

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Joint Petition of Time Warner Cable Inc. and
Comcast Corporation For Approval of a
Holding Company Level Transfer of Control.**

Case 14-M-0183

**Statement of Gerald A. Norlander
Executive Director
Public Utility Law Project of New York, Inc.
June 18, 2014**

Thank you for the opportunity to present views regarding the transaction proposed in the Joint Petition of Comcast and Time Warner¹ and its likely impact on consumers in New York.

I will primarily address concerns regarding telephone service and broadband service.

Telephone Service

Time Warner and Comcast both provide telephone service. With approximately 1.2 million customers, Time Warner is “the second largest provider of telephone service in the State.”² Key areas of concern are universal service and subscribership, consumer protection, service quality, and rates.

Universal Service, Subscribership, and Customer Protection. Universal telephone service is a stated goal in the Communications Act of 1934³ and the

¹ The Petition is at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={44BB9731-0264-4ECF-B8FC-9B5E44BDEAFB}>.

² CASE 13-C-0193 - Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements. Order Granting In Part And Denying In Part Requests For Waivers Of Rules, (Issued October 21, 2013), available at

³ Universal service is a mandate of the 1934 Telecommunications Act as amended by the Telecommunications Act of 1996. A central purpose of the law is “to make available, so far as possible, to all the people of the United

more recent Telecommunications Act of 1996. State law has no specific universal service requirement, though it requires all telephone service to be provided upon request without discrimination at just and reasonable rates,⁴ and the Commission has adopted state universal service requirements, and matching Lifeline assistance benefits, by order.

A fundamental measure of universal service is the percentage of households who subscribe to telephone service. As the availability of phone service from Voice over Internet Protocol (VOIP) providers such as Time Warner and Comcast grew, telephone subscribership in New York has declined. In the most recent FCC report, New York stands third from the bottom in the ranking of the 50 states by subscribership, above only Indiana and West Virginia.⁵ While the causes may be multifaceted, unaffordability, collection practices involving service termination, and lack of consumer protection are likely factors. The circumstances point to a need for careful scrutiny of the proposal and its impact on universal service.

The Commission generally has adopted a deregulation approach, allowing cable VOIP providers of telephone service to operate without regulation of prices, terms and conditions of service. This may have allowed practices which contribute to the low household subscribership in New York. This changed somewhat in 2012, when Time Warner, seeking to obtain subsidies for low income Lifeline service, sought recognition of its status as an “Eligible Telecommunications Carrier” (ETC), which was granted.⁶ This means that Time Warner’s service to its home

States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges....” 47 U.S. Code § 151.

⁴ “Every telegraph corporation and every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful.” PSL 91.1. This duty to serve at just and reasonable rates cannot be eliminated by the legislature or the PSC: a utility’s “duty to serve would exist without the statute, for it results from the acceptance of the franchise of a public service corporation.” *Tismer v. New York Edison Co.*, 228 N.Y. 156, 161 (1920).

⁵ Federal-State Joint Board on Universal Service Monitoring Report (2013), Table 3.8, available at <http://fcc.us/1gvC5yG>.

⁶ “TWCIS(NY)’s petition represents the first request to the Commission for ETC designation from an entity providing service using fixed Voice over Internet Protocol (VoIP) technology.” Case 12-C-0510, *Petition of Time Warner Cable Information Services (New York) LLC, for Modification of its Existing Eligible Communications Carrier Designation*, Order issued March 18, 2013, at p. 10, available at <http://bit.ly/15rXCET>.

telephone customers became fully subject to New York state regulation, including the Telephone Fair Practices Act (TFPA), and low income customers became eligible for Lifeline rate assistance.

In contrast, Comcast has not requested ETC status regarding telephone service to its New York customers. As a consequence, they are not eligible for Lifeline assistance, their service may be shut off for nonpayment of TV bills, they may not be able to enter into deferred payment plans to avoid termination when they fall behind, shutoffs may occur on weekends or at night, and they may not have recourse to the Commission's Hotline and complaint adjudication remedies. The Commission should require that Comcast seek ETC status like Time Warner so that its customers may receive Lifeline assistance and customer protections. The Comcast/Time Warner Joint Petition addresses ETC status as follows:

TWCIS also will continue to provide Lifeline services pursuant to its existing ETC designation (*unless and until the Commission approves an application to relinquish the TWCIS Lifeline certificate*).

