joint Applicants unilaterally decided to treat the scope of the CPUC's authority and what steps the CPUC may take as "open issues" that the parties "may be required to address."[19] While Joint Applicants have chosen to view the issues adopted in the Scoping Memo as discretionary, there is nothing in the Scoping Memo that supports their interpretation. They did not amend their application; they did not present any other showing on the expanded Scoping Memo issues. Their fundamental and basic reaction to the Scoping Memo was "nothing has changed."

The Scoping Memo adopted an aggressive schedule that was somewhat unusual, providing for Opening and Reply Briefs instead of pre-filed testimony, hearings and then briefs, the normal course for proceedings of this magnitude. The accelerated schedule was presented as aiding the CPUC in providing input to the FCC.[20]

Discovery was a major challenge for ORA. Joint Applicants delayed in providing responsive material. In fact, on December 9, 2014 at 4:49 PM on the day prior to this filing, Comcast filed the public version of a supplemental response to ORA's Third Set of Data Requests and provided the confidential version at 6:12 PM. ORA sent the original data request to Comcast on September 4, 2014, over three months ago. Almost all of Joint Applicants' data request responses were prefaced with objections based not only on the usual ones concerning clarity or availability but also continuing challenges to requests being outside the scope of the CPUC jurisdiction. Thus, Joint Applicants continued to

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[18] *Id.* at 2-3.

[19] *Id.* at 3 (emphasis added).

[20] Scoping Ruling at 14-15.

challenge the Scoping Memo. For example, the responses to discovery requests often included this language:

> Comcast objects to this request on the grounds that it seeks information that is neither relevant to the issues in this proceeding, nor reasonably calculated to lead to the discovery of relevant or admissible evidence. Comcast objects on the grounds that the request exceeds the established scope of the proceeding.[21]

On October 7, 2014 ORA filed multiple motions regarding official notice of the FCC's stoppage of its informal "merger clock" for its counterpart proceedings and the continuing problems with discovery. ALJ Duda suspended the schedule on ALJ Bemesderfer's behalf,[22] and ALJ Vieth conducted a Law and Motion Hearing on October 16, 2014. At the hearing, ALJ Vieth told the Joint Applicants to give ORA what ORA had requested (other than matters involved in a protracted discovery dispute at the FCC, a dispute that remains on-going to this day and is currently before the D.C. Circuit) and informed parties that they would be hearing from the assigned ALJ regarding the schedule.[23]

Discovery continued, but with the same challenges faced before the pre-hearing conference. The responsive deliveries continued to be delayed and many discovery responses continued to bear an objection based on the Joint Applicants' continuing objections to the scope of the proceeding. Some elements of discovery, requiring access to highly secure on-line databases with requisite advanced training for ORA staff and consultants, was amazingly slow, taking weeks just to make arrangements, secure

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[21] Exhibit 7, Comcast's Responses to ORA's First Set of Data Requests (Nos. 1-73), 1:49, September 11, 2014. This is an exemplar but similar objections accompanied many responses from all of the Joint Applicants.

[22] ALJ Ruling Suspending Schedule, Granting Official Notice and Scheduling Law and Motion Hearing, October 20, 2014.

[23] October 16, 2014 Hearing Transcript, Reporter's Transcript (RT) 1:16-17, 31-34.

credentials, have training, download software and obtain IT permissions on the CPUC's end, and adjust limitations on usability and functionality.

In an effort to finalize and obtain the Joint Applicants' showing in accordance with the Scoping Memo, ORA asked the Joint Applicants when they would be amending their applications to reflect the scope of the Scoping Memo.[24] The response received was the Joint Applicants did not intend to amend their applications. Specifically, the Joint Applicants said:

> The Joint Applicants do not intend to amend their applications. The original applications clearly set forth the relief requested by the joint applicants in recognition of the Commission's jurisdiction and authority over the proposed transfer of the Time Warner Cable's competitive local exchange carrier (CLEC) and interexchange carrier certificates of public convenience and necessity and the specified customers of Charter's CLEC.
>
> The fact that the ALJ and Assigned Commissioner have expanded the scope of the proceeding, at least in part to inform the Commission's comments to the FCC, to include additional issues that may, or may not, be within the scope of the Commission's jurisdiction does not alter the underlying request for relief or require an amendment of the application. To the contrary, the process adopted by the scoping memo specifically contemplates that the manner in which the Commission will explore these additional issues is via Commission staff data requests and briefing.[25]

On November 13, 2014, the parties received a ruling from ALJ Bemesderfer resetting the schedule. It was a schedule that not only set out difficulties for ORA but was also virtually impossible to meet. Among other things it required all parties, including the Joint Applicants, ORA, and other interested parties, to concurrently file their "briefs"

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[24] E-mail from Lindsay Brown to Suzanne Toller, *et al*., November 12, 2014.

[25] E-mail from Suzanne Toller on behalf of Joint Applicants to Lindsay Brown, November 14, 2014.

with all declarations/exhibits attached; it also required parties desiring hearings to concurrently file a motion identifying all disputed material facts, witnesses they wished to cross and cross-examination time estimates, without any knowledge of the other parties' showings at the time that motion needed to be made; and it set a due date 9.5 working days out, the Monday after Thanksgiving. Reply briefs were to be filed a week later. Finally, hearings were to be held – if at all – two days after parties filed reply briefs.[26]

The schedule was so problematic that on November 18, 2014, ORA (with several other parties joining) filed a motion for reconsideration pointing out much of the history above and requesting that "the schedule and filing requirements set forth in the ALJ Ruling be rescinded and that a prehearing conference be scheduled to discuss a revised schedule and the appropriate process for these proceedings."[27] ORA noted: "The Joint Applicants' failure to conform their showing to the Scoping Memo's scope of the proceeding must be addressed and remedied by requiring the Joint Applicants to amend their applications. Absent adjustments to the schedule and procedures, ORA's and the intervenors' participation will be prejudiced and their due process rights will be impaired."[28]

Among the reasons for these concerns is the obligation under Rule 2.1 of the CPUC's Rules of Practice and Procedure (Rules) for an application to clearly indicate the relief requested so as to inform the public. This is the basic notice requirement of administrative law. It is also clear, as discussed more fully Section III of this brief concerning burden of proof, that it is the Joint Applicants who must bear the burden of

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[26] ALJ's Ruling Resetting Schedule of Proceeding & Granting Official Notice, November 13, 2014 at 3.

[27] Motion Of The Office of Ratepayer Advocates To Reconsider November 13, 2014, Ruling of Administrative Law Judge Resetting Schedule of Proceeding at 21.

[28] *Id.*

going forward as well as the burden of proof. ORA and other interested parties were being asked under the original schedule, to file their briefs – essentially their cases in chief – while not having seen a case in chief from the Joint Applicants that reflected the scope of the proceeding as the Scoping Memo established.

The Greenlining Institute (Greenlining), The Utility Reform Network (TURN) and ORA filed a motion to dismiss, relying on much the same information, and the refusal of the Joint Applicants to amend their applications to reflect the true scope of the proceeding as set forth in the Scoping Memo.[29]

On November 26, 2014, the day before Thanksgiving, the assigned ALJ conveyed by e-mail (later confirmed by formal ruling) a new schedule. It was different, but also problematic. While phrased as a partial grant of ORA's motion, it required:

Applicants' Opening Briefs	December 3, 2014
Protestors' Reply Briefs	December 10, 2014
Motion for Evidentiary Hearings	December 10, 2014
Evidentiary Hearings, if necessary	December 17-18, 2014
Simultaneous Post-Hearing Briefs	December 22, 2014[30]

The November 26 Ruling provided that briefs are to include "as attachments any admissible documents referenced in the briefs, including any prepared testimony, declarations and/or any stipulations of facts by the parties…"[31]

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[29] Joint Motion to Dismiss of Greenlining, TURN and ORA, November 24, 2014.

[30] Administrative Law Judge's Ruling Granting in Part and Denying in Part Motion of the Office of Ratepayer Advocates to Reconsider the November 13, 2014 Administrative Law Judge Ruling Resetting Schedule of Proceeding, November 26, 2014 (November 26 Ruling) at 2.

[31] *Id.*

From the start of this schedule – including the Joint Applicants "full showing" being made available to ORA and other interested parties for the first time– to the end – the filing of concurrent post-hearing briefs if hearing are held – encompasses 19 days.

On December 3, 2014 – one week ago today, the Joint Applicants filed a "Brief" of 94 pages, declarations of four witnesses and many hundreds of pages of additional attachments. In part, these materials, for the very first time, contained Joint Applicants' discussion of the topics in the Scoping Memo; although they continued to extensively focus on topics related to the transfer of CLEC telecommunications services they confined themselves to in their original applications.

ORA, and other parties, thus have had less than one week to complete opening and reply briefs and declarations, discussing not only our positions but addressing those of the Joint Applicants (most of which were seen for the first time one week ago on December 3, 2014). In today's brief, ORA must include other discovery and background materials we wish to have received as evidence. In addition ORA and other intervenors must produce both public and confidential versions of these documents, which is a time-consuming process in itself.

At this point in the proceeding, it is nearly eight months after the Joint Applicants filed their initial application, yet ORA and other parties have seen the Joint Applicants' case in chief for less than one week. Even after the Scoping Memo was issued, there was time to include the following critical procedural elements to this proceeding: amended applications to provide notice of the implications of the merger to the public, on-going discovery, service of Joint Applicants' prepared testimony, other parties testimony served, hearings (as needed) to establish an evidentiary record in a case which should be almost completely fact-based, and briefs to argue positions on the record and the applicable law to the administrative law judge (ALJ), assigned Commissioner, and ultimately, the full CPUC. Yet, for reasons that remain unclear, the span from when the Joint Applicants' made their initial showing on the topics identified in the Scoping Memo, to when ORA and other interested parties have to address that showing and (under the current schedule) complete hearings and file post hearing briefs is compressed

into 19 days. This abbreviated schedule denies due process in that it does not provide ORA and other intervenors with an adequate opportunity to be heard. While due process in the administrative agency setting has many technical rules associated with it and numerous judicial decisions parsing its nuances, the bottom line concept is fundamental fairness.[32]

This proceeding, with its abbreviated procedural schedule, precludes the parties from having adequate notice of and ability to review the Joint Applicants' showing on the issues set forth in the Scoping Memo as well as an adequate opportunity to be heard on the issues. There is simply insufficient time under the schedule to build an adequate record to consider the issues. Thus, the process and schedule are not compatible with principles of fundamental fairness. As they admit in their response to the Motion to Dismiss, the Joint Applicants ignored the issues set forth in the Scoping Memo until they filed their Brief on December 3, 2014.[33] The Joint Applicants' strategy to date has been successful. By urging an expeditious schedule[34] while frustrating discovery, they have denied consumer advocates, including ORA, due process. Ironically, in their Brief, the Joint Applicants suggest that they are the aggrieved parties, stating:

> Pursuant to ALJ Bemesderfer's November 26, 2014 Ruling, intervenors will file reply briefs on December 10, 2014, in which intervenors may make arguments which have not previously been raised. Under the current schedule, unless hearings are held and post-hearing briefs are required, Joint Applicants will not have the opportunity to respond to such new arguments. Thus to the extent necessary, Joint Applicants reserve the right to seek an opportunity to respond

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[32] Cal. Jur. 3d, Administrative Law § 624 (citing *Small v. Superior Court*, 148 Cal. App. 4th 222 (4th Dist. 2007); Witkin, California Procedure 5th Ed., Administration Proceedings § 3(2).)

[33] Joint Applicants' Response to Motion to Dismiss at 3, 6.

[34] *See* Consolidation Motion at 4; RT. 1:93-94, October 16, 2014.

> to factual allegations and legal argument made by intervenors in the reply briefs.[35]

The Joint Applicants have not previously objected to any of the novel procedural elements of this proceeding. They saw no need for hearings when ORA suggested hearings would be useful.[36] They objected to suggestions that they amend their applications to reflect the Scoping Memo. Although they are the moving parties in this proceeding with the burden of proof, they have maneuvered to ensure that ORA and the other interested parties did not even see their opening case until a week before responsive briefs are due. To the extent there is now a problem for Joint Applicants, it is entirely a problem of their own making. Nonetheless, ORA provides its analysis of the proposed merger and applications in this brief and attached declarations.

ORA is determined to comply with the schedule as best as it can. But given the circumstances of the case, it must be recognized that ORA and other intervenors cannot possibly put on the full responsive case this proceeding deserves because of the numerous due process problems, including sheer lack of time. Nonetheless, consistent with the Scoping Memo, ORA provides its analysis on the impact of the proposed merger and related transactions in this brief, in the attached declarations and in other supporting materials.

III. BURDEN AND STANDARD OF PROOF

The term burden of proof is often used to describe multiple components of the obligations on parties to present evidence, the required level of a showing, and the topics on which a showing is required. As noted by Witkin, "The term 'burden of proof' is often used loosely in two senses: (1) the secondary meaning of the burden of *initially*

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[35] Joint Applicants' Brief at 7, footnote 12.

[36] RT 1:82-84, October 16, 2014.

producing or going forward with the evidence; and (2) the primary meaning of the burden of *proving the issues* of the case."[37]

In these proceedings, it is clear that the Joint Applicants bear the burden of proof on both bases. The Joint Applicants have filed applications, each categorized as ratesetting, to seek approval of a proposed merger, changes in their structure and the manner in which services are provided to California customers. They clearly have the burden to establish all of the elements necessary to the CPUC rendering a decision.

It is also clear that the standard for the degree of proof is by a preponderance of the evidence. This standard, prevalent in civil proceedings, including administrative proceedings, and adopted by the CPUC, is generally viewed to require that the evidence presented on one side of an issue is more persuasive than that in opposition.[38]

Both who bears the burden and the standard of proof are explicitly set forth in P.U. Code section 854(e), which states: "The person or corporation seeking acquisition or control of a public utility organized and doing business in the state shall have, before the commission, the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met."[39] While this may well mean that the burden falls exclusively to Comcast as the "…corporation seeking acquisition or control…," it appears from the Brief of Joint Applicants that they are jointly taking on this responsibility.

Finally, P.U. Code section 854(c) provides the CPUC with the threshold standard to determine if the Joint Applicants have made a sufficient showing. The standard the CPUC must use to determine if a sufficient showing has been made is whether on both individual topics and overall the merger is "in the public interest." P.U. Code section 854(c) is explicit on its requirement that the CPUC must determine that the appropriate

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[37] Witkin, California Evidence 5th Edition (2012), Burden of Proof § 1.

[38] California Administrative Hearing Practice 2nd Ed. (CEB) § 7.51.

[39] Pub. Util. Code § 854(e).

standard is whether, on both individual topics and overall, the merger is "in the public interest." The Joint Applicants concur that "in the public interest" is the appropriate standard under P.U. Code section 854.[40] However, the Joint Applicants contend a portion of their request, specifically the asset and customer transfer from Charter Fiberlink to Comcast, should only require a standard of "whether the proposed transaction is adverse to the public interest." This argument is premised on being able to isolate that transaction element as being governed by P.U. Code section 851.[41] As demonstrated in this brief, ORA does not believe any hair-splitting on standard of proof will be a critical factor. This merger is not a close call; it is clearly harmful to the public interest.

