

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Joint Application of Webpass
Telecommunications, LLC (U7278C) and
Google Fiber Inc. for Approval of a Transfer of
Control of Webpass Telecommunications, LLC

Application No. 16-08-009

(Filed August 15, 2016)

**PROTEST OF THE NATIONAL DIVERSITY COALITION TO THE
JOINT APPLICATION OF WEBPASS TELECOMMUNICATIONS,
LLC (U7278C) AND GOOGLE FIBER INC. FOR EXPEDITED
APPROVAL OF A TRANSFER OF CONTROL OF
WEBPASS TELECOMMUNICATIONS, LLC**

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**NATIONAL
DIVERSITY
COALITION**

September 19, 2016

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I. INTRODUCTION

Pursuant to Rule 2.6 of the Rules of Practice and Procedure of the California Public Utilities Commission (“CPUC” or “Commission”), the National Diversity Coalition¹ (“NDC”) hereby protests the above-captioned application (“Application”) filed August 15, 2016 by Webpass Telecommunications, LLC (“Webpass”) and Google Fiber Inc. (“Google Fiber”), (collectively, “Applicants”). The Application first appeared on the Commission’s Daily Calendar on August 18, 2016. Thus, this protest is timely.

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¹ National Diversity Coalition members include the National Asian American Coalition (NAAC), African American Economic Justice Organization, Asian Journal, Chinese American Institute for Empowerment, Christ Our Redeemer AME Church, COR Community Development Corporation, Ecumenical Center for Black Church Studies, Jesse Miranda Center for Hispanic Leadership, Latino Coalition for Community Leadership, Los Angeles Latino Chamber of Commerce, Macedonia Community Development Corporation, National Hispanic Christian Leadership Conference, OASIS Center International, Orange County Interdenominational Alliance, and Templo Calvario CDC. Please note, in prior proceedings before this Commission, NDC members have appeared under the name “Joint Minority Parties”.

II. BACKGROUND

Webpass Telecommunications, LLC (“Webpass”) and its sister companies, Webpass, Inc. and CB-WIC, LLC are all wholly owned by Mr. Charles Barr.² These three organizations are collectively referred to as the “Webpass Companies”. Google Fiber Inc. (“Google Fiber”) is a wholly-owned subsidiary of Google Inc., which is a wholly-owned subsidiary of Alphabet Inc.³ Google Fiber plans to acquire all three Webpass Companies in a two-step transaction, resulting in the Webpass Companies each becoming wholly-owned subsidiaries of Google Fiber.⁴

Step one of the transaction occurred on August 15, 2016, when Google Fiber acquired all equity interests in Webpass, Inc. and CB-WIC, LLC. Mr. Barr retains all equity interest in Webpass Telecommunications, LLC (“Webpass”), which is the organization that holds the CPCN certificate. An individual unaffiliated with the Webpass Companies will be hired to manage day-to-day operations of Webpass, and Mr. Barr will be precluded from engaging in day-to-day management of Webpass.⁵

Step two will occur if the Commission approves the proposed acquisition. Google Fiber would acquire all equity interest in Webpass Telecommunications, LLC from Mr. Barr.⁶ At that point, no immediate changes in day-to-day operations are identified, though it is unclear whether Mr. Barr will resume management responsibilities, or if any personnel changes are planned in human resources, finance, or legal departments.⁷

² A.16-08-009, *Joint Application of Webpass Telecommunications, LLC (u7278c) and Google Fiber Inc. for Expedited Approval of a Transfer of Control of Webpass Telecommunications, LLC, (08/15/2016)* (“Application”) at 2.

³ Application at 2. CB-WIC is also referred to repeatedly as “CB-WCI” in the application (see Application at 4). For clarity, it will be referred to only as “CB-WIC” in this protest.

⁴ Application at 3-4.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 5

III. STANDARD OF REVIEW

A. The Proposed Transaction Must Benefit the Public Interest

The Commission has held that Public Utilities Code (P.U. Code) section 854(a) gives “broad discretion to determine if it is in the public interest to authorize a proposed transaction”⁸ when any public utility is involved. The proper Commission analysis under P.U. Code section 854 must evaluate whether the merger will actually benefit the public interest, instead of merely “not harm” the public interest.

Under a § 854(a) analysis, the Commission has used the criteria enumerated in § 854(c) to evaluate whether public interest benefits would result⁹, and could do so in this proceeding as well. P.U. Code sections 854(c) as well as (b) are independently applicable to the instant proceeding (as discussed below), but if the Commission were to find either section 854(b) or (c) inapplicable, the factors enumerated therein would still be reasonable to use in evaluating the impact on the public interest under a § 854(a) analysis.

