

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 14-M-0183 - Joint Petition of Time Warner Cable, Inc. and
Comcast Corporation for Approval of a Holding
Company Level Transfer of Control

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE STAFF

Graham Jesmer
John Favreau
Brian Ossias
Assistant Counsels
New York Department of
Public Service Staff
State of New York
Three Empire State Plaza
Albany, NY 12223-1350

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INTRODUCTION

In a joint petition filed May 15, 2014 (Joint Petition), Time Warner Cable Inc. (Time Warner)¹ and Comcast Corporation (Comcast) (collectively the Petitioners) request approval of a holding company-level transaction that would result in the transfer of control of certain Time Warner subsidiaries from Time Warner to Comcast.² Approval is requested under Public Service Law (PSL) §§99, 100, and 222. As the Petitioners have structured the proposed transaction, Comcast would purchase all of the outstanding common stock of Time Warner. The following are the comments of the New York Department of Public Service Staff (Staff).

To obtain approval of the proposed transaction under the PSL, the Petitioners must show that the transaction is in the public interest, by demonstrating that the relative benefits outweigh the potential risks and detriments and that the transaction produces net positive benefits for New York. Absent the additional commitments and conditions as described in more detail below, the Petitioners cannot satisfy their burden, as

¹ The abbreviated "Time Warner" in this document does not refer to Time Warner, Inc., which is a separate entity not associated with this transaction.

² The subsidiaries are Time Warner Cable Information Services (New York), LLC (TWCIS) and Time Warner Cable Business LLC (TWCB) (the Competitive Carrier Subsidiaries) and Time Warner Cable Northeast LLC and Time Warner Cable New York City LLC (the Cable Franchisee Subsidiaries).

the public interest standard has been applied in Commission decisions regarding utility acquisitions and mergers over the past several years; most recently, as applied in the review of FortisUS, Inc.'s (Fortis) acquisition of Central Hudson Gas & Electric Corporation (Central Hudson).³ Accordingly, Commission approval of the proposed transaction should only be granted subject to the additional commitments and conditions discussed herein.

SUMMARY OF APPLICATION

Under the terms of the Acquisition Agreement, Comcast will acquire 100 percent of Time Warner's equity in exchange for Comcast stock. The result of the proposed transaction is that the company currently operating as Time Warner will become a wholly-owned subsidiary of Comcast. Following the close of the proposed transaction, Comcast would have approximately 30 million subscribers in the United States. In New York, Comcast currently provides cable television, Internet and telephone services to a relatively small number of subscribers consisting of approximately 22,000, in Dutchess, Westchester and Putnam counties, whereas, Time Warner currently provides cable television, Internet and telephone services to approximately 2.5 million subscribers in approximately 1,150 cities, towns, and villages. Time Warner is also a major presence in the four of the five New York City boroughs and each of the major upstate cities. While the Joint Petition does not seek immediate authority for changes to New York customers' rates, terms or

³ Case 12-M-0192, Joint Petition of Fortis Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions, Order Authorizing Acquisition Subject to Conditions (issued June 26, 2013)(Fortis Order).

conditions of service, or for direct assignment of franchises, certificates, assets or customers, after the close of the proposed transaction, the Petitioners assert that if Comcast wishes to make additional changes that require regulatory approval, Comcast will follow applicable New York filing and notice requirements associated with such changes.

The Petitioners state that the proposed transaction will enhance competition and provide current Time Warner customers with additional programming options, faster Internet speeds and deliver other public interest benefits. Among the benefits put forward by the Petitioners are greater availability of broadband Internet service (broadband) and voice services for customer classes not currently served by either Comcast or Time Warner today (e.g., business customers of various sizes), expansion of low-income broadband service offerings, new services for schools and libraries and a commitment to continue to serve rural customers. Additionally, Comcast states that it will extend to New York State the public interest commitments it made to the Federal Communications Commission (FCC) when it acquired NBC-Universal, which include net and content neutrality rules.⁴

Comcast states that its products, including XFINITY high-speed Internet, the X1 and X2 cable television (TV) systems, and XFINITY digital voice services are superior to similar services currently available from Time Warner in New York State and that the public will benefit from these enhanced offerings. Comcast also states that it expects to accelerate

⁴ MB Docket No. 10-56, 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, Memorandum Opinion and Order (issued January 20, 2011)(Comcast/NBCU Order).

the transition of Time Warner's infrastructure to an all-digital system, enabling it to offer these and other related services in areas of New York where digital cable is not currently available. Comcast further submits that consumers will have additional means of accessing programming through a wider selection of On-Demand programming as well as Comcast's TV Everywhere products, which allows customers to access 50 live TV channels through its XFINITY TV Go application for mobile devices. Finally, the Petitioners state that the proposed transaction will not have any negative impact on competition because the two companies do not compete directly with one another today.

Staff's analysis of the relative benefits of the transaction, as well as identified potential detriments and harms that could result from the proposed transaction, are discussed in detail below. In addition, we put forward specific recommendations for mitigation of those detriments and harms, including foreseen and unforeseen risks that may come as a result of the merger.

PROCESS TO DATE

Following the filing of the Joint Petition on May 15, 2014, the Commission issued a Notice Inviting Comments on May 16, 2014. In addition, pursuant to the State Administrative Procedure Act, a Notice of Proposed Rulemaking was published in the State Register on June 4, 2014. The comment periods for both Notices were set to expire on July 21, 2014. On July 17, 2014, Comcast agreed to extend the statutory time period for Commission review. Accordingly, the Commission's May 16 Notice Inviting Comments was extended until August 8, 2014, with replies due August 25, 2014.

The Commission also held three Informational Forums and Public Statement Hearings concerning the Joint Petition and the proposed transaction. Those hearings were held in Buffalo on June 16, 2014, in Albany on June 18, 2014 and in New York City on June 19, 2014. At them, dozens of speakers, including non-profit organizations, good government and business groups and members of the general public provided their input on whether the Commission should approve the proposed transaction. Some of the statements made reflected a need for low-income Internet access, additional competition and consumer choice in the cable market, enhanced customer service and meaningful Internet neutrality conditions.

In addition, to date, the Commission has received over 2,700 electronically filed comments from the public at-large. The vast majority of those comments oppose the proposed transaction asserting that, among other things, the combined company will have too much control over the video and broadband markets, prices will increase, and customer service will decrease.

SCOPE OF REVIEW

The purpose of the Commission's review in a merger proceeding is to determine the impact on the public interest that the proposed transaction will have on consumers. Its review should not be limited to telephone and cable services and should include broadband. While Staff is not recommending that the Commission "regulate" broadband in the traditional sense of the word, it must consider the impacts of broadband that may result from the merger as part of its broader public interest review under the merger and acquisition provisions of the PSL. In looking at telephone and cable markets in New York, it is

