

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA

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.

I.13-10-003
(Filed October 3, 2013)

**JOINT REPLY POST-HEARING BRIEF
OF THE UTILITY REFORM NETWORK AND THE GREENLINING
INSTITUTE ON COMCAST'S PUBLISHING OF UNPUBLISHED AND UNLISTED
NAMES, TELEPHONE NUMBERS, AND ADDRESSES OF COMCAST SUBSCRIBERS**

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I. SUMMARY AND RECOMMENDATIONS

Pursuant to Rule 13.11 of the Rules of Practice and Procedure, the February 11, 2014 Scoping Memo, the August 25, 2014 ALJ Ruling to Extend Deadlines, and the modification of the briefing deadlines at the October 3, 2014 evidentiary hearing in this matter, The Utility Reform Network (TURN) and The Greenlining Institute (Greenlining) (collectively, Joint Consumers) file this Opening Brief in this Investigation of Comcast relating to its unauthorized disclosure and publication of the names, addresses, and telephone numbers of approximately 75,000 California customers.

Comcast's Opening Brief declines to address a significant number of factual and legal issues addressed in the scoping memo. Comcast's behavior is apparently based on the belief that it has the authority to (1) unilaterally narrow the scope of this proceeding and (2) reserve its discussion of some issues for its reply brief. Accordingly, Joint Consumers respectfully request the opportunity to reply to any new issues raised by Comcast in its Reply Brief.

Joint Consumers are familiar with the contents of the Commission's Safety and Enforcement Division's Reply Brief. That brief addresses many of the flawed arguments and incorrect assumptions in Comcast's Opening Brief. In the interests of clarity and to avoid duplication of effort, Joint Consumers will restrict this reply brief to a discussion of what appropriate monetary and non-monetary remedies the Commission should impose on Comcast. Joint Consumers recommend the following:

- The Commission should impose the highest fine allowed by Public Utilities Code section 2107--\$50,000 per violation.
- The Commission's non-monetary remedies should include structural safeguards that preserve the commission's ability to protect consumers.

II. BACKGROUND

A. Factual

Comcast's unlawful release of the unlisted and unpublished records of almost 75,000 customers caused substantial harms to consumers, to competition, and to the integrity of the Commission's process. The number of released records is substantial and, more disturbingly, the result of multiple separate breaches. Additionally, Comcast's actions to prevent the releases, detect the releases, and disclose and rectify the releases were grossly inadequate.

1. Severity of the Offense

Comcast's violations caused severe harms. Comcast not only charged customers for a service that those customers did not receive, Comcast also created a significant safety threat to some of those customers. Comcast advertised stronger privacy protections than its competitors, when in fact it provided no such protection. Comcast actively worked to avoid responsibility in this proceeding, and its multiple violations affected an enormous number of consumers.

a. Harms to Customers

Many customers paid for unpublished numbers because they were in law enforcement or had other safety and privacy concerns.¹ For example, John Doe 1, an FBI agent,² testified that “[i]n my line of work, and the work that my ex-wife was doing also the same line of work, having access to a person's telephone number can lead to detrimental results in your personal life and your professional life.”³ Another witness stated “I've been in law enforcement for 20 years, over 20 years...Because of my work, and the cases that I've work[ed] on, there is always the threat of safety or retaliation by defendants towards my family, my house. Two different homes

¹ Hearing Transcript at 8:20-25, 9:16 (SED witness John Doe 1); 72:17-19 (SED witness John Doe 8); 323:3-324:9 and 330:16-20 (SED witness Jane Doe 2).

² *Id.* at 9:16 (SED Witness John Doe 1).