Joint Petition, 10. (*Emphasis added*). The notion that TWCIS would ask the Commission to reverse the ETC determination should be rejected. Instead, the Commission should insist that Comcast file an application for ETC status and obtain a commitment from TWCIS not to file any application to relinquish its ETC status, and to redouble its efforts to enroll Lifeline customers, with the goal being full enrollment of all eligible customers. The Commission should require reports on Lifeline enrollment, service denials, termination notices, actual service terminations, deferred payment agreements, and other collection activities, as it does regarding electric and gas service, so that it can identify problems and trends affecting affordability and universal service.

Service Quality. In general, the national reputation of Comcast and Time Warner regarding service quality and customer satisfaction leaves much to be desired. Information regarding performance in New York should be scrutinized. In 2013, when TWCIS became an ETC and regulated provider of telecommunications services in New York, the Commission required filing of regular reports regarding service quality and performance in meeting the service quality metrics established by the Commission in its

regulations.⁷ These reports have been filed with the Commission, and responses to staff inquiries regarding service quality performance, have been filed accompanied by requests for trade secret protection, which have not been decided.⁸ As a consequence there is no public record of telephone service quality.⁹

Data regarding the number of TWCIS “core” customers and service quality should be disclosed. The burden should be placed upon TWCIS to go beyond its blanket invocation of trade secrecy as to the totality of its reports, and to redact any claimed particular trade secrets contained in the reports, and to justify the redactions with the necessary showings of actual harm. The reports and Time Warner’s performance on New York telephone service quality should be made public, and steps to correct any deficiencies should be adopted if the Commission should approve the transaction.

Rates. Comcast and Time Warner have made no commitments regarding future rates. There has been no determination by the Commission as to reasonableness of TWCIS(NY) rates for telephone service. There is little reason to believe that pricing of the telephone service is reasonable or competitive. Instead, with the small number of providers and a price cap set for the dominant providers, there is every reason to expect that prices are at best oligopolistic. The Utility Project recently issued a paper questioning reasonableness of Time Warner prices for telephone service in relation to the cost of providing the service. See *It’s All Interconnected, Part XIII* It would be appropriate in this, as in other merger cases, for the Commission to require a filing with rate case quality data so that Time Warner rates and charges for telephone service can be assessed for reasonableness, and to establish a rate plan to protect customers after the merger, who may be charged more to recover costs of acquisition.

⁷ “Because it provides service to approximately 1.2 million customers, thus exceeding the 500,000 access line threshold (16 NYCRR §603.4(c)(2)), TWCIS is required to report on all of these service metrics within 30 days following the end of the report period (16 NYCRR §603.4(b)).”

⁸ “On October 21, 2013, the Commission issued an Order in the above-referenced case (the “October 21 Order”) directing Time Warner Cable Information Services (New York), LLC (“TWCIS(NY)” or the “Company”) to file its service quality data in compliance with the Commission’s Rules and Regulations on a monthly basis. A copy of the service quality reports for January – April of 2014 (“January-April Confidential Reports”) have been confidentially filed with the Records Access Officer today. Along with the Reports, a letter responding to DPS Staff inquiries, which was sent to Mr. John France on May 7, 2014, was also filed confidentially with the Records Access Officer today.” TWCIS(NY) letter requesting trade secret status for service quality report, filed June 12, 2013, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A4DA5870-E5E1-40E8-83B5-A33658BD490D}>.

⁹ The Utility Project has requested release of this information in a pending FOIL request.

In sum, there should be careful scrutiny of the proposal as it affects telephone customers. The petition provides little in the way of assurances that Comcast and Time Warner phone service, after the merger, will be affordable and provided at just and reasonable rates, terms and conditions of service, with service quality in conformance with Commission standards. The Commission should require that Comcast, like Time Warner, seek ETC status and provide Lifeline assistance and consumer protections.

Broadband

The Joint Petition contains several general statements about expansion of broadband. However, absent from the Joint Petition is any indication of the goals and budgets or real plans for such expansion. Nor is there any indication that any incremental expansion or investment will come as a result of the merger. Without concrete goals, plans and budgets, it is possible that after the transaction the combined holding company may allocate insufficient resources to build out facilities needed in New York to accomplish universal service goals.