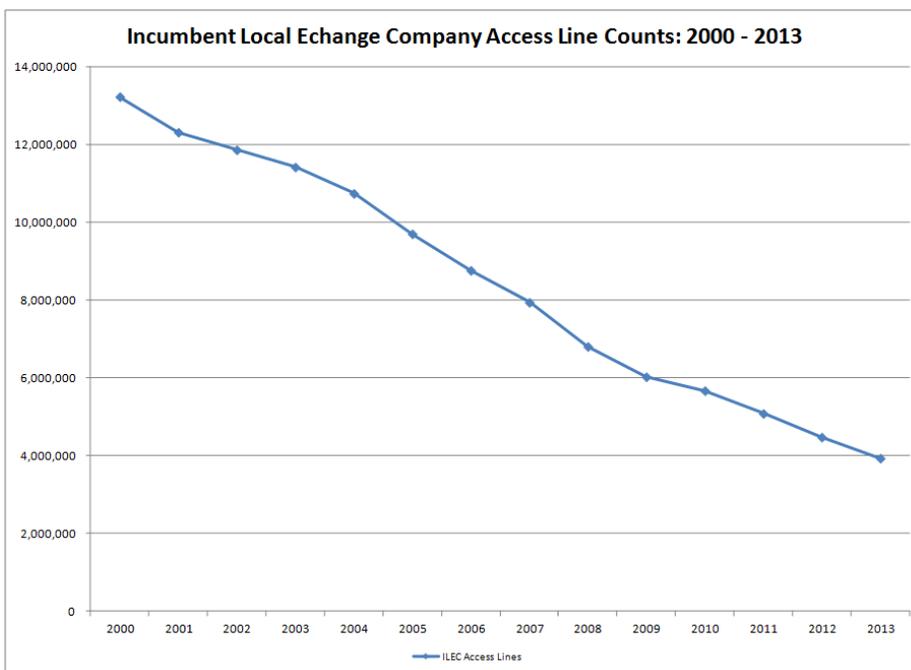
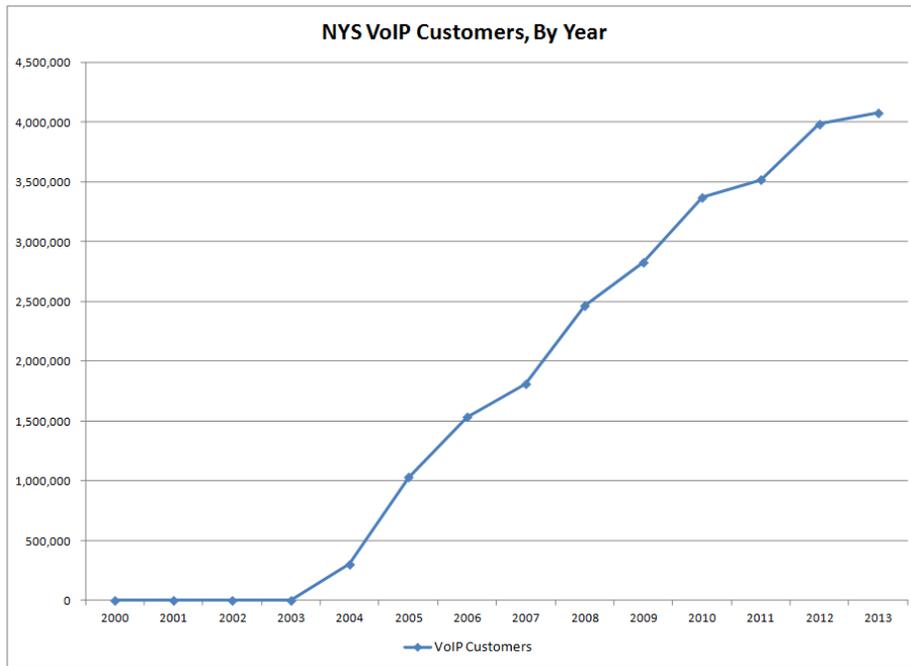
essential to also look at broadband because all of these services fall under the rubric of communications and are interchangeable to an extent.

Application of the public interest standard to include consideration of broadband is reasonable for several reasons. First, not only does broadband rely upon the same network as telephone and cable services, but, more importantly, in many instances, it competes directly with cable and telephone services for market share in New York. For example, the Petitioners' standalone broadband service offerings allow their customers the ability to download and stream content through third-party providers such as Netflix, Hulu, and Apple TV, which compete directly with traditional cable video services. Further, as download speeds increase, offerings like these and many others will only become more robust and competitive.

Additionally, Voice over Internet Protocol (VoIP), the technology behind the Petitioners' voice service offerings relies on the same network as cable and Internet services, and is increasingly replacing traditional landline telephone service in New York. The prevalence of broadband networks provided by landline telephone and cable companies, as well as terrestrial wireless companies, has opened up opportunities for advanced services, such as VoIP phone service, to become widely available to consumers. Over the course of the last decade, more than four million New York residential and business consumers have adopted VoIP phone service. Since 2000, incumbent telephone company access line counts have fallen from more than 13 million, to approximately four million.⁵ Millions of those incumbent local exchange carrier line losses were customers

⁵ Incumbent telephone company access line counts are provided in company Annual Report filings pursuant to 16 NYCRR §641.1.

migrating to VoIP phone service, as were many secondary line migrations from dial-up Internet services, to faster, more advanced cable modem, digital subscriber line (DSL) and optical carrier broadband services now offered by most companies providing broadband service in New York. The following charts illustrate the impact of VoIP on traditional wireline service.



It should also be noted that, under Federal law, the Public Service Commission is obligated to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all ... (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. §1302(a). That statute defines "advanced telecommunications capability" to include "broadband telecommunications capability." 47 U.S.C. §1302(d)(1). Thus, under this clear Federal mandate, the Commission must consider the impact of broadband on the proposed transaction in New York State.⁶

Finally, even the Petitioners rely heavily on the incremental benefits of enhanced broadband offerings in their Joint Petition, touting, among other things, faster download speeds and technological innovations as benefits for New York consumers inherent in the proposed transaction at issue.⁷ Indeed, they implicitly acknowledge that any Commission public interest review of the net positive benefits and potential detriments and harms of the proposed transaction should include an examination of broadband, in addition to telephone and cable services. Therefore, the Commission should not examine the

⁶ The United States Court of Appeals for the District of Columbia Circuit reached the same statutory interpretation. See, Verizon v. Federal Communications Commission, et al., No. 11-1355 (decided January 14, 2014), pp. 18-19.

⁷ Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, Joint Petition, pp. 25-27.

impacts of the proposed transaction on the telephone and cable markets in New York without also considering broadband.

STANDARD OF REVIEW

General

Under PSL §99(2): "[n]o telephone corporation shall transfer or lease its works ... without the written consent of the commission.... Any other transfer or lease between non-affiliates regardless of cost shall be effective without the commission's written consent within ninety days after such corporation notifies the commission that it plans to complete such transfer or lease ... unless the commission, or its designee, determines within such ninety days that the public interest requires the commission's review and written consent." Since Time Warner currently operates under a duly authorized and approved Certificate of Public Convenience and Necessity, Commission approval of the proposed transaction is required.⁸ While a PSL §99 transfer is presumed to be in the public interest, the Commission may determine that the public interest requires

⁸ Case 93-C-0569, Petition of Time Warner AxS Rochester L.P. for a Certificate of Public Convenience and Necessity to provide switched and non-switched telecommunications services on an intraLATA, interLATA, inter and intra-city basis within the State of New York (issued December 31, 1993) and Case 93-C-0899, Petition of Time Warner AxS of New York City, L.P. to Amend the Certificate of Public Convenience and Necessity granted to Manhattan Cable Television, Inc. by Commission Order Issued August 29, 1986 and transferred to Time Warner AxS of New York City by Order Issued August 9, 1993, to include the provision of all forms of telecommunications service on an intraLATA, intracity basis throughout the State of New York, filed in C 27091 (issued August 25, 1994).

further review and written consent and, it has made such a finding in this case.⁹

Under PSL §100(1) and (3): “[n]o telegraph corporation or telephone corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold any part of the capital stock of any telegraph corporation or telephone corporation ... unless authorized so to do by the commission.” Moreover, “[n]o consent shall be given by the commission ... unless it shall have been shown that such acquisition is in the public interest; provided, however, that any such consent shall be deemed to be granted by the commission ninety days after such corporation applies to the commission for its consent, unless the commission, or its designee, determines and informs the applicant in writing within such ninety day period that the public interest requires the commission's review and its written consent.” Thus, the burden of demonstrating that the transaction satisfies the public interest rests with the Petitioners. If Time Warner and Comcast cannot satisfy this burden, the Commission may, in its discretion, conduct a further review of the public harms that may result from the proposed transaction. Again, it has made such a determination here.¹⁰

Similarly, under the newly amended PSL §222(3)(b): “[t]he commission shall not approve the application for a transfer of a franchise, any transfer of control of a franchise or certificate of confirmation, or of facilities constituting a significant part of any cable television system unless the applicant demonstrates that the proposed transferee and the cable television system conform to the standards established in

⁹ See, Letter Dated May 21, 2014 from Chad Hume, Director, Office of Telecommunications to Comcast and Time Warner.

¹⁰ Id.

the regulations promulgated by the commission ... that approval would not be in violation of law, or any regulation or standard promulgated by the commission, and that the transfer is otherwise in the public interest...."¹¹

The new PSL §222 specifically requires that the Petitioners make a demonstration that the proposed transaction is in the public interest. The burden falls to the Petitioners in the first instance to show that the proposed transaction's benefits outweigh its detriments in order to obtain Commission approval. The standard enumerated under PSL §222 is in line with that used in PSL §70 for electric and gas corporation mergers and acquisitions. Under the PSL §70 "public interest" criterion, a petitioner must show that the transaction would provide ratepayers a positive net benefit. In implementing the public interest standard, the Commission's examination of the relative benefits and detriments of the proposed transaction is very broad. For example, the impact of Iberdrola's acquisition of Rochester Gas & Electric Corporation (RG&E) and New York State Electric & Gas Corporation (NYSEG) on the vertical market power of Iberdrola in the wind energy industry was examined at length by the Commission in its analysis and ultimate approval of that transaction.¹²

¹¹ L. 2014, Ch 57 (Part R).

