BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a). | Application 14-04-013<br>(Filed April 11, 2014) |
| And Related Matter. | Application 14-06-012<br>(Filed June 17, 2014) |

**COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION GRANTING WITH CONDITIONS APPLICATION TO TRANSFER CONTROL**

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# I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these comments on the Proposed Decision Granting with Conditions Application to Transfer Control (PD).

While much of the analysis of the present record in the PD is correct, the proposed adoption of 25 conditions, either individually or in any combinations, to allow approval of the proposed merger, is legal error. As the PD correctly concludes, the Joint Applicants[1] have failed to show by a preponderance of the evidence that they are entitled to approval of this merger. That is the legal standard and that failure should be the end of the matter. Beyond that, as the PD also correctly establishes, ORA and the other interested parties have shown the substantial harm to competition and customers that will continue and be exacerbated by the merger.

A laundry list of conditions not proposed by the Joint Applicants and not available for comment or analysis prior to the release of the PD have been proposed to offset the Joint Applicants' failure. However, these conditions do not ameliorate the substantial harm to competition that will occur if the merger is approved. Moreover, approval of the proposed merger would send a signal that no matter how deficient an applicant's showing or how great the harm identified, the CPUC will likely approve the application.

# II. DISCUSSION

## A. CPUC's Jurisdiction in this Proceeding

Pursuant to the adopted August 14, 2014 Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge (Scoping Memo), review of these applications comes under Public Utilities Code section 854(c) (Section 854(c)) and Section 706(a) of the Telecommunications Act of 1996 (Section 706).[2]

Section 854(c) requires findings on each of seven factors and a finding that on balance, the merger "is in the public interest." It requires the CPUC to "***provide*** mitigation measures to ***prevent***

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[1] The Joint Applicants are Comcast Corporation (Comcast), Time Warner Cable, Inc. (TWC), Charter Communications (Charter) and Bright House Networks (Bright House).

[2] Scoping Memo at 4-5, 8-12. Section 706 is codified at 47 U.S.C. § 1302(a).

significant adverse consequences which may result." It also places on the applicant the burden of proving by a preponderance of the evidence that these requirements are met.[3]

Section 706, as described extensively in both the Scoping Memo and in Exhibit 5 to ORA's Brief, both incorporated here by reference, requires the CPUC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . 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 telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[4] The PD correctly notes that Public Utilities Code Section 710 (Section 710) contains a clear exemption for a requirement or express delegation by federal law, and that Section 706 therefore applies.[5]

The PD makes three errors in its discussion of Section 706, however. First, while the PD says that the CPUC has the authority to review the impact of the merger on the deployment of broadband in California, it fails to mention that, consistent with Section 706 and Section 710, the CPUC also has the authority to review the deployment of VoIP in California.[6] The PD should be clarified to state that under Section 706, both VoIP and broadband are covered.

Second, the PD states that the CPUC has limited authority to act under Section 706.[7] However, the CPUC's authority to review and take regulatory measures under Section 706 is expansive.[8] As

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[3] Pub. Util Code 854(e), which provides: "The person or corporation seeking acquisition or control of a public utility organized and doing business in this 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." As ORA noted in its Brief, "preponderance" is a 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."; PD at 86 COL 3; ORA Brief at 16.
[4] 47 U.S.C. § 1302(a).
[5] Section 706 constitutes both a requirement that and expressly delegates the CPUC review the effects and take any steps necessary to ensure the deployment of advanced communications capability in its review of the merger. (PD at 21.)
[6] VoIP falls under the definition of advanced communications capability: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." (47 U.S.C. § 1302(d)(1).)
[7] PD at 2, 18, 21, 65.
[8] The PD notes two limiting principles on page 20 of the PD – that Section 706 must be read in conjunction with the rest of the 1996 Telecommunications Act and that any action taken under Section 706 must be related to the deployment of advanced communications capability. (Citing *Verizon v. FCC*, 740 F.3d 532, 640 (D.C. Cir. 2014).)

