

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.

**REPLY COMMENTS OF PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC.
REGARDING PROPOSED TRANSFER OF CONTROL OF
TIME WARNER CABLE, INC. TO COMCAST CORPORATION**

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I. INTRODUCTION

On February 13, 2014, Philadelphia-based Comcast Corporation (“Comcast”) and New York-based Time Warner Cable, Inc. (“Time Warner Cable,” or “TWC”) announced an agreement for the transfer of ownership of Time Warner Cable (including its subsidiaries) to Comcast, for approximately \$45.2 billion.¹ Comcast is the largest mass media and communications company in the world by revenue, the largest cable company and home Internet service provider in the United States, and the nation’s third largest home telephone service provider. In addition to its utility network systems, Comcast is the owner of NBC Universal, a major producer of media content, some of which is transmitted by Comcast and TWC to their customers. Time Warner Cable, headquartered in New York City, is the second largest cable company in the U.S.,

¹ See Joint Petition at 9-10.

behind only Comcast. Nationally, in 2009, Time Warner Cable had 14.6 million basic cable subscribers, 8.8 million Digital cable subscribers, 8.7 million Road Runner residential internet service subscribers, 2.5 million DVR subscribers, and 4.5 million residential Digital Phone subscribers, making it the fifth-largest landline phone provider in the United States.²

In New York State, Time Warner Cable provides digital cable television, broadband internet and Voice over Internet Protocol (“VoIP”) telephone service to approximately 2.6 million subscribers.³ TWC has 1.2 million telephone customers and operates in nearly all of New York’s 62 counties. It is the state’s second largest telephone company, smaller only than Verizon. The company provides “triple play” phone, broadband, and cable TV service in major upstate cities including Buffalo, Rochester, Syracuse, and Albany, and in many other areas. In New York City, Time Warner Cable serves all of Manhattan, Queens and Staten Island, as well as the northwest corner of Brooklyn.⁴

In contrast, Comcast’s voice phone services are limited to ten communities in New York, as are Comcast’s video services.⁵ The before and after corporate organization charts filed with the Joint Petition show that merger will be accomplished upstream of the New York subsidiaries of Comcast and TWC that provide direct services to New York customers. Thus, after the proposed transfer of ownership, customers of Comcast and TWC subsidiaries in New York would continue to receive

² See Wikipedia, “Time Warner Cable,” accessed Aug. 5 2014.

³ Statement of Governor Andrew M. Cuomo (May 19, 2014), <http://on.ny.gov/Uy53Zl>.

⁴ Joint Petition at 4-5.

⁵ Joint Petition at footnotes 10, 12.

services from those same entities, but the entities would all be owned by the Comcast parent.⁶

Although nationally Comcast is larger than Time Warner Cable, Comcast presently has a small fraction of the customers in New York that TWC has — 23,000 versus more than 2.5 million. Considering that, if approved, the entire merger nationwide would give Comcast more than 30 million subscribers, New Yorkers alone would account for nearly 10 percent of the merged company's total customer base.

On May 15, 2014, Comcast and Time Warner Cable filed a Joint Petition with the New York Public Service Commission (“PSC” or “Commission”) for permission to transfer ownership of TWC to Comcast.⁷ On May 16, 2014, the Commission began this proceeding to review the proposed transfer and issued a notice inviting public comments.⁸ Comcast acknowledges that in addition to New York’s approval of the ownership transfer, the companies must also receive federal approval and approvals in the other states where they operate.⁹

It is important for the Commission to consider the scope of this transaction. This is not just one cable company taking over another, contrary to the implication of the Commission notice that it is simply the federal cable statute that applies here.¹⁰ It is a company that provides cable, broadband and telephone service taking over another

⁶ The corporate organization charts are in Exhibit A to the Joint Petition, at <http://bit.ly/1nThkmO>.

⁷ The Joint Petition of Time Warner Cable, Inc., and Comcast Corporation is accessible at <http://bit.ly/1zn2nO3>.

⁸ Notice, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={86E0143D-9C37-448A-8BE5-1AAA4F642341}>.

⁹ See <http://time.com/44562/comcast-time-warner-cable-cohen/>.

¹⁰ Id.

large company that also provides cable, broadband **and** telephone service in New York. So we have cable issues, broadband issues, and telephone issues. Indeed, TWC, the target here, is not just a telephone company but an eligible telecommunications carrier (“ETC”) under 47 U.S.C. § 214(e), transfer of which is subject to additional state statutory scrutiny.¹¹

At this point, the public record consists of the Joint Petition, comments, and public statements at informational forums held by the Commission. The Joint Petition on its face provides few details and reveals little specific information regarding the risks or the claimed positive benefits to New York that might occur as a result of the transfer. For example, there is little explication of the “synergies” that are proposed to result from the transaction and whether they will be of significant incremental value to New York, how they will affect consumers, or if the synergies will be from layoffs and cost-cutting to yield net revenue increases of value mainly to the Petitioners, while harming the State and its consumers.¹² Comcast and TWC both have sought to keep significant amounts of information about their services and intentions out of the public record.¹³

The online public record of the case does not indicate what questions the Commission staff is asking in their interrogatories, and it is difficult if not impossible for the public to know what the transaction proponents are supplying as answers to the Staff questions.¹⁴ In contrast, if there were accompanying rate cases, as often occurs in

¹¹ Notably, both TWC and Comcast franchises acknowledge that their networks are Title II “telecommunications services” under federal law. See It’s All Interconnected, Part XIII, available at <http://bit.ly/1qG7Vws>.

¹² See Part V.C., below; see also Staff Comments at 35-36.

¹³ See Parts III.B.-D., below.

¹⁴ The online case file is at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0183>.

merger cases at the Commission (and which could have been required on the Commission's own motion¹⁵), there would be a public filing by the utilities and review of their future rates, terms and conditions of service, with detailed financial data, past and projected operating income and expenses, review of returns on equity and capital investment plans, assessment of customer service, affordability, subscribership and other relevant data. But no rate cases are pending, and such basic information is not contained in the Joint Petition or in the public record of the case. The public record has not been augmented by the merger applicants. The deficiencies of the Joint Petition remain uncured by any supplemental filings addressing areas of critical public interest.

Preliminarily, the Public Utility Law Project of New York, Inc. ("Utility Project") observes that New York State telecom consumers are at a disadvantage in the public review of whether the proposed transfer of control is in the public interest. There are no independent, well resourced advocates for consumers or competitors involved as active parties, conducting discovery and developing the public record regarding matters such as

- reasonableness of current and future rates for all services
- increasing telephone subscribership,
- service extension to areas unserved by cable or high speed broadband,
- service enhancement,
- service quality,
- broadband rates
- broadband enhancement,

¹⁵ E.g., See http://www.dps.ny.gov/06M0878_FactSheet_11-30-06.pdf.

- consumer impacts such as price and services,
- customer protection
- billing, collection, and shutoff practices
- positive benefits flowing from the transaction,
- risks, and
- impacts on competitors, including rival media content providers using network services.¹⁶

The Utility Project previously noted this absence of well-resourced consumer advocates as active parties in the case, at an informational forum held by the Commission and in its Initial Comments, filed June 19, 2014.¹⁷ This deficiency is also uncured.

The Department of State Utility Intervention Unit (“UIU”) intervened as a party on August 8, 2014¹⁸ -- nearly three months after the case began -- to file comments on behalf of the Secretary of State.¹⁹ The Secretary’s comments raise some quite valid concerns, but do not constitute a comprehensive review and assessment of the matter or even reference any fact discovery that was undertaken by UIU or Staff or any other active party.

¹⁶ See Utility Project Updates blog (April 4, 2014), <http://bit.ly/1dTfPTI>.

¹⁷ The Utility Project Initial Comments are filed in DMM as Public Comment #2782, June 19, 2014, and are available at <http://bit.ly/1ASvOt9>.

¹⁸ UIU may “*on behalf of the secretary*, initiate, intervene in, or participate in any proceedings before the public service commission. . . .” NY Executive Law § 94-a(4)(b)(i). In contrast, the power of UIU to intervene *on behalf of consumers* is limited by the same statute “to represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies engaged in the regulation of *energy services*. . . .” PSL § 94-a(4)(b)(ii). (*Emphasis added*) Accordingly, UIU has no direct statutory power to represent the interests of consumers in telecom cases, or to challenge a decision of the PSC on behalf of consumers, and so the comments of UIU should be read simply as representing the views of the Secretary of the Department of State, or his superior in the executive branch.

¹⁹ UIU Comments filed August 8, 2014 are available at <http://bit.ly/VKreN9>.

Under the announced Commission process, there will be no evidentiary hearings to resolve disputed factual issues, or, for that matter, any other process for assessing the credibility of witnesses supporting Petitioners' assertions of public benefits flowing from the merger, prior to the expected action on the proposal on October 2, 2014.

A takeover of this magnitude deserves close scrutiny. Comcast claims on its website that

[t]hrough this merger, more American consumers will benefit from technological innovations, including a superior video experience, higher broadband speeds, and the fastest in-home Wi-Fi. The transaction also will generate significant cost savings and other efficiencies. American businesses will benefit from a broader platform, and the Company will be better able to offer advanced services like high-performance point-to-point and multi-point Ethernet services and cloud-based managed services to enterprises. Additionally, the transaction will combine complementary advertising platforms and channels and allow Comcast to offer broader and more valuable packages to national advertisers.²⁰

As shown below, Comcast's claims for New York fall short, in extent, details and in commitment. Despite these generalities, however, there is no firm commitment in the Joint Petition regarding future rates,²¹ services, broadband service enhancement, subscribership, affordability and universal service, consumer protection, or service quality for telephone and broadband. Rather, there are risks that rates will rise, costs and jobs in New York will be cut, service quality and consumer protection will decline, and universal service goals for both telephone service and broadband will not be accomplished.

The Commission conducted several public forums regarding the proposed transfer of ownership of Time Warner Cable, and invited the public to comment on the

²⁰ <http://corporate.comcast.com/news-information/news-feed/time-warner-cable-to-merge-with-comcast-corporation>.

²¹ See Joint Petition at 2.

merger by July 31, 2014. The Commission also stated that comments will be received until a decision is eventually made. On July 17, 2014, the Commission extended the time for filing comments, and indicated it may consider the merger petition at its October 2, 2014 session.²² As of August 25, 2014, more than 2,900 public comments have been filed, mostly urging the Commission not to approve the proposed transfer of ownership. The Petitioners and the few who have supported the petition have not demonstrated there will be a net benefit to New York flowing from this transaction, as recognized by Commission staff in its comments,²³ by the Public Utility Law Project,²⁴ other organizations, and by numerous individual public commenters.

The Utility Project is a nonprofit organization advocating on behalf of low and fixed income consumers. Due to its limited resources, the Utility Project has not sought intervention as an active party. Initial Comments were submitted by the Project on June 19, 2014, in which we maintained that the Joint Petition fails to satisfy the Commission's standards applicable to the proposed transfer of ownership. The Utility Project welcomes the opportunity to submit these Reply Comments pursuant to the Commission's notice.²⁵

²² See <http://bit.ly/1ruMxk8>.

²³ See Staff Comments at 1-2. Staff's comments are at

²⁴ The Utility Project Initial Comments, Public Comment #2782, filed June 19, 2014, are available at <http://bit.ly/1ASvOt9>.

²⁵ These comments were prepared with the assistance of David C. Bergmann, Telecom Policy Consulting for Consumers, Columbus, Ohio.

