

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).

A. 15-07-009
(Filed July 2, 2015)

**APPLICATION OF CHARTER COMMUNICATIONS, INC., CHARTER
FIBERLINK CA-CCO, LLC (U6878C), TIME WARNER CABLE INFORMATION
SERVICES (CALIFORNIA), LLC (U6874C), AND BRIGHT HOUSE NETWORKS
INFORMATION SERVICES (CALIFORNIA), LLC (U6955C)
FOR REHEARING OF D.16-12-070**

James W. McTarnaghan
PERKINS COIE LLP
505 Howard Street
Suite 1000
San Francisco, CA 94105
Telephone: (415) 344-7007
Facsimile: (415) 344-7207
Email: jmctarnaghan@perkinscoie.com

Luke C. Platzer
Bradley P. Humphreys
Elliot S. Tarloff
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 661-4813
Email: lplatzer@jenner.com

Attorneys for Charter Communications, Inc., et. al.

Date: December 29, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. SPECIFICATION OF ERRORS IN D.16-12-070..... 3

II. ARGUMENT 3

 A. THE REASONING FOR IMPOSING NEW CONDITIONS IN THE
 DECISION CONSTITUTES AN ABUSE OF DISCRETION. 3

 1. ORA and CforAT Fully Litigated the Issues, and D.16-05-007’s
 Omission of Various Additional Conditions Was Purposeful. 4

 2. ORA and CforAT Subsequently Failed to Demonstrate Legal Error
 Justifying Modification of D.16-05-007’s Carefully Balanced and
 Purposeful Decision. 8

 3. Because ORA/CforAT’s Rehearing Request was Unsupported, the
 Decision’s Modification of D.16-05-007 Constitutes Legal Error
 and Should Be Vacated. 8

 B. THE NEW CONDITIONS ARE CONTRARY TO LAW..... 10

 1. The Commission Erred by Imposing Conditions That Do Not
 Mitigate Transaction-Specific Harm and Are Unsupported by Any
 Factual Findings..... 10

 2. The Purportedly “Voluntary” Nature of the Commitments Cannot
 Support Their Imposition Seven Months After-the-Fact and
 Separate from the Package in Which They Were Offered..... 13

 C. IMPOSING NEW CONDITIONS LONG AFTER CLOSING OF THE
 TRANSACTION VIOLATES DUE PROCESS. 16

III. CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

In re Candelario, 3 Cal. 3d 702 (1970) 9

In re Marriage of Falcone, 164 Cal. App. 4th 814 (2008) 8

Miranda v. City of Cornelius, 429 F.3d 858 (9th Cir. 2005) 17

Southern California Edison Co. v. Public Utilities Commission, 140 Cal. App. 4th 1085 (2006) 9

Utility Consumers’ Action Network v. Public Utilities Commission, 187 Cal. App. 4th 688 (2010) 8

Statutes

Cal. Pub. Util. Code § 854(c) 10, 11, 12, 13, 15

Cal. Pub. Util. Code § 1731(a) 2

Cal. Pub. Util. Code § 1732 2

Cal. Pub. Util. Code § 1757(a) 11

42 U.S.C. § 1983 2

Administrative Rulings

In re Application of Neighbors for Smart Rail for Rehearing of Resolution of SX-100 and for Oral Argument, A.11-12-010, Decision Following Rehearing Affirming Resolution SX-100 and Granting Authorization to Expo Authority to Construct 16 At-Grade and 11 Grade-Separated Highway Light Rail Crossings as Part of Phase 2 of the Exposition Corridor Light Rail Transit Project, D.13-08-005 (Aug. 15, 2013) 17

In re Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, A.06-08-010, Order Modifying Decision 08-12-058 and Denying Rehearing of Decision, as Modified, D.09-07-024 (July 9, 2009) 8

Investigation of the Commission’s Own Motion into the Operations and Practices of Southern California Edison Co., Cellco P’Ship LLP d/b/a/ Verizon Wireless, Sprint Communications Co LP, Next G Networks of California, Inc. and Pacific Bell Telephone Co. d/b/a/ AT&T California and AT&T Mobility LLC, Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007, I.09-01-018, Decision Conditionally Approving the Southern California Edison Company Settlement Agreement Regarding the Malibu Canyon Fire, D.13-09-028 (Sept. 19, 2013) 17

TABLE OF AUTHORITIES

(continued)

	<u>Page(s)</u>
<i>In re Joint Application of Frontier Communications Corp., Frontier Communications of America, Inc. (U-5429C), Verizon California, Inc. (U-1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications, A.15-03-005, Decision Granting Application Subject to Conditions and Approving Related Settlements, D.15-12-005 (Dec. 3, 2015)</i>	10
<i>In re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC) for SBC to Control Pacific Bell (U 1001 C), Which Will Occur Indirectly as a Result of Telesis Merger With a Wholly Owned Subsidiary of SBC, SBC Communications (NV) Inc., A.96-04-038, Opinion, D.97-03-067 (Mar. 31, 1997)</i>	10
<i>In re Joint Application of SBC Communications, Inc. (“SBC”) and AT&T Corp. Inc. (“AT&T”) for Authorization to Transfer Control of AT&T’s Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a [sic] AT&T’s Merger with a Wholly Owned Subsidiary of SBC, Tau Merger Sub Corp., A.05-02-027, Opinion Approving Application To Transfer Control, D.05-11-028 (Nov. 18, 2005)</i>	11
<i>In re Southern California Gas Co., A.96-11-048, Opinion on Negotiated Contract Under Southern California Gas Company’s Demand-Side Management Bidding Pilot, D.97-03-068, 71 CPUC 2d 422 (Mar. 31, 1997)</i>	17
<i>Major Rail Consolidation Procedures, Final Rules, Fed. Carr. Cas. P 38348, 2001 WL 648944 (S.T.B. 2001)</i>	18
<i>Opinion re Application of Alexander F. Eagle to Rescind Decision 82-05-007, 25 CPUC 2d 77 (July 29, 1987)</i>	18
<u>Other Authorities</u>	
California Commission Rules of Practice and Procedure Rule 16.1(c).....	2, 3
California Commission Rules of Practice and Procedure Rule 12.4	17
Surface Transportation Board Denies Request to Expand the ‘Geismar Condition’ Imposed by the Board in Its 1999 Approval of the ‘Canadian National-Illinois Central’ Railroad Merger, <i>News Release</i> (Aug. 27, 2002).....	18

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).

A. 15-07-009
(Filed July 2, 2015)

**APPLICATION OF CHARTER COMMUNICATIONS, INC., CHARTER
FIBERLINK CA-CCO, LLC (U6878C), TIME WARNER CABLE INFORMATION
SERVICES (CALIFORNIA), LLC (U6874C), AND BRIGHT HOUSE NETWORKS
INFORMATION SERVICES (CALIFORNIA), LLC (U6955C)
FOR REHEARING OF D.16-12-070**

Pursuant to Article 2 of the California Public Utilities (“PU”) Code (Sections 1731 *et. seq.*) and Rules 16.1 and 16.2 of the California Public Utilities Commission’s Rules of Practice and Procedure, Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Information Services (California), LLC (U6874C); and Bright House Networks Information Services (California), LLC (U6955C) (hereafter referred to collectively as “Charter”) hereby apply for rehearing of D.16-12-070, issued on December 19, 2016.¹ Pursuant to Section 1731(b), the last day on which an application for rehearing (“Application”) may be filed is December 29, 2016. This Application is timely filed.

¹ D.16-12-070, *Order Modifying Decision (D.) 16-05-007 and Denying Rehearing of Decision, as Modified* (Dec. 19, 2016) (“D.16-12-070” or “the Decision”).

As detailed further below, the Decision unreasonably imposes seven new conditions upon Charter in addition to the numerous conditions imposed in D.16-05-007, issued on May 16, 2016, when the Commission granted Charter’s application to transfer control.² In doing so, the Decision relies exclusively on unsupported assertions by the Office of Ratepayer Advocates (“ORA”) and the Center for Accessible Technology (“CforAT”), in their Joint Application for Rehearing, that the Commission had “inadvertently omitted” these conditions from D.16-05-007. However, the Decision ignores: (a) that those same parties had previously sought the inclusion of these conditions on several occasions, and (b) that their arguments were specifically rejected by the Commission in such decision. The Decision’s revision, issued seven months after D.16-05-007, constitutes legal error that now should be corrected in a subsequent decision on rehearing.

The purpose of an application for rehearing “is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”³ Under California law, seeking rehearing is also a prerequisite to judicial review of the Decision through a writ petition to a court of appeal.⁴ This Application identifies substantial legal errors in the Decision and requests that the Commission remedy such errors. Specifically, the Decision significantly exceeds the Commission’s statutory authority and violates fundamental principles of constitutional due process and administrative law, and contains several legal errors that compel rectification on rehearing, as set forth in Part II below.

Accordingly, Charter seeks rehearing to raise its fundamental legal dispute before the Commission and to preserve its rights to judicial review of the Decision.⁵ As detailed herein, Charter asserts that the portions of D.16-12-070 that impose new conditions should be vacated.

² D.16-05-007, *Decision Granting Application to Transfer Control Subject to Conditions* (May 16, 2016) (“D.16-05-007”).

³ Commission Rules of Practice and Procedure (“Rules” or “Rule”), Rule 16.1(c).

⁴ Public Utilities Code §§ 1731(a), 1732.

⁵ Charter also reserves the right to assert any federal claims resulting from the Commission’s Decision in federal court, including, but not limited to, claims arising under 42 U.S.C. § 1983 and the Supremacy Clause of the United States Constitution.

I. SPECIFICATION OF ERRORS IN D.16-12-070.

Consistent with Rule 16.1(c), Charter demonstrates that the portions of the Decision imposing new conditions on the transfer of control should be vacated, due to the following errors:

1. The Commission's conclusion that the seven new conditions had been "inadvertently" omitted from D.16-05-007, where the inclusion or exclusion of such conditions had previously been extensively litigated by the parties and the Commission's decision not to incorporate them had been purposeful and comported with the reasoning set forth in D.16-05-007, constitutes an abuse of discretion;

2. By including the seven new conditions in the Decision without reaching any findings that might support imposition of such conditions under the operative statutory framework, either in D.16-05-007 or in the Decision, the Commission has not proceeded in a manner required by law;

3. By imposing seven new conditions long after the Transaction had closed, the Commission deprived Charter of any meaningful notice that completing the change of control for which it sought and obtained authorization in D.16-05-007 would operate as an acceptance of such new conditions in addition to those set forth in D.16-05-007 itself, thereby depriving Charter of its constitutional right to due process.

