

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

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application No. A.14-04-013

**PROTEST OF THE GREENLINING INSTITUTE TO THE APPLICATION FOR  
TRANSFER OF CONTROL OF TIME WARNER CABLE INFORMATION SERVICES  
(CALIFORNIA), LLC AND BRIGHT HOUSE NETWORKS INFORMATION  
SERVICES (CALIFORNIA), LLC, TO COMCAST CORPORATION**

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Pursuant to Rule 2.6 of the California Public Utilities Commission's (hereafter, "the Commission") Rules of Practice and Procedure, The Greenlining Institute (hereafter, "Greenlining"), protests the above-captioned Joint Application of Comcast Corporation (hereafter, "Comcast"), Time Warner Cable Inc. (hereafter, "Time Warner"), Time Warner Cable Information Services (California), LLC (hereafter, "TWCIS"), and Bright House Networks Information Services (California), LLC to authorize the transfer of control of Time Warner and Bright House to Comcast. The application was filed on April 11, 2014, and first appeared on the Commission's Daily Calendar on April 17, 2012. Pursuant to Rule 2.6(a), this protest is timely filed.

## **SUMMARY**

The Commission should assess the proposed transaction pursuant to Public Utilities Code section 854, subdivisions (a), (b), and (c). Public Utilities Code section 854, subdivisions (b) and (c) expressly apply to the proposed transaction. The Commission should not waive its review under subdivisions (b) and (c). If the Commission does waive that review, the commission should use the criteria enumerated in those sections in making its public interest assessment.

Applicants have not met their burden of proving that the proposed transaction is in the public interest. The proposed transaction threatens to reduce the quality of management of the new company. The proposed transaction could reduce competition in Los Angeles markets, could reduce the availability of services to low-income consumers, and would result in the loss of Time Warner as a “maverick” provider. The proposed transaction will not result in any economic benefit to residential customers, will not advance the Commission’s diversity goals, and will not preserve the jurisdiction of the Commission. Accordingly, the Commission should deny the proposed transaction or, in the alternative, assess the public interest impacts of the proposed transaction. Additionally, the Commission should report its findings to the Federal Communications Commission in order to provide the FCC with information about the California-specific impacts of the proposed transaction. If the Commission does approve the proposed transaction, it should impose mitigation measures to protect the public interest.

## ARGUMENT

### **I. THE COMMISSION SHOULD ASSESS THE PROPOSED TRANSACTION USING PUBLIC UTILITIES CODE SECTION 854, SUBDIVISIONS (A), (B), AND (C).**

Under Public Utilities Code section 854(a), the Commission must approve acquisitions of public utilities.<sup>1</sup> “The Commission has broad discretion to determine if it is in the public interest to authorize a proposed transaction pursuant to Public Utilities Code section 854, subdivision (a).”<sup>2</sup> Additionally, if a transaction involves a utility with gross annual California revenues in excess of \$500 million, the transaction is subject to review under section 854, subdivisions (b) and (c).<sup>3</sup>

#### **A. § 854(b) Expressly Applies to the Proposed Transaction.**

Comcast argues that because Comcast and Time Warner are not utilities, and that TWCIS has annual revenues below \$500,000,000, § 854(b) does not apply.<sup>4</sup> This argument hinges on the distinction between “utilities” in section (b) and “entities” in section (c). Applicants’ argument presumably relies on § 854(f), which states that “[i]n determining whether an acquiring utility has gross annual revenues exceeding the amount specified in subdivisions (b) and (c), the revenues of that utility's affiliates shall not be considered unless the affiliate was utilized for the purpose of effecting the merger, acquisition, or control.” Corporations Code § 150 states that

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<sup>1</sup> *Decision Granting Conditional Approval of the Acquisition of PacificCorp by MidAmerican Energy Holdings Company, Decision Granting Conditional Approval of the Acquisition of PacifiCorp by MidAmerican Energy Holdings Company*, D.06-02-033 (Feb. 16, 2006) at 23.

<sup>2</sup> *Id.*

<sup>3</sup> Pub. Util. Code § 854.

<sup>4</sup> 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), Apr. 11, 2014 at 12 (hereafter, Application).

“[a] corporation is an ‘affiliate’ of, or a corporation is ‘affiliated’ with, another specified corporation if it directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the other specified corporation.” Greenlining concedes that under the plain language of the statute, the Commission cannot consider the gross annual revenues of Comcast’s affiliates, because Comcast is an acquiring company. However, by the plain language of the statute, § 854(f) does not apply to an *acquired* utility--in this case, Time Warner Cable Information Services (California) (TWCIS). Accordingly, the Commission can, and should, consider the revenues of TWCIS’ affiliates. Given Time Warner’s Los Angeles footprint, it is entirely possible that Time Warner has annual revenue exceeding \$500 million in California. Greenlining urges the Commission to further investigate Time Warner’s California revenue in order to determine whether the Commission must make the findings required by § 854(b).