This is a real risk to New York consumers, because the major competitor for wireline broadband, Verizon, has announced that it is not planning to build out its fiber network beyond communities where it already has obtained cable TV franchises for its FIOS product.¹⁰ As a consequence, Time Warner and Comcast will have little reason to build out their networks, upgrade them, or lower prices, for they will be the only wireline broadband company in many communities -- a *de facto* monopoly without effective regulation unless the Commission imposes requirements on the transaction.

The Joint Proposal offers no protection if they provide slower or inferior service to less preferred customers in rural or economically depressed urban areas, contrary to the public interest. Such results when a monopolist allocates resources are quite predictable:

Left to its own devices, the utility would build a network reaching a lower percentage of the population than [policymakers] would desire. For a fixed geographically averaged price, the utility would stop expanding its network when the private marginal cost of doing so began to exceed the private marginal benefit. [Policymakers] would prefer to

¹⁰ *It's All Interconnected, supra*, at 103-104.

have the network expanded to the point where social marginal cost equals social marginal benefit. Alternatively, the utility would depart from pricing its services at a fixed price, and instead charge higher prices to customers in high cost areas. Thus, the need to impose on the utility an obligation to extend its network is the direct implication of policies of universal service and rate averaging.¹¹

Without strong commitments to ensure good service and continued investment, the transaction should not be approved. Then, the billions of dollars being committed to accomplish the consolidation of existing large companies could be better put to increasing and expanding services. If the transaction were to be approved without real commitments, the existing New York companies might become “cash cows” fueling further mergers and acquisitions, or investment in facilities in other states and countries that will not provide incremental positive benefits to New York and its telecom consumers.

The Joint Petition does reference Time Warner’s recent offering of a broadband-only service for \$14.99, and Comcast’s “Internet Essentials” plan for low income customers. There is no clear commitment in the Joint Proposal, however, to continue to provide or expand these plans after the merger. Also, there is no indication that the plans would not be provided absent the transaction. i.e., they add nothing to any positive benefits demonstrably flowing from the proposed transaction.

The Comcast Internet Essentials program, while a welcome step to make internet service more affordable to low-income households, has several flaws. See Kate Cox, *How Comcast Uses Low-Income Families To Look Good For Regulators*, Consumerist, March 29, 2014:

There are two major obstacles to getting low-income families enrolled in the program, according to outreach workers. The first is the set of eligibility requirements Comcast lays out. To enroll in Internet essentials, families must:

Be located where Comcast offers Internet service

Have at least one child eligible to participate in the National School Lunch Program

Have not subscribed to Comcast Internet service within the last 90 days

Not have an overdue Comcast bill or unreturned equipment

¹¹ J. Gregory Sidak and Daniel Spulber, *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States*, 120 (2003).

Of those four requirements, that 90-day requirement is apparently the biggest stumbling block. Families who were overextending themselves to pay for a full-price Comcast package have to go completely without all service for three full months in order to reduce their costs. 90 days is a full semester of the school year — a long time for a family to cut itself off.

The other barrier is the enrollment process itself: Internet Essentials is separate from Comcast's standard service. It uses a different website and phone number for enrollment and information. Consumers who call Comcast's regular line and try to ask for the cheap internet generally get shunted into some kind of promotional triple-play package. Comcast representatives don't redirect callers to the other phone number.

So the consumers most likely to be able correctly to sign up for Internet Essentials are high-information consumers who have the time and resources to use the internet to research how to get the best choice in internet access. And the target user of Internet Essentials is a lower-information consumer, potentially with education and/or language barriers, who doesn't necessarily have the time and resources, or internet access, to do all the research over best choices.

*Id.*¹² The provision of the low cost “Internet Essentials” service only to new customers, apparently as a promotional rate, and not to existing Comcast customers, obviously raises the issue of rate discrimination. The broadband service is provided over the wire that the cable TV companies install using the public streets and highways, and their powers to enter and install facilities for their business on private land. This use of public land and facilities brings with it a legal duty to provide the service to the public on just and reasonable terms, without discrimination.