*Verizon v. FCC*[9] demonstrated, and as Comcast has concurred in numerous comments and ex parte letters it has filed at the FCC during the past year,[10] the FCC's and state' authority to act under Section 706 is broad. The word "limited" should be removed from the PD's discussion of the CPUC's jurisdiction under Section 706.

Third, the PD appears to wrongly state that while the CPUC has the jurisdiction to impose conditions, the CPUC does not have regulatory authority under Section 706 to deny the merger and seems to defer the issue of the anti-competitive impacts of the merger to the FCC, U.S. Department of Justice (DOJ) and California Attorney General (AG).[11] The PD ignores the language in Section 706 that requires the CPUC to take regulatory action to ensure that California is deploying broadband and VoIP "on a reasonable and timely basis" . . . "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 telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[12] Thus, the CPUC has the jurisdiction to deny the merger.[13] Moreover, the CPUC cannot, as a matter of law, and should not, as a matter of policy, delegate that authority to the FCC and the U.S. DOJ, and must take any regulatory steps necessary to achieve the reasonable and timely deployment of broadband and VoIP in California.

Lastly, under *NCPA v. CPUC*, the CPUC is ***required*** to review the anti-competitive harms in every proceeding before it and is ***required*** to make findings on those anti-competitive effects, ***whether the CPUC has jurisdiction or not***.[14] The PD wrongly excluded video programming from consideration as both a legal and policy matter.[15]

### B. The Evidence in the Record Demonstrates that the Merger is Not in the Public Interest under Applicable Law

As the PD demonstrates, the Joint Applicants have not made the required showing, either as to the most critical of the individual topics or the overall result of the proposed merger.

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[9] *Verizon v. FCC*, 740 F.3d 523 (D.C. Cir. 2014).
[10] *See, e.g.,* Comcast Comments filed 7/15/14 and 9/15/14 and Comcast Ex Parte Notices filed on 5/12/14, 9/5/14, 9/12/14, 9/18/14, 11/4/14, 11/10/14 in GN Docket 14-28 and GN Docket 10-127.
[11] *See* PD at 6, 65-66.
[12] 47 U.S.C. 1302(a).
[13] The U.S. DOJ and FCC could approve the merger and California could deny it. Comcast/TWC could merge in 49 states. This result would be legal.
[14] *Northern California Power Agency (NCPA) v. CPUC*, 5 Cal. 3d 370 at 377-378, 486 (1971).
[15] PD at 2.

### 1. The Evidence Demonstrates, and the PD Agrees, That the Merger will Have Serious Anti-Competitive Consequences for California

The evidence in the proceeding shows that there is an established risk of very substantial harm to the state and local economies due to the ability of the post-merger company to exercise monopolistic power over pricing, last mile broadband competition and how content will be distributed to broadband customers in California. The PD correctly finds that the proposed merger is anti-competitive and that the anti-competitive effects of the merger would negatively impact the deployment of broadband in California:[16]

> We may also take note of the merger's likely enhancement of that market power, if the merger is consummated. From an edge provider's perspective, its choices in reaching California consumers through high-speed broadband in California will be substantially curtailed. Instead of the choice between two large cable systems delivering high speed broadband to upwards of 80% [sic] of the households in California, the edge or content provider will have only one choice, Comcast. …
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> The power of the terminating monopolist to discriminate or otherwise act anti-competitively vis-a-vis edge or content providers could increase the cost and reduce the attractiveness of that competing content. This, in turn, lessens the demand for high-speed broadband access to the Internet, and thus runs counter to Section 706(a)'s mandate to promote competition in broadband services[]
>
> In more concrete terms, the proposed merger between Comcast and Time Warner reduces the possibilities for content providers to reach the California broadband market. …
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> ***Parties have made a convincing showing of the anti-competitive consequences that Comcast's post-merger market power may have on the deployment of broadband in California, and of anti-competitive harms that would occur in California if the merger is consummated.***[17]

As the PD notes, if the merger is approved, Comcast's broadband distribution network will **pass more than 84%** of all California households post-merger.[18] Of this **84%**, some **nearly 80%** of those households will have no other choice but Comcast as an Internet service provider capable of

