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 (U-6874- C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-695-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application 14-04-013 (Filed April 1, 2014)
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REPLY BRIEF OF THE GREENLINING INSTITUTE AND CONSUMERS UNION

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Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure, the November 13, 2014 Administrative Law Judge's Ruling Resetting Schedule of Proceeding and Granting Official Notice, and the November 26, 2014 Administrative Law Judge's Ruling Granting in Part and Denying in Part Motion of the Office of Ratepayer Advocates to Reconsider the November 13, 2014 Administrative Law Judge Ruling Resetting Schedule of Proceeding, The Greenlining Institute ("Greenlining") and Consumers Union respectfully submits this reply brief in opposition to the applications in the above-captioned proceeding.

I. INTRODUCTION

The proposed transactions would harm California consumers and the public interest. The proposed transactions will delay the reasonable and timely deployment of broadband to all Californians because those transactions will (1) Increase the Combined Company's Power to Act as a "Network Gatekeeper," increasing the combined company's ability to hinder competitors' online video streaming services and forestall innovation, (2) will not improve deployment of broadband to schools and libraries, and (3) will not improve deployment of broadband to unserved and underserved areas. Additionally, the proposed transactions will delay the reasonable and timely deployment of broadband to all Californians because the combined company will use its increased power to control the components of bundled services.

The proposed transactions will harm unserved and underserved Californians. Applicants' extension of the failed Internet Essentials Program to low-income customers in Time Warner Cable's service territory will not increase low-income adoption of broadband services and will not increase digital literacy. Applicants make no meaningful commitments that the combined company will offer standalone internet access or inform customers about the availability of that standalone internet access, or that the combined company will offer lifeline service to any of its customers.

The proposed transactions will not maintain or improve service quality or customer service for consumers. The proposed transactions will not maintain or improve the quality of management of the combined company. The proposed transactions threaten the safety of California customers who receive voice and broadband services from the merged entity. The proposed transactions will not result in a combined company with a serious commitment to diversity. Finally, Applicants overstate the scale of and scope of the proposed transactions' efficiencies, and do not demonstrate how those purported efficiencies would benefit consumers.

Any potential merger-specific benefits are speculative and are outweighed by enormous potential harms to consumers, and there are no mitigation measures that the Commission could impose that would be sufficient to ensure that the proposed transactions are in the public interest. Accordingly, the merger is not in the public interest and, per Public Utilities Code section 841, subdivisions (b) and (c), the Commission should deny the applications. To the extent that there are material facts in dispute in this proceeding, the Commission should hold public participation hearings.

II. THE PROPOSED TRANSACTIONS WOULD HARM CALIFORNIA CONSUMERS AND THE PUBLIC INTEREST

The proposed transactions will delay the reasonable and timely deployment of broadband to all Californians. The proposed transactions will harm unserved and underserved Californians. The proposed transactions will not maintain or improve quality of service or the quality of management of the combined company, and would threaten the safety of California consumers. The proposed transactions will result in a combined company that maintains Comcast's woefully insufficient commitment to diversity. Finally, Applicants overstate the scale and scope of the proposed transactions' efficiencies and do not show how those efficiencies would benefit consumers.

A. The Merger Would Harm California Customers and The Public Interest Because The Proposed Transactions Will Delay the Reasonable and Timely Deployment of Broadband to All Californians.

As noted in the Commission's scoping memo, Public Utilities Code section 710 and section 706(a) of the Federal Telecommunications Act expressly grant the Commission the authority to implement regulatory measures that promote the reasonable and timely deployment of broadband.[1] The proposed transactions, if approved by the Commission, would actually delay the reasonable and timely deployment of broadband to all Californians. The proposed transactions would increase the combined company's power to act as a broadband "network gatekeeper," giving the combined company unprecedented power to hinder competing online video streaming services and innovation. The proposed transactions will not improve deployment of broadband to schools, libraries, and unserved and underserved areas. Finally, the proposed transactions will give the combined company unprecedented control over the bundled services market, thereby delaying the deployment of broadband to all Californians.

1. The Proposed Transactions Will Delay the Reasonable and Timely Deployment of Broadband to All Californians Because the Proposed Transactions Will Increase the Combined Company's Power to Act as a "Network Gatekeeper."

The proposed transactions would create a national "gatekeeper" to the Internet by combining the two largest residential broadband Internet service providers in the United States. Online video programmers and distributors would be dependent as never before on Comcast's "last mile" network for access to many millions of consumers. With control over that last mile, the combined company would have the power to determine who could pass through, and on what terms.

The U.S. Department of Justice ("DOJ") raised a similar concern in 2000 when the nation's two largest residential broadband providers at the time, AT&T and MediaOne, sought to merge.[2] DOJ was concerned that the merger would increase the combined company's power "to

[1] Scoping Memo at 11-12.
[2] Competitive Impact Statement, filed in United States v. AT&T Corp., Civ. Act. No. 1:00CV01176 (D.D.C. filed May 25, 2000). Excite@Home had the exclusive right to provide residential broadband service over the cable facilities of its three principal equity holders, AT&T, Cox Communications and

extract more favorable terms" from content providers to access its subscribers.[3] "By exploiting its 'gatekeeper' position in the residential broadband content market, the combined company could make it not commercially viable for disfavored content providers to invest in the creation of attractive broadband content, and reduce competition and restrict output in that market."[4] DOJ was concerned 14 years ago that AT&T's gatekeeper power, in controlling a little over two million broadband subscribers, threatened to hamper the development of the broadband industry,[5] and it required AT&T/MediaOne to divest their interest in Road Runner (which provided Internet access) so it would be independent.[6]

The same concern is present here, only more so. Comcast and Time Warner Cable dominate high-speed residential broadband (connection download speeds at 10 Mbps and higher) with an estimated combined share of between 47 and 49 percent – not 2 million subscribers as in AT&T/MediaOne, but *30* million.[7] Even though Comcast may not currently compete with Time Warner Cable in specific local markets, the merger would consolidate the combined company's control over the local markets that are most important to online video distributors, content programmers, and advertisers. One of the key areas where the combined company would extend its dominance is Southern California, including the Los Angeles market.[8] With a much larger overall national footprint and control of key markets across the country like Los Angeles, the

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Comcast. *Id*. at 4. MediaOne, along with then-Time Warner Entertainment and other entities, owned the second largest residential broadband provider, Road Runner. *Id*. at 4-5.

[3] *Id*. at 2.

[4] *Id*. at 2.

[5] *Id*. at 4.

[6] *Id*.

[7] Mark Cooper, Director of Research, Consumer Federation of America, *Buyer And Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable"* 7 (April 8, 2014), http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf.

[8] 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-2014042 9,0, 4429983.story#ixzz30VX3U7y.

combined company would become the de facto residential broadband gatekeeper, and would have the power to decide what consumers can see.

Then-Commissioner Michael Copps noted this emerging danger in his dissent from the 2006 order allowing Comcast and Time Warner Cable to acquire the assets of Adelphia:

> Concentrating so much clout in the Applicants gives them the ability to make or break cable programming across the country. If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television and of communities – especially minority communities – who struggle for basic access to programming they want and need. ... We need to support independent programmers and independent content production. I'll say it again: we just cannot afford to cede so much content control to so few media companies. It's bad because of the homogenized entertainment and information we are fed and it's bad for our democracy. And what happens if these two companies refuse to take political advertisements for issues they oppose? It's like giving them the keys to control what we watch, see and hear.
>
> . . .
>
> We are entering a world where big and concentrated broadband providers are searching for new business models and sometimes even suggesting that web sites may have to pay additional charges and new tolls for the traffic they generate. This could change the character of the Internet as we know it.[9]

Now, the reach is broader, the stakes are higher, and the harm that would result is even worse. If the Commission approves the transactions, the combined company will be able to prohibit programmers and content producers—including minority programmers and content producers—from airing their content. Similarly, the combined company will be able to prohibit consumers—including consumers from communities of color—from accessing the content of their choice.

[9] *FCC Approves Adelphia, Time Warner, Comcast License Transfer*, 2006 WL 1976221 (F.C.C. July 13, 2006) (Comm'r Michael J. Copps, Dissenting)

2. The Proposed Transactions Will Delay the Reasonable and Timely Deployment of Broadband to All Californians Because the Combined Company Will Use Its Power as a "Network Gatekeeper" to Hinder Competitors' Online Video Streaming Services.

The proposed transactions will harm consumers because the new company will have increased power to hinder competitors' online video distribution ("streaming") services. The Internet can bring revolutionary benefits to consumers by enabling them to access the programs they want, when they want, for an affordable price. As a result, growing number of consumers have decided to "shave the cord" by buying smaller cable packages, or "cut the cord" altogether, because of frustration with ever-increasing cable rates, undesirable bundles, and poor service.

The proposed transactions would give the combined company more power to hinder these innovative Internet platforms from becoming a viable route for consumers to "cut" or "shave" the cable cord.[10] In words that foreshadow Netflix's recent experience with Comcast, the FCC wrote in 2011:

> We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to

[10] Comcast knows all too well that the emerging growth of online video distributors (OVDs) threaten its high video distribution profits. Comcast-NBCU Competitive Impact Statement, filed in United States v. Comcast Corp., Civ. Action No. 1:11-cv-00106 at 17 (D.D.C. dated Jan. 18, 2011) (hereafter, Comcast-NBCU Competitive Impact Statement). Comcast and TWC in their FCC filing identify Netflix, Google, Apple, and Amazon's streaming services as competitors. Public Interest Statement, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57 (filed September 23, 2014) (hereafter, Comcast-NBCU Public Interest Statement). The FCC noted in its Comcast-NBCU order that the record was "replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its business, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it." Memorandum Opinion and Order in In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, at ¶ ¶ 85-86 (adopted January 18, 2011, released January 20, 2011) (hereafter, Comcast-NBCU Order).

> Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video.[11]

In this fashion, Comcast could use its market power in video programming to withhold its popular NBCU and sports programming from OVDs, or to license it at excessive fees. By controlling access to programming through the set-top box, it could also stifle development of innovative ways to bring programming to the television. It could also use its market power as an Internet service provider to discriminate against OVDs, who cannot access their subscribers' homes without fast Internet connections. Their "future competitive significance depends, in part, on robust broadband capacity."[12] And Comcast can control the households' experience of watching Netflix and other video programming from OVDS. And the merger would increase Comcast's power and incentive to do both.

