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-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application 14-04-013 (Filed April 11, 2014)
Joint Application of Comcast Corporation, Time Warner Cable Information Services (California), LLC (U6874C) and Charter Fiberlink CA-CCO, LLC (U6878C) for Expedited Approval to Transfer Certain Assets and Customers of Charter Fiberlink CA-CCO, LLC to Time Warner Cable Information Services (California), LLC, Pursuant to Public Utilities Code Section 851.	Application 14-06-012 (Filed June 17, 2014)

COMMENT OF THE WRITERS GUILD OF AMERICA, WEST INC.

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I. INTRODUCTION

The Writers Guild of America, West, Inc. ("WGAW"), submits this comment on the Proposed Decision ("PD") issued by Administrative Law Judge Bemesderfer on February 13, 2015 in the above-referenced proceeding in consideration of the proposed transfers of control between Comcast Corporation and Time Warner Cable Information Services (California), LLC, Bright House Networks Information Services (California), and Charter Fiberlink LLC. WGAW believes that this merger, and the related transactions with Charter, should be denied, as stated in our Opening Brief ("Brief"), and that the proposed approval with Conditions will be insufficient to prevent significant harm to the public interest.

The PD identifies numerous harms resulting from these transactions, including many that WGAW detailed in our Brief, such as higher prices, a loss of benchmark competition and the establishment of a statewide terminating access monopoly that facilitates Comcast's ability to reduce the attractiveness of competing online video distributors ("OVDs"), which in turn could reduce demand for high-speed broadband. In addition to these harms, WGAW identified several other anti-competitive outcomes, including harm to state and local economies as well as upstream content markets, and believes that any conditions, including those promulgated in this proceeding, will be insufficient to overcome these numerous harms. Furthermore, the *Northern California Power Agency v. Public Utilities Commission* ("*NCPA*") precedent cited in this proceeding, allows the Commission to broadly consider anti-competitive outcomes. Given the California Public Utilities Commission's ("CPUC" or "Commission") authority under *NCPA*, the Commission should recognize that Comcast's growth as a distributor enhances its buyer or monopsony power over programmers. Comcast can exercise its monopsony power by negotiating affiliate fees, which are monies paid to networks for carriage on Comcast's systems, at below-market rates, by placing programmers in more expensive, less subscribed cable tiers or by refusing carriage altogether, eliminating access to more than 30% of the market. Comcast's ability to exercise monopsony power threatens upstream content markets and independent programmers in particular. For these reasons as well as those detailed in our Brief, WGAW believes that the merger and related transactions should be rejected.

II. JURISDICTION

The CPUC's review of the merger and related transactions must consider the potential to harm programming and online video competition, both as broadly anti-competitive outcomes as well as ones that may specifically discourage broadband competition and deployment, because demand for content helps drive consumer demand for high-speed broadband. In addition, the CPUC must assess the effect of the transactions on state and local economies, including entertainment industry employment.

The CPUC has jurisdiction to evaluate the negative impact these transactions will have on programming and online video, and to reject the transactions on these grounds. The Proposed Decision cites *NCPA*, which holds that the Commission must consider *any* anti-competitive effects of the merger. This allows the CPUC to broadly assess the impact on both linear and online video. Further, under Section 706(a) of the Telecommunications Act, the Commission has authority to take regulatory action to promote competition in the broadband industry and remove barriers to investment.[1] The PD indicates that the CPUC has the authority to impose a series of detailed Conditions that affect Comcast's service, footprint and policies, and that these Conditions are warranted given the profound and wide-ranging harms produced by the

[1] Proposed Decision of ALJ Bemesderfer in Application 14-04-013 and 14-06-012, February 13, 2015, pp. 17, 18-21. *("Proposed Decision")*

transactions. If the CPUC has the jurisdiction to recognize and try to mitigate such potential harms, the Commission must also have the authority to reject the transactions.