II. ARGUMENT

A. THE REASONING FOR IMPOSING NEW CONDITIONS IN THE DECISION CONSTITUTES AN ABUSE OF DISCRETION.

The purpose of a rehearing application and a decision on rehearing is to correct legal errors in a Commission decision.⁶ Here, however, ORA and CforAT's rehearing application, which supplied the basis for the Commissions' modification of D.16-05-007 in the Decision, did not allege any legal error for the Commission to correct. Instead, ORA/CforAT reframed issues that had already been fully litigated and rejected by the Commission as "inadvertent, but significant, errors in the omission of specified conditions associated with the approval of the

⁶ Rule 16.1(c) of CPUC Rules of Practice and Procedure.

transfer of control.”⁷ ORA/CforAT’s sole support for this new characterization is their self-acknowledged “belief” that the Commission must have meant, but failed, to include seven separate conditions in D.16-05-007 for which ORA and CforAT had previously advocated.⁸ Such “belief” is premised on one paragraph in D.16-05-007 stating:

Many of the conditions proposed by protestors are reflected in the promises made and assurances given by Joint Applicants. To the extent that those promises and assurances are responsive to the concerns of the protestors, we will reformulate them as explicit conditions of approval. In addition we will impose conditions that are reasonably inferred from the promises and assurances.⁹

The cited paragraph does not, literally, state that the Commission was going to reformulate *all* of the “promises and assurances” given by the Joint Applicants as explicit conditions of approval. To the contrary, it acknowledges that the Commission was adopting them only in part. Had the PD and the Decision intended to adopt and mandate all of them, it would have simply stated: “We adopt all of the conditions listed above.” As such, the only proper response on rehearing was for the Commission to deny ORA/CforAT’s allegation as unsupported by any evidence, as the allegation reflected mere speculation that could not be squared with the text of D.16-05-007, the text of the PD, or the history of this proceeding prior to that point. Instead, ignoring concrete evidence that the Commission had already considered and rejected ORA/CforAT’s positions, the Decision erroneously adopts ORA/CforAT’s legal fiction and imposes the previously rejected conditions. By doing so, the Commission has not proceeded in a manner required law, has made a decision not supported by record evidence, and has abused its discretion. The Commission should correct such error by vacating the portion of the Decision that imposes the additional conditions.

1. ORA and CforAT Fully Litigated the Issues, and D.16-05-007’s Omission of Various Additional Conditions Was Purposeful.

ORA/CforAT’s claim that D.16-05-007 contains an “inadvertent omission” of numerous conditions for which they had previously advocated is simply not supported by the record in this proceeding, which clearly demonstrates that the omission of those conditions from D.16-05-007

⁷ May 26, 2106 Joint Application for Rehearing of Decision 16-05-007 at 2.

⁸ *Id.*

⁹ *Id.*, p. 4, quoting from D.16-05-007, at 62.

was purposeful. Far from being overlooked, these conditions represent some of the most heavily litigated issues in this proceeding.

On April 12, 2016, Administrative Law Judge (“ALJ”) Bemserderfer issued his Proposed Decision (the “PD”) addressing the proposed transfer of control. In Section 3.1.9, the PD addressed the issue whether mitigation measures should be imposed, and it divided potential conditions into two distinct groups: (a) “those to which Applicants have agreed” via Memoranda of Understanding (“MOUs”) with various parties; and (b) “those raised by protestors to which Applicants have not agreed.”¹⁰ With regard to the proposed conditions not arising out of MOUs, the PD enumerated all of the conditions proposed by various protestors, including ORA and CforAT. At the end of that section, the PD included the language quoted above and made it clear that the PD was making choices to include some, but not all of the conditions listed before the quote and noting that additional conditions were being added as well.¹¹ Ordering Paragraph 2 of the PD specifically indicated that “[t]he approval [of the transfer of control] herein is subject to the following conditions,” and then listed fourteen separate, selected conditions—which did not include the additional conditions sought by ORA and CforAT and now imposed by the Decision.¹²

In the period between the PD and the Commission’s vote on May 12, 2016, ORA and CforAT fully and relentlessly advocated their positions in opposition to the PD, as follows:

- On May 2, 2016, ORA filed Opening Comments consisting of fifteen pages of text and an Appendix A containing “ORA’s Proposed Revisions to Proposed Decision -- Findings of Fact, Conclusion of Law and Ordering Paragraph.” As the primary argument in these comments, ORA advocated that the PD should adopt all of Charter’s voluntary commitments made in Charter’s reply brief with ORA’s modifications.¹³ ORA specifically challenged the PD’s statement regarding reformulation of conditions in the PD and asserted that “the PD errs in omitting to include each of the several voluntary commitments made in this proceeding, and make those commitments explicit conditions

¹⁰ PD at 56.

¹¹ *Id.* at 62.

¹² *Id.* at 68-70.

¹³ May 2, 2016 ORA Opening Comments on the PD at 1-5.

of approval...”¹⁴ ORA’s Appendix A proposed the inclusion of specific Ordering Paragraphs, including those that have now been added in the Decision.¹⁵

- On May 2, 2016, CforAT filed Opening Comments on the PD and alleged that the PD erred by not imposing additional conditions that focus on the needs of persons with disabilities. CforAT specifically proposed four conditions in the text of its comments and included specific language in Appendix A to its comments.¹⁶
- On May 3, 2016, CforAT counsel Melissa Kasnitz engaged in *ex parte* communications with Commissioner Florio’s advisor and provided a copy of an *ex parte* written communication with President Picker on April 19, 2016.¹⁷ In these *ex parte* contacts, CforAT advocated for inclusion of additional conditions in the PD. Ms. Kasnitz thereafter engaged in similar *ex parte* advocacy with Commissioner Peterman’s advisor on May 4, 2016, Commissioner Randolph’s advisor also on May 4, 2016 and with President Picker’s advisor on May 5, 2016.¹⁸ In each of these contacts, according to the Notices filed and on the record in this proceeding, CforAT specifically pursued conditions related to persons with disabilities similar or identical to those omitted from D.16-05-007 but now imposed for the first time by the Decision.
- ORA also engaged in comprehensive *ex parte* advocacy for the positions stated in its Opening Comments with noticed contacts on April 25, 2016 with Commissioner Florio’s advisor, on April 29, 2016 with Commissioner Randolph’s advisor, on May 3, 2016 with President Picker and his advisor, and on May 9, 2016 with Commissioner Sandoval and her advisor.¹⁹ In each of these communications, ORA presented its position that the PD erred by omitting conditions that ORA believed to be necessary and provided copies of Appendix A to its Opening Comments, which proposed specific language for such requested conditions.

¹⁴ *Id.* at 2.

¹⁵ *Cf.* ORA Appendix A to its Opening Comments, Proposed Ordering Paragraphs 2.q, r, and s to new Ordering Paragraphs 2.r., s and t in the Decision.

¹⁶ May 2, 2016 CforAT Opening Comments on the PD, pp. 2-3, Appendix A. Similar to ORA’s proposed conditions, CforAT’s proposed conditions parallel the new conditions added as Ordering Paragraphs 2.u, v, w and x.

¹⁷ Notice of Ex Parte Communication filed by CforAT on May 3, 2016; *see also* Notice of Ex Parte Communication filed by CforAT on April 19, 2016, reporting on the written *ex parte* contact made directly to President Picker.

¹⁸ Notice of Ex Parte Communication filed by CforAT on May 6, 2016.

¹⁹ Notices of Ex Parte Communications by the Office of Ratepayer Advocates, filed on April 28, 2016, May 4, 2016, May 6, 2016 and May 11, 2016. ORA continued to have *ex parte* contacts on the issue even after D.16-05-007 was issued, including a May 25, 2016 “preview” of its Application for Rehearing and the “inadvertent omission” theory. Notice of Ex Parte Communication by the Office of Ratepayer Advocates, filed on May 27, 2016.

- On May 9, 2016, ORA filed Reply Comments on the PD. Those reply comments responded to Joint Applicants’ Opening Comments, which demonstrated that the PD imposed, in several places, conditions upon the transfer of control more stringent than the package of commitments the Joint Applicants had offered. Once again, ORA squarely stated its position that “[t]he PD must recognize the full extent of Joint Applicants’ voluntary commitments related to broadband enhancements, service quality, and backup power educational materials, and require New Charter to fulfill them as a condition of approval as indicated in Appendix A.”

In sum, ORA and CforAT conducted a regulatory “full court press” to pursue additional conditions above and beyond those included in the PD—both through the comment process and through private meetings with all five Commissioner offices. Notably, in all of this advocacy, ORA/CforAT’s claim was not that there had been some inadvertent omission by the Commission. Instead, they focused on the alleged substantive relief they sought through their proposed conditions. Such advocacy paralleled ORA/CforAT’s advocacy prior to the PD.²⁰

After this extensive activity, the Commission rejected ORA’s and CforAT’s positions. In D.16-05-007, the Commission included a new section 6, which summarized the Comments on the PD filed by all parties, including Joint Applicants, ORA, and CforAT.²¹ D.16-05-007 also modified the PD to address certain of the comments filed by parties or concerns of other Commissioners.²² In addition, D.16-05-007 noted that reply comments were filed by numerous parties, including Joint Applicants and ORA, and specifically noted that no changes were made as a result of Reply Comments.²³ Thus, the Commission fully acknowledged and considered the extensive advocacy from ORA and CforAT seeking inclusion of the additional conditions, yet declined to adopt the conditions for which they had advocated.

²⁰ See, e.g., CforAT Opening Brief, filed March 1, 2016, at 11-16; ORA Opening Brief filed March 1, 2016 at 49-52.

²¹ D.16-05-007 at 65-67.

²² For example, D.16-05-007 made significant changes in some of the ordering paragraphs related to broadband speeds. Compare PD, Ordering Paragraph 2.f, with D. 16-05-007, Ordering Paragraphs 2.f, g, h, and i. See also modifications made to PD Ordering Paragraph 2.j as revised in D.16-05-007, as modified in D.16-05-007, Ordering Paragraph 2.m to address concerns voiced by Commissioner Sandoval.

²³ D.16-05-007 at 68.

2. ORA and CforAT Subsequently Failed to Demonstrate Legal Error Justifying Modification of D.16-05-007’s Carefully Balanced and Purposeful Decision.

After clearly losing on this issue in both the PD and then in D.16-05-007, ORA and CforAT filed a joint application for rehearing, in which they reframed their argument—away from their original argument that the PD failed to include conditions necessary to mitigate harms arising from the Transaction—to their new theory that D.16-05-007 “inadvertently” omitted these conditions. ORA and CforAT disingenuously ignored that they had argued, as shown above, that these conditions should have been included, and that such arguments were rejected in D.16-05-007. Instead, they stated only their unsupported belief that the Commission “inadvertently” omitted these conditions.²⁴ Other than that assertion, ORA and CforAT did not allege any true legal error—and there is none—associated with the Commission’s decision to adopt some, but not all, of the conditions proposed by ORA and CforAT. Even if their contention that an inadvertent omission could, *arguendo*, constitute legal error, ORA/CforAT provided no citations to the record or to the law to support their position and provided no evidence to otherwise support the claim that these conditions had been omitted in D.16-05-007 by accident.

3. Because ORA/CforAT’s Rehearing Request was Unsupported, the Decision’s Modification of D.16-05-007 Constitutes Legal Error and Should Be Vacated.

In order for the Commission to grant rehearing, some legal error must be identified that needs to be corrected and some legal rationale must be stated to support the changes from the original decision.²⁵ To do otherwise is an abuse of the Commission’s discretion.²⁶ In recent

²⁴ Joint Application for Rehearing, filed May 26, 2016.

²⁵ *Util. Consumers’ Action Network v. Pub. Utils. Comm’n*, 187 Cal. App. 4th 688, 697 (2010) (“If a party fails to support a claim of error with argument, or support an argument with the necessary citations to the record, we may deem the argument waived.”); *In re Marriage of Falcone*, 164 Cal. App. 4th 814, 830 (2008) (“The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived.”); *In re Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project*, A.06-08-010, Order Modifying Decision 08-12-058 and Denying Rehearing of Decision, as Modified, D.09-07-024, at 2 (July 9, 2009) (“The fact that there is disagreement or contrary evidence on a holding does not indicate any legal error in the Decision.”).

years, especially under the leadership of President Picker, the Commission has attempted to improve the transparency of its decision-making process. Actions, such as those taken in the Decision—in which a well-reasoned and purposeful decision, made after fully litigating the underlying issues, is modified without justification—undercut such efforts and undermine trust in the Commission’s decision-making process.