Experience has shown that these concerns are well-founded. After the Comcast-NBCUniversal deal, Comcast successfully used its market power to charge Netflix, the biggest and most powerful online video distributor, higher fees to ensure smooth delivery of its programming. Netflix publicly described how it "has seen firsthand how Comcast can leverage its existing market power to extract arbitrary tolls to reach consumers, particularly from Internet video companies like Netflix who pose a competitive threat to Comcast's own video services."[13] Around the time that Comcast announced its proposed merger with Time Warner Cable, Netflix was agreeing to pay Comcast a premium "toll" to not degrade its members' video experience--

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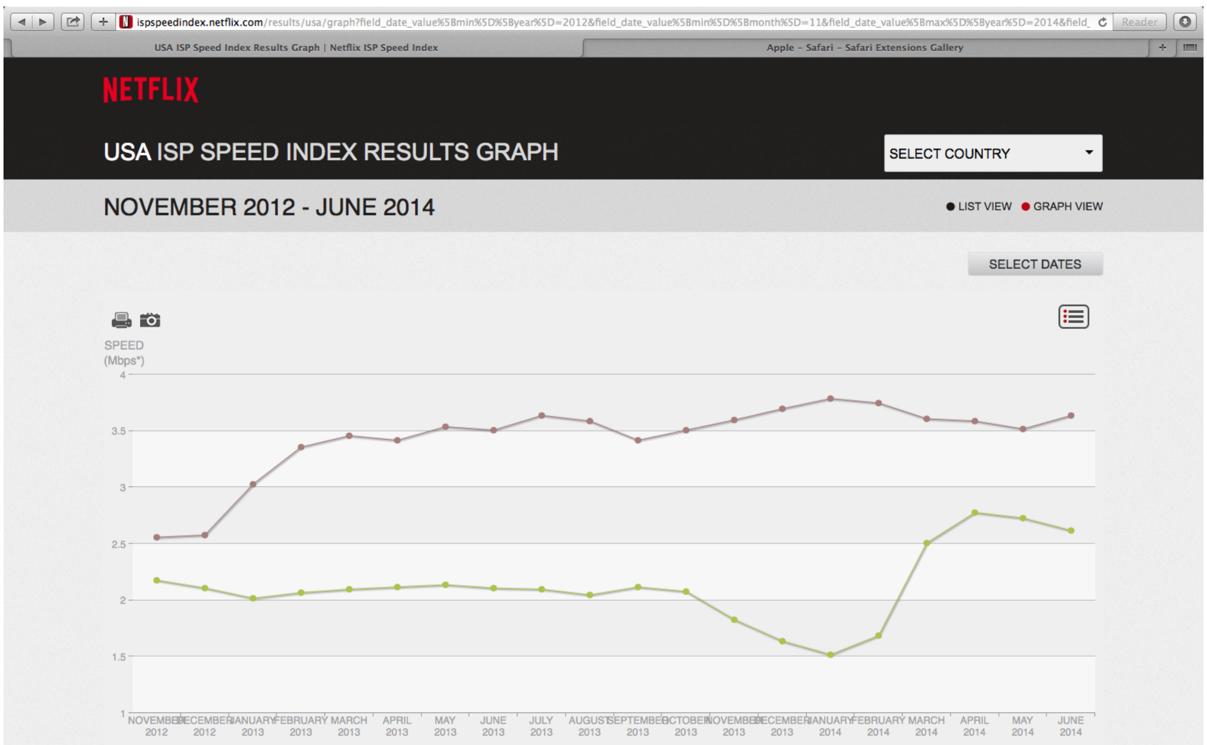
[11] *Id.* at ¶ 61.
[12] Comcast-NBCU Competitive Impact Statement at 17.
[13] Letter dated April 23, 2014 from Netflix to Sen. Al Franken, available at http://www.franken.senate.gov/files/letter/140424NetflixResponse.pdf.

according to Netflix, the first time it was ever forced to pay an Internet service provider for access to its subscribers.[14]

The graph below, comparing the average speed at which Netflix subscribers could stream movies on Comcast's and Google Fiber's broadband Internet service, reflects how Comcast's demand was an anticompetitive flexing of market power muscle, rather than any legitimate reflection of technological limitations.[15]



The purple, top line represents Google; the green, bottom line represents Comcast.

Source: Netflix

[14] *Id.*

[15] Netflix's data "reflect the average performance of all Netflix streams on each [Internet service provider's] network from Nov. 2012 through Jun. 2014 and average performance during prime time starting in Oct. 2013." Netflix, USA ISP Speed Index Archives, http://ispspeedindex.netflix.com/results/usa/archives?field_date_value[value][year]=2014&field_date_value[value][month]=6 (last visited Aug. 1, 2014).

The graph shows how the average speeds for Comcast subscribers increased dramatically and almost immediately after Netflix paid Comcast's "toll."[16] Netflix has described how Comcast was able to degrade its subscribers' broadband stream from Netflix to force Netflix to pay this toll:

> Comcast is limiting the capacity of connections between its network and other networks, unless the network agrees to pay Comcast for access. This congestion causes delays when traffic enters Comcast's network through the settlement-free connections. Consumers experience these delays as slow page loads, poor streaming quality, and frequent streaming pauses.
>
> Few Americans have a meaningful choice in broadband service providers: Comcast subscribers are largely stuck with Comcast. And the only way for content providers to reach the millions of broadband subscribers currently controlled by Comcast is to go through Comcast. By degrading consumers' experience, Comcast can demand that content providers pay them a toll to avoid congestion and reach their captive subscribers. If content providers cannot effectively reach Comcast subscribers, they cannot compete. So they have little alternative for an uncongested connection unless they agree to Comcast's terms. [17]

If a company like Netflix, which has more subscribers than Comcast does, can be forced to pay Comcast a toll, no one would stand a chance against a combined Comcast/Time Warner Cable, with control over an even larger subscriber base covering 16 of the top 20 key markets in MVPD, and 17 of the top 20 key markets in broadband. As a result of the combined company exacting these tolls, smaller, more innovative OVDs would face increased costs and could be

[16] If the toll reflected genuine, inherent capacity constraints on Comcast's network, then we would not see such an abrupt and dramatic increase in the average speeds; they would increase gradually over time, as Comcast added capacity. And if this were an industry-wide capacity problem at the Internet's interconnection points, one would not see the stark disparity in Comcast's and Google's average Internet speeds. Both would be affected similarly. And if Netflix were truly causing the problem by overloading the Internet, Google would also be degrading its Internet service to Netflix or complaining – but it is not.[16]

[17] Letter from Netflix to Sen. Al Franken, dated April 23, 2014.

forced out of business.[18] The combined company's customers would pay more – either in higher monthly fees for the OVD's programs, if the OVD pays the toll, or in slower speeds to stream or download the programs, if the OVD can't or won't pay. Finally, the tolls would harm consumers generally, as the cascading harms from these gatekeeper tolls spilled out beyond the combined company's geographic markets to everywhere that these OVDs serve.[19] These consequences would slow or stop OVD offerings, in turn reducing consumer demand which drives broadband deployment.

3. The Proposed Transactions Will Delay the Reasonable and Timely Deployment of Broadband to All Californians Because the Combined Company Will Use Its Power as a Network Gatekeeper to Forestall Innovation.

The merger also stands to substantially decrease technological innovation in the video distribution industry. Comcast is upgrading its set-top boxes, for example, with more sophisticated electronic devices that perform the same functions as the boxes now in use – as the interface through which subscribers receive digital channels, access a channel guide, and order pay-per-view programming.[20] Box rentals have been an important revenue source in their own right,[21] but the box is also a mechanism for controlling access to the television set. Despite the FCC's attempts, the effort to create a competitive retail market for set-top boxes has been

[18] *See, e.g.,* Netflix, US and Canada Blog, *Internet Tolls and the Case for Strong Net Neutrality*, March 20, 2014, http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html ("If this kind of leverage is effective against Netflix, which is pretty large, imagine the plight of smaller services today and in the future. Roughly the same arbitrary tax is demanded from the intermediaries such as Cogent and Level 3, who supply millions of websites with connectivity, leading to a poor consumer experience.").
[19] Comcast-NBCU Competitive Impact Statement at 14.
[20] Joint Applicants' Opposition to Petitions to Deny and Response to Comments at 65, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57 (filed September 23, 2014).
[21] FCC, Report on Cable Industry Prices, MM Docket No. 92-266, at 12 (June 7, 2013) (reporting average price for leased equipment in January 2012 of $6.28 per month for basic service (a 22.9 percent increase from 2011), $7.29 for expanded basic, and $7.75 for the next most popular service).

unsuccessful.[22] Subscribers overwhelmingly are led to use the box rented out by their cable operator.[23]

It is not enough, in order for competition and innovation to take hold, that technology companies are designing devices that stream media from online video distributors like Netflix and Hulu and could become a substitute for the cable provider's set-top box. As it is, consumers have to purchase these devices in addition to, and not in lieu of, their rented set-top boxes. So if consumers that want cable programming, they are wedded to the set-top box. This provider-imposed restriction adds further to the cost and complexity of moving between cable and over-the-top programming, creates a disincentive for consumers to adopt broadband, and therefore slows broadband deployment.

Additionally, the proposed transactions would eliminate a company whose practices encourage broadband deployment. As Comcast upgrades its boxes and expands their array of functions, and as the interface between Comcast's cable and broadband technologies grows, the danger is that Comcast will have even more power to direct – and restrict – the course of innovation in both, thereby also restricting choices for consumers. And this danger is not an abstract threat—Comcast customers have already reported Comcast's blocking the customer's ability to access the Internet through their Internet-enabled television:

> We had TV internet access to Netflix, HBO and many other internet entertainment sources for two months or more. Then suddenly one day, Comcast cancelled this internet access. We called for home service (we pay extra for this). They came by and said our internet access through the tv was just fine. We asked them to swap the cable box, but they would not do this. We still cannot access the

[22] *Id*.
[23] *See id*.

> internet through our tv. We purchased Roku and are now able to get Netflix through Roku, but Comcast is still blocking our HBO access which we pay for.[24]

In 2013, Time Warner Cable set out on a different, more open course. It entered into a deal with Roku, which allowed consumers to dispense with their set-top box and use an app on their Roku player to receive up to 300 live television channels as well as on-demand programming.[25] Time Warner Cable billed the availability of Time Warner Cable television on an open platform as a 'significant milestone' that gave consumers "more choice in entertainment than was ever possible before".[26] Industry observers hailed Time Warner Cable's uses of an open platform as a big first step toward greater customer choice and innovation, noting that Time Warner Cable was "the first multichannel video program distributor to offer TV access to authenticated subscribers without the need of a cable set-top box."[27] If the Commission approves the proposed transactions, it will eliminate Time Warner Cable and Time Warner Cable's investment in technologies that promote broadband deployment will cease.

4. The Proposed Transactions Will Not Improve Deployment of Broadband to Elementary and Secondary Schools and Classrooms and Libraries.

Applicants tout Comcast's provision of complimentary cable and Internet service to a embarrassingly small number of schools in California, and further claim that the proposed transactions will "will position Comcast to advance those efforts in other parts of California and elsewhere."[28] This claim is a typical example of Comcast making a statement which looks like a commitment, but does not bind the combined company to any action whatsoever. Comcast's

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[24] Exhibit A.

[25] Time Warner Cable, Press Release, TWC TV Launching on Roku: Authenticated Cable Service Streams Thousands of Live Programs to TV (Jan. 7, 2013), http://www.timewarnercable.com/en/about-us/press/twc_tv_launching_on_roku.html.

[26] *Id*.

[27] Eric Gruenwedel, *Time Warner Cable Bows Roku Channel*, HOME MEDIA MAGAZINE, March 8, 2013, http://www.homemediamagazine.com/industry-news/time-warner-cable-bows-roku-channel-29845.

[28] Comcast Opening Brief at 92.

statement, simply put, is that the proposed transactions will give the combined company the ability to expand its service to schools. However, the fact that the combined company could take that action is not sufficient to show that the proposed transactionswill *actually result* in increased deployment of broadband to elementary and secondary schools and classrooms and libraries. Additionally, Applicants fail to mention that Comcast's provision of service to schools and libraries is subsidized by ratepayers through the E-Rate and California Teleconnect programs.[29] It is entirely possible that Comcast's costs of providing free service to some schools is offset by those subsidies.