II. PROPONENTS FAILED TO SATISFY THE NEW YORK PUBLIC INTEREST STANDARD FOR UTILITY MERGER APPROVAL WHICH REQUIRES A SHOWING OF NET POSITIVE BENEFITS FROM THE PROPOSED TRANSFER

In New York, to satisfy the state’s “public interest” test for utility merger approvals, a transfer of ownership such as proposed in this case must be demonstrated to provide net positive benefits to consumers in the state.²⁶ The Federal Communications Commission (“FCC”) has essentially the same public benefit standard.²⁷ Benefits must be shown to flow from the proposed merger, and not from normal operations of the companies which could occur in the absence of a merger. The burden of proof is on the petitioners to make this showing.²⁸ The New York statutes do not include a time limit for the Commission’s decision on such transactions.²⁹

The merger requires review by the PSC under laws governing cable TV and telephone company mergers. Broadband services as provided by Comcast and Time Warner also fall under the PSC’s purview here.³⁰ Regarding cable TV, recently enacted Section 222 of the New York Public Service law (“PSL”) provides:

²⁶ PSL §§ 100.3, 215, 222; Case No. 12-M-192, *Joint Petition of Fortis and CH Energy Group*, Order Approving Acquisition Subject to Conditions (June 26, 2013) (“Fortis”), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A55ECCE9-C3B2-4076-A934-4F65AA7E79D1}>.

²⁷ <http://www.fcc.gov/guides/review-of-significant-transactions>. New York’s standard is stricter than the “no harm” standard used by some jurisdictions, and the Federal Trade Commission standard, which is essentially, “no harm to competition.” <http://www.ftc.gov/system/files/documents/reports/36th-report-fy2013/140521hsrreport.pdf>. An invitee to the Commission’s forum who spoke in favor of the proposal acknowledged the higher New York standard. PSC forum, NYC Trans. at 39, available at <http://bit.ly/1kJKlcz>.

²⁸ See Fortis, supra note 26.

²⁹ See Staff Comments at 14.

³⁰ See id. at 7-11.

3. (b) The 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 the regulations promulgated by the commission pursuant to section two hundred fifteen of this article, 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; provided, however, that a failure to conform to the standards established in the regulations promulgated by the commission shall not preclude approval of any such application if the commission finds that such approval would serve the public interest.

(Emphasis added.) Clearly, the statute requires a review of whether the merging parties are in compliance with existing **cable TV** standards. Further, PSL § 215, referenced by the cable merger review law, empowers the Commission to

prescribe standards for the construction and operation of cable television systems, which standards shall be designed to promote (i) safe, adequate and reliable service to subscribers, (ii) the construction and operation of systems consistent with most advanced state of the art, (iii) a construction schedule providing for maximum penetration as rapidly as possible within the limitations of economic feasibility, (iv) the construction of systems with the maximum practicable channel capacity, facilities for local program origination, facilities to provide service in areas conforming to various community interests, facilities with the technical capacity for interconnection with other systems within regions as established in the commission's statewide plan and facilities capable of transmitting signals from subscribers to the cable television company or to other points; and (v) the prompt handling of inquiries, complaints and requests for repairs...

The statutes thus recognize the social goals of universal television service (rapid maximum accessibility), "safe, adequate and reliable service," and customer protection ("handling of inquiries, complaints and requests for repairs..."). The Commission has adopted regulations containing its cable TV standards and consumer protection rules at 16 NYCRR Part 890.³¹ A thorough assessment of the petitioners' compliance with all

³¹ The Commission's Rules are at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/49775FD17CDEE7F285257C910059DEED?OpenDocument>.

these rules, and correction of any deficiencies, is required by the cable merger statute. Yet the Joint Petition contains no self-assessment of compliance and does not address the requirement.

In addition, New York PSL § 100.3 requires PSC approval of any transfer of ownership of a **telephone company**, and also applies to this transaction, because Time Warner Cable Information Services (TWCIS) NY, a provider of VOIP service, is a telecommunications provider and telephone company under New York law.³² Indeed, as previously mentioned, Time Warner has become the second largest telephone company in New York State. PSL § 100.3 contains the following requirement:

No consent shall be given by the commission to the acquisition of any stock in accordance with this section 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.

The Commission issued the requisite notice indicating that “the public interest requires a more detailed review of the petition,” and that commission review and consent is necessary.³³ Neither PSL § 100.3 (for telecom) nor PSL § 222 (for cable) imposes a time limit on the PSC's determination. The PSC need not accede to a putative

³² “Although the Federal Communications Commission (FCC) has not yet determined the overall classification of interconnected VoIP, it recently recognized that a VoIP provider with a state commission issued Certificate of Public Convenience and Necessity (CPCN) that has also filed a tariff offering intrastate telecommunications service, is functioning as a telecommunications provider.” CASE 12-C-0510 - Petition of Time Warner Cable Information Services (New York), LLC for Modification of Its Existing Eligible Telecommunications Carrier Designation, *Order Approving Designation As A Lifeline-Only Eligible Telecommunications Carrier* (issued March 18, 2013).

³³ Letter from Chad Hume, Director DPS Office of Telecommunications, dated 5/21/14, informing company its petition needs further review, available at <http://bit.ly/1nTFTjx>.

timeframe from federal cable law to resolve this crucial, factually- and policy-interwoven proposal for New York.

The telephone merger statute does not explicitly mention or require the same assessment of compliance with standards that the more recently enacted cable TV merger law requires, but a review of Time Warner's compliance with the PSC telephone service standards and telephone consumer protection standards certainly would be a relevant and appropriate area for PSC inquiry, and for possible conditions if approval were to be conditionally allowed. In Case 13-C-0193, discovery revealed that large numbers of TWC customers were losing phone service as a consequence of unpaid bills for non-telephone services.³⁴ These disconnections, along with the growth in customers who buy phone service bundled with cable TV service, may be a factor in New York's dismally low telephone subscribership rates, undermining the goal of universal phone service. Accordingly, there should be scrutiny of TWC's subsequent performance regarding shutoffs for collection purposes, and of Comcast's billing, collection, and shutoff practices to assess whether public interest values of universal service and customer protection are being advanced.

As discussed, the statutes governing both cable TV and the telephone company ownership changes require, as a condition of any PSC approval, that the Commission find that the transaction is in the "public interest." Last year, in its Order approving the takeover of Central Hudson Gas & Electric by Fortis, Inc., subject to

³⁴ See Utility Project's Supplemental Comments in Case 13-C-0193, Aug. 26, 2013, at 4-5, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BD38B838-FA68-4516-9C99-BF87B328ED98}>

conditions, the Commission reviewed and summarized the standard it applies to determine if a change in utility ownership is in the public interest:

[T]he public interest analysis starts by requiring 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.

Once we have gauged the net benefits by comparing the transaction's intrinsic benefits versus its detriments and risks, we can assess whether the achievement of net positive benefits requires that the intrinsic benefits be supplemented with monetized benefits (sometimes described as "positive benefit adjustments" or PBAs). Then, if necessary, we establish a quantified PBA requirement, "as an exercise of informed judgment because there is no mathematical formula on which to base such a decision."³⁵

The PSC should apply this standard in determining whether Comcast's proposed takeover of Time Warner Cable would be in the public interest.

At the New York City Commission forum, Mr. Santorelli, associated with a program of New York Law School ("NYLS"), put forward an exceedingly cramped definition of the public interest. He asserted that the public interest "revolves around the ability of all stakeholders to align resources in every sector of an internet community around shared goals for broadband connectivity."³⁶ The **public** interest in this transaction demands more than just aligning vague multi-sector resources. It must include what the **applicants** will do in recognition of universal access and affordability, adequacy of service and bandwidth, future rates, privacy, public safety, consumer

³⁵ Fortis at 59.

³⁶ NYC Trans. at 39, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A5B3331C-F46F-4EB3-A34D-9AF320DAC977}>.

protection and access to competitors, and concrete measures to accomplish those public goals. Comcast claims in the Joint Petition that in New York

there will be net benefits to core voice, video and broadband services (through ongoing enhancements to the expanded Comcast network), new tools for technicians to quickly and correctly diagnose and address issues, security and risk management improvements, and innovative partnerships with educational and governmental entities.³⁷

The Initial Comments of a Philadelphia City Councilman illustrate the kind of commitments one might expect from a consolidation of this magnitude:

Speaking as a City Councilman in Comcast's "home base," I've seen this firsthand. Comcast is dedicated to making Philadelphia a high-tech driver of economic activity, both for Pennsylvania and the region. After completing the Comcast Center in 2010, earlier this year the company announced plans to build yet another skyscraper to house an Innovation and Technology Center with ample space for new business ventures that will revitalize our City in the not-so-distant future. This new venture will have both immediate and long-term economic impact on the City and the state. In addition to all of the family-sustaining union jobs that the building's construction will require, the project is expected to add 2,800 permanent jobs here in Philadelphia and more than 20,000 direct and indirect jobs throughout the state. That translates to a \$2.75 billion shot in the arm to Pennsylvania's economy thanks to Comcast's initiatives here in the City of Philadelphia. This venture could produce similar results. The company has stated it intent to invest hundreds of millions of dollars into the networks it hopes to acquire in the transaction, which will create short-term work opportunities. More importantly, it provides municipalities throughout the state with a free infrastructure upgrade with broadband speeds that tend to stimulate economic activity and attract new businesses.³⁸

The Joint Petition filed in New York contains no comparable pledges of job creation and investment. Rather, we will see in Parts IV and V below how the net benefits calculation works out for in New York, and note that -- notwithstanding glowing praise coming from public officials in Comcast's home town Philadelphia -- two recent academic articles

³⁷ Joint Petition at 12.

³⁸ Comments of Philadelphia City Councilman Bobby Henon, August 8, 2014, available at <http://bit.ly/1r7y5KB>.

conclude that, at the overall national level, the proposed transfer of ownership is not in the public interest.³⁹

III. The new state cable merger statute requires a compliance review.

A. The compliance review

As quoted above, PSL 222(3)(b) requires that the Commission not approve a cable merger “*unless the applicant demonstrates* that the proposed transferee and the cable television system conform to the standards established in the regulations promulgated by the commission pursuant to section two hundred fifteen of this article....” (Emphasis added.) The Joint Petition asserts it is made “pursuant to Sections 99, 100 and 222 of the New York Public Service Law,”⁴⁰ but does not address the plainly worded substantive requirement of Section 222. The Petition lacks any demonstration that the Joint Applicants are in full compliance with all regulatory requirements or have a plan with enforceable provisions to come into compliance.

On its face, therefore, the Joint Petition is deficient because it contains no evidence or representation of regulatory compliance, and should be denied because, given the current state of the public record, the statutorily-required assessment has not been performed. The fact that the statute allows the Commission to permit a merger notwithstanding noncompliance with a regulation does not excuse the applicants from

³⁹ Maurice E. Stucke and Allen P. Grunes, [Crossing the Rubicon: Why the Comcast/Time Warner Cable Merger Should Be Blocked](#) (June 2014), *Global Competition Review*, [University of Tennessee Legal Studies Research Paper No. 245](#); see also Stucke and Grunes, *The Beneficent Monopolist* (April 2014) [University of Tennessee Legal Studies Research Paper No. 239](#).

⁴⁰ Joint Petition, p.1.

their failure either to demonstrate compliance or to come forward with a plan to come into compliance, in their Joint Petition.

Governor Andrew M. Cuomo announced in May that the Commission “will use its new regulatory powers to conduct a thorough and detailed investigation into Comcast’s proposed merger with Time Warner Cable to determine whether the proposed transaction is in the best interest of Time Warner’s New York customers and the State as a whole.”⁴¹ A starting point for the Commission to exercise its vaunted “new regulatory powers” under Section 222 would be to follow the words of the statute and require the Petitioners to demonstrate full compliance with the Commission’s rules for cable service, including all those in 16 NYCRR Part 890.⁴² That Part includes many consumer protections ranging from billing practices to negative option sales practices, with which cable television companies “must comply.” The Petitioners could also be required, in the Commission’s discretion, to demonstrate full compliance with its other rules, such as those governing phone service, or, in the alternative, to put forward a public plan for achieving compliance.

As can be seen from numerous public comments in this case, neither Time Warner nor Comcast has a stellar reputation for service quality. Comcast has been described as “the worst in the country....”⁴³ This was reinforced by the recent news about the epic efforts of a Comcast service rep to dissuade a customer from dropping his service, ignoring the customer’s numerous express statements, which went viral on

⁴¹ <http://www.governor.ny.gov/press/05192014Comcast-Time-Warner-Merger>.