³ *Id.* at 8:20-25 (SED Witness John Doe 1).

have been burglarized. My car has been broken in. I've done everything I can to make my life, my family members private, information private..."⁴

It is particularly chilling that even today, the Commission does not know the full extent of the disclosure. Comcast produced witnesses who testified that they had no idea where the Comcast numbers ended up.⁵ As for the end-date, Ms. Donato claims that except for Plaxo all of the directory breaches were remedied by year-end 2012,⁶ and specifically states that non-published numbers going to Frontier and its publishers ended in 2011.⁷ Jane Doe 10 attaches a 2012-2013 telephone book from Frontier territory that has her non-published name, address and telephone number in it, which shows that for many customers, the data breach may have continued.⁸

b. Harms to Competition

Comcast's description of non-published service contains an affirmative statement that Comcast will protect customers' privacy: "non-published directory service **ensures** that Comcast will not submit your phone number to the phonebook, online directories or directory assistance"⁹ (emphasis added). Verizon's policy does not contain a similar affirmative statement, only stating that customers' names, addresses, and phone numbers "are not published" and that a customer's unlisted phone number "is not available" from directory assistance.¹⁰ Similarly, AT&T's policy only states that "[n]on-listed' numbers are not listed in

⁴ *Id.* at 323: 3- 324:9 (SED Witness Jane Doe 2).

⁵ Hearing Transcript at 578:27-579:3 (Comcast witness Phil Miller).

⁶ Exhibit COM 103C, Donato Direct, at 7 (chart).

⁷ *Id.* at 22:7-8 ("this process ended in 2011").

⁸ Exhibit SED 003, Rahmon Rebuttal, at Attachment B.

⁹ Hearing Transcript at 367:23-26 (Comcast witness Robert Munoz).

¹⁰ Exhibit COM-112.

the phone book” and that “[n]on-published’ numbers are not available in the phone book or through Directory Assistance.”¹¹

c. Harms to the Integrity of the Commission’s Processes

As noted in Joint Consumers’ Opening Brief, at the same time that Comcast was disclosing customers’ unlisted information, it also successfully supported a bill, SB 1161, that severely restricts the California Public Utilities Commission’s authority to impose consumer protections on Voice over Internet Protocol providers.¹² Comcast then delayed reporting the unlawful disclosures for at least three months after it discovered them, and finally reported the unlawful disclosures only after SB 1161 took effect.¹³ 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 1161.¹⁴

d. Number of Violations

Comcast’s actions resulted in its release of the unlisted and unpublished information of almost 75,000 Comcast customers. Additionally, as noted in Joint Consumers’ Opening Brief, it

¹¹ Exhibit COM-113.

¹² SB 1161 was eventually enacted as Public Utilities Code section 710.

¹³ 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, I.13-10-003 (Oct. 3, 2013) (hereafter, Comcast Unlisted Numbers OII).

¹⁴ 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).

appears that the publication of non-published numbers is not entirely attributable to the “process error,” but is instead an ongoing and chronic problem.¹⁵

2. Comcast’s Conduct

a. Comcast’s Prevention Mechanisms

Comcast remains oblivious to the fact that its failure to prevent the multiple releases of customer information is a serious concern. Even if Comcast’s claims that it had “reasonable processes and procedures in place to prevent the disclosure of non-published listings,” and “reasonable processes for addressing customer concerns about non-published service,”¹⁶ the fact remains that Comcast failed to implement any process to detect possible problems.

b. Comcast’s Detection Mechanisms

Comcast had multiple opportunities to discover the breach as evidenced by the California Trouble Tickets, contacts from California customers who also had called Comcast before discovery of the breach, and Comcast internal emails warning of problems with non-published numbers.¹⁷ Comcast claims that it took only *two* CR trouble tickets for it to discover the breach in October 2012.¹⁸ Comcast also claims that “[t]he number of customer calls and trouble tickets, moreover, did not suggest a systemic issue.”¹⁹ Finally, Comcast argues that it could not

¹⁵ See Hearing Transcript at 457:1-6 (Comcast witness Lisa Donato).

¹⁶ Comcast Opening Brief at 39.