5. The Proposed Change of Control and Merger Will Not Improve Deployment of Broadband to Unserved and Underserved Areas.

Applicants argue that the proposed transactions will improve deployment of broadband services to unserved and underserved areas.[30] However, Applicants' Opening Brief and supporting documents contradict this claim. When explaining why they do not expand their networks into new service areas, Applicants state that they "rationally focus their capital investments *within their existing footprints*, given the higher and more predictable returns available from such initiatives as compared to an incremental expansion into another facilities-based provider's service territory."[31] Applicants further state that the combined company will focus its investment on improving existing systems.[32]

Even if the proposed transactions result in increased capital investment in the combined company's networks, by Applicants' own admission, that investment will be used to improve

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[29] See Comcast Connection Enriches California School District Curriculum And Encourages Students To Reach Beyond The Classroom, *available at* http://business.comcast.com/docs/default-source/case-studies/case-study-folsom-cordova.pdf?sfvrsn=0 (last accessed December 10, 2014).
[30] Comcast Opening Brief at 6.
[31] *Id*. at 8. (Emphasis added).
[32] *Id*.

current networks. Accordingly, the proposed transactionswill not result in build-out to unserved areas. In fact, based on Applicants' claims that it is not sufficiently profitable to build infrastructure in an existing competitor's footprint,[33] it is more likely that Applicants would build out to unserved areas if the Commission *denies* the merger. Accordingly, the Commission's approval of the proposed transactions would create a substantial risk of slowing broadband deployment to all Californians.

6. The Proposed Transactions Will Harm Consumers Because The Combined Company Will Use Its Market Power Over Bundled Services to Stifle Competition

As discussed above, the proposed transactions threaten harms to consumers who purchase broadband services. In addition to those harms, the proposed transactions threaten harms to competition in the market for bundled services. The proposed transactions would harm competition in the bundled services market by (1) increasing the combined company's market power over programming and in local television and broadband markets, and (2) reducing consumers' access to program and viewpoint diversity.

a. Cable Providers' Primary Business Focus is on the Sale of Bundled Services.

One of the most serious flaws in the Applicant's Opening Brief is its complete failure to address, or even acknowledge, the impact of the proposed transactions on bundled service. AT&T & DIRECTV's recent application before the FCC notes that "[i]n contrast to the increasing demand for bundles, standalone video service is of decreasing significance,"[34] and that "bundled offerings of broadband and video services increasingly have become the focus of

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[33] Applicants' Opening Brief, Exhibit D, Mark A. Israel et al., *Economic Analysis of the Effect of the Comcast-TWC Transaction on Voice and Broadband Services in California* at 36 (Dec. 24, 2014) (hereafter, Israel Economic Analysis).
[34] Public Interest Statement at 52, Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90 (June 11, 2014).

consumer demand and competitive energy for cable incumbents, telephone companies…and [broadband service providers]."[35] In the Comcast-NBCU merger, the FCC was so concerned about Comcast's incentives to offer only bundled service that it imposed a requirement that Comcast offer standalone service as a condition of FCC approval.[36] A study by Time Warner Cable concluded that bundling was an excellent tool for reducing customer churn.[37]

Applicants' arguments before the Commission attempt to portray Comcast as a company that happens to offer three disparate products—telephone, video, and broadband service. However, this position fails to acknowledge that Comcast constantly pushes its employees to promote bundled service. Customers have described the Comcast's efforts to promote bundled service:

> I approached Comcast when our cable/phone/internet bill became too large to handle. We were already on basic cable, the smallest option to choose from. I asked to have the cable dropped from our services and only pay for internet and phone. I was told it would cost more because it would not be 'bundled.' It made no sense to completely drop a product only to pay more. I asked if there was anything we could do to reduce our bill and was told no. After 20+ years as a Comcast customer, I cancelled Comcast that day and will never be a Comcast customer again. They obviously don't need customers, nor do they need to be concerned with loyal customer service. I hope someday others realize they have the power to make changes.[38]

Additionally, as discussed in further detail below, Comcast pressures its employees to sell expanded services to customers that cannot afford or do not need those services.[39]

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[35] *Id*. at 51-52.
[36] Comcast-NBCU Order at ¶ 57.
[37] Jeffrey Prince, The Dynamic Effects of Triple Play Bundling in Telecommunications (Winter 2012), *available at* http://www.twcresearchprogram.com/pdf/TWC_PrinceReport.pdf (last accessed December 10, 2014)
[38] Exhibit A.
[39] *Id*.; Adrienne Jeffries, Employee metrics show how Comcast pushes customer service reps to make sales (August 19, 2014), *available at* http://www.theverge.com/2014/8/19/6028059/training-materials-show-how-comcast-pushes-customer-service-reps-to/in/5716626.

Applicants claim that the combined company's operations in California will "involve significant capital expenditures for network elements," although that assertion is qualified by the statement that those plans "are still very preliminary pending the necessary regulatory approvals."[40] Given Comcast's overwhelming focus on selling bundled services, it follows that the combined company will focus those capital expenditures on areas that contain customers likely to purchase bundled service, and not on areas that do not. Accordingly, the combined company's offering of bundled services will adversely affect the deployment of broadband services to all Californians.

b. The Proposed Transactions Will Harm Consumers Because the Combined Company Will Have the Increased Ability to Engage in Anticompetitive Conduct Against Rival MVPDs.

When reviewing the Comcast-NBCU merger, the FCC was concerned that Comcast would withhold programming from other distributors (cable systems, telcos and satellite companies) or would raise the prices for such programming:

> The proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [Comcast-NBCU Joint Venture] would come to control or raise programming costs to its video distribution rivals. These exclusionary strategies could raise distribution competitors' costs or diminish the quality of the content available to them. As a result, Comcast could obtain or (to the extent it may already possess it) maintain market power in video distribution, and charge higher prices to its video distribution subscribers than those consumers would have paid absent the transaction.[41]

The DOJ similarly found that Comcast, in gaining control over NBCU programming, would gain significant market power, and new incentives, for engaging in such discriminatory practices.[42]

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[40] Comcast-NBCU Order at ¶ 23.
[41] *Id*. at ¶ 29.
[42] Comcast-NBCU Competitive Impact Statement; *see also* Complaint ¶ 51, filed in United States v. Comcast Corp., Civ. Action No. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.htm.

Studies have confirmed that the bigger a cable operator's downstream subscriber footprint, the larger the price hikes for regional sports networks following vertical integration will be.[43] The combined company could use its increased power to harm both its competitors (other multi-channel video program distributors plus the emerging online video programming distributors) and consumers.[44]

One good example is regional sports network (RSN) programming, which continues to be a major draw for many cable subscribers.[45] And because sports programming is must-have, a cable company can significantly hamper its rivals from serving their subscribers by charging them too much for that programming, or by withholding it altogether, because sports programming is a "must-have" product.[46] As the D.C. Circuit found in *Cablevision*:

> When a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate – like the games of a local team selling broadcast rights to a single sports network – competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company. To use a concrete example, we doubt that Philadelphia baseball fans would switch from cable to an alternative MVPD if doing so would mean they could no longer watch Roy Halladay, Cliff Lee, Roy Oswalt, and Cole Hamels take the mound, even if they thought the

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[43] Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REVIEW OF NETWORK ECONOMICS 61, 66 (2013).

[44] *Id.* (expressing concern about Comcast's "ability to raise the fees for retransmission consent for the NBC [owned and operated television stations] or effectively deny this programming entirely to certain video programming distribution competitors" and Comcast's gaining "the right to negotiate on behalf of its broadcast network affiliate stations or the ability to influence the affiliates' negotiations with its distribution competitors.").

[45] *Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 712 (D.C. Cir. 2011); *see also* In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Sixth Annual Report, 15 FCC Rcd. 978, 986 ¶ 16 (2000) ("We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace.").

[46] *Cablevision*, 649 F.3d at 702 (crediting the Commission's 2006 regression analysis that found that the withholding of terrestrial RSNs substantially lowered the percentage of television households subscribing to DBS in two of three studied markets from what would have been expected without such withholding, and that the study found that "terrestrial programming withholding decreased a competitor MVPD's market share from 14.5% to 8.6% in Philadelphia and from 11.1 % to 7.4% in San Diego, although it found no statistically significant effect in Charlotte").

> alternative MVPD was otherwise superior in terms of price and quality. Facing such a structural disadvantage, a potential MVPD competitor might realistically conclude that expanding its presence in the Philadelphia market would be uneconomical, thus limiting its ability to provide video programming – and hence satellite video programming – to customers.[47]

Comcast was well aware of this anticompetitive opportunity, and the FCC found evidence that Comcast had in fact taken advantage of it using its own regional sports networks.[48]

The proposed transactions would increase the combined company's power to hinder its competitors by denying them access to valuable NBCU programming, or by raising their licensing fees above what it would have made sense for a stand-alone NBCU to charge.[49] Comcast owns interests in many RSNs including Comcast SportsNet Bay Area (67 percent), and Comcast SportsNet California (100 percent).[50] In acquiring Time Warner Cable, Comcast would increase the number of regional sports networks it would control, including key networks in Los Angeles.[51] For example, Time Warner Cable has a long-term agreement with the Los Angeles

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[47] *Id.* at 708 (D.C. Cir. 2011).

[48] Comcast-NBCU Order at ¶ 37 (noting how "the record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPDs that compete with Comcast in video distribution" and how this conclusion is consistent with our previous finding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been.")

[49] *See, e.g.*, American Cable Association, Press Release, ACA to FCC: Finish Program Access Rules Update Before Reviewing New Comcast Merger (Feb. 13, 2014), http://www.americancable.org/node/4651 ("Comcast-NBCU's takeover of Time Warner Cable would vastly increase the number of cable homes served by an operator affiliated with NBCU's popular programming, creating new incentives for NBCU to demand unfair terms and conditions from TWC's pay-TV distribution rivals, including ACA Members.").

[50] Comcast/TWC Public Interest Statement at 13, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57 (filed September 23, 2014).

[51] In October 2012, Time Warner Cable launched the Los Angeles regional sports networks (one in English and one in Spanish) that carry the Los Angeles Lakers' basketball games and other regional sports programming. Time Warner Cable, Form 10-K for the fiscal year ended December 31, 2013, at 5, http://www.sec.gov/Archives/edgar/data/1377013/000119312514056642/d640670d10k.htm.

Lakers for rights to distribute all their locally available games.[52] If allowed to acquire Time Warner Cable, Comcast could make it more difficult or more costly for rival video program distributors to access this popular video and sports content – including companies seeking to build new fiber networks.

The proposed transactions have the potential to harm consumers by increasing the price of, and lowering consumer choice regarding, bundled services. If Comcast chose to deny other MVPDs access to valuable NBCU and sports programming, consumers who wanted to purchase bundled service with that programming would have no choice but to purchase that service from Comcast. If Comcast chose instead to inflate the licensing fees it charged to other MVPDs, consumers would either pay more for their bundle (if their MVPD pays the inflated fee), would lose access, (if the MVPD can't afford to pay the increased fees), or would suffer other harms (if their MVPD pays the inflated fee and therefore has less money to invest in innovation and expansion). As a result, consumers' demand for bundled services could slow or decrease, accordingly slowing demand for broadband deployment.

c. The Proposed Transactions Will Harm Consumers Because the Combined Company Will Have Significantly More Control over Diversity of Programming.