III. TRANSACTIONS WILL GIVE COMCAST A HIGH-SPEED BROADBAND MONOPOLY, THREATENING ONLINE VIDEO COMPETITION

The Proposed Decision acknowledges the effect these transactions will have on online content markets, highlighting the gatekeeper position Comcast will enjoy post-merger, and yet it fails to sufficiently address this outcome. As the PD notes, following the transactions, Comcast will enjoy a monopoly in the local market for high-speed (25 Mbps or higher) broadband, acting as the only provider for 76.6% of Californians.[2] The removal of two providers from the state also results in a loss, to consumers and to the Commission, of benchmark competition, policy competition and the potential for future overbuilding by the most likely candidates.[3]

Comcast's local domination of high-speed broadband will put it in the position of being a content gatekeeper in California with "significantly expanded market power to act anti-competitively if it so chooses."[4] It will have the ability to foreclose competition in the upstream market for online content by increasing the costs and reducing the appeal of that content.[5] Comcast is a vertically-integrated cable and broadband distributor and is a significant owner of content properties including television and film production studios, numerous cable networks, two broadcast networks, as well as several online video platforms. As both an owner and distributor of content, Comcast has the incentive to act anti-competitively towards competing online content providers, to protect its linear distribution systems and to favor its affiliated OVD

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[2] *Proposed Decision*, p. 86.
[3] *Proposed Decision*, pp. 64-65.
[4] *Proposed Decision*, p. 67.
[5] *Ibid.*

properties.[6] As the PD makes clear, harm to the upstream market for online content reduces consumer demand for high-speed broadband, conflicting with the Section 706(a) mandate to promote broadband competition.[7] The "sheer dominance of Comcast's post-merger position," Comcast's enhanced ability to harm competitors and edge providers, and the ancillary effects on high-speed broadband are well documented in the PD.[8]

IV. CONDITIONS ARE INSUFFICIENT AND DO NOT ADDRESS THE HARMS TO CONTENT

As documented in our Brief and this Comment, these transactions will cause significant harm to online content, an outcome explicitly recognized in the PD. The transactions will give Comcast the power to implement practices that raise the cost and lower the quality of broadband and edge services for Californians. The PD notes Comcast's "terminating monopoly" power, which has already been exercised in the context of the Comcast-Netflix dispute, enabling Comcast to demand paid interconnection from a content provider and raising that OVD's costs for providing online video.[9] In addition, Comcast has said that all of its customers will be subject to data caps, or usage-based billing, within five years;[10] these data caps have the capacity to greatly increase the cost of consuming video online from independent sources.[11] These practices not only harm independent content created for initial distribution online—an issue of particular concern to WGAW members—but they also make OVDs less viable as competition to cable television service, effectively reducing consumer choice. Likewise, anti-competitive network

[6] Brief of the Writers Guild of America, West Inc. in Application 14-04-013 and 14-06-012, December 10, 2014, pp. 26-27. *("WGAW Brief")*
[7] *Proposed Decision,* p. 67.
[8] *Proposed Decision,* p. 68.
[9] *Proposed Decision,* p. 67.
[10] *WGAW Brief,* p. 14.
[11] *WGAW Brief,* p. 17.

management practices targeted at video could discourage investment by edge providers, which has been a significant source of jobs in Southern California.

All of these harms to online video could decrease demand for high-speed Internet service, undermining state broadband goals. However, the proposed Conditions are insufficient to remedy this. While noting extensive harms and suggesting some Conditions, the PD ultimately defers to the authority of the Federal Communications Commission ("FCC"), the US Department of Justice and State Attorneys General to protect online content competition.[12] However, because the CPUC has the authority to consider all anti-competitive effects of these transactions, it has an obligation to recognize the harm to online video markets, which support California's economy and state broadband competition and provides competitive choices for consumers.[13]

The Conditions the PD proposes for mitigating the harms to broadband are insufficient. Two Conditions that appear directly intended to address WGAW and others' concerns regarding Comcast's post-merger incentive and ability to harm online video and broadband are Condition 9, which requires that Comcast offer California customers the ability to use independent video programming platforms such as Roku on the same basis Time Warner Cable ("TWC") currently does,[14] and Condition 17, which requires that Comcast continue to offer standalone broadband at speeds, price points and terms comparable to TWC.[15] These are inadequate protections for the relevant harms. While data caps could conceivably be prohibited by Condition 17's requirement to provide standalone broadband at "speeds, prices, and terms" at least comparable to TWC's