⁴² See footnote 31, *supra*.

⁴³ Albany Trans at 62, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={34E3E6F1-97B0-43C4-A6FC-FEEB0C0B44A4}>.

the Internet.⁴⁴ While possibly extreme, this incident illustrates the Comcast emphasis on up-selling and hard selling of customers at every opportunity. It is apparently Comcast's plan to increase revenue by being more aggressive than Time Warner Cable, in order to "upsell" customers to buy more services whenever they call:

Finally, we do not know how the merger will affect real prices. Comcast has made no secret of its desire for the merger to yield "revenue synergies." Indeed, **Comcast apparently sees these increased revenues as the more important benefit.** Neil Smit, President of Comcast Cable, noted at the 2014 Deutsche Bank Telecom and Media Conference,

I think the revenue synergies are greater than the cost synergies. **On the revenue synergies side the first would be in the residential area where we would seek to bundle more and that is call center training, that's teaching people to sell another RTU on a call, on a service call, fix a billing problem, upsell to a third product, so just bundling better.** You get higher ARPU, higher retention, lower churn rates.

The question with respect to prices, therefore, is whether these financial benefits to the firm reflect increased demand resulting from offering a better service, or simply a better ability to extract more of the rents than TWC.⁴⁵

If Comcast implements such hard sell tactics, as seems to be its plan,⁴⁶ this may harm vulnerable elderly and low income Time Warner Cable customers in New York who live on limited budgets, who may be susceptible to incessant promotions but can ill afford paying more⁴⁷ and who may have a hard time dropping services, as the infamous viral

⁴⁴ "Comcast on hellish customer service call: Rep did 'what we trained him' to do," PC World, July 22, 2014, available at <http://bit.ly/1sp7M2T>.

⁴⁵ Scott Wallsten, "An Economic Analysis of the Proposed Comcast/Time Warner Cable Merger," Technology Policy Institute (May 2014) at 5 (emphasis added); accessible at http://www.techpolicyinstitute.org/files/wallsten_evaluating%20the%20comcast%20twc%20merger.pdf.

⁴⁶ See <http://www.wetmachine.com/tales-of-the-sausage-factory/is-comcasts-awful-service-grounds-for-blocking-the-twc-deal-yes-actually/>, linking to a report of the Comcast selling manual: <http://www.theverge.com/2014/8/4/5967255/this-is-comcasts-internal-handbook-for-talking-customers-out-of>.

⁴⁷ See discussion of disconnections in Part II, supra.

Comcast customer abuse incident shows. The combination of cutting costs and jobs in New York,⁴⁸ coupled with harvesting more revenue from Time Warner Cable customers through high pressure telephone sales tactics may benefit Comcast, but this can hardly be seen as in the public interest or a positive benefit to New York.

B. Petitioners are withholding crucial service quality information from the public.

Comcast and Time Warner are not shy about touting the putative benefits of their merger, including broad -- but unquantified -- generalities about service extension and improvement of broadband service, low-income programs, basic broadband rates, service quality, investment, and other matters. But when it comes to divulging their actual performance and actual intentions and budgets regarding matters affecting the public interest, such as Internet service to schools, extension of rural broadband, service quality performance, jobs in the state, universal service, rates, and so forth, well, those apparently are “trade secrets” because of fears the information would benefit virtually nonexistent competitors.

On June 17, 2014, the Public Service Commission was asked, in a Freedom of Information Law (“FOIL”) request, to provide its staff discovery requests and the answers of Comcast and Time Warner in PSC Case 14-M-0183 up to that date.⁴⁹ Reports filed with the PSC by Time Warner regarding its phone service quality performance were also requested under FOIL. The staff discovery questions – but not the companies’ answers -- up to the date of the request were readily provided.

⁴⁸ See Part V.C., below.

⁴⁹ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2F693B9E-7B1-42DD-91C3-9169140EB2CB}>.

Comcast/Time Warner protested public release of many of the answers, and the answers and limited Time Warner phone service quality reports that were supplied were heavily redacted, pending resolution of its trade secrecy claims regarding the omitted information. On July 15, 2014, Comcast/Time Warner filed a brief urging the Administrative Law Judge not to require disclosure of the redacted information. The Petitioners said:

In general, the redacted trade secret information and the Exhibits identified below include, without limitation, information and details concerning (i) the current operations and future business plans of the Companies, (ii) strategic information concerning their products and services, (iii) strategic investment plans, (iv) customer and service location information, and (v) performance data. This highly sensitive information has not been publicly disclosed and is not expected to be known by others. Moreover, **given the highly competitive nature of the industries in which Comcast and Time Warner Cable compete, disclosure of these trade secrets would cause substantial injury to the Companies' competitive positions— particularly since the Companies do not possess reciprocal information about their competitors.**⁵⁰

The “competition” for TV, broadband, and phone business in New York generally boils down to a duopoly (phone company or cable) or at best an oligopoly (maybe phone and cable companies plus Dish or wireless), in which providers probably are able to easily deduce who has the other’s customers and likely know, due to interconnection and traffic activity, what their “rivals” are doing.⁵¹

Also, under the proposed transaction, with the absorption of Time Warner Cable by Comcast, there will be one less major potential competitor for new or renewed cable franchises when the terms of current franchises expire. Petitioners dodge this reality

⁵⁰ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D255EB13-D204-4E8D-B656-9AD214F877A8}> (emphasis added).

⁵¹ See <http://utilityproject.org/2014/05/15/new-report-raises-questions-about-regulation-of-verizon-services/>.

when they claim “there will be no reduction in competition in any other segment because Time Warner Cable and Comcast do not compete directly with one another in New York.”⁵² Consequently, reliance upon this truncated “competition” as a substitute for public scrutiny of rates, terms and conditions of service, and performance in satisfying public interest goals is questionable. If there were vibrant competition, we doubt there would be 2,900 public comments generally opposing the transaction, many of them complaining of poor service, or that New York would be third from the bottom nationally in telephone subscribership, or that broadband service would be expensive, slow, and insufficiently available in rural areas of New York State.

C. *What Comcast and Time Warner Didn't Want the Public to Know*

Comcast/Time Warner’s request to the PSC to maintain secrecy of information included continued blocking of the release of a seemingly endless list:

- “specific details of Time Warner Cable’s current broadband deployment plans in New York. In particular, the information contains the specific details about such plans, including the franchise area, county, total miles of deployment, number of premises passed and the completion or planned completion date. Such information is kept confidential by Time Warner Cable”
- “information regarding the Companies’ promotional rates for service in various locations within their respective footprints – as well as competitive intelligence concerning competitor offerings. This compilation and competitive analysis are not publicly available.”
- “specific details of Time Warner Cable’s current build-out plans to rural areas of New York, as well as Comcast’s future business plans in this area. The information also contains anticipated financial expenditures for Time Warner Cable’s build-out plans. Such information has not been publicly disclosed.”
- “information concerning the New York schools and libraries served by Time Warner Cable, as well as information concerning Comcast’s future business plans to serve such entities. This information is kept confidential by Time Warner Cable and has not been disclosed to the public.”

⁵² Joint Petition at 2.

- “information concerning the number of Comcast’s “Internet Essentials” customers in New York, as well as Comcast’s future business plans for the “Internet Essentials” program.”
- “the Companies’ detailed customer and service quality data.”
- “information concerning the Companies’ current operations and staffing levels in New York, as well as Comcast’s future business plans concerning post-merger operations and employee levels.”
- “information setting forth the number of subscribers to Time Warner Cable’s “Everyday Low Price” broadband service.”
- “Comcast’s handling of customer requests for an unlisted service, and how Comcast handles customer inquiries related to this subject matter.”⁵³
- “Comcast’s future business plans with respect to particular subject matters.”
- “information and performance statistics relating to the Companies’ call centers in New York and the Northeast.”⁵⁴
- “information concerning Time Warner Cable’s operations as they relate to projects funded by federal or state [energy efficiency or distributed energy resource] programs.”
- “information concerning Comcast’s operations and future business plans relating to avoidance of truck rolls and vehicle fleets.”
- “information relating to the number of Wi-Fi hotspots that Time Warner Cable has deployed in New York, as well as Comcast’s future business plans in this area.”
- “information concerning Comcast’s handling of cyber-security issues associated with its Xfinity Home service.”
- “information concerning the Companies’ operations and customers in relation to cellular backhaul service.”
- “information concerning Time Warner Cable’s projects funded by NYSERDA”
- “projects developed in conjunction with New York State”⁵⁵

⁵³ See (redacted response to DPS-7.

⁵⁴ See (redacted) response to DPS-26.

⁵⁵ See footnote 41, supra.

The Joint Petitioners should be estopped from claiming there will be net positive benefits to customers and the public, in any of these areas where they refused to provide specific public information about their actual performance and future intentions.

D. The July 22, 2014 ALJ Ruling and the Records Access Officer's Ruling on Time Warner Cable's Phone Service Quality Reports

On July 22, 2014, PSC Administrative Law Judge David Prestemon issued a decision regarding Comcast/Time Warner's objections to release under FOIL of information provided to Department of Public Service ("DPS") Staff.⁵⁶ The decision discusses in depth the standard for releasing information under FOIL when there is a "trade secret" claim that release will cause competitive harm. It rejected trade secret claims as to some items, but accepted the secrecy claims for numerous others.

But that decision has now been appealed as to some of the information required to be released. On August 1, 2014, Comcast and Time Warner appealed the determination of the ALJ to the Secretary of the Commission, insofar as it would require release of its staffing data and broadband expansion plans, both of which categories of information are crucial for an informed public decision on the merger. In the motion and in declarations accompanying it, the merger proponents again claim such information is a "trade secret," that competition exists, and that release of information would benefit competitors and be harmful to the utilities. In the meantime, some of the other information that was required by the ALJ to be released in unredacted form has been divulged.

⁵⁶ Available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A7503C38-93E2-4282-8C70-BE5D3FFE1D76}>.

In a separate matter regarding a more limited FOIL request, for Time Warner's phone service quality reports required to be filed under an October 22, 2013 PSC Order in Case 13-C-0193, the DPS Records Access Officer held that the utility had failed to substantiate facts to support trade secret designation.⁵⁷ Again, however, other than heavily redacted Time Warner phone service quality reports (which do reveal a history of deficiencies in the areas of service hookup times and service restoration times), the reports are not yet fully public.⁵⁸ Also, there are no phone service quality reports at all for Comcast, because unlike Time Warner Cable, its VOIP home telephone service still is not acknowledged by Comcast or the Commission to be a "telecommunications service," subject to the rules applicable to telephone companies, including billing, collection, and shutoff rules, and the requirement to make reduced price service available to low-income customers.

In sum, the situation remains that significant information related to the public interest and claims of the Petitioners is not publicly available to test whether the proposed transaction would provide net positive benefits to New York. This must be resolved before the Commission can render a valid decision on this transaction; again, the New York statutes put no time limit on the decision.

⁵⁷ The RAO decision is at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={003C1E86-33A6-41B8-8F10-27B21108F90C}>.

⁵⁸ The redacted Time Warner phone service quality reports are at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={5A629DC8-B8C8-44A3-AF41-40B6C7830037}> and for "core" customers are at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={600960EE-6578-45A2-B9C0-D40BE27E19CE}>.

IV. THE JOINT PETITION PROPONENTS OMIT MENTION OF RISKS, AND THE BENEFIT CLAIMS ARE VAGUE, UNQUANTIFIED, AND NOT SHOWN TO FLOW FROM THE PROPOSED TRANSFER.