¹⁷ See SED Opening Brief at

¹⁸ See Exh. COM 103, Donato Direct Testimony at 3:9-13 (“In October 2012 Comcast received two XFINITY Voice customer complaints stating that the customers’ Non-Published directory listing information was appearing in Ecolisting (Comcast’s online directory listing website). Comcast began an investigation which ultimately revealed that the root cause of the issue identified by those two customers was a systemic problem that began in 2009 (the “Process Error”).”).

¹⁹ Comcast Opening Brief at 39.

reasonably have been expected to discern the smaller sample of California customers affected by a privacy breach.²⁰

Comcast was unable to explain why the two October trouble tickets were any different than the hundreds of trouble tickets about non-published issues that had gone before.²¹ Comcast failed to explain why the two October trouble tickets triggered Comcast's investigation while all of the previous trouble tickets did not. Comcast did not explain how the two October trouble tickets allowed Comcast to identify a larger problem when the previous trouble tickets did not. If Comcast's claim that the two October trouble tickets allowed Comcast to discover the release, any of those trouble tickets should have triggered Comcast's discovery of the process error. The fact that Comcast claims that it had no way to detect a privacy breach affecting thousands of consumers in California shows that it is operating well below the standard of care that the law requires in handling its customers' confidential information.

c. Comcast's Policies and Procedures for Disclosing and Rectifying the Release of Unlisted and Unpublished Information

i. Comcast's Disclosure Policies

As discussed above, Comcast delayed notifying the Commission in order to take advantage of SB 1161. Additionally, as noted in Joint Consumers' Opening Brief, Comcast has been profoundly uncooperative in this proceeding. Comcast consistently objected to discovery requests, while at the same time providing piecemeal, incomplete responses to those discovery requests that were favorable to Comcast. Similarly, Comcast regularly refused to respond to data requests citing statutory or contractual prohibitions, but was willing to make exceptions or compromises to those refusals in order to turn over evidence favorable to Comcast.

²⁰ Exhibit COM 106, Stephens Rebuttal Testimony, at 11, and 4-21 generally.

²¹ Hearing Transcript at 456:6-11 (Comcast witness Lisa Donato).

ii. Comcast's Rectification Efforts

Comcast took steps to minimize the possibility that affected customers would actually receive notice of the release of their information, including minimal efforts to reach past customers by mail, the removal of an option to speak to a live agent from Comcast's "robo-call" notifying customers of the release, and Comcast's ongoing unwillingness to make a public statement or issue a press release.²² For example, while some of the affected customers purchased bundled service including broadband, Comcast did not attempt to contact those customers via those customers' email addresses on record with Comcast.²³ Comcast only attempted to notify affected customers in English.²⁴

As a company that appeared to be overly concerned with its own bottom line, Comcast contacted few customers and reimbursed them a paltry \$1.50 credit for each month the number was unpublished.²⁵ Not all of the affected customers received the credit, because Comcast's sole effort to reach past customers was sending a letter to a customer's last known address.²⁶ Some customers received free service for a limited period of time.²⁷ For the very small number of customers who actually received notice and went through the laborious process of obtaining further compensation, those customers received remedies ranging from monetary relief²⁸ to a service credit or promotion²⁹ to nothing at all.³⁰

²² See Exh. SED 3, Momoh Rebuttal, at 1-11.

²³ Hearing Transcript at 558:10-13 (Comcast witness Christina Stephens).

²⁴ *Id.*

²⁵ *Id.* at 9:4-11 (SED witness John Doe 1); 72:17-19 and 73:9-11 (SED witness John Doe 8); 327:22-328:24 and 329:27-330:20 (SED witness Jane Doe 2).

²⁶ Exh. COM 105, Stephens Direct, at 8:3-7.

²⁷ Hearing Transcript at 9:4-11 (SED witness John Doe 1).

²⁸ Exh. COM 106, Stephens Rebuttal, at 32:15-16.

²⁹ *Id.* at 33:1-3.

³⁰ *Id.* at 33:3-7.

Interestingly, when addressing the service credits, rebundlings, or promotions provided to some of the customers, Comcast describes those credits, rebundling, and promotions in terms of the value to the customer.³¹ By describing the credits in those terms, Comcast conveniently avoids the fact that Comcast's actual cost of providing those credits, rebundlings, and promotions was far less than the "value to the customer."