A significant dispute in this proceeding which, unfortunately, remains unresolved at this time, has been on what elements it is necessary for the Joint Applicants to prevail in sustaining their burden of proof. The Joint Applicants filed these applications seeking authority to undertake limited transactions related to the merger and rearrangements of their various companies. As initially filed, and as the applications remain today, Joint Applicants filed these applications on the basis that the only jurisdictional transactions before the CPUC are the transfers of CLEC and interexchange carrier certificates of public convenience and necessity. These are businesses limited in nature and ancillary to their primary broadband and cable television businesses.

A.14-04-013, as filed, states the purpose of the application is "to request that the Commission authorize the transfer of indirect ultimate control of Time Warner Cable's wholly-owned subsidiary, TWCIS [Time Warner Cable Information Services (California) LLC] (U-6874-C) to Comcast Corporation under PU Code Section 854(a)."[42] Joint Applicants asserted in A.14-04-013 that "[t]he only issue to be considered is whether the indirect transfer of control of TWCIS (CA) and the pro forma transfer of Time Warner

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[40] See, *e.g.*, Brief of Joint Applicants at 7.

[41] *Id.* at 65.

[42] A.14-04-013 at 1.

Cable's interest in the Bright House California is in the public interest and consistent with PU Code Section 854(a)."[43]

A.14-06-012, filed subsequently as a companion to, and ultimately consolidated with, A.14-04-013, notes that as a result of the broader transaction between Comcast and TWC "…Comcast Corporation will acquire Charter [Fiberlink] systems in a number of states including California. … As part of this transaction, Charter Fiberlink will transfer to TWCIS (CA) all of its business telecommunications service customers within certain franchise areas, excluding those customers in Charter Fiberlink's operating territory in the Lake Tahoe area. Fewer than 1,000 customers will be affected, along with any and all related regulated assets used to serve those customers."[44]

ORA protested both applications. The bases for the Protests were that, given the significance of the overall merger of the two largest cable and broadband companies in the United States and California, the CPUC's jurisdiction with respect to these transactions and, therefore, the applicable standards for evaluating them, were much broader than the Joint Applicants represented.

In addition to P.U. Code section 854, as noted in Section II above, ORA discussed Section 706 and the recent D.C. Circuit opinion, *Verizon v. FCC* interpreting that section. Section 706 provides:

> 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

[43] A.14-04-013 at 29.

[44] A.14-06-012 at 9-10.

> telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[45]

Section 706 defines "advanced telecommunications services" to include broadband and VoIP.[46] Joint Applicants have argued in this proceeding that state commissions, including the CPUC, do not have regulatory authority under Section 706 to examine the effects of the proposed merger on broadband and VoIP services and to take any steps (consistent with Section 706) necessary to accomplish the purpose of Section 706.[47] The position Joint Applicants have taken before the CPUC is completely at odds with their position at the FCC. Specifically, Comcast has argued in the FCC's Open Internet docket that "the [Federal Communications] Commission can rely on Section 706 to prohibit any paid prioritization arrangements that threaten Internet openness."[48] Section 706 grants authority to state commissions that is both parallel to, and independent of, the FCC's authority. Comcast cannot claim that the FCC has the authority to adopt Open Internet under Section 706, and at the same time argue that the CPUC does not have the authority to review the effects of the proposed merger and related transactions on advanced communications capability, *i.e.*, broadband and VoIP.

In the Scoping Memo, the scope of this proceeding was, in large measure, in agreement with that requested by ORA and other interested parties. The Scoping Memo noted, "[i]n essence, the D.C. Circuit Court found Section 706 to be an actual grant of authority to the FCC and the state commissions to take concrete steps by utilizing measures that 'promote competition' and 'remove barriers to infrastructure

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[45] 47 U.S.C. § 1302(a).

[46] ORA Protest at 8-10; *see also* Exhibit 5, ORA Section 706 Jurisdiction Letter.

[47] *See* Joint Applicants' Brief at; Joint Applicants' Reply to Protests at 9-13.

[48] Comcast's Reply Comments at 28, *In the Matter of Protecting and Promoting the Open Internet*, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 GN Docket No. 14-28, adopted May 14, 2014.

investment.'"[49] After discussing the relevance of the various parts of P.U. Code section 854 and Section 706, the Assigned Commissioner and ALJ ruled as follows:

> The scope of this proceeding includes all issues that are relevant to the proposed Merger's impacts on California consumers in order to inform this Commission's comments with the FCC, and determine whether any conditions should be placed upon a merged entity. Bearing in mind our limited resources and the FCC's and Department of Justice's concurrent review of the Merger, we intend to focus this proceeding on (but do not limit it to) the following limited issues that have the greatest impact on California consumers:
>
> 1. Does the proposed change of control and the Merger meet the criteria enumerated in Pub. Util. Code § 854(c)? Specifically, parties should focus their attention on the criteria enumerated in Pub. Util. Code § 854(c)(6) and (c)(8), with due consideration given to the merger's effect on safety, reliability, consumer protection, competition as well as voice, backhaul, wholesale and broadband services in California.
> 2. What are the implications of the Merger for broadband deployment in California including, in particular, deployment of broadband to elementary and secondary schools and classrooms and to unserved and underserved areas of the State?
> 3. Is the proposed change of control in the public interest, taking into account findings of fact related to topics 1 and 2?
>
> a. Would the Merger enhance safety and reliability of California customers who receive voice and broadband services from the merged entity?
>
> b. Would the merged entity result in greater build out to unserved and underserved areas in California as well as to California schools and libraries?
>
> c. How would the Merger benefit California

[49] Scoping Memo at 11.

consumers? For example, will the merger benefit low income outreach and adoption of broadband services that are accessible, affordable, and equitable in a manner that is enforceable and will help close the digital divide? Will the merger help educate consumers on using computers and the internet when service is provided? Will the merged entity offer standalone internet access and make sure consumers are aware of this offer?

d. Would the Merger maintain or improve the quality of service to California consumers?

e. What Merger-specific and verifiable efficiencies would likely be realized by the merger?

f. What impact would the Merger have on the market for special access or backhaul services?

i. What alternatives to the merging entities' special access backhaul facilities currently exist, and what alternatives would exist after the merger?

ii. Would the Merger increase the ability of the merging parties to impose exclusive or requirements contracts on purchasers of backhaul services?

g. Would the Merger, which is planned as a nationwide transaction, have specific or different effects in California? For example, would the merger result in less competition in the California marketplace for broadband customers as compared to broadband customers nationally?[50]

With respect to Section 706, the Scoping Memo stated:

> Therefore, the scope of the Commission's current review of the Merger between Comcast and TWC, as stated in this Ruling, falls within the limited authority granted under Pub. Util. Code § 854 and Section 706(a) of the Telecommunications Act. The CPUC is seeking information under the limited authority granted by state and federal law

[50] Scoping Memo at 12-14.

> and protecting the public interest to promote state and federal goals, such as encouraging broadband deployment, promoting safety and furthering 'innovation, consumer choice and protection, and economic benefits to California.'[51]

As noted in Exhibit 5, ORA Section 706 Jurisdiction Letter, Section 706 is a critical tool given to the CPUC to facilitate the State pursuing existing State policies and practices to promote the expansion of broadband to all Californians.

The challenge for ORA has been that the two applications remained unchanged even after the CPUC expanded the scope of the proceeding in the Scoping Memo. While in the December 3, 2014 Brief the Joint Applicants, for the first time in this proceeding, discuss the proposed merger in the context of P.U. Code section 854 and Section 706, they mistakenly continue to argue against the applicability of both.

There is, beyond the specific statutory authority of P.U. Code section 854 and Section 706, a further requirement imposed on any CPUC consideration of this merger that the Scoping Memo did not mention. The CPUC has a long-standing obligation to always consider the potential anticompetitive impacts of matters before it, whether or not raised by the parties. This is separate and apart from the obligations set out in P.U. Code section 854(b)(3), which the Scoping Memo did not adopt.[52]

In *Northern California Power Agency v. CPUC*, the California Supreme Court stated:

> It is no longer open to serious question that in reaching a decision to grant or deny a certificate of public convenience and necessity [the specific issue in that proceeding], the Commission should consider the antitrust implications of the matter before it. The Commission itself has stated: "'There

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[51] *Id.* at 12

[52] "Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result." Pub. Util. Code § 854(b)(3).

> can be no doubt that competition is a relevant factor in weighing the public interest,'" and that "[antitrust] considerations are also relevant to the issues of . . . public convenience and necessity." (citing *M. Lee (Radio Paging Co.)* (1966) 65 *Cal. P.U.C. 635*, 640 and fn. 1.)[53]
>
> In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content to the broad statutory concept of the "public interest."
>
> As seen above, the Commission may approve projects even though they would otherwise violate the antitrust laws; it may also disapprove projects which do not violate such laws. Its consideration of antitrust problems is for purposes quite different from those of the courts; it does not usurp their function.
>
> …
>
> As we have seen, it is clear that the Commission must take into account the antitrust aspects of applications before it.
>
> As we have indicated above, the public interest in preventing monopolies is one facet of the larger public convenience and necessity which the Commission was established to protect. The Commission may and should consider *sua sponte* every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty, and where a private party has so clearly demonstrated the adverse impact of the proposed facilities, the Commission certainly cannot ignore the problem simply because it was not raised by one having impeccable credentials of legal standing. (*Marine Space Enclosures, Inc. v. Federal Maritime Com'n (1969) 420 F.2d 577, 585, 591-592 [137 App.D.C. 9]*.)[54]

After carefully reviewing the facts of that specific case, the Court stated:

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[53] *NCPA v. CPUC*, 5 Cal. 3d 370, 377 (1971).

[54] *Id.* at 378.

> As we have seen, it is clear that the Commission must take into account the antitrust aspects of applications before it. It is equally obvious that the Commission failed to perform this essential duty in the instant case…The Commission must place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public. Here, the Commission did not perform this task.[55]

Finally, the Court noted, which is consistent with the requirements of P.U. Code section 854:

> Even if we were to assume, as the Commission and PG&E [the real party in interest] contend, that the Commission did in fact take into account the antitrust problems, we would still be compelled to annul the decision because of the Commission's obvious failure to make appropriate findings. As we have often said, the Commission must make specific findings of fact and conclusions of law relevant to all materials issues of a case. Here, there are no findings of fact which could possibly be construed as dealing with antitrust considerations. There is no definition of relevant market, no determination of effect upon competition, no finding as to the reasonableness of any restraint.[56]

As is clear from the contents of this brief and the declarations attached to it, ORA is raising issues concerning competition implicating antitrust considerations and the resulting effect this merger will likely have on existing and potential competitors and their respective customers.[57] In rendering its decision on the Joint Applicants' proposed

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[55] *Id*. at 379.

[56] *Id*. at 380.

[57] Though as *NCPA v. CPUC* holds, ORA is not required to make this showing: "The Commission may and should consider sua sponte every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty, and where a private party has so clearly demonstrated the adverse impact of the proposed facilities, the Commission certainly cannot ignore the problem simply because it was not raised by one having impeccable credentials of legal standing." *NCPA v. CPUC*, 3 Cal. 3d at 380.

merger and related transactions, the CPUC "must make specific findings of fact and conclusions of law relevant to all materials issues" of this proceeding. This encompasses findings of fact dealing with antitrust considerations, including defining the relevant market, determining the impact of the proposed merger on competition, and making findings "as to the reasonableness of any restraint."[58]

IV. The CPUC Should Reject the Proposed Merger And Related Transactions Because It Will Reduce Competition in California.

In their Brief, filed only one week ago, Joint Applicants largely ignored most of the issues laid out in the Scoping Memo and touched upon a discussion of broadband only minimally. Rather, Joint Applicants continue to claim that the proposed merger is nothing more than a few CLECs merging and that the CPUC should not concern itself with other impacts of the proposed transaction. They do not discuss in their brief the significant effects of the proposed merger on the competitive landscape in California. However, in several attached declarations, Joint Applicants claim that the merger will have no negative impact on competition in California. As discussed below, these claims are without merit. The Joint Applicants have failed to meet their burden to show that the proposed merger will not reduce competition and that the merger is in the public interest. In fact, if the CPUC approves the merger, customers will be irreparably harmed due to the impact on competition in California.

The proposed merger is not in the public interest because, applying P.U. code section 854(c) and Section 706, it will not "[b]e beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility" and it will not advance the deployment of broadband and advanced communications capability in California.[59] There are no conditions that can ameliorate the competitive harms of these proposed transactions.

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[58] *NCPA v. CPUC*, 3 Cal. 3d at 380.

[59] P.U. Code § 854(c)(6); Section 706.

A. The Impact of the Proposed Merger On Competition Is Within the Scope Of This Proceeding

As an initial matter, Joint Applicants made no showing on the impact of the proposed merger on the level of competition in the broadband Internet access market in their applications to the CPUC, as they are required to do. The Scoping Memo clearly set forth that competition was part of the scope of these consolidated proceedings, and, as indicated above in Section III of this brief, *NCPA v. CPUC* requires the CPUC to look at the impact of the proposed merger on competition in California.[60] Specifically, the Scoping Memo included within the scope the question of whether "the merger [will] result in less competition in the California marketplace for broadband customers as compared to broadband customers nationally?"[61]

Appended to this brief as Exhibit 1 is the Expert Report and Declaration of Lee L. Selwyn (Selwyn Declaration). Dr. Selwyn's Declaration discusses why approval of the proposed merger will result in competitive harms to California consumers.

B. Numbers Do Not Lie

Joint Applicants claim that the proposed merger will not reduce competition in California. This storyline distracts from the facts. Comcast and TWC are the two largest cable "Multi-System Operators" (MSOs) in California.[62] Pre-merger, Comcast currently passes [redacted] of homes in California**.** Post-merger, Comcast will be able to serve [redacted] of all homes in California.[63] These figures are derived from the data that Joint Applicants provided to ORA. The U.S. Census Bureau has different definitions of "homes" and "households." Even if ones uses the term "households" in an analysis, it is clear that the

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[60] 5 Cal. 3d 370, 377 (1971); Scoping Memo at 13-14.

[61] *Id.* at 14.

[62] Exhibit 1, Selwyn Declaration at 13, ¶ 12, including charts and tables. Selwyn provides that MSO "is a term commonly used in the cable industry to describe a company that owns and operates two or more cable TV systems." (*Id.*)

[63] *Id.*

merger will have a disproportionate impact on California with Comcast passing 33.7% of households in California before the merger, and 84% of households in California post-merger.[64]

The impact of the proposed merger on California versus nationwide is striking. Comcast and TWC currently pass around 80 million homes nationwide, or about 60% of the nationwide housing units.[65] Thus, the analysis of the proposed merger in California will be different from the analysis at a national level, where the proposed merger may have less of an impact, albeit still a significant one.