B. § 854(c) Expressly Applies to the Proposed Transaction.

Public Utilities Code section 854(c) requires that the Commission consider eight enumerated criteria “where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars.” The plain language states that § 854(c) applies to an application where *any of the entities* that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars.<sup>5</sup> Applicants cite three cases in support of the claim that the Commission has interpreted “entities” in § 854(c) to only refer to utilities.<sup>6</sup> However, in two of the cases cited by Applicants, the Commission did not squarely address the issue of subsidiaries, and instead decided to waive

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<sup>5</sup> Pub. Util. Code § 854(c)

<sup>6</sup> Application, *supra* note 4 at 13.

the § 854(a) and (b) requirements.<sup>7</sup> In fact, the MCI-British Telecom's Finding of Law No. 4 stated that "[t]he issue as to whether MCIC has in excess of \$500 million in gross annual revenues is moot and need not be addressed."<sup>8</sup> In the third case, neither the acquiring nor the acquired company had annual revenues in excess of \$500 million.<sup>9</sup> Additionally, in the California Pacific Electric proceeding, the Commission expressly considered the annual revenue of Algonquin Power & Utilities Corp., a holding company which did not operate as a utility.<sup>10</sup> Applicants' claim that 854(c) only applies when a proposed transaction is a utility is contradicted by the very cases cited by Applicant. Whether Applicants are themselves utilities is irrelevant to the Commission's determination whether § 854(c) applies.

C. The Commission should not Waive its Review under § 854 (b) and (c).

Comcast erroneously claims that this current proposed merger should also be exempt from § 854(b) and (c) review. Section 853(b) gives the Commission discretion to exempt transactions from §§ 854(b) and (c) review, regardless of the \$500 million gross annual revenues requirement. Greenlining believes that the Application does not contain sufficient facts to warrant a waiver of § 854(c). Unlike the cases cited by Applicants, this potential merger promises to harm California consumers and the public interest.<sup>11</sup> While it is true that the Commission has exempted NDIECs and CLECs from § 854(c), it has done so only with limited

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<sup>7</sup> *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, D.97-05-092, 1997 Cal. PUC LEXIS 340, May 21, 1997 at 663.

<sup>8</sup> *Id.* at 667.

<sup>9</sup> *Joint Application of California Pacific Electric Company, LLC (U933E), Algonquin Power & Utilities Corp., Liberty Energy Utilities Co., Emera Incorporated, Emera US Holdings Inc., and California Pacific Utility Ventures, LLC for Expedited Approval of Indirect Transfer of Control of California Pacific Electric Company, LLC (U933E) Pursuant to California Public Utilities Code Section 854(a), Decision Approving Settlement Agreement*, D.12.06-005, Jun. 7, 2012 at 10.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> Application, *supra* note 4 at 13.



exception in circumstances far different than those in the current proceeding.<sup>12</sup> Accordingly, the Commission should not waive the § 854(b) and (c) requirements.

D. Even if § 854 (b) and (c) do not Expressly Apply, the Criteria Enumerated in Those Sections is Relevant to a Public Interest Assessment.

The issue of whether this transaction triggers the application of §§ 854(b) and (c) aside, the Commission has found that the criteria enumerated in those provisions provide a useful framework for analyzing transactions under the public interest standard in § 854(a).<sup>13</sup> Thus, the Commission has looked at the proposed transaction's impact on: the financial condition of the resulting public utility, service quality, management quality, fairness to affected public utility employees, fairness to the majority of affected public utility shareholders, the benefits to state and local economies, Commission jurisdiction, and competition.<sup>14</sup> Similarly, in D.00-06-079, the Commission noted that it utilized a number of factors to determine whether a transaction such as this is in the public interest, including antitrust considerations, economic and financial feasibility, purchase price, value of consideration exchanged, efficiencies, operating costs savings, and others.<sup>15</sup>

As the Commission noted in D.10-10-017, "some of the criteria enumerated in §§ 854(b) and (c) mirror criteria identified by past Commission decisions as relevant to a public interest assessment under § 854(a), and depending on the nature of the transfer at issue, may well be

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<sup>12</sup> *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, Opinion Approving Application to Transfer Control*, D.05-11-028, Nov. 18, 2005 at 20.

<sup>13</sup> D.06-02-033, *supra* note 1, at 23.

<sup>14</sup> *Id.*

<sup>15</sup> *In the Matter of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S West Long Distance, Inc., and U S West Interprise America, Inc., Opinion*, D.00-06-079, Jun. 22, 2000 at 14.

relevant and even necessary to the specific public interest assessment required.”<sup>16</sup> Moreover, the Commission has found that in order to determine whether the transaction is in the public interest under § 854(a), “it is reasonable for the Commission to assess the public interest factors enumerated in § 854(c) and undertake an analysis of antitrust and environmental considerations.”<sup>17</sup> Even if the Commission finds that § 854(b) and (c) do not apply to this transaction, Greenlining respectfully requests that the Commission utilize the criteria set forth in those subsections when making its public interest assessment.

## **II. APPLICANTS BEAR THE BURDEN OF PROVING THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST.**

In an application for transfer of control, the applicants bear the burden of proving that the Commission should approve the application and any ancillary agreements.<sup>18</sup> When evaluating a proposed transaction under § 854(a), “[t]ypically the Commission has required an applicant to show that a proposed transfer is ‘not adverse to the public interest’ though occasionally the Commission has articulated the standard as requiring a showing that the transfer is ‘in the public interest.’”<sup>19</sup> Under all three sections, if a proposed transaction is adverse to the public interest, applicants do not meet the burden of proof.

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<sup>16</sup> *In the Matter of Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction*, D.10-10-017, Oct. 15, 2010 at 15. (hereafter, *Sierra Pacific Power*).

<sup>17</sup> *In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI’s California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon’s Acquisition of MCI* Conclusion of Law 8, D.05-11-029 (November 18, 2005).

<sup>18</sup> *Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction*, D.10-10-01, Oct. 14, 2010 at 16.

<sup>19</sup> *Id.* at 11.