The Joint Petition does not identify **any** potential downsides or risks to the transaction. Perhaps revealing insecurity about the market power effects of coupling two giant providers, however, the Joint Petition repeats claims of putative competition benefits 28 times, but despite the repetition, these counterintuitive assertions -- that the elimination of Time Warner Cable actually would be good for competition -- are ultimately unconvincing. No amount of claimed competition lipstick could conceal the reality that a major competitor would be devoured, or of the sheer size of a post-acquisition Comcast. The Joint Petitioners have not adequately addressed the reasonable concerns of the public, such as those raised by New York City Comptroller Scott M. Stringer,⁵⁹ Consumers Union,⁶⁰ Common Cause,⁶¹ and many others to the effect that the proposed merger may have harmful effects in the marketplace and for consumers.

Several proponents of the merger, for example, Philadelphia City Council members,⁶² laud Comcast for past benefits provided by the Company. These communications do not, however, focus on risks and benefits to New York and its consumers flowing from the transaction. Prior charitable “good works” and what the business has done for jobs in the City of Philadelphia and the economy of that city and

⁵⁹ Comptroller Stringer’s Comments are available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E47A9582-C1F0-4603-AAEF-7681AE0486FB}>.

⁶⁰ Transcript of June 19, 2014 New York City forum, at 14 – 19.

⁶¹ *Id.* at 19 – 26.

⁶² See, e.g., comments of Philadelphia City Council members Bobby Henon, Mark F. Squilla, James Kenney, Frank S. Lucente, and David Oh posted in DMM.

region in the past, or even lately, are not the issue, because these benefits already occurred without the merger and in other locations.⁶³ Rather, the inquiry must focus on risks and benefits to New York flowing from the requested transfer.

Petitioners' claims that the merger will provide incremental positive benefits to New York must be addressed and scrutinized in detail by the Commission. That task is made more difficult by the fact that the claimed benefits vary from the Joint Petition to the public statements of Comcast representatives. It is problematic to match up a specific "benefits list" for New York from the Joint Petition with those mentioned by Petitioners and their few supporters in their public statements. It is the Joint Petition, however, which is the pleading that must be scrutinized by the Commission under the test for merger approval articulated in the Central Hudson/Fortis case.

As to each claimed benefit, the Commission should ask:

- Is the claim a binding commitment for New York?
- Is the claimed benefit quantified for New York?
- Is there a timetable for achieving each promised benefit in New York?
- Is the benefit incremental, i.e., due to the transfer and more than what a utility employing best practices would be doing whether or not merging with another?
- Is the condition enforceable?

Accordingly, any claims of the takeover proponents must be based on the current state of the Joint Petition and the public record.

⁶³ E.g., Letter of Richard A. Cohen, Mayor of Agawam, MA, noting past good works of Comcast, Letter of Adam Schneider, Mayor of Long Branch, New Jersey praising Comcast, Letter of Charles Lyons, Superintendent of Shawsheen Valley Technical School, Billerica, Massachusetts, Letter of Mayor Harry J. Parrish II, Manassas Virginia.

A. General

The few comments in support of the merger echo statements at the public session in support of the transaction, where Petitioners asserted that “[t]he transaction will create a new world class communications media technology company, which will deliver real benefits to consumers, businesses, and public institutions, in the State of New York.”⁶⁴ Repetition of such nonspecific rhetoric resonates with the typical puffery for other such public utility merger and acquisition transactions, even those that are not ultimately approved, and whether or not, if approved, they produce the promised benefits. Comcast also stated:

As a recognized industry leader with solid financial capabilities and technological expertise, Comcast will deliver better, more reliable services that improve the quality of life of New Yorkers. We will also continue to work with the Commission and Department of Public Service staff to help ensure that the transition is seamless.⁶⁵

How will Comcast show the services to be better and more reliable? How will they show improvements will occur due to the merger? The record is that the Petitioners seek to thwart even modest public disclosure of a few basic indicators of their service quality performance. Has Comcast they read the legion of public comments in this case complaining about poor service? How could the public know, with so many customers, whether in the aggregate they will receive “better, more reliable services,” if the minimal

⁶⁴ Buffalo Info Trans. at 8, available at <http://bit.ly/1qGQAnj> .

⁶⁵ Id. at 9.

phone service performance reports that are required are stifled as secrets or waived or not considered by regulators?⁶⁶

Further, committing to “work with the Commission and Department of Public Service staff” is hardly a grand or additive promise. It is to be expected that the merger proponents, like most other utilities, already “work with the Commission and Department of Public Service Staff” as a matter of ordinary business.⁶⁷ This is a normal everyday occurrence in New York at the Public Service Commission.⁶⁸ Accordingly, this claim of continued cooperation, like other claims of continuation of current work or practices in the Petition, simply cannot be counted as an *incremental* benefit flowing from the proposed merger, as is required under the Commission’s merger standard.

B. Advanced Voice Service and Enhanced Intermodal Voice Competition

Some proponents argue that there will be improved service as a consequence of the merger.⁶⁹ Notably, these telephone service aspects are the first-listed of the Joint Petition’s claimed benefits for this multimedia transaction.⁷⁰ The Joint Petition states,

⁶⁶ In this context as in others, New York State ought to have a state consumer advocate interested in such reports.

⁶⁷ Indeed, [Project Sunlight](#) indicates that Comcast met three times with Commissioners and Department of Public Service leadership staff prior to filing the Joint Petition (April 10, April 24, May 8), and three times after filing the Joint Petition, on August 13 (two meetings, one with the Chairman and one with two other Commissioners), and on August 18, 2014, prior to the due date of their Reply.

⁶⁸ See *NY PSC Ex Parte Communication Practices Faulted by Moreland Commission*, <http://bit.ly/1mlogzN>.

⁶⁹ E.g., New York Congressman Bill Owens states in his public comment that “Comcast has committed to continue to invest heavily in New York....” But “heavy” investment may be in the mind of the beholder. The Joint Petition does not set out any infrastructure investment budgets, pre or post merger, and there are indications that TWC capital investment will actually be reduced by \$400 million. A promise to “continue” investment is not the same as providing incremental net positive benefits from the transaction, which is the standard to be applied. A “commitment” -- with no timetable and no detailed budgets -- is difficult to comprehend, and so fulfillment of the “commitment” may be even more difficult to evaluate or enforce.

⁷⁰ Joint Petition at 12-20.

By permitting Comcast and Time Warner Cable to combine the best aspects of their robust and innovative voice services, and by adding scale to Comcast's overall business that will encourage more network investment in New York, approval of this transaction will leave the merged company better suited to offer an array of advanced voice services in competition with ILECs and other providers. The benefits of the transaction will accrue to New York residents and businesses alike.⁷¹

The key phrase here is “combin[ing] the best aspects of their robust and innovative services.” Comcast, in effect, is proposing to share the best of each company's services with the other company's customers.⁷² The Petition cites to Comcast's XFINITY Voice, and increased international calling (although the increases were enacted by the companies acting separately).⁷³ The Petition also cites the Time Warner Cable's facilities build-out.⁷⁴ But there is simply no concrete commitment to incrementally improve upon the current TWC services. Also, given the rapid pace of change in the telecom markets, upgrading of systems is normal, and would be expected of TWC, even without the merger. Indeed, there are indications that if the merger were approved, Comcast might significantly cut capital expenditures and other costs at Time Warner Cable.⁷⁵ There is no commitment that such cuts will not happen,⁷⁶ and, as previously discussed, the companies are adamantly resisting public disclosure of their staffing, broadband expansion, and investment plans in New York.

⁷¹ Id. at 12-13.

⁷² See also id. at 13, 16.

⁷³ Id. at 13-14.

⁷⁴ Id. at 14.

⁷⁵ See Part V.C.

⁷⁶ The comments of the New York Urban League and Capital District Black Chamber of Commerce applaud Comcast's salutary past performance in community service and equal employment opportunity and support the merger. However, if the merger brings about the claimed \$1.5 Billion per year in TWC merger synergy benefits, comprised in part from savings due to layoffs or relocation of jobs from TWC headquarters in New York City to Philadelphia, then those hardest hit by the proposed merger may be laid off or transferred minority TWC employees with less seniority.

A central argument of the Joint Petition is that allowing Comcast and Time Warner to combine will enhance competition in New York, by allowing the combined company to be a stronger competitor.⁷⁷ Under that philosophy, few proposed mergers would be disallowed, no matter other harms or lack of benefits. On the other hand, somewhat inconsistently, the Joint Petition asserts that the merger will not **harm** competition for a simple reason: Comcast and Time Warner do not compete directly with another in New York.⁷⁸ To which one response might be, “Why not?” Actually, they could compete for local cable TV franchises when they come up for renewal; they could compete for large business telecom customers; they could compete for handling bulk backhaul traffic⁷⁹; they could compete with Verizon to provide faster broadband, and they could compete for related services such as advertising. As to the latter point, the Initial Comments of Viamedia show that there may also be less competition for advertising after the consolidation, harming spot cable advertising and raising advertising costs for the small New York businesses served by that industry.⁸⁰ The risks of the combination are ignored or understated. Instead of investing organically in its New York infrastructure, winning new customers, and competing with Time Warner for new franchises, it appears more that Comcast is deploying its capital mainly to buy TWC’s customers and the revenue streams from them, in order to increase market share and dominance. More importantly, however, as discussed above, the merger

⁷⁷ Joint Petition at 14; see also *id.* at 15-20 (business customers).

⁷⁸ *Id.* at 20.

⁷⁹ See response to DPS-44.

standard is net benefits, not mere “lack of harm.”⁸¹ There is no showing that the merger will increase competition.

The Joint Petition gives a passing nod to rural areas, as follows:

TWCIS is the largest facilities-based competitor in rural New York. The combined company will continue the build out of network facilities and remain engaged in the Connect NY broadband grant program, bringing advanced services and the benefits of intermodal competition to countless new small businesses for the first time. This will, in turn, enable these small businesses to compete against those businesses in more urban areas on a more equal footing, enhancing economic development across the State.⁸²

General claims that more service will reach customers in more remote areas are not credible because TWC does not provide granular data showing the current extent of its network. Continuing a current program or current level of investment does not reasonably describe any incremental benefit from the merger, absent announced Time Warner plans to cancel the program. Notably absent are investment budgets and timetables for the vaunted accelerated upgrades of TWC services, and evidence that the upgrades provide noticeable benefits to most subscribers or would not be done by TWC without the merger. Accordingly, this claim cannot be counted as part of any net benefit from the proposed transaction.

C. Broadband and cable

As important as broadband service is to the State, the discussion of broadband benefits in the Joint Petition is sparse. But at a public meeting, Comcast claimed:

⁸⁰ See [Viamedia Comments to Comcast-Time Warner.pdf](#), filed August 8, 2014.

⁸¹ See Part II, *supra*.

⁸² *Id.* at 19.

[We will provide] faster and more reliable broadband and Comcast binding commitment to an open Internet. For residential customers, Comcast will invest heavily to upgrade Time Warner Cable systems across New York and transition them to all digital, more quickly than Time Warner Cable could do so on its own. Comcast has already transitioned its own systems to all digital and has the expertise and financial resources to do it.⁸³

All digital systems will allow Comcast to deliver next generation advanced video and voice services, more programming choices, faster Internet speeds, and significantly improve network performance, reliability, and security. We will improve the customer experience for Time Warner Cable video subscribers in several ways.⁸⁴

Comcast describes its overall broadband offerings as better than Time Warner's.⁸⁵ But Comcast proposes no specific timetable or scope for improving the broadband experience in all of its New York territory, including the larger Time Warner territory. Also, information necessary to assess performance and establish goals for universal broadband service is not provided in the Joint Petition. As stated by the New York State Broadband Office,

there are approximately 360,000 census blocks in NYS, with the number of housing units in a single census block ranging from 1-362. Under the federal mapping methodology, *if a provider provides service to any housing unit within the census block, all housing units are assumed to be served*. While the level of inaccuracy is impossible to determine without having more granular data, we consistently receive letters from NYS citizens, elected representatives, and even broadband providers reporting discrepancies in the mapping data. This reinforces the fact that *broadband availability in most rural census blocks is overstated*.⁸⁶

If it were to ignore deficiencies in the Joint Petition and approve the transaction, the Commission must impose enforceable conditions, as described in Part VII below, in

⁸³ Buffalo Trans. at 9..