The Herfindahl-Hirschman Index (HHI) numbers, which the United States (U.S.) Department of Justice, the Federal Trade Commission, and state attorneys general have used since 1982 to measure market concentration for purposes of antitrust enforcement, are also telling. Pre-merger, Comcast's HHI based on homes passed is [redacted]; post-merger it is [redacted], an increase of [redacted].[66] While ORA was unable to conduct a complete HHI analysis comparing Comcast to other entities providing substitutable broadband services in Comcast's footprint in California, these HHI numbers are quite revealing.[67] Under the U.S. Department of Justice/Federal Trade Commission's 2010 *Horizontal Merger Guidelines,* a market with an HHI in excess of 2,500 is defined as "highly concentrated." The Horizontal Merger Guidelines state that "[m]ergers resulting in highly concentrated

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[64] *Id.* at 13, ¶ 12, 153, ¶ 126. Selwyn's Declaration notes that the census bureau defines and counts households and housing units differently. Housing units appear to be more directly comparable to Joint Applicants' "homes passed" numbers.

[65] *Id.* at 15, 18 ¶¶ 14, 18.

[66] *Id.* at 13, ¶ 12, Table 1. Dr. Selwyn calculated the HHIs based upon "homes passed" because subscriber data for broadband providers other than the Joint Applicants was not available. HHIs based upon subscriber counts would be lower, but the merger-driven increase would still be well in excess of the 200 point threshold established by the U.S. Department of Justice.

[67] In order for ORA to conduct a complete HHI analysis it would have been required to gather data from all of the other entities providing a substitutable broadband service in California. Given the timelines in these consolidated proceedings, ORA did not have the time or resources to conduct such an inquiry.

markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."[68] The increase in the HHI in the California residential broadband Internet access market that would result from the proposed merger is many multiples of the 200-point threshold set out in the *Horizontal Merger Guidelines.*[69] Even without comparing the full market, it is clear that the proposed merger would increase the HHI by well over 200 points.

Just on these numbers alone, this merger and related applications should fail. But there are many other troubling aspects of the proposed merger with regard to its impact on the level of competition in the broadband Internet access market in California.

C. There Is Little to No Competition In California For the Services Comcast Provides And Customers Expect

1. There Is Little To No Competition at the Speeds To Which the Overwhelming Majority Of Comcast Customers Subscribe

Comcast claims that there is robust competition in the broadband Internet access marketplace in California.[70] This claim has no merit.

An overwhelming majority of Comcast's customers receive service at download speeds at 25 Mbps and up, with only [redacted] or fewer of Comcast broadband subscribers choosing a service tier below download speeds of up to 25 Mbps.[71] Post-merger, Comcast will have a near monopoly on the market in California for high-speed broadband Internet access at a download speed of 25 Mbps and up.[72] As FCC Chairman Wheeler has noted:

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[68] United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 2010* edition ("HMG"), at §5.3, Market Concentration; see also Selwyn Declaration at 13, ¶ 12.

[69] Exhibit 1, Selwyn Declaration at 15, ¶ 13.

[70] Joint Applicants' Brief at 5; Exhibit D, Israel, Keating and Weiskopf Declaration at 43-48, ¶¶ 57-62.

[71] Exhibit 1, Selwyn Declaration at 51, ¶ 46.

[72] *Id.* at 18, ¶ 18.

> [a] 25 Mbps connection is fast becoming "table stakes" in 21st century communications. . . . At 25 Mbps, there is simply no competitive choice for most Americans. Stop and let that sink in...three-quarters of American homes have no competitive choice for the essential infrastructure for 21st century economics and democracy.[73]

Joint Applicants cannot dispute this analysis. In fact, a statement made in a declaration attached to Joint Applicants' Brief, demonstrates that Dr. Selwyn's use of the 25 Mbps benchmark was conservative. Exhibit B to Joint Applicants' Brief, Declaration of Shane Portfolio provides: "The majority of Comcast Internet customers in California now receive speeds of more than 50 Mbps [download], with a third or so receiving speeds up to 105 Mbps."[74] Indeed, at those higher speeds, there is even less competition.[75]

Thus, if the merger is approved, Comcast will pass from 84% to [redacted] of households or homes in California, and for the majority of those customers, they will have no other options at speeds that they want and need. In addition, even for those customers that have an option, switching broadband providers is no simple matter, as discussed in the section below.

2. Lack of Competitive Alternatives in California

Joint Applicants claim that there are plenty of competitive alternatives to Comcast's broadband service in California. These claims are, at best, exaggerated.

While Joint Applicants tout that Google Fiber, municipal overbuilds, and other providers are changing the competitive broadband landscape in California,[76] Joint

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[73] Prepared Remarks of Chairman Wheeler, "Facts and Future of Broadband Competition" presented at the 1776 Headquarters, Washington, D.C., September 4, 2014, at 3, 4. http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition

[74] Joint Applicants' Exhibit B, Portfolio Declaration at 13, ¶ 51. The 50 Mbps referred to a download speed.

[75] Exhibit 1, Selwyn Declaration at 59, ¶ 49, Figure 8.

[76] Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 44, ¶ 61.

Applicants also admit that these other providers are not a real alternative or competitor to Comcast's fixed wireline broadband service:

> To be clear, we are not claiming that Google Fiber, municipal broadband offerings, or other such providers are alternatives for a large percentage of Comcast broadband customers today. Although these competitors are relevant in certain markets, their current footprint remains limited. Instead the threat to Comcast comes from the *long-term strategies of these potential entrants or expanders.*[77]

In fact, there are few substitutes for the fixed wireline broadband services that Comcast offers.[78] Verizon's *FiOS* and AT&T's high-speed U-Verse have a very limited footprint both in California and nationally for high-speed broadband.[79] Google Fiber will not provide a competitive alternative to California customers in the near future.[80] Because of its speed variability, bandwidth caps, usage-based pricing, mobile wireless broadband is not a competitive alternative to Comcast's wired broadband service.[81] Fixed wireless broadband also cannot be considered a close substitute to Comcast's broadband service because of its limited availability, technological and geographical constraints, and substantially higher prices.[82]

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[77] *Id.* at 47, ¶ 63 (emphasis added).

[78] Exhibit 1, Selwyn Declaration at 32-33, ¶¶27-28, 63-72, ¶¶52-59.

[79] *Id.* at 35-36, ¶¶ 32-33.

[80] *Id.* at 38, ¶ 34 (noting: "[t]o qualify even for *consideration*, Google requires that candidate cities confirm that are prepared to satisfy a detailed screening 'checklist,' which includes a set of detailed criteria that many cities will be unwilling or unable to meet, and even those that are will most likely have to wait for years before any actual deployment can begin . . . Finally if, as is more likely than not, Google Fiber ends up in the very same communities where Verizon or AT&T have also chose to locate their own fiber-based services, it will increase competition for the small percentage of customers that already have some (albeit a duopoly) but not offer a competitive alternative to the very large percentage of household for whom the Joint Applicants are the only providers offering broadband at 10-25 Mbps or higher." (Emphasis in original).)

[81] *Id.* at 39-40, ¶¶ 35-36.

[82] *Id.* at 41-47, ¶¶ 37-43.

The FCC agrees that mobile service data should not be part of the review of residential broadband subscriber figures and competition in the broadband market. On December 9, 2014, the FCC's Media Bureau Chief sent a Memorandum to the Secretary of the FCC requesting that exhibits containing broadband subscriber data for Comcast, TWC and Charter be entered into the record of the FCC's merger proceeding, MB Docket No. 14-57.[83] In addition to the aggregate national and proposed footprint broadband subscriber data for the license transfer applicants, the Media Bureau also has decided to post the number of providers of wired, residential broadband service in the Joint Applicants' proposed footprints.[84] The Memorandum also states that the Media Bureau is requesting to post "subscriber totals by technology at various broadband speeds … and a comparison of cable broadband subscription with subscription to other technologies in homogenous tracts."[85] And most significantly, consistent with Dr. Selwyn's analysis, the Memorandum provides that the Media Bureau has decided "to exclude mobile service data from its finding pursuant to 47 U.S.C. section 1302(b) . . . The [Federal Communications] Commission has noted that available data concerning mobile services appear to be unreliable and overstate deployment to a significant degree."[86] ORA has provided this Memorandum as Exhibit 17 to this Brief (FCC Media Bureau Memorandum).

There is a critical difference between a service that Joint Applicants claim is "competing" with Comcast's service, and a service that is a close substitute to Comcast's service in that it would "actually constrain[s] the Joint Applicants' prices."[87] The absence

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[83] Exhibit 17, FCC Media Bureau Memorandum at 1.

[84] *Id.* at 2. The Media Bureau will only provide this data for Comcast, TWC and Charter, not Bright House.

[85] *Id.* at 3.

[86] *Id.* at 4.

[87] *Id.* at 33, ¶ 28.

of a close substitute for Comcast's broadband service, *e.g.*, service at speeds of 25 Mbps and up, means that Comcast "enjoys a *de facto* monopoly" on its broadband service offerings.[88] Furthermore, the "quality of any competitive broadband service in any given area actually matters a great deal" to consumers.[89] In areas where competitors offer speeds equal to or greater than 25 Mpbs, Joint Applicants' penetration rates were lower.[90]

Not surprisingly, given that the fixed wireline broadband market in California and nationally is typically a monopoly for speeds for 25 Mbps and up, and at most a duopoly in the remaining areas of the country, prices in the fixed wireline broadband market have risen steadily in the past five years.[91] Specifically, Comcast and TWC have had continual price increases for their broadband services in all speed tiers from 2009 to present.[92] If there was sufficient competition in the fixed wireline broadband market, then prices should have gone down or, at a minimum, remained level, as has occurred in most other technology sectors.[93] When one contrasts this with the mobile wireless market, where there are four major national carriers and several regional smaller carriers, it is not surprising that pricing for wireless data and voice have, at the same time these past five years, been steadily decreasing.[94]

Furthermore, Joint Applicants seem to completely ignore that by subsuming Charter into Comcast in California, the proposed merger will completely eliminate a direct competitor of TWC. There are an estimated [redacted] households in the Los Angeles

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[88] *Id.* at 33, ¶ 28. AT&T's U-Verse and Verizon's *FiOS* will be in less than 17.9% of Comcast's post-merger footprint. In the rest of Comcast's footprint, they will enjoy a near-monopoly at 25 Mbps and up downloads speeds. (*See Id.* at 63, ¶ 51.)

[89] *Id.* at 81, ¶ 67.

[90] *Id.* at 81, ¶ 67.

[91] *Id.* at 83-87, ¶¶ 69-71.

[92] *Id.* at 91, ¶ 75.

[93] *Id.* at 91, ¶75.

[94] *Id.* at 85-86, ¶ 70.

region that will lose a direct competitor if the Comcast/TWC/Charter merger and related transactions are approved.[95] Joint Applicants have provided no evidence that this loss of a direct competitor will not dampen competition in the Los Angeles market.

The bottom line is that a post-merger Comcast will become the single dominant provider of last-mile broadband access in California. For high-speed broadband Internet access offering download speeds of 25 Mbps in California, Comcast will have a monopoly except in those few areas where Verizon's *FiOS* or a high-speed version of AT&T's U-Verse is deployed. Verizon and AT&T do not have plans to expand *FiOS* or high-speed U-Verse, so they cannot be considered real competitors to Comcast.[96] As Dr. Selwyn notes: "The resulting impact of the merger upon the California broadband market is both unique and unparalleled, and has the potential to lead to even greater price increases than those that the Joint Applicants have, individually, put into effect in recent years."[97]

3. Comcast's And TWC's Claims That They Cannot Afford To Compete Against One Another And That There Will Be Robust Competition In the California Broadband Market Post-Merger Are Baseless.

Both Comcast and TWC state that they do not compete directly with one another in California, and that they do not have plans to deploy facilities or other infrastructure in each other's territories.[98] They also claim that pursuing their own investment to expand

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[95] This number is derived from the California Broadband Availability Data which gathers data on a census block level.

[96] *Id.* at 64-65, ¶¶ 52-53

[97] *Id.* at viii.

[98] *See* Joint Applicants' Exhibit A, McDonald Declaration at 4, ¶ 12; Joint Applicants' Exhibit C, Leddy Declaration at 3, ¶¶ 6, 9; Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 6, ¶ 9.

into the other's core territories would not be economically feasible.[99] At the same time, Comcast and TWC claim that there is robust competition in California.[100] These two statements contradict each other.

According to Comcast, "[w]hether Comcast and TWC *could* compete with each other . . . . is not germane to evaluating the proposed transaction. Rather the relevant questions are whether Comcast and TWC *would* be likely to compete with one another—which one properly evaluates by considering whether they have an incentive to expand their footprints in competition with one another absent the transaction—and what competition would look like in such a scenario."[101]

Moreover, the claims by Joint Applicants that it is not economically feasible for Comcast and TWC to overbuild in each other's service territories are entirely inconsistent with Joint Applicants' claims that there is robust competition in the broadband marketplace in California. Comcast and TWC are the two largest cable companies nationwide and in California, and are "uniquely qualified to expand into each other's territories as competitors in terms of their expertise and financial strength."[102] In some

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[99] *See* Joint Applicants' Exhibit A, McDonald Declaration at 4, ¶ 14; Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 36, ¶ 46.

[100] Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 43, ¶ 59.

[101] *Id.* at 35, ¶ 44. Joint Applicants further contend: "The primary reason that incumbent cable operators have not generally overbuilt each other's historical franchise areas is that the fixed costs are too high to be recouped, making the return on investment not worth it relative to other strategic initiatives. As noted in Dr. Israel's first FCC declaration, '[o]verbuilding (*i.e.*, building a network entirely from scratch) in one another's service area would be a significant expense made more difficult to recover by the competitive video and broadband marketplace that already exists.' In addition to the cost of materials and labor to build a network entirely from scratch, the expense of obtaining permits, rights-of-ways, and so on can be very substantial." *(Id.* at 36, ¶ 46 (citations omitted).)

[102] Exhibit 1, Selwyn Declaration at 24, ¶ 22.

places, they provide service to customers within the same zip code, yet they still choose not to compete against one another.[103]

Joint Applicants completely evade the real issue. If Joint Applicants, the two largest providers of broadband, video and voice services in California, have determined that is not economically feasible to compete directly with one another, then this tells us that there is a very serious problem with the level of competition in California, which, for the broadband services that Comcast offers and nearly all of Comcast's customers subscribe to, will be a monopoly in most areas of the state post-merger. It also begs the question as to who will be able to afford to compete effectively against Comcast, which will pass from 84% to [redacted] of households or homes in California, and which will face little to no competition in most of its post-merger footprint.