### **III. APPLICANTS HAVE NOT MET THEIR BURDEN OF PROVING THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST.**

The proposed transaction will be adverse to the public interest. Comcast has refused to meet the Commission's requirement to certify that it is able to improve or maintain the quality of management of the resulting public utility doing business in the state. The character of Comcast's managerial candor has also been recently called into question. Additionally, the proposed transaction threatens competition in the Los Angeles market and the existence of universal service. The proposed transaction will eliminate a maverick in the telecommunications industry and potentially decrease the diversity of viewpoints and suppliers in California.

Additionally, Applicants fail to provide sufficient evidence of the proposed transaction's purported benefits. Contrary to Applicants' public interest claims, the Application lacks proof of any substantial merger-specific benefits and demonstrates a great potential for harm to the public interest. Accordingly, the Commission should either deny the application or, at minimum, further investigate whether the proposed transaction is in the public interest.

#### **A. The Proposed Transaction Threatens to Reduce the Quality of Management of The New Company and Harm the Public Interest.**

The Commission's public interest assessment includes a consideration of, among other factors, whether the proposed transaction will "[m]aintain or improve the quality of management of the resulting public utility doing business in the state."<sup>20</sup> Applicants have failed to make this showing because they have not complied with the certification requirements under D.13-05-035. Additionally, recent behavior by Comcast indicates that the proposed transaction will actually degrade the quality of management of the new company, harming the public interest.

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<sup>20</sup> Pub. Util. Code § 854(c).

1. Comcast is not Exempt from Certification Pursuant to D.13-05-035.

The Commission requires a telephone corporation seeking authority to transfer control to go through a certification process.<sup>21</sup> An important requirement of this process obliges the applicant to show that it has the technical and managerial skills necessary to provide the proposed services in its service territory.<sup>22</sup> The applicant must provide a sworn affidavit stating that “to the best of applicant’s knowledge neither applicant, any affiliate, officer, director, partner, nor owner of more than 10% of applicant, or any person acting in such capacity whether or not formally appointed, is being or has been investigated by... any law enforcement or regulatory agency for failure to comply with any law, rule or order.”<sup>23</sup> Through these certification requirements, the Commission ensures that the review process is accurate and efficient to achieve the goal of protecting California consumers from carriers providing services in the state.<sup>24</sup>

Applicants’ claim that they are exempt from the Commission’s certification requirements under D.13-05-035 is incorrect. Applicants argue that they do not have to meet those requirements because it is unreasonably burdensome for the Applicants to make that broad certification. Comcast states that it is too burdensome to encompass all of affiliates and employees for the purposes of this certification.<sup>25</sup> It also states that it can focus on the applicant Comcast Corporation and its regulated California utility Comcast California Phone.<sup>26</sup> Assuming, for the sake of argument, that Comcast may properly submit a certification focused on Comcast

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<sup>21</sup> *Decision Addressing Revisions To The Certification Processes For Telephone Corporations Seeking Or Holding Certificates of Public Convenience And Necessity, and Wireless Carriers Seeking Or Holding Registration*, D.13-05-035, May 23, 2013.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 37.

<sup>25</sup> Application, *supra* note 4 at 26.

<sup>26</sup> *Id.*

Corporation and Comcast California Phone,<sup>27</sup> the Application does not provide sufficient information to meet the requirements of D.13-05-035. For example, several sections of what appears to be Applicants' affidavit<sup>28</sup> make claims about Comcast Corporation, but are silent as to Comcast California Phone. Greenlining respectfully submits that Applicant's efforts to comply with D.13-05-035 are insufficient to show that the proposed transaction will maintain or improve the quality of management the new company.

2. Comcast's Actions in I.13-10-003 Raise Serious Concerns About The Character of the New Company's Management.

Recent actions by Comcast in California involving the release of confidential consumer information raise serious questions about Comcast's character. Comcast's behavior raises serious questions about how Comcast treats its current customers, and how it will treat Time Warner's customers should the merger be approved. As a result, the quality of management of the new company could actually decline, thereby harming the public interest.

Comcast is currently the subject of a California Public Utilities Commission (CPUC) investigation regarding its admitted disclosure of over 74,000 Californians' unlisted phone numbers over a period of at least two years.<sup>29</sup> These 74,000 customers constitute more than half of Comcast's California customers that requested an unlisted number.<sup>30</sup> Many of these customers requested an unlisted number because they had testified against violent criminals,

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<sup>27</sup> Application, *supra* note 4 at 26.

<sup>28</sup> *Id.* at 27.

<sup>29</sup> *California Public Utilities Commission, Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Comcast Phone of California LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, Order Instituting Investigation into the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers by Comcast, I.13-10-003 (Oct. 3, 2013) (hereafter, Comcast Unlisted Numbers OII).*

<sup>30</sup> *Id.* at 8.

were survivors of domestic violence, or worked in the criminal justice field, and accordingly had serious privacy concerns.<sup>31</sup>

Comcast states that it did not discover these disclosures until early October of 2012.<sup>32</sup> However, there is evidence that Comcast knew about the disclosures as early as March of 2010.<sup>33</sup> At the same time that Comcast was disclosing customers' unlisted information, it also supported SB 1161, a bill which severely restricts the California Public Utilities Commission's authority to impose consumer protections on Voice over Internet Protocol providers.<sup>34</sup> Comcast was one of SB 1161's strongest proponents and supporters.<sup>35</sup> While it is unclear to what extent Comcast lobbied in support of SB 1161, it appears that Comcast did not raise the issue of unauthorized release of information with any of the legislators it met with during the process.

