BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CAL

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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	A.14-04-013 (Filed April 11, 2014)
Joint Application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC (U6878C) for Expedited Approval to Transfer Certain Assets and Customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, Pursuant to Public Utilities Code Section 851.	A. 14-06-012 (Filed June 17, 2014)

REPLY BRIEF, OPENING TESTIMONY, REPLY TESTIMONY, AND CERTAIN EXHIBITS OF THE UTILITY REFORM NETWORK
PUBLIC VERSION

December 10, 2014

TURN
THE UTILITY REFORM NETWORK
Lower bills. Livable planet.

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In accordance with Rule 13.11 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") hereby submits its Reply Brief in the above-captioned proceeding. Pursuant to the Administrative Law Judge's ("ALJ") Ruling of November 26, 2014 resetting the schedule for this proceeding and clarifying email to the parties on the same date, TURN is submitting a combined opening and reply brief with opening and reply testimony of our expert witness Susan M. Baldwin attached thereto.

I. INTRODUCTION

From a California-specific perspective, the proposed acquisition by Comcast Corp. ("Comcast") of Time Warner Cable, Inc. and Time Warner Cable Information Services California), LLC (collectively, "Time Warner," "Time Warner Cable" or "TWC") is a blatant attempt by Comcast to further dominate and control the local telephone, broadband, and video markets to the detriment of California consumers. The proposed merger is not in the public interest. It poses significant anticompetitive concerns. Moreover, the "substantial public interest benefits" touted by the Joint Applicants are extremely vague empty promises. In addition, the post-merger Comcast would be a significantly larger entity making it less accountable to regulators, policy makers, and consumers.

It is critical that the Commission realize that this is a merger of goliaths. Among the top three providers of broadband access nationally, Comcast is the largest and Time Warner Cable the third largest, while AT&T is second. Among cable providers, Comcast is the largest and Time Warner Cable the second largest. If approved, the proposed transaction will result in Comcast being the dominant provider of broadband Internet access and video, and a significantly larger player in the voice telephony market. While size alone is not usually the sole rationale to reject a merger of this type, in this case the ramifications of the proposed merger to California are substantial. If consummated, the proposed merger will increase Comcast's number of video, broadband Internet access, and voice customers by approximately 50 percent nationally with a concomitant increase in market share across the nation as well as in California. In Comcast's markets the merger will cement the already existing duopoly of an incumbent telephone and a cable provider as the only real options available to consumers.

As discussed in the attached testimony of Susan M. Baldwin,

> "The California economy, communities, and consumers increasingly depend on Comcast's network and services. As a high-tech state, California depends critically on

> access to a state-of-the-art, globally competitive advanced public network. The innovation, affordability, speed, resiliency, and ubiquity of Comcast's broadband network directly and significantly affect California's ability to compete in the global market place, to attract talent and businesses, to bolster innovation, to support adequate health care, support aging in place, enable remote learning, and encourage civic engagement, among other things."[1]

The proposed acquisition is bad for consumers, bad for competition, and bad for California and should be rejected by the California Public Utilities Commission ("CPUC" or "Commission"). The only parties that stand to benefit from this deal are Comcast and Time Warner's shareholders. Impact on shareholders is just one of several criteria the Commission must examine to assess whether the acquisition is in the public interest. When measured against the remaining criteria as enumerated in Public Utility Code (P.U. Code) § 854(c) the Commission must find that the proposed acquisition is not in the public interest and therefore must be rejected. Furthermore, this Commission should recommend that the FCC also reject the proposed acquisition. In the alternative, TURN proposes conditions that might mitigate some of the negative consequences of the acquisition. However, we are not convinced that given the profound impact on the video, broadband and voice markets and on competitive choices quality and prices for consumers that this transaction would create, any conditions will truly act to ameliorate these effects.

II. THE COMMISSION CLEARLY HAS JURISDICTION OVER THIS PROPOSED TRANSACTION UNDER BOTH CALIFORNIA AND FEDERAL LAW

A. COMCAST AND TIME WARNER ARE TELEPHONE CORPORATIONS WITH COMMISSION ISSUED CPCNS AND OFFER SERVICES REGULATED BY THE COMMISSION

1. Comcast and Time Warner Are "Telephone Corporations"

[1] Opening Testimony of Susan M. Baldwin on Behalf of TURN, at 103 ("Baldwin Opening Testimony").

The Commission has already determined Time Warner California to be a "telephone corporation" pursuant to Pub. Util. Code § 234.[2] In D.14-03-038, this Commission found that "Time Warner California satisfies both federal and state requirements as a common carrier telephone corporation with a Commission-issued CPCN [Certificate of Public Convenience and Necessity] and whose service as an ETC is consistent with the public interest, convenience and necessity."[3] Thus, in its 2014 decision, the Commission determined that, because Time Warner California meets the requirements of a common carrier telephone corporation[4] and has a Commission-issued CPCN, it "is subject to the jurisdiction of this Commission."[5]