The bottom line is that if the CPUC accepts that it is not economically feasible for Comcast and TWC to overbuild in each other's territories, then the CPUC must also reach the conclusion that there is not sufficient competition in the broadband Internet access marketplace.[104] Indeed, the evidence indicates that there is not sufficient competition in the broadband Internet access market in California, and that Comcast and TWC have *elected* not to compete in each other's territories because they are engaging in market allocation*, i.e*., an agreement (whether tacit or overt) in which competitors such as Comcast and TWC divide the market among themselves.[105] Moreover, the fact that Comcast and TWC have engaged in market allocation and chosen not to build out in each other's territories cannot be used as justification for the proposed merger.[106]

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[103] *Id.* at 24, 142,¶¶ 22, 119. *See also* Joint Applicants' Exhibit A, McDonald Declaration at 4, ¶ 12.

[104] *Id.* at 25, 175, ¶¶ 23, 154.

[105] *Id.* at 22, ¶ 20.

[106] *Id.* at 22, ¶ 20.

4. Customers Cannot Easily Switch Broadband Providers.

Joint Applicants also claim that "customers would, in fact, switch to broadband alternatives in large numbers should Comcast degrade access to edge providers."[107] An "edge provider" is defined as "referring to content, application, service, and device providers, because they generally operate at the edge rather than the core of the network."[108] The fact that customers say that they would switch broadband providers, based on a survey that Joint Applicants themselves commissioned, has no bearing on whether customers would actually switch.

The majority of Comcast customers are used to having broadband speeds at a minimum of 25 Mbps download (according to Comcast, the real number is 50 Mbps), and in most areas of the California, there is no competitive alternative at those speeds.[109] Thus, the question of whether customers say they would actually switch to broadband alternatives becomes meaningless. As Dr. Selwyn notes, "[c]ustomers who observe the degradation of service and decide to abandon Comcast/TWC would first have to identify an actual equivalent service that is available at their location and that is not itself engaging in similar degradation of Online Video Distributor (OVD) content."[110] Indeed, as discussed more fully in below, the fact that Netflix has signed a similar agreement with Verizon as it did with Comcast so that Netflix customers would not experience service degradation and congestion in Netflix's service indicates that these service degradation and congestion problems will not be eliminated by a customer simply switching providers.[111]

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[107] Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 44, ¶ 60.

[108] FCC's *Open Internet Order*, 25 FCC Rcd at 17907, ¶ 4 footnote 3.

[109] Exhibit 1, Selwyn Declaration at 59, ¶ 49, Figure 8.

[110] *Id.* at 140, ¶ 118.

[111] *Id.* at 143-144, ¶¶ 119-120.

Furthermore, in the areas where there are two competitors, Joint Applicants' study does not consider that consumers will experience high switching costs that include, as FCC Chairman Wheeler has noted "early-termination fees, and equipment rental fees."[112] Chairman Wheeler explains:

> But even two "competitors" overstates the case. Counting the number of choices the consumer has on the day before their Internet service is installed does not measure their competitive alternatives the day after. Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees. And, if those disincentives to competition weren't enough, the media is full of stories of consumers' struggles to get ISPs to allow them to drop service.
>
> It was precisely the analysis of switching costs that the Commission adopted in its 2010 Open Internet Order and that the D.C. Circuit affirmed. In upholding the Commission's authority to maintain an Open Internet in order to limit the gatekeeper power of broadband ISPs, the D.C. Circuit affirmed these competitive realities, observing, "if end users could immediately respond to any given broadband provider's attempt to impose restrictions on edge providers by switching broadband providers, this gatekeeper power might well disappear."
>
> But users cannot respond by easily switching providers. As a result, even though there may be *competition*, the marketplace may not be offering consumers *competitive* opportunities to change providers, especially once they've signed up with a provider in the first place.[113]

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[112] *Id.* at 87, ¶ 71 (citation omitted).

[113] Prepared Remarks of Chairman Wheeler, "Facts and Future of Broadband Competition" presented at the 1776 Headquarters, Washington, D.C., September 4, 2014 at 4 (emphasis in original). http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition. *See* also Exhibit 1, Selwyn Declaration at 87, ¶ 71 (citation omitted); Selwyn Declaration at 87-91, ¶¶72-74.

Switching one's broadband Internet provider is not just a matter of picking up a phone and expecting the switch to magically happen. There are many barriers to switching providers due to a lack of competitive alternatives, cost, and logistics that Joint Applicants simply ignore in the declarations attached to their Brief.

D. Not Only Will Comcast Have a Stranglehold Over the Broadband Internet Access Market, Comcast Will Also Have the Incentive And Ability To Control the Content That Its Customers View Over Their Comcast-Provided Broadband Internet Access Service.

Although Joint Applicants have claimed that ORA is attempting to regulate cable in this proceeding and that their multi-channel video program distribution (MVPD) cable television businesses have no relevancy to the issues set forth in the Scoping Memo, Joint Applicants are wrong on both counts.[114] ORA has not claimed in these proceedings that the CPUC's jurisdiction extends to regulating cable television. However, there is a clear and distinct relationship between Joint Applicants' control over the broadband Internet access marketplace and its MVPD cable television business. Joint Applicants are currently using their market power in broadband, which is squarely within the scope of this proceeding, both to recover competitive losses and to deter competition in MVPD cable television where they do confront actual competition. If the merger is approved, Comcast will have an even greater ability to effectively pursue such tactics, which will harm broadband consumers.[115] Therefore, these issues are extremely relevant to the inquiry at hand and are within the scope of this proceeding.

Joint Applicants also contend that the Scoping Memo determined that "issues related to the Internet backbone [] [and] content delivery networks" are not within the scope of this proceeding.[116] Joint Applicants are incorrect. The Scoping Memo states that

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[114] *See* Joint Applicants' Brief at 5, footnote 8.

[115] Exhibit 1, Selwyn Declaration at 94, ¶ 76.

[116] Joint Applicants' Brief at 5, footnote 8.

data requests should be issued in topics including: "Terms and conditions, such as contracts customers must sign in order to receive service from Joint Applicants and contracts between Joint Applicants and content delivery networks for connection to Joint Applicants' network[]" and "Backhaul, such as whether the merger would limit competition in backhaul service in California[]."[117] Furthermore, the Scoping Memo states that the scope of the proceeding contains, but is not limited to, the following issues:

> 1. Does the proposed change of control and the Merger meet the criteria enumerated in Pub. Util. Code § 854(c)? Specifically, parties should focus their attention on the criteria enumerated in Pub. Util. Code § 854(c)(6) and (c)(8), with due consideration given to the merger's effect on safety, reliability, consumer protection, competition as well as voice, backhaul, wholesale and broadband services in California.
>
> …
>
> f. What impact would the Merger have on the market for special access or backhaul services?
>
> i. What alternatives to the merging entities' special access backhaul facilities currently exist, and what alternatives would exist after the merger?
>
> ii. Would the Merger increase the ability of the merging parties to impose exclusive or requirements contracts on purchasers of backhaul services?[118]

Thus, it is clear that issues related to the Internet backbone and content delivery networks are part of the scope of this proceeding. Moreover, as discussed below, the analysis that ORA conducted on these issues demonstrates that the proposed merger's consolidation of the broadband Internet access market greatly effects content delivery networks and will reduce the choices customers have to view content.

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[117] Scoping Memo at 7.

[118] Scoping Memo at 13-14.

1. Because Comcast Has a Near-Monopoly Over Broadband Internet Access, It Can Leverage Its Control Of Broadband Customers In California To Inhibit Competition By OVDs To Its Cable Television Service.

Comcast and TWC broadband Internet access subscribers are on the rise, while their cable TV subscribership has been decreasing.[119] Comcast is a vertically integrated company and it has the incentive and ability to inhibit competition in this area. In essence, Comcast has a disproportionate ability to shape what is and is not available to customers and at what prices.[120] Approval of the merger will only exacerbate these problems.

There is increased availability of video streaming offered by Online Video Distributors (OVDs) over the Internet using a broadband connection.[121] Examples of OVDs are now household names – Amazon, Vudu, Netflix – and they increasingly pose a challenge to traditional cable and broadcast television.[122] Despite this new alternative to Joint Applicant's cable MVPD business, Joint Applicants "still control the critical gateway through which their principal OVD rivals must pass," meaning that Joint Applicants control the pipes and the flow of information to the customers of OVDs like Netflix and Amazon.[123] Because of this, Comcast and TWC are able to inhibit or prevent an OVD's ability to effectively compete against Joint Applicants' core cable television and content businesses.[124] A merged Comcast will be in an even stronger position to

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[119] Exhibit 1, Selwyn Declaration at 101, ¶ 82, Table 21.

[120] *Id.*

[121] *Id.* at 97, ¶ 78.

[122] *Id.* at 97, ¶ 78.

[123] *Id.* at 102, ¶83.

[124] *Id.* at 102, ¶ 83.

foreclose OVD competition to its cable business by its stranglehold on broadband Internet access in California.

A prime example of such behavior that has been in the press in recent months is the Comcast-Netflix dispute. Netflix has accused Comcast of purposefully slowing down the download speed of Netflix content to Comcast customers. This obviously affected end users' ability to use and enjoy Netflix – e.g., a customer's movie will not load all or it will keep pausing or buffering while watching the movie. This could cause customers to drop Netflix in favor of purchasing Comcast on-demand-services, or it may cause customers who had been "cord cutters", *e.g.*, dropping cable in favor of receiving content via their broadband Internet connection, to feel they have no choice but to sign up for a fixed landline cable service such as Comcast.

Netflix was clearly concerned about these possible outcomes and the result of the dispute with Comcast was that Netflix signed a contract with Comcast agreeing to pay an "access charge" for the ability of Netflix to reach Comcast customers, as will be discussed more fully below.[125] The effect of this agreement is to increase Netflix's costs (and therefore, ultimately, increase the prices that Netflix customers pay), impacting Netflix's ability to compete. It also gives Comcast a way to recover any losses it has suffered from cable television "cord cutters" – those individuals who have decided to forgo cable and instead stream content over their Internet broadband connection.[126]

Other ways that Comcast can limit OVD competition includes preventing the use of set-top devices such as Roku and Sony Playstations, which allow consumers to see OVD content, *e.g.*, Netflix streaming, on their televisions via a set-top video streaming device.[127] Also, because Comcast provides both cable television and broadband Internet

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[125] *Id.* at 103, ¶ 84. Netflix entered into the same type of agreement with Verizon "in order to overcome similar congestion and service degradation." *(Id.* at 143, ¶ 119.)

[126] *Id.* at 103, ¶ 84.

[127] *Id.* at 104, ¶ 86.

access to customers and has significant market power over broadband Internet access, Comcast is able to coordinate the pricing of its cable and broadband services to limit the number of "cord-cutters" from dropping cable, and to the extent that consumers do cut the cord on cable, Comcast can recover some of those revenues via its broadband service.[128]

The effect of Comcast's actions not only stifles OVD competition, but also gives advantages to the content production and distribution services of Comcast. As Dr. Selwyn notes: "With a post-merger Comcast serving more than 33% of the US MVPD market, competitive foreclosure targeted at so large a segment of the national OVD market would make it difficult, if not impossible, for rival content providers to compete even in areas not served by the post-merger Comcast entity."[129]

2. Comcast's Control Over the Broadband Internet Access Market Allows It To Control the Content Customers View Over Their Broadband Connection.

Comcast and TWC operate a "two-sided platform" that serves both end-users/consumers (referred to in industry terms as "eyeballs") and content providers, and both of these platforms must pass through a gateway that is controlled by Comcast and TWC.[130] The consumers (or "eyeballs") are able to download and upload content from the Internet and also watch television via their cable service.[131] On the content provider side of the platform, OVDs are given a way to get their content and other services to Comcast's and TWC's customers.[132]

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[128] *Id.* at 106, ¶ 88.

[129] *Id.* at 105, ¶ 87.

[130] *Id.* at 107, ¶89

[131] *Id.* at 107, ¶89

[132] *Id.* at 107, ¶89

Comcast and TWC are able to make a profit off of both sides of these platforms, often for the same exact service, a sort of double charging. The Netflix contract is a prime example of this. Comcast customers already pay for a certain level of service, for example, 50 Mbps download speed. Yet Comcast is also able to charge Netflix for delivery of Netflix's content over Comcast's pipes to a Comcast customer without degrading the delivery of that content. The customer has already paid Comcast to receive service at 50 Mbps, yet, Comcast is able to charge both the customer for the service, and Netflix for the same service.[133] Netflix's additional costs will be passed down to consumers.

The details of the Comcast Netflix "Master IP Backbone Services Agreement" (Netflix Agreement), Attached as Confidential Exhibit 6, reveal the market power that Comcast already exerts *prior to the merger being approved*. In the Netflix Agreement, Comcast agrees to provide Netflix [redacted][135] As Dr. Selwyn notes, "[a]t a minimum, the Comcast agreement constitutes more than [redacted] of Netflix's total pre-tax income, ranging up to [redacted] if Netflix requires additional capacity."[136]

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[133] *Id.* at 158, ¶ 134.

[134] *Id.* at 118, ¶97; Exhibit 6, Comcast Master IP Backbone Services Agreement.

[135] *Id.*

[136] *Id.*

After Netflix and Comcast signed the Netflix Agreement, Netflix download speeds via Comcast's network immediately improved.[137] This cuts against Comcast's claims that there were other reasons for Netflix's service degradation problems; one cannot simply build capacity overnight and have dramatically increased download speeds as occurred with Comcast.[138]

This is just one example of Comcast's pre-merger ability to "control and pace the extent of OVD entry into the video content market."[139] Post-merger, Comcast will be in an even better position to extract rents from OVD providers, and to limit their entry into the market, by virtue of its significantly expanded control of the consumer broadband market. For all of these reasons, OVDs do not represent much of a competitive threat to Comcast's cable business as long as Comcast retains its firm monopoly control of the OVD customers' broadband access service.[140] Moreover, as discussed in Section III(A)(4) above, a California consumer cannot simply switch providers to avoid these types of problems. In most areas of California, there is no competitive alternative to the broadband service Comcast offers, switching service providers is logistically challenging and costly, and other large ISPs are also able to, and indeed do, engage in the same behavior and tactics as Comcast.[141]

Because Comcast is also a content provider itself (Comcast owns NBCUniversal (NBCU), which controls a large portfolio of video content, and it competes with OVDs that provide similar or identical content over the Internet), it has "an additional incentive to degrade rival content providers' customer experience and/or to increase the OVDs'

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[137] *Id.* at 145, ¶ 120.

[138] *Id.* at 145, ¶ 120.

[139] *Id.* at 119, ¶97.

[140] *Id.* at 119, ¶97.

[141] *Id.* at 144, ¶ 119.

costs of accessing their own 'eyeball' customers via the Comcast broadband access network."[142]

Indeed, the implications of the consolidation of the broadband Internet access market in California (and nationally) on the cable television market and competing OVDs further demonstrates that the proposed merger is not in the public interest because it will not promote the deployment of advanced communications capability in California. Rather, the evidence shows that the proposed merger will not only stifle and dampen competition in the broadband Internet access market, it will also have a negative impact on the cable television and the competing OVD market. This will ultimately limit consumer choice and translate into higher prices for consumers in California as Comcast will be in an even better position to control the pipes and the flow of content from 84% to [redacted] of California consumers.