Applicants acknowledge that the Commission must consider whether the proposed transfer of control is “in the public interest consistent with Public Utilities Code section 854.”¹⁰ However, the Application does not specify or limit which subdivisions of § 854 are applicable to the proposal. Neither is there any explanation of how the public interest benefits claimed in the Application satisfy any specific statutory requirements under § 854 or other standards.

⁸ D.06-02-003, *Decision Granting Conditional Approval of the Acquisition of PacificCorp by MidAmerican Energy Holdings Company* (02/16/2006) at 23. (emphasis added)

⁹ D.05-11-028, *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* (11/18/2005).

¹⁰ Application at 8.

B. Applicants Bear the Burden of Proving Benefits to the Public Interest

Under P.U. Code section 854(e), the Applicants seeking Commission approval of their Application bear the burden to prove that the requirements of section 854 (b) and (c) are met¹¹. The Applicants must demonstrate clearly, by a preponderance of the evidence, how their proposal will protect and promote the public interest. The relevant factors for evaluating potential benefits and likely harms of the merger on the public interest are clearly provided in sections 854(b) and (c), yet the Application fails to address any particular criteria, and relies upon broad and generic statements of possible benefits. Such assertions are insufficient to meet the statutory requirements.

C. Applicants Must Demonstrate Public Interest Benefits In Line With P.U. Code

Section 854(c)

1. Applicants have failed to raise any defense to applicability of 854(c)

Section 854(c) and its listed criteria apply to applications “...where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars...” (emphasis added)¹². Applicants have failed to provide information on the gross annual California revenues of any of the entities named as parties in the proposed transaction.¹³ Applicants have however provided Exhibit E as Attachment 5 to their Application,

¹¹ “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.” P.U. Code Section 854(e).

¹² P.U. Code Section 854(c).

¹³ On page 2 of the Application, Applicants requested to incorporate by reference the Webpass application for a CPCN, A.14-03-007 (“Webpass CPCN Application”). Such application included an Exhibit F, which is described as “documentation demonstrating the funding of its savings account statement with cash resources in excess of \$100,000, plus additional amounts sufficient to cover any deposits that may be required by underlying carriers”. (Webpass CPCN Application at 8.) Such exhibit appears to show savings account balances and cash assets, but not annual revenue, and was filed under seal. NDC has not had the opportunity to review that document at this time.

a Securities and Exchange Commission Form 10-K, prepared by Google Fiber's parent company, Alphabet, and have stated that Google Fiber does not prepare separate financial statements.¹⁴

The policy decision of Google Fiber not to prepare separate financial statements from their parent company is irrelevant to the applicability of § 854(c). Applicants are legally required under § 854(e) to affirmatively demonstrate how their proposal satisfies statutory criteria, including proving any defense they may raise against application of § 854(c) by providing documentation of the gross annual California revenue of all entities involved.

Applicants have failed to provide such information for Google Fiber or Webpass, and therefore Applicants have failed to demonstrate a defense against § 854(c).

2. Alphabet is a party to the transaction with annual California revenue above the threshold requirement of 854(c)

The documentation that was provided in Exhibit E indicates that Alphabet has gross annual California revenue far in excess of \$500 million dollars. Alphabet's consolidated annual revenue for 2015 was nearly \$75 billion.¹⁵ This information by itself supports the possibility that Google Fiber's separate annual income may be substantial. However, even if Google Fiber's California income is below \$500 million, Alphabet is still an entity involved in the proposed transaction. Although Applicants have chosen to list Google Fiber as the party of record, that does not prevent the Commission from considering the circumstances and determining the true parties to the transaction.

The Application discusses benefits arising from "the financial, operational, and managerial resources of Google Fiber"¹⁶, yet these benefits come primarily from Alphabet and Google, Inc. not Google Fiber on its own. Financially, Google Fiber is not independent enough

¹⁴ Application at 5.

¹⁵ Application, Attachment 5, Exhibit E at 25.

¹⁶ Application at 5.

from Alphabet and Google, Inc. to even prepare its own separate financial statements.¹⁷ The funding for the proposed merger appears to come from Alphabet and Google Inc.’s revenue and credit strength. Google Fiber is operated and managed as a wholly-owned subsidiary of Google Inc., which is a wholly-owned subsidiary of Alphabet Inc.¹⁸ In their formation documents, Google Fiber lists the mailing addresses of their incorporator, their principal executive office, and their principal office in California as Google Inc.’s headquarters¹⁹. Therefore, the financial, operational, and managerial resources of Google Fiber flow directly from Alphabet, and therefore Alphabet should be regarded as a true party to this proposed transaction.

D. Applicants Must Demonstrate Public Interest Benefits In Line With P.U. Code Section 854(b)

1. Applicants bear the burden to prove compliance with § 854(b)

In the Pacific Telesis/SBC Merger²⁰, the Commission rejected a narrow interpretation of 854(b) which implied that the parties bear the burden of proving compliance with 854(b) only after it is determined that a utility is signatory to the merger documents²¹. Instead, the Commission reiterated that 854(e) places the burden of proving compliance with 854(b) on “the person or corporation seeking acquisition or control of a public utility”, without needing to first determine which entity is a utility or has sufficient revenue.²²

Applicants have failed to provide any statements defending against applicability of § 854(b). Neither is there sufficient information provided in the Application for the Commission to determine whether the specific requirements are met. As previously highlighted, Applicants

¹⁷ *Id.*

¹⁸ *Id.* at 2.

¹⁹ Application, Attachment 2, Exhibit B: Article Fifth, Statement and Designation by Foreign Corporation; Application at 2.

²⁰ D.97-03-067, *Re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC)*, (03/31/1997) (“PacTel/SBC”).

²¹ *Id.* at 20.

²² *Id.*

acknowledged the applicability of P.U. Code section 854²³, but made no attempt to address any subsections or requirements.

2. Applicants are both utilities, as is Google Inc., a real party in interest

Under § 854(b), the Commission must find that a proposed merger provides certain public interest benefits and protections if any involved utility has annual California revenue above \$500 million. P.U. Code section 216(a) defines a “public utility” as follows:

“Public utility” includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof. (emphasis added)

P.U. Code section 216(b) goes on to state that whenever any such corporation “performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that [corporation], is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part [of the statutory code].” (emphasis added).

Webpass is clearly a utility, as it has applied for and received a CPCN from the Commission to operate as a telephone corporation and public utility²⁴. Google Fiber provides broadband telecommunications services throughout the nation and is expanding into California cities including San Francisco, San Jose, Los Angeles, Irvine, and San Diego²⁵. Its activities indicate that it too is a public utility, but no evidence or even any assertions were made concerning either utility’s gross annual California revenue in the Application²⁶.

²³ Application at 8.

²⁴ D.15-04-011, *Decision Granting Webpass Telecommunications, LLC a Certificate of Public Convenience and Necessity to Provide Full Facilities-Based and Resold Competitive Local Exchange Service and Interexchange Service*, (04/13/2015) (“Webpass CPCN Decision”) at 3.

²⁵ <https://fiber.google.com/newcities/#viewcities> (As of 09/2016)

²⁶ See FN 13 above.

When making the determination as to which entities' revenues are relevant to consider, the Commission should look beyond just the technical corporate structure of parent and subsidiary companies, and consider which entities are the real parties involved. In PacTel/SBC, the Commission held that “[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.”²⁷ The Commission chose to “focus on substance rather than form in determining whether Pacific [was] a party within the meaning of § 854”²⁸ and “pierc[ed] the corporate veil”²⁹ to find that the requirements of 854(b) applied to proposed transaction.

Here, the practical result of the proposed transaction, if consummated, is that it will certainly involve Google Inc. and Alphabet, as the Applicants have acknowledged by providing financial documentation and listing benefits flowing from the resources of Google Fiber's parent company. As discussed previously, the Application cites to the financial, operational, and managerial strengths that are tied to Alphabet and Google Inc. which the merger could bring to Webpass.

Additionally, an examination of Alphabet and Google Inc. as real parties to the transaction reveals that they have numerous different businesses that qualify them as public utilities in their own right as well. These include the “google voice” service that allows customers to make and receive calls, send and receive texts, forward calls, use voicemail, caller ID, call blocking, international calling, and conference calling services among other offerings³⁰ similar to traditional telephone corporations.³¹

²⁷ PacTel/SBC at 17.

²⁸ *Id.* at 19.

²⁹ *Id.*

³⁰ <https://www.google.com/googlevoice/about.html> (As of 09/2016)

³¹ P.U. Code section 234(a) defines a “telephone corporation” as “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.”

Furthermore, the definition of a “public utility” as discussed above in § 216 includes “common carrier”. The definition of “common carrier” from P. U. Code section 211 includes any corporation that provides transportation to the public or any portion thereof³². Google, Inc. has a corporate coach fleet of shuttles that transports about 6,400 employees to work every day, as well as a corporate car sharing fleet that makes up the largest corporate EV charging infrastructure in the United States, completing on average over 1,000 charging sessions daily for their corporate EVs, totaling more than 1.5 million miles driven.³³

With such extensive and widely utilized services, Google, Inc. is operating as a “telephone corporation” and “common carrier” and should therefore qualify as a “public utility” under the § 216 definitions. Google Inc.’s direct and practical involvement in the proposed merger makes its annual revenue relevant, which is substantial enough to require that the Applicants demonstrate that the criteria of §854(b) are met.

E. The Commission Has Broad Authority to Examine the Impact to the Public Interest of All Applications

As previously discussed, under § 854(a), the Commission has broad authority to determine if proposed mergers will benefit the public interest. Also, under P. U. Code section 851³⁴, precedent has long held that the Commission can evaluate whether proposed transactions

P.U. Code section 233 defines a “telephone line” as “all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.” (emphasis added).

³² “ ‘Common carrier’ means every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part.” P. U. Code section 211.

³³ <https://www.google.com/green/efficiency/oncampus/> (As of 09/2016). The website includes a link to a 2011 video produced by Google, in which Transportation Operations Manager Brendon Harrington states that their shuttle program includes over 70 vehicles with over 275 scheduled daily departures (timestamp 0:43), and the EV fleet includes 35 vehicles (timestamp 2:40) <https://www.youtube.com/watch?v=Dt5sMxYMkGs>. This information is over 5 years old, and the program has certainly grown considerably during that time.

³⁴ “A public utility ... shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, or by any means whatsoever, directly or

are adverse to the public interest.³⁵ In addition to the requirements of applicable statutes, the Commission has its own “active and independent duty to guard the public interest”³⁶. In referring to this duty, the California Supreme Court stated that, “The Commission may and should consider *sua sponte* every element of public interest affected by facilities which it is called upon to approve.”³⁷ This duty to guard *every* element of public interest when evaluating all proposed transactions means that the Commission must consider a wide range of criteria.

Taken together, the statutory and precedential authority above gives the Commission a clear responsibility to evaluate the impact on the public interest of the proposed application including all the reasonably possible public interest harms to market competition, employee and supplier diversity opportunities in the technology industry, and progress in bridging the digital divide. These considerations are well within the appropriate scope of considerations before the Commission in this proceeding.

IV. DISCUSSION

A. The Application Fails to Demonstrate That the Merger is in the Public Interest

Section IV of the Application provides a total of one page of explanation for the public interest benefits of the proposed acquisition.³⁸ Applicants state that the proposed transaction will

indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having either secured an order from the commission authorizing it to do so...” P. U. Code section 851.

³⁵ “The relevant inquiry for the Commission in Section 851 proceedings is whether the proposed transaction is ‘adverse to the public interest.’” D.13-10-063, *Decision Granting Approval Under Public Utilities Code Section 851 For Conveyance of a Lease By Southern California Edison Company To the City of Lakewood*, (10/31/2013) at 6, citing to D.84-04-102, *Application of Universal Marine Corporation, a California Corporation, for Authority to Sell and So. Cal. Ship services, a California Corporation, to Purchase a Certificate of Public Convenience and Necessity of Universal Marine Corporation and for Temporary Authority to Conduct Operations Under Said Certificate in the Interim*, 1984 Cal. PUC LEXIS 962 at 3(“[W]e have long held that the relevant inquiry in an application for transfer is whether the transfer will be adverse to the public interest”); see also D.89-07-016, 1989 Cal. PUC LEXIS 582, *25, 32 CPUC 2d 233.

³⁶ *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577 (1969) at 585.

³⁷ *Northern California Power Agency v. Public Utilities Commission*, 5 Cal. 3d 370 (1971) at 381.

³⁸ Application at 5-6.

“enhance the competitive position of Webpass Telecommunications to the benefit of the California telecommunications marketplace...”³⁹ and allow Google Fiber “to experiment with new technologies for purposes of improving Google Fiber’s own services.”

No details are provided for how the acquisition will actually enhance Webpass’ competitive position. The Application mentions reduced “administrative burdens”⁴⁰, but does not indicate any amount of cost savings or the number of planned personnel reductions, nor does the Application quantify any anticipated operational efficiencies. In fact, the first step of the transaction has already resulted in operational *inefficiency*, by bringing in a new individual to manage the day-to-day operations of Webpass, which Mr. Barr was formerly overseeing.⁴¹ Following the proposed merger, there will be no immediate changes to day-to-day operations of Webpass⁴², which may indicate that Mr. Barr will resume management duties. Applicants assert that expedited Commission approval of the transaction would somehow benefit the public interest by promptly ending the inefficiency created by the transaction⁴³. However, prompt Commission *denial* of the transaction would return day-to-day operations back to normal as well, providing the same “benefit”.

Similarly, Applicants provide no information regarding how experimentation with new technologies through acquiring Webpass will improve Google Fiber’s services.⁴⁴ Experimentation is a valuable step in improving technology, but it can just as easily result in wasted resources that do not produce useable advancements or useful information. Greater benefits to the public interest and technological advancements may be realized by protecting

³⁹ Application at 5.

⁴⁰ *Id.*

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ *Id.*

start-ups from acquisition, preserving smaller companies that think differently and are more entrepreneurial than larger established corporations. The desire to preserve independent experimentation and development is an oft cited reason for why Google Inc. reorganized itself under the Alphabet holding company structure in the first place.⁴⁵ Many companies may do better by maintaining their independence from acquisition by Alphabet. After all, just because “Google is not a conventional company [and does] not intend to become one.”⁴⁶ does not mean that developing companies do not want to be conventional, and would not succeed by following conventional models.

B. The Application Should Be Modified to Provide Public Interest Benefits Under Section 854(c)

While the Applicants have failed to provide sufficient information for the Commission to find that the requirements of § 854(c) have been met, the Application raises many public interest concerns for consumers at large, and a number of issues that are specifically harmful to the minority community. NDC raises the following specific concerns, but reserves the right to address additional issues after further reviewing filings and documents in greater detail.

1. The acquisition does not assure that Google Fiber will maintain the service Webpass proposed to ratepayers and the Commission, violating 854(c)(2)

Applicants state that Webpass will not change the rates, terms, or conditions of their plans⁴⁷ and there will be no “discontinuance, reduction, or impairment of any services to any

⁴⁵ “I should add that we are not intending for this to be a big consumer brand with related products— the whole point is that Alphabet companies should have independence and develop their own brands.” – Larry Page. <https://abc.xyz/> (as of 09/2016).

⁴⁶ *Id.*

⁴⁷ Application at 6.

customer in California”⁴⁸. However, Applicants provide no specific commitments on how long these assurances will remain in effect. NDC notes with concern that in conjunction with step one of the proposed transaction, executed on August 15, 2016⁴⁹, Webpass stopped providing service in the State of Florida⁵⁰. This directly contradicts the public assurances they offered of continued service in Miami and Miami Beach⁵¹. As details regarding this drop in service are not provided, it is unclear whether this is an indication of future planned reductions in service, but it supports such an inference.

Furthermore, in the Webpass CPCN Application⁵², Webpass provided a map of their proposed service area as Exhibit C. This was required under D.95-12-056 at Appendix C Rule 4.E, as cited in the Webpass CPCN Decision⁵³. The proposed service area map lists the following cities in California: Bakersfield, Chico, Fresno, Los Angeles, Monterey, Palm Springs, Sacramento, San Diego, San Francisco, San Luis Obispo, Stockton. Within their CPCN Application, Webpass asserted that “Commission approval of the instant application will reaffirm the principle of competition in the telecommunication market within California and benefit California telephone users by providing... (iv) development and expansion of the telecommunications industry in California with attendant employment opportunities for California customers.”⁵⁴

The decision granting Webpass their CPCN was based upon a requirement for and a record that contained a service area map, which listed the above cities that Webpass proposed to

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 2, FN 1.

⁵¹ “Webpass will continue to grow its service in current operational cities of San Francisco, Oakland, Emeryville, Berkeley, San Diego, Miami, Miami Beach...” <https://webpass.net/blog/google-fiber-agrees-to-acquire-webpass> (As of 09/2016).

⁵² A.14-03-007 (see FN 13).

⁵³ D.15-04-011 (see FN 24) at 10.

⁵⁴ A.14-03-007 at 6.

develop and expand into. Google Fiber has not provided any details on their plans for expansion and development of the Webpass service territory, and has stated only that there would be no reduction in service. However, Webpass received their CPCN with assertions of the benefits flowing from their development and expansion into the 11 cities listed above, a number of which contain large populations of minority groups living in disadvantaged communities that are underserved with internet access, and have higher than average levels of unemployment. Of the 11 cities in Webpass' proposed service territory map, Google Fiber's website indicates plans to expand service only into Los Angeles, San Diego, and San Francisco.⁵⁵ If Google Fiber only maintains Webpass' service in the areas where it is currently available, (and stops dropping service in states like Florida) the public interest will still be harmed by the aborted or delayed expansion of broadband telecommunication technology into more cities. In order to "maintain" Webpass' service in the public interest under § 854(c)(2), Google Fiber must commit to continue with the planned expansion of service into underserved communities that Webpass presented to the Commission when it received its CPCN certificate.

2. It is not clear that the merger will treat utility employees fairly and reasonably under 854(c)(4)

As the Application states that Google Fiber will "relieve the Webpass Companies of administrative burdens including human resources, finance, and legal work"⁵⁶, it appears likely that some Webpass personnel will be laid off if the merger is approved. Applicants have not specified which or how many employees will be let go, or what process will be used to make those determinations.

⁵⁵ <https://fiber.google.com/newcities/#viewcities> (as of 9/2016).

⁵⁶ Application at 5.

NDC is concerned that employee diversity is not being appropriately prioritized and addressed, especially in technology companies such as Google Inc., which employ disproportionately low percentages of minorities. As of the end of 2015, Google Inc.'s overall workforce was only 2% African and 3% Hispanic⁵⁷. While 32% of the workforce was identified as Asian⁵⁸, no break down among the many Asian subethnic groups was provided, which could mask a predominance of Chinese and/or Indian Asians, but virtually no South-East Asian employees. These statistics persist, even after Google Inc. admitted their problem with diversity back in May 2014, made internal commitments to “get to work on Diversity”, and spent more than \$150 million on diversity programs.⁵⁹

Google Fiber, as a subsidiary of Google Inc., is subject to the diversity policies in place for Google Inc., and as with their finances, Google Fiber may not be able to track and report on diversity metrics separately from Google Inc. For these reasons, and also because Google Inc. is engaged in the activities of regulated utilities and is a real party in interest to this transaction as previously discussed, the Commission must evaluate the diversity policy commitments and practices of Google Inc. Commission guidelines along with strengthening Google's own internal efforts would be more effective in addressing the problem than allowing Google to continue with their current policies.

3. The proposal does not contain sufficient provisions designed to benefit state and local economies and communities under 854(c)(6)

⁵⁷ “Just 2% of Google's overall workforce was black and 3% was Hispanic as of the end of 2015, unchanged from the year before when Google first released its internal numbers. The vast majority of Google employees (59%) are white, down a slim 1% from 2014. Another 32% of employees are classified as Asian.” CNN, Fiegerman, Seth, *Google's Search For Non-White Male Employees Shows Few Results*, (06/01/2016) <http://money.cnn.com/2016/07/01/technology/google-diversity-stalls/index.html>.

⁵⁸ *Id.*

⁵⁹ *Id.* See also THE WASHINGTON POST, McGregor, Jena, *Google Admits It Has a Diversity Problem*, (05/29/2014) <https://www.washingtonpost.com/news/on-leadership/wp/2014/05/29/google-admits-it-has-a-diversity-problem/>.

The Application has not set forth specific provisions designed to benefit state and local economies, and the communities within the utility service area. Supplier diversity targets are key tools that utilities use to benefit local economies and communities, as minority-owned businesses are more willing to hire from and invest in minority communities, which face higher than average unemployment rates and are predominantly low-income. Utility partnerships with minority businesses help to increase the capacity of those businesses and increase job opportunities for minorities, directly improving economic conditions in minority communities and indirectly improving their educational and health conditions, presenting back to the utility more capable suppliers, employees, and customers.

The proposed merger would position the Applicants to compete more with established broadband telecom providers. Because of the Commission's historic focus and prioritization of diversity issues, regulated utilities have achieved substantial supplier diversity levels averaging over 32%⁶⁰. Major broadband telecom providers have achieved even higher goals, such as AT&T California and Verizon California, which achieved over 48% and 50% procurement from diverse suppliers respectively in 2015⁶¹. NDC urges the Commission to look closely at the supplier diversity record of the Applicants and their commitments to improving supplier diversity. If expansion of their existing diversity practices along with the expansion of the merged company would not benefit the public interest, appropriate provisions and targets should be added before the Commission grants approval of the transaction.

Additionally, strong commitments to expanding affordable internet access in disadvantaged communities would provide meaningful economic benefits. Access to jobs,

⁶⁰ CALIFORNIA PUBLIC UTILITIES COMMISSION, *Year 2015 Utility Procurement of Goods, Services and Fuel from Women-, Minority-, Disabled Veteran-owned, and LGBT-owned Business Enterprises* (09/2016) at 1. [http://www.cpuc.ca.gov/uploadedFiles/CPUC_Website/Content/About_Us/Business_and_Community_Outreach/GO_156_Reports/2014\(1\)/2016%20GO%20156%20Leg%20Report%20with%20tables.pdf](http://www.cpuc.ca.gov/uploadedFiles/CPUC_Website/Content/About_Us/Business_and_Community_Outreach/GO_156_Reports/2014(1)/2016%20GO%20156%20Leg%20Report%20with%20tables.pdf).

⁶¹ *Id.*

education, and even healthcare and other programs from government, non-profit, and community based organizations is increasingly dependent upon internet service. Also, the vast majority of cultural content such as music, art, and entertainment, is accessed through the internet. Because “[b]roadband has become essential to participation in modern society”, the Federal Communications Commission (FCC) has already taken steps to modernize its Lifeline program to include broadband internet service, stating that “While over 95% of households with incomes of \$150,000 or more have access, only 48% of those making less than \$25,000 have service at home”⁶². This “digital divide” prevents those in underserved communities from utilizing the benefits of the internet, perpetuating a cycle of poverty created by lack of access to information and opportunity, and is exacerbated by barriers to obtaining internet service, including high costs and slow speeds. Internet service providers, including large established companies, but especially smaller developing ones that are poised to disrupt the current broadband industry paradigm, must offer affordable and useable internet service to the millions of underserved Californians who currently lack sufficient internet access.

The newly merged Google Fiber must commit to provide low-cost internet access options to disadvantaged communities, by maintaining and enhancing current offerings. Webpass currently offers a “built-in” service for multi-unit dwellings (MuD), providing 100 Mbps – 1 GIG speeds for \$30/month to each unit.⁶³ This “built-in” option could revolutionize affordable internet access for disadvantaged communities, which contain a high proportion of MuDs. The Applicants would be able to show a meaningful public interest benefit and help mitigate harms by making a commitment to deploy the “built-in” service to a minimum number of MuDs in disadvantaged communities at a discounted rate. Applicants should redesign the “built-in”

⁶² *FCC Takes Steps to Modernize and Reform Lifeline for Broadband*, (06/18/2015) https://apps.fcc.gov/edocs_public/attachmatch/DOC-333992A1.pdf.

⁶³ <https://webpass.net/residential/builtin>.

offering to provide service in disadvantaged communities for \$15/month at a minimum 30 Mbps speeds. This would be in-line with prior affordable internet plans that the Commission has required, such as in the recent Charter/Time Warner/Bright House acquisition⁶⁴. Applicants could achieve cost savings from providing lower bandwidth, as well as participating in the \$2.25 billion Lifeline program as a broadband provider, which provides \$9.25/month in subsidies per household⁶⁵.

Google Fiber currently provides a 25 Mbps service for \$15/month called the “Broadband Plan”⁶⁶. This is an affordable plan at a reasonable speed⁶⁷, but it is only offered in areas with “low rates of Internet connectivity”, based on information from the U.S. Census and the FCC⁶⁸. It is not at all clear what specific eligibility requirements must be met before the Broadband Plan will be offered in a neighborhood. Also, Google Fiber services are only available in neighborhoods that are connected to the Google fiber optic cable network (a “fiberhood”). But fiberhoods are only available in a few select cities, and will only be set up after enough individual customers sign up to participate⁶⁹. Aside from the limited areas that are offered the chance to sign up at all, it is not clear when sign-ups will be open for a neighborhood, how many people need to sign up, and for which service plans, before a fiberhood will be connected.

Google Fiber should clarify the eligibility and sign up process for the Broadband Plan, and commit to setting up a certain number of fiberhoods in disadvantaged communities in

⁶⁴ D.16-05-007, *Decision Granting Application to Transfer Control Subject to Conditions* (05/12/2016) (“Charter Decision”) at 8, 11-12, 26, 70; referencing A.15-07-009, *Presiding Officer’s Ruling Granting Joint Motion of Charter Communications, Inc. and Charter Fiberlink CA-CCO, LLC (u6878c) and the National Diversity Coalition to Modify Positions In Proceedings to Reflect Memorandum of Understanding Between the Parties*, (02/17/2016) Attachment A, *Memorandum of Understanding Between Charter Communications, Inc. and the National Diversity Coalition* at 11.

⁶⁵ *FCC Modernizes Lifeline Program For The Digital Age* (03/31/2016) https://apps.fcc.gov/edocs_public/attachmatch/DOC-338676A1.pdf.

⁶⁶ <https://support.google.com/fiber/answer/6389063> (As of 09/2016).

⁶⁷ FCC minimum speed benchmark for “broadband” is 25 Mbps/3 Mbps. *2016 Broadband Progress Report* (01/28/2016) at 3. https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf.

⁶⁸ <https://support.google.com/fiber/answer/6389063> (As of 09/2016).

⁶⁹ https://support.google.com/fiber/answer/2657216?hl=en&ref_topic=2657129.

California following the approved merger. They should also specify any plans they may have to deploy fiber optic cable networks to low-income housing developments in California, as they have in other states⁷⁰. Provisions in the proposal to provide free gigabit internet service to public housing projects, HUD assisted housing, and community centers in California, as have been done elsewhere, would demonstrate substantial public benefits flowing from the merger.

4. Additional measures are necessary to mitigate significant adverse consequences under 854(c)(8)

The Commission must look at whether a merger will benefit the public interest before granting approval. But where harms to the public interest have been identified, mitigating measure may be included in the proposal to avoid or counter-balance the harms. Mitigating measures are an important consideration of the public interest impact of mergers under § 854(c)(8), as well as under P.U. Code section 854(d) which requires the Commission to consider “reasonable options to the proposal recommended by other parties”. If Applicants commit to providing clear, measurable benefits to disadvantaged communities as discussed above, these could balance out the harms caused by the merger, and provide a solid basis for Commission approval.

V. PROCEDURAL ISSUES

A. Categorization

NDC has no objection to the Applicant’s proposed categorization of ratesetting.

B. Hearings

As discussed above, the Application fails to provide enough information for the Commission to determine the public interest benefits and assess the harms of the merger under

⁷⁰ <https://fiber.google.com/community/#/> (as of 09/2016).

the requirements of P.U. Code Section 854, particularly 854(b) and 854(c). The Commission should either reject the Application outright as failing to meet the statutory burden of proof, or hold hearings to investigate and make factual findings on the specific impacts to low-income consumers, diversity goals, and economic conditions. The Commission should additionally evaluate whether mitigation measures can offset harms and provide an overall public interest benefit. At hearings, NDC would present facts in support of contentions discussed above, that the proposed merger would harm the public interest unless mitigating measures are included. NDC respectfully requests that the Commission schedule evidentiary hearings.

C. Proposed Schedule

NDC recommends that the Commission reject the Applicants premature request for expedited *ex parte* treatment⁷¹. That request was based upon an incorrect assumption that there would be no protests filed, and was justified upon benefits to “business objectives”⁷² and not benefits to the public interest. NDC proposes the following schedule for Commission consideration:

September 19, 2016	Period for Submission of Protests Expires
September 29, 2016	Reply to Protests
October 13, 2016	Prehearing Conference
November 14, 2016	Scoping Memo Issued
November 28, 2016	Opening Comments on Scoping Memo
December 12, 2016	Reply Comments on Scoping Memo

⁷¹ Application at 7.

⁷² *Id.* at 1.

December 26, 2016	Supplemental Applicant Testimony ⁷³
January 25, 2016	Intervenor Testimony
February 24, 2016	Rebuttal Testimony
March 13-14, 2016	Evidentiary Hearings
April 14, 2016	Opening Briefs
April 28, 2016	Reply Briefs
May 30, 2016	Proposed Decision Issued
June 29, 2016	Opening Comments on PD
July 13, 2016	Reply Comments on PD

VI. CONCLUSION

For the reasons set forth herein, NDC protests the Applicants’ request for approval of their merger transaction, as they have not provided sufficient information to prove that the transaction will benefit the public interest, nor have they included mitigating measures to prevent significant adverse consequences which may result.

September 19, 2016

Respectfully Submitted,

/s/ _____
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Robert Gnaizda, General Counsel

Attorneys for
THE NATIONAL DIVERSITY COALITION



⁷³ As discussed throughout this protest, Applicants have failed to provide sufficient evidence that the proposed transaction will benefit the public interest and comply with statutory requirements. NDC provides in our proposed schedule the opportunity for Applicants to submit supplemental testimony to meet their burden of proof.