Media/telecommunications mergers affect not only consumers' wallets and purses, but also the marketplace of ideas.[53] Comcast, by acquiring Time Warner Cable, would increase its already massive cable subscriber base by approximately 38 percent (not including the 3.9 cable subscribers it plans to divest to Charter), and be much larger than any other multi-channel video

[52] *Id*.
[53] *See* In Re FCC Declines to Approve Echostar-DirecTV Merger, 2002 WL 31268861 (F.C.C. Oct. 10, 2002).

program distributor, including the satellite companies DISH and DirecTV,[54] the telephone companies AT&T and Verizon,[55] and any overbuilder that uses a preexisting telecommunications operator's network (such as the cable networks) to offer customers an alternative.[56]

The proposed transactions do more than simply increase the number of consumers that are Comcast customers. Comcast already has large market shares in key metropolitan markets, including a market share of 58 percent in San Francisco (based on MVPD subscribers).[57] Because the combined company would control almost every key metropolitan market, video programmers would need distribution carriage through that combined company. In effect, the combined company could dictate what programs consumers can watch– not only in its markets but everywhere in California and across America. A nightly business program, for example, would never get the viewership it needs to be financially viable if it were carried only in rural markets. Realistically, that program would need access to viewers in the Los Angeles region and other urban business centers. Other video programmers that seek urban viewers would need access to the combined company, which would dominate most major urban centers. It would be impossible for many programmers to avoid the merged firm and still be able to make a go of it. Because video programmers would need to distribute their sports, entertainment, and news programs through the combined company, that company could hinder both competition and programming diversity by deciding what programs consumers could view, including where and when. So if an independent content provider wants to offer a sports-based package, perhaps

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[54] *Comcast-NBCU* Competitive Impact Statement, *supra* note 24 (finding that they collectively accounted at the time" for approximately 31 percent of video programming subscribers nationwide, although their shares vary and may be lower in any particular local market").
[55] *Id*. (finding that AT&T and Verizon, while enjoying success in the selected communities they have entered, "currently have limited expansion plans").
[56] *Id*. (finding that the "[o]verbuilders serve an even smaller portion of the United States").
[57] *Id*.

NCAA athletics of universities currently under-represented, at a lower price point, the combined company could squelch the idea. It has the incentive and ability to refuse support for new programs like this that would compete against its own programming.[58]

But more broadly, the combined company's sheer size would give it undue power to determine what programming is worth carrying, and at what cost to the program content provider. Programs with a smaller, specialty audience could well find it more difficult to affordably reach their viewers. As a result, those audiences could decide not to purchase bundled service, which in turn would slow broadband deployment.

7. The Proposed Transactions Will Delay the Reasonable and Timely Deployment of Broadband to All Californians.

The proposed transactions would increase the combined company's power to act as a broadband "network gatekeeper," giving the combined company unprecedented power to hinder competing online video streaming services and innovation. The proposed transactions will not improve deployment of broadband to schools, libraries, and unserved and underserved areas. Finally, the proposed transactions will give the combined company unprecedented control over the bundled services market, thereby delaying the deployment of broadband to all Californians. The proposed transactions, if approved by the Commission, would actually delay the reasonable and timely deployment of broadband to all Californians, harming consumers and the public interest.

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[58] The FCC identified, and Second Circuit acknowledged, how Comcast's incentive and ability to harm unaffiliated networks would increase after acquiring NBCU. *Time Warner Cable v. Fed. Comm. Comm'n*, 729 F.3d at 152 n.5 (2nd. Cir. 2013) (quoting Comcast-NBCU Order ¶ 116). And Comcast did just that, favoring its own news programming on CNBC over Bloomberg, by exiling Bloomberg to a more remote channel. Bloomberg was forced to spend years in litigation to get Comcast to treat it fairly. The merger would give Comcast even more power to harm other video programmers and consumers who want to see these programs.

B. The Proposed Transactions Will Harm Unserved and Underserved Californians.

The proposed transactions will cause harms that fall particularly hard on the less affluent and the underserved. The extension of Comcast's Internet Essentials program will not benefit adoption of broadband services by low income consumers. The proposed transactions will not ensure standalone internet access or inform customers about the availability of that standalone internet access. Finally, the proposed transactions will eliminate the availability of LifeLine service to consumers in Time Warner Cable's existing service territory.

1. Applicants' Extension Of The Internet Essentials Program To Low-Income Customers In Time Warner Cable's Service Territory Will Not Help Educate Consumers On Using Computers And The Internet When Service Is Provided.

In is scoping memo, the Commission asks:

> How would the Merger benefit California consumers? For example, will the merger benefit low income outreach and adoption of broadband services that are accessible, affordable, and equitable in a manner that is enforceable and will help close the digital divide? Will the merger help educate consumers on using computers and the internet when service is provided?[59]

Applicants respond by discussing Comcast's Internet Essentials program, and explaining that, post-transaction, the combined company will expand the Internet Essentials program to eligible consumers within Time Warner Cable's current service area.[60] While Greenlining and Consumers Union wholeheartedly support increasing the availability of affordable broadband service to low-income consumers, Applicants exaggerate the effect that Internet Essentials has had in increasing that availability. While Applicants describe extensive outreach efforts by Comcast, those outreach efforts have not had the needed effect. This may be partly attributable to Comcast's apparent failure to provide support services for the program in languages other than English. Applicants' purported commitments to continuing the Internet Essentials program post-

[59] Scoping Memo at 13.
[60] Applicants' Opening Brief at 50.

transaction are illusory. Finally, Comcast's digital literacy efforts related to Internet Essentials have been insufficient.

a. Comcast's Outreach Efforts Have Not Resulted in Significant Adoption of Internet Essentials.

Greenlining's Protest pointed out the very limited success of the Internet Essentials program.[61] While adoption numbers seem to have improved (from approximately 6 percent to approximately 14 percent), those figures remain abysmally low. In response to this data, Applicants present the Internet Essentials program as a significant success. In support of this claim, Applicants discuss a number of Comcast's outreach efforts, including:

- Selling nearly 30,000 subsidized computers at less than $150 each;
- Distributing nearly 37 million Internet Essentials brochures at no cost;
- Broadcasting more than 4 million public service announcements, valued at nearly $51 million;
- Having a total of 2.2 million visitors access Internet Essentials websites;
- Fielding more than 2.3 million phone calls to our Internet Essentials call center
- Offering Internet Essentials in more than 30,000 schools and 4,000 school districts, in 39 states and the District of Columbia;
- Partnering with thousands of community-based organizations, government agencies, and federal, state, and local elected officials; and
- Dedicating $1 million in grants to create "Internet Essentials Learning Zones."[62]

[61] Greenlining protest at 17. That protest indicated that the adoption rate was "about one half of one percent;" that number was inaccurate. The adoption rate for Internet Essentials at that time was approximately 6 percent.
[62] Applicants' Opening Brief at 90-91.

Greenlining and Consumers Union appreciate these outreach efforts. Despite all of these efforts, however, Comcast has only been able to enroll about 350,000 households, about 46,000 of which are in California—certainly helpful, far fewer than needed.[63] Greenlining and Consumers Union hope that Comcast will increase its efforts to extend the reach of broadband service to the poor and underserved. However, Comcast can do so without the Commission's approving the proposed transactions. Additionally, Time Warner Cable can introduce a broadband adoption program whether the Commission approves the proposed transactions or not.

b. Internet Essentials Provides Extremely Limited Benefits to Limited English Proficiency Consumers.

Applicants indicate that Comcast offers print materials regarding Internet Essentials in 14 languages.[64] While this effort is laudable, Applicants indicate that Comcast's Internet Essentials online outreach, for example, is only available in English and Spanish.[65] It is likely that Comcast's low Internet Essentials enrollment figures are in some part attributable to the limited options for limited English proficiency customers.

c. Applicants Have Made No Commitments to Continuing the Internet Essentials Program.

Applicants make grandiose statements about continuing the Internet Essentials program: "[i]n March 2014, Comcast announced that the Internet Essentials program had been extended indefinitely, meaning that eligible households will be able to enroll in the program beyond the three school year period originally proposed by Comcast and adopted by the Condition."[66] In

[63] Applicants' Opening Brief at 51.
[64] Applicants' Opening Brief, Exhibit A at 32
[65] *Id*. at 31.
[66] Third Annual Compliance Report on Internet Essentials, The Comcast Broadband Opportunity Program at 9, Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.For Consent to Assign Licenses andTransfer Control of Licensees (filed July 31, 2014), *available at*

making this statement, however, Applicants do not make any *actual commitments* to continue or expand the program. Comcast may claim that it is extending Internet Essentials "indefinitely," but "indefinitely" refers only to an *unspecified period of time*. Applicants have made no meaningful commitment to continue the Internet Essentials program, and could conceivably eliminate the program the day after the proposed transactions are approved. Given that the combined company could eliminate the Internet Essentials program immediately after it gained approval of the proposed transactions, and could just as easily continue and expand the program even without a merger, the Commission should not consider Internet Essentials a benefit of those transactions.

d. Applicants' Extension Of the Internet Essentials Program to Low-Income Customers in Time Warner Cable's Service Territory Will Not Help Educate Consumers on Using Computers and the Internet When Service Is Provided.

As discussed above, Comcast's outreach efforts to promote Internet Essentials have not this far resulted in significant program enrollment. The Internet Essentials program cannot increase the digital literacy of eligible consumers who are unaware of or do not enroll in the program. But Comcast's digital literacy education efforts for those consumers who actually enroll in Internet Essentials also appear to have had only limited effect. Applicants report that only 29% of IE customers "took advantage" of IE in-person or online training resources.[67] It is unclear whether even those customers completed in-person or online training, or whether that training resulted in increased digital literacy among those customers. Applicant's own expert concedes that the Internet Essentials program is not an ideal tool for teaching digital literacy,

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http://www.internetessentials.com/sites/internetessentials.com/files/reports/comcast_internet_essentials_annual_report_2014-07-31_-_fcc_low_res.pdf (last accessed December 10, 2014).

[67] Applicants' Opening Brief, Exhibit A, Attachment A, at 21.

recommending that Internet Essentials customers look elsewhere for digital literacy resources.[68] Expanding Comcast's digital literacy training to current Time Warner Cable customers is not likely to result in a meaningful increase in digital literacy, particularly in light of the fact that Applicants appear unwilling even to make a binding commitment to continue the Internet Essentials program.

e. Applicants' Extension of the Internet Essentials Program to Low-Income Customers In Time Warner Cable's Service Territory will not increase Outreach and Adoption of Broadband Services that are Accessible, Affordable, and Equitable in a Manner that is Enforceable and Will Help Close the Digital Divide.