3. History Repeats Itself: The Netflix Agreement And Reciprocal Compensation.

Comcast has publicly characterized the Netflix Agreement as a "'peering arrangement' for the exchange of traffic under which the sender of more traffic than it receives (*i.e.*, 'out of balance' traffic) is required to pay the recipient for termination to its end users."[143] What Comcast appears to be doing is applying an intercarrier reciprocal compensation regime onto the process of exchanging traffic over the Internet.[144] This is inconsistent with the FCC's efforts over the past several years to reform intercarrier reciprocal compensation.

The 1996 Telecommunications Act imposed various duties on local exchange carriers (LECs) that were designed to facilitate competition in local telephone service. One such duty is that each LEC is required to "establish reciprocal compensation

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[142] *Id.* at 113-114, ¶ 94.

[143] *Id.* at 119, ¶ 98.

[144] *Id.* at 119, ¶ 98.

arrangements for the transport and termination of telecommunications."[145] Reciprocal compensation is a mechanism by which telecommunications carriers compensate one another for the costs associated with the transport and termination of calls that originate on one LEC's network and terminate on another LEC's network. Typically, for carriers (such as incumbent local exchange carriers (ILECs)) that did not directly compete, a "bill and keep" arrangement, where each carrier agreed to complete the inbound calls for the other carrier without payment, seemed to work as traffic was "in balance".

In the case of competitive local exchange carriers (CLECs), however, traffic was not in balance and so the carrier that sent more traffic than it received would pay the other carrier for terminating calls.[146] For long distance and toll-free calls, the person placing the calls would pay his interexchange carrier (IXC) for the entire call, and the IXC would pay "access charges" to both the originating and terminating local carriers. Whether one paid reciprocal compensation or IXC "switched access charges" depended on the geographic locations of the calling and called party.[147] The rates set under both the reciprocal compensation and switched access charges regimes "were often arbitrary and unrelated to the actual costs involved . . . The resulting economic distortions engendered highly inefficient serving arrangements, gaming, and literally several decades of regulatory proceedings at both the federal and state levels and appellate litigation."[148]

The FCC adopted a plan in 2011 for "Comprehensive Intercarrier Compensation Reform" and is now using fixed monthly payments that the end user pays. Under the 2011 FCC Ruling, "the legacy 'access charges' and local 'reciprocal compensation' regime is in the process of morphing into a so-called 'bill-and-keep' approach under

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[145] 47 U.S.C. § 251(b)(5).

[146] Exhibit 1, Selwyn Declaration at 123, ¶ 100.

[147] *Id.*

[148] *Id.* at 125, ¶ 102.

which both the originating and termination parties pay their own local service provider for the switched access connections between their end user access line and the IXC."[149]

Comcast's exertion of its already significant market power to strong-arm Netflix to sign the Netflix Agreement that essentially replicates much of the market distortion and problems of the intercarrier compensation regime that the FCC finally resolved after 15 years should cause one to pause. With regard to the Netflix Agreement, Comcast "is already being compensated *by its own end user customer* for carrying traffic requested by the end user customer from Netflix or other edge providers *at the data rate being purchased and paid for by the end user customer* between the point at which the OVD or its Content Delivery Network – the Internet counterpart of an IXC – hands off the traffic to Comcast (at the 'edge' of a Comcast local broadband distribution network) for routing to the Comcast end user 'eyeball' []."[150] Thus, because it already has such a significant share of the broadband Internet access market, Comcast is able to negotiate terms to receive revenues that duplicate the revenues Comcast is receiving from its end user customers. And because Netflix, an "edge provider," will have to pass along the costs of entering into the Netflix Agreement with Comcast to its customers, Comcast customers who also use Netflix streaming pay twice for the same service.

The fact that Comcast has been successful in imposing these duplicative charges on customers demonstrates that Comcast already has a monopoly relationship with its customers (the "eyeballs").[151] If the merger is approved, Comcast will be in the position to exert even greater market power in requiring that content delivery networks and other edge providers sign contracts, such as the Netflix Agreement, and in dictating the terms of such agreements.

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[149] *Id.* at 123, ¶ 102.

[150] *Id.* at 126, ¶104 (italics in original).

[151] *Id.* at 132, ¶ 110.

4. A Greater Footprint Will Give Comcast More Opportunities To Use Its Control Of Content To Raise Costs for Rivals And To Lessen the Value Of Any Competing Services, Resulting In Higher Costs For Consumers And/Or Less Consumer Choice.

The Joint Applicants contend that because they serve non-overlapping geographic areas and do not compete with one another, their merger would have no adverse effect upon competition within each of their respective existing footprints. Joint Applicants' claim is without merit both as to the consumer side and the content side of the Joint Applicants' two-sided market. By more than doubling the size of its footprint in California, Comcast will have more opportunities to use its control of content to raise costs for rivals and to lessen the value of any competing services. This will result in higher costs for consumers and/or less consumer choice in California.

To illustrate this point, Dr. Selwyn discusses the FCC's requirement for cable television (TV) operators to carry the signal of any local TV station (*i.e.*, one whose primary broadcast coverage overlaps part or all of the cable TV operator's serving area) that elects "must carry" status.[152] If the TV station foregoes "must carry" treatment, it is then free to negotiate a "retransmission" agreement with the local cable TV operator(s) under which the latter will pay the broadcast station for the right to retransmit its signal.[153] Retransmission negotiations involving local broadcast television stations or other high-value content are often challenging and lengthy, and "occasionally result in economic warfare whereby one of the parties attempts to pressure the other by unilaterally cutting off, or threatening to cut off, [end-user customer] access (*i.e.*, either the station refuses to allow its signal to be carried by the cable operator, or the cable operator refuses to carry the signal at issue)."[154] CBS and satellite TV provider Dish

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[152] *Id.* at 150, ¶ 123.

[153] *Id.*

[154] *Id.*

Network have been engaged in precisely this type of showdown for the past several months.[155] Another recent case in point involves the broadcast rights to the Los Angeles Dodgers games.

TWC has exclusive rights for local distribution of Los Angeles Dodgers games on behalf of SportsNet LA, an entity created by the Dodgers ownership.[156] TWC customers have access to Dodgers games over their TWC cable service, but in order for customers of other video services with which TWC directly competes (*e.g.*, DirecTV, Dish Network, AT&T U-Verse) to view Dodgers games, their video service provider must negotiate an agreement with TWC.[157] While TWC has offered such agreements to its competitors, TWC's competitors claim that the prices TWC is requesting are unreasonably high, and no competitor has signed an agreement with TWC.[158] As a result, the only way to see Dodgers games in the Los Angeles area is to sign up for TWC.[159] One cannot even view or stream the games live online at mlb.com in the Los Angeles area.[160] Approximately 70% of households in Southern California do not have access to Dodgers games.[161] As Dr. Selwyn notes, TWC's "tactic has operated to severely disadvantage TWC's competitors either by increasing their costs (if they agree to pay the price being asked) or by degrading their service (by preventing their customers from

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[155] *Id.*

[156] *Id.* at 151, ¶ 124.

[157] *Id.*

[158] *Id.* (citation omitted).

[159] *Id.* TWC did strike a deal in September with a local Los Angeles broadcast station to show the last six Dodgers games of the season (of the near-100 game season). (https://tv.yahoo.com/news/los-angeles-dodgers-time-warner-cable-agree-air-202000334.html). Also, customers of Bright House, a TWC subsidiary, can also see Dodgers games.

[160] You can only watch the Dodgers on a delay via mlb.com if you are in the Los Angeles area.

[161] LA Dodgers: A good team that can be hard to watch. http://www.cnbc.com/id/101714339#.

watching Dodgers games)."[162] Indeed, sports games are often a driver in determining which service a customer may choose. If the only way to see Dodgers games is to sign up for TWC, then that severely inhibits whatever competition may exist in the Los Angeles market.

Post-merger, when Comcast is passing census blocks with 84% of housing units in California, and [redacted] of homes in California, this type of market power could lead to disastrous results. Comcast owns NBCU, which controls, in addition to the NBC television network, a wide array of cable services. Comcast will be in the position to raise retransmission fees to affiliated cable TV systems (which are a "left pocket-to-right pocket" transactions) "that have no net effect upon the parent company's bottom line."[163] The parent company can raise the costs of rival video distributors' and/or degrade the quality of their retail service (*i.e.*, withholding content desirable to customers) "should these competitors refuse to pay such elevated retransmission charges."[164]

Pre-merger, Comcast passes only about 33.7% to [redacted] of Californians and therefore, is not in as good of a bargaining position pre-merger to extract additional dollars in the form of retransmission fees because it needs to bargain and negotiate with approximately [redacted] to 66.3% of the cable market in California.[165] If Comcast attempted to raise retransmission fees now, pre-merger, in order to corner the market on content for customers in California, then cable operators that operate outside of Comcast's footprint (TWC, Verizon and AT&T) would be less likely to agree to pay those fees and carry NBC and other Comcast-owned content.[166] Post-merger, when Comcast more than doubles it size and passes between 84% and [redacted] of households and

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[162] *Id.* (citation omitted).

[163] *Id.* at 152, ¶ 125.

[164] *Id.*

[165] *Id.* at 153, ¶ 126 ; 13, ¶ 12.

[166] *Id.* at 153, ¶ 126.

homes in California, Comcast will be in a much better bargaining position to obtain high retransmission fees.[167] As Dr. Selwyn notes, the percentage of households or homes that Comcast-TWC might conceivably sacrifice by overcharging for retransmission would drop multi-fold, from the current [redacted] or 66.3% to [redacted] or 16%.[168]

E. Joint Applicants Have Not Demonstrated That the Proposed Merger Would Produce Efficiencies Or Infrastructure Investment And Upgrades That They Could Not Otherwise Achieve On Their Own.

The Scoping Memo asked the following questions: "Would the merged entity result in greater buildout to unserved and underserved areas in California as well as to California schools and libraries?"; and "What Merger-specific and verifiable efficiencies would likely be realized by the merger?"[169]

Joint Applicants contend that the proposed merger "will accelerate the deployment of more advanced and reliable broadband services to more consumers across the country, including in California . . . The Transaction will speed the network upgrades to the acquired TWC systems."[170] Joint Applicants also claim that "post-transaction, the combined company will be able to *consider* greater build outs of network facilities, with CASF support, to unserved and underserved areas in the State."[171] Joint Applicants assert that "the additional investments and innovations that will be needed to deliver the services consumers are demanding in the future will be more effectively and efficiently achieved by the combined company than either company could achieve alone."[172] Lastly,

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[167] *Id.* at 153, ¶ 126 ; 13, ¶ 12.

[168] *Id.*

[169] Scoping Memo at 14.

[170] Joint Applicants' Brief at 75-76.

[171] *Id.* at 76 (citations omitted) (emphasis added).

[172] *Id.* at 76.

Joint Applicants highlight that the proposed merger will result in better and more convenient Wi-Fi both inside and outside the home.[173]

Comcast claims that it is "uniquely well-positioned to apply [] [its] expertise here" because it has "already experience the 'learning curve' for a complex, system-wide digital transition project."[174] Comcast's argument is without support. Comcast even admits that "TWC has started to convert its systems to all-digital."[175] Given that both Comcast and TWC are the largest broadband Internet access providers in California, and that they both have roughly the same number of subscribers (TWC currently passes more housing units in California), this line of reasoning cannot be justified.[176]

While Comcast asserts that the merger will make it more likely that it will *consider* building out in unserved areas, it is clear that this statement is mere puffery. Comcast is not making any commitments or promises. It states only that if the merger is approved, it is more likely to *consider, i.e*., think about, whether to build out in unserved areas. As previously discussed, the lack of competition in the broadband Internet access market for the services that Comcast provides would, in all likelihood, reduce further build-outs by the merged entity in unserved areas.[177] As noted by FCC Chairman Wheeler, competition is the major driver for infrastructure investment in broadband.[178] As FCC Chairman Wheeler notes:

> The underpinning of broadband policy today is that competition is the most effective tool for driving innovation,

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[173] *Id.* at 83.

[174] *Id.* at 76 (citations omitted),

[175] *Id.* at 75. *See also* Exhibit 1, Selwyn Declaration at 15, ¶ 13 , Table 1.

[176] *See* Exhibit 1, Selwyn Declaration at 15, ¶ 13 , Table 1.

[177] *See Id*. at 21-32, ¶¶ 19-26.

[178] *See* Prepared Remarks of Chairman Wheeler, "Facts and Future of Broadband Competition" presented at the 1776 Headquarters, Washington, D.C., September 4, 2014. http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition

> investment, and consumer and economic benefits. Unfortunately, the reality we face today is that as bandwidth increases, competitive choice decreases . . . The simple lesson of history is that competition drives deployment and network innovation. That was true yesterday and it will be true tomorrow. Our challenge is to keep that competition alive and growing.
>
> Today, cable companies provide the overwhelming percentage of high-speed broadband connections in America. Industry observers believe cable's advantage over DSL technologies will continue for the foreseeable future.[179]

The Joint Applicants' have failed to demonstrate that the merger will produce efficiencies that each of the Joint Applicants, particularly Comcast and TWC, could not otherwise achieve on their own.[180] Even if the proposed merger would result in the claimed efficiencies, Joint Applicants have failed to demonstrate that any of these efficiencies will flow through to consumers in the form of lower prices instead of into Comcast's bottom line. In fact, Comcast Executive Vice President David L. Cohen has publicly stated that "We're certainly not promising that customer bills are going to go down or even increase less rapidly."[181]

Moreover, if there are efficiencies that might be achieved through adoption of best practices across the two merging companies, the Joint Applicants offer no evidence that the proposed merger is a prerequisite to the adoption of such best practices, or that these could not be accomplished by each company individually in the absence of the merger. Indeed, the U.S. Department of Justice 2010 *Horizontal Merger Guidelines* provide that "[e]fficiencies that the merging parties are capable of achieving in the absence of the proposed merger cannot be included in the merger evaluation. In addition, any merger-

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[179] *Id.* at 1, 3.

[180] Exhibit 1, Selwyn Declaration at 171-176, ¶¶ 152-154.

[181] http://www.nytimes.com/2014/02/15/business/media/as-services-expand-cable-bills-keep-rising.html?_r=0

specific gains cannot be the result of anticompetitive conduct, such as cost savings arising from reduction in rivalrous conduct."[182]

In their Brief, Joint Applicants write: "Comcast has been a leader in rolling out in-home Wi-Fi gateways that give customers the nation's fastest wireless speeds and excellent performance over their home wireless network . . . As of September 2014, Comcast has already deployed these gateways to approximately eight million households, where consumers now enjoy faster speeds and better performance over their home wireless network."[183] Comcast notes that the merger will benefit consumers in California because it will deploy these "home Wi-Fi gateways" to the current TWC service territory.