¹² Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009) pp. 63-89 (Iberdrola Order); see also, Digital Paging Systems, Inc. v Public Serv. Commn., 360 N.Y.S.2d 931 (3d Dep't 1974)(where the Commission, in analyzing a request for authorization to purchase more than 10 percent of the voting capital stock, determined that the transaction was not in the public interest because the

In amending PSL §222, we believe that it was the New York State Legislature's intent to align the Commission's review and approval process for PSL §222 proposed transactions with PSL §70 reviews and approvals. The former PSL §222 review required Commission approval if it did not find a violation of the public interest, while the amended statute now requires a demonstration of the public interest by the applicant. This modification, together with the fact that there is no provision for a transaction to go into effect by operation of law, makes the amended PSL §222 consistent with the PSL §70 merger and acquisition standard. Therefore, it makes sense, both as a practical and legal matter, to consider applications for the transfer and acquisition of cable franchises, assets and stock under the same transfer and acquisition analysis used for electric or gas corporations. A review and interpretation of the public interest standard under PSL §70 is paramount to establishing the appropriate public interest standard to be applied here under PSL §222. Such review will define what is meant by the phrase "public interest," as well as identify what is required to satisfy that standard.

Under the Commission's PSL §70 merger and acquisition precedent,¹³ the public interest standard is satisfied if the

proposed purchase would exacerbate conflict between stockholder groups, which would be an obstacle to financing and a drain on time and resources of management of the carrier).

¹³ Case 06-M-0878, National Grid PLC and KeySpan Corp. - Stock Acquisition, Abbreviated Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KEDNY and KEDLI (issued August 23, 2007) and Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KEDNY and KEDLI (issued September 17, 2007) (together KeySpan Orders); Case 07-M-0906, Acquisition of Energy East Corp. By Iberdrola, S.A., Abbreviated Order Authorizing Acquisition (issued

merger or acquisition is found to produce a "net positive benefit" for ratepayers. As stated by the Commission in its Fortis Order: "the clearest articulation [of the] public interest analysis..." under which the Commission approves a merger or acquisition is that it "require[s] Petitioners to make a three-part showing: that the transaction would provide customers positive net benefits, after considering (1) the expected benefits properly attributable to the transaction, offset by (2) any risks or detriments that would remain after applying (3) reasonable mitigation measures."¹⁴ Further, once the Commission has compared the transaction's benefits and detriments: "[it] can assess whether the achievement of net positive benefits requires that the intrinsic benefits be supplemented with monetized benefits..." referred to as positive benefit adjustments (PBAs).¹⁵ Therefore, if the proposed transactions' benefits do not outweigh unmitigated detriments, monetary PBAs can be used to sufficiently "tip the scale" to establish that the transaction provides a net positive benefit for existing customers. If this is accomplished, the transaction should be found to be in the public interest and ultimately approved.

Applying the public interest standard in a manner that ensures consumers obtain a net positive benefit is not unique to New York. In fact the FCC,¹⁶ the public utility commissions of

September 9, 2008); Iberdrola Order, supra; Fortis Order, supra.

¹⁴ Case 12-M-0192, supra, Fortis Order, p. 59.

¹⁵ Id.

¹⁶ See, Comcast/NBCU Order. The FCC stated that its public interest review "entails a thorough examination of the potential harms and benefits of the proposed transaction, including any voluntary commitments made by the Applicants to further the public interest. As part of this process, the Commission may impose remedial conditions to address potential

the States of California,¹⁷ and Oregon,¹⁸ as well as the Commonwealth of Massachusetts,¹⁹ all have a "net positive benefit" standard that is applied to utility mergers.

Application

The Commission should seek net positive benefits in the form of conditions and, if necessary, a PBA here because the Petitioners have made no commitments that the combined company will share the projected synergy savings associated with the proposed transaction with New York customers. Conditional

harms likely to result from the transaction. If, on balance, the benefits associated with the proposed transaction outweigh the remaining harms, the Commission must approve the transfer if it serves the public interest." See also, Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12363 (2008); News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3276 (2008); SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300 (2005).

¹⁷ See, Cal. Pub. Util. Code 854(b) (1996). California has a statutory mandate that a minimum of 50% of the short- and long-term net economic benefits of electric utility merger be shared with its customers.

¹⁸ See, Or. Pub. Util. Comm'n, In re Legal Standard for the Approval of Mergers, 212 Pub. Util. Rep. 4th 449, 455-457 (2001); I/M/O the Application of Enron Corp. For an Order Authorizing the Exercise of Influence Over Portland General Electric Company, 177 PUR 4th 587, 595-596 (June 4, 1997). Oregon has gone so far as to require that 100% of the merger savings flow through to ratepayers in order for a transaction to be considered in the public interest.

¹⁹ See, Joint Petition for Approval of Merger between NSTAR and Northeast Utilities, pursuant to G.L. c. 164, § 96, Interlocutory Order on Standard of Review, D.P.U. 10-170 (March 10, 2011). Massachusetts as recently changed its standard of review of utility mergers to require a showing of net benefits.

approval of the proposed transaction to ensure that synergy savings inure to the benefit of New York customers builds upon the premise that synergy savings benefit customers in a fully competitive market and provides assurance that New York customers will receive a fair share of those promised savings. Such conditions and commitments also serve to lend credibility to Petitioners' claims regarding the benefits of the transaction and are consistent with established Commission precedent in applying the public interest standard to merger and acquisition cases. For this transaction, Staff uses two methodologies to quantify the dollar value of the public interest benefits that should inure to New York customers: 1) an estimate of the amount of synergy savings that would be received by customers in a competitive market, and 2) a PBA estimate based on methodologies used by the Commission in reviewing other proposed mergers and acquisitions.

As part of the proposed transaction, Comcast publically announced that the acquisition and merger of Time Warner and Comcast will produce \$1.5 billion of synergy savings.²⁰ Post acquisition, New York customers would represent approximately 7.642% of the Comcast's total customer base (2,522,000 out of 33,000,000). In a fully competitive market, the vast majority of savings that are replicable by other market participants should inure to the benefit of customers. A conservative presumption of a 50% customer/50% shareholder sharing of these synergies, applied to Comcast's expected New

²⁰ Time Warner Cable to Merge with Comcast Corporation to Create a World-Class Technology and Media Company, <http://corporate.comcast.com/news-information/news-feed/time-warner-cable-to-merge-with-comcast-corporation> (February 13, 2014). Comcast also forecasts \$400 million in capital expenditure efficiencies, which Staff does not seek to condition.

York customer percentage, establishes that New York customers should receive approximately \$57,315,000 (7.642% x \$750 million) in benefits annually from the proposed transaction.²¹ Over the first ten post-acquisition years, New York customer synergy savings should be approximately \$530.0 million assuming that 50% of synergies are achieved in the first year, 75% in the second year, and 100% thereafter (\$57.3 million X 50% + \$57.3 million X 75% + \$57.3 million X 8 = \$530.0 million). Using the current accepted discount rate of 12%, based on the market cost of capital, the net present value of this \$530.0 million would equal a current value of approximately \$303 million.²²

A commitment from the Petitioners to provide at least \$303.5 million of incremental benefits would obviate or greatly lessen the justification for conditions or a PBA to establish a "net positive benefit" in this case. However, without such a commitment, conditions would become necessary to establish a net positive benefit to satisfy the public interest standard.²³

In both the Iberdrola and Fortis proceedings, PBAs were either required by the Commission, or settled upon by the parties and adopted by the Commission, to create a net positive benefit for ratepayers. The methodology used by Staff in those proceedings was relatively straightforward and was based on the "delivery revenues" of each utility.

²¹ It should be noted that in both the Iberdrola and Fortis transactions, 100% of the expected synergies were applied as a customer benefit. But, Staff recognizes here that the telecommunication and cable markets are somewhat competitive and, therefore, we use 50% of the expected synergies as a gauge of dedicated customer benefit in this case.

²² This estimate may be conservative because it does not include savings that Comcast characterizes as capital expenditure synergies and revenue synergies.

²³ Case 07-M-0906, supra, Iberdrola Order, p. 131.

In this proposed transaction there are no stated "delivery revenues" to use as a viable benchmark. However, Commission assessed revenues are common to all industries - electric, gas, telephone and video - and can be used as a reasonable benchmark. Therefore, a fair net positive benefit benchmark would be to compare the recent public interest benefits in both Iberdrola and Fortis to the respective assessable revenues of the companies involved in those transactions. In 2007, NYSEG and RG&E assessable revenues equaled approximately \$2.711 billion and the PBA required was \$275 million.²⁴ The Iberdrola PBA was approximately 10% of the companies' assessable revenues. In 2011, Central Hudson's assessable revenues were approximately \$869 million and the public interest benefit (including minimal synergies) settled upon by the parties and approved by the Commission was close to \$49 million that included a public interest benefit of \$40 million and dedicated synergy savings of \$9.5 million, which equated to 5.6% of Central Hudson's assessable revenues. When Time Warner's assessable cable revenues are added to its assessable telephone revenues, Time Warner's Commission assessed revenues equal approximately \$3.180 billion. Using Iberdrola as a benchmark would require public interest benefits of about \$320 million for this transaction, while the Fortis benchmark would produce public interest benefits of approximately \$180 million.