Applicants' representations that the combined company will continue to offer Internet Essentials cannot be relied upon to be effective. Comcast's outreach efforts have not resulted in significant adoption of Internet Essentials, and Internet Essentials does not appear to effectively reach limited English proficiency consumers. Applicants have made no commitments to continuing the Internet Essentials program, and the merger has no bearing on Applicants' ability to extend broadband service to low-income communities. Finally, Comcast's digital literacy efforts related to Internet Essentials also appear to have had only limited effect. Accordingly, Applicants' extension of the current failed Internet Essentials program to low-income customers in Time Warner Cable's service territory will not necessarily increase adoption or digital literacy. Additionally, there is no guarantee that he combined company will not discontinue Internet Essentials after the Commission approves the transactions. Accordingly, the Commission should disregard Applicants' claims about the benefits of the Internet Essentials program as a justification for approving the proposed transactions.

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[68] *Id*.

2. Applicants Make No Commitment that the Combined Company Will Offer Standalone Internet Access or Inform Customers about the Availability of that Standalone Internet Access.

In its scoping memo, the Commission asks "[w]ill the merged entity offer standalone internet access and make sure consumers are aware of this offer?[69] Applicants provide the tepid response that "[i]n addition to extending Internet Essentials to Time Warner Cable's territories, Comcast will also maintain its commitment to offering consumers the option to purchase broadband service on a standalone basis. This offering stems from a condition in the NBCUniversal transaction, but has become a core feature of Comcast's broadband business."[70] Much like Applicants' claims about the combined company's post-transaction plans to offer Internet Essentials, this response contains no actual commitment to continue offering standalone service. Based on those statements, the combined company could discontinue offering standalone service the moment the Commission approved the merger.

Additionally, Greenlining and Consumers Union are skeptical that the combined company will inform customers about the availability of standalone Internet access. As a condition for approving the NBCU transaction, for example, the Commission required Comcast to provide and promote a reasonably priced stand-alone broadband service.[71] The FCC intended to keep a road open for customers who wanted to move from bundled to unbundled service, who maybe wanted even to cut out cable entirely and move to over-the-top programming.[72] Comcast's sales force, however, continued to actively promote the bundle, and failed to promote

[69] Scoping Memo at 13.
[70] Applicants' Opening Brief at 92.
[71] Comcast-NBCU Order at ¶ 102.
[72] *Id*.

the inexpensive standalone alternative.[73] Complaints mounted.[74] Eventually, the Commission brought action and imposed an $800,000 penalty on Comcast for noncompliance.[75]

Applicants make no meaningful commitment to continue to offer standalone broadband service pending approval of the proposed transactions. Additionally, Comcast's past behavior indicates that the combined company will not promote unbundled, standalone service. Accordingly, the Commission should disregard Applicants' claims that the proposed transactions will result in the combined company's offering standalone broadband service.

3. The Proposed Transactions Will Eliminate the Availability of LifeLine Service to Consumers in Time Warner Cable's Existing Service Territory.

In its Protest, Greenlining raised concerns about the fact that, post-merger, Comcast would likely reverse Time Warner Cable's business plan to offer LifeLine service to customers within its service territory.[76] Much like is response to Greenlining's claims about Internet Essentials, Applicants respond with reassurances which are essentially meaningless. For example, Kevin J. Leddy, Time Warner Cable's Executive Vice President, Corporate Strategy, states that "Time Warner Cable intends to transfer its VoIP customers from its unregulated retail affiliate, Time Warner Cable Digital Phone LLC, to Time Warner CableIS(CA), which is a competitive local exchange carrier ('CLEC') authorized to provide telecommunications services in the State. Time Warner Cable has no plans to modify its VoIP based service plans except as necessary pursuant to that change in regulatory status; that is, Time Warner Cable's features,

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[73] Consent Decree, In the Matter of Comcast Corporation, Docket No. DA-12-953 (June 27, 2012), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-12-953A1.pdf.
[74] *Id*.
[75] *Id*. For a description of other reported claims of noncompliance, *see, e.g.*, Letter from Senator Al Franken to the Honorable Tom Wheeler, dated Feb. 27, 2014, http://www.franken.senate.gov/files/letter/140227FCCLetterComcastTWC.pdf.
[76] Greenlining Protest at 15-16.

rates, and other service terms will remain essentially the same as they exist today, and will similarly remain comparable to the attributes of Comcast's voice offerings."[77]

It is important to note that Mr. Leddy's statements do nothing more than describe Time Warner Cable's *current* business plans. Mr. Leddy cannot guarantee that, post-transaction, the combined company will continue to offer LifeLine service. In fact, as Greenlining has previously noted, any actual knowledge by Mr. Leddy's regarding Comcast's future plans might well rise to the level of an antitrust violation.[78] Any assurances would have to come from Comcast, which provides none: Comcast states that it "will continue to provide service to LifeLine customers of Time Warner CableIS(CA) *unless and until*, in the normal course, Comcast files and the Commission approves an application to relinquish the Time Warner CableIS(CA) LifeLine certification."[79] Applicants provide no guarantee that the combined company will continue to offer LifeLine service post-transaction. Accordingly, the Commission should ignore Applicants' claims of LifeLine benefits.

C. The Proposed Transactions Will Not Benefit California Consumers or The Public Interest Because The Merger Will Not Maintain or Improve Quality of Service.

The Commission's scoping memo asks whether the proposed transactions will improve quality of service to California consumers.[80] The proposed transactions will not maintain or improve service quality for California consumers. Additionally, the proposed transactions will not meaningfully improve customer service for California consumers.

[77] Applicants' Opening Brief, Exhibit C, at ¶ 7.
[78] Greenlining Protest at 18.
[79] Applicants' Opening Brief, Exhibit C, at ¶ 11 (emphasis added).
[80] Scoping Memo at 13.

1. The Proposed Transactions Will Not Maintain or Improve Service Quality for Consumers.

Applicants assert that the proposed transactions will result in "more reliable networks" for Time Warner Cable Customers.[81] This improved quality of service will not, apparently, result in improved quality of service to any of the combined company's other customers. In early 2014, Consumers Union asked its members to describe experiences involving those members' cable companies. According to respondents who were current and former Comcast customers, Comcast's quality of service includes service that "cuts in and out constantly," download and upload speeds that "change erratically" and "are sometimes fast and sometimes very slow," "[f]requent interruption in internet services without explanation (frequently happens during day time hours when internet is needed)," inadequate bandwidth, blocked channels and Internet access through some televisions, and unreliable phone service.[82] Greenlining and Consumers Union doubt that any Time Warner Cable customer would view this level of service quality as an "improvement."

In their Opening Comments, Applicants boast that Comcast now offers two-hour appointment windows across "most" of its footprint, and that Comcast meets this commitment 97 percent of the time.[83] Even if these claims are true, numerous Comcast customers have complained that technicians show up and are unable to install equipment, do not install the services that the customer paid for, perform failed installations that result in the customer receiving no service, or announce that they do not want to complete the installation because it "was time to go home."[84] Comcast's solution to this problem is apparently to encourage

[81] Applicants' Opening Brief at 37.
[82] Exhibit A.
[83] Applicants' Opening Brief at 28.
[84] Exhibit A.

customers to install broadband equipment themselves, despite a disturbingly low activation success rate.[85]

Applicants respond to these, and similar, complaints about service quality with the rather puzzling argument that because Comcast's customer service is incrementally better than Time Warner's customer service, the proposed transactions are in the public interest.[86] Even if Comcast's customer service is "less terrible" than Time Warner Cable's customer service, that would not justify the Commission's approval of the proposed transaction. Such Commission approval would actually harm the public interest, because it would send providers the clear message that providers have no obligation to offer acceptable service quality, and, in fact, that a company that provides some of the worst service quality of any industry in the country[87] can still obtain Commission approval to acquire another company.

2. The Merger Will Not Maintain or Improve Customer Service for Consumers.

Despite Comcast's marketing efforts to convince customers that Comcast's customer service has improved, Comcast continues to provide the worst customer service among cable companies and also provides some of the worst customer service among 19 industries.[88] Comcast won Consumerist.com's 2013 "worst company in America" contest.[89] These

[85] Applicants' Opening Brief, Exhibit D at 20.
[86] Applicants' Opening Brief, Exhibit D at 24. "The relevant question, of course, is the incremental effect of the transaction."
[87] Lance Whitney, Cable providers, ISPs rank dead last for customer service (August 21, 2013), *available at* http://www.cnet.com/news/cable-providers-isps-rank-dead-last-for-customer-service/.
[88] *Id*.
[89] Congratulations To Comcast, Your 2014 Worst Company In America! (April 8, 2014), *available at* http://consumerist.com/2014/04/08/congratulations-to-comcast-your-2014-worst-company-in-america/.

consistently poor rankings create a very real risk that a combined company would similarly disregard the interests of consumers.[90]

Even after Comcast announced the proposed transaction, Comcast's customer service has continued to decline. Customers have reported being yelled at and harassed by service reps,[91] experiencing overly long wait times for installation or repair,[92] being told that the customer would not have received a refund but for the fact that the customer had a recording of a phone call where a representative offered a refund,[93] and spending two and a half hours on the phone with customer service representatives.[94] These customer complaints do not appear to be isolated incidents, as these actions are consistent with training materials and performance metrics that Comcast provides to its employees.[95] Comcast's internal documents and its public statements admit that its customer service policies are responsible for incidents like those described above.[96]

Comcast employees and ex-employees describe constant pressure to sell customers service, even if those employees work in tech support, billing, general customer service, or

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[90] Comcast and Time Warner Cable Score Low on Latest Consumer Reports Customer Satisfaction Survey (March 24, 2014) , *available at* https://consumersunion.org/news/comcast-and-time-warner-cable-score-low-on-latest-consumer-reports-customer-satisfaction-survey/.

[91] Dan Siefert, Comcast's customer service nightmare is painful to hear (July 25, 2014), *available at* http://www.theverge.com/2014/7/15/5901057/comcast-call-cancel-service-ryan-block.

[92] Adrienne Jeffries, Comcast Confessions: why the cable guy is always late (August 4, 2014), *available at* http://www.theverge.com/2014/8/4/5960251/comcast-confessions-why-the-cable-guy-is-always-late.

[93] Adrienne Jeffries, Now everyone is recording their nightmare Comcast calls (August 11, 2014), *available at* http://www.theverge.com/2014/8/11/5991525/now-everyone-is-recording-their-nightmare-comcast-calls.

[94] Meg Marco, Watch A Guy Sit On Hold With Comcast Until They Close (August 14, 2014), *available at* http://consumerist.com/2014/08/13/watch-a-guy-sit-on-hold-with-comcast-until-they-close/

[95] Adrienne Jeffries, Here's why your Comcast rep is yelling at you (July 16, 2014), *available at* http://www.theverge.com/2014/7/16/5909591/here-s-why-your-comcast-rep-is-yelling-at-you.