What Joint Applicants fail to discuss in their Brief are the myriad concerns and problems with its "home Wi-Fi gateways" which include: (1) privacy; (2) security; (3) service degradation; (4) energy use; (5) notification to consumers; and (6) lack of customer authorization.

On December 4, 2014, a class action lawsuit was filed against Comcast concerning the home Wi-Fi gateways, *Grear v. Comcast,* Case No. 4:14-cv-05333, U.S. District Court for the Northern District of California. The summary of the Class Action Complaint, attached as Exhibit 16 states:

> 1) Americans are increasingly turning to Wi-Fi wireless networks to connect their smartphones, tablets, and laptops to the Internet. In light of this fact, Comcast saw an opportunity to compete with cellular carriers such as AT&T and Verizon – while the Company does not have an infrastructure of cellular towers, it does have millions of residential customers dispersed across the United States who already pay Comcast to supply Internet access to their homes ("Xfinity Internet Service"). As part of that service, Comcast leases to its customers wireless routers that create home Wi-Fi networks. These households,

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[182] Selwyn Declaration at 174, ¶ 153 (citations omitted).

[183] Joint Applicants' Brief at 83 (citations omitted).

Comcast realized, could be used as infrastructure for a national Wi-Fi network.

2) Within the past several years, Comcast began supplying its residential customers with new wireless routers, equipped to broadcast not only its customers' home Wi-Fi network signal, but also an *additional* Wi-Fi network signal that was available to the *public*. Comcast then began selectively activating these routers to broadcast the secondary network – the public "Xfinity Wi-Fi Hotspot" – in various markets across the country, with the goal of enabling 8 million Xfinity Wi-Fi Hotspots by the end of 2014.

3) Comcast does not, however, obtain the customer's authorization prior to engaging in this use of the customer's equipment and Internet service for public, non-household use. Indeed, without obtaining its customers' authorization for this additional use of their equipment and resources, over which the customer has no control, Comcast has externalized the costs of its national Wi-Fi network onto its customers. The new wireless routers the Company issues consume vastly more electricity in order to broadcast the second, public Xfinity Wi-Fi Hotspot, which cost is born by the residential customer.

4) Additionally, this unauthorized broadcasting of a secondary, public Wi-Fi network from the customer's wireless router degrades the performance of the customer's home Wi-Fi network.

5) Finally, the unauthorized broadcasting of a secondary, public Wi-Fi network from the customer's wireless router subjects the customer to potential security risks, in the form of enabling a stranger who wishes to access the Internet through the customer's household router, with the customer having no option to authorize or otherwise control such use.

6) Comcast's actions violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; and the Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502. Plaintiffs seek injunctive and declaratory relief, restitution, and monetary damages, individually and on behalf of (1) a national class of all households in the United States that have subscribed to

> Comcast's Xfinity Internet Service and that, as a result, have leased wireless routers that broadcast an Xfinity Wi-Fi Hotspot; and (2) a California subclass of all households in California that have subscribed to Comcast's Xfinity Internet Service and that, as a result, have leased wireless routers that broadcast an Xfinity Wi-Fi Hotspot.[184]

Joint Applicants raised the Wi-Fi Hotspot issue in their Brief for the first time in this proceeding. ORA has had no opportunity to conduct discovery on this important matter. As *Grear v. Comcast* notes, the home Wi-Fi gateways implicate a number of key issues that merit further examination. Of particular interest to ORA is the potential impact that home Wi-Fi gateways have on the degradation of service quality, the lack of customer notification, and privacy issues. ORA notes that customer privacy is a key issue in the CPUC's Order Instituting Investigation against Comcast, I.13-10-003, which is considering whether the CPUC should impose a fine or order other remedies for Comcast's apparent actions in violation of privacy-related laws.[185]

F. Lowest Income Households Most Vulnerable To Future Rate Increases.

Providers of broadband services at each speed tier are focusing their resources on more affluent areas and customers. Dr. Selwyn found that "*the weighted average median household income is consistently greater for every speed tier in census blocks where one or more competitors offer service than for those census blocks where the Joint Applicants are the only source broadband access at that speed.*"[186]

Dr. Selwyn determined that TWC, Charter and Bright House currently serve areas with much lower average household incomes than those Comcast serves.[187] He also noted

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[184] Exhibit 16, *Grear v. Comcast,* Case No. 4:14-cv-05333, U.S. District Court for the Northern District of California, Class Action Complaint (citations omitted).

[185] I.13-10-003 at 1.

[186] Exhibit 1, Selwyn Declaration at 73-74, ¶ 61 (emphasis in original).

[187] *Id*. at 79, ¶ 64.

that TWC, Charter and Bright House have significantly lower broadband subscriber penetration rates than Comcast. In addition, where there are competitors to Joint Applicants, those competitors appear to be serving more affluent customers.[188]

This raises a public policy issue for the CPUC as it has been committed to eliminating the "digital divide" in California.[189] As Dr. Selwyn notes:

> Actions that would authorize combinations of service providers that result in increased market concentration and vertical integration, enhancing the ability of the remaining dominant providers to extract economic rents at both the end user and content provider sides of the broadband access market, are at odds with Congressional objectives, as set out at Section 706, of assuring universal access to advanced telecommunications capabilities for all Americans.[190]

G. The Impact Of the Merger On Consumer Choice For Voice Services.

The proposed merger will also likely effect consumer choice for residential voice services. While Joint Applicants focus on business services, ORA is particularly concerned about the impact of the proposed merger on low income residential customers. These are the consumers that tend to purchase standalone voice services. These also are the consumers that are less likely purchase broadband services than are more affluent customers.[191] Yet it is more and more difficult to purchase standalone telephone service as consumers are pushed toward bundles, where Joint Applicants make more of a profit. And there is no requirement in California that entities offer standalone voice service, unless they are offering traditional wireline service. While it is unclear how much the price of voice services is when it is packaged as part of a bundle, the price of cable and broadband services has been steadily increasing, and therefore, the bundled prices have

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[188] *Id.* at 80, ¶ 66.

[189] *See e.g.*, Pub. Util. Code §§ 281, 709(d).

[190] Exhibit 1, Selwyn Declaration at 82, ¶ 68.

[191] *Id.* at 153, ¶ 128.

also increased "disproportionately to the economy as a whole . . . ."[192] Joint Applicants have not provided any evidence concerning the impact of the proposed merger on low-income households that, due to limited disposable income, may choose not to purchase double/triple play packages.

H. Joint Applicants' Claim That Post-Merger, Comcast Is Willing To Adhere To Open Internet Principles, Rings Hollow.

While Joint Applicants state in their Brief that net neutrality is not at issue in these consolidated proceedings, they nonetheless raise the issue in one of their Declarations that was produced specifically for the CPUC (not the FCC) review. To the extent the Joint Applicants raise the issues as it relates to the proposed merger of Comcast and TWC and related transactions, ORA briefly responds here.

Joint Applicants attempt to quell concerns about the impact of the proposed merger on competition in Comcast's last-mile networks by providing Comcast's "willingness to adhere to Open Internet principles—which prevent selective degradation of particular traffic in the last mile—effectively eliminate[ing] any concern about harm in the last mile."[193] This statement is misleading at best. As part of the conditions imposed as a result of the merger between Comcast and NBCU, Comcast committed to adhering to the FCC's 2010 Open Internet Order. However, that commitment expires in 2018, and it is unclear what would happen to that commitment if the FCC adopts different Open Internet Rules prior to 2018.[194]

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[192] *Id.* at 153, ¶ 129; *see also* Selwyn Declaration at 161-167, ¶¶ 138-144.

[193] Joint Applicants' Exhibit D, Israel, Keating and Weiskopf Declaration at 41, ¶ 54.

[194] *Memorandum and Order*, 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 10-56, FCC11-4, 26 FCC Rcd 4238, 4275, ¶ 94 (2011); http://blogs.wsj.com/corporate-intelligence/2014/04/08/comcast-if-you-support-net-neutrality-let-us-buy-time-warner-cable/

While the FCC is currently considering adopting new Open Internet Rules (not "principles, as Comcast characterizes them), it is unclear what the end result will be, and if, indeed, any Open Internet Rules will ultimately be adopted. Under the various plans that the FCC has circulated thus far, Comcast will be able to pick and choose which traffic goes in fast lanes. Further, the FCC's proposed rules provide that remedies for violations would occur long after the harm to consumers is done, if at all.[195] Moreover, Comcast has opposed strong Open Internet Rules, as noted in its appeal of the FCC's original Open Internet Rules.[196] Comcast's claim of commitment to Open Internet Principles should not hold any water, to the extent the CPUC believes it is relevant to the instant proceedings.

As previously stated, the proposed merger will reduce competition on the broadband Internet access market in California at an unprecedented level. The ramifications of Comcast and TWC merging into the largest provider of broadband Internet access both in California and nationally extends well beyond broadband. The merged entity also will likely have a negative impact on the prices for residential voice services, particularly for low-income consumers.

V. Service Quality Of Broadband Communications.

This merger bodes poorly for broadband customers because it represents a merger of companies that have objectively poor track records in providing customer service. In addition, particularly in the case of Comcast, the acquiring entity in this merger and the one likely to establish the resulting corporate culture, there does not seem to be any concern about identifying problems or remedying them. The approaches taken by the

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[195] *See In the Matter of Protecting and Promoting the Open Internet*, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 GN Docket No. 14-28, adopted May 14, 2014.

[196] *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *see also* Reply Comments of Comcast at 9-26, *In the Matter of Protecting and Promoting the Open Internet*, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 GN Docket No. 14-28, adopted May 14, 2014.

Joint Applicants in describing broadband service quality are very different from the analysis undertaken by ORA staff.

In both their Brief and appended declarations, the Joint Applicants have done two things. First, they continue to argue that "Section 706(a) of the Telecommunications Act of 1996 does not authorize this Commission to review broadband-related aspects of the Transaction."[197] At this point they have gone beyond their arguments about regulatory jurisdiction and suggest the CPUC cannot even "review" broadband elements. That is clearly erroneous.

On the substantive level, out of cautious regard for the risk that perhaps ORA is correct and the CPUC does have jurisdiction not only to review but to evaluate this merger based on an exercise of that jurisdiction over broadband and other advanced communications capability, the showing of the Joint Applicants has consisted of providing a corporate public relations package without providing detailed plans and commitments of direct benefit to consumers. According to Comcast, things are terrific, new products and services are being rolled out all the time, everyone is happy. For example the Joint Applicants state:

> The proposed transfers of control will accelerate the deployment of more advanced and reliable broadband services to more consumers across the country, including in California. While TWC has started to convert its systems to all-digital, Comcast has already transitioned to a fully digital network, has rolled out some of the fastest Internet speeds and the largest Wi-Fi network in the nation and is ready to implement next-generation technologies that will further improve the performance, reliability, and security of its network.[198]

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[197] Joint Applicants' Brief at 75.

[198] *Id.* at 75, citing to Portfolio Declaration.

The Joint Applicants go on to describe the billions they are investing, the new speeds they are achieving, the nation-wide Wi-Fi system they are creating[199] and other new and wonderful things. The Declaration of Shane Portfolio, Exhibit B to the Joint Applicants' Brief, discusses at length billions of dollars of investment, speed, the enhanced ability to "compete" resulting from their larger size and other system attributes. Some of those may be assets and some, as discussed elsewhere in this brief, may be very troubling assets for a merger of this size. The Portfolio Declaration misses the mark when discussing service quality and reliability of broadband. The point is, what is likely to happen to customer service as a result of this merger? On that topic, other than its rosy descriptions of happy customers with great technology, the Joint Applicants' Brief and its declarations are totally lacking.

As presented in Exhibit 3 of this this brief, the Declaration of Adam J. Clark (Clark Declaration), ORA has sought out and analyzed the objective data – to the extent such data is available. ORA was successful in obtaining data from independent survey organizations such as J.D. Power and Associates (provided by TWC) and the American Customer Satisfaction Index (publicly available). The results were much less successful when asking the Joint Applicants how they measure their service to their customers.

Particularly in the case of Comcast, the questions evoked puzzled and puzzling answers, noting that there were no standards or metrics for ascertaining how well they were servicing their customers. Obviously if you have no standards, they never get violated or missed. If they never get violated or missed, life must be good and everyone is happy. As noted in the Clark Declaration:

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[199] *Id.* at 84-85. As discussed in Section IV above, this relies on allowing Xfinity customers [also known as total strangers] to use a "host's" [also known as 'you'] Wi-Fi "without affecting the hosts customers service and without needing the host's Wi-Fi password." If you are the least bit skittish about internet security and having total strangers use your personal Wi-Fi without asking, this benefit may give you some pause.

> ORA asked the Joint Applicants to provide their definition of "quality of service" as it pertains to broadband services, and any related metrics or internal processes. Bright House raised various objections to the questions and did not provide an answer. Comcast indicated the company does not define the term "quality of service", and stated:
>
> > For broadband services, Comcast does not provide a "quality of service" for any Internet traffic on its Internet access service – all traffic delivered over XFINITY Internet service is delivered on a 'best efforts' basis. Comcast, however, ensures that it provisions sufficient capacity for its Internet access service to ensure that it delivers the speeds it advertises.[200]

But the objective data shows that consumers are not happy. In fact large numbers of customers are unhappy, and that unhappiness has led Comcast and Time Warner to excel at being near the bottom of virtually every independent evaluation of service quality for cable broadband providers. It has also led many of those customers to write countless letters opposing this merger to the FCC. It has led major consumer organizations to oppose this merger at the FCC and at the CPUC. Making a poorly performing company even larger is not a recipe for success, but instead, continues to put consumers at risk for continued poor quality of service.

ORA's analysis and findings regarding broadband service quality are detailed in the Clark Declaration. In summary they show the following:

- The Joint Applicants provided limited data to support the claim that the proposed merger will maintain or increase the quality of their broadband services in California. There is limited evidence to suggest that the proposed network upgrades are sufficient to overcome serious deficiencies in the overall quality of their broadband services. Furthermore, the Joint Applicants have not offered

[200] Exhibit 3, Clark Declaration at 16-17.

substantial evidence that they are not able to achieve the same (or greater) level of network quality improvements on their own. The Joint Applicants provided little to no supporting data or documentation to quell serious concerns regarding the currently substandard quality of their broadband services. As such, consumers may be at risk of experiencing a decline in the quality and reliability of broadband services.