Here, the Decision makes significant modifications to D.16-05-007 without any showing of legal error, and without any support for the assertion that there had been an inadvertent omission. Similarly, repeating back ORA/CforAT’s advocacy, the Decision’s sole support for its position is to reference the statement that remains unchanged from the PD to D.16-05-007—which does no more than indicate that the Commission was reformulating some of the conditions proposed by protestors and adding more of its own, and, as set forth above, does not support the proposition that the Commission intended to take every commitment that had been part of Charter’s proposed package of voluntary commitments and incorporate them as mandatory conditions.²⁷ The Decision, perhaps led astray by ORA/CforAT, fails to grapple with the fact that ORA and CforAT had fully engaged in litigation and advocacy on precisely this point, and that the Commission, fully aware of ORA/CforAT’s positions, had held its course.

To now assert seven months later that seven significant conditions had been inadvertently omitted—after they had been the subject of extensive comments and *ex parte* communications—is both legal error and an abuse of the Commission’s discretion. If a litigant is able to lose on an issue, only to then turn around and assert that the Commission, instead of ruling against them, had merely “forgotten” to rule in their favor—and then have that position accepted—the Commission, or its Appellate Division, would be able to modify any decision at any time without

²⁶ Compare *In re Candelario*, 3 Cal. 3d 702, 705 (1970) (“An amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error, therefore, unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion.”) with *So. Cal. Edison Co. v. Pub. Utils. Comm’n*, 140 Cal. App. 4th 1085, 1094, 1105-06 (2006) (“[T]he PUC prejudicially abused its discretion by failing to comply with its own procedural rules.”).

²⁷ Decision at 4.

any legal or policy justification. Accordingly, given the complete lack of justification for the changes made to Ordering Paragraph 2 in the Decision, such changes should be vacated.

B. THE NEW CONDITIONS ARE CONTRARY TO LAW.

1. The Commission Erred by Imposing Conditions That Do Not Mitigate Transaction-Specific Harm and Are Unsupported by Any Factual Findings.

The seven new conditions set forth in the Decision are additionally unlawful on the grounds that the Commission has not made any findings—whether in the Decision or in D.16-05-007 itself—that might support the Commission’s authority to impose them under Section 854.

As the Commission itself has recognized, the Commission’s appropriate statutory task under Section 854(c)(8) is “to mitigate potential *transaction specific* harms.”²⁸ It is not to mitigate harms that would exist “with or without the merger.”²⁹ Thus, the Commission’s statutory authority to require mitigating conditions depends upon the existence of a nexus between such conditions and a specific “harm” under the other seven subparts of Section

²⁸ *In re Joint Application of Frontier Communications Corp., Frontier Communications of America, Inc. (U-5429C), Verizon California, Inc. (U-1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, A.15-03-005, Decision Granting Application Subject to Conditions and Approving Related Settlements, D.15-12-005, at 55 (Dec. 3, 2015) (emphasis added).

²⁹ *In re Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC) for SBC to Control Pacific Bell (U 1001 C), Which Will Occur Indirectly as a Result of Telesis Merger With a Wholly Owned Subsidiary of SBC, SBC Communications (NV) Inc.*, A.96-04-038, Opinion, D.97-03-067, at 70 (Mar. 31, 1997).

854(c).³⁰ Furthermore, any conditions imposed pursuant to Section 854(c)(8) must be supported by factual findings.³¹

The Decision's imposition of seven new conditions strays from these principles. The new conditions are unrelated to any specific effect of the Transaction, and no findings, in either D.16-05-007 or the Decision, could plausibly support them.

a) The Commission's Factual Findings Do Not Support Additional Conditions Related to Service Quality or Network Reliability.

The Decision adds several conditions related to service quality and network outages, contained in subparagraphs (r), (s), and (t) of the Modified Ordering Paragraph. Among other things, the Decision requires Charter to provide semiannual reports containing service reliability data and outage information,³² to provide federal network outage reports to the Commission and to ORA,³³ and to retain an independent consultant to survey customer satisfaction, subject to specific requirements.³⁴

³⁰ *In re Joint Application of SBC Communications, Inc. ("SBC") and AT&T Corp. Inc. ("AT&T") for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a [sic] AT&T's Merger with a Wholly Owned Subsidiary of SBC, Tau Merger Sub Corp., A.05-02-027, Opinion Approving Application To Transfer Control, D.05-11-028, at 60 n.130 (Nov. 18, 2005) (explaining that without "a standard of review" for mitigation measures, the Commission "[i]nstead . . . use[s] the authority to propose any needed mitigation measures in conjunction with [its] review of criteria 1 through 7" (emphasis added)); id. at 91, 96 (accepting applicants' argument that "protesting parties [were] seek[ing] improperly to use th[e] [merger review] proceeding as an open mi[c] on issues previously litigated and a grab bag of concessions that would advance their individual interests, but bear no direct relationship to the merger"; characterizing the proposed mitigation measures as a "litany of conditions" without any "basis upon which to conclude" that they addressed adverse consequences; concluding that the "request for conditions . . . [therefore] ha[d] little merit"; and refusing even to identify and "discuss" certain proposals which were not "needed to prevent serious adverse consequences" and did not "represent reasonable options" (internal quotation marks and footnote omitted)).*

³¹ Pub. Util. Code § 1757(a) (authorizing court review of Commission decisions to determine, among other things, whether the "decision of the commission is not supported by the findings").

³² Decision at 16, Ordering Paragraph 1.d.r.

³³ Decision at 16, Ordering Paragraph 1.d.s.

³⁴ Decision at 16-17, Ordering Paragraph 1.d.t.

D.16-05-007 contains no indication, or even a suggestion, that service quality or network reliability would suffer as a result of the Transaction. Accordingly, it does not contain factual findings of the sort that would be necessary to support imposition of these additional conditions. Although D.16-05-007 did note that ORA had expressed some concerns regarding *existing* service quality issues in its discussion of Section 854(c)(2),³⁵ the Commission did *not* find that any such concerns were Transaction-specific.³⁶ To the contrary, the Commission itself acknowledged in D.16-05-007 that such concerns were *not* Transactions-specific, describing ORA’s concerns as related to “current service levels” and indicating that Charter could satisfy the statutory requirements of Section 854(c)(2) by maintaining pre-merger service quality.³⁷

Nor did the Commission make additional findings in the Decision that could operate as a predicate for the further service- and network-related conditions imposed therein. The Decision does no more than refer to a statement in D.16-05-007 that the Commission would hold Charter to its commitment to improve service quality to the customers of the licensed subsidiaries.³⁸ However, as set forth above, D.16-05-007 itself neither identifies any Transaction-specific harm nor includes any factual findings that could support imposition of the additional conditions. Moreover, the Decision disregards that D.16-05-007 *already* addressed service quality and reliability concerns through other means, such as the requirement that Charter and its affiliates satisfy *all* service quality standards for voice communication established in General Order 133-C, a requirement that already goes well beyond those generally applicable to CLECs.³⁹

Thus, the Commission has failed to make any findings that could support the new service- or network-related conditions set forth in the Decision, much less explain why the conditions already imposed in D.16-05-007 were inadequate to address any such concerns. Accordingly, under Section 854(c)(8), no statutory basis for the imposition of such new requirements exists, and imposing them is legal error.

³⁵ D.16-05-007 at 36.

³⁶ D.16-05-007 at 36-37.

³⁷ D.16-05-007 at 36.

³⁸ Decision at 8-9.

³⁹ D.16-05-007 at 72.

b) The Commission Has Made No Findings Whatsoever Regarding the Transaction's Effect on Disability Access.

The analysis set forth in part (a), *supra*, is equally fatal to the validity of the additional conditions imposed in subparagraphs (u) through (x) of the Modified Ordering Paragraph. Those subparagraphs impose various requirements related to access to services by residential customers with disabilities, including numerous policy and training changes related to the accessibility of Charter's bills and website to customers with disabilities (above and beyond those required of other industry participants).⁴⁰

As the Joint Applicants made clear during the proceeding before the Commission, these requirements, requested by CforAT, were out-of-place in a merger proceeding, given the absence of any nexus between the Transaction and service accessibility, and such requests should instead be directed at industry-wide rulemaking or standard-setting.⁴¹ It is unsurprising, therefore, that neither D.16-05-007 nor the Decision identifies any way in which the Transaction would affect accessibility to service by customers with disabilities. Indeed, aside from restating CforAT's position, D.16-05-007 includes no discussion at all regarding access to persons with disabilities, and, in the Decision, the Commission made no further factual findings that might provide a statutory basis for the newly imposed conditions. Accordingly, the statutory predicate for such new conditions under Section 854(c)(8) has not been satisfied and their imposition by the Decision is legal error.

2. The Purportedly "Voluntary" Nature of the Commitments Cannot Support Their Imposition Seven Months After-the-Fact and Separate from the Package in Which They Were Offered.

At bottom, the Decision's basis for imposing the additional conditions proposed by ORA and CforAT is the claim that the Joint Applicants agreed to accept each of those conditions in their reply briefing, thereby obviating any need for the Commission to determine whether such measures were necessary to alleviate Transaction-specific harms.⁴² However, this assertion is inaccurate and relies on a selective and incomplete understanding of the commitments offered by the Joint Applicants during the approval process.

⁴⁰ Decision at 17-19, Ordering Paragraphs 1.d.u-x.

⁴¹ See Joint Applicants' Reply Br. at 123-25, 130; Joint Applicants' Reply Comments at 6.

⁴² Decision at 6-10.

The Joint Applicants did not offer a series of voluntary commitments in a vacuum, irrespective of what other conditions the Commission might order. Rather, to address certain concerns raised by various intervenors during the approval process, the Joint Applicants offered a *package* of voluntary measures that would be acceptable to the Joint Applicants on the whole, based on an evaluation of the overall cost and burden of compliance and assuming the Commission found those conditions necessary to mitigate any transaction-specific harms.⁴³ In D.16-05-007, however, the Commission did *not* adopt the Joint Applicant’s proposed package of voluntary commitments. Instead, the Commission adopted some of the Joint Applicants’ offered commitments, modified or reformulated others, and, at least initially, declined to adopt others. Critically, a number of the conditions adopted by the Commission in D.16-05-007 are significantly more onerous than what the Joint Applicants had proposed, such as in the areas of LifeLine discounts, customer education regarding battery-back-up power, and customer CPE, and will result in costs and burdens that the Joint Applicants did not anticipate when they agreed to the MOUs or offered the package of proposals set forth in the reply briefing.⁴⁴

Had Charter known that the Commission would impose in D.16-05-007 additional conditions more onerous than the package of commitments the Joint Applicants had offered, and which Charter neither supported nor believed were necessary to mitigate an anticipated Transaction-related harm, the package of voluntary commitments the Joint Applicants would have offered in their Reply Brief would have been different—and would not have included the seven new conditions now added by the Decision. The Joint Applicants’ package of proposed voluntary commitments were just that—a package—that assumed the absence of significant additional requirements. Contrary to what the Commission found in the Decision, the fact that

⁴³ Joint Applicants’ Reply Br. at 3-5 (providing a list of specific voluntary commitments and indicating that Charter would “make *these* additional commitments” in an effort to address other parties’ concerns (emphasis added)); *id.* at 18 (proposing that the Commission adopt proposed package of voluntary commitments as a way to avoid jurisdictional difficulties associated with other parties’ requested mandatory broadband- and VoIP-related conditions); *id.* at 92-93 (emphasizing the voluntary nature of Charter’s proposed package of commitments and that, absent Charter’s consent, further conditions would not be appropriate).