[96] Jacob Kastrenakes, Comcast admits its policies are responsible for customer harassment (July 22, 2014), *available at* http://www.theverge.com/2014/7/22/5926565/comcast-leaked-memo-reexamining-retention-call-policies; Adrienne Jeffries, This is Comcast's internal handbook for talking customers out of canceling service (August 4, 2014), *available at* http://www.theverge.com/2014/8/4/5967255/this-is-comcasts-internal-handbook-for-talking-customers-out-of.

repair.[97] Comcast pressured one employee to sell new services to a customer who was 55 days late on her bill.[98] Another employee stated that when a 90-year-old woman called to add phone to her account, the employee's supervisor stated that the woman "was probably senile… but you should have upgraded her cable. I don't think you are going to be sitting in this seat for very long."[99] Comcast's internal documents indicate that the company considers sales to be about 20 percent of an employee's performance.[100]

Consumers who were asked to share stories of problems with their cable companies had similar experiences with Comcast. Some customers reported being sold services not available in their area:

> Totally inept tekkies and lousy customer (non)service. Take the time we had VOD installed. The Comcast tekkie put it in and left. We tried for three days to make it work. Fed up, we called customer service who finally said, "Oh, wait, you don't have VOD in your area." That tekkie never tested his installation and sales sold us something that we didn't have in our area. And that was just one of many instances....[101]

Other customers told stories of excessive wait times and Comcast's failure to correct problems:

> One of my business email addresses just stopped receiving emails and I couldn't get anyone at Comcast to fix it for me. Got transferred around and around and had to retell the story to each new customer service rep. There was no record of my pervious conversations with customer service reps. When it finally got resolved, the rep made it sound like it was something that I had done wrong but when I asked him to explain what I'd done so it wouldn't happen again, he couldn't. When I persisted, he simply disconnected the call. Infuriating![102]

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[97] Adrienne Jeffries, Comcast Confessions: when every call is a sales call (July 28, 2014), *available at* http://www.theverge.com/2014/7/28/5936959/comcast-confessions-when-every-call-is-a-sales-call.
[98] *Id*.; Adrienne Jeffries, Employee metrics show how Comcast pushes customer service reps to make sales (August 19, 2014), *available at* http://www.theverge.com/2014/8/19/6028059/training-materials-show-how-comcast-pushes-customer-service-reps-to/in/5716626.
[99] *Id*.
[100] *Id*.
[101] Exhibit A.
[102] *Id*.

> Comcast has the worst help desk service I have ever experienced. On one call, it took me 3 hours to get an issue "resolved", and it wasn't actually solved at the end. They dropped my call 3 times (so I had to start all over), they transferred me to India, back to Az, and then to Ny, and the call quality decrease to the point we couldn't understand each other. They then transferred me to the Microsoft 1-800 number at 10pm, without telling me they were doing that (and I got a Microsoft voice message). It was really sad, and the saddest comment is this is typical. I don't think Comcast management has ever tried using their own service desk. Long waits are typical (they're probably cutting costs for profits). I would ditch them if I could.[103]
>
> Service slow or patchy? Call for help. well pack a lunch and glue the phone to your head.[104]

Customers also experienced problems with billing disputes and bogus fees:

> They charge way too much for awful service. I have had to call every week for the last three months to get charges taken off my bill that are either false or incorrect. They keep trying to overcharge.[105]
>
> I was told to put $100 deposit when I started internet, TV and home phone service. When we moved and stopped service, Comcast did not refund my deposit. I called many times and every time I was told they were processing. It has been one and half years now. The last time I called and was told [they] have never received my deposit. God, how a big company like Comcast could lie like this?! I sent the copy of deposit charge and the proof of payment to their billing department, no response so far (5 weeks already). It is frustrating! Is there a way to stop the bulling of big company? My money, my time, what makes Comcast treats customer this way?[106]
>
> Comcast increases their bogus modem rental fee regularly. I paid $3 per month 3 years ago, and now pay $8 for the privilege of using a hunk of plugged -in plastic that was fully paid off years ago. And how about so called "government" fees that are completely arbitrary and have nothing to do with the government, yet "our" government lets them get away with it; it lets them do whatever they want to their customers' detriment. So nice to know we're represented![107]

Comcast's poor record keeping is often responsible for billing disputes:

> I purchased my own cable modem from BestBuy. Found that Comcast has marked my equipment as theirs in their database and in status of "missing" (a

[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*.

> euphemism for stolen). Only when I challenged Comcast to show me the receiving invoice from their vendor and that I would do that through discovery after filing a police report for stolen equipment (Comcast effectively prevented me using my equipment through their action) did they back down and admit that there was no receiving invoice, they could not explain how this happened or who did it. I suspect that this is an unwritten policy at Comcast to disable the resale of customer owned equipment and force customers into renting the Comcast equipment. I was dismayed to hear from the Comcast employees that Comcast does not have audit trails for updates to customer information in their systems. A discovery action could prove this incorrect but it was more trouble than I was willing to go through. Eventually I overpaid my bill and canceled so they would have to send me a check.[108]

Comcast's customer service problems are not limited to online or phone support, but include problems at Comcast's retail locations:

> I have visited the local ComCast office numerous times to deal with equipment issues and billing issues. There is always a line of at least 30 minutes duration and there is rarely personnel working to make any difference. They recently upgraded [their] facility, but have never added any more help. Andy other business would have floded due to very poor customer service. They just don't care. [They] are too big now. Please don't let them get even bigger..!!

These examples are a fraction of the stories told by unhappy California consumers. Greenlining and Consumers Union include, as Attachment B, the comments of 3,993 California consumers who oppose the transactions, in no small part because of Comcast's dismal record on customer service.

3. The Proposed Transactions will not Result in Meaningful Improvements to Service Quality or Customer Service for the Combined Company's Customers.

The Commission's approval of the proposed transactions would result in the expansion of a company that does not view service quality or customer service as a means to increase customer satisfaction. Rather, Comcast views service calls as a sales opportunity—customer satisfaction is secondary at best. Notably, Comcast's past and present service problems appear to

[108] *Id*.

be in part attributable to past mergers and acquisitions.[109] Comcast has not spent the time or resources to fully integrate previously acquired systems into its network, leading to systemic problems.[110] If the Commission approves the proposed transactions, it is likely that the new company's customers will experience the same, merger-specific problems that Comcast customers have experienced as a result of past transactions. These problems would harm the public interest. Accordingly, the Commission should deny the proposed transactions.

D. The Merger Will Not Benefit California Customers and The Public Interest Because The Merger Will Not Maintain or Improve the Quality of Management of the Resulting Public Utility.

As Greenlining previously argued,[111] the proposed transactions will not maintain or improve the quality of management of the resulting public utility doing business in the state. Applicants respond to those arguments by providing a laundry list of Comcast executives who will allegedly extend their expertise to the acquired Time Warner Cable systems:

> Executives like Steven White, President of Comcast's West Division; William R. "Bill" Stemper, President of Comcast Business Services for Comcast Cable; Eric Schaefer, Senior Vice President and General Manager, Communications, Data and Mobility for Comcast Cable; Catherine Avgiris, Executive Vice President and Chief Financial Officer of Comcast Cable; and Neil Smit, President and Chief Executive Officer of Comcast Cable and Executive Vice President of Comcast Corporation, have decades of industry experience and success between them.[112]

However, all of these executives appear to be *regional* or *national* Comcast employees: Applicants do not discuss the management teams of Comcast's California-focused companies

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[109] Adrienne Jeffries, Comcast Confessions: growing pains of a Goliath (August 11, 2014), *available at* http://www.theverge.com/2014/8/11/5978481/comcast-confessions-there-is-no-one-comcast.
[110] *Id*.
[111] Greenliing Protest at 8.
[112] Applicants' Opening Brief at 44-45.

such as Comcast Phone of California.[113] Comcast states that its new-found commitment to improving its customer service includes the creation of a new position, that of Senior Vice President, Customer Experience, but does not state whether it is creating a similar position within California.[114]

In support of their argument that the proposed transactions will improve the quality of management of the combined company, Applicants list a number of Comcast officers who will not meaningfully commit to improving Internet Essentials or providing LifeLine service, have overseen a company that provides some of the worst customer service in the country, and make constant promises to improve but never follow through. The Commission should reject Applicants' arguments that the proposed transactions will improve the quality of the combined company's management.

E. The Proposed Transactions Will Result in a Combined Company that Maintains Comcast's Woefully Insufficient Commitment to Diversity.

Applicants apparently feel that, for the largest cable provider in the country, Comcast's voluntary compliance with the Commission's GO 156 requirements is a sufficient commitment to diversity.[115] Comcast's minimal efforts are not only disappointing, but are significantly lower than any other reporting telecommunications provider in California. While California telecommunications providers reported spending over 2.6 billion dollars on supplier diversity in 2013, Comcast's share of that amount was 24 million dollars, by far the lowest amount of any

[113] See Order Instituting Investigation into the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers by Comcast, 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 (October 8, 2013).
[114] Applicant's Opening Brief at 39.
[115] *Id*. at 17.

provider.[116] In comparison, Cox, a company with a far smaller California presence, spent 91 million dollars on supplier diversity.[117]

Comcast continues to neglect minority business enterprise (MBE) spending in the African American and Native American categories:

> Comcast slightly improved its overall MBE spending to 8.23% in 2013 and received an F+. Comcast achieved slight increases in all areas, but did not move above 1% in African American and MWBE contract spending. In the Native American and DVBE categories, spending remained at zero.[118]

Applicants conflate Time Warner Cable's failure to participate in the GO 156 supplier diversity program with actual measurements of Time Warner Cable's diversity efforts.[119] Applicants have provided no actual evidence that Comcast's paltry diversity spending is greater than that of Time Warner Cable. Even if Applicants had, the incremental improvement to diversity efforts that could potentially result from the proposed transactions is insufficient to make those transactions be in the public interest.

F. The Proposed Transactions Threaten the Safety of California Customers who Receive Voice and Broadband Services from the Merged Entity.

Comcast customers have reported problems with Comcast service which have posed serious safety risks:

> My 81 year old Mother's phone service has been up and down for over 2 weeks! She lives alone and has health problems. I have spent countless stressful hours trying to get her land line back up. It is against CA PUC regulations for a land line to be down; yet it has been up and down for over 2 weeks. I informed the Comcast General Council, but still no resolution. Plus, they sent her a bill for

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[116] Stephanie Chen and Noemi Gallardo, Supplier Diversity Report Card: Unexpected Achievements and Continuing Gaps at 10 (June 2014), available at http://greenlining.org/wp-content/uploads/2014/06/2014-Supplier-Diversity-Report-Card-printer-friendly.pdf (last accessed December 10, 2014).
[117] *Id*. at 12.
[118] Id.
[119] Applicants' Opening Brief at 17.

> $167--they promised credits to reduce her bill for the problems, but did not issue the credits. She has no real alternative, and they have drastically raised her prices over the years.[120]

If the Commission approves the proposed transactions, current Time Warner Cable customers would likely experience the same service quality issues which Comcast customers have reported time and time again. A customer without phone service is a customer who cannot reach emergency services. Accordingly, the proposed transactions have the potential to seriously threaten consumers' safety.

Additionally, some of the alleged benefits of the proposed transactions could actually pose a serious risk to consumers' safety. For example, Comcast has invested in new network architecture "in which a handful of geo-redundant switches are capable of serving all Comcast residential voice customers."[121] However, the FCC has noted that a failure in part of a centralized, IP-based networks has the potential to create massive traffic outages for 911 service.[122] "For example, in April 2014, a software coding error at a Colorado-based SSP's 911 call routing facility led to a loss of 911 service to a population of more than 11 million in seven states – California, Florida, Minnesota, North Carolina, Pennsylvania, South Carolina, and Washington – for up to six hours."[123] Comcast's "improved" network architecture could, in fact, lead to widespread 911 outages and serious harms to public safety.