Additionally, while Comcast admits that it discovered the disclosures no later than early October 2012, it did not report the disclosures until January 9, 2013, nine days after SB 1161 went into effect.<sup>36</sup> Comcast admits that its disclosure of the unlisted numbers was a violation of CPUC rules at the time the disclosure occurred, but now argues that the CPUC has no jurisdiction to investigate or impose penalties against Comcast because of SB 1161.<sup>37</sup> To date,

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<sup>31</sup> Comcast Unlisted Numbers OII, *supra* note 29 at 3.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> SB 1161 was eventually enacted as Public Utilities Code section 710.

<sup>35</sup> An April 17, 2012 committee bill analysis listed Comcast Communications as a supporter of the legislation, and Comcast continued to support SB 1161 throughout the legislative process. See Sen. Energy, Utilities and Commc'ns Committee, Analysis of Sen. Bill 1161 (2011-2012 Sess.), *available at* [http://leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1151-1200/sb\\_1161\\_cfa\\_20120413\\_162757\\_sen\\_comm.html](http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1161_cfa_20120413_162757_sen_comm.html).

<sup>36</sup> Comcast Unlisted Numbers OII, *supra* note 29 at 2.

<sup>37</sup> *California Public Utilities Commission, Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Comcast Phone of California LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, Motion to Dismiss of Comcast Phone of California, LLC and its Affiliates*, I.13-10-003, Nov. 18, 2013 (hereafter Comcast Motion to Dismiss).

Greenlining has seen no evidence in the information available in support of the merger that Comcast has done anything, or plans to do anything, to correct its course and start doing right by its customers, despite claims that it plans to improve its customer service.

Comcast's actions—releasing unlisted phone numbers while actively lobbying to remove the CPUC's jurisdiction to punish such acts—seriously call into question Comcast's character and quality of management. These released phone numbers belong to more than half of Comcast's customers in California who have paid for their phone numbers to remain private, and the proposed merger could put more customers at risk of the same breach of statutory and Constitutional right. The Commission should further investigate whether the proposed transaction will reduce the quality of management of the new company and harm the public interest.

B. The Proposed Transaction Could Reduce Competition in Los Angeles Markets.

The Commission's public interest assessment includes a consideration of, among other factors, the proposed transaction's effect on competition.<sup>38</sup> Applicants argue that there will be a *de minimis* harm to competition as a result of the proposed transaction, because the merging companies service territories do not overlap.<sup>39</sup> However, Comcast's planned divestiture of its customers creates very serious potential threats to competition in the Los Angeles area.

Applicants state that as a condition of the transaction, Comcast will divest itself of approximately three million current customers.<sup>40</sup> It is Greenlining's understanding that as part of this divestiture, Comcast and Charter Communications have preliminarily agreed that Comcast

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<sup>38</sup> Pub. Util. Code § 854(b); Sierra Pacific Power, *supra* note 16.

<sup>39</sup> Application, *supra* note 4 at 20-11.

<sup>40</sup> Public Interest Statement 6, Federal Communications Commission, *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57 (*hereafter*, Public Interest Statement).

will sell 1.4 million existing Time Warner Cable customers directly to Charter.<sup>41</sup> Additionally, Comcast will divest another 2.5 million existing Comcast customers to a company owned by Comcast and Charter, and Charter will have the right to buy the jointly owned company after four years.<sup>42</sup> Under the terms of the deal, nearly 280,000 Charter customers in Southern California will be switched to Comcast as early as next year.<sup>43</sup> It should be noted that Comcast and Charter have not yet finalized their agreement and the terms of that agreement could change.

Charter and Time Warner both provide service in Los Angeles, and the two companies' service territories overlap significantly.<sup>44</sup> Greenlining believes that if the Applicants obtain approval for the merger, the subsequent deal between Charter and Comcast could result in the elimination of Charter from those service territories. Accordingly, the Commission should investigate the impact of Charter's exit from the Los Angeles market on competition and the public interest.

#### C. The Proposed Transaction Could Reduce the Availability of Services to Low-Income Consumers.

In addition to competitive harms in the Los Angeles area, the proposed transaction threatens to eliminate competition in the market for federal Lifeline and California LifeLine services. If the Commission approves the proposed transaction, it is likely that Time Warner will not provide Lifeline service in California, reducing the availability of low-cost phone service to low-income customers. Additionally, Comcast's statements in the Application and past behavior

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<sup>41</sup> Ben Fox Rubin, *Charter Buying Subscribers that Comcast Divests*, The Wall Street Journal, Apr. 28, 2014, <http://online.wsj.com/news/articles/SB10001424052702304893404579529262655682706>.

<sup>42</sup> *Id.*

<sup>43</sup> Meg James, *Comcast to Swap Customers with Charter in an Effort to Ease TWC Deal*, LA Times, Apr. 29, 2014, <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-comcast-charter-20140429,0,4429983.story#ixzz30VX3U7y>.

<sup>44</sup> See Broadbandmap.gov to explore the service territories of Charter and Time Warner in the Los Angeles area.



indicate that the new company will only participate in universal service programs if required to do so by the Commission, and that the new company's compliance with any such requirements will be minimal at best. Finally, there is a strong risk of coordinated anticompetitive behavior between Comcast and Time Warner during the pendency of the merger which the Commission should monitor.