⁸⁴ Id. at 10-11.

⁸⁵ Buffalo Trans. at 17-19.

⁸⁶ Comments of New York State Department of Economic Development, Broadband Program Office, August 8, 2014. (*Emphasis added*).

order to ensure that meaningful incremental broadband benefit to New York consumers occurs as a result of the transaction.

Claims for **cable** benefits are set forth in somewhat more detail in the Joint Petition.⁸⁷ But details for the advanced timetable for digitalization of Time Warner Cable, which Time Warner apparently has already begun, are lacking.⁸⁸ And it appears that the focus of digitalization is enabling Comcast-provided video, rather than enabling customers for accessing all content. These new video services will include Revolution X1 Operating Platform, XFINITY On Demand, TV Online Store, and TV Everywhere,⁸⁹ which were described in TV-commercial terms.⁹⁰

NYLS' Mr. Santorelli consistently stressed the need for and benefits of broadband,⁹¹ as did many other witnesses.⁹² So that raises the question, what are the promised broadband benefits from this transaction? Further, it should be determined how much of these benefits would in fact be incremental to this transaction. For example, wholly unrelated to the merger, Time Warner Cable has promised one-gigabit Internet for Los Angeles in 2016, in response to a request for proposals from that City.⁹³

⁸⁷ Id. at 21-30.

⁸⁸ Id. at 21-22.

⁸⁹ Joint Petition at 23-25.

⁹⁰ Buffalo Trans. at 10-11.

⁹¹ NYC Trans. at 35-39.

⁹² E.g., Buffalo Trans. at 28-32; Albany Trans. at 21-29.

⁹³ <http://www.latimes.com/business/la-fi-gigabit-internet-20140726-story.html#page=1>.

Comcast “Internet Essentials” service is asserted as a significant merger benefit to low-income consumers.⁹⁴ However, as described in responses to staff discovery, in order to get Internet Essentials, a consumer had to meet the following qualifications:

the household must (i) have at least one child eligible to receive free or reduced-price school lunches as part of the National School Lunch Program; (ii) not have subscribed to Comcast Internet service within the last 90 days; and (iii) not have an overdue Comcast bill or unreturned equipment.⁹⁵

Of those requirements, the 90-day requirement was apparently the biggest stumbling block. Families who were overextending themselves to pay for a full-price Comcast package had to go completely without all service for three full months in order to reduce their costs. Ninety days is a full semester of the school year — a long time to be without internet service. Public comment reflected those problems, and Comcast has slightly requalified the qualification (on this one issue): Low-income consumers who owe Comcast money for other services will be able to get Internet Essentials, if the bill is more than a year old.⁹⁶

Another 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 may be shunted into some kind of promotional triple-play package. Comcast representatives may not redirect callers to the other phone number. So the consumers most likely to be able correctly to sign up for Internet Essentials are

⁹⁴ Joint Petition at 26.

⁹⁵ Response to DPS-23.

⁹⁶ <http://www.telecompetitor.com/comcast-internet-essentials-low-income-broadband-offers-amnesty-past-due-balances/>; <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/04/comcast-is-expanding-its-10-a-month-internet-program-for-the-poor/>.

high-information consumers who have the time and resources to use the internet to research how to get the best choice in internet access. But the target user of Internet Essentials is a lower-information consumer, possibly 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.

Comcast's decision to continue Internet Essentials "indefinitely"⁹⁷ is not a significant incremental benefit. Internet Essentials needs to be improved to ensure its benefits to New York consumers, and both Comcast and Time Warner need to adopt improved programs for their respective service territories. Comcast's recent announcement that it would give new Internet Essentials customers six months of the service for free⁹⁸ is an improvement, although not without problems of its own, as discussed below.

On July 21, the Comptroller of the City of New York, Scott M. Stringer, filed comments that stated:

While there is a significant digital divide in New York on socioeconomic lines, the truth is that no neighborhood is immune from poor internet. From Tribeca to Tompkinsville, the Upper East Side to East Flatbush, the South Bronx to Sheepshead Bay, communities across the city and throughout the state are affected by poor broadband. The latest data from the FCC shows that, as of June 30, 2013, over 40 percent of connections in New York State are below 3 Mbps.⁹⁹

⁹⁷ Joint Petition at 26.

⁹⁸ <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/04/comcast-is-expanding-its-10-a-month-internet-program-for-the-poor/>.

⁹⁹ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E47A9582-C1F0-4603-AAEF-7681AE0486FB}>, at [2].

The Comptroller also stressed the need to improve Internet Essentials.¹⁰⁰ Other commenters at the public forums criticized the program for a variety of shortcomings.¹⁰¹

As described above, Internet Essentials is a centerpiece of the claimed benefit of the service to low-income customers. But 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. Adding six months' free service actually increases the discrimination against current customers.

In a footnote, the Joint Petition asserts that it may be making promises regarding matters over which the commission lacks jurisdiction, and attempts to preserve a prerogative not to have those matters subjected to scrutiny:

Certain of the subjects and benefits discussed in this Joint Petition pertain to non-jurisdictional products and services. While those items are included herein in order to provide a comprehensive view of the public interest benefits of the proposed transaction, Petitioners respectfully reserve all rights relating to the inclusion of or reference to such information, including without limitation Petitioners' legal and equitable rights relating to jurisdiction, filing, disclosure, relevancy, due process, review and appeal.

While the legislature has not charged the Commission directly with the responsibility to regulate broadband, this does not mean that the Petitioners' broadband services are wholly exempt from duties under New York law.¹⁰² The broadband service is provided over the same wire that the cable TV companies and telephone companies install using the public streets and highways, using their powers as utilities to enter and install facilities for their business on private and public land. This use of public land and

¹⁰⁰ Id.

¹⁰¹ E.g., NYC Trans. at 24-26, 30-33, 48, 60-61, 103, 108.

¹⁰² See Staff Comments at 8-10.

facilities for utility purposes brings with it a legal duty to provide services to all members of the public on just and reasonable terms, without discrimination.

An analogous situation occurred a century ago, when the New York statutes only authorized electric lighting companies. With the advent of refrigeration and motors, Edison, then just a lighting company, began to supply electricity for power to selected customers. Much like today's cable companies providing broadband service over wires installed for television, Edison argued when challenged by a customer who wanted the enhanced service that the utility could decide who received the enhanced power service and who would not. In response, the Appellate Division stated:

In our opinion, however, the company's duty to furnish service does not rest upon the statute alone, but upon the common-law 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 anyone 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.¹⁰³

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.”¹⁰⁴ Even though the statutes may not have caught up with the ancillary use of cable wires for broadband, the Commission's jurisdiction to determine the public interest gives broad power to assess whether state broadband goals are furthered by the proposal, and to ensure that they are if the transaction were to be approved.

¹⁰³ *New York ex rel. C. Perceval, v. Public Serv. Comm'n*, 163 A.D. 705, 708; 148 N.Y.S. 583; 1914 N.Y. App. Div. LEXIS 6955 (Supreme Court of New York, Appellate Division, First Department, 1914).

¹⁰⁴ *Tismer v. New York Edison Co.*, 228 N.Y. 156, 163-164 (1920).

The reduced-rate aspect of the Comcast Internet Essentials program discriminates in favor of new customers and against similarly situated current Comcast customers. It is, therefore, 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. By analogy, Internet Essentials operates like telephone Lifeline service but is made available only to customers who also obtain Linkup services for installation; it is denied to customers who already have service. Unlike telephone Lifeline, there is no separate low-income Internet Essentials rate for which any low-income customer could qualify whether or not they received the education, equipment and installation elements of the Internet Essentials program.

Beyond Internet Essentials, the Joint Petition also promises the combined company will be a leader in “enhanced Wi-Fi development.”¹⁰⁵ No detail is provided on what Comcast has “envisioned.”¹⁰⁶ Thus, this cannot be counted as an incremental merger benefit.

Numerous commenters objected regarding the possibility that Comcast would favor its media affiliates in providing service. Comcast claims a benefit from its commitment to follow the original Open Internet rules.¹⁰⁷ This commitment on Comcast arises from the Comcast/NBC merger.¹⁰⁸ Comcast is already legally bound to follow the

¹⁰⁵ Joint Petition at 27.

¹⁰⁶ Id.

¹⁰⁷ Buffalo Trans. at 18.

¹⁰⁸ FCC Docket No. MB 10-56, Memorandum Opinion and Order, FCC 11-4 (2011), ¶ 94.

original Open Internet rules in its territory until 2018¹⁰⁹ – three and a half years from now.¹¹⁰ Adding TWC to the Comcast commitment should be expected from the merger: since Comcast is already required to honor it, it would make no sense to allow the post-merger TWC affiliates not to honor it. An incremental benefit would arguably ensue if the Petitioners had offered to extend the Open Internet condition in New York, say until at least 2020.¹¹¹

More generally, open access of competitors to utility networks, whether or not required by federal law or the FCC or other merger commitments, is a longstanding requirement of New York state utility law. Utilities have no legitimate expectation that they could prefer favored content, say from the NBC Universal affiliate of Comcast, to content from other sources. In New York, a utility company "represents the public when applying to [another utility 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."¹¹²

Thus, even if unshackled by federal law or other merger commitments, Comcast and Time Warner Cable have no valid expectation that they could give preference in handling internet content produced by them or their affiliates, or disadvantage other content providers serving New Yorkers, which are addressed by the FCC's Open

¹⁰⁹ <http://www.ibtimes.com/fcc-net-neutrality-rules-what-does-proposal-mean-comcast-twc-post-2018-1576011>.

¹¹⁰ But see Comptroller Comments at 3-4

¹¹¹ Given a possible challenge by Comcast, Verizon, et al. to any reasonable Open Internet order, uncertainty will dog this issue at the FCC until at least 2020. Thus the current benefit should have been extended in the Joint Petition in recognition of New York's law and expectations.

¹¹² *People ex rel. Western Union Telegraph Co. v Public Service Commission*, 230 N.Y. 95, 129 N.E. 220, 221 (1920).

Internet Rules. The principle of non-discriminatory service to all is the bulwark against narrow profit-maximizing actions of a utility that work against the public interest, universal service, and affordability. As stated by the New York Court of Appeals, “[i]t is well settled that all who deal with a public service corporation are to be treated alike and favor cannot be extended to one which is not offered to another....”¹¹³ While an ordinary company might have discretion in selecting its customers or setting prices, a utility is different: “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.”¹¹⁴ In light of New York’s longstanding expectation that utilities will offer their services to customers and to competitors without discrimination at reasonable rates, any “Open Internet” promises or commitments of Comcast should not be seen as significant incremental benefits flowing from the transaction. Rather, such commitments to non discrimination and open access simply are a recognition of what New York has long expected of utilities. as a public interest obligation arising from their use of the public streets and eminent domain powers to operate their businesses in the state.

D. Best aspects of voice products

Comcast claims that this merger will bring the “best aspects” of the companies’ services to each other’s customers.¹¹⁵ One of the current “best aspects” of Time Warner’s telephone service is that it is subject to reporting and service quality requirements, and includes reduced Lifeline rates for low income customers. That “best

¹¹³ *Id.*

¹¹⁴ *Penn. Gas Co. v. Public Serv. Comm'n*, 225 N.Y. 397, 402 (1919), *aff'd*, 252 U.S. 3 (1920).

¹¹⁵ *E.g.* Buffalo Trans. at 11.

aspect” should be extended to all Comcast voice customers in the State. Comcast currently has not acknowledged that its home phone service is a telecommunications service, it is not providing low income Lifeline service and is not reporting on its phone service quality, and it is not required to follow Commission billing, collection, shutoff, and other Telephone Fair Practices Act (“TFPA”) phone consumer protection.