The difference in the approved public benefit percentages for Iberdrola and Fortis can be attributed to the remaining unmitigated risks of the respective transactions after risk/detriment mitigation was achieved through Commission approved conditions. In Fortis, the Commission found that "any

²⁴ Id., pp. 136-137.

offsetting risks or detriments ... ha[d] been minimized..."²⁵ In essence, after applying risk mitigation terms and conditions and considering the other benefits shared with customers, the transaction risk was minimal for Central Hudson customers and a PBA representing only 4.6% of Central Hudson's assessable revenues, in addition to the \$9.5 million of concrete consumer commitments, was required to create a sufficient net positive benefit. On the other hand, the unmitigated transaction risks for NYSEG and RG&E customers was greater in the Iberdrola transaction and the Commission found that "the only real and significant public benefit to be derived from the transaction is the possibility of providing customers PBAs as a monetized benefit,"²⁶ and, therefore, the much greater PBA percentage of approximately 10% was necessary for Commission approval.

As stated in the Iberdrola Order, the appropriate PBA level determination "requires an exercise of informed judgment rather than a purely mathematical calculation, but there are benchmarks we can apply to avoid basing a decision solely on subjective notions of equity."²⁷ However, the Commission has recognized that every transaction, no matter how conditioned, represents unique factors. Here, we have promised efficiency gains and foreseen and unforeseen risks and detriments. As discussed in further detail below, while assuming that FCC mandated conditions will mitigate potential risks in the area of vertical market power, the unmitigated risks of this transaction are real and potentially substantial, though they may now appear to be unknown in nature. Therefore, in addition to risk minimizing conditions, using the benchmarks described above,

²⁵ Case 12-M-0192, supra, Fortis Order, p. 60.

²⁶ Case 07-M-0906, supra, Iberdrola Order, p. 112.

²⁷ Id., p. 132.

Comcast's claimed synergy savings and Commission assessable revenues for Time Warner and Comcast, Staff recommends an overall net positive benefit of approximately \$300 million for this transaction, in the form of concrete commitments by the combined company, Commission imposed conditions, and, if needed, a PBA. This amount captures the unique benefits that New York presents the combined company in terms of value synergies not captured by or included in the \$1.5 billion of efficiency gains.

PROPOSED BENEFITS

Staff reviewed and analyzed the proposed transaction. Identified herein are the following benefits that we believe would accrue to New York customers, if approved, as compared to no such transfer occurring between the two companies. In each instance, Staff attempts to analyze the relative significance of each benefit.

Capital investment - Comcast suggests that it will increase capital investment in New York beyond that of Time Warner. But, the Petitioners have not made any specific investment commitments in the Joint Petition. Indeed, according to its response to DPS-54, [BEGIN CONFIDENTIAL INFORMATION]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] END CONFIDENTIAL INFORMATION].

Therefore, to consider Comcast's capital investment as an incremental benefit, the combined company must demonstrate a commitment to make new investments or invest beyond Time Warner's current capital investment budgets.

Enhanced video programming - Comcast's XFINITY On-Demand video programming offers approximately 50,000 programming choices and is more extensive than Time Warner's 15,000-20,000 programming choices. Comcast also recently launched (November 2013) the XFINITY TV Store, giving customers the ability to purchase movies and TV shows for downloading and streaming and store them in the Cloud. Time Warner does not currently offer any such electronic sell-through service. Staff views the relative benefits of Comcast's expanded TV offerings with some skepticism, however, because, as discussed in the detriments section below, this expanded programming comes with a potentially higher price tag. However, notwithstanding the foregoing, we concede that this expanded programming does represent an incremental benefit for New York customers.

Accelerated transition to all-digital video network - Approximately 40 percent of Time Warner's New York customers are served by an all-digital system.²⁸ **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

[END CONFIDENTIAL INFORMATION].²⁹ Comcast completed its transition to an all-digital platform in 2012.³⁰ As a collateral benefit of an all-digital network, Staff believes there will be additional bandwidth for network services, including faster Internet speeds. While Comcast indicates that the proposed all-digital transition of Time Warner's footprint will be accelerated, we note that Comcast has not provided any specific scheduling commitments in the Joint Petition. Therefore, any incremental benefit is mitigated by

²⁸ Response to DPS-41

²⁹ Confidential Response to DPS-55

³⁰ Id.

the lack of a definitive all-digital build-out or other capital investment schedule in New York.

Expanded low-income broadband services - Comcast's "Internet Essentials" offers qualified low-income families low-cost broadband service for \$9.95 per month, the option to purchase an Internet ready computer for less than \$150.00, and multiple options to access free digital literacy training in print, online and in person. There are no price increases, no activation fees and no equipment rental fees. Comcast promotes "Internet Essentials" through local community partners and conducts outreach to public schools and libraries in the communities it currently serves. Earlier this year, Comcast announced that this program, which provides 5Mbps download speeds and 1Mbps upload speeds, would be extended indefinitely. Post-transaction, qualified low-income families in the expanded service area will be eligible for "Internet Essentials," thereby, allowing New York children and their families to benefit from this program. Time Warner does not have a similar low-income program in New York.

"Internet Essentials" appears to be a positive program to introduce broadband service and the Internet to households in New York that do not have home Internet service due to affordability. While this is a laudable program, it should be noted that during the Public Statement hearings held in New York City, Albany and Buffalo, there were significant concerns raised regarding the eligibility requirements of this program. Among other things, people stated that the program was too restrictive and encouraged Comcast to avoid enrollment obstacles by having "Internet Essentials" support families with a range of home languages, not just English and Spanish, remove restrictions that preclude families from enrolling who have subscribed to Comcast Internet service within the last 90 days and remove

restrictions for ineligibility based on arrears.³¹ Thus, while there is a benefit associated with having a program in New York like "Internet Essentials," concerns remain regarding eligibility in this program, as well as the general availability of broadband service to low-income customers, which must be taken into consideration when weighing its relative benefit.

Enhanced Wi-Fi Hotspot Deployment - Comcast states that it is on target to complete installation of its eight millionth Wi-Fi hotspot by the end of this year, in part through the deployment of dual-band wireless routers at residential and business locations, creating extensive Wi-Fi coverage areas where none existed before. Time Warner has no such deployment plans in New York. However, again, Comcast provides no specific time-frame for the specific deployment of Wi-Fi hotspots in New York and, therefore, without such commitment it is difficult to acknowledge a quantifiable net benefit.

Enhanced residential voice services - Comcast offers its XFINITY voice customers features such as caller identification provided over television, laptop, or mobile device and readable voicemail. Comcast's new advanced Internet Protocol (IP) Multimedia Subsystem (IMS) network architecture enables customers to access service from different locations

³¹ See e.g., Case 14-M-0183, *supra*, Information Forum/Public Statement Hearing (dated June 19, 2014) Tr. 29-33. We note that Comcast recently announced that it would grant amnesty to customers that have an outstanding bill that is more than more year old but otherwise qualify for the program. See, Comcast Offers up to Six Months of Complimentary Internet Service and Amnesty Program for Low-Income Families in Colorado and across the U.S. (Augst 5, 2014), available at <http://www.marketwatch.com/story/comcast-offers-up-to-six-months-of-complimentary-internet-service-and-amnesty-program-for-low-income-families-in-colorado-and-across-the-us-2014-08-05>.

using a variety of methods and networks, including wired connections provided by Comcast, Wi-Fi connections and public Internet connections provided by third-parties, whether wired or wireless. The IMS network architecture enables "Voice 2go," which allows users to place calls over a Wi-Fi or data connection from their Comcast-assigned telephone numbers using an application downloaded to mobile devices, and also to receive calls to their home numbers at multiple locations and on multiple devices using the "Advanced Call Forwarding" feature. Time Warner does not provide any such services. Staff considers these enhancements to residential voice a benefit of the proposed transaction.

Potential for greater competition in the business market - According to the Petitioners, the proposed transaction will result in a stronger, more cost-efficient competitor that can offer new options and aggressively price services to small, medium, and enterprise businesses across a wider-area of New York. The combined company's larger footprint should allow it to serve New York business customers more effectively, including regional and super-regional business customers with offices in New York and surrounding states. In addition, Comcast currently offers some services to business customers that Time Warner does not, including Comcast's "Business VoiceEdge" (BVE), which provides web-based private branch exchange functionality with a host of nomadic features like "Be Anywhere" that allows customers to make and receive calls from any device at any location with one phone number, and to use four-digit extensions to contact other mobile phones. BVE also includes the "Teleworker" service, which enables seamless integration of remote and work-at-home employees into a company's phone infrastructure. Staff considers this one of the more important benefits of the proposed transaction because competition in the

small and medium voice and data markets has not evolved at the same pace as the residential market and these services should serve to increase such competition.