B. Procedural Background

Joint Consumers' Opening Brief requested that the Commission impose the following monetary and non-monetary sanctions against Comcast:

- Comcast should pay penalties totaling \$42,572,000;³²
- Comcast should provide safety protections for affected customers consisting of home security systems for each customer with safety concerns, and identity theft protection services for each customer with financial privacy concerns, for a period of three years;³³
- Comcast should provide restitution in the amount of \$20,000,000;³⁴
- Comcast should implement improved disclosure and notice policies, including a separate notice regarding unlisted or unpublished service and re-sending the notification letter in languages other than English;³⁵
- Comcast should reform its complaint and monitoring process;³⁶
- Comcast should perform a "clawback" of customer information;³⁷
- Comcast should perform regular audits;³⁸

³¹ Exh. COM 106, Stephens Rebuttal, at 33:1-2.

³² Joint Consumers Opening Brief at 30.

³³ Joint Consumers Opening Brief at 31.

³⁴ *Id.* at 31-32.

³⁵ *Id.* at 32.

³⁶ *Id.* at 33.

³⁷ *Id.*

- Comcast should be prohibited from enforcing confidentiality provisions of any releases;³⁹ and
- Any conditions imposed on Comcast should be binding on successor entities.⁴⁰

III. LEGAL ISSUES

A. Precedent Supports the Commission's Imposing the Maximum Statutory Penalty.

Comcast cites *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, for the proposition that “[t]he Commission must first ensure that any penalty it contemplates imposing is consistent with precedent.”⁴¹ However, this assertion significantly misstates that decision:

The Commission adjudicates a wide range of cases which involve sanctions, many of which are cases of first impression. As such, the outcomes of cases are not usually directly comparable. In future decisions which impose sanctions, the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.⁴²

D.98-12-075 holds that the Commission must consider similar cases and explain any differences in sanctions; it does not hold that similar cases must have the same sanctions. Accordingly, Comcast’s interpretation of that holding is inconsistent with law.

Comcast cites two cases as precedent for the Commission’s not imposing a fine in the instant case.⁴³ As SED notes in its reply brief, the two cases are distinguishable. In the Cox case, the release of customer information was restricted to printed directories and was limited in

³⁸ *Id.* at 33-34.

³⁹ *Id.* at 34.

⁴⁰ *Id.*

⁴¹ Comcast Opening Brief at 41.

⁴² D.98-12-075 at p. 184.

⁴³ Comcast Opening Brief at 41.

scope.⁴⁴ The companies involved engaged in extensive efforts to “claw back” the offending directories, including multiple visits to each home that received a directory and hiring a research firm to determine how many directories were still in circulation.⁴⁵ The companies involved were able to contact approximately 94 percent of the affected customers, and that 71 percent of those customers took advantage of the remedies offered.⁴⁶ Finally, the Commission found that a penalty was unnecessary, because the companies involved had spent over \$15 million responding to the violations.⁴⁷

In the instant case, Comcast’s release was widespread, and included online listings, which are far more permanent than printed directories and, unlike printed directories, can be accessed by individuals anywhere in the world. Comcast’s efforts to remove the tainted directory information was minimal at best—for example, it did not offer to pay for internet scrubbing, causing some customers to have to sign up for Internet scrubbing on their own.⁴⁸ Comcast’s efforts to contact customers resulted in fewer than 15% of the affected customers contacting Comcast, and, as noted in Joint Consumers Opening Brief, those customers received paltry remedies ranging from monetary relief⁴⁹ to a service credit or promotion⁵⁰ to nothing at all.⁵¹ Comcast has not provided any information regarding how much it has spent on responding to the violations, and in fact avoids disclosing Comcast’s actual cost of providing credits,

⁴⁴ *OIR into Competition for Local Exchange Service*, D.01-11-062.

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ *Id.* at 22.