- The Joint Applicants' receive poor "customer satisfaction" scores and ranks from third party rating agencies. Comcast and TWC do not compare favorably to other broadband service providers and consistently earn substandard marks. In fact, according a University of Michigan study, Comcast and TWC are the lowest rated companies compared to not only Internet service providers, but across all industries and companies included in the study.
- The Joint Applicants receive customer complaints on various aspects of their broadband service, from [redacted]. There has been an upward trend in the number of complaints to the Joint Applicants, and the Joint Applicants have not provided evidence to demonstrate how they will improve on their services, and reduce the number of customer complaints post-merger. Most concerning, however, is the fact that Comcast escalated [redacted] the number of complaints (per broadband connection) as compared to TWC. If Comcast acquires TWC, there is a risk that the merged entity will adopt less effective quality assurance processes and protocols than what TWC currently employs today.
- Comcast takes [redacted] than TWC to complete broadband installations. Comcast provided limited evidence that it will improve broadband installation service quality, or even preserve the status quo. Furthermore, neither Comcast nor TWC completes a satisfactory percentage of new broadband service orders, as both fell short of the 95% benchmark for "commitments met."
- The Joint Applicants provision broadband services that experience outages impacting a significant number of customers in California. The effects of these outages are

> concerning given Comcast's expansion as a broadband service provider in California. Despite the evidence that Comcast's broadband services experience frequent outages in California, Comcast claims that it does not track broadband outages in the State. TWC and Charter, on the other hand, do track broadband outages in California.[201]

One can look at the detail of each of these topics. The Clark Declaration is fact-based; it provides the data collected from the Joint Applicants, to the extent available, as well as from independent survey organizations. A few highlights are appropriate to note here, however.

In J.D. Powers 2014 Residential Internet Service Provider Satisfaction Study – West (the one of most interest to California), Xfinity (the Comcast Service) ranked seventh among the nine largest companies, achieving the lowest available scores in [redacted] of the [redacted] categories. Time Warner Cable was slightly above ([redacted]), while Charter was closer to the top ([redacted]). [202] Looking back over a longer period (2009-2014), "In five of the last six years, J.D. Power's studies assigned Comcast and Charter Communications [redacted] for Overall Customer Satisfaction. TWC failed to earn [redacted] for overall customer satisfaction in each of the six years from 2009-2014."[203]

While Comcast and others show a rise in their raw scores as shown in Figure 2 of the Clark Declaration, this is partially a product of J.D. Power and Associates' recalibration of the rating scale, not necessarily a sign of improvement; thus the overall results remain very problematic.[204]

Things are perhaps even worse when considering the American Customer Satisfaction Index. There Comcast, TWC and Charter "received the lowest scores of all

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[201] *Id.* at 4-5.

[202] *Id.* at 10.

[203] *Id.* at 10-11.

[204] *Id*. at 8.

Internet service providers in the study" and their scores went down from 2013-2014. This is the worst of a bad situation since ACSI "ranked the Internet service sector, as a whole, the worst performing of all 43 sectors tracked by the index." [205] ACSI also noted that, in general, things get worse, not better after mergers. They said:

> Mergers and acquisitions have a generally negative effect on customer satisfaction, particularly among service industries. ACSI-measured service companies that have engaged in frequent, large acquisitions typically experience significantly lower ACSI scores in the period following a Merger when the 'customer as asset' often takes a backseat to reorganization and consolidation via cost cutting.[206]

While this is certainly not Comcast/TWC merger specific, it raises particular flags when the merging entities in question are already starting off with problematic customer service issues.

As the Clark Declaration notes, TWC and Charter both have existing procedures and/or targeted benchmarks for the quality of their broadband services.[207] While the Clark Declaration took a careful look at Comcast's representations to the FCC about the upgrades it was undertaking to "transform the end-to-end customer experience," these statements were given limited weight due to the dearth of any available information on internal service quality metrics and processes.[208] Making glowing statements is easy; measuring their value or effectiveness is tougher.

The Clark Declaration also looked at a variety of common customer problems to the extent information was available or Joint Applicants were willing to provide. This

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[205] *Id*. at 12; citations there to original study.

[206] *Id.* at 14 (citing ACSI. *Key ACSI Finding*. ACSI, LLC. See, http://www.theacsi.org/about-acsi/key-acsi-findings).

[207] *Id.* at 17 and 20 and Attachment 2 to Clark Declaration.

[208] *Id.* at 19.

included customer complaints and their trends, service installation issues and broadband service outages. As noted, in some cases the individual Applicants did not track data or did not track it until it reached a certain level of seriousness (*e.g.*, only complaints that were "escalated") or only tracked complaints that went to third parties such as the FCC or CPUC.[209] While the extensive analysis can be viewed in the Clark Declaration, some trends can be noted.

Comcast only reported on "escalated complaints" (Comcast's term). The number of escalated complaints per 100 broadband connections has grown consistently and significantly from 2010 to the present.[210] Comcast took an average of almost [redacted] days to resolve escalated broadband complaints; some being resolved the same day and some taking much longer.[211] TWC also reported on "escalated" complaints. While Comcast and TWC have somewhat similar numbers of broadband connection in California, Comcast reported twice as many escalated complaints related just to broadband as TWC reported for all its services (telephone, television and Internet access).[212]

When asked by ORA about post-merger changes for handling customer complaints, Comcast said it was "in a very preliminary state" and "operational plans in California have not yet been developed."[213]

In terms of service installation, Comcast took almost [redacted] days on average to install new broadband service in California; TWC reported it took just over [redacted] days.[214]

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[209] Recent press coverage has also given some complaint information. Complaints filed with the Better Business Bureau (BBB) against Comcast in the last three years: 31,980. Against AT&T in same period, AT&T having 3 times as many customers: 22,332. Against Comcast at the FCC in the last 5 years: more than 16,000. Against Charter in all of 2013: 300. Troy Wolverton, Mercury News, December 5, 2014.

[210] Exhibit 3, Clark Declaration at 23.

[211] *Id*. at 24.

[212] *Id.* at 26.

[213] *Id*. at 31.

Finally, on broadband outages, Comcast said it did not have California-specific data[215] although some information could be gleaned from public sources. Once again, how can you tout the quality of your service when you have no measurement of it? By contrast TWC was able to provide details on its minutes of interruptions, their durations, whether affecting residential or business customers and the causes.[216]

There is more data and analysis in the Clark Declaration. The pattern is similar. The issue is not about service offerings, but how well are those offerings deployed, how does a company handle installations, outage or other operational complaints, billing disputes and generally take care of ensuring their customers are getting the services to which they subscribed and are otherwise handled to customers' satisfaction. It does not matter how exotic or technologically-advanced your car is if it spends much of its time in the repair shop rather than on the road.

The Joint Applicants do not give us much information on those topics. Comcast, in particular, seems satisfied to tout all the good stuff it is rolling out. But when it comes to its customer satisfaction about the quality of service, it has very little to report. ORA's investigation appears to have found the reason for that – Comcast does not take any reasonable steps to ascertain its quality of service.

In fact, Joint Applicants give very little information on those topics. Neither their Brief nor their declarations devote so much as one page to objectively indicating how well they service their customers various operational, billing and other needs either on a stand-alone basis or by comparison with other companies. As ORA declarant Adam Clark shows, gathering such data, from the Joint Applicants or independent sources shows they generally perform poorly.

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[214] *Id*. at 33-35.

[215] *Id.* at 84.

[216] *Id.* at 39-41.

VI. Service Quality Of Voice Communications.

Voice service quality is of critical importance. Not only is it essential for communications generally but it is the critical link for emergency services through use of 911. If the voice line is out, 911 service is not functional.[217]

In a similar vein to the discussion of service quality for broadband, this merger is likely to create challenges for voice communications customers. It is similar in that the same approaches and attitudes of the various Joint Applicants exist here as in the case of broadband. Comcast, acknowledged to be the prevailing company post-merger, has the most casual view toward service quality and reliability. And, as noted previously, the CPUC has observed that, "it is more likely that the service quality orientation of the larger acquiring entity will cause a cultural change in the acquired company."[218] As described in the Declaration of Dr. Ayat Osman, Exhibit 2 to ORA's brief (Osman Declaration), the Joint Applicants other than Comcast concur. When asked about how some elements of service quality will be handled post-merger or their plans for particular programs, the response is generally that Comcast will determine that.[219]

The Joint Applicants appear content to make positive pronouncements. "In local markets for residential voice services the transfer of control will allow the combined company to draw on the best aspects of Comcast's and TWC's robust and innovative voice services, creating best-in-class offerings that improve the quality of service for California customers. The transfer of control will likewise improve the quality of

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[217] This may change with the rollout of text-to-911, now being implemented at the state and federal levels, but still in early stages of deployment with no specific target date for completion. Further, those who do not have wireless service or do not text could not avail themselves of that option.

[218] In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc.(MCI) to transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI, D. 05-11-029, November 18, 2005 at 87.

[219] *See, e.g.*, Osman Declaration at 7-8.

business-class voice and data transport services[220] in those local markets."[221] They add that "Comcast has proven to be an industry leader in continuously developing, deploying, and improving a wide range of technologies and services for its customers, including voice related data transport offerings."[222]

The Joint Applicants go on in describing all the various services, offerings and new technologies they are making available to their customers.[223] They talk at length about how Comcast will work to improve service quality and make upgrades for TWC,[224] implying that they will bring TWC up to their standard.[225]

In addition, while Comcast and TWC have each made inroads within their separate footprints in offering advanced voice and data transport services for local businesses, the companies have generally been unable to serve enterprise, regional and other larger business with multiple locations throughout the State."[226] Finally, they note that "[d]espite recent successes, Comcast and TWC have been largely constrained by their current geographic footprints in competing against ILECs and other incumbent providers for many business customers, …"[227] As is clearly demonstrated elsewhere in this brief, the issue has not been that Comcast is "unable" or "largely constrained," the issue has been that Comcast is unwilling. For all its talk about responding to vibrant

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[220] "Data transport" services as used in the Joint Applicants Brief "refers to the provision of services to business customers in conjunction with business voice offerings. It does not encompass any data transport in the larger 'interconnection' sense…" Joint Applicants Brief at 27, footnote 102.

[221] Joint Applicants' Brief at 8.

[222] *Id.* at 24.

[223] *Id.* at 27-29.

[224] *Id.* at 37.

[225] It is unclear how TWC can be brought up to a standard that Comcast acknowledges does not exist for its service quality.

[226] *Id.* at 4.

[227] *Id.* at 32.

competition, Comcast has gone to great lengths to not compete by moving into TWC's or anyone else's footprint.[228]

The questions which the Joint Applicants fail to answer is what will be different post-merger. What will they do post-merger to avoid the problems of their existing services. Moreover, Joint Applicants do not answer the obvious question. Assuming they believe they will be able to deliver higher service quality post-merger, why it takes the merger to make that happen.

As was the case with broadband, the Joint Applicants' approach to voice services presents a wonderfully expansive public relations assessment of its current situation. They discuss their competition with ILEC and CLEC providers and state: "Both Comcast and TWC have developed and deployed innovative voice services in their respective service areas. …As a result of its high quality of service and superior offerings, Comcast's voice customers have grown to over 11 million today, including over 930,000 in California alone.[229] They contend that the "transfer of control [from the merger] will likewise improve the quality of voice and transport services for California businesses."[230]

Neither the Brief of the Joint Applicants nor the declarations suggest any problems with any of their services nor any challenges with integration. In fact, the only change is the potential to offer their services to customers previously unavailable to them due to their limited footprints.

As is demonstrated by the Osman Declaration, the Joint Applicants have significant challenges with their voice systems and, in many ways, the problems attendant to the Comcast system are the most challenging. As Dr. Osman notes in her Declaration:[231]

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[228] *See* Exhibit 1, Selwyn Declaration at 21-23, ¶¶ 19-20.

[229] Joint Applicants' Brief at 25.

[230] *Id.* at 27.

[231] The "bullets" are derived from the Executive Summary in the Osman Declaration; original

- Customers may face a greater risk of voice service quality and reliability performance degradation if the merger is approved than if it was rejected. Because voice service quality and reliability is essential for public safety, this should be a significant concern.
- While the Joint Applicants assert that "the quality of service provided to California customers will not be adversely impacted by the proposed transaction,"[232] they provide little evidence in their applications to support this claim. Responses to ORA's data requests also provide little supporting evidence that the quality of service will be maintained or improved post-merger.
- When asked about the post-merger plans to address the quality and reliability of voice services, TWC provided its current plans to upgrade its network and customer service process. Charter provided its current plans to increase its minimum Internet speeds. It is unclear if these current plans will proceed since TWC contends that post-merger plans for improving service quality and reliability are the responsibility of the acquirer, Comcast.
- Comcast's response to the same question states that the company "has not made any determination regarding the specific steps that it may take to address post-transaction quality of service issues in California."[233]
- TWC and Charter provided some measures on quality of voice service and internal standards that they apply to ensure quality of service for its voice services in California.[234] However, Comcast claimed that it does not strictly define the term "quality of service" related to

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footnotes are generally retained but data designated as confidential has been removed or obscured.

[232] A.14-04-013 at 23. *See also* references to Joint Applicants' Brief, *supra*.

[233] Exhibit 9, Comcast Response to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q-3:47 and Q-3:48. [Public Version]

[234] Exhibits 11 and 13, TWC and Charter Responses to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q-3:28. [Public Version]

voice services and did not provide any information on service quality and reliability metrics, procedures or protocols that it currently uses.[235]

- Comcast states that quality of service as it pertains to voice services "is not measurable by a limited set of metrics." [236]
- Comcast and TWC fall short in meeting the standards for service installation intervals and completion of service orders (commitments met) for their voice services when compared to California's service quality minimum standards for public utility telephone corporations.[237]
- Based on J.D. Power and Associates 2014 Residential Wireline Telephone satisfaction study (West),[238] XFINITY (Comcast), TWC and Charter ranked below the west region average for residential telephone customer satisfaction. Out of eight companies[239] measured, Comcast ranked sixth, TWC seventh, and Charter fifth.
- According to the American Customer Satisfaction Index's press release in 2014, Comcast and TWC have the most dissatisfied customers with the lowest scores to date.[240]

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[235] Comcast briefly described dynamic quality of service (DQoS) as a method that Comcast uses to set and change priorities of different packets in the network. (Exhibit 9, Comcast Response to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q 3-28. And Q 3-29. [PUBLIC VERSION]).

[236] *Id.*

[237] In 2014, Comcast average service installation for voice services significantly longer than TWC's and both exceeded California minimum standard for service installations per General Order 133. In 2014, Comcast's and TWC's commitment met for its voice service orders were both below California minimum standard for service in GO 133. CONFIDENTIAL Response to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q-3:36 and Q-3:38

[238] http://www.jdpower.com/press-releases/2014-us-residential-television-internet-telephone-service-provider-satisfaction

[239] Bright House was not one of the eight companies; the eight companies in the order of ranking (first on the list is highest) are: Cox Communications, AT&T, Verizon, CenturyLink, Charter Communications, Comcast, TWX, and Frontier Communications. *Ibid*

[240] Comcast fell 5% to 60 [in 100-point scale] and TWC fell 7% to a score of 56 http://www.theacsi.org/images/stories/images/news/14may_press2.pdf

- When it comes to the process of handling and resolving customer complaints, TWC provided a description of its processes indicating the company's goals to respond and resolve such complaints. On the other hand, Comcast provided a vague description of its processes with no internal standards to ensure responsiveness to customers.[241]
- Although TWC and Comcast have relatively equal number of broadband customers in California, Comcast received a multiple of the amount of voice, broadband, and cable complaints in 2013 and 2014, compared to TWC.[242] The analysis of the customer complaint data indicates that, compared to Comcast, TWC was more responsive in resolving customer complaints relating to telephone repairs.[243]
- Comcast's poor customer service in California, based on the number of complaints reported by customers, is troubling because it has not provided any plans to improve customer services. For both Comcast and TWC, the trends in customer complaints data indicate that the largest proportions of these complaints were related to service issues, such as outages, intermittent services, installations and service repairs, as opposed to billing complaints.
- Service reliability and public safety in California is a concern because of the number, duration and magnitude of major outages[244] involving the Joint Applicants' voice services.[245]

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[241] Exhibits 9 and 11, Comcast and TWC CONFIDENTIAL Response to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q-3:43 (Comcast Exhibit #-3-42; TWC Exhibit).