Miscellaneous assertions - In addition to the foregoing, the Petitioners' claim that the proposed transaction will not result in a reduction in competition. They note, that neither Comcast nor Time Warner directly compete against one another for cable customers anywhere in New York State, thus, they argue that there will not be a decrease in competitive cable options as a result of the transfer of control. The Petitioners also claim that, there will be no disruption in customer services because upon completion of the proposed transaction, Time Warner subsidiaries will become indirect, wholly owned subsidiaries of Comcast. The Petitioners state that they are not seeking authority for the transfer of customers or for any changes in rates, terms or conditions of service and the combined company will also continue to provide Lifeline Discounted Telephone Service (Lifeline) pursuant to Time Warner's existing eligible telecommunications carrier designation.

Staff expects that customers will retain the same digital phone number they had with Time Warner; will have the same billing account; and, the same cable box and other technology will continue to operate. In other words, the transaction should be technologically transparent for consumers. We also acknowledge that, following the proposed transaction, there should be no diminution in the number of service provider options available to consumers in the video market because Comcast and Time Warner do not currently have overlapping service areas in New York. Since the potential for direct competition no longer exists, however, this assertion is in no way a benefit of the proposed transaction. Moreover, regarding

the Petitioners' assertion that there will be no disruption in customer service, we also note that if Comcast wishes to make additional changes following the proposed transaction that require regulatory approval, it has explicitly asserted its rights to follow applicable Commission filing and notice requirements associated with such changes. As a result, there is no guarantee that Comcast will maintain the status quo for any length of time following the proposed merger, and, therefore, no such commensurate benefits accrue to New York consumers.

POTENTIAL DETRIMENTS

Despite the Petitioners' assertions that there will be no negative impacts as a result of the proposed transaction, Staff has identified a number of potential detriments and harms that are likely to result if the merger is approved without any enforceable conditions or commitments. The detriments identified by Staff are listed below.

Customer service - Both Comcast and Time Warner have poor customer service satisfaction as measured by survey results. For example, according to a May 2014 report from the American Customer Satisfaction Index (ACSI), Time Warner and Comcast were the lowest and the next to lowest rated cable television companies, respectively.³² Similarly, among Internet Service Providers (ISPs), customers rated Comcast and Time Warner as the companies with the lowest customer satisfaction in the industry.³³ According to ACSI, customers rated Comcast and

³² See, ACSI, Telecommunications and Information Report 2014, p. 2, available at <http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2014/acsi-telecommunications-and-information-report-2014>.

³³ Id., p. 4.

Time Warner even lower for Internet service than for cable television service.³⁴ This is also true with respect to the telephone service sector.³⁵

J.D. Power and Associates (J.D. Power) also conducts periodic surveys of customer satisfaction in various industries, measured separately in different areas of the country. J.D. Power's surveys of customer satisfaction are one of, if not, the most widely known and publicized measures of customer satisfaction. Its 2013 survey of residential customers showed that in the East Region,³⁶ for ISPs, of seven large providers, Comcast's XFINITY product and Time Warner were rated fifth and sixth, respectively; of seven large residential telephone service providers, Comcast and Time Warner rated fifth and seventh, respectively; and, of eight large residential television service providers, Comcast and Time Warner rated seventh and eighth, respectively.

Finally, the PSC Complaint Rate, a metric used by the Commission to independently measure service quality, apart from service quality performance reported by the carriers under the Commission's Service Standards, demonstrates that Comcast's telephone and video service complaint rates have historically been higher than those of Time Warner over the last three years. Consumer complaint data collected by the Department's Office of Consumer Services indicates that, on an annualized basis from 2011 through 2013, Comcast exceeded the PSC Complaint Rate threshold of 0.075 complaints per 1,000 access lines or less per

³⁴ Id.

³⁵ Id., p. 6.

³⁶ The East Region as defined by J.D. Power includes Maine, New Hampshire, Vermont, New York, Pennsylvania, New Jersey, Massachusetts, Rhode Island, Connecticut, Maryland, West Virginia and Virginia.

month for video service, and exceeded the PSC Complaint Rate threshold in 2011 for phone service. Comcast's PSC Complaint Rate for 2012 and 2013 were below the 0.075 threshold. However Comcast's PSC Complaint Rate was still substantially worse than that of Time Warner for the previous three years, if evaluated using the methodology prescribed in Case 97-C-0139, regarding Carrier-to-Carrier Service Quality Guidelines.³⁷

The Office of Consumer Services' complaint data does indicate that for the first six months of 2014, Comcast's PSC Complaint Rate has improved, and is now very close to the level of Time Warner's. However, given Comcast's past inconsistent track record as it relates to the PSC Complaint Rate for video and phone service quality, we are concerned about backsliding and maintaining service quality going forward, and it is imperative that Comcast's recently improved PSC Complaint Rate is at least consistent with the levels demonstrated by Time Warner for the combined company following the proposed transaction. Backsliding from established Time Warner PSC Complaint Rate levels described above would be contrary to the public interest and result in a negative effect on subscribers to video and phone services post-acquisition.

Comcast's video service pricing may result in slightly higher rates for consumers - According to the Petitioners' response to DPS-11, cable TV rate card information contained in Exhibit 11-1 and Exhibit 11-2, and from publically available information obtained from Comcast and Time Warner's websites for a sample of zip codes in New York State, Comcast's average cable

³⁷ See, Case 97-C-0139, Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies, Order Establishing Additional Inter-Carrier Service Quality Guidelines and Granting in Part Petitions for Reconsideration and Clarification (issued February 16, 2000).

rates are slightly higher than those of Time Warner for comparable services, across most package levels, as illustrated in the table below.

<u>Comparison of Cable Rates Between Time Warner Cable and Comcast</u>			
	<i>Retail Rate</i>	<i>Promo Rate</i>	<i>Average Rate</i>
Time Warner "Starter" (Basic) Cable ³⁸ <i>Local and PEG Channels, Religious, Shopping (~20 Channels)</i>	~\$8-23/mo	N/A	~\$8-23/mo
Comcast Basic Cable <i>Local and PEG Channels, Religious, Shopping (Channels Vary)</i>	~\$17-20/mo	N/A	~\$17-20/mo
Comcast Digital Economy <i>Up to 50 Channels, 40+ Music Channels</i>	\$39.95/mo	\$29.95/mo	\$34.95/mo
Time Warner Standard TV <i>70+ Channels</i>	\$76.99/mo	\$39.95/mo	\$58.45/mo
Comcast Digital Starter <i>80+ Channels, On Demand, 40+ Music Channels</i>	\$69.95/mo	\$49.99/mo	\$59.97/mo
Time Warner Cable Preferred TV <i>200+ Channels</i>	\$86.99/mo	\$49.99/mo	\$68.49/mo
Comcast Digital Preferred <i>160+ Channels, On Demand, 40+ Music Channels</i>	\$87.90/mo	\$59.99/mo	\$73.95/mo
Comcast Digital Premier <i>Premium Channels, Sports Packages, with Digital Preferred TV</i>	\$127.40/mo	\$69.99/mo	\$98.70/mo

We note that Comcast's cable pricing is uniform across its various service territories, and while the Petitioners have stated that they do not intend to raise cable rates at this time, there remains a possibility that Comcast will institute these uniform prices in the future. Were Comcast to institute its current uniform pricing throughout Time Warner's footprint following the proposed transaction, these increases would have an impact on New York consumers, who would be forced to pay slightly more for certain cable television services, while

³⁸ Time Warner's "Starter" Package and Comcast's Basic Package vary in price and channel lineup depending on the franchise area being served and the number of local channels carried in a given geographic area. The range of prices listed for these services attempt to present the entire range of costs across New York State.

receiving only the limited benefits associated with some additional programming choices.

Universal broadband affordability - The merger could negatively impact consumer choice in the broadband and emerging on-line video markets and drive up prices. Time Warner currently offers a standalone broadband offering under its "Everyday Low Price" banner. This service is available to all customers regardless of income or other eligibility criteria. This Time Warner offering is \$14.99/month for speeds of up to 2Mbps, has been available since November 2013 and replaced a previously generally available low-price option.³⁹ In addition, Time Warner offers a "Basic" \$47.99/3Mbps option as well as a "Standard" \$57.99/15Mbps option.⁴⁰ In contrast, Comcast's least expensive generally available offering for standalone Internet service is its "Economy Plus Service" offered at \$39.95 per month for speeds of up to 3Mbps. Comcast's "Performance" service is \$54.99/month for speeds up to 25Mbps.⁴¹ The following table illustrates a price comparison of Time Warner and Comcast's respective offerings, for the first 24 months of

³⁹ Times Union, *Time Warner launches low-cost Internet: \$14.99 a month* (November 7, 2013), available at <http://blog.timesunion.com/business/time-warner-launches-low-cost-internet-14-99-a-month/57799/>.