⁴⁴ Decision at 72-73. The Decision’s approach will undoubtedly chill future applicants from offering packages of acceptable voluntary commitments, if the Commission’s approach is to treat the constituent elements of such proposals as binding even when more additional, more onerous conditions are added on top of those proposals.

the seven new conditions imposed by the Decision were contained within Charter's previous offer (but subject to critical exceptions and modifications from the form in which the Decision adopts them)⁴⁵ cannot support their imposition now, after the Commission has otherwise declined to accept Charter's package of voluntary commitments in the form in which it was offered.

Moreover, with respect to each of the voluntary commitments in the Joint Applicants' proposed package, the Joint Applicants were clear that the imposition of the conditions was not appropriate under the relevant legal standard for Section 854(c)(8), because the Commission must "evaluate the need for 'mitigation measures to prevent significant adverse consequences which might result' from a transaction" and because no such "adverse consequences" would result from the Transaction.⁴⁶ Although the Commission may have deemed some of those commitments appropriate in D.16-05-007, neither D.16-05-007 nor the Decision contains any findings identifying harms that would be mitigated by the seven newly imposed conditions.

This reasoning further supports the conclusion, set forth in Part II.A, *supra*, that D.16-05-007 had sensibly and purposefully declined to incorporate the seven new conditions, because, although part of Charter's package of offered voluntary commitments (albeit with the critical differences discussed below), they were neither necessitated nor supported by any finding of transaction-specific harm. The Decision, however, ignores the Commission's earlier reasoned decision-making by proceeding as though the component parts of Charter's proposed package had been offered in a vacuum, and imposing additional conditions without any effort to make findings that might predicate those conditions on the Commission's statutory authority under Section 854(c)(8).⁴⁷

⁴⁵ Several of the commitments offered by Charter were expressly conditioned upon the Commission providing for confidential treatment of the information submitted, which conditions the Decision inexplicably omits.

⁴⁶ Joint Applicants' Reply Br. at 92.

⁴⁷ Charter also continues to reserve its objections to the Commission's jurisdiction to impose conditions related to its VoIP and broadband Internet access services.

C. IMPOSING NEW CONDITIONS LONG AFTER CLOSING OF THE TRANSACTION VIOLATES DUE PROCESS.

The Decision further errs by imposing *ex post facto* conditions of which Charter had no notice, nor meaningful opportunity to consider whether to accept by closing the transaction, thereby depriving Charter of its right to due process.

D.16-05-007, which approved the Transaction subject to certain conditions, closely followed from ALJ Bemserfer's PD. Although Charter had disagreed with several of the factual findings and related conditions in the PD, Charter made the decision to forego most of those challenges in order to close the Transaction and expedite the delivery of public interest benefits to California consumers. Moreover, as explained in Part II.A *supra*, Charter reasonably believed the conditions set forth D.16-05-007 comprised the entire set of conditions for Commission approval—as the Commission had declined to order the further conditions repeatedly requested by ORA/CforAT—and closed the Transaction on May 18, 2016 in reasonable reliance on D.16-05-007.

Charter's closing the Transaction on May 18, 2016 also reflected the economic realities it faced at the time. Those included the fact that the Commission did not issue D.16-05-007 until after all other relevant regulators (including the FCC) had already approved the Transaction, leaving Charter in the difficult position of bearing the substantial costs associated with the merger process, yet unable to realize any of the synergies or additional revenue that the Transaction would create, until the merger closed—a fact Charter more than once urged the Commission to take into account in its schedule.⁴⁸ The Decision's adoption of substantial and material conditions that Charter was not able to take into account at the time of closing, more than seven months after-the-fact, is inconsistent with the guarantees of due process and fundamental fairness.

⁴⁸ See January 13, 2016 Motion by Joint Applicants for Order Altering Schedule and Deferring Ruling on the Need for Evidentiary Hearings. As the Joint Applicants explained, Charter issued indebtedness of approximately \$23.8 billion to finance the Transaction, predicated on the expectation that the costs of such additional financing would be offset by the greater revenues of the merged entity, as well as the significant synergies the merged entity would be able to realize. *See id.* at 5-6.

The Commission’s own precedents approach due process challenges by “smell test” rather than under hard and fast rules.⁴⁹ However, the CPUC has “glean[ed] from the case law,” among other things, that due process requires “at a minimum, notice and opportunity to be heard,” and that this opportunity must be “meaningful” in terms of both timing and manner,⁵⁰ given the “total[ity] [of the] circumstances.”⁵¹ The Decision fails to satisfy these requirements.

The Decision’s adoption of seven additional after-the-fact conditions failed to provide Charter with notice at a meaningful time that closing the Transaction would operate as acceptance of such requirements, because the Transaction had long closed.⁵² Charter thus lacked the ability to decide whether the incremental costs associated with the additional conditions changed the fundamental cost-benefit analysis of moving forward with the Transaction in the form in which it was structured at the time of closing. It is generally inconsistent with principles of due process for agencies that review corporate mergers “to impose new conditions on [the]

⁴⁹ *In re Application of Neighbors for Smart Rail for Rehearing of Resolution of SX-100 and for Oral Argument*, A.11-12-010, Decision Following Rehearing Affirming Resolution SX-100 and Granting Authorization to Expo Authority to Construct 16 At-Grade and 11 Grade-Separated Highway Light Rail Crossings as Part of Phase 2 of the Exposition Corridor Light Rail Transit Project, D.13-08-005, at 41 (Aug. 15, 2013).

⁵⁰ *Id.* at 41-42; *see also, e.g., Miranda v. City of Cornelius*, 429 F.3d 858, 866-67 (9th Cir. 2005).

⁵¹ *See, e.g., Miranda*, 429 F.3d at 866-67 (quotation marks omitted).

⁵² In other postures, the Commission recognizes the importance of providing parties with the opportunity to accept or reject conditions formulated by the Commission. *See* CPUC Rule of Practice and Procedure 12.4; *see also Investigation of the Commission’s Own Motion into the Operations and Practices of S. Cal. Edison Co., Celco P’Ship LLP d/b/a/ Verizon Wireless, Sprint Commc’ns Co LP, Next G Networks of Cal., Inc. and Pac. Bell Tel. Co. d/b/a/ AT&T Cal. and AT&T Mobility LLC, Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007*, I.09-01-018, Decision Conditionally Approving the Southern California Edison Company Settlement Agreement Regarding the Malibu Canyon Fire, D.13-09-028, at 52 (Sept. 19, 2013) (“Southern California Edison Company and the Commission’s Safety and Enforcement Division shall file and serve a notice within five business days from the effective date of this order that states whether they accept the conditions in the previous Ordering Paragraphs.”); *In re S. Cal. Gas Co.*, A.96-11-048, Opinion on Negotiated Contract Under Southern California Gas Company’s Demand-Side Management Bidding Pilot, D.97-03-068, at 1-2, 71 CPUC 2d 422 (Mar. 31, 1997) (“Within thirty days from the effective date of this order, SCE and SoCal shall file a statement at the Commission Docket Office informing the Commission of whether Winegard accepts [a CPUC-imposed] condition, and[,] if so, shall submit modifications reflecting this additional security provision with their filing.”). The Decision deprives Charter of any such choice.

approval of a transaction that has already been consummated.”⁵³ This is true even where the agency has “express authority . . . to issue [such] supplemental orders;” such authority “must necessarily be used very cautiously and sparingly once the parties to an approved merger no longer have the opportunity to elect not to proceed if they are unwilling to accept all of the conditions that [have been placed] on [the] approval of [a transaction].”⁵⁴ With due respect to the Commission’s authority, that authority cannot extend to retroactively withholding or attaching new and different conditions to approval of an event that has already taken place with the Commission’s approval. Parties must be able to “safely act under [a final Commission Decision] without fear of later attack.”⁵⁵

These general principles hold special salience here, because the PD and D.16-05-007 “crafted a more-tailored” set of conditions than those proposed by any of the Intervenors or Protestors (or indeed, than those offered by Charter), and those conditions were “commensurate with the potential for . . . harm” that ALJ Bemserfer and the Commission believed to be present as a factual matter.⁵⁶ Although Charter did not agree with all of these findings, the conditions in the PD and in D.16-05-007, at least in substantial part, bore a nexus to factual findings contained therein. The deliberate nature of the Commission’s conditions in D.16-05-007 is confirmed by the fact that D.16-05-007 imposed several conditions *in excess* of the package of conditions that Charter had voluntarily offered, such as in the areas of LifeLine discounts, customer education regarding battery back-up power, and customer CPE. “[I]t would be markedly unfair at this point”—*i.e.*, after the Joint Applicants “had already consummated their merger”—“to expand those conditions,”⁵⁷ particularly where, as here, the new conditions

⁵³ *Major Rail Consolidation Procedures*, Final Rules, Fed. Carr. Cas. P 38348, 2001 WL 648944, at *31 & n.53 (S.T.B. 2001).

⁵⁴ *Id.*

⁵⁵ *Opinion re Application of Alexander F. Eagle to Rescind Decision 82-05-007*, 25 CPUC 2d 77 (July 29, 1987) (quotation marks omitted).

⁵⁶ See Surface Transportation Board Denies Request to Expand the ‘Geismar Condition’ Imposed by the Board in Its 1999 Approval of the “Canadian National-Illinois Central” Railroad Merger, *News Release* (Aug. 27, 2002).

⁵⁷ *Id.*

address purported harms that were not found to be credible by either ALJ Bemserfer or the Commission.⁵⁸

Although Charter had an opportunity to brief the merits of the additional conditions (in its comments on the PD and in response to ORA's and CforAT's Applications for Rehearing), the mere opportunity to argue against the imposition of *ex post facto* conditions does not cure the deprivation of due process that the imposition of such conditions effects. Merely being able to oppose such new conditions did not provide Charter with the "meaningful" choice that is pertinent here, much less provide it a "meaningful" time—the choice whether to accept the imposition of full set of conditions by proceeding to closing, or to deem the conditions too onerous and forgo the portions of the Transaction requiring the Commission's approval.

Beyond the unfairness in the instant case, the Decision, if left to stand, could inadvertently create a precedent that encourages unfair delay tactics and sandbagging in other proceedings. Protestors and intervenors would have every incentive to propose vast swaths of disparate and even potentially contradictory conditions throughout the merger review process, any of which could be adopted by the Commission at any point in time (including after the close of a transaction). Due process does not contemplate such gamesmanship. Moreover, with respect to the PD process, Charter was focused on proposing a good-faith, comprehensive set of commitments to address concerns raised by various Intervenors and Protestors. It would fly in the face of fairness (and likewise create perverse incentives) to now penalize Charter for not previously opposing each of the additional conditions. And the rehearing process itself similarly did not provide Charter a meaningful opportunity to be heard, because of its *ex post facto* nature.

Nor can the deprivation of Due Process be cured on the theory that Charter could have waited until the conclusion of rehearing process to decide whether to proceed with closing the Transaction. Irrespective of whether *ex post facto* conditions are ever permissible as a matter of due process, they were particularly inappropriate in this case, as the Commission's extended approval schedule, paired with the economic circumstances of this Transaction, deprived Charter of any meaningful opportunity to await the conclusion of the rehearing process here.

As noted, due process requires consideration of the totality of the circumstances. Here, those circumstances include: (1) that the Joint Applicants, at all times, urged the Commission to

⁵⁸ See also Part II.B, *supra*.

act expeditiously given the economic realities of the merger; (2) that the Commission initially set a schedule that contemplated completing review nearly three months after the FCC was expected to approve the merger; (3) that Charter incurred substantial debt to finance the Transaction and its debt servicing costs were substantial during an extended period in which Charter was seeing no additional revenues or synergies; and (4) that the post-closing integration process itself takes time to complete and to generate efficiencies and other public interest benefits.⁵⁹ With due respect to ALJ Bemserfer and the Commission, by May 12, 2016, review of the Transaction by the FCC already had concluded, notwithstanding the significantly more limited scope of review here under the *Scoping Ruling* and the limitations on the Commission's jurisdiction. Indeed, by that point, there were no further hurdles to closing the Transaction at all—every other entity to review the Transaction already had approved it. The Commission was aware of, and its prolonged approval process was in part the cause of, the economic realities that compelled closing the Transaction within days of the issuance of D.16-05-007. Those realities deprived Charter of any meaningful opportunity of waiting seven months for the Commission to resolve the rehearing petitions before proceeding to closing, and make the imposition of *ex post facto* conditions particularly inappropriate here.