⁴⁸ *Id.* at 327:22-328:24, 329:27-330:20.

⁴⁹ Exh. COM 106, Stephens Rebuttal, at 32:15-16.

⁵⁰ *Id.* at 33:1-3.

⁵¹ *Id.* at 33:3-7.

rebundlings, and promotions.⁵² Comcast's violations and subsequent response to those violations in this proceeding are significantly more severe than those in the Cox proceeding.

Comcast's reliance on *Knell v. Pacific Bell and AT&T*, D.03-08-025, is similarly misplaced. That case involved one customer and four telephone lines.⁵³ Additionally, in *Knell* the Commission specifically noted that it would impose "substantial penalties...where we have found widespread violations of our rules and regulations." In the instant proceeding, Comcast's violations included almost 75,000 customers and occurred over a period of at least two and a half years. This scenario is exactly the kind of widespread violation referred to in *Knell* that would justify the Commission's imposing a substantial penalty.

B. The Commission's Framework For Determining Fines Supports the Commission's Imposing the Highest Possible Penalty.

While, as discussed above, Comcast cites D.98-12-075 incorrectly, that decision is very instructive regarding potential sanctions. The decision provides a helpful framework for determining fines; it is this **framework** which the Commission expressly stated was precedential.⁵⁴ While D.98-12-075 involved affiliate transaction rules for energy utilities, that decision creates a framework for monetary sanctions that is instructive in this proceeding. In that case, the Commission held that there were "two general factors used by the Commission in setting fines... (1) severity of the offense, and (2) conduct of the utility."⁵⁵

⁵² See Opening Comments at 15.

⁵³ D.03-08-025 at 1.

⁵⁴ D.98-12-075 at 183.

⁵⁵ *Id.* at p. 188.

1. The Nature of Comcast's Offenses Was Severe.

When examining the severity of the offense, the Commission considers a number of factors.⁵⁶ These factors include (1) the extent of any economic harm, (2) the extent of any competitive harms, and (3) whether the utility violated any reporting or compliance requirements.⁵⁷ Additionally, when examining the severity of the offense, the Commission considers the number of violations.⁵⁸

a. Comcast's Violations Harmed Consumers.

The Commission first considers the economic harm to the victims as well as any unlawful benefits gained by the utility.⁵⁹ While violations that have caused actual physical harm are considered the most severe, violations that threatened that harm follow closely behind.⁶⁰ In the instant proceeding, a number of witnesses, particularly those involved in law enforcement, described cognizable threats to their safety as a result of Comcast's unlawful release of those witness' unlisted and unpublished information.⁶¹ Per D.98-12-075, these threats are some of the most severe, a fact which weighs in favor of more substantial fines.

b. Comcast's Violations Harmed Competition.

"The Commission has recognized that deprivation of choice of service providers, while not necessarily imposing quantifiable economic harm, diminishes the competitive marketplace such that some form of sanction is warranted."⁶² As discussed in Joint Consumers' opening

⁵⁶ *Id.* at p. 188.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Hearing transcript at 9:4-11 (SED witness John Doe 1); 72:17-19 and 73:9-11 (SED witness John Doe 8); 327:22-328:24 and 329:27-330:20 (SED witness Jane Doe 2).

⁶² D.03-08-025 at 188.

brief, Comcast's repeated failure to review its operations resulted in multiple separate releases of unlisted and unpublished customer information.⁶³ Upon these releases, Comcast did not make a media announcement or press release; when Comcast did act, it took steps to hide its lack of systemic safeguards from the public, including requiring customers to sign confidentiality agreements as a condition of settlement.⁶⁴

Despite Comcast's claims to the contrary, these actions were likely motivated by a fear of losing current customers, as well as a fear that potential customers aware of the serious privacy problems inherent in Comcast's service would choose another provider. Comcast's failure to disclose these problems gave Comcast an unfair competitive advantage because Comcast was able to portray itself as a company that protected customers' privacy, when in fact Comcast did not. Accordingly, Comcast's repeated failure to review its operations and implement reasonable safeguards diminished the competitive marketplace. Such behavior justifies the Commission's imposition of a higher penalty.

c. Comcast's Violations Harmed the Integrity of the Regulatory Process.