⁴⁰ Time Warner Internet Services (last visited August 7, 2014), available at <http://www.timewarnercable.com/en/internet/internet-service-plans.html>. The rates listed by Staff are the retail rates for the respective service offerings, the promotional rates for the first 12 months for these two services are \$29.99 and \$34.99 per month, respectively. The retail rates apply following that period.

⁴¹ Comcast High Speed Internet Services (last visited August 7, 2014), available at <http://www.comcast.com/internet-service.html>.

service, based on publically available rate lists for New York State customers of both companies as of August, 2014.

<u>Comparison of Internet Rates Between Time Warner Cable and Comcast</u>			
	<i>Retail Rate</i>	<i>Promo Rate</i>	<i>Average Rate</i>
Time Warner "Everyday Low Price" <i>2Mbps Download/1Mbps Upload</i>	\$14.99/mo	N/A	\$14.99/mo
Time Warner "Basic" <i>3Mbps Download/1Mbps Upload</i>	\$47.99/mo	\$29.99/mo	\$38.99/mo
Comcast "Economy Plus" <i>3Mbps Download</i>	\$39.95/mo	N/A	\$39.95/mo
Comcast Performance Starter <i>6Mbps Download</i>	\$49.95/mo	N/A	\$49.95/mo
Time Warner "Standard" <i>15Mbps Download/1Mbps Upload</i>	\$57.99/mo	\$34.99/mo	\$46.49/mo
Time Warner "Turbo" <i>20Mbps Download/2Mbps Upload</i>	\$67.99/mo	\$44.99/mo	\$56.49/mo
Comcast "Performance" <i>25Mbps Download</i>	\$66.95/mo	\$39.99/mo	\$53.47/mo
Time Warner "Extreme" <i>30Mbps Download/5Mbps Upload</i>	\$77.99/mo	\$54.99/mo	\$66.49/mo
Time Warner "Ultimate" <i>50Mbps Download/5Mbps Upload</i>	\$107.99/mo	\$64.99/mo	\$86.49/mo
Comcast "Blast" ⁴² <i>105Mbps Download</i>	\$76.95/mo	\$59.99/mo	\$68.47/mo
Comcast "Extreme 150" <i>150Mbps Download</i>	\$114.95/mo	\$89.99/mo	\$102.47/mo

Importantly, Time Warner's lower priced offerings, especially the "Everyday Low Price" product, represent choices for New York consumers. Any loss of these services would likely result in consumers paying more to ensure they have access to the same level of high-speed Internet service and its important resources. Customers using Time Warner's "Standard" 15Mbps offering to utilize the Internet as their alternative video content provider, for example, would also be forced to pay broadband prices commensurate with Comcast's current video offerings to continue to exercise that option.

Staff has additional concerns. As a condition of its acquisition of NBC/Universal, Comcast was required to offer "Performance Starter," a \$49.99/6Mbps broadband offering.

⁴² This service has recently been upgraded to 105Mbps and varies in retail price depending on the service territory.

However, based on Comcast's history of failing to adequately market this "Performance Starter" standalone broadband offering,⁴³ we are skeptical that Comcast will offer or aggressively market the important Time Warner standalone broadband offerings discussed above. And, as indicated, Comcast's "Internet Essentials" program is not a viable substitute for these Time Warner services because it requires that consumers meet certain eligibility criteria. "Internet Essentials" is a needs-based program available to households that have a child eligible for the national school lunch program, do not have any overdue bills or unreturned equipment, and have not subscribed to a Comcast Internet service within the last 90 days. The loss of these Internet service options is, therefore, a detriment.

Jobs and focus in New York State - The potential for loss of jobs in New York is material following the proposed transaction. The combined Time Warner/Comcast will inevitably have less of a focus on New York in terms of both jobs and the level of customer service provided to the New York market because the state will represent a smaller portion of the combined company's customer base post-merger. According to the Petitioners response to DPS-17, Comcast currently has one cable operations center with a single employee in New York. It has no

⁴³ Federal Communications Commission, *FCC Resolves Comcast-NBCU Investigation* (June 27, 2012), available at <https://www.fcc.gov/document/fcc-resolves-comcast-nbcu-investigation>; and *Comcast Consent Decree - Stand Alone Broadband* (June 27, 2012), available at <http://www.fcc.gov/document/comcast-consent-decree-stand-alone-broadband>. Comcast did not have a link to "Performance Starter" on its website, did not include "Performance Starter" on its rate cards, and paid an \$800,000 penalty to the U.S. Treasury for this apparent failure to comply with its commitments to the FCC.

call centers, no service centers and no walk-in centers in New York. In contrast Time Warner has five call centers employing approximately 1,996 staff, 61 retail/walk-in centers employing approximately 2,674 staff, nine corporate offices employing approximately 1,257 staff, 26 service/maintenance locations employing approximately 1,687 staff, two media offices employing approximately 435 staff, and 11 other service related functions employing about 1,003 staff, with total employment in the state of approximately 9,052. Time Warner is a company with its headquarters in New York and a New York centric focus. Comcast, on the other hand, is headquartered in Philadelphia and has a much wider national footprint. For example, New York currently represents about 19.3% of Time Warner's overall customer base.⁴⁴ New York would represent 7.642% of the combined entity's customer base following the proposed transaction.

Hence, there is a real danger that Comcast will look to gain operational efficiencies by moving/consolidating customer-facing jobs and other positions to out-of-state locations. Out-of-state service centers would make it difficult for the combined company to maintain its current level of customer service. Longer wait times and lack of local knowledge could lead to increased frustration and dissatisfaction on the part of New York customers, and a significant decline in the overall level of service provided. The use of larger regional call centers might result in efficiencies that could benefit the combined company financially, but would be unlikely to benefit its customer in terms of improved service quality. These facilities employ staff conducting a variety of important services for customers throughout the state, services that are best provided at the local level rather than from out-of-state

⁴⁴ Case 14-M-0183, supra, Joint Petition, p. 5.

facilities. Comcast has made no commitment regarding the number of jobs it will create or retain in New York following the proposed transaction. Although the response to DPS-17 indicates that the merger will not result in a reduction of customer-facing jobs in New York, as indicated, it might be possible to gain operational efficiencies by moving/consolidating customer-facing jobs to out-of-state locations.

Infrastructure expansion investment - The combined companies estimate \$1.5 billion in operating efficiencies and \$400 million in capital expenditure efficiencies, with additional opportunities for revenue synergies, as a result of the proposed merger.⁴⁵ Operational efficiencies typically encompass the types of scale, scope, and coordination of economies that can potentially be realized through horizontal and vertical integration. Comcast expects to realize operating efficiencies, in full, within three years, with more than 50% achieved in the first year.⁴⁶ **[BEGIN CONFIDENTIAL INFORMATION]**

[END CONFIDENTIAL INFORMATION].⁴⁷ The Petitioners, however, have not provided a reasonable identification of these operational savings and revenue synergies associated with the proposed merger. Nor, according to its response to DPS-53, **[BEGIN CONFIDENTIAL INFORMATION]**

⁴⁵ See, Investor Presentation - Comcast and Time Warner Cable (February 13, 2014), <http://files.shareholder.com/downloads/CMCSA/2671320491x0x725713/781d73e7-0635-47b4-b25e-34e5c7ea4ff9/Comcast%20Investor%20Presentation.pdf> p. 12.

⁴⁶ Id.

⁴⁷ Confidential Response to DPS-53.

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CONFIDENTIAL INFORMATION].

Rather, the Petitioners' claim that the proposed transaction will nevertheless translate into consumer benefits. New York consumers can benefit from merger synergies and savings either via lower prices or investment of those savings and synergies back into the networks used by New York consumers. Without firm commitments, however, there is the potential that operational savings associated with distribution improvements to Time Warner's New York systems might be allocated to the benefit of other states or to shareholders, but not New York consumers.

Market power - Petitioners describe the proposed transaction primarily as a merger of two firms that do not compete in each other's service territories. Thus, the Petitioners argue that "the transaction will have no negative impact on competition."⁴⁸ However, the Petitioners' horizontal view of competition is too narrow. While it is true that Comcast and Time Warner do not compete directly against one another, they do compete with other providers of telephone, television and broadband services, whose competitive position may be undermined as a result of the merger. The combined company would be able to exercise its increased capital and financial resources to discourage new entries into these markets, stifling technological innovation and further competition, while keeping prices artificially high.