### 1. The Proposed Merger Promises to Harm Lifeline Customers.

Greenlining believes that the market for wireline Lifeline services is a relevant submarket in the state and local markets where Time Warner operates. In recent years, Time Warner has shifted its business model to include serving low-income customers.<sup>45</sup> For example, Time Warner recently applied for ETC status in order to begin offering Lifeline in California.<sup>46</sup> In its application for ETC status, Time Warner noted its commitment to serving low-income consumers, stating that “[d]esignating TWCIS (CA) as an ETC will enable it to offer high-quality voice service at price points that meet the needs of California’s Lifeline-eligible consumers, and thus will serve the public interest.”<sup>47</sup> The Commission subsequently granted that application.<sup>48</sup> The merger has the potential to reduce competition for Lifeline services, because

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<sup>45</sup> See *Time Warner’s Petition for Modification of Existing Eligible Telecommunications Carrier Designation*, New York Public Service Commission, 12-C-0510, Nov. 13, 2012; and *Petition of Time Warner Cable Information Services (Maine), LLC for Designation as a Lifeline-only Eligible Telecommunications Carrier in the State of Maine*, WC Docket No. 09-197, Federal Communications Commission, Jul. 22, 2013.

<sup>46</sup> *Application of Time Warner Cable Information Services (California), LLC (U-6874-C) for Designation as an Eligible Telecommunications Carrier*, California Public Utilities Commission, A.13-10-019, Oct. 25, 2013.

<sup>47</sup> *Id.* at 14-15.

<sup>48</sup> *Application of Time Warner Cable Information Services (California), LLC (U6874C) for Designation as an Eligible Telecommunications Carrier*, Decision Granting Request For Eligible Telecommunications Carrier Status, D.13-03-038, Apr. 3, 2014.

the merger will either (1) eliminate Time Warner as a potential entrant<sup>49</sup> (if Time Warner has not begun providing Lifeline service at the time the merger is consummated), or (2) eliminate Time Warner as a competitor (if Time Warner has begun offering Lifeline service at the time the merger is completed).<sup>50</sup> The Commission should examine the public interest harms that would result from the new company's withdrawing or failing to offer Lifeline service.

Even if Comcast does not intend to relinquish Time Warner's ETC status, Comcast does not indicate any interest in applying for ETC status and providing California Lifeline service through any of its affiliates that offers telephone service, or any successor companies, regardless of the technology used to provide that telephone service. Although the new company would benefit from the merger by acquiring more market power, it will not leverage this benefit to provide affordable stand-alone telephone service to Lifeline-eligible customers. The actual or potential elimination of Time Warner as a Lifeline provider would seriously harm the public interest. The Commission should examine the possible effects of the merger on Time Warner's low-income, disabled, and elderly consumers' ability to have quality, affordable phone service.

Unlike Time Warner, Comcast has displayed no interest in providing Lifeline service in California. While Comcast does not directly state that it is planning on relinquishing Time Warner's Lifeline offerings once the merger closes, Greenlining believes that Comcast is not interested in offering Lifeline through TWICS based on statements Comcast made in its application.<sup>51</sup> "As noted above, TWCIS (CA) recently was designated as an ETC in California, but has not begun to offer any Lifeline services as of the date of this application. If TWICS (CA)

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<sup>49</sup> *Horizontal Merger Guidelines*, U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, Aug. 19, 2010, available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> See Application, *supra* note 4 at 22 where Comcast states that it will continue to offer Lifeline through TWCIS if TWCIS starts to offer Lifeline prior to the merger and "unless and until the Commission approved an application to relinquish the TWCIS CA Lifeline certificate."

offers Lifeline services prior to the transfer of control of TWCIS (CA) to Comcast Corporation, Comcast Corporation acknowledges that it would continue to provide service to Lifeline customers (unless and until the Commission approved an application to relinquish the TWCIS (CA) Lifeline certificate).”<sup>52</sup> These statements are a strong indication that the new company does not intend to offer Lifeline service.

The proposed transaction’s potential elimination of Lifeline in Time Warner’s service areas could seriously harm low-income consumers and the public interest. Similarly, Comcast’s consistent refusal to provide Lifeline service harms the public interest. The Commission’s merger assessment should include an examination of effects of the proposed merger on the new company’s low-income, disabled, and elderly consumers’ ability to have quality and accessible phone service.

## 2. Comcast Has a Poor Record of Serving Low-Income Customers.

Comcast has historically only participated in low-income programs when required to do so. Comcast’s lack of commitment to its Internet Essentials program is a perfect example of Comcast’s reluctance to serve low-income customers. Comcast created its “Internet Essentials” program as a condition of the FCC’s approval of its merger with NBCUniversal. Internet Essentials was a product of the settlement that Comcast was forced to negotiate as a condition of its takeover of NBC Universal, not an independent business decision.<sup>53</sup> Internet Essentials is set to expire in 2014.<sup>54</sup>

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<sup>52</sup> Application, *supra* note 4 at 21-22.

<sup>53</sup> *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum of Opinion and Order, Docket No. 10-56, Jan. 18, 2011 at 141.

<sup>54</sup> *See id.*

Comcast announced that it would extend Internet Essentials “indefinitely” after its original expiration in June 2014.<sup>55</sup> After Comcast is no longer required to provide Internet Essentials, there is no guarantee how long Comcast will continue and expand the program. In order to be eligible for Internet Essentials, Comcast requires that an applicant has not subscribed to Comcast Internet within the last 90 days and that the applicant does not have an overdue payment or unreturned equipment. These eligibility requirements naturally eliminate a huge portion of the low-income population that otherwise qualify for the program. Comcast has shown no concrete plans to accept new sign-ups or make any improvements to its eligibility requirements and quality of service.