Similarly, Applicants claim that the proposed transactions will increase the combined company's deployment of "'Neighborhood Hotspots' (Wi-Fi residential gateways that offer a

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[120] Exhibit A.
[121] Applicants' Opening Brief at 26.
[122] Policy Statement and Notice of Proposed Rulemaking, In the Matters of 911 Governance and Accountability and Improving 911 Reliability at ¶ 20, FCC Docket. No. 14-186 (November 21, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1121/FCC-14-186A1.pdf (last accessed December 10, 2014).
[123] *Id*. at ¶ 21.

supplemental public pathway for other Xfinity users, without affecting the host customer's service and without needing the host's Wi-Fi password).[124] It appears that Comcast activates its Neighborhood Hotspots without notifying its customers, adding an additional 30 to 40 percent more costs to a customer's electricity bill than the modem itself.[125] Additionally, "'the data and information on a Comcast customer's network is at greater risk' because the hotspot network 'allows strangers to connect to the Internet through the same wireless router used by Comcast customers.'"[126] Comcast's expansion of its Neighborhood Hotspots to Time Warner Cable customers places those customers' data, privacy, and safety at risk.

G. Applicant's purported Efficiencies are Neither Merger-specific Nor Verifiable.

When reviewing proposed transaction, the Commission does not consider the purported benefits of that transaction if those purported benefits are "vague, speculative, or otherwise cannot be verified by reasonable means."[127] Broadly speaking, Applicants make four general claims about efficiencies which are unverifiable, not merger-specific, or both. First, Applicants argue that Comcast offers consumers superior products and services to what Time Warner Cable offers, so that Time Warner Cable subscribers would be "upgraded." Second, Applicants argue that Comcast needs to be even larger than it is today in order to gain economies of scale and scope and spread its fixed costs. Third, Applicants argue that the two companies together could offer consumers "the best of both" in terms of products and services. And fourth, Applicants

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[124] Applicants' Opening Brief at 84.
[125] Benny Evangelista, Comcast sued for turning home Wi-Fi routers into public hotspots (December 8, 2014), *available at* http://m.sfgate.com/business/article/Comcast-sued-for-turning-home-Wi-Fi-routers-into-5943750.php (last accessed December 10, 2014).
[126] *Id*.
[127] 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/100819 hmg.pdf.

claim that through the merger they would be able to take additional steps to help bridge the digital divide.

None of these claims holds up under scrutiny. First, the merging companies cherry-pick facts about how Comcast offers superior products and services to Time Warner Cable. Furthermore, it appears that, in significant ways, Time Warner Cable subscribers are likely to be worse off with the merger than without it. Second, Comcast and Time Warner Cable are already so big that any additional economies of scale from the merger are likely to be negligible. Third, the claim that the merger would allow the companies to offer "the best of both" actually underscores the fact that the two companies have incompatible technologies and that the merger would result in substantial integration difficulties. Fourth, in terms of Comcast's other promises to do good things for consumers, underserved communities, or society, these benefits can be provided without the merger and should not be held hostage to it.

1. Applicants Overstate the Benefits to Time Warner Cable Subscribers from an "Upgrade"

Applicants tout the supposed superiority, as compared with Time Warner Cable, of Comcast's broadband speeds, Wi-Fi options, X1 video platform and DVR, large Video On-Demand ("VOD") library, completed transition to "all digital," and focus on network reliability and customer service, among other things.[128] However, Applicants have cherry-picked what aspects of service choose to compare in order to cast Comcast in the better light. If the tables were reversed and Time Warner Cable were seeking to acquire Comcast, Time Warner Cable could make its own claims about its superiority over Comcast.[129] One important Time Warner

[128] Comcast/TWC Public Interest Statement at 28-66.
[129] Note, for example, Time Warner Cable's description of its "TWC Maxx" initiative, announced in early 2014, that would include more reliable and better quality video at higher speeds, many more on-demand

Cable service that is clearly superior to what Comcast offers, and that Time Warner Cable subscribers would likely lose in the merger, is the ability to use Roku as an independent platform to access video programming. Another, as previously addressed by Greenlining, is the fact that Time Warner Cable provides LifeLine service while Comcast does not. Additionally, Comcast has begun to impose caps in its standard plan; Time Warner Cable's standard plan does not.

Second, at least some of Comcast's specific claims involve some sleight-of-hand. For example, Comcast says it "intends to extend its higher speeds and related consumer benefits to the Time Warner Cable systems….[t]he goal would be to bring the Time Warner Cable services up to Comcast levels."[130] As one FCC commentator has pointed out, however, Time Warner Cable was already planning to speed up service in New York and Los Angeles to give its "standard" subscribers a full 50 Mbps download speed.[131] Comcast's promise to move Time Warner Cable subscribers up from 15 Mbps to 25 Mbps is a bit misleading. In fact, the merger would leave Time Warner Cable subscribers worse off in this respect. Similarly, Comcast may technically have more Wi-Fi hot spots than Time Warner Cable, [132] but cable companies

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titles, a super DVR with 1 TB of storage and six different tuners, etc. *See* Time Warner Cable, Press Release, Time Warner Cable to Transform TV and Internet Experience in New York City and Los Angeles (Jan. 30, 2014), http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2014/Time-Warner-Cable-to-Transform-TV-and-Internet-Experience-in-New-York-City-and-Los-Angeles/default.aspx; Dante D'Orazio, *Time Warner Cable Promises Upgraded Internet, TV Service in Response to Rival Takeover Attempt: More Reliable Service, Faster Speeds, and More Will Come to NYC and LA under a New Brand*, The Verge, Jan. 31, 2014, http://www.theverge.com/2014/1/31/5365816/time-warner-cable-maxx-plans-broadband-cable-improvements-in-nyc-la.

[130] Comcast/TWC Public Interest Statement at 34.

[131] Adi Robertson, *Comcast Has Very Bad Reasons for Wanting to Buy Time Warner Cable: Defending the Massive Takeover to the FCC Requires Some Leaps of Logic*, The Verge, April 9, 2014 http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cable-takeover; see also D'Orazio, *supra* note 101; TWC Jan. 30, 2014 Press Release, supra note 101 ("Time Warner Cable customers in New York City and Los Angeles will be the first to benefit from major enhancements that will transform their service as they know it.").

[132] Comcast/TWC Public Interest Statement at 38-41.

(including Comcast and Time Warner Cable) have already pooled their resources to create a joint Wi-Fi network.[133] No merger was required to accomplish this effort.

As noted above, Comcast's current subscribers do not think highly of its products and services. Time Warner Cable subscribers might not think of Comcast's products and services as much of an "upgrade." It is also important to keep in mind that these upgrades often involve installation costs and price hikes for required equipment upgrades needed in order to enjoy the "upgraded" products and services. These costs and price hikes are not always initially obvious to the consumer. For example, one Comcast customer reports:

> Comcast recently terminated their local TV transmissions over QWAM channels. They now require an additional converter box to make my new "digital, cable ready TV" work. Of course, this comes with an additional $3.00 per month rental charge. Plus, I don't get all my channels with this box, I need another, more expensive one, to receive all the channels I pay for on all TVs in the home.[134]

Applicants selectively choose what aspects of Comcast and Time Warner Cable's services to compare, make false claims about planned improvements, and fail to discuss the extra costs that consumers will pay for those improvements. Given Applicants' omissions in these respects, Applicant's claims cannot be verified. Accordingly, the Commission should reject those claims when considering the public interest impact of the proposed transactions.

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[133] Adi Robinson, Comcast has very bad reasons for wanting to buy Time Warner Cable: Defending the massive takeover to the FCC requires some leaps of logic (April 9, 2014), *available at* http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cable-takeover (last accessed Dec. 10, 2014); see also Cable Alliance Creates Nation's Largest WiFi Network (June 10, 2013), *available at* http://corporate.comcast.com/news-information/news-feed/cablewifi-alliance-offers-access-to-more-than-150000-wifi-hotspots-creates-largest-wifi-network-in-the-u-s-2(last accessed Dec. 10, 2014).
[134] Exhibit A.

2. Applicants Overstate the Scale and Scope of the Proposed Transactions' Efficiencies and Do Not Show How They Would Benefit Consumers

In further broadening its scale and scope, Comcast would gain no benefit significant enough to outweigh the harm that would result from its increased market power. Comcast and Time Warner Cable are already both giant companies. Comcast and Time Warner Cable cannot credibly argue on the one hand that they need to get larger and have a broader geographic footprint in order to compete effectively, and then argue on the other hand that much smaller providers are significant competitive alternatives. Under Applicants' logic, Comcast should be allowed to keep buying cable companies and Internet service providers until it controls them all – because with each new acquisition, Comcast would spread its fixed costs over an even larger customer base.

The prospect of possible cost savings never justifies a merger that increases an already dominant company's market power in a market that is already too concentrated.[135] Applicants have not shown any significant cost-saving efficiencies that they need their merger in order to achieve, let alone how any such efficiencies would translate into savings to consumers.[136] Comcast has flatly stated that consumers should not expect prices to decline as a result of the merger.[137]

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[135] Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010), http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("antitrust laws give competition, not internal operational efficiency, primacy in protecting customers").

[136] *Id*. (merging companies must show that "cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market").

[137] Jon Brodkin, 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/ (last accessed December 10, 2014).

Comcast does not need to become an even more dominant nationwide platform to attract equipment manufacturers, app developers, and programmers.[138] And whatever benefit the combined company would gain in being able to take further advantage of so-called "network effects,"[139] by which the attractiveness of a product increases with the number of people using it, would come at the expense of increasing barriers to entry and further entrenching Comcast's dominance.[140] In essence, Comcast desires to become the Great Barrier Reef on which all cable technology will develop. That might be beneficial to Comcast, but it would be bad for consumers. Comcast could maintain and reinforce its market power, and its ability to direct technological development to its own advantage, but at the cost of fewer competing platforms, fewer choices, higher prices, and potentially worse customer service.

3. The Proposed Transactions Would Cause Significant Disruptions and Substantial Diversion of Resources to Integration Efforts.

Applicants claim, unconvincingly, that the proposed transactions would result in the whole being greater than the sum of the parts.[141] But they vastly understate the difficulties and costs involved in moving Time Warner Cable subscribers onto the Comcast platform, and in taking the other steps necessary to integrate the two companies. Any benefits to Time Warner Cable subscribers would likely be slow in coming, while significant disruptions, cost overruns, and diversions of resources would be almost certain. For example, consumers have described the

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[138] Comcast/TWC Public Interest Statement at 25 (internal footnote excluded).

[139] United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999*), aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

[140] Cf. Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 829 (6th Cir. 2011) (affirming the finding of Realcomp's substantial market power from MLS's market share, network effects, and barriers to entry); *Microsoft*, 84 F. Supp. 2d at 20 ("For just as Microsoft's large market share creates incentives for [independent software vendors] to develop applications first and foremost for Windows, the small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows.").