[12] "The ability to exercise that increased market share on Internet content may be constrained by some of the conditions of this Decision, and will likely be analyzed in more detail in the proceedings before the Federal Communications Commission (FCC), the U.S. Department of Justice (USDOJ), and State Attorney Generals (State AGs)." *Proposed Decision,* p. 63.
[13] *Proposed Decision,* p. 17, note 18, citing *Northern California Power Agency v. Public Utilities Com.,* 5 Cal. 3d 370, 377 (1971) at 380.
[14] *Proposed Decision,* p. 78.
[15] *Proposed Decision,* pp. 80-81.

current offerings, this is not made explicit. Condition 9 will not protect any future independent video platforms, or any platforms with which TWC does not have a current agreement, and is therefore inadequate to protect or preserve future broadband competition and innovation. Beyond independent video programming platforms and broadband pricing, there are many venues where Comcast can act to disadvantage competing online video, including its own streaming platforms and the interconnection points for its network, neither of which are addressed by the PD's Conditions. Finally, both of these Conditions last for a period of only five years. In year six, Comcast could increase the price of standalone broadband, cease to offer unbundled services, and limit the availability of online video by severing relationships with unaffiliated platforms like Roku.

The proposed Conditions also lack the ability to protect against the breadth of harms that WGAW and others have outlined. For instance, the Conditions do not address the harms to state and local economies that will flow from the harms to online video. Comcast could use its proprietary control of set-top boxes and its X1 streaming video platform to act as a content gatekeeper. With 30% of the video market and 50% of high-speed broadband connections nationwide, a decision by Comcast not to carry OVD streaming applications on the X1 platform or as a preinstall on Comcast's set-top box has the effect of restricting competing applications and the original programming featured on those services. Comcast could further use its control of interconnection to slow competing services or demand higher payments from OVDs for access to its network, both establishing a new revenue stream and striking a blow to the most viable streaming competitors. Any reduction to the attractiveness or increase in the cost of online video products and services could discourage investment in online content. For California, and

Southern California specifically, these practices could impact production jobs and the associated economic output.

WGAW reported on the importance of this economic segment in its Brief, and notes here that the jobs from online video series have helped to drive Hollywood employment to its highest level in a decade, progress which will be threatened if these transactions are approved.[16] Nor do the Conditions address the harm to innovation from reducing three providers to one, or the loss of benchmark competition for consumers and the Commission, which the PD recognizes.[17] As other commenters have noted in this proceeding, TWC took a more innovative approach by allowing its customers to use a third-party device to access TWC's live and on-demand programming, rather than forcing customers to remain dependent on its set-top boxes.[18] Requiring Comcast to replicate TWC's current agreements with independent video programming platforms does not preserve the future innovation that will be foreclosed if the transactions are approved.

Neither do any of the Conditions constrain the increased monopsony power that Comcast will wield, or protect against the related harms to content markets. Comcast and TWC are both buyers of video programming, and are direct horizontal competitors in the national market for video programming. Comcast has established, in its filings at the FCC, that it currently pays less for programming than TWC, and that it expects significant cost savings from the extension of those lower rates across TWC's subscriber base.[19] Post-merger, Comcast's expanded size and

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[16] Richard Verrier, "Digital jobs help drive Hollywood employment to highest level in decade," *LA Times,* February 10, 2015, http://touch.latimes.com/#section/-1/article/p2p-82771575/.
[17] *Proposed Decision,* pp. 64-65.
[18] Reply Brief of The Greenlining Institute and Consumers Union in Application 14-04-013 and 14-06-012, December 10, 2014, p. 13.
[19] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations,* FCC MB Docket No. 14-57, April 8, 2014, Declaration of Michael J. Angelakis ¶ 7.

control of distribution will enable it to further lower rates below competitive levels. Networks will be forced to accept below-market payments for their programming or face the loss of 30% of the market, either of which will leave them with less money to invest in new programming.

In addition, Conditions will not protect the public interest because they are short-term, behavioral remedies that do nothing to alter the underlying power dynamics and singular incentives that the transactions create, and which will remain after the Conditions expire. There is also no guarantee that the Conditions will act as intended given Comcast's well-documented history of non-compliance. Comcast has found ways to sidestep, fight and ignore conditions of its acquisition of NBC Universal in 2011. For instance, Comcast was fined by the FCC for failing to adequately market the standalone broadband offering that was one condition of that transaction.[20] While subject to Open Internet conditions, Comcast has still managed to discriminate against unaffiliated online video traffic in multiple ways. First, it did so by exempting its own video streaming service from data caps when viewed on the Xbox, while unaffiliated video services, such as Netflix, streamed from the same device were counted against the cap.[21] Second, Comcast harmed online competition by using its control of interconnection to cause Netflix traffic requested by its subscribers to be degraded.[22] Another condition stipulated that if Comcast groups any news and/or business channels in a "news neighborhood," it must group all independent news and business news channels in that neighborhood, to prevent Comcast from discriminating against independent networks via tiering and channel placement. However, Comcast failed to place Bloomberg TV, an unaffiliated business news channel in a