Comcast’s implementation and administration of Internet Essentials has been a failure, and the current program does almost nothing to benefit the public interest. The “high-speed connections” Comcast gives participants are slow: 3Mbps downstream and 768Kbps upstream.<sup>56</sup> A household must have at least one household member eligible for the National School Lunch Program to participate in Internet Essentials. Comcast estimates that there are about 2.6 million eligible households that meet that requirement in Comcast’s service territory. Of those 2.6 million households, only about 150,000 households are *actually* served—a penetration rate of about one half of one percent. Comcast’s *de minimis* compliance with its commitment to Internet Essentials has resulted in a program which neither serves enough people to make a real impact on reducing the digital divide, nor provides sufficient speed and data to allow low-income customers to benefit from high-speed internet.

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<sup>55</sup> Public Interest Statement, *supra* note 40 at 59.

<sup>56</sup> This speed is about 70% slower than the average connection of internet in the U.S. See Akamai’s *State of the Internet Q4 2013 Report*, Vol.6 Num. 4, available at <http://www.akamai.com/dl/akamai/akamai-soti-q413-exec-summary-a4.pdf>.

Comcast is touting IE as a huge success and promises to expand the program to TW's territories as a result of the merger, in order to bring all Americans into the digital communications age and end digital divide.<sup>57</sup> However, Internet Essentials has failed to meet its purported goals of benefitting to low-income households and bridging the digital divide. In the program's current form, the extension of Internet Essentials to Time Warner consumers will be of extremely limited benefit to Californians. Greenlining urges the Commission to consider Comcast's lackluster efforts to promote Internet Essentials when assessing whether the merger is in the public interest.

3. There Is A Significant Risk That Applicants Will Engage In Illegal Coordinated Conduct During the Pendency of the Transaction.

Greenlining believes that there is a possibility that Time Warner may relinquish its Lifeline certificate or abandon its plans to offer Lifeline service during the pendency of the merger, in order to relieve the new company of any obligation to provide Lifeline service. Those actions would be strong evidence of coordinated anticompetitive behavior between Comcast and Time Warner. The Commission should ensure that Time Warner does not renege on its commitment to offer Lifeline service and institute safeguards to prevent any anticompetitive behavior by the combining companies during the pendency of the transaction

D. The Proposed Transaction Would Result in the Loss of Time Warner as a "Maverick" Provider.

Applicants argue that because Comcast and Time Warner do not compete in any market, the proposed transaction raises no concerns about increased market concentration.<sup>58</sup> However, market concentration is not the only evidence of competitive effects of a transaction.<sup>59</sup> "An

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<sup>57</sup> *Akamai's State of the Internet Q4 2013 Report*.

<sup>58</sup> Application, *supra* note 4 at 20-21.

<sup>59</sup> *Supra* note 51.

acquisition eliminating a maverick firm...in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.”<sup>60</sup> “If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of the product.”<sup>61</sup>

Unlike most other cable companies, Time Warner has acknowledged that its offering telephone services makes Time Warner a common carrier. Time Warner acknowledges that these offerings make it subject to Commission regulation as a telecommunications carrier: “TWC has now transitioned to a more efficient and cost-effective business model under which it relies on TWCIS (CA) to interconnect and exchange traffic with incumbent local exchange carriers. In addition to carrying out wholesale carrier functions relating to interconnection with the public switched telephone network, TWCIS (CA), a telephone corporation in California, will provide retail interconnected VoIP service as a telecommunications service pursuant to its CPCN.”<sup>62</sup>

As noted above, Time Warner is one of a very small number of cable companies that view serving low-income consumers as part of a viable business model. Time Warner is a “maverick” that freely acknowledges that to the extent it provides telephone service, it is a common carrier. Time Warner’s acknowledgment of its common carrier status, as discussed further in section IV.H below, ensures that Time Warner will serve the public interest by contributing to a consistent standard of telephone service quality across the state. Eliminating Time Warner would eliminate one of the few “good actors” in the cable industry and would

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 24.

<sup>62</sup> *Supra* note 46 at 3.

reduce service options for individuals with fewer choices in the telephone market.

Accordingly, the proposed transaction has the potential to harm consumers and the public interest.

E. The Proposed Transaction Will Not Result in Any Economic Benefit to Residential Customers.

The new company will experience some cost savings as a result of eliminating redundant costs (which includes job cuts) and increased bargaining power with suppliers and purchasers. The new company should have to pass some of those savings on to customers. However, Comcast apparently does not intend to pass any cost savings along to customers. David L. Cohen, Executive Vice President of Comcast, has stated that Comcast is “certainly not promising that customer bills are going to go down or even increase less rapidly” as a result of the merger, and that benefits to consumers, if any, will come via “quality of service, by quality of offerings, by technological innovations.”<sup>63</sup> Given the potential rise in Comcast’s revenue derived from California post-merger, the Commission should scrutinize how Comcast will provide short-term and long-term economic benefits to the public interest.

F. The Commission Should Investigate the Effect of the Proposed Transaction on Diversity.

Supplier, workforce, management, and ownership diversity are issues of public interest, particularly in a state as diverse as California. Applicants claim that the merger would bring Time Warner under control of an entity that voluntarily reports and performs well under the supplier diversity standards of the Commission’s GO 156.<sup>64</sup> While it is generally true that Comcast has made some progress on its supplier diversity performance, Greenlining does not

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<sup>63</sup> Jon Brodtkin, *Comcast: No Promise that Prices “Will go down or even increase less rapidly,”* ARTECHNICA.COM, Feb. 13, 2014, <http://arstechnica.com/tech-policy/2014/02/comcast-no-promise-that-prices-will-go-down-or-even-increase-less-rapidly/>.