E. Accessibility services¹¹⁶

Accessibility services are in the public interest, but Petitioners have not shown what portion of the benefit is actually incremental to the transaction, rather than part of what **any** civic-minded public utility would do as part of its normal public interest obligation to serve all members of the public.

F. Self-service options¹¹⁷

Similarly, self-service capabilities can be in the public interest, but it must be noted that they also save money for the utility, shift burdens to customers, and might lead to job losses in New York State, offsetting or diluting any positive benefit. Moreover, self-service functionality is a general cross industry trend in customer service, and the Joint Petition does not make a persuasive case that they are not a part of normal practices. Such self-service options do not seem incremental to the transaction, as the Commission requires.

¹¹⁶ E.g., id. at 12.

¹¹⁷ Joint Petition at 22; see also Buffalo Trans. at 13-14.

G. Service quality

Numerous public commenters decried the poor service quality of TWC and Comcast. Comcast notes its “commitment to improve customer service to consumers here in New York.”¹¹⁸ That rhetorical “commitment” needs to be transformed into specific actions, with accompanying metrics, reports and enforcement if needed. Such specifics are not proposed or contained in the Joint Petition.

Yet Comcast asserts, “We offer one- to two-hour service appointment windows, including evenings and weekends. And we are meeting these appointments, ninety-seven percent of the time.”¹¹⁹ And Comcast asserts, “[s]ince 2010, Comcast has improved its J.D. Power overall satisfaction score by more than any other video or broadband provider in the industry.”¹²⁰

This is trying to make a silk purse out of a sow’s ear: Comcast still ranks low in service quality in every region but the West,¹²¹ which makes the Joint Petition’s touting of service quality as a “vital part of Comcast’s culture”¹²² ring rather hollow. There is no specific quantification of how service would be improved or in which categories. Indeed, this does not seem to be an incremental benefit of the merger.¹²³ The key elements for a real commitment are adopting appropriate metrics, requiring public reporting of

¹¹⁸ Id at 14.

¹¹⁹ Id. at 13

¹²⁰ Id. at 14.

¹²¹ See

http://broadband.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=broadband&cdn=b2b&tm=63&f=00&su=p284.13.342.ip_&tt=2&bt=3&bts=3&zu=http%3A/www.prnewswire.com/news-releases/jd-power-and-associates-reports-customer-expectations-for-data-speed-drive-satisfaction-with-internet-service-providers-132689883.html.

¹²² Joint Petition at 30.

¹²³ See response to DPS-18.

performance, and enforcing failures to meet the metrics. Also, as previously discussed, there is no assessment in the petition of compliance with the statutory cable TV customer service requirements. Further discussion of service quality deficiencies is found in Part IV.D.

H. Business and competition

For its business customers, Comcast touts the benefit of having fewer companies to deal with, in areas where Comcast and Time Warner currently compete.¹²⁴ As mentioned above, another way to look at this is that having fewer companies to deal with means less competition for the business customers, which is not the goal of New York law or Commission policy. Staff notes that both Petitioners have considerable market power.¹²⁵

On the other hand, a claimed benefit of the transaction is expanded wholesale services to wireless carriers.¹²⁶ It should be remembered that both Time Warner and Comcast have cooperative marketing deals with Verizon Wireless,¹²⁷ so this claimed attribute of the merger also benefits the Petitioners.

I. Synergies

Staff in its Initial Comments does not seek a customer share of “revenue synergies.” In investors’ conferences, there have been discussions of “revenue

¹²⁴ Id. at 26; Buffalo Trans. at 15. The claimed “schools and libraries” benefit (Joint Petition at 26-27) really falls under this category.

¹²⁵ Staff Comments at 36-38.

¹²⁶ Buffalo Trans. at 16.

¹²⁷ See <http://www.comcast.com/verizon-wireless.html>;
<http://www.verizonwireless.com/wcms/consumer/home-services/tv-internet-homephone/twc.html>.

synergies” as a benefit of the proposed transaction, in addition to cost synergies.¹²⁸

The Joint Petition and the Comcast public statements are pretty much silent on the issue of “revenue synergies,” which have been said to outpace the \$1.5 Billion/year TWC cost reductions. Those “revenue synergies” in New York will apparently come from customers paying more, for added services, or maybe in higher rates. These have been ignored in Staff’s proposal for monetized Public Benefit Adjustments. A further discussion of cost synergies in these comments can be found in Part V.C, under the risks consumers face from this transaction.

J. Miscellaneous

Of the few comments in support of the merger, some praised Comcast for its community service and charitable endeavors. Without attempting to minimize Comcast’s commitments to community involvement, diversity, charity and energy efficiency,¹²⁹ these are things that a public-spirited public utility of this size would be expected to do. So these cannot be counted as incremental benefits of the merger.

K. Summary on Benefits

Despite the proponents’ claims, the benefits of the merger are unquantified, or may be illusory or of minimal incremental value to New York’s consumers. Mr. Santorelli was able to claim only “some evidence” supporting various benefits, but did not describe the “evidence.”¹³⁰ Such claims, coupled with a Joint Petition devoid of details of firm commitments, cannot carry the Petitioners’ burden of proof of benefits.

¹²⁸ See Wallsten, *supra* note 45 at 2.

¹²⁹ Joint Petition at 27, 28-29; Buffalo Trans. at 19-20.

¹³⁰ NYC Trans at 41, lines.3-5, 10-12, 19-21; at 42, lines 8-11.

But the transaction also carries significant risks, which we address below.

V. SUBSTANTIAL RISKS OF THE TRANSACTION THAT ARE NOT ADDRESSED IN THE JOINT PETITION

A. Risks to Universal Subscribership

New York State law requires all telephone service to be provided upon request without discrimination at just and reasonable rates.¹³¹ The Commission has adopted state universal service requirements, and matching Lifeline assistance benefits, by order.¹³²

In 2012, Time Warner sought to obtain support for low income Lifeline service, and sought status as an ETC pursuant to 47 U.S.C. § 214(e), which was granted by the PSC.¹³³ This meant that Time Warner's service to its home telephone customers became fully subject to New York state regulation, including the Telephone Fair Practices Act ("TFPA"),¹³⁴ and Time Warner Cable low-income phone customers

¹³¹ PSL § 91. In addition there are common law requirements to provide service to all, including competitors, at just and reasonable rates, without discrimination. *Tisner v. New York Edison Co.*, 228 N.Y. 156, 163-164 (1920).

¹³² See <http://stopthecap.com/wp-content/uploads/2013/08/PSC-Approval-of-TWC-Petition-Lifeline-3-13.pdf>.

¹³³ It does not appear that Time Warner has done so in any states other than California. See Decision Granting Request for Eligible Telecommunications Carrier Status, CPUC Docket No. A.13-10-019 (March 27, 2014). See also <http://www.usac.org/about/tools/fcc/filings/2014/Q3/LI01%20Low%20Income%20Support%20Projected%20by%20State%20by%20Study%20Area%20-%203Q2014.xlsx>. Bundling federally-supported Lifeline service with a non-discounted cable and/or broadband package is probably a reasonable customer retention strategy for a market like New York State.

¹³⁴ TFPA consists of regulations of the Commission which roughly paralleled the legislative adoption of a utility consumers' bill of rights in the Home Energy Fair Practices Act (HEFPA). The TFPA regulations are at 16 NYCRR Part 609.

became eligible for Lifeline rate assistance.¹³⁵ This public benefit which promotes affordable service to the poor and universal subscribership must be preserved.

In contrast with Time Warner Cable, Comcast has not requested ETC status regarding telephone service to its New York customers. As a consequence, Comcast telephone customers are not eligible for Lifeline assistance to make service affordable; their service may be shut off for nonpayment of TV bills, they may not be able to enter into affordable 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 Joint Petition makes a troubling reference to 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*)."¹³⁶ Thus, there is a veiled suggestion that Time Warner Cable might seek to do so. Federal law allows such relinquishment, following a process that requires State approval.¹³⁷ No wireline company has yet sought ETC relinquishment, however. Thus, the ETC provision of the Joint Petition offers no real benefit to Time Warner Cable customers, but it would perpetuate the absence of protection and affordability options for Comcast's phone customers, who now have fewer benefits, rights, and protections than Time Warner Cable customers.

If the Commission entertains granting permission for the merger, it should insist as a condition of any approval that Comcast file an application for ETC status, and

¹³⁵ 47 U.S.C. § 254(j).

¹³⁶ Joint Petition at 10.

¹³⁷ 47 U.S.C. § 214(e)(4).

obtain a commitment from TWCIS not to file any application to relinquish its ETC status.¹³⁸ The combined companies should redouble their efforts to enroll telephone Lifeline customers, with the goal being full enrollment of all eligible customers, and to address Linkup assistance. As a condition of any approval, the Commission should also require both Comcast and Time Warner subsidiaries in New York to file 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 the Commission can identify problems and trends affecting affordability and universal service.

In the end, a fundamental measure of universal service is the percentage of households who subscribe to telephone service. Yet as the availability of phone service from VOIP providers such as Time Warner Cable and Comcast grew dramatically in recent years, **telephone subscribership in New York has actually lagged**. In the most recent FCC report, New York stands third from the bottom in the ranking of the 50 states for telephone subscribership, above only Indiana and West Virginia.¹³⁹

The causes for this may include unaffordability, inadequate sign-up of eligible Lifeline customers, collection practices involving phone service termination for nonpayment of charges for other services, and generally inadequate consumer protection when VOIP phone service is provided by cable companies. The circumstances point to a need for rejection of the Comcast/TWC proposal without

¹³⁸ The responses to DPS-20 and 22 are coyly silent about Comcast's plans.

¹³⁹ <http://utilityproject.org/2014/05/29/fcc-telephone-subscribership-of-new-york-households-declines-again-in-2013-new-york-now-48th-of-50-states/>. The "subscribership" is for traditional wireline service, for wireless and for VoIP.

particular attention to affordability of phone service and steps to further universal service.¹⁴⁰

B. Risks to Rates

Staff has made no rate proposal to reduce or cap rates. Comcast and Time Warner have made no commitments regarding future rates for phone service, or, for that matter, for any of their other services. Indeed, there has been no determination by the Commission as to the reasonableness of TWC's or Comcast's existing rates for telephone service. Further, as discussed above, Comcast's potential "revenue synergies" of more than the \$1.5 Billion/year cost synergies may implicitly include increased rates.

There is little reason to believe that the pricing of Comcast/TWC telephone service will be reasonable or competitive. Instead, with the small number of wireline providers and a price cap set for the dominant incumbent providers, there is every reason to expect that current prices are at best an equilibrium that is the result of oligopolistic pricing practices. The Utility Project recently issued a multi-faceted paper that, in part, questioned the reasonableness of TWC prices for telephone service in relation to the cost of providing the service.¹⁴¹ It would be appropriate in this, as in other merger cases,¹⁴² for the Commission to require a filing with rate case quality data so that Time Warner and Comcast rates and charges for telephone service can be

¹⁴⁰ See <http://utilityproject.org/campaigns/comcast-time-warner-merger/universal-subscribership/>.

¹⁴¹ See It's All Interconnected, Part XIII. <http://utilityproject.org/2014/06/24/its-all-interconnected-oversight-and-action-is-required-to-protect-verizon-new-york-telephone-customers-and-expand-broadband-services/>.

¹⁴² See http://www.dps.ny.gov/06M0878_FactSheet_11-30-06.pdf.

assessed for reasonableness, and to establish a rate plan to protect New York customers after the merger, lest they be charged unreasonably more to recover Comcast's \$45.2 billion costs of acquisition.

Staff notes the possibility of increased video prices.¹⁴³ Staff also remarks on video package prices, noting that if Comcast adopted its present price structure, current Time Warner Cable customers would see increases for little additional value.¹⁴⁴ Likewise, Staff shows that if Comcast applied its broadband pricing structure to Time Warner territory, customers would lose the ability to subscribe to the current lower-priced standalone broadband offering.¹⁴⁵ This should not be allowed to happen.