[16] PD at 67-68 (emphasis added); *see also* PD at 66.
[17] PD at 67-68 (emphasis added).
[18] ORA Brief at, e.g., 2, 27, 29 and Exhibit A, Selwyn Declaration at e.g., 13 and 153.

offering the FCC's minimum broadband speed standard of 25 Mbps download/3Mbps upload.[19] The FCC has made it clear that its definition of broadband is not aspirational or futuristic, but that it applies today. In adopting its new standard, the FCC stated in its 2015 Broadband Progress Report, which the PD takes official notice of, that:

> 41. . . . When speeds of 25 Mbps/3 Mbps are available, a substantial and fast-growing number of consumers are adopting and migrating to higher speeds. . . . Customers are deciding for themselves at a very rapid rate that they need services at this or higher speeds.
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> 42. The fact that nearly one-third of consumers adopt 25 Mbps/3 Mbps when they have the option to do so supports our finding that this offering is neither futuristic nor attractive only to a narrow set of heavy broadband users or early adopters. And they are migrating to 25 Mbps/3 Mbps at a remarkable rate.[20]

That broadband is now defined as 25 Mbps upload/3Mbps download is also reflected in California Assembly Bill (AB) 238, provided as Attachment A to these Comments, which would amend Public Utilities Code Section 281 to define broadband as 25 Mbps upload/3 Mbps download.[21] The proposed legislation states, "[i]t is the intent of the Legislature to enact legislation to pursue the deployment of advanced telecommunications services with line 25 broadband speeds of at least 25 Mbps downstream and 3 Mbps line 26 upstream in all areas of the state."[22]

As the FCC recognizes, due to its lower speed, bandwidth caps, and usage-based pricing, mobile wireless broadband is not a competitive alternative to or a substitute for the Joint Applicants' wired broadband services.[23] Mobile wireless broadband also cannot fulfill the rising demand for functionalities such as: (1) the ability to do homework and to participate in remote video "virtual classrooms," (2) streaming HD video at a quality level sufficient for viewing on a large screen and, (3)

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[19] ORA Brief at, e.g., 2, 27, 29 and Exhibit A, Expert Report and Declaration of Lee L. Selwyn at 71-72.
[20] FCC's 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment at 27, 28, 29, 32 (footnotes omitted). *See also* PD at 6 granting CforAT's Motion for Official Notice.
[21] Attachment A. http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0201-0250/ab_238_bill_20150224_amended_asm_v98.pdf
[22] *Id.*
[23] 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 for this merger because "available data concerning mobile services appear to be unreliable and overstate deployment to a significant degree." ORA Brief, Exhibit 17, FCC Media Bureau Memorandum at 1 issued in MB Docket No. 14-57. The FCC also does not consider satellite in its analysis of the broadband market. *See* FCC's 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment at 5. *See also* PD at 6.

running applications that require high bandwidth capacity in one or both directions. Due to its limited availability, technological and geographical constraints, and substantially higher price, fixed wireless broadband is also not a substitute for the Joint Applicants' broadband services. The level of "competition" that fixed wireline broadband represents is so minuscule as to have zero impact in constraining the market power of the Joint Applicants.

While Comcast and TWC claim they do not compete with each other, that claim is a result of their own choice not to compete on a physical infrastructure basis with regard to broadband; there is no legal or policy barrier to such competition. Comcast's and TWC's argument that they do not compete also fails to take into account that the broadband market is multi-sided as it serves consumers and it also provides the means for content providers to deliver services to their customers, content services that compete with those services that Comcast and TWC offer.[24] There are major and on-going changes that will give a post-merger Comcast, the largest operator of broadband services, the ability to control content and its distribution over the last mile high-speed Internet connections. Competition is growing in the market for over-the-top (OTT) broadband-delivered content, but TWC, a major competitive alternative to Comcast in this area, will be eliminated if the merger is approved. As Dr. David Sappington recently noted at the FCC's January 30, 2015 Meeting of Economists, "[w]hen you allow the two large ISPs to merge, they have the ability to impose a fatal blow, which they could not individually."[25] If the merger is not approved, however, Comcast and TWC are likely to compete with each other for the distribution of content to each other's customers over a high-speed Internet connection, and that competition will not be confined to their geographic footprint. But to use competing broadband-delivered content, consumers will still need to buy broadband access from Comcast. The PD recognizes this fact, but then fails to take the next step, which is to deny the merger.