[242] The number of customer complaints for TWC included broadband, voice and cable services and Comcast complaints included broadband and voice services for the period between January 2010 and August 2014. Exhibit 11, TWC CONFIDENTIAL Response to ORA 3rd DR [ORA-A.14-04-013.PHH-002], No. Q-3:40 (TWC Exhibit 3-7 and Comcast Exhibit R-3:40)

[243] This finding is based on analyzing the durations to resolve customer complaints; for example, in 2013, TWC had an annual average duration of half that of Comcast to resolve phone repair complaints. *Ibid*

[244] The FCC has established rules to require communication providers (including wireline,

- In 2014, multiple major voice network outages, in multiple locations in Northern California, left a large number of Comcast's customers with no voice services or access to 9-1-1 services.[246] The duration of the 2014 outages ranged up to several hours. The outages had a significantly greater impact on Comcast customers in 2014 compared to 2013.[247]
- TWC's Network Outage Reporting System (NORS) outage reports data also indicates significant outages in California and, due to reporting problems TWC was fined and subjected to a three-year compliance plan.
- Charter also filed FCC major outage reports affecting voice services (VoIP and Cable Telephony) in California from the period between January 2010 and August 2014. In 2014, several of these outages affected users that were

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wireless, VoIP, cable amongst others) to report certain disruptions to their network depending on the type of communication, duration of the outage, and the number of affected users. **The threshold requirement for VoIP outages** is: an outage of at least 30 minutes duration that potentially affects: (1) at least 900,000 user minutes of interconnected VoIP service and results in a complete loss of service; (2) any special offices and facilities; or (3) a 911 special facility. The FCC **reporting requirements for VoIP providers i**s: (1) within 24 hours of discovering a reportable outage meeting the user minute threshold or potentially affecting any special offices and facilities, or (2) within 240 minutes of discovering a reportable outage potentially affecting a 911 special facility. In either event, VoIP providers must submit a Final Report to the FCC within 30 days of discovering the reportable outage.

[245] While TWC and Charter provided service outages information that they track internally, Comcast claimed that it does not "collect outage information by county, and generally does not differentiate by residential and business customers in its outage reporting." (Comcast Response to ORA 3DR, No. q-3:31 [Public Version].)

[246] These six major outages occurred in February, March, July and August of 2014.

[247] With regard to Comcast's VoIP network outages in California, the number of total affected VoIP users in 2014 was [redacted] those in 2013. In addition, the total outage impact, in terms or duration and number of users (VoIP user minutes), was about [redacted] than that in 2013 (Outage durations in 2013, [redacted] It is not clear whether Comcast filed NORS Outage Reports in 2010 through 2012 and did not provide those reports to ORA, or it did not experience major reportable voice service outages during this period.

> left with no access to voice and E9-1-1 services. The outage durations in 2014 ranged up to multiple hours.

As the Osman Declaration shows, the service quality challenges this merger faces are not just a simple litany of a few things that need to be fixed. The problems are extensive and, due to the seeming lack of concern about them, pervasive.

ORA's examination of service quality, in large measure, was confined to California. While it is possible that the problems and their magnitudes are unique to California, ORA doubts that this is the case. It would make very poor business sense for Comcast to have its worst service quality problems in its biggest market. Also, since the poor service quality and dearth of standards of Comcast appears to be due to a lack of concern, demonstrated by an absence of any mechanisms to measure or assess service quality, that would seem likely to be an absence occurring corporate-wide on a national basis. It would not make sense for Comcast to have standards and metrics set at the overall corporate level but fail to implement them in its largest market.

The entities in this transaction that have some existing plans to improve service quality and reliability of voice service in California are TWC and Charter. But as the Joint Applicants note and as anticipated by the CPUC, it will be the acquirer Comcast that will be setting (or not setting, as the case may be) the standards.[248]

As discussed in some detail in the Osman Declaration, while they use different approaches, both TWC and Charter have relatively systematic approaches to assessing service and improving service quality. TWC discussed its system upgrades and improvements to customer service.[249] Charter similarly is undertaking major

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[248] Exhibit 2, Osman Declaration at 7-8; *see also* In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc.(MCI) to transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI, D. 05-11-029, November 18, 2005 at 87.

[249] *Id.* at 7-8.

improvements in its facilities.[250] These are all proceeding in advance of and without the need for the merger.

When it comes to measuring quality of service, again both TWC and Charter had extensive, although different, efforts in place. TWC provided ORA with information on how it assesses voice services in terms of performance, availability and customer experience and has both procedures and metrics, including things such as its "home phone service scorecard" which included critical success factors, measures and targets, and a look at past performance.[251] Charter relies in part on the CPUC's General Order 133-C standards for various measures, including trouble reports and answer time.[252] Both TWC and Charter provided ORA with "some data to illustrate their current and historical performance as well as their internal quality of service standards."[253] Tellingly, Comcast did not.[254]

Where Comcast provided data on specific service-related activities, it hardly provides impetus for this merger. As shown in great detail in the Osman Declaration and the supporting materials, in service provisioning (service installation) which measures how long it takes to get service set up after ordering and how many of those orders are accomplished, both Comcast and TWC fell below the CPUC's minimum standards and the results are getting worse over time. TWC does slightly better than Comcast on installation time but falls a bit behind on commitments met.[255]

From the standpoint of consumer satisfaction surveys, *i.e.*, those conducted by independent third parties, not by the applicants themselves, things are similarly bleak. As

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[250] *Id.* at 8.

[251] *Id.* at 9.

[252] *Id.* at 10-11.

[253] *Id*. at 12.

[254] *Id.*

[255] *Id.* at 13-14.

shown by the J.D. Power and Associates survey, among eight large western telephone service providers, for 2014 Xfinity (Comcast) and Time Warner Cable (TWC) are two of the three in the lowest rung, getting "two power circles". Charter is one above with "three power circles" Cox, AT&T and Verizon are at the top.[256] It is very likely that these rating could get worse post-merger since that has been exactly the trend. While Charter has shown some improvement in its standing, Comcast and TWC have both dropped in the rankings each of the last three years.[257]

On the subject of customer complaints, Comcast provided general information on how it processes complaints while TWC provided a fairly detailed run-down of the procedures.[258] Details on complaint data from the CPUC's Consumer Affairs Branch and the respective records of the Joint Applicants are contained in the Osman Declaration. In some cases it is difficult to separate voice complaints from broadband or the information was provided on an aggregated basis. This is likely the product of the nature of many complaints that for customers that have multiple services, the elements of the complaint – *e.g*., installation, outages, repairs and billing – may well cover more than one affected service.

As shown in various table and charts in the Osman Declaration, and allowing for the fact that in various cases the data is not segregated, Comcast has higher complaint rates than TWC; by some measures dramatically higher.[259] In terms of specific complaints regarding the time of resolution of telephone repair, the data is quite clear. Comcast takes much longer on average to resolve these complaints than TWC and that pattern is consistent over all the years examined, *i.e*., from 2010 to August of 2014.[260]

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[256] *Id*. at 17.

[257] *Id*. at 17-18 and tables following.

[258] *Id*. at 22-23.

[259] *Id.* at 24-26, including charts/tables.

[260] *Id.* 30-34, including charts/tables.

With respect to outage reporting, ORA obtained what outage information was available. As noted in the Osman Declaration, Comcast did not provide voice service outage reports, claiming it does not collect such information. TWC and Charter did give both company and federally submitted reports.[261] As shown, Comcast experienced a modest number of "outages", but depending on the cause, an outage can affect a very significant number of customers for an extended period of time. While TWC had fewer reportable instances than Comcast, problems with TWC's reporting led to a federal penalty and additional reporting requirements.[262]

ORA notes that the Osman Declaration is filled with a many charts and tables and analyzes a significant amount of fairly complicated data. On the other hand, the Joint Applicants' showing is effectively devoid of any suggestion that customers have had complaints, service problems including delays in getting service and outages. There is no mention of how many customers have been without telephone service including access to 9-1-1 service. The fact that they have chosen to ignore service quality when the Scoping Memo specifically addressed service quality is very telling.[263]

Joint Applicants have failed to demonstrate that the proposed merger will maintain or improve the level of service quality for voice services in California as required by P.U. Code section 854(c) and Section 706.

VII. Fate Of Lifeline And Other Low-Income Programs Is Uncertain.

At the very best, the fate of low-income programs, such as the Lifeline telephone program and the broadband Internet Essentials program, is completely uncertain if this merger goes forward. The reason is simple. While the CPUC recently granted TWC Eligible Telecommunications Carrier (ETC) status and, therefore, TWC is able to offer

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[261] *Id.* at 35-36.

[262] *Id.* at 36-41, including charts/tables.

[263] *See* Scoping Memo at 13.

Lifeline service to its low-income customers, it has not yet done so and Comcast's commitments have extended no further than allowing Lifeline service to continue to Time Warner customers who have it at the time of the merger (currently none) until such time as it decides to discontinue Lifeline. Indeed, Comcast does have ETC status to offer Federal lifeline service in California, and it stopped participating in the California LifeLine program in 2008.

While Comcast has its own low-income broadband program, Internet Essentials, imposed as a condition of its prior merger with NBCU, it is of limited duration and there is nothing, beyond a voluntary commitment, that it will continue. As ORA analyst Eileen Odell has shown in her declaration appended to this brief as Exhibit 4 (Odell Declaration), if the merger is approved, the low-income programs are either at risk of demise or neglect by Comcast.

To their credit, in this area unlike most, the Joint Applicants have at least provided a fair amount of information about current programs, at least the Internet Essentials program.[264] But, like most of their description in their Brief, it is a description of all that is good about the programs without any of the potential risks from the customers' standpoint.

As the Odell Declaration notes, none of the Joint Applicants currently offers Lifeline service to its telephone customers, although Charter offers a discount that is equivalent.[265] TWC received ETC approval in March 2014 making it eligible to offer federal Lifeline service to its large number of eligible California customers, but it has not yet done so.[266] Unless it is offered prior to the proposed merger taking place, a merged company will not be under any obligation to honor that authorization and Comcast has

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[264] *See, e.g*, Joint Applicants' Brief at Exhibit A, the McDonald Declaration, generally, and Attachments A and B.

[265] Exhibit 4, Odell Declaration at 4.

[266] *Id.* at 4-5.

not made any affirmative commitment about Lifeline. The same would be the case for continuing the Charter voluntary rate discount.[267]

The Scoping Memo was very clear in wanting information about the proposed merger and its benefits for "low income outreach and adoption of broadband services that are accessible, affordable, and equitable in a manner that is enforceable and will help close the digital divide.[268] And, as noted previously, Section 706 provides: "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…"[269] California has in the past made efforts to bridge the digital divide.[270] As noted by the Odell Declaration, and referring to a study by the California Emerging Technology Fund (CETF), this effort has been challenging and has stagnated in recent years.[271]

While TWC had a low-income broad band program, Connect2Compete, it lasted only two months ending more than two years ago.[272] Comcast's Internet Essentials program seemed promising at first, but has multiple problems. It has only reached a relatively small portion of eligible customers and the scope of eligible customers is too small, encompassing only low-income families that have children.[273] Thus, in addition to the large number of potential participants that are not part of the program, it is not available to other low-income individuals, such as the elderly or disabled, who may not

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[267] *Id.*at 5.

[268] Scoping Memo at 13.

[269] 47 U.S.C.§ 1302(a).

[270] Pub. Util. Code § 709(d).

[271] Exhibit 4, Odell Declaration at 6.

[272] *Id.* at 6-7.

[273] *Id.* at 9-11.

have children.[274] Moreover, as currently structured, the Internet Essentials offering is too slow (5 mbps download; 1 mbps upload) to even meet the California standard of being "served" for broadband purposes (6 mbps download; 1.5 mbps upload), as contrasted with being "underserved" or having inadequate speed to meet basic broadband needs.[275]

Finally, it is unclear what the duration of the Internet Essentials program will be. Joint Applicants, particularly Comcast, have simply not demonstrated that the expansion of Internet Essential into TWC's footprint will mitigate the impact and harms of the merger.

VIII. CONCLUSION AND REQUEST FOR RELIEF

The CPUC should not approve this merger and related transactions. This case is not about two CLECs merging or swapping out a few business customers. What is a stake here is the future of communications. If the CPUC approves this merger, we will leap from a broadband Internet access marketplace that already has little to no competition at speeds that most Californians want and take their service at, to a broadband Internet access marketplace that is almost solely controlled by Comcast. The numbers say it all – Comcast will more than double its size from passing 33.7% to [redacted] of households or homes in California pre-merger to post-merger, serving 84% and [redacted] of households or homes in California. Comcast's and TWC's claims that the merger will not impact competition because they do not currently compete in each other's service territories rings hallow. The fact that they have chosen not to compete in a marketplace that already suffers from lack of competition cannot be used as a justification for the proposed merger.

The ramifications of approval of this merger extend far beyond a consumer's inability to choose among competing high-speed broadband service providers. A post-

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[274] *Id.* at 10.

[275] *Id.* at 11-12 (citing D.12-02-015).

merger Comcast will control the pipes to an overwhelming majority of Californian's homes. Because of its market power in the broadband Internet access market, Comcast will be in the position to disadvantage its rivals such as the on-line video distributors (OVDs), content providers, providers of voice services, and beyond. There is no question that at the end of the day, those who will be harmed most by the proposed merger of Comcast and TWC are the end user customers in California – those that will more likely than not, have no choice among competing broadband Internet access providers and who will suffer in terms of having reduced content choices and experiencing Comcast's poor service quality and customer care.

For the aforementioned reasons, the Office of Ratepayer Advocates respectfully requests the following relief:

1. The California Public Utilities Commission (CPUC) should determine that the proposed merger of the Joint Applicants as requested in these consolidated applications and as evaluated under the Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge is not in the public interest and therefore, should deny approval of the merger and related transactions. ORA can identify no mitigation measures or conditions that would lead us to alter this recommendation.
2. That the CPUC convey to the Media Bureau of the Federal Communications Commission (FCC) and to the FCC itself the record established in this proceeding and the results of any CPUC deliberations and determinations.
3. That the declarations and other materials appended to this brief and incorporated by reference and citation be identified and received into evidence in the formal record of these consolidated applications.

Respectfully submitted,

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December 10, 2014