⁵⁹ See *supra* note 48; see also, e.g., Application 15-07-009, at 35-36 (July 2, 2015) (proposing schedule contemplating resolution by Dec. 3, 2015); Proposed Schedule and Supporting Statement of Joint Applicants, A.15-07-009 (Sept. 24, 2015) (proposing schedule contemplating full Commission vote by December 17, 2015).

III. CONCLUSION

As demonstrated in this Application for Rehearing, the Decision suffers from serious legal, factual, and procedural errors that warrant reversal of the Decision's imposition of new conditions that were intentionally omitted from D.16-05-007. Upon rehearing, the Commission should vacate the portion of the Decision that imposes these new conditions and limit the conditions imposed upon the transfer of control to those imposed in D.16-05-007.

Respectfully submitted,

By: /s/ James W. McTarnaghan

Luke C. Platzer
Bradley P. Humphreys
Elliot S. Tarloff
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 661-4813
Email: lplatzer@jenner.com

James W. McTarnaghan
PERKINS COIE LLP
505 Howard Street
Suite 1000
San Francisco, CA 94105
Telephone: (415) 344-7007
Email: jwmctarnaghan@perkinscoie.com

Attorneys for Charter Communications, et al.

Dated: December 29, 2016

134010968.2

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C) ; Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).

Application 15-07-009
(Filed July 2, 2015)

**RESPONSE OF THE OFFICE OF RATEPAYER ADVOCATES
AND CENTER FOR ACCESSIBLE TECHNOLOGY TO MOTION OF
CHARTER COMMUNICATIONS, INC., CHARTER FIBERLINK CA-CCO, LLC
(U6878C), TIME WARNER CABLE INFORMATION SERVICES
(CALIFORNIA), LLC (U6874C), AND BRIGHT HOUSE NETWORKS
INFORMATION SERVICES (CALIFORNIA), LLC (U6955C) FOR STAY OF
DECISION 16-12-070**

MELISSA W. KASNITZ
Legal Counsel
Center for Accessible Technology
3075 Adeline Street, Suite 220
Berkeley, CA 94703
Telephone: (510) 841-3224
Email: service@cforat.org

NIKI BAWA
Staff Counsel
Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2049
Email: niki.bawa@cpuc.ca.gov

January 26, 2017

I. INTRODUCTION

Pursuant to Rule 11.1(e) of the California Public Utilities Commission’s Rules of Practice and Procedure, the Office of Ratepayer Advocates (“ORA”) and Center for Accessible Technology (“CforAT”) hereby files this Response to the January 11, 2017 Motion for Stay of Decision (“D.”)16-12-070¹ (“Motion”) by Charter Communications, Inc; Charter Fiberlink CA-CCO, LLC; Time Warner Cable Information Services (California), LLC; and Bright House Networks Information Services (California), LLC (collectively “Charter”).

Charter’s Motion should be denied. First, this Motion for stay is procedurally improper as it relies on an improper application for rehearing. For this reason alone, the motion should be denied by the California Public Utilities Commission (“Commission”). If the Commission considers the Motion on the merits despite the procedural impropriety, it should still be denied. Charter has failed to provide any serious factual support for the claim that Charter “will suffer serious and irreparable harm” if a stay is not granted or that it is “likely to succeed on the merits,” beyond vague assertions of “due process” and other violations.² In our reply to Charter’s December 29, 2016 Application for Rehearing, ORA and CforAT have already provided reasons why Charter’s claims are unlawful and procedurally improper.³ The Commission acted in an appropriate manner when it modified D.16-05-007.

The Commission’s Rehearing Decision correctly clarified an intent to include conditions to the Charter merger that were: 1) voluntarily proffered by Charter during the pendency of the proceeding,⁴ 2) referenced in the body of the Merger Approval Decision as being conditions that

¹ Herein, D.16-12-070 will be referred to as the Rehearing Decision, and D.16-05-007 will be referred to as the Merger Approval Decision.

² Application of Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC (U6878C), Time Warner Cable Information Services (California), LLC (U6874C), and Bright House Network Information Services (California), LLC (U6955C) For Rehearing of D.16-12-070, filed on December 29, 2016 (“Charter Application for Rehearing”).

³ See, Response of the Office of Ratepayer Advocates and Center for Accessible Technology to Application of Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC (U6878C), Time Warner Cable Information Services (California), LLC (U6874C), and Bright House Network Information Services (California), LLC (U6955C) For Rehearing of D.16-12-070, filed on January 13, 2017 (“ORA and CforAT Response to Charter AFR”).

⁴ Reply Brief of Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC (U6878C), Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC (U6874C), Advance/Newhouse Partnership, Bright House Networks, LLC, and Bright House Networks Information Services (California), LLC (U6955C), Public Version, filed on March 11, 2016 (“Charter Reply Brief”).

the Commission intended to impose on Charter,⁵ and 3) acknowledged in the Rehearing Decision to have been inadvertently excluded from the ordering paragraphs of the Merger Approval Decision.⁶ This clarification was appropriate and well within the Commission's authority. Additionally, Charter's ability to comply with the terms without experiencing undue harm is evident from the fact that these terms were initially set out by Charter itself.

The Commission should not need to reach the merits of the Motion. In the unlikely event that it does find Charter's application for rehearing and Charter's Motion to be procedurally proper, the Commission should deny Charter's Motion as unlikely to cause irreparable harm and unlikely to succeed on the merits. Charter's Motion should be denied with prejudice as it fails to meet the legal standard for a stay and is designed to delay or hamper valuable consumer protection rules that are necessary for the public interest.

II. PROCEDURAL IMPROPRIETY

Charter's Motion should be denied on procedural grounds without any need to reach the merits. Charter's Motion relies on its application for rehearing that was improperly and unlawfully filed on December 29, 2017. As set forth in ORA/CforAT's response to Charter's application for rehearing, the Commission's rules generally do not permit parties to file an application for rehearing of a rehearing decision. The Commission has only allowed such rehearing applications under extraordinary circumstances, such as when "it is the first opportunity that any party has had to appeal this issue."⁷ This exception does not include instances where the Commission is merely clarifying its prior resolution of issues, as is the present case. Nor did Charter assert that its application fell into the exception to the general rule, or even acknowledge the existence of the rule. Since the Rehearing Decision does not include any newly-decided issues, the general rule stands, leading to the conclusion that Charter's rehearing application is procedurally improper and it should be denied. Because there is no basis for Charter to seek rehearing on the Modified Decision, there is no procedural basis for a stay to be issued.

⁵ See, D.16-05-007, pp. 56-62.

⁶ See, D.16-05-007, p. 10.

⁷ *Order Denying Rehearing of Decision (D.) 02-02-028 Filed by Southern California Edison Company [D.02-04-065]* at 2 (citation omitted); *see also, Order Modifying Decision (D.) 14-11-021 and Denying Rehearing, as Modified [D.15-03-049]*, pp. 2-3.

III. LEGAL STANDARD FOR CONSIDERATION OF A STAY

Even if the Commission considers the motion on its merits, notwithstanding the procedural improprieties, the motion should be denied. Section 1735 of the Public Utilities Code (Pub. Utils. Code) states that an “application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision of the Commission,” or “operate in any matter to stay or postpone the enforcement” of any order, “except in such cases and upon such terms as the commission by order directs.” Commission precedent sets forth the legal standard for consideration of such orders.

The Commission has applied a variety of factors in determining whether there is good cause to grant a stay pending rehearing of its own decisions.

Two of the primary factors in determining whether to grant a stay are: 1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; and 2) whether the moving party is likely to prevail on the merits. The Commission has applied the irreparable harm/likelihood of success on the merits standard in a number of cases. See, e.g., *Utility Consumers Action Network v. Pacific Bell* (“UCAN”), D.01-11-069, 2001 Cal. PUC LEXIS 1121 (Nov. 21, 2001); *Pacific Gas and Electric Company*, D.99-09-035, 1999 Cal. PUC LEXIS 602 (Sept. 2, 1999). This standard is applied flexibly; a moving party need not demonstrate that both factors have been met. Rather, if there is high degree of irreparable harm, something less than likelihood of success on the merits may justify a stay. Similarly, if there is no harm to the moving party, a stay may not be appropriate even if the party may ultimately prevail.

In considering whether to impose a stay, the Commission also balances harm to the applicant or the public interest if the decision is later reversed, versus harm to other parties or the public interest if the decision is affirmed. *Re Line Extension Rules of Electric and Gas Utilities*, Res. E-3627, 1999 Cal. PUC LEXIS 928 (Nov. 4, 1999). The Commission can also look at the harm to the public if the decision is stayed versus the harm to the public if it is not. In addition, the Commission has considered other factors relevant to a particular case, such as whether an applicant for rehearing will go to court before the Commission has had an opportunity to act on the rehearing application.⁸

⁸ D.04-08-056, p. 3 (denying stay of consumer protection rules).

In addition to the standard above, in determining a standard for defining irreparable harm the Commission often structures its discretion to stay its own decisions by reference to the leading California case on the subject, *North Shuttle Service v. Public Utilities Commission*, although that case applied the *appellate* standards for stay, found in Pub. Utils. Code §§ 1761-64.⁹

IV. CHARTER FAILS TO SHOW A STAY IS JUSTIFIED

A. No Showing of Irreparable Harm

Charter spends all of two pages asserting why it will allegedly suffer “serious or irreparable harm” if a stay is not granted.¹⁰ As explained in more detail in ORA’s and CforAT’s response to the procedurally improper application for rehearing, Charter’s due process argument lacks merit as Charter has had ample notice and an opportunity to be heard regarding adoption of the conditions at issue.¹¹ Charter attaches no declarations and provides no specificity as to why the express incorporation of seven conditions that had been inadvertently excluded in the ordering paragraphs of the Merger Approval Decision (though addressed in the discussion), and to which Charter had agreed to abide by in voluntary commitments made during the pendency of the proceeding, would cause “irreparable harm.” As to the minimal costs Charter claims it will have to endure if it has to abide by a small number of new consumer protection conditions, the Commission has ruled that “monetary loss alone is not an adequate showing of irreparable harm.”¹² According to *North Shuttle*, the Court of Appeal will only consider monetary loss to be irreparable harm where the applicant has specifically demonstrated that the loss is severe enough

⁹ *North Shuttle Service v. Public Utilities Commission*, 67 Cal. App. 4th 386, 392 (1998) (“the Legislature has erected substantial barriers to granting temporary stays”); *See, e.g.*, D.08-09-044, p. 18, citing *North Shuttle* in denying stay (“In evaluating serious or irreparable harm, we generally follow the standard under *North Shuttle Service, Inc. v. Public Utilities Commission*”); *See also*, D.01-11-062, *UCAN v. PacBell*, citing *North Shuttle* in declining to impose stay in marketing abuse injunction against PacBell; D.04-08-056, citing *North Shuttle* in declining to impose a stay of consumer protection rules promulgated in D.04-05-057

¹⁰ Motion of Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC (U6878C), Time Warner Cable Information Services (California), LLC (U6874C), and Bright House Network Information Services (California), LLC (U6955C) For Stay of Decision 16-12-070, filed on January 11, 2017 (“Charter Stay Motion”), p. 4.