Moreover, Comcast's ability to bundle video programming with a high-speed Internet connection can deter and negatively impact other Internet service providers (ISPs) to reasonably and timely deploy broadband in California. Other ISPs may not have the vertically integrated services that Comcast has to be able to compete. As discussed above, the control of content will be a major factor in the ability of broadband systems other than Comcast to compete in California markets and to

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[24] Some of the interested parties to this proceeding represent those content providers which are a major industry in California whether from the movie and television studios of Southern California or the electronic media sources of Northern California.
[25] FCC's Transcript of January 30, 2015, Proposed Comcast-TWC-Charter Transaction, MB Docket 14-57, Economic Analysis Workshop at 130, lines 4-8. http://apps.fcc.gov/ecfs/document/view?id=60001031131

provide content at reasonable cost, if at all, to their customers. If one looks at the focus of the merger proceeding at the FCC, a major focus of discovery has been exactly on that topic.[26] It was also a major impetus for the adoption by the FCC of the net neutrality order on February 26, 2015.[27]

The near monopoly control of high-speed Internet that a post-merger Comcast will acquire will also give it the ability and the incentive to dictate pricing to consumers as well as limit consumers' ability to choose competing content. For example, Comcast has announced plans to eliminate flat-rate pricing of broadband in favor of usage-based billing, which will make competing over the top services more costly for consumers to use and thus less competitive.

ORA's analysis of the impact of the proposed merger on competition is consistent with the Horizontal-Merger Guidelines (HMG) which "outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to ***mergers and acquisitions involving actual or potential competitors ("horizontal mergers")*** under federal antitrust laws."[28] The HMG state that "[t]he Agencies measure market shares based on the best available indicator of firms' ***future competitive significance*** in the relevant market."[29] The HMG provide that a "relevant market" with regard to the proposed merger and related transactions in California includes over the top video services (i.e., online streaming video), which California consumers access via their broadband connection.[30]

In sum, the ability of a virtual monopoly broadband provider to control over 84% of the last-mile access to broadband customers and to control content, its availability and pricing will constitute a very significant harm to California. The CPUC has clear jurisdiction under both Section 706 (specifically) and the *NCPA v. CPUC* decision (more generally) to consider this situation and its harmful ramifications. To not do so is legal error.

[26] For example, on 2/27/15, the FCC issued new data requests to seven content providers asking a several questions about contracts with online video distributors, and whether those contracts ever included provisions that limited the companies' ability to make agreements with other companies: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0225/DOC-332247A2.pdf
[27] http://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet
[28] HMG at 1.
[29] *Id.* at 17.
[30] *Id.* at 7-8.

### 2. Other Aspects of the PD that are Unlawful or Demonstrate that the Merger is Not in the Public Interest

The merger must be in the public interest. While ORA has taken no position with respect to the Joint Applicants finances or the fairness to employees or shareholders, the evidence demonstrates that the applicants have serious service quality issues, being among the worst in an industry known for poor customer service.[31] In fact, the Joint Applicants showing, described in the PD is nothing more than a rendition of new equipment rollouts, not how they deal with their customers on a daily basis, and Joint Applicants fail to demonstrate that these claimed benefits would only occur if the merger is approved.[32]

Another important Section 854 criterion ignored by the PD is that the merger should not harm the regulatory jurisdiction of the merger. Section 854(c)(7) states that the merger should "preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state." The PD fails to adequately explain how the proposed merger satisfies this criterion by a preponderance of the evidence.

Furthermore, the PD does not comply with Section 854(d), which requires the CPUC to "consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal." While the PD states that several parties are opposed to the merger, the PD does not consider the "reasonable option" of no merger, as required.