<sup>64</sup> Application, *supra* note 4 at 15.

view that progress as “well-performing,” and in fact gave Comcast an “F” in Greenlining’s 2013 Supplier Diversity Report Card. Applicants have made no greater commitment to substantially improve the new company’s efforts to diversify its suppliers or workforce, and overall economic development of our communities beyond Comcast’s currently lackluster efforts. The Commission has been a national leader in ensuring robust supplier diversity programs in major California’s energy, telecommunications, and water companies all throughout California. The Commission’s merger assessment should include an investigation of the new company’s commitment to diversity.

G. The Purported Benefits of the Proposed Transaction are Not Merger-Specific.

The Commission does not consider the purported benefits of a transaction if those purported benefits are “vague, speculative, or otherwise cannot be verified by reasonable means.”<sup>65</sup> While Applicants claim a number of purported benefits, the Application does not contain enough information for the Commission to verify those benefits. For example, the Application makes some general assertions about how competition will benefit, but provides no actual detail. Similarly, Applicants claim that the two companies will be able to complete the transaction without disrupting customer service,<sup>66</sup> but fail to provide a specific customer transition plan that demonstrates that customer service will be minimally interrupted. Applicants’ analysis of the § 854(c) factors consists of bare claims that the proposed transaction satisfies each of the factors, without any substantial supporting data or a single citation.<sup>67</sup> Accordingly, the Commission should reject those claims as unverifiable.

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<sup>65</sup> *Supra* note 51.

<sup>66</sup> Application, *supra* note 4 at 21.

<sup>67</sup> *Id.* at 22-24.



“When reviewing a merger, acquisition, or control proposal, the commission shall consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal.”<sup>68</sup> It appears that there may be reasonable options to the merger such as agreements or joint ventures. For example, Comcast, Time Warner, and Bright House were able to successfully enter into a joint venture (called “SpectrumCo”) and enter into an agreement with Verizon Wireless to sell bundled cable and wireless services.<sup>69</sup>

Applicants state that both companies attempted to enter into agreements with each other and other companies. However, those attempts failed because the cable companies could not agree on terms.<sup>70</sup> Greenlining finds this argument dubious, especially in light of the fact that, as discussed above, Applicants have previously successfully entered into such agreements. Accordingly, Applicants’ claims that it is “too hard” to enter into agreements with other providers ring false. The Commission should investigate whether Applicants could achieve the purported benefits listed in the Application with a reasonable option other than the proposed transaction.

#### H. The New Company Would Likely Claim that the Commission had no Jurisdiction to Regulate that Company.

The Commission’s merger assessment includes consideration of whether the proposed merger will “[p]reserve the jurisdiction of the commission and the capacity of the commission to

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<sup>68</sup> Cal. Pub. Util. § 854, subd. (d).

<sup>69</sup> *FCC Approves Verizon Wireless-SpectrumCo Transaction*, FCC, Aug. 23, 2012, <http://www.fcc.gov/document/fcc-approves-verizon-wireless-spectrumco-transaction>

<sup>70</sup> Public Interest Statement, Declaration of Michael J. Anjelakis at 8 (hereafter, Angelakis Declaration); Public Interest Statement, Gregory Roston and Michael D. Topper, *An Economic Analysis of the Proposed Comcast – Time Warner Cable Transaction* at 26, 37, 54, 62 (hereafter, Economic Analysis).

effectively regulate and audit public utility operations in the state.”<sup>71</sup> As discussed above,<sup>72</sup> Comcast actively lobbied for deregulation of IP-enabled services. Additionally, Comcast currently maintains the position that Public Utilities Code section 710 prevents the Commission from regulating any of Comcast’s actions as long as those actions are remotely related to IP-enabled services.<sup>73</sup>

As discussed above, Time Warner acknowledges that, to the extent that it provides telephone service, Time Warner is a telephone corporation that provides telecommunications services, regardless of those services’ underlying technology.<sup>74</sup> Comcast, however, steadfastly maintains the position that as a company that provides digital voice services, it is not a telephone corporation, nor does it provide telecommunications services.<sup>75</sup> Additionally, Comcast has indicated that one of the new company’s first priorities will be to convert to an entirely IP-enabled network:

- “Post-transaction, Comcast is committed to speeding the IP cable transition throughout the combined company’s expanded footprint, creating even greater value for customers.”<sup>76</sup>
- “[A] critical step will be to upgrade all of TWC’s systems from a part-analog to an all-digital platform in order to provide improved quality as well as additional capacity for broadband and other advanced services.”<sup>77</sup>
- “Comcast has stated that the transition of TWC systems to all-digital will be an initial focus immediately after the transaction.”<sup>78</sup>

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<sup>71</sup> Pub. Util. Code § 854(c)(7),

<sup>72</sup> See *supra* note 35.

<sup>73</sup> Comcast, Motion to Dismiss, *supra* note 37.

<sup>74</sup> *Supra* note 48 at 3.

<sup>75</sup> Comcast, Motion to Dismiss, *supra* note 37.

<sup>76</sup> Joint Written Statement of David L. Cohen and Arthur T. Minson, Jr., U.S. Senate Committee on the Judiciary, Hearing on “The Impact of the Comcast-Time Warner Cable Merger on American Consumers at 21 (April 9, 2014).

<sup>77</sup> Anjelakis Declaration, *supra* note 40 at 10.