¹¹ *See*, ORA Response to Charter AFR, pp. 6-8.

¹² D.04-08-065, p. 4, citing *North Shuttle Service, Inc. v. Public Utilities Commission*, 67 Cal. App. 4th 386, 395 (1998).

to jeopardize an appellant's entire enterprise.¹³ Charter has failed to make any such showing, or even any assertion that the loss would reach this magnitude or any other.

As to Charter's more nebulous claims that "many of the compliance deadlines for the new conditions had already passed at the time the [Rehearing] Decision was issued," and "a stay is... necessary to clarify the confusion surrounding Charter's... deadlines,"¹⁴ Charter cites no authority that inconvenience or confusion could constitute irreparable harm. Indeed, the appropriate avenue to seek redress for confusion about deadlines would be for Charter to discuss with ORA and CforAT an update to the due dates of the conditions, and then request permission from the Commission for dates to comply with the Rehearing Decision conditions. Instead, Charter has chosen to file costly rehearing applications and stay motions that unnecessarily delay the implementation of important and necessary consumer protection conditions. Normally, extensions of time to comply with a Commission order could simply be addressed to the Executive Director, with copies to all parties, pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure. That remedy may still be available, although the modification is for alteration of dates that have already passed and thus may require Commission approval. ORA and CforAT are happy to work with Charter to develop a schedule that would be appropriate for all parties and that would maximize protection for California's consumers.

Finally, Charter's confidentiality claims are without merit. Charter is well aware of the Commission's confidentiality rules under General Order 66C and Pub. Utils. Code § 583, which includes misdemeanor charges for any Commission staff member who releases confidential information. Charter, which has significant experience participating in Commission proceedings, has asserted these statutes and rules on many occasions in the past. As there are already statutes and general orders in place to protect confidential information there is no need for the Commission to adopt duplicative confidentiality rules. As such, Charter's confidentiality claims fail to reach the level of irreparable harm required for a stay.

Charter also claims a due process denial by reason of the rehearing decision coming out months after it closed the transaction. Charter rushed to close the transaction before the time for filing an application for rehearing had even run. That was its decision and by so doing it should

¹³ *North Shuttle*, p. 395.

¹⁴ Charter Stay Motion, p. 4.

be considered to have assumed the risk that an application for rehearing might be filed and result in modifications to D.16-05-007. A regulated entity cannot preempt Commission action by such timing of its closing.

B. No Showing of Likelihood of Succeeding on the Merits

Charter also fails to make the case that it is likely to succeed on the merits of its procedurally unlawful and improper December 29, 2016 application for rehearing. At pages 6-8 of Charter's Motion, Charter briefly summarizes the claims it makes in its application for rehearing. Even if the Commission were to decide that Charter's application for rehearing should not be dismissed for procedural impropriety, Charter has failed to demonstrate any legal error in either its improper application or its motion for a stay. ORA and CforAT provide overwhelming evidence in our response to Charter's application for rehearing that Charter's arguments regarding the Commission's abuse of discretion, lack of findings, and violation of Charter's due process rights are baseless.¹⁵ In short: 1) the Commission did not abuse its discretion by reformulating Charter's voluntary commitments into the ordering paragraphs of the Merger Approval Decision through the Rehearing Decision; 2) contrary to Charter's claims, the Commission made sufficient findings of fact to support a final decision, such as the addition of Findings of Fact 14 in Ordering Paragraph 1(c) of the Rehearing Decision; and 3) Charter had ample notice that it might be obligated to comply with its own proposed commitments, as well as a meaningful opportunity to be heard, starting with ORA's and CforAT's application for rehearing that was filed a mere ten days after the issuance of the Merger Approval Decision and to which Charter filed a response on June 10, 2016.¹⁶

C. "Balanced of Harm" Analysis Requires that the Commission Deny Charter's Motion for Stay.

As discussed above and in ORA's and CforAT's response to Charter's December 29, 2016 application for rehearing, Charter will suffer minimal to no harm if the Commission correctly denies Charter's motion for stay and dismisses Charter's unlawful and improper rehearing application. In contrast, greater harm may come to the public, as necessary consumer protection conditions that were voluntarily agreed to by Charter will be delayed even further due

¹⁵ ORA and CforAT Response to Charter AFR, pp. 4-8.

¹⁶ See, ORA Response to Charter AFR.

to Charter's unwarranted and unlawful litigiousness. This balancing of harms is a substantive part of the Commission's test on whether to issue a stay,¹⁷ but was not mentioned by Charter in its motion.

V. CONCLUSION

For the reasons stated above, the Commission should deny Charter's Motion to Stay D.16-12-070. Further, ORA and CforAT respectfully request that the Commission also dismiss Charter's unlawful and improper rehearing application with prejudice as Charter's recent filings are merely delaying the implementation of necessary and important consumer protection conditions that will benefit the people of California.

Respectfully submitted,

/s/ MELISSA W. KASNITZ

/s/ NIKI BAWA

Melissa W. Kasnitz
Legal Counsel

Niki Bawa
Staff Counsel

Center for Accessible Technology
3075 Adeline Street, Suite 220
Berkeley, CA 94703
Telephone: (510) 841-3224
Email: service@cforat.org

Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2049
Email: niki.bawa@cpuc.ca.gov

January 26, 2017

¹⁷ D.04-08-056, p. 3.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C).

Application 15-07-009
(Filed July 2, 2015)

**ORDER MODIFYING DECISION (D.) 16-12-070,
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. SUMMARY

In this Order, we dispose of the application for rehearing of Decision (D.) 16-12-070¹ (or “Decision”) and related Motion for Stay of D.16-12-070, filed by Charter Communications, Inc., Charter Fiberlink CA-CCO, LLC, Time Warner Cable Information Services (California), LLC (“TWCIS”), and Bright House Networks Information Services (California), LLC (“BHNIS”) (collectively “Rehearing

¹ All citations to Commission decisions are to the official pdf versions which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

Applicants”). Rehearing Applicants were part of a larger group of entities collectively known as “Joint Applicants”² who had filed the underlying Application (A.) 15-07-009, which sought Commission authorization for the transfer of control of both TWCIS and BHNIS to Charter Communications, Inc. and a *pro forma* transfer of control of Charter Fiberlink. (Application, p. 2.) Through the transfers requested in the Application, Charter Communications, Inc., TWC, and BHN would merge to become “New Charter” (the “Transaction”). (*Ibid.*) Following the Transaction, TWCIS and BHN would both be indirect subsidiaries of New Charter. (Application, pp. 1-2.) In D.16-05-007, the Commission approved the Transaction with conditions aimed to mitigate harms arising from the Transaction.

The Office of Ratepayer Advocates (“ORA”) and Center for Accessible Technology (“CforAT”) (collectively, “ORA/CforAT”) jointly filed an application for rehearing of D.16-05-007, alleging that the Commission erred in omitting certain conditions to the approval of the Transaction. In reviewing ORA/CforAT’s application for rehearing, we discovered that we had inadvertently left out seven conditions, which ORA/CforAT’s rehearing application alleged had been omitted in error. In D.16-12-070, and in response to the joint rehearing application filed by ORA/CforAT, we agreed and corrected this error by modifying D.16-05-007, to add these inadvertently omitted conditions.

Specifically, in determining the necessity of these modifications, we looked at the four corners of D.16-05-007 and the record for the proceeding to ascertain our intent for approving the Transaction, including what conditions to impose. In D.16-12-070, we determined that there was specific discussion in D.16-05-007 that

² On July 2, 2015, Charter Communications, Inc., on behalf of itself and its wholly-owned subsidiary Charter Fiberlink CA-CCO, LLC, Time Warner Cable Inc. (“TWC”), on behalf of itself and its wholly-owned subsidiary Time Warner Cable Information Services (California), LLC (“TWCIS”), and Advance/New House Partnership on behalf of itself and its subsidiary Bright House Networks, LLC (“BHN”) as well as BHN’s wholly-owned subsidiary Bright House Networks Information Services (California), LLC (“BHNIS”) (collectively, “Joint Applicants”) jointly filed A.15-07-009.

evidenced our intent to include as part of our approval of A.15-07-009 the commitments made by Joint Applicants to the parties, including the seven ORA/CforAT conditions at issue. In D.16-05-007, we stated, in part: “*To the extent that those promises and assurances are responsive to the concerns of protestors, we will reformulate them as explicit conditions of approval.*” (D.16-05-007, p. 62, emphasis added; see also D.16-12-070, p. 8.) Thus, the Commission agreed with ORA/CforAT that the Commission had erred in inadvertently failing to make explicit in D.16-05-007’s ordering paragraphs seven ORA/CforAT conditions that Joint Applicants on behalf of New Charter had proposed in their Reply Brief. Joint Applicants’ Reply Brief, Appendix A, presented a modified merger proposal to specifically address concerns raised by ORA, CforAT, and other protesting parties. (See generally Joint Applicants’ Reply Brief; see also *id.*, Appendix A.) Accordingly, D.16-12-070 modified Ordering Paragraph (OP) 2 of D.16-05-007 to include the seven ORA/CforAT conditions and to add a finding of fact concerning Transaction-specific harms.³

Rehearing Applicants timely filed an application for rehearing of D.16-12-070. They allege that the Commission erred in modifying D.16-05-007 to include ordering paragraphs that correspond to Joint Applicants’ seven commitments to ORA/CforAT that were at issue in ORA/CforAT’s Rehearing Application. (Rehrg. App., p. 2.) Rehearing Applicants do not refute that Joint Applicants had made those specific offers in their Reply Brief, but disagree with D.16-12-070’s conclusion that the Commission’s omission of these ordering paragraphs was an inadvertent error. Their theory is that the Commission deliberately omitted these ordering paragraphs and that this omission in D.16-05-007 constituted the Commission’s express rejection of the seven conditions at issue. (Rehrg. App., p. 2.) On this basis, Rehearing Applicants claim the Commission committed three errors: (1) the Commission lacked justification for the

³ D.16-05-007, as modified by D.16-12-070, now includes in OP 2 subparagraphs (r) through (x), which corresponds to the seven ORA/CforAT conditions at issue, as well as Finding of Fact 14 concerning harms.

changes made to Ordering Paragraph 2 in D.16-05-007, and thereby, abused its discretion; (2) the Commission has not made any Transaction-specific findings of harm related to the seven ORA/CforAT conditions at issue, and (3) Rehearing Applicants were deprived due process because they had no meaningful notice or opportunity to be heard on these seven ORA/CforAT conditions.

On January 12, 2017, ORA/CforAT filed a timely response in opposition to the Application for Rehearing of D.16-12-070. On February 6, 2017, Rehearing Applicants filed a Reply to ORA/CforAT's Response.

On January 11, 2017, Rehearing Applicants filed a Motion for Stay of D.16-12-070. ORA/CforAT timely filed a Response opposing the Stay, to which Rehearing Applicants were given an opportunity to also file a Reply.

We have reviewed each and every allegation set forth in the Application for Rehearing of D.16-12-070. We are of the opinion that good cause does not exist for the granting of the rehearing application.

However, in our review of the Application for Rehearing of D.16-12-070, we realized that additional modifications to D.16-05-007 are necessary to clarify certain of the conditions set forth in subparagraphs (r) through (x), which D.16-12-070 had added to D.16-05-007. Specifically, we modify D.16-12-070 so that D.16-05-007 will be modified to add the confidentiality provisions that were part of Joint Applicants' proposed commitments to ORA concerning broadband and voice service quality reporting, federal outage reports, and the customer satisfaction survey.⁴ Further, we change the commencement date for compliance of conditions (r), (t), (v), (u) and (w) in OP 2 of D.16-05-007, as modified by D.16-12-070, from the date of "closing of the Transaction" to the date of issuance of today's decision. Rehearing of D.16-12-070, as modified, is denied.