C. Risks from Cost Synergies

Staff in its Initial Comments raises credible, dire warnings about the possible impact of the transaction on New York jobs, especially "customer-facing" jobs.¹⁴⁶ The Joint Petition does not mention the amount of expected merger cost synergies, and the few proponents seem to accept unquantified assertions without scrutiny. Comcast's public statements at the PSC forums also did not address the amount of savings anticipated through the takeover of Time Warner Cable. Why? This is not an insignificant matter.

A recent paper indicates an estimated annual \$1.5 billion nationwide in "merger synergies" may come from cost cutting at Time Warner Cable:

¹⁴³ Staff Comments at 29-30.

¹⁴⁴ Id. at 30-31.

¹⁴⁵ Id. at 31-32; see also response to DPS-2 (Comcast standalone broadband is \$49.95 per month).

¹⁴⁶ Staff Comments at 33-35; despite Comcast's protestations to the contrary. See response to DPS-17.

On the cost side of the ledger, Comcast estimates that the “synergies”—presumably through gains from scale efficiencies—will yield cost savings of \$1.5 billion a year in operating expenses by the third year and continuing into the future, plus short-term “capital expenditure efficiencies” of \$400 million, or about 10 percent of TWC’s operating expenses...¹⁴⁷

Is it a forgone conclusion, not worth discussing, that a major amount of these “cost savings” will likely come from reduced capital and operating expenditures by Time Warner Cable here in New York State, one of the largest components of the acquisition? With Time Warner Cable headquartered in New York, and its New York operations comprising a large part of the income and expenses, post-merger cost savings at Time Warner Cable under Comcast ownership could shift work and jobs to Comcast headquarters in Philadelphia and affect New York adversely. Under the Fortis merger standard,¹⁴⁸ a reasonable portion of anticipated merger synergy savings should benefit New York and consumers here. In any event, the impact on New York from reduced capital and operating expenditures must be calculated and offset against the value of claimed benefits.

D. Service Quality

As previously discussed, the national reputation of Comcast and Time Warner regarding service quality and customer satisfaction leaves much to be desired.¹⁴⁹ Information regarding their performance in New York should be made public and

¹⁴⁷ Wallsten, *supra* note 45, at 2.

¹⁴⁸ See footnote 35, *supra*.

¹⁴⁹ See footnote 121, *supra*. Although its own customers may not like Comcast, Comcast asserts it is first among the “World’s Most Admired” cable and satellite companies in Fortune’s survey. Joint Petition at 11.

scrutinized, especially under the new cable merger statute. Staff raises significant concerns about this issue.¹⁵⁰

In 2013, when Time Warner became an ETC and a 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. As previously discussed, however, the reports filed with the Commission, and the responses to staff inquiries regarding service quality performance, have all been accompanied by requests for trade secret protection, which have not yet been decided. As a consequence, as this Petition is reviewed, there is no adequate public record of Time Warner's (or Comcast's) service quality.

Data regarding the number of TWCIS "core" customers and service quality should be disclosed. The partial data that was provided in redacted reports suggest there are performance problems in the areas of new service hookups and timeliness of repairs after phone service outages.¹⁵¹ 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 required if the Commission approves the transaction. Staff seeks to prevent backsliding.¹⁵² But more aggressive measures, as discussed below, are needed to improve the combined companies' dismal service quality.

¹⁵⁰ Staff Comments at 27-29.

¹⁵¹ See NY Utility Project Blog, Time Warner Service Quality: Falling Short, July 29, 2014. Available at <http://utilityproject.org/2014/07/29/time-warner-service-quality-falling-short/>.

¹⁵² Staff Comments at 29.

E. Upstate New York provider competition is dwindling.

Proponents of the merger assert that there is significant competition that will not be harmed by the merger. But with Verizon halting its expansion of its fiber broadband network service (FIOS) in upstate New York,¹⁵³ there is a risk that, in the absence of meaningful competition, the Time Warner Cable and Comcast subsidiaries in New York will enjoy a *de facto* monopoly over broadband in their service territories. For example, the combined Comcast and Time Warner Cable will have market power and may not maximize the social utility of expanding high speed broadband that is in the public interest in New York,¹⁵⁴ or will not upgrade existing slow networks, or will refuse to build out their networks in less densely populated areas, even though profitable.¹⁵⁵ The Time Warner affiliates will have no fear that their Comcast affiliates will propose a better broadband and cable deployment program at franchise renewal time, because they will be the same entity. Rather, the holding company that owns the New York subsidiaries may harvest the fruits of market power in New York and deploy capital investments in

¹⁵³ See <http://stopthecap.com/2012/05/22/nine-upstate-ny-mayors-accuse-verizon-of-avoiding-urban-poor-in-fiber-upgrades/>; <http://blog.timesunion.com/business/verizon-ending-rollout-of-fios-skipping-many-in-capital-region/18933/>.

¹⁵⁴ As described by Sidak and Spulber,

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 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.

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

¹⁵⁵ See <http://www.troyrecord.com/general-news/20140512/no-silver-bullet-for-expanding-internet-in-nassau>.

other jurisdictions where higher returns may be possible or where there is more vibrant competition for customers.

F. Proponents have not Proposed Solutions to high Broadband Pricing in New York.

Market power enables providers to roll out their enhanced services to maximize their profits rather than social utility. Bundling broadband services enables Internet service providers (“ISPs”) to combine pricing among broadband, TV, telephone and, in some cases, mobile services. The ISPs know that in the current environment, many customers will need to subscribe to a broadband service, so ISPs like Comcast and Time Warner have little incentive to keep rates low.¹⁵⁶ According to BBC News, U.S. high-speed broadband service costs nearly three times as much as in the U.K. and France, and more than five times that of South Korea.¹⁵⁷ Since broadband service is the ISP’s highest-margin offering, which may exceed 90% gross profit,¹⁵⁸ in a bundled offering the ISP can afford to offer short term promotional rates for bundled services to gain market share without real competition over long term prices, which are usually similar.¹⁵⁹

Numerous commenters complained of slow or nonexistent broadband service. The Petitioners and merger proponents put forward no specifics to address this problem. The Joint Proposal offers no protection if the companies provide slower or

¹⁵⁶ See <http://stopthecap.com/2014/04/15/nobody-raises-rates-like-comcast-since-2009-up-68-for-basic-21-for-expanded-basic-cable/>.

¹⁵⁷ <http://www.bbc.com/news/magazine-24528383>.

¹⁵⁸ <http://stopthecap.com/2013/01/17/cable-industry-that-makes-90-margin-on-broadband-now-says-caps-are-about-fairness/>.

¹⁵⁹ See also <http://utilityproject.org/campaigns/comcast-time-warner-merger/broadband-pricing-is-high-in-u-s-including-new-york/>.

inferior service to less preferred customers in rural or economically depressed urban areas, contrary to the public interest. Were the Commission not to dismiss the Joint Petition and instead approve it with conditions, then a condition needs to be imposed to prevent such harms.

G. Competition

As mentioned above, Staff recognizes that both Comcast and Time Warner have substantial market power. Staff does not, however, “attempt to fully mitigate or alleviate this particular concern,” deferring to the greater resources and greater available time available to the FCC and to the Department of Justice.¹⁶⁰ This Commission has responsibilities to the public in New York State, pursuant to New York law.¹⁶¹ If the Commission were to simply make New York approval subject to any federal conditions, as Staff proposes,¹⁶² this would be an abdication of the Commission’s obligation to further the public interest and protect New York customers.

VI. THIS TRANSACTION SHOWS NO NET BENEFITS, SO SHOULD BE DISAPPROVED. APPROVAL WOULD REQUIRE THE ADOPTION OF SUBSTANTIAL PBAs.

The Staff comments state,

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.

The Utility Project agrees. For this reason, the Joint Petition should be dismissed.

¹⁶⁰ Staff Comments at 38.

¹⁶¹ See Parts II and III, *supra*.

¹⁶² Staff Comments at 38-39.

But Staff suggests instead of dismissal that the transaction might be approved subject to Commission-imposed 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.¹⁶³

The Commission has stated,

Once we have gauged the net benefits by comparing the transaction's intrinsic benefits versus its detriments and risks, we can assess whether the achievement of net positive benefits requires that the intrinsic benefits be supplemented with monetized benefits (sometimes described as "positive benefit adjustments" or PBAs). Then, if necessary, we establish a quantified PBA requirement, "as an exercise of informed judgment because there is no mathematical formula on which to base such a decision."¹⁶⁴

As shown above, the Joint Petition is defective and should be dismissed, and the detriments and risks of this transaction greatly outweigh the inadequately-supported claimed "intrinsic benefits." Dismissal of the Joint Petition, without prejudice for refile and renoting of a new petition for public comment would be the appropriate resolution. This is appropriate under the circumstances, where there is no evidentiary hearing or

¹⁶³ Staff Comments at 39.

¹⁶⁴ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A55ECCE9-C3B2-4076-A934-4F65AA7E79D1}>.

other process for developing or supplementing the record to address deficiencies in the Joint Petition.¹⁶⁵

If the Commission does not dismiss the Joint Proposal, we assume that it may commence settlement negotiations to resolve differences among the active parties. As previously pointed out, there is no active party who is an independent well resourced representative of ordinary or low-income consumers who would be involved in development of an alternative to the transaction as proposed in the Joint Petition. If alternative proposals are considered, alternative proposals should not be kept secret and should be made public, with further opportunities for public comment.¹⁶⁶

If it does not dismiss the Joint Petition as we urge, and instead approves the merger subject to conditions, the Commission should address the deficiencies we have noted, and should also adopt a level of PBAs that produce the statutorily-required net benefits from the transaction. Staff has assessed \$303 million as what's needed for this transaction to have a positive net benefit.¹⁶⁷ This is based on the amount of claimed cost savings.¹⁶⁸ Staff does not explain why it did not include capital expenditure

¹⁶⁵ Cf., *Matter of New York Tel. Co. v Public Serv. Comm. of State of N. Y.*, 59 AD2d 17, 20, mot for lv to app den 42 N.Y. 2d 810, where the Commission dismissed a major rate case due to deficiencies in the filing, and the Court reversed, saying that “the public has a vital interest not only in rates that are not excessive, but also in rates that enable a utility to provide adequate service and, consequently, even a proposed rate increase should not be denied without an opportunity for the public to be heard....” *Id.* In this case, there is no pending rate change, there is no claim that merger is necessary, and there is no hearing scheduled to further develop the record.

¹⁶⁶ Robert Freeman, Executive Director of the New York Committee on Open Government, has stated that utility case settlement proposals and documents exchanged among parties, deemed “confidential” under PSC regulations, are not actually made confidential by statute, and indicated that they may be available to the public under the Freedom of Information Law (“FOIL”). FOIL-AO-f11466, available at <http://docs.dos.ny.gov/coog/ftext/f11466.htm>.

11466

¹⁶⁷ Staff Comments at 18.

¹⁶⁸ *Id.* at 17.

efficiencies,¹⁶⁹ which would increase the needed PBAs by more than 25%. Also, Staff does not explain why it does not consider the \$400 million reduction in TWC capital expenses or propose a share of the reported “revenue synergies” which may outweigh the \$1.5 Billion/year cost synergies.

Further, Staff calculates its PBAs at \$145 million, as discussed in the next Part, leaving \$155 million to be determined.. The Utility Project proposes other conditions in the next Part that could close the larger-than-\$300 million gap for this transaction we see. Staff specifically stated that its proposed conditions should be “**part of** any Commission approval of the proposed transaction....”¹⁷⁰

Staff proposes a PBA in the amount of \$50 million for infrastructure buildout to unserved and underserved areas.¹⁷¹ The Utility Project supports this PBA. We note, however, that given Staff’s ultimate conclusion that an additional \$155 million in PBAs is needed for approval of this transaction,¹⁷² there should be room for upward movement of the \$50 million proposed by Staff.