Likewise, Comcast is also a telephone corporation and, thus, falls under the jurisdiction of the Commission. In a 2008 decision, SureWest protested Comcast's continued CPCN status in light of Comcast's request to discontinue certain telecommunications services in the state of California.[6] But Comcast explained that it would continue to provide California customers with regulated access service.[7] As a result, the Commission denied SureWest's request that Comcast's Certificate of Public Convenience and Necessity ("CPCN") be discontinued and determined that it "cannot find that [Comcast] will cease to be a telecommunications carrier when it discontinues offering services through [Comcast Digital Phone]"[8] Furthermore, "[t]he Commission determines whether a service provider is a

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[2] Decision Granting Request for Eligible Telecommunications Carrier Status, D.14-03-038 at 2, 5.
[3] *Id.* at 6.
[4] Also, as referenced above, a carrier that provides service as an ETC in the state of California such as Time Warner California also meets the definition of a "telephone corporation" pursuant to Pub. Util. Code § 234.
[5] D.14-03-038 at 6.
[6] *Opinion Addressing Application of Comcast Phone of California, LLC for Authority to Discontinue* Telecommunications Services in the State of California, D.08-04-042 at 12.
[7] *Id*.
[8] *Id*.

telephone corporation through the Commission's issuance of a CPCN, WIR or Franchise under Public Utilities Code Sections 1001-1013"[9] and, as described more fully below, Comcast holds a Commission-issued CPCN. Thus, Comcast is a telephone corporation. As recently as earlier this year, the Commission determined that an entity deemed a "telephone corporation" that holds a CPCN falls under the jurisdiction of the CPUC.[10]

2. Both Time Warner and Comcast Currently Hold CPCNs Issued By the Commission

Time Warner California was issued a CPCN on March 16, 2004.[11] In 2008, Time Warner California requested to cancel its residential circuit-switched voice tariff but continue to hold its Commission-issued CPCN.[12] Time Warner California asserted that "its CPCN authorizes the provision of competitive local and interexchange telecommunications services, through which it has a tariff on file which permits [it] to offer intrastate telecommunications services in California…[and it] plans to offer additional intrastate telecommunications services in the future, including wholesale telecommunications services that would be offered to the public and to its affiliate, [Time Warner Cable] Digital Phone."[13] Time Warner California has also insisted that it has utilized its CPCN – offering, by tariff on file with the Commission, Basic Service and Lifeline service to the public – and has planned to continue to do so in the future.[14]

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[9] *Decision Adopting Revisions to Modernize and Expand the California Lifeline Program*, D.14-01-036 at Conclusions of Law 13 at 166.
[10] D.14-03-038 at 6 and *Decision Adopting Revisions to Modernize and Expand the California Lifeline Program*, D.14-01-036 at Conclusions of Law 13 at 166.
[11] *See generally* D.04-03-032 (granting Time Warner California's request for issuance of a CPCN); *see also* D.14-03-038 at 2, 5-6.
[12] D.08-02-006 at 24.
[13] *Id.* at 24-25.
[14] *See* D. 14-03-038 at 5 and *Opinion Addressing Application of Time Warner Cable Information Services, LLC for Authority to Discontinue Telecommunications Services in the State of California,* D.08-02-006 at 25.

As explained above, the Commission's 2008 decision determined that Comcast[15] was allowed to retain its Commission-issued CPCN.[16] In fact, the Commission has acknowledged that Comcast has confirmed that it provides regulated access service.[17]

As cited above, the Commission noted that a carrier that is a telephone corporation and holds a CPCN falls under the jurisdiction of the Commission. Here, Comcast and Time Warner hold Commission-issued CPCNs – as well as fit the criteria of a "telephone corporation." Thus, Comcast and Time Warner fall under the jurisdiction of this Commission.

3. Comcast and Time Warner Have Services That Are Currently Regulated By the Commission

As noted above, Comcast concedes that it has a Commission-issued CPCN for the purpose of providing "regulated access service" to California customers.[18] It is clear that Comcast agrees to being regulated by this Commission based on the regulated services it provides to Californians.

On October 25, 2013, Time Warner California sought an order designating it as an Eligible Telecommunications Carrier ("ETC").[19] In its request, Time Warner California sought to provide "Lifeline service to qualifying low-income customers in California and receiv[e] corresponding support from the federal universal service fund and the California Lifeline

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[15] Here, TURN refers to Comcast Phone of California. However, Exhibit F to Joint Applicants' Application, a structure chart, reflects that Comcast Phone of California is under the umbrella of Comcast Corporation pre- and post-merger.

[16] D.08-04-042 at 1-2, 10-12 (where SureWest Telephone's protest was denied in which SureWest Telephone urged the Commission to revoke Comcast's CPCN status as a condition of granting Comcast's withdrawal of local exchange and intrastate interexchange voice telecommunications services in Northern California).

[17] *Id.* at 12.

[18] *Id*.

[19] *See generally, Application of Time Warner Cable Information Services (California), LLC (U-6874-C) for Designation As An Eligible Telecommunications Carrier,* A.13-10-019.

fund."[20] Time Warner California also agreed to provide a number of services to Californians, including the following: "'voice telephony services' including Voice grade access to the public switched network by which customers will be able to place and receive calls on the public switched telephone network… [a]ccess to emergency services, such as 911 and enhanced 911…[and] California Lifeline Service elements found in General Order 153…to Lifeline customers."[21] Time Warner California also agreed to adhere to California consumer protection and service quality standards.[22]

The CPUC's authority to grant requests for designation of ETC status derives from Resolution T-17002 and its federal authority is set forth in the Communications Act in 47 U.S.C. § 214(e)(2).[23] Under its authority, the Commission granted the request on April 3, 2014.[24] Thus, Time Warner California is now able to provide regulated services due to its new ETC status.