⁴ These conditions correspond to D.16-05-007, OP 2, subparagraphs (r), (s), and (t), as modified by D.16-12-070.

II. DISCUSSION

- A. The Commission examined the four corners of D.16-05-007 and the record to determine that seven commitments Joint Applicants had made to ORA/CforAT were inadvertently omitted from D.16-05-007's ordering paragraphs, and accordingly, correctly modified D.16-05-007 to make them explicit conditions.**

Rehearing Applicants argue that D.16-12-070's "reasoning for imposing new conditions constitute an abuse of discretion." (Rehrg. App., p. 3.) Specifically, they claim that D.16-12-070 unlawfully relied exclusively on unsupported assertions made by ORA and CforAT in their Application for Rehearing of D.16-05-007, regarding whether the Commission had "inadvertently omitted" these conditions from D.16-05-007." (Rehrg. App., p. 2.) These claims have no merit. As set forth in D.16-12-070, the Commission fully examined the specific language in D.16-05-007, as well as the record, to ascertain the Commission's intent to make these seven ORA/CforAT conditions at issue "explicit conditions of approval." (See D.16-12-070, p. 62.)

As an initial matter, the Rehearing Application mischaracterizes the action the Commission took in D.16-12-070. D.16-12-070 did not add new conditions beyond those already known to the parties and contemplated in D.16-05-007. The purpose of modifying D.16-05-007's OP 2 to include Joint Applicants' seven commitments to ORA/CforAT was to clarify what the Commission had always intended to mandate in D.16-05-007 with respect to New Charter's merger obligations.

This clarification was necessary because ORA/CforAT, in their Application for Rehearing of D.16-05-007, had raised the issue about whether New Charter would comply with its voluntary commitments to them if these conditions were not made "explicit conditions of approval." Joint Applicants confirmed in their Response to ORA/CforAT's Rehrg. App. of D.16-05-007 that New Charter was not obligated to fulfill them because the Commission did not include them in the list of conditions in D.16-05-007's ordering paragraphs. (Joint Applicants' Response to ORA/CforAT's Rehrg App. of D.16-05-007, pp. 11-15.) Thus, in D.16-12-070 the Commission was not,

as Rehearing Applicants suggest, re-evaluating any policy positions; it was merely correcting a drafting error to make D.16-05-007's ordering paragraphs consistent with that decision's text, and thereby, the Commission's intent.

In D.16-12-070, we explained our rationale for modifying OP 2 in D.16-05-007 to include the seven ORA/CforAT conditions at issue:

The other set of mitigation measures are referred to in the Decision as "Proposed Conditions." (D.16-05-007, pp. 56-64.) These were "mitigating conditions" that ORA, CforAT, Writers Guild, and Stop the Cap!, had proposed the Commission adopt if it were to approve the Transaction. (See D.16-05-007, p. 56.) The Decision lists these parties' proposed conditions on pages 56 through 62 and then provides the following discussion:

[Discussion of Proposed Conditions]

Many of the conditions proposed by protesters are reflected in the promises made and assurances given by Joint Applicants. *To the extent that those promises and assurances are responsive to the concerns of the protesters, we will reformulate them as explicit conditions of approval. In addition, we will also impose conditions that are reasonably inferred from those promises and assurances.*

(D.16-05-007, p. 62, emphasis added.) Joint Applicants in their Reply Brief had made "promises and assurances" in the form of "new commitments" that explicitly responded to the concerns raised by ORA, CforAT, Writers Guild, and Stop the Cap!, who were the remaining parties that did not reach MOUs or other agreements with Joint Applicants. (See Joint Applicants' Reply Brief, pp. 116-121, 123-125, 127-130 & Appendix A.) It is thus evident from this discussion in the Decision that the Commission intended to convert these commitments into mandatory ones. (D.16-05-007, pp. 56-42.) Nothing in the remaining parts of the Decision indicates otherwise.

(D.16-12-070, p. 8.) D.16-12-070 also determined that other parts of D.16-05-007 contained language consistent with an intent by us to hold New Charter responsible for other commitments Joint Applicants had made. (See D.16-12-070, pp. 8-10.)

Rehearing Applicants, as in Joint Applicants' Response to ORA/CforAT's Rehr. App. of D.16-05-007, argue that the Commission meant something more limited in its "Discussion of Proposed Conditions," discussed *supra*.⁵ Rehearing Applicants claim that "the cited paragraph does not, literally, state that the Commission was going to reformulate all of the 'promises and assurances' given by the Joint Applicants as explicit conditions of approval." (Rehr. App., p. 4.) According to Rehearing Applicants, "[h]ad the PD [(Proposed Decision)] and the Decision intended to adopt and mandate all of them, it would have simply stated: 'We adopt all of the conditions listed above.'" (*Ibid.*) Thus, they argue that "the only proper response on rehearing was for the Commission to deny ORA/CforAT's allegation as unsupported by any evidence." (*Ibid.*) Rehearing Applicants' assertion regarding the Commission's intent is plainly wrong for several reasons.

First, the commitments made in Joint Applicants' Reply Brief constitute a basis for the modification of D.16-05-007 to include the inadvertently omitted conditions. Citing to Joint Applicants' Reply Brief, we observed in D.16-12-070 that Joint Applicants had agreed to additional commitments as a compromise to the conditions proposed by protesters. (See Joint Applicants' Reply Br., p. 3, stating: "However, in an effort to demonstrate that they are committed to working with California community groups and regulators, the Joint Applicants have reviewed the conditions requested by other parties in their Opening Brief, and are prepared to agree that New Charter will make substantial and additional, California-specific commitments to accommodate concerns raised by those parties." Emphasis added.) The following statement in

⁵ This discussion is part of D.16-05-007's analysis of Section 854(c)(8), where the issue was: "Can the Commission Impose or Does the Merger Proposal Contain Mitigation Measures to Prevent Significant Adverse Consequences Which May Result?" (See D.16-05-007, pp. 56-62.)

D.16-05-007's "Discussion of Proposed Conditions" reflects these facts: "Many of the conditions proposed by protesters are reflected in the promises made and assurances given by Joint Applicants." (D.16-05-007, p. 62.)

Plainly, the statement that follows in D.16-05-007: "To the extent that those promises and assurances are responsive to the concerns of the protesters, we will reformulate them as explicit conditions of approval," demonstrates the Commission's intent to mandate all of the additional commitments made in its Reply Brief because Joint Applicants had offered them all with the express intent to "accommodate concerns raised by parties." (See Joint Applicants' Reply Br., p. 3.) The next statement: "In addition, we will also impose conditions that are reasonably inferred from those promises and assurances," also supports our interpretation.

Second, Appendix A of Joint Applicants' Reply Brief set forth all of the commitments New Charter was willing to make in response to the concerns raised by ORA, CforAT, the Writers Guild of America, West ("WGAW"), the California Emerging Technology Fund ("CETF"), the Greenlining Institute ("Greenlining"), DISH Network, Inc. ("DISH"), and the International Brotherhood of Electrical Workers Local 639 and 1245 ("IBEW") in their Opening Briefs. (See Joint Applicants' Reply Br., fn. 4., p. 5.) The seven ORA/CforAT conditions at issue were commitments Joint Applicants offered in Appendix A of the Reply Brief. Therefore, these seven conditions fell within the scope of the "promises and assurances" that the Commission intended to "reformulate" as "explicit conditions of approval." (D.16-05-007, p. 62.)

Third, nowhere in D.16-05-007 do we state that we "specifically rejected" any of the commitments that Joint Applicants had made in their Reply Brief, as Rehearing Applicants argue without citation to specific language. (See Rehr. App., pp. 2 & 7.) While ORA and CforAT may have raised these issues in comments on the PD and ex parte communications, the "Discussion on Proposed Conditions" remained unchanged in the PD and D.16-05-007. Therefore, the Commission's express statements in D.16-05-007 best evidence the Commission's intent.

Finally, merely because the conditions were not initially included in the ordering paragraphs of D.16-05-007 does not mean that the Commission changed its mind about “reformulate[ing] them as explicit conditions.” Otherwise, the term “reformulate” would be rendered meaningless.

As demonstrated above, in modifying OP 2 of D.16-05-007, we acted consistently with our stated intention in D.16-05-007 to “reformulate as explicit conditions” all of Joint Applicants’ voluntary commitments (that New Charter would fulfill) offered in their Reply Brief, Appendix A. Appendix A included the seven ORA/CforAT conditions at issue here.

B. D.16-12-070 added to D.16-05-007 Finding of Fact 14, which directly addresses the “harms” mitigated by the seven ORA/CforAT conditions at issue.

Rehearing Applicants contend that D.16-12-070 erred because “neither D.16-05-007 nor the Decision [D.16-12-070] contains any findings identifying harms that would be mitigated by the seven newly imposed conditions.” (Rehrg. App., p. 15.) First, as explained above, the seven conditions at issue were not “new”; the Commission had originally intended them to be part of the conditions of approval listed in OP 2 of D.16-05-007.

Second, Finding of Fact (“FOF”) 14, which D.16-12-070 added to D.16-05-007, proves their claim false. Notably, the Rehearing Application does not address this determination, which states:

In an effort to address other parties’ concerns and meet their fundamental objections, the Joint Applicants have taken the significant step of agreeing that New Charter will make additional commitments set forth in Joint Applicants’ Reply Brief, Appendix A.

(D.16-12-070, pp. 15-16.) As evident by its terms, FOF 14 incorporates the “harms” addressed by Joint Applicants’ voluntary commitments, including the seven ORA/CforAT conditions at issue here. The “harms” were specifically detailed in “other

parties' concerns" and "fundamental objections," which were raised in their Opening Briefs and referenced in Joint Applicants' Reply Brief.⁶

For instance, ORA cited to evidence presented in testimony from various ORA witnesses, which detailed how the Transaction would have an adverse consequence on broadband and voice service quality because the merging entities had low levels of customer satisfaction.⁷ (See ORA's Opening Br., pp. 34-42.) ORA noted the harms to service quality and reliability post merger and pointed to Joint Applicants' failure to provide any evidence of how service quality and reliability would be maintained or evidence of concrete, measurable, performance-based commitments that will ensure the proposed merger maintains or raises the quality of broadband services. (See ORA's Opening Br., pp. 37 & 42.) In D.16-05-007, the Commission found this ORA testimony "persuasive." (See D.16-05-007, pp. 36-37.)

Further, ORA observed that Charter, with its own problems addressing service quality, reliability, and public safety issues, would also be "inheriting a TWC network that is fraught with service quality problems." (ORA's Opening Br., p. 38.) To mitigate the adverse consequences of the proposed Charter and TWC merger, ORA's Opening Brief proposed three conditions specifically geared towards remedying the service quality and customer satisfaction harms it had identified. (ORA's Opening Br., pp. 49-51.)

In response, Joint Applicants' Reply Brief stated that "Joint Applicants are particularly encouraged that ORA, notwithstanding its opposition to the Transaction, has proposed conditions. New Charter will commit to accommodate a number of ORA's

⁶ See e.g., ORA Opening Brief (March 1, 2016); CforAT Opening Brief (March 1, 2016); WGAW Opening Brief (March 1, 2016); CETF Opening Brief (March 1, 2016); Greenlining Opening Brief (March 1, 2016); DISH Opening Brief (March 1, 2016); IBEW Opening Brief (March 1, 2016).