Additionally, given Comcast's prior acquisition of NBC-Universal, the vertical market power concerns associated with the interplay of Comcast's significant position in the upstream video programming market, with its activities as the largest cable TV provider in the downstream video distribution

⁴⁸ Case 14-M-0183, supra, Joint Petition, p. 20.

market, would now be magnified as the Comcast video distribution footprint is expanded to include the Time Warner service areas. And, to the extent that there have been shortcomings with the adequacy and enforceability of the behavioral remedies put in place by the FCC and Department of Justice (DOJ) to address these vertical market power concerns, those shortcomings will be magnified by Comcast's acquisition of Time Warner.⁴⁹ As explained by the DOJ in its Competitive Impact Statement in U.S. v. Comcast/NBCU, Comcast has both the incentive and experience to engage in exclusionary practices which may harm competitive providers of video programming and competitive video distributors.⁵⁰ The incentives and success of exclusionary practices are heightened with respect to new and innovative market entrants.⁵¹

The combined company will be a more powerful buyer of programming and other upstream wholesale services. On the one

⁴⁹ The Comcast/NBCU behavioral remedies instituted by the DOJ and FCC include, among others, a requirement for non-discriminatory licensing of content to rival on-line distributors, a must carry news requirement which also specified that news channels to be clustered together, a prohibition against discrimination in program carriage on the basis of affiliation, a net neutrality clause prohibiting Comcast from unreasonable discrimination in the transmission of content over its network a requirement to provide and market its \$49.95 standalone internet broadband service for a fixed period of time. A number of these remedies, however, have proven to be ineffective. *See*, American Antitrust Institute, *Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked*, pp. 18-19, available at <http://www.antitrustinstitute.org/content/antitrust-experts-urge-enforcers-block-comcast-time-warner-cable-merger>.

⁵⁰ *See*, Competitive Impact Statement, p. 25, U.S. v. Comcast Corp. (D.C. Circuit 2011) (1:11-cv-00106), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

⁵¹ Id., p. 21.

hand, this should reflect an opportunity to pass savings associated with negotiating more favorable deals with suppliers on to consumers. On the other hand, this added buying power and control over a larger footprint increases the incentive for the combined company to engage in exclusionary practices that increase its market power over retail customers and result in less of an incentive to pass along savings to consumers. The increased size of the new combined company will only serve to exacerbate the potential detriments discussed herein.

While Staff recognizes that vertical market power is a potential detriment, our recommendations below do not attempt to fully mitigate or alleviate this particular concern.⁵² Normally, we would conduct a thorough anti-trust review of utility mergers affecting New York State. Here, however, the 120-day timeline mandated by 47 U.S.C. §537, does not allow for such a thorough review. Staff will, therefore, defer to the appropriate Federal agencies undertaking such review. As outlined by the DOJ in its Competitive Impact Statement, the DOJ and the FCC have expertise in this area and expend a great deal of resources in collecting and reviewing tens of thousands of documents, interviewing numerous companies impacted by the proposed transaction, consulting with industry experts, and performing independent analyses associated with identifying the anti-competitive impacts of this type of merger and in fashioning appropriate remedies. Moreover, the time afforded to these federal agencies is more consistent with such an in depth review. Accordingly, since their review will not be complete until after the Commission acts on the proposed transaction, Commission approval

⁵² We note, however, that our recommended conditions to retain and enhance Time Warner's more attractive standalone broadband offering would help to mitigate this concern.

of the proposed transaction will be subject to DOJ and/or FCC determinations that the merger serves the public interest.

ANALYSIS AND RECOMMENDATIONS

Based on a review of the relative benefits and detriments above, Staff has determined that there is no net positive benefit as a result of the proposed merger absent specific additional commitments and conditions. We also find that certain detriments can be mitigated with conditions and that if the benefits promised can be turned into concrete commitments by the combined company, the Commission should find sufficient net positive benefits to approve the proposed transaction. Accordingly, we recommend that the following commitments and conditions be considered as part of any Commission approval of the proposed transaction in addition to any necessary PBA discussed herein. Staff identifies broad areas of commitments that we believe provide valuable public interest benefits. We also endeavor to propose a means by which these commitments can be translated into concrete actions, but we recognize that alternative means may also be possible.

Customer service - The poor customer satisfaction performance of both Comcast and Time Warner is a serious concern. This concern is heightened by the fact that the combined company may have less focus on New York and may become distracted during the transition that will inevitably follow the close of the merger. As a condition of the Commission's approval of the proposed transaction, the combined company should be required to achieve improvements in service performance. Specifically, Staff recommends that the combined company should be required to achieve improvements in service performance as measured by J.D. Power. J.D. Power conducts

surveys that are among the most widely used and publicized measures of such satisfaction. However, we are only recommending improvements in the J.D. Power survey measure of customer satisfaction for New York customers for Internet and residential television services, but not telephone.⁵³

Specifically, by the end of 2016, and then maintained through at least the fifth year after the merger's closing, those measures of customer satisfaction for the combined company's New York operations should be at least at the most current average of the residential customer satisfaction scores achieved for all entities in the Internet and residential television industry segments for the East Region.⁵⁴ While the

⁵³ The Commission has determined that sufficient competitive alternatives exist in much of New York's residential telephone market, obviating the need for a customer service improvement requirement. See e.g., Case 05-C-01616, Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006). Regarding the small business telephone segment, Staff recommends refraining from imposing service quality commitments at this time in order to promote further competition. Whereas Comcast and Time Warner are relatively new entrants into the telephone market, they are incumbents in the video market. While this market is somewhat competitive in certain areas, Staff notes that Comcast and Time Warner ranked lowest and second lowest in the cable and broadband customer satisfaction. In order to keep the Petitioners focused on improving their customer service post-merger, we recommend the conditions detailed above.

⁵⁴ This will require Comcast to work with J.D. Power to extract and analyze New York specific survey results. On a 1,000 point scale, the 2013 East Region average is 686 for Internet and 696 for Residential Television, meaning the combined company will need to achieve an improvement from Time Warner of 38 points for Internet and 47 points for Residential Television.

Commission has previously required the development and implementation of customer satisfaction surveys designed to augment service quality improvements in the telephone section as part of its performance incentive plans,⁵⁵ here, absent the development of such a survey, the Commission should require improvements in the JD Power rankings for the combined company, which are readily available and will require less upfront cost and development time to achieve than a new survey. Achievement of these goals will also keep Comcast focused on improving customer service, offset any potential customer service detriment as a result of the proposed merger, and help produce concrete benefits for New York customers.

Staff recognizes that these improvements will require investment on the part of the combined company in technology and training. Additionally, Staff recognizes that competitive pressures will require the combined company to invest in raising its customer satisfaction rates, regardless of any Commission imposed condition to do so. Notwithstanding this, the combined company should also be subject to consequences should it not achieve its recommended level of service quality performance.

Therefore, based upon the fact that there will be a cost to achieve these improvements in the J.D. Power metrics, which cost will in part be driven by this condition, for each measure (video and broadband) for which these service quality targets are not met annually the combined company should be required to pay \$5 million into a public benefit program as determined and directed by the Commission if it fails. Should the combined company fail to achieve these improvements for two

⁵⁵ See, Case 92-C-0665, Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Performance Regulation Plan for New York Telephone Company (issued September 26, 1994).

consecutive years, the payment should double to \$10 million per metric until the target is satisfied. This incentive is designed to ensure that Comcast remains focused on improvements in New York and dedicates resources to that goal. Staff assigns an overall consumer value of \$50 million to this condition.

Finally, following the merger, the Commission should require that Comcast's PSC Complaint Rates for telephone and cable services be maintained in order to ensure that they are as good, or better, than those currently achieved by Time Warner. Therefore, the combined company should be required to submit a plan within 60 days of the issuance of an order in this case demonstrating how it will maintain its PSC Complaint Rates going forward, especially in light of the expected infrastructure build-outs and possible service interruptions that will follow.

Jobs and focus in New York State - In order to maintain service quality and avoid undue negative economic consequences for New York, the proposed merger should be accompanied by a commitment that, for non-headquartered staff, employment in New York should not decline disproportionately to the State's portion of the combined company's territory. The synergies and cost savings that Comcast identifies should be achieved in a manner that ensures the percentage change in non-headquartered staff in New York is the same, or less than, the percentage change in non-headquarters staff corporate-wide. This should be measured on each of the first five annual anniversaries of the date of the proposed merger's closing.

In addition, Comcast should be required to provide 90 day advance notice to the Commission, of any planned Time Warner/Comcast call center closing, or call center relocation out of New York. This requirement recognizes the importance of providing customer assistance services within New York and should extend for five years. While this condition mitigates

Staff's concern regarding potential job losses in New York as a result of the proposed merger, we note that it does not create any incremental net positive benefit for New York.