Staff states,

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.¹⁷³

¹⁶⁹ Id. at 17, footnote 20.

¹⁷⁰ Staff Comments at 39 (emphasis added).

¹⁷¹ Id. at 46.

¹⁷² Id. at 48.

¹⁷³ Id.

As shown in Part V, the Utility Project assesses the detriments more seriously (Staff has six categories of detriment; Utility Project adds one). And despite adding two categories of claimed benefit (see Part IV) to Staff's eight, we find less true benefit than Staff did.

VII. IN ANY APPROVAL OF THE TRANSFER, COMMITMENTS, MONETIZED WHERE POSSIBLE, ARE NEEDED TO ADDRESS THE RISKS AND ENSURE MEANINGFUL POSITIVE BENEFITS FLOW FROM THE TRANSACTION.

A. Proposals for this proceeding

As discussed, the paucity of information in the Joint Petition and public case file does not support approval of the transaction. If the Joint Petition is not dismissed, the Petitioners should be required to supplement it in the areas of deficiencies noted by Staff, the Utility Project, UIU and others. To make that possible, data regarding the number of TWCIS "core" customers and service quality should be made public. The burden should be placed upon TWCIS to go beyond its blanket invocation of trade secrecy as to the totality of its phone service quality reports. Time Warner's performance on New York telephone service quality should be made public. There should be scrutiny of TWC's performance since Case No. 13-C-0193 regarding shutoffs for collection purposes, and of Comcast's billing, collection, and shutoff practices to assess whether public interest values of universal service and customer protection are being advanced. Generally, as stated above, the circumstances of this transaction point to a need for careful scrutiny, with particular attention to affordability of phone service and steps to further universal service. The Petitioners could also be required, in the Commission's discretion, to demonstrate full compliance with its other rules, such as

those governing phone service, or, in the alternative, to put forward a plan for achieving compliance.

Further, as suggested in numerous contexts herein, the Commission should require the filing of rate-case-quality information before it judges this merger. That will likely extend the proceeding's timeline beyond October 2, 2104, but there can be no doubt that this transaction in New York is far more than just a transfer of cable systems.¹⁷⁴ In a triple play, it involves merging telephone and broadband systems, in addition to cable video.

B. Conditions for the transaction

As discussed above, Staff has monetized \$145 million in PBAs, with another \$155 million needing to be found. Crucially, as discussed below, a number of Staff's proposed conditions are not monetized. This does not mean they should be rejected; rather those conditions, and those proposed here, should be considered in the Commission's "exercise of informed judgment."¹⁷⁵

1. Open all services to all customers

As discussed in Part I, there has been no commitment here regarding future rates, services, service enhancement and universal service for telephone and broadband.¹⁷⁶ Indeed, there has been no determination by the Commission as to the reasonableness of Time Warner's or Comcast's rates for telephone or any other

¹⁷⁴ See 47 U.S.C. § 537; see also Staff Comments at 38.

¹⁷⁵ Fortis, *supra* footnote 26.

¹⁷⁶ See responses to DPS-13, 14.

service.¹⁷⁷ One condition for rates and services (and service enhancement) could be that the many customers in the Time Warner area and the customers in the Comcast area have the ability to choose from either company's best options available over comparable infrastructure. This would address Staff's concern over video package prices,¹⁷⁸ as well as Staff's concern about customers losing the ability to subscribe to the current Time Warner lower-priced standalone broadband offering.¹⁷⁹ Rate reductions or perhaps a simple rate freeze, depending on information provided, could also benefit consumers.

2. Universal service

As to universal service, and also discussed in Part I, the Utility Project recommends adoption of enforceable conditions to expand availability and reliability of affordable, high speed broadband to all New Yorkers in areas served by Comcast and Time Warner, and recommends that Comcast be recognized by PSC as a telecommunications service provider like Time Warner, and that both providers' service quality be monitored.

Staff proposes that Comcast offer "a more robust broadband," as a more affordable choice.¹⁸⁰ The Utility Project supports this condition, which should have explicit targets; It would be difficult to verify performance under Staff's non-specific proposal.

¹⁷⁷ See Part V.B.

¹⁷⁸ Id. at 30-31.

¹⁷⁹ Id. at 31-32.

¹⁸⁰ Id. at 45.

Staff's \$50 million infrastructure investment program for unserved and underserved areas should be considered here. The Utility Project supports at least that large a program. Staff states, "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."¹⁸¹ This makes sense, and other conditions should be examined to see if they would be aided by similar company-filed proposals.

3. Internet Essentials

As discussed in Part IV.C, Internet Essentials needs to be further improved to ensure its benefits to New York consumers, and a similar improved program should be required for Time Warner territory.¹⁸² Specifically, 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. Staff supports this.¹⁸³ Also, the Commission should seek rate plan commitments to ensure that Internet Essentials endures after the transaction. The free six month service should be extended to all Internet Essentials customers. Staff would also put a higher-speed "Everyday Low Price" service into effect.¹⁸⁴ The Utility Project supports this

¹⁸¹ Id. at 47.

¹⁸² See Comptroller Comments at [2].

¹⁸³ Staff Comments at 43.

¹⁸⁴ Id. at 45.

enhancement. Staff values this at \$45 million over five years, based on 150,000 customers,¹⁸⁵ or \$9 million per year.

Staff proposes that Comcast work with the New York “I Link” program, and otherwise, to promote the Essentials programs.¹⁸⁶ The Utility Project supports this condition, but notes that it has not been monetized.

4. ETC status/Lifeline

The Commission should insist as a condition of approval that Comcast file an application for ETC status, and obtain a commitment from TWCIS not to file any application to relinquish its ETC status. The Commission should also require the combined companies to redouble their efforts to enroll Lifeline customers, with the goal being full enrollment of all eligible customers with a plan be established to accomplish the goal.¹⁸⁷

5. Reporting

The Commission should require reports from Comcast/Time Warner 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.¹⁸⁸

¹⁸⁵ Id.

¹⁸⁶ Id. at 44-45.

¹⁸⁷ Lifeline, which is supported from federal funds, is revenue-neutral for the companies, other than marketing costs, which surely can be found as part of the \$155 million-plus needed PBAs.

¹⁸⁸ See also Comptroller Comments at [3]: “It is critical that the PSC not only press Comcast to significantly expand the reach of Internet Essentials, but also that it engage in appropriate oversight to ensure that the company is meeting its commitments to low-income residents of the Empire State.”

As discussed above, the reports and Time Warner's performance on New York telephone service quality should be made public. Steps to correct any deficiencies should be adopted if the Commission approves the transaction.¹⁸⁹ Since Comcast will also be an ETC, even though smaller, the reports and repairs for Comcast should also be public.

6. Discrimination among customers

As noted above, the Joint Proposal offers no protection if the companies provide slower or inferior service to less preferred customers in rural or economically depressed urban areas, contrary to the public interest. A condition needs to be imposed to prevent such harms. Staff's proposed "J.D. Powers" standard will not likely catch those harms.

7. Service quality

As discussed in Part III.A, the Petitioners stated, "As a recognized industry leader with solid financial capabilities and technological expertise, Comcast will deliver better, more reliable services that improve the quality of life of New Yorkers."¹⁹⁰ The key things for the Commission to do to ensure this commitment is met are adopting appropriate metrics, requiring public reporting of performance, and enforcing failures to meet the metrics.¹⁹¹

Staff has proposed a metric – performance on a New York-specific JD Power survey for cable and broadband service (which would be public),¹⁹² and a penalty for nonperformance -- \$5 million to a "public benefit fund" (doubled if missed for two

¹⁸⁹ See Part V.D.

¹⁹⁰ Buffalo Trans. at 9.

¹⁹¹ See Part III.F.

¹⁹² Staff Comments at 41.

consecutive years).¹⁹³ The metric is too general, and should be backed up by detailed reporting. The value Staff places on nonperformance is too small, for companies this large, in one of their largest markets. This is one area where Comcast should be required to file a plan for performance.

Further, Staff asserts that, per a 2006 PSC ruling, telecom in New York does not need customer service improvements.¹⁹⁴ It simply makes no sense in 2014 to have only cable and broadband service improvement conditions, especially given the level of bundling and the current duopoly (or oligopoly) environment. Improvements are needed across the board.

Staff would 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,” and requires a report.¹⁹⁵ The report must be public. And is Time Warner’s current performance the proper standard to measure the merged company against? Only if Comcast’s New York service quality is significantly lower than Time Warner’s is this a net benefit. The Utility Project urges the Commission to insist on a higher standard.

Staff concludes that service quality improvements will require investment,¹⁹⁶ but does not suggest a dollar amount. That investment will be part of the expected synergies, and, in the end, higher service quality in this large New York market will, of course, benefit Comcast’s culture.

¹⁹³ Id.

¹⁹⁴ Id. at 40, footnote 53.

¹⁹⁵ Id. at 42.

¹⁹⁶ Id. at 41.

8. Protecting New York from synergies

The Joint Petition fails to address the amount and sources of merger synergies, and fails to propose measures to protect New York from diminished expenditures for capital improvements, expansion, and system maintenance after a transfer of ownership.

Staff proposes a condition that there be no “disproportionate” decline in New York jobs.¹⁹⁷ That would not be a “net benefit” from this transaction; it would only be damage mitigation. A net benefit would be a condition for **increased** New York employment. Staff would also make a 90-day notice of New York call center closings a condition.¹⁹⁸ Staff recognizes that this is not a net benefit.¹⁹⁹ A condition not to close New York call centers would be of benefit.

On the other hand, Staff proposes a workforce development effort, worth \$1 million.²⁰⁰ The Utility Project supports this proposal, but again wonders why a larger project budget was not proposed.

Only with conditions such as these could the Commission conceivably approve this merger, given the lack of benefits shown and the transaction’s significant risks.

¹⁹⁷ Staff Comments at 42.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id. at 43.

VII. CONCLUSION

The Utility Project concludes, based on the public record developed thus far in this case, that Petitioners have not sustained their burden of proof to demonstrate that significant net positive benefits to New York flow from the transfer of Time Warner Cable to Comcast Corporation so as to warrant a finding that the transaction is in the public interest. Instead, scrutiny of the Joint Petition and the public record reveals that the risks of the transaction are not identified or adequately addressed, the putative benefits are exaggerated, insufficiently quantified, or are not shown to be a necessary or demonstrable consequence flowing directly from the proposed transaction. Further, the transaction does not address important public interest issues such as rates, affordability of service, consumer protection, sagging phone subscribership, expansion and enhancement of broadband service, service quality, monetized public benefit adjustments for New York consumers, and competition. Based upon the current state of the public record, the Utility Project recommends rejection of the merger application.

If the Commission does not dismiss the Joint Petition, it should require an amended or supplemental Petition to address areas of deficiencies and to satisfy the burden of showing significant net positive benefits. Then, any conditional approval of the merger should, at a minimum, address the matters discussed above regarding rates and rate plans, enforceable conditions to expand availability and reliability of affordable, high speed broadband to all New Yorkers in areas served by Comcast and Time Warner, and include commitments for improving telephone subscribership and telephone customer protection, monetized public benefit adjustments going beyond those proposed by Staff, implement recommendations of UIU and the State Broadband

Office, require open access, and assure investments and jobs retention in New York. The Utility Project specifically recommends that Comcast be recognized by PSC as a telecommunications service provider like Time Warner Cable, and that both providers' telephone service quality and protection of customer rights under the Telephone Fair Practices Act be more closely monitored.

If the Commission approves this transaction, it must adopt quantifiable, binding and enforceable conditions to ensure compliance with those conditions. It may be, as Mr. Santorelli suggested, that "mergers are just not the best way to make lasting policy."²⁰¹ But given the size and scope of the Petitioners' operations in New York State, and the risks of this transaction to New York and its consumers, the Commission must ensure in any approval that a merger would provide lasting net benefits to New Yorkers, congruent with broader, lasting state and Commission policies.

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Respectfully submitted



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²⁰¹ NYC Trans at 40.