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[20] Stacey Higginbotham, "Comcast pays $800,000 to U.S. for hiding stand-alone broadband," *GigaOm,* June 27, 2012, https://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/.

[21] Kyle Orland, "Comcast: Xbox 360 On Demand streams won't count against data caps," *Ars Technica,* March 26, 2012, http://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demand-streams-wont-count-against-data-caps/.

[22] Brief of the Office of Ratepayer Advocates in Application 14-04-013 and 14-06-012, December 10, 2014, pp. 42-47.

news neighborhood, thereby favoring its affiliated business network, CNBC.[23] It took more than two years of fighting before Comcast finally relocated Bloomberg TV.[24] As these examples illustrate, Comcast has the resources to wage protracted legal battles over conditions. Court challenges to the proposed Conditions could very well exceed the 5-year term they are in effect, during which the harm to the public interest would accrue.

The CPUC should not rely on the FCC's revised Net Neutrality rules to address these harms because of the unique dominance and position of Comcast post-merger.[25] As an initial matter, at the time of this writing the full text of the rules have yet to be released. However, it appears that the new regulations will not establish bright-line rules regarding interconnection, a point at which Comcast can exert control over OVDs in order to raise the cost of online video, or data caps, allowing Comcast to raise the cost of unaffiliated online video for consumers.[26] Interconnection fees may result in less money to invest in content or higher prices passed on to consumers. These practices threaten to undermine the creative and competitive potential of online video.

Finally, as Comcast stated in its response to the revised Net Neutrality rules, it is very likely that the FCC's rules have years of legal challenges ahead of them.[27] The merger, if allowed, would be irreversible, and the proposed Conditions in combination with Net Neutrality

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[23] FCC Public Notice DA 11-1077, released June 20, 2011, https://apps.fcc.gov/edocs_public/attachmatch/DA-11-1077A1.pdf.

[24] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses,* FCC MB Docket No. 10-56, Third Annual Report of Compliance with Transaction Conditions (filed February 28, 2014), p. 2.

[25] *Proposed Decision,* p. 68.

[26] Jeff John Roberts, "FCC votes yes on net neutrality in partisan spectacle," *GigaOm,* February 26, 2015, https://gigaom.com/2015/02/26/fcc-votes-for-net-neutrality-in-partisan-spectacle/.

[27] Ben Collins, "Comcast Now Says It Will Not Sue the FCC," *The Daily Beast*, February 26, 2015, http://www.thedailybeast.com/articles/2015/02/26/comcast-we-will-sue-to-slow-the-web.html#.

rules will not be able to protect against all of the harms that Comcast will have the power to enact.

V. CONCLUSION

WGAW continues to respectfully request these transactions be denied. The PD states that evaluation of the transactions should include the anti-competitive effects and the effects on broadband competition and deployment in the state of California. Through this lens, it is clear the tremendous harms California and its citizens will be subject to if the transactions are approved. No conditions can mitigate the impact of giving Comcast, the largest cable and Internet provider and a major content producer and distributor, sole control over 76.6% of Californians in the market for high-speed broadband. No conditions can mitigate the effects of placing the future of Internet innovation for this state in the hands of one company, particularly one with the incentive and ability to hinder the development of a competitive online video market. There are no proposed conditions that can protect programmers, which must rely on Comcast to reach a large share of the market and will be threatened by its enhanced monopsony power if it acquires the 2nd largest cable provider of video and Internet services in the United States and its closest competitor in CA. Even if the Conditions were able to mitigate all of the harms, Comcast has the means to delay compliance until conditions expire. The CPUC also should not rely on the FCC's new Net Neutrality rules which, though a positive development for consumers, will not protect against all of the means Comcast has at its disposal to enact anti-competitive harms on California. The only way to protect the public interest is to deny these transactions.

Respectfully submitted,

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