In assessing a fine, the Commission also examines whether the utility's actions caused harm to the integrity of the regulatory process.⁶⁵ While D.98-12-075 did not directly address a utility's behavior during a proceeding, Comcast's behavior during this proceeding has been extremely problematic. As noted above, Comcast delayed reporting the violation until after it successfully lobbied for a bill that restricted the Commission's jurisdiction over VoIP services, and then used the new law to attempt to escape liability, used the discovery process to provide

⁶³ See SED Opening Brief at 29.

⁶⁴ *Id.* at 123-124.

⁶⁵ *Id.*

piecemeal, incomplete responses that were favorable to Comcast, and made exceptions to its long-standing discovery objections in order to introduce evidence favorable to Comcast.

Joint Consumers are particularly frustrated by Comcast's assertion that it can choose to reserve its discussion of certain issues in this proceeding for its reply brief. This position deprives Joint Consumers of the ability to respond to Comcast's arguments.⁶⁶ The Commission should accord Comcast's disregard of the Commission's rules a high level of severity.

d. Comcast's Violations Were Numerous and the Result of a Number of Separate Breaches.

"A series of temporally distinct violations can suggest an on-going compliance deficiency which the public utility should have addressed after the first instance. Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one which is limited in scope."⁶⁷ In the instant proceeding, Comcast released unlisted and unpublished customer information in a series of temporally distinct violations.⁶⁸ Additionally, those violations resulted in the release of almost 75,000 customers' records. Given these facts, the Commission is justified in imposing a more severe penalty.

2. Conduct of the Utility

The Commissions "conduct of the utility" factor "recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation."⁶⁹

⁶⁶ Comcast Opening Brief, Appendix 1.

⁶⁷ *Id.*

⁶⁸ SED Opening Brief at pp. 27-31.

⁶⁹ D.98-12-075 at 188-189.

a. Comcast's Policies to Prevent Violations like the Ones at Issue Were Nonexistent.

“Prior to a violation occurring, prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable law and regulations, and most critically, **the utility regularly reviewing its own operations to ensure full compliance.**”⁷⁰ As noted in Joint Consumers’ Opening Brief, for a period of over two years, Comcast had no effective safeguards in place to prevent the release of unlisted or unpublished customer information, no effective process for detecting those releases, and no effective policies for reviewing system changes that might cause problems like the release of unlisted or unpublished customer information.⁷¹ This lack of systems and monitoring justifies the Commission’s imposing a more severe penalty.

b. Comcast's Policies for Detecting Violations like the Ones at Issue Were Nonexistent.

Comcast spends a great deal of time characterizing its near-constant releases of unlisted and unpublished customer information as “inadvertent,”⁷² unforeseeable,⁷³ or the result of an “anomaly.”⁷⁴ Comcast further uses this characterization to argue that the Commission should impose no penalty.⁷⁵ However, the fact that the releases were the result of an accident or inadvertence is not grounds for a reduction or elimination of a penalty: “[t]he Commission expects public utilities to monitor diligently their activities. Where utilities have for whatever reason failed to meet this standard, the Commission will continue to hold the utility responsible

⁷⁰ D.98-12-075 at 189.

⁷¹ Joint Consumers Opening Brief at 10-12.

⁷² Comcast Opening Brief at 1.

⁷³ *Id.* at 12.

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 42.

for its actions.”⁷⁶ Lack of knowledge of a violation of the Commission’s rules is not a mitigating factor.⁷⁷ Accordingly, even if Comcast’s releases were inadvertent, the Commission should not consider that as a factor when determining a penalty in this proceeding.

c. Comcast’s Disclosure and Rectification Efforts Were Woefully Insufficient.