[141] Comcast/TWC Public Interest Statement at 25 ("Each company brings proprietary technology and specialized knowledge about providing its unique mix of products and services.").

experience of being caught in a small Time Warner/Comcast boundary re-alignment, stating that "the transition was a nightmare for several years," and that it took years to work through all the transition problems – including three years to get the horrible exterior installation corrected on her home.[142]

As the Los Angeles Times reported in 2008, major integration problems resulted when Comcast and Time Warner Cable acquired and divided up the assets of Adelphia:

> Time Warner became the dominant cable-TV provider in the Greater Los Angeles area in mid-2006, when it joined with Comcast to buy out bankrupt Adelphia Communications Corp. Then Time Warner swapped franchises with Comcast so each would have dominant markets in different parts of the U.S.
>
> The combination proved costly because Time Warner Cable had to revamp and upgrade Adelphia's and Comcast's old franchises and meld them with its own. Customers swamped call centers with complaints about Internet and e-mail outages, TV channel lineup changes and, especially, the hours they spent on hold to fix things.[143]

A Time Warner spokesperson at the time unequivocally blamed these problems on "integration issues we inherited from Adelphia and Comcast."[144]

Although Comcast and Time Warner Cable acknowledge that "the contractual and operational integration issues are not trivial,"[145] they sidestep the questions of what those issues are, how much they would cost to remedy, and how long it would take. The integration issues related to the proposed transactions would disrupt customers, increase costs, and divert resources from service quality and customer service improvements. Accordingly, the integration would

[142] Exhibit A.
[143] *See* Alana Semuels, "A Murky High-def Picture," L.A. TIMES, May 27, 2008, available at http://www.latimes.com/la-fi-hdtv27-2008may27-story.html#page=1 (last accessed December 10, 2014).
[144] *Id.*
[145] *See* Comcast/TWC Public Interest Statement, Declaration of Michael J. Angelakis ¶ 29, http://apps.fcc.gov/ecfs/document/view?id=7521098031.

not be a benefit, as Applicants claim. The integration would harm consumers and the public interest.

4. The Commission Should Not Allow Applicants to Hold Promises to Communities Dependent Hostage to Approval of the Proposed Transactions.

Applicants have an unfortunate history of only offering benefits to communities when Applicants serve to gain from those offers. For example, Applicants claim that "Comcast developed Internet Essentials to help low-income students and their families" by systematically addressing "the primary barriers to broadband adoption."[146] However, this claim paints an exceedingly rosy view of Comcast's motivations—reports indicated that Comcast launched its *Internet Essentials* program at a time that the program was useful to secure approval of the Comcast-NBCUniversal deal.[147]

Similarly, Comcast did not augment the Internet Essentials program (or announce its intention to do so) until it applied for approval of the proposed transactions in this proceeding.[148] Tying merger approval to a commitment to take socially beneficial actions creates the wrong incentives, and is no substitute for competition. Competition ensures that, in the words of

[146] Applicants' Opening Brief at 50.
[147] *See, e.g.*, Cecilia Kang, "Comcast is trying to improve its image with a program for low-income consumers," Washington Post (May 9, 2014), http://www.washingtonpost.com/business/technology/comcast-is-trying-to-improve-its-image-with-a-program-for-low-income-consumers/2014/05/09/cab489cc-d231-11e3-937f-d3026234b51c_story.html ("Internet Essentials was conceived expressly to win goodwill in Washington. It began three years ago as part of an offering to the FCC as the agency considered another big and controversial merger by Comcast — this one to NBC Universal for $31 billion.").
[148] *See, e.g.*, Lily Hay Newman, Comcast's Internet Program for Low-Income Customers Is Getting a Makeover, SLATE, Aug. 5, 2014, http://www.slate.com/blogs/future_tense/2014/08/05/comcast_is_expanding_its_internet_essentials_program_for_poor_customers.html; Adi Robertson, Comcast Is Promoting its Low-Cost Internet Program by Forgiving Old Debts, THE VERGE, Aug. 4, 2014, http://www.theverge.com/2014/8/4/5967323/comcast-announces-debt-forgiveness-program-for-internet-essentials.Jon Fingas, "Comcast tries to clinch TWC merger by sweetening its low-income internet plan," http://www.engadget.com/2014/08/04/comcast-sweetens-internet-essentials/.

Supreme Court Justice William Douglas, "the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant."[149] The Commission should reject Applicants' attempts to cast themselves as socially responsible companies as a basis for approving their proposed transactions.

III. THE PROPOSED TRANSACTIONS WOULD HARM CALIFORNIA CONSUMERS AND THE PUBLIC INTEREST AND DO NOT MEET THE REQUIREMENTS OF PUBLIC UTILITIES CODE SECTION 854, SUBDIVISONS (A) AND (C).

As discussed above, the proposed transactions will delay the timely and reasonable deployment of broadband to all Californians, and will create particular harms for low-income consumers in California. Additionally, the proposed transactions will not improve quality of service or the combined company's management, will potentially threaten the safety of consumers, and will not advance the Commission's diversity efforts. The public interest harms caused by the proposed transactions far outweigh any public interest benefits. Accordingly, the Commission should deny the proposed transactions pursuant to Public Utilities Code section 854, subdivisions (a) and (c).

IV. THERE ARE NO MITIGATION MEASURES THAT THE COMMISSION COULD IMPOSE THAT WOULD BE SUFFICIENT TO ENSURE THAT THE PROPOSED TRANSACTIONS ARE IN THE PUBLIC INTEREST.

In its Protest, Greenlining suggested that if the Commission did not deny the Application, it should impose mitigation measures sufficient to ensure that the proposed transactions are in the public interest.[150] However, based on Comcast's prior halfhearted compliance with the FCC's

[149] United States v. Vandebrake, 771 F. Supp. 2d 961, 1001 (N.D. Iowa 2011) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)) *aff'd*, 679 F.3d 1030 (8th Cir. 2012).
[150] Greenlining Protest at 24.

conditions in the Comcast-NBCU merger, the Applicant's responses to data requests in the instant case, and Applicants' recent behavior in front of the Commission, Greenlining no longer holds that position.

Given Comcast's tendency to creatively interpret the terms of mitigation measures, it would be difficult for the Commission to describe required or prohibited conduct with sufficient specificity to ensure Comcast's compliance.[151] Similarly, the Commission will experience difficulty in detecting noncompliance and in resolving complaints, because companies who have complaints but must rely on ongoing business relationships with Comcast will be hesitant to come forward.[152] Finally, when Comcast has been subject to mitigation measures that interfere with Comcast's inherent profitmaking incentives, Comcast has flat-out failed to comply.[153]

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[151] For example, the DOJ and the Commission were aware at the time of Comcast-NBCU that Netflix and other over-the-top providers represented the "best hope" for increased competition to cable's dominance. *See, e.g., Comcast-NBCU* Complaint, *supra* note 52, ¶ 9. As a result, they imposed a number of conditions intended to prevent Comcast from engaging in conduct that would interfere with this developing source of competition. The DOJ and FCC orders spelled out multiple restrictions on Comcast's permitted behavior, including not discriminating against program content delivered over its own broadband network – adopting the FCC's "open Internet rules."
The conditions did not anticipate, however, that Comcast might decide not to continue to increase the number of ports into its network to keep pace with the increasing volume of traffic that content providers, and particularly Netflix, were delivering at the request of Comcast customers. The Comcast-NBCU conditions dealt with what happened when information was already *on* Comcast's network, not what happened at the point of contact *with* the network. Comcast assured the FCC and DOJ of net neutrality for its last mile. But Comcast found a loophole: it discriminated *before* the last mile, at the interconnection points. Ultimately, the behavioral conditions did not protect even the largest online video distributor, Netflix.

[152] See Notice of Proposed Rulemaking¶ 172 , In the Matter of Protecting and Promoting the Open Internet, FCC Docket No. 14-61 (May 15, 2014).

[153] Thus, when the condition required Comcast to locate its rival Bloomberg News on a channel in a "news neighborhood" in close proximity to other news stations, the result was that Comcast fought the condition tooth and nail for more than two years.
Here, it seems clear that if Comcast did not own NBCU, its incentive would have been to give maximum exposure to Bloomberg News, to satisfy its subscribers who watch Bloomberg News. But its ownership of NBCU programming, in particular MSNBC and CNBC, fundamentally altered that incentive.
That the behavioral condition did not deter Comcast even when its discrimination against Bloomberg News was so highly visible to regulators suggests how much more difficult it is to require less visible good behavior when the company's incentives run in the other direction.

The proposed transactions would cause such colossal public interest harms that no number of mitigation measures could tip the balance in favor of the public interest. The Commission would have enormous potential difficulty crafting mitigation measures that could hold the combined company accountable. Finally, there is a significant likelihood that Comcast will effectively ignore or seek to circumvent any mitigation measures that it does not care for. For these reasons, Greenlining and Consumers Union are in agreement that it is impossible to create mitigation measures sufficient to ensure that the proposed transactions are in the public interest.

V. THE COMMISSION SHOULD HOLD PUBLIC PARTICIPATION HEARINGS TO DEVELOP A FULL RECORD IN THIS PROCEEDING.

Applicants' Opening Brief includes a large number of letters from public interest groups which support the proposed transaction.[154] The claims in those letters are contradicted by the actual experiences of former and current Comcast customers, included as attachment ___. Additionally, Greenlining and Consumers Union include the comments of 3,933 California consumers who oppose the proposed transactions between Comcast and Time Warner as Attachment B. Accordingly, it appears that there are significant material facts at issue in this proceeding.

Given the extremely short period allotted for evidentiary hearings, and the extremely short time to prepare for those hearings, Greenlining and Consumers Union do not believe that Commission's current proposed evidentiary hearings would provide sufficient evidence for the Commission to make those factual determinations. However, Greenlining and Consumers Union do believe that public participation hearings would provide the Commission with the opportunity

[154] Applicants' Opening Brief, Exhibit N.

to hear from the residential and business customers who would be harmed by the proposed transactions. Accordingly, Greenlining and Consumers Union respectfully request that the Commission hold public participation hearings.

VI. CONCLUSION

Applicants claim that the goal of the proposed transactions is to ensure quality, innovative, next-generation phone and broadband service to consumers in California. Those goals are laudable. However, the proposed transactions will not bring these promised improvements. Rather, the proposed transactions will reduce quality of service, delay the deployment of next-generation services, and widen the Digital Divide between higher-income and lower-income citizens. Even if the proposed transaction brings about all of the benefits Applicants claim, the harms to consumers far outweigh those purported benefits, and would harm the public interest as a result.

The National Broadband Plan notes the central role that broadband plays in the social and economic life of Americans, listing the percentage of broadband users who engaged in certain online activities, including: bought a product (83%), received local or community news (80%), visited a government website (79%), banking (69%), received information or applied for a job (60%), received advice from government about a health or safety issue (54%), took a class online (24%).[155] Electronic mail is increasingly replacing telephone calls as a basic and necessary means of communication. For people who use the Internet, 59% send or read e-mail as part of a typical day.[156]

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[155] *See* National Broadband Plan, p. 16, Exhibit 3-B.
[156] *See* Pew Internet & American Life Project, Internet, Broadband, and Cell Phone Statistics 11, (January 5, 2010) *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_December09_update.pdf>.

Thus, broadband is a resource of incredible importance for survival and advancement in this country. Consumers in California cannot be further left behind. For the above-stated reasons, Greenlining and Consumers Union respectfully request that the Commission deny the Applications.

Respectfully submitted, Dated: December 10, 2014

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