The fact that the state and federal statutes have not kept pace with the additional uses to which a wire used for cable TV can be put (e.g., to provide broadband service) does not mean that the utility is free to discriminate against customers or competitors, or to charge unreasonable prices for the service.

An analogous situation occurred a century ago, when the New York statutes authorized electric *lighting* companies. With the advent of refrigeration and motors, Edison, a *lighting* company began to supply electricity for *power*, to selected customers, and argued when challenged that Edison could decide

¹² Available at <http://consumerist.com/2014/03/29/how-comcast-uses-low-income-families-to-look-good-for-regulators/>.

who received the enhanced power service and who would not. The court stated:

In our opinion, however, the company's duty to furnish service does not rest upon the statute alone, but upon the commonlaw obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that if it did not undertake to furnish electricity for power purposes to any one it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its franchise as a public service company. **So professing and undertaking, it cannot arbitrarily pick and choose whom it will serve and whom it will not.**¹³

As stated by the New York Court of Appeals, “a [utility] occupies the streets Even without any statute, it would be under a duty to furnish [service] to the public at fair and reasonable rates.”¹⁴

The Comcast “Internet Essentials” program discriminates in favor of new customers and against similarly situated persons who are current Comcast customers, and, therefore, is contrary to the principle that utility companies which utilize the public streets and public property for their business must treat all members of the public equally and may not discriminate in their prices or services. The Commission should insist that the reduced rate programs for low income customers be modified to encompass all eligible low-income customers, including those currently in other rate plans, that a goal be set to enroll all eligible customers, and a plan be established to accomplish the goal. Also, the Commission should seek rate plan commitments for Time Warner’s lower cost plan to ensure that it endures after the transaction.

¹³ *People of the State of New York ex rel. C. Perceval, a Corporation, Relator, v. The Public Service Commission for the First District and Edward E. McCall and Others, as Commissioners Thereof, and The New York Edison Company, Respondents*, Supreme Court of New York, Appellate Division, First Department, 163 A.D. 705; 148 N.Y.S. 583; 1914 N.Y. App. Div. LEXIS 6955, July 10, 1914 (*Emphasis added*).

¹⁴ *Penn. Gas Co. v. Public Serv. Comm'n*, 225 N.Y. 397, 402 (1919), *aff'd*, 252 U.S. 23 (1920). Similarly, competitors to Comcast and Time Warner cannot be denied access to the wire installed over public land being used for broadband service. See *People ex rel. Western Union Telegraph Co. v Public Service Commission*, 230 N.Y. 95, 129 N.E. 220, 221 (1920) (“A telegraph company ‘represents the public when applying to [another telegraph company] for service and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions’”).

Conclusion

The Joint Proposal lacks specifics to show that significant incremental positive benefits will flow to New York consumers from the proposed transaction. There is no commitment regarding future rates, services, service enhancement, and universal service for telephone and broadband. Rather, in the absence of commitments there is a risk that rates will rise, service quality will be low, and universal service goals for both telephone service and broadband will not be accomplished.

Based on the public record at this point, there is insufficient evidence to support approval of the transaction. The petitioners have claimed trade secrecy as to all their responses to staff interrogatories (which also are not filed in the public record).¹⁵ Thus, the Joint Petition does not reveal sufficient information regarding positive benefits, it is not possible for the public to know what the Commission staff is asking about in their interrogatories, and it is not possible for the public to know what the transaction proponents are supplying as answers to Staff questions. With no accompanying rate case, which could be required, there is no public filing and review of the financial data and capital investment plans and other relevant data.

There is no active party representing consumers or competitors conducting independent discovery in the case, and developing the public record regarding consumer impacts, positive benefits, and impacts on competitors.

¹⁵ As an example of the extreme lack of transparency, the transaction proponents indicate in their Joint Petition that the number of their customers will be provided under seal, even though a recent Commission decision indicates that Time Warner has 1.2 million phone customers.

With no evidentiary hearings, the matter will likely be decided on a record that lacks transparency. The Commission must be very proactive in assuring protection of consumers and in gaining actual positive benefits from the transaction, if it were to be approved.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gerald A. Norlander". The signature is written in a cursive style with some loops and flourishes.

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