The Commission also takes into account the utility’s actions in disclosing and rectifying a violation or violations. “A penalty must take into account the scope of a utility’s investigatory efforts, level of self-reporting and cooperation, and corrective measures...We expect and demand cooperation and will reward it appropriately.”⁷⁸

i. Comcast Has No Excuse for its Late Disclosure to the Commission.

The Commission expects that a public utility that is aware a violation has occurred will promptly bring that violation to the attention of the Commission.⁷⁹ “The precise timetable that constitutes ‘prompt’ will vary based on the nature of the violation. **Violations which physically endanger the public must be immediately corrected and thereafter reported to the Commission staff.** Reporting violations should be remedied at the earliest administratively feasible time”⁸⁰ (emphasis added).

As discussed above, Comcast’s unlawful disclosure of unlisted and unpublished customer information presented serious safety risks to a number of customers. Despite the substantial risk of harm, Comcast did not immediately notify Commission staff.

⁷⁶ *Id.* at 189.

⁷⁷ *Id.*

⁷⁸ Decision Modifying Law and Motion Judge’s Ruling Imposing Sanctions for Violations of Ex Parte Rules, Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period of 2015-2017, D.14-11-041 (citing D.08-09-038 at 108).

⁷⁹ D.98-12-075 at 189.

⁸⁰ *Id.*

Comcast states that it discovered the breach in October 2012 and had implemented corrective measures by December 10, 2012. Even if Comcast discovered the breach as late as October 2012 and did not have corrective measures in place until December 10, it still waited 30 days to notify the Commission. Comcast has provided no explanation for this delay in reporting. Comcast had no excuse not to report the violations to the Commission immediately, and the Commission should consider Comcast's failure to do so when considering the appropriate fine.

ii. Comcast's Attempts to Rectify the Violations were Woefully Insufficient.

Comcast's so-called "improvements" to prevent the future inadvertent releases of customer information are similarly insufficient. The Commission very recently addressed a company's self-imposed remedies in D.14-11-041.⁸¹ In that proceeding, PG&E discovered that it had failed to disclose a number of improper ex parte communications.⁸² PG&E claimed that "it self-reported these violations and took swift action to make significant changes that are designed to prevent this from ever happening again."⁸³ PG&E discharged the company vice president who engaged in the improper communications, as well as that employee's supervising vice president and associate vice president.⁸⁴ PG&E reconfigured its chain of authority to have its newly named Vice President of Regulatory Affairs report directly to PG&E's president.⁸⁵ PG&E created a new position to help oversee PG&E's compliance with CPUC rules and

⁸¹ D.14-11-041 (Decision Modifying Law and Motion Judge's ruling Imposing Sanctions for Violation of Ex Parte Rules), Application of Pacific Gas and Electric Company Proposing cost of Service and Rates for Gas Transmission and Storage Services for the Period of 2015-2017, A.13-12-012 (Dec. 19, 2014).

⁸² *Id.* at 11

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

requirements.⁸⁶ PG&E hired an experienced outside consultant to assist in PG&E's creation of a "best-in-class regulatory compliance model."⁸⁷ Finally, PG&E announced its intention to implement additional mandatory training for PG&E employees who interact with the Commission.⁸⁸ Despite all of these "fixes," the Commission ultimately chose to impose the maximum penalty for each violation by PG&E.⁸⁹

Comcast's purported self-imposed remedies in this proceeding fall far short of those discussed above. Comcast states that it changed its process for reporting to Neustar, and provided Neustar with corrected directory data listings, told its engineers on the billing and directory listing teams to coordinate in the future, updated its database and listings software, and implemented procedures that will help identify systemic issues.⁹⁰ However, Comcast did not provide any detail regarding those fixes. Given Comcast's prior behavior, Joint Consumers believe that Comcast's self-imposed remedies will be ineffective and insufficient to solve Comcast's ongoing issues with releasing unlisted and unpublished customer information. Comcast itself provides evidence to support this claim. It appears that Comcast's only attempt to ensure that the affected customers do not experience a re-release of their directory listings has been to check the records of **1.2** percent of the affected customers—12 out of every 1000 affected customers.⁹¹

Comcast also claims that it is commissioning internal audits and developing software improvements that will allow Comcast and Neustar to update their systems simultaneously. However, Comcast has had since **at least** October 2012 to implement these changes, but has

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 16.