Finally, Comcast should work with the State University of New York to design a workforce development program with community colleges. In connection with this effort, the combined company should consider committing to fund a \$1 million pilot program in conjunction with the State University of New York Community College system designed to prepare and transition New York State students to jobs within the combined company, post merger. This additional monetary commitment will help ensure that the combined company has a well-trained entry level workforce in New York and remains committed to New York jobs and its economy.

Universal broadband affordability - With access to broadband becoming increasingly important for New Yorkers, the combined company should commit to a series of steps and service offerings designed to make broadband service truly universal in the current Time Warner footprint in New York State. First, in order to further the goal of universal broadband availability, the provision of Comcast's current "Internet Essentials" program, which limits participation to families who have not subscribed to an Internet service within the last 90 days should be enhanced in New York. Families who would otherwise qualify for the "Internet Essentials" program, but subscribe to the \$14.99 monthly Time Warner offering, or other relatively lower-priced Internet service before the "Internet Essentials" program was available in New York, or because they were not aware of the program, should be permitted to enroll. Similarly, Comcast's current "Internet Essentials" program limits participation to customers with no overdue bills. Customers in arrears should not be excluded from participating in the program. Indeed,

payment-troubled customers may obtain considerable benefits from a program that may aid them in paying their bills on time as a result of learning how to use the Internet to enhance their training and skills and to search for higher paying jobs.

Second, in order to supplement the "Internet Essentials" Program and maintain access to broadband service for those low-income New Yorkers that do not qualify for "Internet Essentials," the combined company should commit to offer a product we will refer to as "New York Essentials." This offering should provide a speed equal to that of the "Internet Essentials" offering, with improvements in speed as discussed in the next heading, at the same \$9.95 rate. This new offering, which is designed to increase the availability of low-cost broadband service, should be available to customers who participate in the Lifeline telephone program for at least five years upon signing up.⁵⁶ Staff recommends that the combined company dedicate a minimum of \$45 million the "Internet Essentials" and "New York Essentials" offerings which is based upon a \$5 discount per month from the \$14.99 "Everyday Low Price" product for an estimated 150,000 customers over five years.

Further, Comcast should work with the I Link Program that is being organized by the New York State Broadband Program Office and with non-profit community organizations to promote "Internet Essentials" and "New York Essentials." By linking these broadband service affordability elements with the

⁵⁶ Lifeline is an assistance program offered by many telephone service providers to assist income-eligible consumers. Customers are eligible for Lifeline if their household income is at or below 135% of Federal Poverty Guidelines, or if they participate in any of a defined list of assistance programs, including Home Energy Assistance Program, Supplemental Security Income, and the Free School Lunch Program.

Broadband Program Office's awareness/outreach, home computer, and training elements, the goal of providing universal broadband can be more effectively managed and achieved. Accordingly, the combined company should be required to promote the availability of these basic Internet services in New York, by among other things, including them in all lists of Internet service offerings on its website, at its retail outlets, and in other marketing materials.

In order to maintain access to broadband service for New Yorkers that do not qualify for "Internet Essentials" or "New York Essentials," the combined company should be required to retain and continue to offer Time Warner's \$14.99 "Everyday Low Price" Internet offering, and to increase the speed of this offering to 3Mbps download and 1Mbps upload, which is consistent with what Time Warner has already publically stated it plans to do in some markets.⁵⁷

Broadband speed enhancements - To ensure that a basic broadband offering is available at evolving speeds at a reasonable price for all customers and an affordable price for low income customers, Comcast should commit to offer a more robust standalone broadband offering that is priced in a manner that enables customers to effectively exercise choice to seek either a fully bundled offering or pursue standalone internet coupled with newly emerging online video on demand options like

⁵⁷ See, Time Warner Cable to Transform TV and Internet Experience in New York City and Los Angeles (January 30, 2014), available at <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>. We recognize the rapid pace of change in the broadband market. Therefore, should the "Everyday Low Price" offering no longer be competitive in the future, the Commission should invite the combined company to petition for relief of this condition.

Netflix and Apple TV. We note that the New York State Broadband Program Office's definition of minimum speed threshold for broadband is 6Mbps download/1.5 Mbps upload.⁵⁸ We also note that the FCC is reexamining its speed benchmarks for broadband.⁵⁹ The offering we are urging Comcast to propose should consider these developments.⁶⁰ As the basic broadband product evolves, we expect Comcast to work with the State (including DPS and the Broadband Program Office) to ensure that this new emerging product is made available to all customers at a reasonable price, and to low-income customers at an affordable price.

Infrastructure expansion investment: Connect NY – The combined company should be required to commit to a \$50 million infrastructure investment program to expand its network to underserved and unserved areas in New York. This investment would serve three objectives: 1) expanding service to rural communities; 2) expanding service to industrial parks and businesses; and, 3) expanding enhanced service to community anchor institutions (e.g., schools, libraries, community centers, municipal buildings, public facilities and hospitals). These funds should be used to target areas which would not be built out or enhanced using the combined company's current

⁵⁸ See, New York State Broadband Program Office, 2011-12 Annual Report, available at <http://nysbroadband.ny.gov/assets/documents/2011-2012BroadbandAnnualReport.pdf>.

⁵⁹ GN Docket No. 14-126, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Tenth Broadband Progress Notice of Inquiry (issued August 5, 2014).

⁶⁰ This product will likely fall somewhere between the Time Warner "Standard" 15Mbps product and the Comcast "Performance Starter," 6Mbps offering in terms of both price and speed.

investment guidelines. The value of these funds should be based on industry standard build-out costs per mile and connection costs or the value of discounted revenues that would otherwise be obtained had the service been acquired in the ordinary course. Staff would expect the combined company to work with Staff and the Connect NY Broadband Program, in consultation with regional stakeholders, to establish criteria and funding priorities to utilize these infrastructure expansion investments to ensure that they are incremental and that they maximize public interest benefits. The Commission should direct the combined company to file a proposal for this investment within 60 days of the closing of the merger and consult with Staff and the New York State Broadband Program Office, which administers Connect NY, regarding this program.

Infrastructure expansion investment: capital

investment - Given the level of Time Warner's planned 2014 capital expenditures throughout New York, to forestall the unmitigated risk of curtailed or abbreviated capital investment post-transaction, for the year 2015, the combined company should, at a minimum, commit to invest Time Warner's capital expenditures for 2014, and in addition, commit to additional capital investment to derive an investment net gain post-transaction. In this regard, Staff believes that it should commit to a build-out schedule that advances Time Warner's 75% all-digital timetable, with the goal of reaching 100% digitization by mid-2016. Other infrastructure investments put forward, but without any specific commitments, include the deployment of Wi-Fi hotspots in New York State, rural infrastructure deployment and increased availability of broadband to schools and libraries. The combined company should, therefore, commit to a timetable through 2017 which includes estimated Wi-Fi hotspot, rural infrastructure and

school and library deployments annually, and indicate what portion of the deployments are additive, or net gain deployments to those current development plans of Time Warner, as a post merger benefit to New York State.

Infrastructure expansion investment: other - The conditions outlined above mitigate specific detriments identified by Staff and add additional positive benefits of roughly \$145 million. Depending on how the Commission assesses the transaction's benefits and detriments and how the commitments are eventually designed and valued, there may be a gap between the net benefits, including commitments, and the net positive benefits needed in order for the proposed transaction to be considered an overall net positive benefit for New York. Accordingly, we invite the Petitioners to make additional concrete commitments in its response to these comments, in the areas of infrastructure investment discussed above. In any event, the Petitioners should make a concrete commitment to ensure that, an additional \$155 million in benefits is assured for its New York customers' share in synergy savings to be realized.

CONCLUSION

Staff has reviewed the benefits and detriments of the proposed transaction, both concrete and speculative, and we find that there is no net positive benefit as a result of the proposed merger absent specific commitments and conditions that translate into guaranteed New York consumer benefits. To ensure the proposed transaction promotes the public benefit and satisfies the Commission's public interest standard under the PSL, Staff recommends that the Petitioners make certain commitments to mitigate potential detriments and deliver net

positive benefits to New York customers. These commitments would address service quality, job retention, universal service, network deployment to unserved/underserved areas and broad infrastructure investment and improvement commitments. With these commitments backed by enforceable conditions set by the Commission, we believe the merger would promote the public interest and should, therefore, be approved.

Respectfully submitted,

Graham Jesmer
John Favreau
Brian Ossias
Assistant Counsels
New York State
Department of
Public Service Staff
Three Empire State Plaza
Albany, NY 12223-135