The Joint Applicants have objected to the scope of authority of the CPUC under Section 854 and Section 706 by opposing efforts to require them to amend their applications to conform to the Scoping Memo and in their Brief. The conditions, as discussed below, require the good will and cooperation of a post-merger Comcast. As demonstrated by Joint Applicants' opposition to the CPUC's jurisdiction in this proceeding, the CPUC will likely experience challenges at every step. The PD fails to establish that this merger will "preserve the jurisdiction" of the CPUC.

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[31] PD at 47-50, 63-64, based on evidence submitted by ORA on pages 59-78 of its Brief and in Exhibits 2 and 3.
[32] *Id.* at 28. *See also* Pub. Util. Code § 854(d).

### C. The Joint Applicants Have Not Demonstrated that their Claimed Benefits are in the Public Interest or that They Would Not Occur Independent of the Merger

The Joint Applicants have not met their burden that the merger is in the public interest. First, even assuming that the claimed benefits are real, the Joint Applicants have not made an affirmative case that these benefits are in the public interest. The Joint Applicants' rendition of merger-specific and veritable efficiencies is nothing more than assertions and claims, none of which stand-up under any reasonable scrutiny. TWC has specific plans for improving its services.[33] The customer service provided by both Comcast and TWC is objectively poor and Comcast provides no specific plans on the record to improve customer service and satisfaction levels, including a short-term and longer-term target.[34] Comcast's contention that it needs to be bigger to gain scale and scope economies is without factual demonstration. The idea that the two companies together will be the "best of both" in products and services is contrary to the evidence in this record. Comcast even touts its voicemail to text feature, but this features has been offered for years and has no bearing on the merger.

Second, the Joint Applicants fail to demonstrate that their claimed network upgrade benefits cannot be secured independent of the merger. In fact, the record demonstrates that TWC is currently upgrading its network and that a merger is not needed for TWC to enhance its voice and broadband services. While Comcast claims that it might be able to upgrade TWC's network slightly faster, the evidence shows that TWC may have already accomplished these voice and broadband upgrades.[35] The record also demonstrates that if the merger is approved, things will be worse for TWC customers. For example, post-merger, current TWC customers will (1) pay higher rates as TWC has committed that its customers will always have access to unlimited broadband, while Comcast has plans to move entirely to usage-based billing;[36] (2) will receive worse service quality and poorer customer service;[37] and (3) will receive fewer service offerings and fewer program choices post-merger.[38]

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[33] ORA's Brief, Exhibit 10: TWC Response to ORA Data Request, Set 1, Q.#31, and Exhibit 11: TWC Response to ORA Data Request, Set 3, Q.#47

[34] ORA's Brief, Exhibit 9: Comcast Response to ORA Data Request, Set 3, Q-3:47 and Q-3:48.

[35] TWC Response to ORA Data Request Set 1, Q. 31 and Set 3, Q. 47. *See also* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-completes-digital-upgrade-20141114-story.html This articles states that in November 2014, TWC "*wrapped up a nearly yearlong upgrade to its Los Angeles network, completing a switch to all-digital from analog systems.*" According to the article, customers who had standard Internet service, or up to 15 megabits per second, will have up to 50 Mbps.

[36] Writer's Guild of America, West, Brief at 16; http://www.nytimes.com/2014/02/15/business/media/as-services-expand-cable-bills-keeprising.

The PD recites the Joint Applicants claimed benefits of the merger but fails to provide any analysis of the Joint Applicants' claimed benefits. In addition, the PD does not compare the claimed benefits of the merger with what would occur should the merger not take place.

### D. Due Process Violations with the Proposed Conditions in the PD

In many respects, the PD captures the positions and showings of the various parties in a correct fashion. After this analysis, the PD leads clearly to a basis to deny the applications. Not only did the Joint Applicants not carry their burden but other parties, including ORA, demonstrated the harm to be expected. After demonstrating the anti-competitive harm of the merger, rather than logically deny the merger, the PD presents a collection of 25 "conditions." The proposed conditions do not mitigate the harms identified; in most cases the conditions have nothing to do with the identified harms.

As discussed in greater detail in Attachment 2, Appendix A, these proposed conditions should not be considered by the CPUC and, if considered, should not be accepted or adopted. The PD's conditions are procedurally flawed. First, the Joint Applicants did not propose any mitigation conditions as required by Section 854(c)(8).[39] Contrary to the assertion in the PD ORA clearly did not recommend or support any conditions, since we saw none that would mitigate the substantial harms identified.[40]

To the extent the conditions listed were recommended by other parties, they were contained in briefs/declarations filed on December 10, 2014. There was no provision for reply briefs and, based on the ALJ Ruling of November 26, 2014, there was no possibility of hearings on any conditions. In that ruling establishing the final schedule for this proceeding the ALJ requested that parties file a motion requesting hearings no later than December 10, 2014.[41] However, since the date for ORA and others to identify the details of desired hearings was the same day on which any briefs containing conditions were due, it was not possible to make a motion "specifying in detail all alleged disputed material facts"

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[37] American Customer Satisfaction Index. *Key ACSI Finding*. ACSI, LLC. http://www.theacsi.org/about-acsi/key-acsi-findings
[38] PD at 64.
[39] Section 854(c)(8) states that applicants are required to: "[p]rovide mitigation measures to prevent significant adverse consequences which may result."
[40] PD at 73.
[41] ALJ's 11/26/14 Ruling Granting and Denying in Part ORA's 11/18/14 Motion to Reconsider the 11/14/14 ALJ Ruling Resetting Schedule.

because parties had not yet seen the briefs, proposed conditions or disputed material facts.[42] In effect, the ALJ's Ruling made it impossible for parties to comply with the requirement for filing a motion for hearings.

In their briefs, almost every party opposed the merger and did not consider imposing conditions as to ameliorate the harms caused by the merger.[43] With the exception of CETF, parties at the February 25, 2015 All-Party Meeting confirmed this before the four attending commissioners. CETF's initial support of the PD at the All-Party Meeting was tempered by a statement from its counsel that should the CPUC remove the expansion of Internet Essentials from the PD, CETF would no longer support the merger.

The conditions were never considered by the parties until their publication in the PD and have now become the *de facto* most critical element of the decision, being used to overwhelm the carefully considered discovery, declarations and briefs of the parties that otherwise comprise the record in this proceeding. This presents serious due process concerns. There was no effective notice regarding the scope, use or details of these conditions and, other than through these limited comments, no opportunity to be heard. In part, this is a product of the limited nature allowed for comments on a PD, which while filed in the record, are not considered evidence in the record.[44] Rule 14.3 provides:

> Comments shall focus on factual, legal or technical errors in the proposed …decision and in citing such errors shall make specific references to the record or applicable law. Comment which fail to do so will be accorded no weight.[45]

This, ORA has limited ability in these comments to evaluate the policy concerns, much less the relevance of, 25 conditions. If conditions are to be considered at all, the record must be reopened in this proceeding or there must be a separate additional phase to consider conditions.

### E. Legal and Factual Errors with the Proposed Conditions

The PD does not make the claim that the conditions will ameliorate the anti-competitive harms of the proposed merger. Instead, the PD makes hopeful assertions. For example, the PD provides that

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[42] *Id.*
[43] TURN, Greenling, CforAT, Media Alliance, DISH, Common Cause, Consumers Union all oppose the merger.
[44] The PD states that there is no obligation or need to conduct hearings in these applications and that no one has requested them. ORA requested hearings at several stages and was rebuffed by the Joint Applicants since they claimed it would take too much time and the PD finds not only that hearings are not necessary, but also devalues the importance of evidentiary hearings. The conditions are clear examples of disputed material issues of fact.
[45] Rule 14.3

"[t]he ability to exercise that increased market share on Internet content ***may*** be constrained by some of the conditions of this Decision . . . .[46] The PD also states: "[w]hile we are troubled by the protestors' and intervenors' many examples of potential harms that may flow from the merger, we ***believe*** that those harms may be mitigated by the imposition of conditions …" and the PD seems to gives pause to the value of the conditions. It states: "[t]he Applicants must meet the conditions adopted herein in order to provide ***reasonable assurance*** that the proposed transaction will be in the public interest in accordance with Pub. Util. Code §854(a) and (c)….We only adopt conditions which mitigate an effect of the merger in order to satisfy the public interest requirement of §854."[47] While the PD correctly states that the merger is anti-competitive, it then adopts conditions that it hopes ameliorate the anti-competitive effects of the merger. This is legal error. In order to approve this merger, the CPUC must find that the merger is in the public interest on the day the CPUC approves the merger, and it must remain in the public interest on a going forward basis; it cannot base its decision on a finding that the merger *may* be in the public interest.[48]

All of the 25 conditions are irrelevant because, as a whole, they do not address the anti-competitive harms of the merger for last-mile broadband service. The harms also include the continued and likely enhanced poor customer service to California consumers. As the proposed decision states, the "merger presents [TWC] customers with the real possibility that they will receive poor customer service, fewer service offerings, and fewer program choices from Comcast after the merger than they receive from [TWC] before the merger."[49] The proposed conditions do not adequately mitigate this harm.

ORA could not find any basis in the record for Conditions 10 and 16. With regard to Condition 16, not only is there no basis in the record for this condition, Comcast and TWC already meet Condition 16, offering speeds higher than 25 Mbps download/3 Mbps upload. Other conditions require the merged Comcast to do things they are already required to do or that TWC already does. Comcast is already required to comply with Condition 6 under D.10-01-026. A condition requiring Comcast to comply with a CPUC decision does not address the shortcomings of this merger, and issuing a condition to force Comcast to comply with a CPUC decision that already had the force of law

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[46] PD at 63 (emphasis added).
[47] PD at 3 (emphasis added).
[48] The paucity of factual findings, and large number of conditions in the PD speak to this issue.
[49] PD at 64.

only serves to weaken the CPUC's authority. With regard to Condition 9, Comcast's counsel stated at the February 25, 2015 all-party meeting that Comcast is already providing customers with the ability to use Roku.[50]

Several conditions require a post-merger Comcast to do things that could be accomplished without the merger. For example, with regard to Condition 1, under its Section 706 authority, the CPUC could order Comcast and TWC, as separate entities, to offer California and Federal Lifeline. Also, regarding Conditions 11, 12 and 13, the CPUC could also order Comcast to expand the Internet Essential program and require TWC to create a parallel program under its Section 706 authority.

Other conditions, such as Condition 18 which requires Comcast to build at least 10 new broadband facilities, are vague and ambiguous. Condition 25 is not, in fact a condition. It states that if Comcast fails to comply with the other conditions "the public, or the Commission may take enforcement action against Comcast based on the Commission's rules, orders, and decision, and the California Public Utilities Code, and Comcast shall not contest the Commission's jurisdiction to do so." It does not compel the CPUC to take action for a violation of any condition, but makes such action optional. Condition 25's requirement that Comcast not contest jurisdiction is impossible to enforce and may well be unlawful; it is certainly unenforceable if "the public" seeks to enforce the conditions.

Finally, several conditions require activities that are effectively impossible to ascertain compliance with. In all but a few, they require a level of monitoring, auditing, investigation and ultimate enforcement that the CPUC has neither the resources nor inclination for. It is unclear how compliance with Condition 19, which would prevent Comcast from lobbying against municipal broadband either directly or indirectly, would be enforced. Conditions 2, 9, 17, 19 and 24 have sunset dates. The PD does not explain in any fashion how the harm caused by the merger will be remediated by the date of the expiration of the condition or what steps the CPUC must take if there are still merger-related harms at the end of the sunset dates. As was discussed at the All-Party meeting, there is no provision in any of these conditions for enforcement. None of these conditions are self-executing and Comcast does not need to meet any of these conditions prior to the decision taking effect.

[50] ORA searched Comcast's website and found, contrary to past practice, that Roku is now listed as a device that can be used by Comcast customers: http://customer.comcast.com/help-and-support/internet/wireless-gateway-2/

### F. Enforcement of the Conditions is Unfeasible

Once approved and once the companies merge, the merger is final and cannot be reversed, while conditions can be individually whittled down or removed (by Comcast) through federal court challenges, or petitions to modify decisions that can be brought before the CPUC or state legislation.[51] The conditions themselves are difficult to enforce and must be contested after-the-fact which will require time-consuming litigation. It is inconceivable that all or even many of these conditions will be complied with. Monitoring and compliance will require sufficient CPUC staff resources and tools to ensure that Comcast is meeting the conditions. Many of the conditions are incapable of audit or evaluation, or lack criteria for measuring whether Comcast has met the condition. Some conditions have performance dates of several years, and no indication of what happens if a failure occurs. Because the conditions are not feasible, not self-executing, do not include specified upfront penalties and do not require compliance prior to Comcast receiving approval for the merger, there is little incentive for Comcast to comply with them.

In addition, Comcast does not have a good track record on abiding by conditions. Comcast's compliance with the conditions from its prior merger with NBC Universal (NBCU), the merger that forced Comcast to offer the Internet Essentials program, is documented.[52] This record is replete with problems and shortcomings of the Internet Essentials program as cited by CETF, CforAT, TURN, Greenlining and others. Another condition to the NBCU merger requires Comcast to follow the FCC's 2010 Open Internet Order until 2018.[53] Yet there is evidence in the record of this proceeding that Comcast was throttling and/or blocking Netflix's traffic during the time that this requirement has been in effect, which resulted in Netflix having no choice but to sign an agreement with Comcast, whereby Comcast could impose tolls on Netflix for a service that Comcast's customers have already paid for.[54]

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[51] Because a federal question is involved, a party may appeal a decision in this is a case directly to federal court without exhausting its administrative remedies (i.e., filing an application for rehearing), and federal courts conduct a de novo review, meaning that the court will not give the CPUC's decision any deference. A successful court challenge by Comcast could nullify some of the conditions, turning a decision that, from the CPUC's perspective, was in the public interest, into one that no longer is in the public interest.

[52] ORA Brief at 79.

[53] *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-neutralitylet-us-buy-time-warner-cable/

[54] *See* Exhibit 6 to ORA Brief.

If Comcast fails to comply, it will be too late; harms to consumers would have already been materialized and the CPUC will not be able to undo the merger. And, all of the conditions are required to be complied with to provide "reasonable assurance" of being in the public interest. ORA disputes that the conditions mitigate the harms of the merger and that there exists any meaningful mechanisms to evaluate compliance and compel compliance if a post-merger Comcast falls short.

As a legal and policy matter, ORA cannot suggest ways to improve the proposed conditions because there is no set of conditions that will ameliorate the harms of the merger, as supported by the record evidence in these consolidated proceedings. If the CPUC continues on its flawed path to approving the merger with conditions, then the CPUC should, at a minimum, follow the U.S. DOJ's model of a consent decree, and require that the Joint Applicants comply with all conditions before the decision takes effect. That is to say, the Joint Applicants could not merge until after the conditions are met. This is the only way to ensure that Comcast will comply with any conditions.

### G. Use of 84% Figure in the PD

In its Brief, ORA provided public and confidential numbers for the number of Californian households that will be impacted by the proposed merger. The public number – 84% -- is based on publicly available information from California Broadband Availability Data, which is provided at the census block level. ORA also provided a number that is higher than 84%, which is considered confidential because it is based on data that Joint Applicants marked as propriety. This higher number, which is between 84% and 100% is more accurate than the 84% figure because it is based on actual data from the Joint Applicants themselves. It appears to utilize the same data that Joint Applicants use in their respective 10-K Annual Reports, but at a nation-wide level. As such, given that this data is not confidential on a national level in their 10-K Annual Reports, this figure should not remain confidential in a CPUC decision.

## III. CONCLUSION

The proposed merger of the Joint Applicants should be denied based on their failure to demonstrate that it is in the public interest and based on the substantial harms that would result in California if the CPUC approves it. The CPUC should advise the FCC, and U.S. DOJ immediately of its decision to deny the merger and if not already done, transmit the confidential record and data request questions and responses to both federal agencies.

An appendix is provided in Attachment B.

Respectfully submitted,

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