⁹⁰ Comcast Opening Brief at 24-25.

⁹¹ *Id.* at 24.

somehow failed to do so.⁹² The Commission should accordingly ignore these proposed but as-yet unimplemented solutions when considering the amount of penalty to impose.

3. The Facts in this Proceeding Justify the Commission's Imposing the Highest Possible Penalty.

Comcast's violations were numerous caused severe harms to consumers, competition, and the integrity of the regulatory process. Those violations were the result of Comcast's abject failure to implement any prevention or detection mechanisms. Comcast's response to the violations, in terms of both its remedies for customers and its notification to the Commission, were grossly insufficient. Accordingly, the Commission should impose the highest possible fine of \$50,000 per violation.

C. The Commission's Non-Monetary Remedies Should Include Structural Safeguards that Preserve the Commission's Ability to Protect Consumers.

Joint Consumers are deeply disturbed by Comcast's continuing attempts to avoid responsibility for its actions through a corporate "shell game."⁹³ Comcast's position appears to be Comcast can repeatedly breach its customers' privacy by obtaining phone numbers from Comcast Phone, and then transferring those numbers to Comcast IP. Comcast's attempt to litigate and re-litigate this issue raises serious concerns about Comcast IP's willingness to abide by any sanctions. Joint Consumers therefore offer several possible solutions.

First, the Commission has the authority to compel Comcast to divest itself of Comcast Phone if that divestiture is required by the public interest.⁹⁴ Comcast has made it clear that it plans to use Comcast Phone to provide interconnection services to its customers, while using Comcast IP as a shield when it harms its customers. Accordingly, the Commission can order

⁹² Comcast Opening Brief at 24.

⁹³ See Comcast Opening Brief at 3-4.

⁹⁴ D.98-12-075 at 171-172.

Comcast to divest itself of Comcast Phone, and require Comcast to obtain a CPCN through Comcast IP, thereby significantly reducing this risk to consumers.

Second, the Commission can disallow the shared use of Comcast's company names and logos if that disallowance is necessary to protect the public interest.⁹⁵ As noted by Commission Staff, Comcast uses shared company names and logos in its provision of bundled service.⁹⁶ In order to prevent customer confusion, the Commission could disallow Comcast's use of Comcast company names and logos in its provision of telephone service.

Finally, the Commission could strengthen its sanctions against the Comcast entities that are parties to this proceeding by imposing structural safeguards on Comcast Phone. In addition to imposing Joint Consumers and SED's proposed sanctions against those companies, the Commission's order should include the following language:

Comcast Phone of California, LLC and any successor entities are prohibited from providing retail or wholesale interconnection services to any Comcast affiliate that does not provide the same protections required of Comcast Phone of California, LLC in this decision.

This sanction would ensure that Comcast cannot create a corporate structure that allows it to avoid responsibility when it harms customers.

IV. CONCLUSION

Comcast's casual attitude towards the privacy of its customers led to Comcast's releasing the private information of almost 75,000 California Comcast customers. The circumstances of the violations, as well as Comcast's subsequent response, more than justify the Commission's imposing the highest allowable fine in this proceeding. However, even the largest fine may not be sufficient to deter Comcast from engaging in similar behavior in the future. Comcast apparently feels that its compliance with California statutes and regulations, as well as the

⁹⁵ *Id.* at 171.

⁹⁶ *See* Staff Report at 6.

Commission's authority, as optional. Given Comcast's refusal to abide by this authority, the Commission's imposing a fine is no guarantee of Comcast's future good behavior. Accordingly, Joint Consumers urge the Commission to impose structural safeguards on Comcast that protect consumers, competition, and the integrity of the regulatory process.

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Respectfully submitted,

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