Because both Comcast and Time Warner provide regulated services to customers in the state of California, they fall under the jurisdiction of the Commission. As a result, the Commission has the authority to determine the appropriateness of the merger between the two carriers in the state of California.

B. SECTION 706 OF THE 1996 TELECOMUNICATIONS ACT CONFERS JURISIDCTION TO THE COMMISSION TO REVIEW THE BROADBAND ASPECTS OF THIS PROPOSED MERGER

1. Section 706 Confers Authority to the States to Take Regulatory Actions to Promote the Deployment of Advanced Telecommunications Capability

Section 706 of the 1996 Telecommunications Act (47 U.S.C. § 1302) provides:

[20] D.14-03-038 at 1.
[21] *Id.* at 3-4.
[22] *Id.* at 4.
[23] *Id.* at 2.
[24] See generally, D.14-03-038.

> 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 telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[25]

The Act also defines "advanced telecommunication capability" to include broadband.[26]

In the recent case of *Verizon v. FCC*[27], the D.C. Circuit Court of Appeals, in reviewing the FCC's "open internet rules," held that Section 706 grants the FCC "the requisite affirmative authority" to regulate broadband in order to promote the deployment of advanced telecommunications capability.[28] Similarly, the Court held that the delegation to the state commissions included in Section 706 was consistent with other such delegations made by Congress over the years in the telecommunications sector.[29] It is also notable that the Court in *Verizon* cited to the Senate Committee Report that describes Section 706 as a "necessary fail-safe" "intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications capability—is achieved."[30] Thus, it is clear that Section 706 delegated regulatory authority to both the FCC and the state commissions to undertake actions necessary to stimulate the deployment of broadband. Review of a proposed merger that could result in one entity, Comcast, dominating the provision of broadband services

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[25] 47 U.S.C. § 1302.
[26] 47 U.S.C. § 1302 (d)(1).
[27] *Verizon v. FCC*, 740 F.3d 623 (D.C. Circuit, 2014) ("*Verizon*").
[28] *Verizon*, 740 F.3d at 635.
[29] *Verizon*, 740 F.3d at 638.
[30] *Id*., citing S.Rep. No. 104-23, at 50-51 (1995).

in California would certainly appear to fall within the jurisdiction of this Commission.[31]

2. Public Utilities Code Section 710 Is Not a Bar to the Commission Reviewing the Proposed Transaction

Joint Applicants have argued that any Commission review of the broadband aspects of the proposed transaction is barred by Public Utilities ("P.U.") Code Section 710.[32] That Code Section places limits on CPUC jurisdiction to regulate Voice over Internet Protocol ("VoIP") and Internet ("IP") – enabled services. However, Section 710 has some clear exceptions; notably that Commission authority over such services is prohibited "except as required or expressly delegated by federal law."[33] Section 706 of the 1996 Telecommunications Act is precisely such a delegation of authority to the Commission pertaining to advanced telecommunications capability aka broadband. Section 706 is very clear, as is the interpretation of that section by the Court in *Verizon v. FCC*. Furthermore, the goals of P.U. Code Section 710 are harmonious with those of Section 706 of the federal act – they are both intended to promote the deployment of broadband. Thus, it is apparent that the Commission has a responsibility to review the proposed transaction given the impacts it may have on broadband investment, deployment and consumer welfare. This conclusion is fully supported by the Scoping Memo issued in this proceeding.[34]

III. THE PROPOSED TRANSACTION SHOULD BE REVIEWED UNDER THE STANDARDS OF P.U. CODE SECTIONS 854(B) AND (C).

A. P.U. Code Sections 854(b) and (c) Are Applicable to This Transaction

[31] For a detailed and excellent discussion of Section 706 see ORA letter dated July 22, 2014 submitted to ALJ Bemesderfer in the instant proceeding.
[32] Letter from Suzanne Toller to ALJ Bemesderfer dated July 9, 2014.
[33] P.U. Code Section 710(a).
[34] Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge in A.14-04-03 (8/14/14), at 10-12 ("Scoping Memo").

Joint Applicants argue that the proposed merger should be reviewed and approved by the Commission only under P.U. Code Section 854(a) and that Sections 854(b) and (c) are not applicable. TURN disagrees.

Joint Applicants contend, "it is clear that section 854(b) does not apply."[35] The essence of Joint Applicants' argument is that the proposed transaction involves no utilities but rather is occurring at the holding company level. When faced with this same argument in the past, the Commission has not allowed the structure of a transaction to dictate whether and how to assess whether the proposed merger is in the public interest. For example, in the SBC and Pacific Telesis Group Merger, the Commission held "[a]lthough the transaction is technically structured as a merger between SBC and Telesis, the practical result of the proposed transaction, if it is consummated, is that it involves Pacific."[36] Focusing on substance rather than form, the Commission "pierced the corporate veil" to find that Section 854(b) was applicable to the transaction.[37] That same reasoning should apply to the instant transaction.

Joint Applicants further argue that Section 854(b) should not apply since "neither of the utilities impacted by this transaction – TWIS (CA) [Time Warner California] or Bright House California – has gross annual intrastate California revenues exceeding $500 million."[38] The language of Section 854(b) clearly states that 854(b) applies to "any of" the utilities involved in the transaction. Comcast does not consider itself a "utility" and hence it argues that its

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[35] 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 Indirect 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 Public Utilities Code Section 854(A), ("Joint Application") at 12.

[36] *Re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC),* D.97-03-067, 71 CPUC 2d 351 (March 31, 1997) ("SBC/Telesis Merger").

[37] *Id*.

[38] A.14-04-013 Joint Application, at 12.

California revenues should not be considered by the Commission in ascertaining whether Section 854(b) or 854(c) apply. However, as described more fully above, Comcast continues to hold a CPCN and continues to provide telecommunications services in California. Thus, Comcast continues to be a "telecommunications carrier" subject to Commission jurisdiction. As such, TURN submits that the Commission can consider the revenues of both parties to the proposed merger in ascertaining whether the $500 million revenue threshold has been reached.

In response to discovery, Comcast, for 2013 had **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL**[39] What is unclear about this data response is what is included in "basic revenue," "digital revenue" and "data revenue." However, given that the Commission is empowered under Section 706 of the Telecommunications Act of 1996 to regulate broadband in order to enable more deployment, TURN submits that revenues derived from broadband should count in meeting the $500M threshold and, therefore, Comcast meets the $500 million threshold.

Joint Applicants also contend that Section 854(c) is not applicable. Joint Applicants' argument is essentially the same as they made with respect to Section 854(b): although 854(c) refers to "any of the entities that are parties to the proposed transaction," rather than using the term "utilities" as in 854(b), the $500 million threshold for 854(c) should only be applicable to the utility that is a party to the transaction. Joint Applicants assert that this interpretation is consistent with Commission practice in reviewing mergers. Joint Applicants cite several cases to support their assertions. While these cases do appear to state the view that a "utility" must meet the revenue threshold for 854(c) to apply, it is important to note that of the three cited cases two

[39] Comcast Confidential Response to ORA 1-153, Bates Comcast_ORA_0000093.

were not even decided on the grounds that 854(c) was inapplicable due to revenues below the $500 million threshold.

In the merger of SBC and AT&T the Commission did not rule on whether any of the parties to the transaction had annual revenues of $500 million; the proceeding was determined on the basis of granting the parties a Section 853(b) exemption. However, as discussed below, while the Commission did not directly apply Section 854(c), the Commission did nonetheless "assess the public interest factors enumerated in Section 854(c)."[40] Similarly, in the MCI and British Telecom merger ("MCI/BT"), the Commission held that "regardless of whether any MCIC California certificated carrier has gross annual California revenues in excess of the $500 million,"[41] the transaction was approved via a Section 853(b) exemption.

What is most significant, however, is not the annual revenues, but the fact that the Commission is under a statutory duty to assess whether the transaction under review is in the public interest. Furthermore, pursuant to Section 853(b), "an exemption may apply to transactions of any scale, so long as application of Sections 854(b) and (c) 'is not necessary in the public interest.'"[42]

B. Section 853(b) Exemption is Inappropriate For This Transaction

Joint Applicants argue that the Commission should exempt this transaction under Section 853(b). Joint Applicants note the flexibility the Legislature granted the Commission as well as this Commission's exemptions of non-dominant interexchange carriers ("NIDEC") and competitive local exchange carrier ("CLEC") mergers from Sections 854(b) and (c). Joint

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[40] *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation,* D.05-11-028, mimeo at COL 5 (SBC/AT&T).

[41] D.97-05-092 (MCI-British Telecom), 1997 Cal. PUC LEXIS 340, at *22 (MCI/BT).

[42] D.05-11-028 at 12.

Applicants suggest a set of criteria that the Commission has applied in granting such exemptions: "where the utilities were not subject to traditional cost of service regulation; where there was competition; and where there would be benefits from the merger for California consumers."[43] While Joint Applicants appear to cite to the SBC/AT&T merger decision,[44] they have misstated the supposed "criteria" as well as the fact that the Commission specifically stated that the elements for determining whether to grant an exemption were specific to the SBC/AT&T case. In that merger the Commission said the "criteria" were: "i) specific characteristics of the merger applicants; ii) the state of and the impact on the market as a whole; and iii) the likelihood that competitive pressures and our regulatory regime will cause benefits achieved through the combination to flow through to consumers."[45]

The most significant point ignored by Joint Applicants is that the Commission has consistently been clear that consideration of an 853(b) exemption will be made on a case-by-case basis based on the specific facts of the particular transaction.[46] In addition, the Commission has stressed that the exemption "must be applied selectively as it must be the exception and not the rule."[47] In the SBC/AT&T as well as in the MCI/BT mergers, the Commission clearly stated that

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[43] A.14-04-013 Joint Application at 13.

[44] The cite provided in the Joint Application for these criteria appears to be incorrect. TURN assumes the Joint Applicants meant to use the decision from the SBC/AT&T proceeding. *See generally* D.05-11-028.

[45] *Id.* at 18.

[46] *See* MCI/BT, D.97-05-092, 72 CPUC 2d 656, 663 ("We caution that we limit this §§ 854(b) and (c) exemption to the unique facts and circumstances of this transaction."). *See also*, D.98-05-022 and D.01-03-079. In addition, in the non-consummated proposed merger between WorldCom and Sprint, the ALJ clearly ruled, and was specifically affirmed by the Commission, that the cases allowing exemptions from Sections 854(b) and (c) were clearly not precedential (In re Request of MCI WorldCom, Inc. and Sprint Corporation for Approval to Transfer Control of Sprint Corporation's California Operating Subsidiaries to MCI WorldCom, Inc., A.99-12-012, ALJ Ruling Denying Motion of MCI WorldCom and Sprint for Early Determination of Exemption From Public Utilities Code Sections 854(b) and (c), as affirmed in D.01-02-040, COL 12, Feb 8, 2001).

[47] *In re Request of WorldCom, Inc. and Intermedia Communications, Inc., for Approval to Transfer Control of Intermedia Communications, Inc. and its Wholly-owned Subsidiary to WorldCom, Inc.,* D.01-03-079 (Mar. 27, 2001) at 3.

Section 853(b) exemptions were to be made on a case-by-case basis.[48] Accordingly, the Commission should not rubber-stamp the proposed transaction as the Joint Applicants request.

C. Whether Section 854(b) or (c) Are Applicable, the Commission Should – At a Minimum – Apply the Section 854(b) and (c) Standards

In the event the Commission decides that Sections 854(b) and (c) are inapplicable to this proposed transaction, TURN submits that the Commission should, at a minimum, apply the standards identified in those sections. This is not an unusual request. In the SBC/AT&T merger the Commission did precisely that: "in order to determine whether the transaction is in the public interest pursuant to Section 854(a), it is reasonable to assess the public interest factors enumerated in Section 854(c) and [the Commission] undertakes an analysis of antitrust and environmental considerations."[49] In addition, the Commission assessed the impact on competition in California. Similarly, in the recent failed AT&T/T-Mobile proposed merger, the Commission opened an investigation and among the issues it considered was the standards enumerated in Sections 854(b) and (c).[50]

IV. EVIDENTIARY HEARINGS

TURN neither supports nor opposes evidentiary hearings in this proceeding. We do note, however, that TURN's expert witness Susan Baldwin will be unavailable for the new dates of December 17-18, 2014 identified by the ALJ in the ruling dated November 26, 2014 for possible evidentiary hearings. Ms. Baldwin has a previous commitment as a witness in a proceeding

[48] D.97-05-092 at 22 (warning that "we caution that we limit this Section 854(b) and (c) exemption to the unique facts and circumstances of this transaction").
[49] SBC/AT&T, at COL 5.
[50] *See*, *Order Instituting Investigation on the Commission's Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy*, I.11-06-009 (June 9, 2011).

before the Pennsylvania PUC from December 16-18.[51] We further note that the revised proceeding schedule, whereby briefs from intervenors are due seven days before the evidentiary hearings, leaves little time for intervenors to adequately prepare for such hearings.

V. THE PROPOSED MERGER IS NOT IN THE PUBLIC INTEREST

A. The Proposed Merger Will Harm Competition in the Residential Consumer Market

Joint Applicants' principal assertion as to why this transaction is in the public interest is that the transaction will "improve" competition because the companies do not currently compete directly in California.[52] Going further, Joint Applicants assert, "there is no plausible basis for concluding that the transfer of control would reduce competition in *any* local markets."[53]

As demonstrated by TURN's expert witness, Ms. Baldwin, the residential voice and broadband Internet access markets are not now competitive and the Joint Applicants are major suppliers in these markets. Furthermore, Ms. Baldwin explains that the markets for these essential products are highly concentrated such that competition is insufficient to result in just and reasonable rates, terms, and conditions given that concentration is a strong indicator of market power.[54]

Although Comcast and Time Warner do not serve overlapping geographic markets, the proposed transaction would still have anticompetitive effects because it would: eliminate a

[51] Ms. Baldwin is an expert witness on behalf of CWA/IBEW in Joint Petition of Verizon Pennsylvania LLC and Verizon North LLC for Competitive Classification of all Retail Services in Certain Geographic Areas, and for a Waiver of Regulation for Competitive Services, Pennsylvania PUC Docket Nos. P-2014-2446303 and P-2014-2446304, filed October 6, 2014.
[52] A.14-04-013 Joint Application, at 2. See also, Opening Brief of Joint Applicants, at 9 ("Joint Applicants Brief").
[53] Joint Applicants Brief, at 9 (emphasis in original).
[54] Baldwin Opening Testimony, at 30-31.

valuable industry "benchmark;" eliminate potential competition; and increase Comcast's overall scale and scope.[55]

B. The Proposed Merger Would Eliminate a Valuable Industry Benchmark

As Ms. Baldwin explains in her opening testimony, currently the Commission can compare the reliability, customer service, prices, and service offerings of Comcast and Time Warner Cable to assess the relative performance of these companies in effectuating the Commission's responsibilities to prepare for and respond to emergencies and to enhance the deployment of advanced telecommunications capabilities. The ability to 'benchmark" these two significant market players is lost once the merger is approved.[56] As a result, the Commission's ability to compare the companies and consider "best practices" will be eliminated. Furthermore, "by eliminating a supplier, especially one like Time Warner Cable, which posses substantial resources and experience, one eliminates the possibility for innovation as well as the state's ability to assess alternative ways of providing service and of protecting public safety."[57] Ms. Baldwin also notes that the loss of a major supplier hampers consumers' ability to compare providers, even if products and services are offered outside the customer's geographic market. Knowledge of a different providers offerings, service quality and prices enhances consumers' ability to advocate on their own behalf if they are dissatisfied.[58]

1. The Proposed Transaction Would Eliminate a Potential Competitor

In addition, the proposed transaction would eliminate a potential competitor from the California market. Comcast and Time Warner Cable each have the substantial economic, technical, and market resources and expertise to enable either to enter the others' markets.

[55] Baldwin Opening Testimony, at 32.
[56] Baldwin Opening Testimony, at 32-33.
[57] Baldwin Opening Testimony, at 32-33.
[58] Baldwin Opening Testimony, at 33.

Although Joint Applicants summarily dismiss this potential as "idle speculation,"[59] dramatic changes in the telecommunications industry over the last few years, let alone over the last 20 years, demonstrate that what might be "idle speculation" today, could become a stark reality tomorrow (e.g., the rise of smart phones, social media, and the Internet itself). The proposed merger would eliminate any prospect of Time Warner Cable competing in Comcast's markets, or vice-versa.

Eliminating such potential competition in the voice and broadband markets should be a significant concern as this Commission considers the merits of the proposed transaction. Contrary to the assertions of the Joint Applicants, the market for both voice and broadband access in California are at best duopolies. As Ms. Baldwin demonstrates, other than the Incumbent Local Exchange Carriers ("ILECs"), cable companies are the major providers of wireline telephone service. Moreover, the cable companies almost exclusively offer voice and broadband as a bundle, which means that the limited competition that exists is for those customers who seek a bundled offering.[60] With regards to wireless, TURN submits that the evidence demonstrates that wireless is still not a substitute for wireline service for a large number of consumers, particularly for older consumers.[61] Thus, for many California citizens the "competitive choice" is between a cable bundle that includes a VoIP telephone service and an ILEC offering of either VoIP or a declining quality legacy copper telephone service. If the merger is approved, Comcast will gain even more market power in the voice market with little accountability to the Commission or to consumers.

In the broadband Internet access market, Ms. Baldwin's analysis shows that like the voice market, at best, consumers have two choices – ILEC and cable. Cable providers such as Comcast

[59] Joint Applicant's Brief, at 12.
[60] Baldwin Opening Testimony, at 38-41.
[61] Baldwin Opening Testimony, at 45-47.

and Time Warner Cable have approximately 61% of California's broadband Internet access market for connections at least 3 Mbps downstream compared to only 28.1% xDSL and 9% fiber (both provided by the ILECs).[62] Significantly, as downstream speeds increase beyond 3Mbps, the cable companies' market share also increases. This is so because the ILEC xDSL product is not capable of providing the speeds that cable can provide. Further, the ILECs fiber offerings (AT&T's U-verse and Verizon's FiOS) are clearly not ubiquitous and AT&T and Verizon are on record as either stopping or slowing down any further investment in fiber to residential consumers.[63] Further support for the fact that the broadband access market is at best a duopoly today comes from the Chairman of the FCC Tom Wheeler who has publicly stated that the market is highly concentrated and cable is and will most likely be the dominant provider. Chairman Wheeler has also stated that, "mobile broadband is not a full substitute for fixed broadband, especially given mobile pricing levels and limited data allowances."[64] Thus, it is clear that a Comcast/Time Warner Cable merger will further cement Comcast's market dominance, which is harmful to consumers and not in the public interest.

Joint Applicants also assert that the proposed merger if approved will spur investment by competitors such as the ILECs to counter the investments that Comcast has and will allegedly continue.[65] This claim is unsubstantiated and flies in the face of what has actually been occurring in California. In fact, TURN has presented substantial evidence to the Commission in the service quality proceeding that demonstrates that AT&T and Verizon are under-investing and allowing their copper networks to deteriorate since these companies do not seem to care about competitive

[62] Baldwin Opening Testimony, at 48-51.
[63] Baldwin Opening Testimony, at 52-53.
[64] Baldwin Opening Testimony, at 56-57 discussing Chainman Wheeler's remarks.
[65] Joint Applicants Brief, at 8-9.

threats and possible customer defections regarding basic local telephone service or broadband access.[66]

2. The Proposed Transaction Will Increase Comcast's Scale and Scope

The proposed transaction will also negatively impact competition because if consummated it will significantly expand Comcast's overall scale and scope. For Comcast, of course, this is a major reason for the merger in the first place. However, for consumers and for the state of California such expansion of scale and scope will further entrench Comcast as the dominant provider and "further entrench Comcast's market power, reduce its accountability to consumers and to regulators, and increase the resources it can allocate for lobbying local, state, and federal policy makers to achieve its corporate objectives."[67] Having at best a duopoly, but more likely a monopoly, controlling the voice and broadband access markets will also hinder the Commission's ability to meet its Section 706 responsibilities. It will be all the harder to ensure that advanced telecommunications capabilities are deployed to Californians under such a market arrangement such that these services are widely available at affordable prices.

C. Comcast's "Commitments" of Benefits to Consumers Are In Reality Empty Promises

Joint Applicants, and Comcast in particular, wax eloquently about the numerous "benefits" of the proposed transaction that will supposedly flow to consumers. Unfortunately, there are no binding, enforceable commitments, only empty promises. The Joint Applicants brief and supporting exhibits go on and on about how this transaction will result in new and improved products and services, that there will be no negative impact on jobs in California, that all prices and services will be unaffected, and how the resulting enterprise will offer the highest quality

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[66] See generally TURN pleadings in R.11-12-001, *Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules*. See also, Baldwin Opening Testimony, at 52-54 and 87-88, and Baldwin Reply Testimony, at 28-32.

[67] Baldwin Opening Testimony, at 34-35.

services, *ad nauseum*. While this is a nice tale, the statements ring hollow in terms of actual benefits for California consumers. Moreover, some of the "commitments" are the proverbial "sleeves off the vest" – they sound good but in fact Joint Applicants are promising absolutely nothing. A shining example of this tactic is the hollow promise that Time Warner will "continue to provide service to Lifeline customers…"[68] acknowledging that if Time Warner does not offer any Lifeline services at the time the merge is consummated then Comcast has no responsibility to offer such services.[69]

It is notable that the Joint Applicants provide no commitments for any benefits to consumers aside perhaps from the notion that some benefits will trickle-down to those consumers.[70] In fact, Joint Applicants offer no assurances to consumers that the services and rates currently subscribed to will continue to be applicable post-merger. Joint Applicants contend that the proposed transaction will be "seamless" to customers, stating:

> Because the transaction will be conducted at the holding company level, it will be seamless to Time Warner Cable customers. This application does not request authority for the transfer of customers or the assignment or discontinuance of any certificate. After closing this transaction, if Comcast Corporation wishes to make additional changes that require regulatory approval, such as changes to dba names, rates, terms, or conditions of service, or transfers of customers, Comcast Corporation will follow applicable California filing and notice requirements associated with such changes.[71]

This "commitment" is particularly odious given that Comcast and Time Warner face very little regulation in California and certainly none that would impact rates or terms and conditions. This is due, in part, to the modifications of the P.U. Code limiting CPUC authority to regulate VoIP and IP-enabled services that was intensely supported by Comcast. Thus, a promise to "follow applicable California filing and notice requirements" in the event of changes in rates and

[68] A.14-04-013 Joint Application, at 21-22.
[69] A.14-04-013 Joint Application, at 21-22.
[70] Baldwin Reply Testimony, at 32-33.
[71] A.14-04-013 Joint Application, at 21.

terms and conditions is as empty as a promise could possibly be. TURN urges the Commission to view the various "commitments" with a jaundiced eye.

D. Comcast's Internet Essentials Program

Comcast and its experts expend considerable effort touting the Internet Essentials ("IE") program. Initially, it's important to note that contrary to Comcast's assertions, there was nothing really "voluntary" about Comcast's "commitment" to Internet Essentials.[72] Internet Essentials was a promise extracted by the FCC as one of the conditions for approval of the Comcast-NBCUniversal merger.[73]

Comcast has recently announced, no doubt as a sweetener to engender support for the instant transaction that it will "extend the Internet Essentials program indefinitely and enhance it in various ways."[74] As explained by Ms. Baldwin, the Internet Essentials program, while it has provided a bridge across the digital divide for some low-income households, has been a program with substantial flaws. The most significant of those flaws are an extremely low participation rate and the program's narrow scope.

The low participation rate in California is amply documented in Ms. Baldwin's testimony.[75] In addition, Comcast does not appear to be attempting to assess best practices between the various states it serves so as to better understand why some serving areas have higher penetration rates than others.[76] Moreover, Comcast does not appear concerned about any possible shortfalls relating to the program in California.[77]

The other primary concern about Internet Essentials is that it is unduly narrow in scope.

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[72] Joint Applicants Brief, at 90; McDonald (Comcast), at para. 39.
[73] *Applications of Comcast Corp., General Electric & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses,* Memorandum Opinion and Order, 26 FCC Rcd. 4238 (2011).
[74] Joint Applicants Brief, at 91.
[75] Baldwin Opening Testimony, at 74.
[76] Baldwin Opening Testimony, at 74.
[77] Baldwin Opening Testimony, at 74.

By design Internet Essentials is limited to providing discounted broadband to households with schoolchildren eligible for free or reduced lunch. As Ms. Baldwin explains, there are many households that do not meet these narrow criteria that are on the wrong side of the digital divide.[78] Comcast appears unconcerned with those households and, according to responses to discovery requests, Comcast has not analyzed barriers to broadband adoption for other segments of the population aside from the Internet Essentials target group.[79] In fact, Comcast appears to be extremely resistant to the idea of expanding the program to reach more consumers arguing that such expansion would "more likely…distract and divert resources from the program than advance it."[80]

While Comcast has "committed" to expand Internet Essentials into the Time Warner Cable territory, if they do so without any changes to their approach Comcast will most likely, at most, have a subscription rate comparable to what it has today within Comcast's service area. Thus, the Comcast "commitment" to "expand" the program is a very negligible assurance, particularly given that no details have been offered by Comcast relating to timing, outreach, etc., and that the financial "commitment" to bridging the digital divide in California pales in comparison to the value of the proposed transaction to Comcast and shareholders.[81] TURN makes recommendations relating to Internet Essentials below.

VI. RECOMMENDATIONS

Joint Applicants have not met their burden of proof and thus the Commission should not approve the proposed transaction. However, in the event the Commission approves the

[78] Baldwin Opening Testimony, at 75.
[79] Baldwin Opening Testimony, at 75.
[80] Baldwin Reply Testimony, at 37 citing McDonald (Comcast), at para. 31.
[81] Baldwin Reply Testimony, at 38-42.

transaction and/or recommends to the FCC that it approve the transaction, certain conditions and commitments must be established. These are detailed in Ms. Baldwin's testimony[82] and are repeated here.

Broadband deployment: (1) Annual report to the Commission with data and maps showing the speed and deployment of its broadband Internet access with each community served along with the median income of each of the communities served, and if there are any significant deployment disparities that appear to be linked to communities' income, a detailed explanation for such apparent disparities. (2) Submission of Form 477 data (which provides geographically disaggregated data about the demand for Comcast's broadband Internet access, by speed) to the Commission Staff, ORA, TURN, and other intervenors within one week of such submission to the FCC, subject to the appropriate proprietary treatment.

Broadband adoption: (1) Increased outreach efforts for Internet Essentials, with the goal of increasing program participation; (2) Commitment to increasing IE participation rates with specific milestones for Comcast's existing footprint and for its new footprint for the years ending 2015, 2016, and 2017; (3) Expanded advertising for Internet Essentials through television, radio, and subway and other public transportation advertisements in community-specific languages; and (4) Expanded eligibility for Internet Essentials to include all households who are eligible for the Lifeline Program; households with disabled members; and households with members aged 65 and above particularly those with low, fixed, and limited/moderate incomes.

Broadband speeds: The minimum speed offered through the Internet Essentials will be 4 Mbps. Subsequent increases in the minimum speed will track FCC-established speeds for broadband.

Unbundled broadband Internet access: (1) Option for at least five years from the date of the Commission's order for residential customers to purchase broadband Internet access on a stand-

[82] Baldwin Opening Testimony, at 103-108.

alone with a download speed of at least 4 Mbps for no more than $15.00 per month; (2) Advertising in community-appropriate languages for the stand-alone option through television, radio, and subway and other public transportation advertisements.

Municipal broadband: Will not oppose any municipality's broadband deployment plans and execution and will not lobby for or support state legislation that would prohibit municipalities' broadband deployment.

Nondiscriminatory access: Will extend the Comcast/NBCU net neutrality commitment to seven years beyond the date of the Commission's order, that is, until at least 2022.

Unbundled voice: Option for at least five years from the date of the Commission's order (that is, until at least 2020) for customers to purchase voice on a stand-alone basis for no more than $20/month.

Participation in Lifeline Program: Commitment to participate in Lifeline program, or, in the alternative, to offer stand-alone voice for no more than $20 per month, and to waive the installation fee.

Public safety and reliability: (1) Commitment to work with local and state emergency officials to prepare for and respond to natural and manmade emergencies and power outages, and to report to local and state emergency officials on lessons learned from such efforts. (2) Five-year commitment to conduct comprehensive consumer education regarding the limitations of VoIP-based service during prolonged power outages. (3) Five-year commitment to report outages to the Commission that affect (a) voice or (b) broadband Internet access.

Affordability: (1) Five-year commitment to allow Time Warner Cable's customers to retain the products at the prices that were in effect at the time the Application was submitted to the Commission (i.e., April 11 2014); (2) Five-year commitment to not raise the rates for any

products for Time Warner Cable and Comcast residential customers, whether offered on a stand-alone, packaged, or bundled basis.

Transition: (1) Commitment to seek approval from the Commission of proposed education of customers regarding customer migration from Time Warner Cable to Comcast. (2) Commitment to increase staffing levels at the time of transition to handle customer queries promptly.

Compliance with merger-related commitments and enforcement if Comcast fails to comply: Demonstrate compliance with its commitments through submission of annual reports to the Commission and to all intervenors to this proceeding. Intervenors should have the ability to petition the Commission to pursue enforcement if intervenors determine that Comcast has failed to comply with the merger-related commitments it makes in this proceeding.

VII. CONCLUSION

For the reasons set forth above, TURN opposes the Joint Applicants' merger Application, urges the Commission to reject this proposed transaction, and to advise the FCC to not approve this merger. In the alternative, if the Commission approves the Joint Application, TURN requests that the above conditions be imposed on Joint Applicants.

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Respectfully submitted,

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