⁷ The testimony of ORA's witnesses Adam Clark and Enrique Gallardo included, among others, evidence from Joint Applicants' data responses, Federal Communications Commission network outage reports, J.D. Power's Telephone Customer Satisfaction Survey, and the American Customer Satisfaction Index.

proposals, and, in some places where the Joint Applicants believe that ORA’s requests are impractical, New Charter will undertake alternative commitments in the same areas.” (Joint Applicants’ Reply Br., p. 93.) Accordingly, Joint Applicants made the following commitments to ORA (among the others that D.16-05-007 did include in OP 2):

- Commit to service quality reporting consistent with applicable G.O. 133-CC (sic) metrics for its interconnected VoIP services for three years and certain additional outage reporting requirements for broadband and VoIP services over the same period.⁸
- Create and conduct a customer satisfaction survey in conjunction with ORA.⁹

(Joint Applicants’ Reply Br., p. 4; see also *id.*, pp. 116-121.) These are the conditions that D.16-12-070 added to OP 2 of D.16-05-007 because the Commission inadvertently failed to make them “explicit conditions of approval,” as D.16-05-007 stated it would.

Similarly, in Joint Applicants’ Reply Brief, they made the following commitments to CforAT:

- Improve New Charter’s customer education surrounding battery backup power systems and install such batteries at cost to disabled customers that may have difficulty installing them.¹⁰
- Improve the accessibility of its online content and customer communications to persons with disabilities.¹¹

⁸ Conditions No. 27, 28, & 29 in Appendix A of Joint Applicants’ Reply Br., pp. 11-12, provided the full terms of this commitment.

⁹ Condition No. 30 in Appendix A of Joint Applicants’ Reply Br., p. 13-14, provided the full terms of this commitment.

¹⁰ Condition No. 32 in Appendix A of Joint Applicants’ Reply Br., pp.11-12, provides the full terms of this commitment.

¹¹ Conditions Nos. 34 & 35 in Appendix A of Joint Applicants’ Reply Br., pp. 15-16, provide the full terms of this commitment.

(Joint Applicants' Reply Br., pp. 4, 123-125 & 127-131.) These are the conditions that D.16-12-070 added to OP 2 of D.16-05-007 to make them explicit conditions, as the Commission stated it would.

In sum, FOF 14's reference to Joint Applicants' Reply Brief sufficiently incorporates the Transaction-specific harms being addressed by the conditions the Commission intended to adopt in D.16-05-007, which included the seven ORA/CforAT conditions at issue here.

C. The Commission did not violate due process by modifying D.16-05-007 to explicitly add the conditions that it had intended to mandate in that decision.

Rehearing Applicants argue the Commission violated their due process rights in "imposing *ex post facto* conditions" of which they assert they neither had notice, nor a meaningful opportunity to be heard. (Rehrg. App, p. 16.) In other words, they argue that it was reasonable for them to believe that the conditions set forth in D.16-05-007 comprised the entire set of conditions for Commission approval. On that belief, they closed the Transaction on May 18, 2016, a day after D.16-05-007 issued. (Rehrg. App., p. 20.) Rehearing Applicants accuse the Commission of having a "prolonged approval process" and blames that in part on causing "the economic realities that compelled closing the Transaction within days of the issuance of D.16-05-007." (Rehrg. App., p. 20.) They assert, without citation to authority, that "[t]hose realities deprived [Rehearing Applicants] of any meaningful opportunity of waiting seven months for the Commission to resolve the rehearing applications before proceeding to closing." (Rehrg. App., p. 20.) These claims are baseless.

First, there can be no question that Rehearing Applicants had notice and knew that New Charter could be obligated to fulfill the seven ORA/CforAT conditions at issue because (1) it was Joint Applicants who had proposed these conditions in the first place (in Joint Applicants' Reply Brief) and (2) Rehearing Applicants were put on notice on May 26, 2016, just 10 days after D.16-05-007 issued, that ORA/CforAT had put the seven conditions at issue in their Rehearing Application of D.16-05-007. For Rehearing

Applicants to now argue otherwise makes it appear as if Joint Applicants were acting in bad faith when they represented that New Charter “will make substantial and additional, California-specific commitments to accommodate concerns raised by other parties.” (Joint Applicants’ Reply Br., p. 3.)

As we explained in D.16-12-070, it was the Commission’s intent in D.16-05-007 to adopt the voluntary commitments Joint Applicants had offered in Appendix A of their Reply Brief “to the extent those promises and assurances are responsive to the concerns of the protesters.” Responding to the concerns of protesters is the precise reason Joint Applicants gave for making the additional commitments in their Reply Brief, which included the seven ORA/CforAT conditions at issue. (See Joint Applicants’ Reply Br., p. 3, [“Joint Applicants have reviewed the conditions requested by other parties in their Opening Brief, and are prepared to agree that New Charter will make substantial and additional, California-specific commitments to accommodate concerns raised by those parties.” Emphasis added.])

Second, the fact that it was Joint Applicants who had voluntarily proposed that New Charter would perform the additional commitments offered in their Reply Brief, Appendix A, undercuts any complaints Rehearing Applicants are now making about “incremental costs” associated with seven conditions that New Charter was already prepared to fulfill. (See Joint Applicants’ Reply Br., p. 93 [“Nonetheless, in the interest of cooperation, the Joint Applicants believe that a number of the proposed additional conditions—although not necessary—*can* be implemented by New Charter and are *willing* to make additional commitments to accommodate those requests.” Emphasis added.])

Third, the alleged “economic realities” and deadlines associated with the Transaction were all of Rehearing Applicants’ own doing,¹² as the Transaction was not one required by the Commission but sought for the purpose of obtaining “greater revenues of the merged entities.” (Rehrg. App., fn. 48, p. 16.) As noted above, the

¹² Rehearing Applicants were part of the Joint Applicants who filed A.15-07-007. See fn 2, *supra*.

Transaction was consummated before D.16-05-007 became a final decision, after the disposition of any rehearing application or the passing of the deadline for the filing of such an application. Rehearing Applicants did so at their own risk.¹³

Fourth, Rehearing Applicants had ample notice and opportunity to be heard on this issue regarding the unintended omission of the seven ORA/CforAT conditions. They received notice from ORA/CforAT's Application for Rehearing of D.16-05-007, and took the opportunity to respond. (See Joint Applicants' Response to ORA/CforAT's Rehrhg App., pp. 11-15.)

Fifth, Rehearing Applicants were allowed to raise those same arguments again in their Application for Rehearing of D.16-12-070. (Cf. Rehrhg. App., pp. 3-20 with Joint Applicants' Response to ORA/CforAT Rehrhg App., pp. 11-15.) Essentially, by their Application for Rehearing of D.16-12-070, they are taking a second bite of the apple. As before, these arguments have no merit for the reasons discussed herein and in D.16-12-070.

Therefore, as discussed above, Rehearing Applicants had ample notice and opportunity to be heard on the issues concerning the inadvertently omitted conditions. Rehearing Applicants were thus not denied due process.¹⁴

¹³ Joint Applicants knew there was a rehearing application that raised the issue regarding the omission of the conditions. Despite this, they chose to close the Transaction prior to the resolution of this challenge to D.16-05-007, and thus, that decision was not final. Accordingly, they assumed the risk that the Commission might agree with ORA/CforAT's rehearing application on this issue. To say otherwise would mean that the Commission could not address a rehearing application and, in this case, correct an inadvertent error it had made, because the Transaction was closed.

¹⁴ Rehearing Applicants portray themselves as the victims of "gamesmanship" by ORA/CforAT, arguing that "the Decision, if left to stand, could inadvertently create a precedent that encourages unfair delay tactics and sandbagging." (Rehrhg. App., p. 19.) To the contrary, their claims of not being provided "meaningful" notice and "meaningful" opportunity to be heard *on their very own proposals* reflect an attempt to take advantage of the Commission's "drafting" mistake in inadvertently omitting ordering paragraphs that correspond to the seven ORA/CforAT conditions at issue.

D. D.16-12-070 is modified to clarify the applicability of the confidentiality provisions and due dates contained in the seven ORA/CforAT conditions at issue.

Rehearing Applicants point out that D.16-12-070 omits confidentiality requests tied to three of the seven ORA/CforAT conditions at issue concerning Joint Applicants' service quality reporting and customer satisfaction survey commitments to ORA.¹⁵ (Rehrg. App., fn. 45, p. 15; see also Motion for Stay, fn. 11, p. 5.) In their confidentiality request, Joint Applicants stated: "In return, the Joint Applicants request that the Commission issue an order prohibiting the release of this confidential information, outside of Commission staff or ORA, to any person or entity, except upon prior notice to New Charter and an opportunity to be heard." (See Joint Applicants' Reply Brief, Appendix A, pp. 11-12.) Since, as explained above, the Commission in D.16-05-007 had intended to include Joint Applicants' commitments set forth in their Reply Brief, Appendix A, the Commission will modify D.16-12-070 to amend OP 2 subparagraphs (r), (s), and (t) in D.16-05-007 to add the confidentiality provisions to them.¹⁶

Rehearing Applicants further raise an argument that many of the compliance deadlines for the new conditions had already passed at the time the Commission issued D.16-12-070 because the obligations for those conditions began to run "from the closing of the Transaction." (See Motion for Stay, pp. 4-5.) The affected conditions are the ones listed in OP 2, subparagraphs (r), (t), (v), (u), and (w), of D.16-05-007, as modified by D.16-12-070. Rehearing Applicants are correct, but the passing of the deadlines does not negate New Charter's underlying obligation regarding each condition. Thus, for purposes of clarification, we modify D.16-12-070 to extend the relevant compliance periods in D.16-05-007 for these conditions, as set forth in the

¹⁵ Those three conditions were made explicit in D.16-05-007 by D.16-12-070's modification, which added subparagraphs (r), (s), and (t) to OP 2.

¹⁶ The Commission already deems service quality reports it receives from carriers as confidential. (See General Order 133-D, Rule 4.d.)

Ordering Paragraphs below. We believe it is reasonable to preserve the intended time frame for compliance for each of the conditions listed in OP 2, subparagraphs (r), (t), (v), (u), and (w). These time frames were proposed by Joint Applicants. Because of the passage of time, we believe it is necessary to change the trigger date for commencement of the time frame for each condition. Accordingly, rather than having the obligations set forth in these conditions commence “from the closing of the Transaction,” they will now commence from the date of issuance of today’s decision.

E. Charter’s Motion for Stay Is Moot.

In its Motion for Stay, Rehearing Applicants ask for a stay pending the resolution of their Application for Rehearing. With the disposition of this rehearing application, the Motion for Stay is now moot. Thus, the motion is dismissed as moot.

III. CONCLUSION

We modify D.16-12-070 for the reasons discussed above. Otherwise, good cause does not exist for the granting of the Application for Rehearing of D.16-12-070. Therefore, we deny rehearing of D.16-12-070, as modified.

THEREFORE, IT IS ORDERED that:

1. Ordering Paragraph 1.d. of D.16-12-070, which added subparagraphs (r), (s), and (t) to Ordering Paragraph 2 in D.16-05-007, is modified to add to each of these subparagraphs the following confidentiality provision:

Information provided to ORA by New Charter pursuant to this condition shall not be disclosed outside of Commission staff or ORA, to any person or entity, except upon prior notice to New Charter and an opportunity to be heard.

2. Because of the passage of time, the commencement date for the compliance of conditions (r), (t), (v), (u), and (w) of Ordering Paragraph 2 in D.16-05-007, as modified by D.16-12-070, is changed from the date of the closing of the Transaction to the date of issuance of today’s decision.

3. Rehearing of D.16-12-070, as modified, is hereby denied.
4. This proceeding, Application (A.) 15-07-009, is closed.

This order is effective today.

Dated March 23, 2017, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners