

**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)

**PREHEARING CONFERENCE STATEMENT OF
THE NATIONAL DIVERSITY COALITION**

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**NATIONAL
DIVERSITY
COALITION**

November 21, 2016

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I. INTRODUCTION

Pursuant to Rule 7.2(a) of the Commission’s Rules of Practice and Procedure, the Administrative Law Judge’s Prehearing Conference Ruling¹ dated October 13, 2016 and Ruling Resetting Prehearing Conference² dated October 24, 2016, the National Diversity Coalition (“NDC”) submits this prehearing conference statement in preparation for the prehearing conference (PHC) scheduled for November 30, 2016.

In the PHC Ruling and the Ruling Resetting PHC³, the ALJ directed the parties to address in a joint statement the following matters:

1. Identification of the specific factual and legal issues that the Commission needs to decide in this case;
2. Whether any discovery is needed and the anticipated date such discovery must be completed;
3. What material facts are undisputed;
4. What material facts are disputed for which hearings are needed, or whether the parties intend to submit written testimony or declarations upon which a decision may be issued regarding those disputed material facts;

¹ A.16-08-009, *Administrative Law Judge’s Ruling Setting Prehearing Conference and Requiring the Parties to Meet and Confer and File a Joint Prehearing Conference Statement* (“PHC Ruling”) (10/13/2016).

² A.16-08-009, *Administrative Law Judge’s Ruling Resetting Prehearing Conference for November 30, 2016; Requiring the Parties to Meet and Confer and File a Joint Prehearing Conference Statement* (“Ruling Resetting PHC”) (10/24/2016).

³ Substantially similar lists of matters to address were provided in the PHC Ruling at 2-3 and the Ruling Resetting PHC at 2-3.

5. If a hearing is needed: (a) the estimated time/days required for hearing; and (b) the number of potential witnesses that each side intends to call at the hearing; and
6. A proposed joint schedule for this case, including dates for completing discovery, filing prepared written testimony (as applicable), and for hearing.

Although attempts were made to meet and confer to provide a joint PHC statement as ordered by the ALJ, the parties were unable to resolve any significant number of issues, and were unable to draft a meaningful joint statement. Under footnote 1 of the Ruling Resetting PHC, the parties have decided, with permission from the ALJ, to file separate PHC statements. NDC will attempt herein to fully comply with the ALJ's orders to address the above identified matters to the extent possible in a separate statement.

II. IDENTIFICATION OF THE SPECIFIC FACTUAL AND LEGAL ISSUES THAT THE COMMISSION NEEDS TO DECIDE IN THIS CASE

As raised in NDC's protest to this Application⁴, the significant issues for the Commission to decide in this case are what provisions of Cal. Public Utilities Code section 854⁵ apply, and whether the requirements of those provisions are met. The Applicants also acknowledge that the issue before the Commission is "whether the proposed transfer of control as described herein is in the public interest consistent with Public Utilities Code Section 854."⁶

The Commission will first need to determine relevant questions of fact regarding all the organizations involved in the proposed transaction, the nature and extent of their regulated activities, and their annual California revenues. This will include the Commission deciding whether they will narrowly focus only on the second step of this transaction, Google Fiber Inc.'s

⁴ A.16-08-009, *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*. ("NDC Protest") (9/19/2016).

⁵ All statutory references herein are to the California Public Utilities Code, unless otherwise indicated.

⁶ 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*. ("Application") (8/15/2016) at 8.

(Google Fiber) acquisition of Webpass Telecommunications, LLC (Webpass Telecom), or if the Commission will consider both parts of the transaction as a whole, including the acquisition of Webpass Telecom, Webpass Inc., and CB-WCI, LLC (collectively the “Webpass Companies”). The Commission must also decide if they will evaluate the involvement of Alphabet Inc./Google Inc., one of the largest companies in the world, as they expand into the California broadband telecommunications market.

The Commission must then determine which sections of 854 properly apply, and if their requirements are met. The Commission will need to determine the facts regarding any actual public interest benefits that are likely to result from the transaction, and the extent of those benefits, and then make legal determinations on whether they satisfy the requirements of the applicable sections of 854. Initial factual determinations are necessary to provide the informational basis for the Commission’s legal determinations as to applicable law and whether the applicable laws have been satisfied.

A. The Commission Should Determine That Applicants Bear the Burden of Proof Under 854(e)

Section 854(e) is clear that the company seeking acquisition of a public utility has the burden of proving that the requirements of 854(b) and (c) are met⁷. In our protest, NDC pointed out that the company seeking acquisition bears this burden even before it is determined which entity is a utility or has sufficient revenue.⁸ Applicants in this proceeding acknowledge that they are seeking to acquire Webpass Telecom, and that Webpass Telecom is a public utility⁹. Even

⁷ Section 854(e) in its entirety states, “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.”

⁸ NDC Protest at 6, citing to D.97-03-067, *Re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC)*, (3/31/1997) (“PacTel/SBC”) at 20.

⁹ Application at 2, 4.

without considering any disputed matters as to the involvement of parent companies and the larger merger transaction as a whole, Applicants have the burden to produce evidence to comply with 854(b) and (c), whether to meet the requirements, or demonstrate their inapplicability. Applicants have failed to provide any actual documentation on the gross annual California revenues of any entities in their Application¹⁰ or their Reply to Protest¹¹, or disclose details on the potentially regulated activities of involved entities. The Commission should order them to produce additional information to meet their burdens under 854(e).

B. The Commission Should Determine That 854(c) Applies

1. Google Inc. and Alphabet Inc. are “entities that are parties to the proposed transaction”

Section 854(c) applies to mergers where “any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars”. Applicants attempt to frame this transaction as a small, routine acquisition occurring only between Google Fiber and Webpass Telecom. Yet Google Inc. and Alphabet Inc. are clearly parties to the proposed transaction, as their financial, operational, and managerial resources are completely intertwined with Google Fiber, and necessary for the funding and purported benefits of the transaction.¹² The Application states that Google Fiber is a wholly-owned subsidiary of Google Inc, which is a wholly-owned subsidiary of Alphabet Inc¹³. Further, the Application

¹⁰ 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.

¹¹ A.16-08-009, *Joint Reply of Webpass Telecommunications, LLC (U7278C) and Google Fiber Inc. to the Protest of the National Diversity Coalition* (“Reply to Protest”) (9/29/2016).

¹² Application at 5.

¹³ *Id.* at 2.

states that Google Fiber does not prepare separate financial statements from its parent company Alphabet¹⁴. The financial information provided in Exhibit E to the Application, while it does not provide specific information on Google Fiber's finances, appears to indicate that losses from operating income and capital expenditures far outweigh revenue¹⁵. It is therefore most likely that the proposed acquisition is funded entirely or substantially by Google Inc. and/or Alphabet Inc.

Additionally, this acquisition of the Webpass Companies is reported as being the result of strategy shifts determined by Alphabet Inc¹⁶. The NY Times article indicates that Google Fiber is focusing on cheaper-to-deploy wireless technology to try to reduce the apparently substantial operating losses of Google Fiber. However, because of this change in strategy, Craig Barratt, CEO of Access/Google Fiber has stepped down from his position. He was also a Senior Vice President at Alphabet, and will remain on only as an adviser. If Alphabet Inc. is able to make sweeping changes to the business strategy of Google Fiber, which results in the Google Fiber CEO stepping down, and a fundamental change in their business model which prompts the currently proposed transaction, then clearly Alphabet Inc. is involved in this transaction. Given Craig Barratt's dual role as CEO of Google Fiber and Senior VP at Alphabet Inc., it is also very likely that the companies share other management personnel and executives.

Finally, as pointed out in the NDC protest, 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 headquarters¹⁷. Taken together, these factors

¹⁴ Application at 5.

¹⁵ *Id.* Exhibit E at 95.

¹⁶ THE NEW YORK TIMES, *Google Curbs Expansion of Fiber Optic Network, Cutting Jobs*, WAKABAYASHI, DAISUKE (10/25/2016). See http://www.nytimes.com/2016/10/26/technology/google-curbs-expansion-of-fiber-optic-network-cutting-jobs.html?_r=1. (checked on 11/17/2016). BLOOMBERG, *Google's Alphabet Experiment Misses Goal: Keeping Executives*, BERGEN, MARK (10/26/2016). See <https://www.bloomberg.com/news/articles/2016-10-26/google-s-alphabet-experiment-misses-key-goal-keeping-executives>. (checked on 11/17/2016).

¹⁷ Application, Exhibit B: Article Fifth, Statement and Designation by Foreign Corporation; Application at 2.

demonstrate an extensive involvement between Google Fiber, Google Inc., and Alphabet Inc. in the financial, managerial, and operational activities, all of which are implicated in the proposed transaction, making all three entities real parties to the transaction.

2. It is not reasonable to focus narrowly only on Google Fiber and Webpass Telecom

Applicants have argued that this proceeding should narrowly focus on “whether the transfer of control of Webpass Telecommunications is consistent with the public interest”, that this is a “type of transfer of control routinely approved by the Commission without a hearing or a prolonged procedural schedule”¹⁸, and that the “small and routine nature of this transaction”¹⁹ warrants expedited approval.

Similar arguments were raised, unsuccessfully, in the proceedings for the Charter/Time Warner Cable/Bright House merger (“Charter proceeding”) and the Comcast/Time Warner Cable/Bright House merger²⁰ (“Comcast proceeding”). The applicants in the Charter proceeding asserted that sections 854(b) and 854(c) were “inapplicable because the Transaction is occurring at the holding company level and none of the utilities at issue in the Joint

¹⁸ Reply to Protest at 2.

¹⁹ *Id.* at 3.

²⁰ A.15-07-009, *Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C)* (“Charter Application”) (7/2/2015);

A.14-04-013, *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)*, (“Comcast Application”) (4/11/2014).

Application has gross annual California revenues exceeding \$500 million”²¹. They asserted that the Commission lacked jurisdiction to evaluate the impact of the transaction beyond the effect on the market for voice services in California.²² They further claimed that the transfer of control of Charter Fiberlink to New Charter did not require 854 review because it was only a “pro forma transfer”, simply a “change in legal control,” and that “the change in legal control is not a change in actual control.”²³

However, in the final decision, the Commission reaffirmed the Scoping Ruling²⁴, stating that “the ALJ and the Assigned Commissioner ruled that the standard of review is whether or not the transaction is in the public interest and that in making that determination the Commission should evaluate the Transaction in accordance with the criteria enumerated in §§ 854(a) through 854(c) of the Pub. Util. Code. We concur.²⁵” The Scoping Ruling looked to the larger parent companies involved, and reasoned that “Both Charter Communications Inc. and Time Warner Corporation have gross annual California revenues exceeding \$500 million, and accordingly the Transaction is subject to review under Pub. Util. Code § 854(c).”

Even though the larger Charter transaction was broken into three separate mergers among different subsidiaries²⁶, and the transaction took place indirectly through holding companies, and the public utilities narrowly involved had revenues below \$500 million, the Commission still looked past narrow consideration of only the merging subsidiaries, and evaluated all involved entities to determine that 854(c) applied.

²¹ D.16-05-007, *Decision Granting Application to Transfer Control Subject to Conditions* (“Charter Decision”) (5/16/2016) at 18.

²² *Id.* at 20.

²³ *Id.* at 18.

²⁴ A.15-07-009, *Assigned Commissioner’s Scoping Ruling* (“Charter Scoping Ruling”) (11/13/2015).

²⁵ Charter Decision at 20.

²⁶ Charter Application at 15-16.

Similar arguments to narrow the focus were rejected in the Comcast proceeding. The applicants there argued that acquisition of a Time Warner Cable subsidiary were occurring only at the holding company level, and the transaction for a Bright House Network subsidiary would result in only a *pro forma* transfer of control²⁷. It was asserted that the sizes of the utility subsidiaries were “relatively small (each company has less than \$500M in gross annual California revenues)”²⁸ and there would be no change in rates, or the terms and conditions of service to existing customers²⁹. For these reasons, the applicants urged the Commission to treat their merger as a “routine matter and approve the change of control without delay”, and narrowly limit the Commission’s jurisdiction to “evaluating the impact of the proposed license transfer on the market for voice services in California.”³⁰

However, in the Scoping Ruling for the Comcast Proceeding, the Assigned Commissioner and ALJ rejected the applicants arguments, and included within the scope of the proceeding the issue of whether the merger met the criteria enumerated in section 854(c), and specifically evaluated the implications of the merger on California broadband deployment, particularly to schools and unserved/underserved areas, and the benefits to low-income outreach and adoption of broadband services that were accessible, affordable, and equitable³¹. The Comcast proceeding ended with the applicants withdrawing their application, but in the final decision approving the withdrawal with conditions, the Commission included the reasoning of the Scoping Ruling.³²

²⁷ Comcast Application at 11.

²⁸ *Id.* at 2-3.

²⁹ *Id.* at 28.

³⁰ A.14-04-013, *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge* (“Comcast Scoping Ruling”) (8/14/2014) at 3.

³¹ *Id.* at 13.

³² A.14-04-013, *Decision on Motion to Withdraw Application to Transfer Control* (“Comcast Decision”) (7/29/2015) at 15.

In the instant proceeding, the corporate structure of Alphabet Inc., Google Inc., Google Fiber, and the Webpass Companies, along with the latest creative attempt to structure mergers to avoid Commission jurisdiction, should not prevent the Commission from identifying who are the real parties to the transaction. In the above discussed cases, the Commission refused to take a narrow view of the transactions involving small subsidiaries, and evaluated the larger mergers involving massive parent corporations to determine that 854(c) applied. In the same way, the Commission here must consider the larger transaction, and evaluate the combined involvement of Google Inc. and Alphabet Inc. in the operations, management, finances, and strategy decisions of Google Fiber, which makes them clearly parties to the transaction, regardless of how this particular merger is structured.

3. The Commission must determine which parties to the transaction have CA Revenue that meets the threshold requirement

After determining that Google Inc. and Alphabet Inc. are actual parties to the transaction, the Commission must evaluate their annual CA revenue to determine if it meets the \$500 million level. It is almost certain that they would have at least \$500 million in annual CA revenue. However, Applicants have not provided documentation on the CA revenue of any entity except Webpass Telecom, and have stated that such information is not relevant in response to data requests and efforts to determine undisputed material facts. Therefore, the Scoping Ruling should provide guidance for the parties on this matter, clarifying that that annual CA revenue of Google Inc. and Alphabet Inc. is relevant, as well as that of Google Fiber, and all the Webpass Companies. Furthermore, as there is no limitation in the statute narrowing the revenue requirement to only that which comes from utility activities, the Scoping Ruling should also clarify that all California revenue from any activity of an entity is relevant and within the scope.

4. The Commission must determine whether Applicants have met the public interest requirements of 854(c).

Under 854(c), the Commission will consider eight criteria to determine if, on balance, the proposed merger is in the public interest. The Applicants have stated broadly and generically that Webpass Telecom will benefit from the merger by gaining access to the “financial, operational, and managerial resources of Google Fiber” which will relieve administrative burdens, and that this will lead to “the benefit of the California telecommunications marketplace.”³³ This is insufficient to meet the specific criteria enumerated under 854(c). In addition to the concerns raised in our protest regarding harms to the quality of service to ratepayers³⁴, utility employees³⁵, and local economies and communities³⁶, NDC has come to see additional likely harms to the financial condition of the resulting utility under 854(c)(1), and the quality of management under 854(c)(3). Google Fiber has apparently been sustaining significant operational losses³⁷ and the inefficiencies and other factors causing this could negatively impact the operation of the Webpass Companies, to the detriment of their customers. This situation also casts doubt on the abilities and decisions of Google Fiber’s management team, and how well they will run the Webpass Companies in the future. Additionally, as discussed earlier, Google Fiber’s CEO Craig Barratt resigned along with the strategy shift that led to the proposed transaction, leaving Google Fiber with uncertain leadership during changing business conditions. This instability hardly seems beneficial for the Webpass Companies and their customers.

³³ Application at 5.

³⁴ 854(c)(2), NDC Protest at 12

³⁵ 854(c)(4), NDC Protest at 14

³⁶ 854(c)(6), NDC Protest at 15

³⁷ Application Exhibit E at 95.

The Commission must evaluate clear evidence of specific alleged benefits before determining that the merger is in the public interest under 854(c).

C. The Commission Should Determine That 854(b) Applies

1. The Commission must determine whether Google Inc. and/or Alphabet Inc. are utilities

Section 854(b) applies when “any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars”. Applicants have asserted (without providing documentation) that Google Fiber and Webpass Telecom have revenues below \$500 million dollars.³⁸ However, as discussed above, the Commission has in recent cases looked beyond the confines of merging subsidiaries as narrowly framed by applicants, and determined that parent companies involved in the larger transactions are real parties. As discussed above, Google Inc. and Alphabet Inc. are clearly parties to the proposed transaction. It is also very likely that their revenues meet the threshold amount. What remains to be determined under 854(b) is whether they are utilities.

NDC raised concerns in our protest over Google Fiber’s activities and Google Inc.’s VoIP service³⁹. In their reply, Applicants claim that Cal. Public Utilities Code section 710(a) excludes VoIP and IP-enabled services from Commission jurisdiction⁴⁰. However, Applicants failed to mention that section 710(a) provides an exception when there is an express delegation by federal law⁴¹. The U.S. Court of Appeals for the District of Columbia and this Commission both found that Section 706(a) of the 1996 Federal Telecommunications Act⁴² provided that

³⁸ Reply to Protest at 4.

³⁹ NDC Protest at 7-8.

⁴⁰ Reply to Protest at 5.

⁴¹ Cal Pub. Util. Code section 710(a) states in part that “the commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet protocol enabled services except as required or expressly delegated by federal law...”

⁴² 47 U.S.C. § 1302(a), et seq.

express delegation. This same issue was argued in the Comcast proceeding and Charter proceeding.

In the Comcast proceeding, the Commission rejected the applicant's argument that section 710(a) prevented Commission jurisdiction over VoIP and IP-enabled services. The Scoping Ruling reviewed the delegation in Section 706(a) of the Telecommunications Act, as well as a ruling by the D.C. Circuit Court that unambiguously found the provisions of section 706(a) to be an affirmative grant of authority to the Commission.⁴³ The Scoping Ruling stated that, "In view of the D.C. Circuit Court's conclusion that Section 706(a) is 'an affirmative grant of authority' to the FCC and the state commissions, it appears to fall clearly within the highlighted exemption in Pub. Util. Code. § 710."⁴⁴

Almost identical arguments were considered in the Charter proceeding⁴⁵. In the Charter Scoping Ruling, the ALJ and Assigned Commissioner found that it was appropriate for the Commission to evaluate broadband activities as within the scope of the proceeding, despite the prohibition of 710(a)⁴⁶. In the final decision, the Commission reiterated their authority to evaluate broadband issues, but provided another basis for such jurisdiction, stating that the applicants had placed such matters in issue by discussing "allegedly beneficial effects of the Transaction" on the broadband market.⁴⁷

Additionally, Cal. Public Utilities Code section 710(d) provides an explicit exception to 710(a) for the enforcement of state and federal laws, including, but not limited to, "state and local authority governing the use and management of the public rights-of-way." The 710(d)

⁴³ Comcast Scoping Ruling at 10.

⁴⁴ *Id.* at 12.

⁴⁵ Charter Decision at 19-20.

⁴⁶ Charter Scoping Ruling at 5.

⁴⁷ Charter Decision at 20-21.

provisions are designed to preserve State jurisdiction over areas where the State has a special interest, including over local consumer protection and business regulation, local environmental quality, and local taxes. State and local authorities should have special protection over their authority to govern public rights-of-way, as that affects the use and regulation of the land and territory itself, over which state and local authorities have jurisdiction superior to federal claims. This protection of state authority to govern public rights-of-way is directly involved in the acquisition of Webpass Telecom, which holds a certificate of public convenience and necessity (CPCN), which provides Webpass with, among other things, “access to public rights of way in California”⁴⁸.

Therefore, in consideration of these delegations and exceptions, 710(a) does not bar the Commission from evaluating the broadband telecommunication activities, including VoIP and IP services, of the involved entities.

2. The Commission must determine if Google Inc. and Alphabet Inc. are acting as a transportation utility

Google Inc. and Alphabet Inc. operate a bus shuttle service and car sharing service that may qualify them as a “common carrier” public utility⁴⁹. It is unclear how the shuttle and car sharing operations are structured, whether they are under Google Inc., Alphabet Inc., or some subsidiary structure. Applicants provided no response to this issue in their Reply to Protest, and refused to provide further information in response to data requests, claiming it was not relevant. The Commission should evaluate this issue as well in determining the applicability of 854(b).

⁴⁸ 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* (4/13/2015) at p 12.

⁴⁹ NDC Protest at 9.

3. The Commission must determine if the requirements of 854(b) are met

In order to determine if the requirements of 854(b) are met, the Commission will need to evaluate facts pertaining to any short or long term economic benefits from the merger. Benefits must flow to ratepayers, and not be less than the benefits that flow to shareholders. Applicants have discussed alleged benefits of the merger to the companies themselves, “enhancing the competitive position of Webpass Telecommunications”⁵⁰ and “improving Google Fiber’s own services”⁵¹. However, no specific economic benefits have been identified for ratepayers. The Commission will need to make factual determinations on the nature and degree of any economic benefits that might result for ratepayers, then decide if they are legally sufficient under 854(b).

D. The Commission Should Determine That 854(a) is Applicable to the Entire Merger Transaction, and the Relevant Criteria to Apply

The Commission must review and authorize every aspect of the transaction at issue here under section 854(a), including the step-one “Initial Close” acquisition of Webpass Inc. and CB-WIC, LLC⁵². All utility mergers require prior authorization from the Commission, otherwise they are void and of no effect.⁵³ As discussed above, section 710(a) does not exempt the Webpass Companies from Commission jurisdiction based on their broadband telecommunications activity⁵⁴. Additionally, the benefits of that acquisition have been placed in issue⁵⁵ as so are appropriate for Commission review under the rationale of the Charter decision.

Section 854(a) gives the Commission broad discretion to evaluate the public interest benefits of transactions. NDC highlighted in our protest that under 854(a), the Commission has

⁵⁰ Application at 6.

⁵¹ *Id.* at 7.

⁵² *Id.* at 4.

⁵³ Section 854(a).

⁵⁴ Application at 2, Reply to Protest at 2.

⁵⁵ Reply to Protest at 2.

“broad discretion to determine if it is in the public interest to authorize a proposed transaction.”⁵⁶, and has previously used the criteria of 854(c) in an 854(a) analysis⁵⁷. Applying the 854(c) criteria under 854(a) would be in line with the Commission’s own “active and independent duty to guard the public interest”⁵⁸. 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.”⁵⁹ 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.

Applicants acknowledge that the Commission may consider section 854(c) factors as part of an 854(a) analysis, but argue against it, claiming that this is a “routine transfer of a small certificate-holder”.⁶⁰ But in fact the transaction before the Commission involves one of the largest corporations in the world using its wholly-owned subsidiary to expand into the broadband services market in California by acquiring multiple affiliated companies. When Comcast and Charter attempted to expand into this market through similar creative merger structures involving subsidiaries and holding companies, the Commission evaluated the involvement of the parent companies in the whole transaction. No company with annual CA revenue above \$500 million should be able to avoid Commission review of their expansion into regulated California markets, simply by structuring mergers through subsidiaries. Furthermore, the number of steps, and

⁵⁶ NDC Protest at 3; 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)

⁵⁷ 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).

⁵⁸ *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577 (1969) at 585.

⁵⁹ *Northern California Power Agency v. Public Utilities Commission*, 5 Cal. 3d 370 (1971) at 381.

⁶⁰ Reply to Protest at 8.

whether the steps occur simultaneously⁶¹, following Commission approval⁶², or part before and part after approval as structured here⁶³, makes no substantive difference.

E. Summary of Issues to Decide

For each of the following issues, the Commission should either determine the question now to provide guidance for the parties, or include the issue in the scope of these proceedings to be determined in the final decision:

Does 854(e) apply?

- Do the Applicants have the burden of proving compliance with 854(b) and (c)?
- Should the Applicants file supplemental testimony to meet their burden?

Does 854(c) apply?

- Are Google Inc. and Alphabet Inc. parties to the proposed transaction?
 - To what extent is Google Inc. and Alphabet Inc. involved in the financial, managerial, and operational workings of Google Fiber?
- Are Webpass Inc. and CB-WCI, LLC parties to the proposed transaction?
 - Is the acquisition of Webpass Inc. and CB-WCI, LLC relevant to the proceeding?
- Do Google Inc. or Alphabet Inc. have annual CA revenues greater than \$500 million?
 - Is all annual CA revenue relevant?
- Do the specific benefits of the proposed transaction meet the public interest requirements of 854(c)?

Does 854(b) apply?

- Are Google Inc. and Alphabet Inc. utilities that are parties to the proposed transaction?
 - Does section 710(a) bar Commission review of broadband telecommunications activities, including VoIP and IP services?
 - Is information on Google Inc. and Alphabet Inc.'s transportation services relevant?
- Does Google Inc. or Alphabet Inc. have annual CA revenues greater than \$500 million?
 - Is all annual CA revenue relevant?
- Do the specific benefits of the proposed transaction meet the public interest requirements of 854(b)?

Does 854(a) apply?

- Is Commission authorization required for all aspects of the proposed transaction, including the acquisition of Webpass Inc. and CB-WCI, LLC?
- What criteria will the Commission apply under an 854(a) analysis?

⁶¹ Charter Application at 15.

⁶² Comcast Application at 10.

⁶³ Application at 4.

III. WHETHER ANY DISCOVERY IS NEEDED AND THE ANTICIPATED DATE SUCH DISCOVERY MUST BE COMPLETED

The Commission may need considerable additional information to determine which sections of 854 apply to the proposed transaction, and if the public interest requirements of those sections are met. It is difficult to estimate the amount of time that will be necessary to conduct discovery at this time, before the scoping ruling has identified the scope of the proceeding and relevant matters. Also, NDC has thus far encountered considerable difficulties obtaining data responses and resolving disputes in a timely manner. The difficulties pertain primarily to delays by Applicants in providing responses, as well as extensive objections in data responses claiming that information beyond the narrow transaction between Google Fiber and Webpass Telecom is not relevant.

NDC requests that the ALJ and Assigned Commissioner affirmatively state in the Scoping Ruling that discovery responses should be provided within 14 days, unless the parties agree to a different time frame, objections are waived for responses provided after the agreed upon deadline, and that relevancy should be interpreted broadly for issues as set forth in the scoping ruling. With these parameters and guidance, NDC is hopeful that discovery can proceed in a more efficient manner, and will be concluded before the start of evidentiary hearings.

IV. WHAT MATERIAL FACTS ARE UNDISPUTED

The parties were unable to resolve disagreements over what facts are material and relevant, aside from the information of the fact itself, and agreed to await further guidance from the ALJ and the Assigned Commissioner. If the Scoping Ruling includes within the scope of the proceeding the applicability and requirements of section 854(a), 854(b), and 854(c), NDC believes there will be little or no substantial dispute over the following facts, which would

therefore be material. However, please note that these are not all facts that parties have agreed are undisputed, nor are they all facts NDC has been able to fully verify. Without agreement by the parties, NDC is unable to answer this question at all, but herein attempts to provide facts that should have the least dispute once relevancy is determined.

- Google Fiber is a wholly-owned subsidiary of Google Inc.
- Google Inc. is a wholly-owned subsidiary of Alphabet Inc.
- Alphabet Inc. and/or Google Inc. provide all or most of the operating budget of Google Fiber.
- Alphabet Inc. and/or Google Inc. provide all or most of the funding for the capital expenditures of Google Fiber.
- Individuals on the executive management team of Google Fiber also serve on the executive management teams of Google Inc. and/or Alphabet Inc.
- Google Fiber has offices located on the same campus as Google Inc.
- Hiring at Google Fiber Inc. is conducted through a program run by Google Inc.
- Webpass Telecommunications, LLC is a public utility.
- Webpass Telecommunications, LLC does not have over \$500 million in annual CA revenue.
- Webpass Inc. does not have over \$500 million in annual CA revenue.
- CB-WCI, LLC does not have over \$500 million in annual CA revenue.
- Google Fiber does not have over \$500 million in annual CA revenue.
- Google Inc. has over \$500 million in annual CA revenue.
- Alphabet Inc. has over \$500 million in annual CA revenue.
- Employment diversity goals at Google Fiber Inc. are set, implemented, and tracked by Google Inc.
- No specific amount of cost savings for the involved entities have been calculated to result from the proposed transaction.
- No specific economic benefits for ratepayers have been calculated to result from the proposed transaction.
- Google Fiber Inc. does not have any specific targets for its employee diversity program.
- Google Fiber Inc. does not have any specific targets for its supplier diversity spending.
- Google Fiber Inc. does not have any specific plans to offer low-cost internet service to low-income consumers.
- Google Fiber Inc. does not have any specific plans to expand service into areas of CA with low rates of internet connectivity.

V. WHAT MATERIAL FACTS ARE DISPUTED FOR WHICH HEARINGS ARE NEEDED, OR WHETHER THE PARTIES INTEND TO SUBMIT WRITTEN TESTIMONY OR DECLARATIONS UPON WHICH A DECISION MAY BE ISSUED REGARDING THOSE DISPUTED MATERIAL FACTS

The parties dispute material facts that affect the applicability of sections 854(b) and (c), and the public interest criteria under those code sections. Hearings will most likely be necessary to examine and clarify these facts, especially pertaining to the nature and degree of alleged benefits to the public interest that will result from the merger. Some facts below may not turn out to be substantially material or in dispute, but at this point, with a lack information provided by Applicants in their application and data responses, NDC herein attempts to provides our best answers on this matter. Material disputed facts include, but are not limited to, the following:

- What is the nature and extent of Google Inc. and Alphabet Inc.’s involvement in the acquisition of the Webpass Companies?
 - In what ways were Google Inc. and Alphabet Inc. involved in making the decision to acquire the Webpass Companies?
 - In what ways did Google Inc. and Alphabet Inc. help provide or secure funding or credit to acquire the Webpass Companies?
- How will the acquisition of the Webpass Companies provide specific public interest benefits as required under 854(c)?
- What is the nature and extent of Google Inc. and Alphabet Inc.’s involvement in the operations and management of Google Fiber and the acquired Webpass Companies?
 - In what ways does Google Inc. and Alphabet Inc. support, influence, or control the business activities of Google Fiber and the acquired Webpass Companies?
 - In what ways does Google Inc. and Alphabet Inc. support, influence, or determine the business policies of Google Fiber and the acquired Webpass Companies?
- How will the acquisition of the Webpass Companies provide specific public interest benefits as required under 854(b)?
- What is the nature and extent of activities engaged in by Google Inc. and Alphabet Inc. that are traditionally provided by public utilities, or are similar to activities and services of public utilities?
 - In particular, what are the details of the Google Voice service, the bus shuttle service, and car sharing service that are offered by Google Inc. and Alphabet Inc.?

VI. IF A HEARING IS NEEDED: (A) THE ESTIMATED TIME/DAYS REQUIRED FOR HEARING; AND (B) THE NUMBER OF POTENTIAL WITNESSES THAT EACH SIDE INTENDS TO CALL AT THE HEARING

NDC anticipates that hearings will be needed. However, the amount of time and days required will depend substantially on the quality of supplemental testimony and data responses provided by Applicants. NDC requests that the Commission require Applicants to file supplemental testimony addressing the statutory requirements of any sections of 854 that will be included as within the scope of these proceedings. The number of witnesses sponsoring testimony will help determine the number of potential witnesses that may be called. NDC is also hopeful that with guidance and direction in the Scoping Ruling, future data responses from Applicant will be more responsive. In consideration of these factors, NDC believes that two days of hearing is reasonable to schedule for now, and hopes that the parties can work together to reduce the amount of hearing time actually required.

VII. A PROPOSED JOINT SCHEDULE FOR THIS CASE, INCLUDING DATES FOR COMPLETING DISCOVERY, FILING PREPARED WRITTEN TESTIMONY (AS APPLICABLE), AND FOR HEARING

NDC proposes the following schedule for the ALJ and Assigned Commissioner’s consideration. This was developed separately, without reaching agreement with Applicants. If a more expedited schedule is desired, NDC proposes first to reduce the amount of time allotted for filing Supplemental Applicant Testimony and Rebuttal Testimony.

November 30, 2016	Prehearing Conference
December 29, 2016	Scoping Ruling Issued
January 30, 2017	Supplemental Applicant Testimony ⁶⁴
March 1, 2017	Intervenor Testimony

⁶⁴ If the Scoping Ruling places 854(b) or (c) within the scope of the proceedings, NDC provides in our proposed schedule the opportunity for Applicants to submit supplemental testimony to meet their burden of proof.

March 29, 2017	Rebuttal Testimony
April 11, 2017	Conclusion of Discovery Period
April 12-13, 2017	Evidentiary Hearings
May 12, 2017	Opening Briefs
May 26, 2017	Reply Briefs
June 26, 2017	Proposed Decision Issued
July 26, 2017	Opening Comments on PD
August 9, 2017	Reply Comments on PD

VIII. CONCLUSION

NDC respectfully requests that the ALJ and Assigned Commission include within the scope of these proceedings the requirements under 854(b) and (c), and instruct the Applicants to file supplemental testimony to meet their burden of proof. We also ask that guidance is provided to clarify discovery expectations, and recommend adoption of our proposed schedule.

November 21, 2016

Respectfully Submitted,

/s/
Tadashi Gondai, Director of Legal Affairs

Attorney for
THE NATIONAL ASIAN AMERICAN
COALITION and
THE NATIONAL DIVERSITY COALITION