Greenlining believes that Comcast's plan to transition to an all-IP network is in large part motivated by Comcast's unwillingness to serve low-income consumers or be subject to consumer protections for telephone service. Given this motivation, as well as Comcast's extreme views regarding the scope of the Commission's jurisdiction, the proposed transaction will not preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.

I. The Commission Should Deny the Proposed Transaction or, in the Alternative, Assess the Public Interest Impacts of the Proposed Transaction.

The proposed transaction will not offer substantial benefits to California consumers and instead poses a great risk of public interest harms. Comcast's poor managerial character, the threats to competition, universal service, and diversity, the elimination of Time Warner as an industry maverick and Comcast's overall unwillingness to subject itself to the Commission's jurisdiction demonstrate that the proposed transaction will be adverse to the public interest. Greenlining respectfully requests that the Commission deny the application or, in the alternative, investigate the above-listed issues to determine whether the proposed transaction is in the public interest.

**IV. IF THE COMMISSION DOES APPROVE THE PROPOSED TRANSACTION, IT SHOULD IMPOSE MITIGATION MEASURES TO PROTECT THE PUBLIC INTEREST.**

If the Commission does not deny the Application, it should impose mitigation measures sufficient to ensure that the proposed transaction is in the public interest.<sup>79</sup> As discussed above, the new company's compliance with *already existing* mitigation measures or conditions relating to other transactions or proceedings would be insufficient to ensure that the proposed transaction

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<sup>78</sup> Economic Analysis, *supra* note 40 at 40.

<sup>79</sup> See Pub. Util. Code § 854(c)(8).

is in the public interest. Accordingly, should the Commission approve the Application, the Commission should impose mitigation measures that will preserve competition, protect consumers and ensure that the new company passes through the economic benefits of the transaction. Finally, because of Comcast's history of poor compliance with previous conditions, the Commission must take care to craft detailed mitigation measures with measurable performance metrics, and substantial penalties if the new company fails to meet those metrics.

## **V. PROCEDURAL ISSUES**

### **A. Comments or Objections Regarding the Applicants' Statement On The Proposed Category.**

Greenlining has no objection to Applicants' proposed category of Ratesetting.

### **B. Need for Hearing.**

As discussed above, the Commission should investigate and make factual findings regarding the impacts of the proposed transaction. These factual findings should include, but should not be limited to, investigating the impact of the proposed transaction on low-income consumers, economic benefits, and diversity. If the Commission does not set hearings early on the proceeding, the unavailability of the parties or Commission resources could cause an undue delay in the proceeding. Additionally, the Commission should schedule hearings for a time frame that will ensure that the Commission is able to provide input to the FCC during its pending investigation of the proposed merger. Accordingly, Greenlining respectfully requests that the Commission schedule hearings consistent with the suggested schedule below.

### **C. Issues to be Considered.**

Greenlining disputes Applicants' contention that the only issue to be determined in this proceeding is whether Applicants have met the requirements of Public Utilities Code section

954, subdivision (a). Greenlining respectfully requests that the Commission's merger assessment include consideration of the following issues:

- Whether Applicants have met their burden of proof to demonstrate that the transaction is in the public interest under §854(a), (b), and (c).
- Whether Applicants have complied with the Commission's D.13-05-035 certification requirements.
- Whether Applicants have demonstrated that the new company will have sound managerial character.
- Whether the proposed transaction's impacts on competition will harm the public interest.
- Whether the proposed transaction's impacts on California Lifeline customers will harm the public interest.
- Whether the proposed transaction's impacts on low- and moderate- income Californians will harm the public interest.
- Whether the proposed transaction's impacts on diversity will harm the public interest.

#### D. Proposed Schedule.

Greenlining respectfully suggests a schedule that will allow the Commission to provide input into the Federal Communication Commission's investigation.<sup>80</sup> Accordingly, Greenlining suggests the following schedule:

May 19, 2014	Period for Submission of Protests Expires
May 30, 2014	Reply to Protests
June 15, 2014	Prehearing Conference
July 15, 2014	Scoping Memo Issued
August 15, 2014	Opening Comments on Scoping Memo
September 1, 2014	Reply Comments on Scoping Memo
September 15, 2014	Intervenor Testimony
September 30, 2014	Rebuttal Testimony

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<sup>80</sup> Federal Communications Commission, *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57.

November 3-5, 2014	Evidentiary Hearings
December 3, 2014	Opening Briefs
December 18, 2014	Reply Briefs
January 19, 2014	Proposed Decision Issued
February 19, 2014	Opening Comments on PD
March 6, 2014	Reply Comments on PD

## CONCLUSION

Time Warner's interest in providing service to low-income consumers is, unfortunately, one of the few exceptions to the industry's usual belief that providers should only offer service to low-income consumers when the law requires it. Comcast appears to see no benefit to serving low-income consumers, and has only done so when required and in a halfhearted fashion. The proposed transaction promises to eliminate Time Warner, one of the few "good actors" in the industry in this regard, and replace it with a company that steadfastly opposes the Commission's jurisdiction, does not meet the needs of many consumers within its service territory, and does not advance the Commission's public interest goals. The Commission should not approve the Application unless, and until, Applicants demonstrate that the proposed transaction is in the public interest.

For the above-stated reasons, Greenlining respectfully requests that the Commission deny the Application.

Respectfully submitted,

Dated: May 19, 2014

/s/ Paul Goodman  
Paul Goodman  
Legal Counsel  
The Greenlining Institute

/s/ Carmelita Miller  
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Legal Fellow  
The Greenlining Institute