

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA



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Order Instituting Rulemaking On The
Commission's Own Motion Into The
Application Of The California Environmental
Quality Act To Applications Of Jurisdictional
Telecommunications Utilities For Authority
To Offer Service And Construct Facilities.

R.06-10-006

(Filed October 5, 2006)

**RESPONSE OF VERIZON TO APPLICATIONS FOR REHEARING OF
DECISION 10-12-056 FILED BY (1) AT&T CALIFORNIA, FRONTIER, SUREWEST,
AND THE SMALL LECs AND (2) THE LEAGUE OF CALIFORNIA CITIES, THE
CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC.**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	4
A. The Decision Errs in Applying CEQA to “All” Carriers Despite the Fact that Most Carriers Are Not Required to Obtain Commission Preapproval for Construction.	4
B. The Decision Violates Due Process as it Clearly and Substantially Contradicts the Express Goals of the OIR, Resulting in a Scoping Modification Without Proper Notice and Opportunity for Comment.	6
C. The Commission Has the Authority to Adopt Exemptions from the New CEQA Rules, and the Exemptions that the Commission Adopted Have Ample Record Support.	8
III. CONCLUSION.....	12

TABLE OF AUTHORITIES

PAGE

California Public Utilities Commission Rules and Regulations

Rule 16.1(d) 1

California Public Utilities Commission Decisions

D.06-04-030 10
D.10-12-056 1, 4
GO 159A 2, 7
GO 170..... passim

California Statutes and Regulations

14 Cal. Code Regs. § 15000 5
14 Cal. Code Regs. § 15002(b)(3) 4
14 Cal. Code Regs. § 15002(i)(1) 4
14 Cal. Code Regs. § 15022 12
14 Cal. Code Regs. § 15022(a)..... 5
14 Cal. Code Regs. § 15022(a)(1)(A)..... 8
14 Cal. Code Regs. § 15022(a)(1)(B)..... 8
14 Cal. Code Regs. § 15022(a)(1)(C) 8
14 Cal. Code Regs. § 15378(a)(3) 4
Cal. Pub. Res. Code § 21080(a) 4, 6, 12
Cal. Pub. Util. Code § 234 4
Cal. Pub. Util. Code § 236 4
Cal. Pub. Util. Code § 1708..... 11, 12
Cal. Pub. Util. Code § 1757.1(a)(2) 5
Cal. Pub. Util. Code § 1757.1(a)(6) 6, 8
Cal. Pub. Util. Code § 5820 (“DIVCA”) 2, 7, 8

California Case Law

Davidson Homes v. City of San Jose (Cal. App. 6th Dist. 1997) 54 Cal. App.
4th 106 9, 10, 11
So. Cal. Edison v. PUC (2006) 140 Cal. App. 4th 1085 6, 8

Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure, Verizon California Inc. (U-1002-C) and its certificated wireline affiliates¹ submit this Response to the Applications for Rehearing of D.10-12-056 (the "Decision") filed by (1) AT&T California, Frontier, SureWest, and the Small LECs (collectively, the "Joint Carriers") and (2) the League of California Cities, the California State Association of Counties, and Scan Natoa, Inc. (collectively, the "Cities") on January 24, 2011.

I. INTRODUCTION

The Commission launched this proceeding to reform the way it implements the California Environmental Quality Act ("CEQA") with respect to the telecommunications industry. Specifically, in its Order Instituting Rulemaking ("OIR"), the Commission articulated three laudable goals:

- Ensure that the Commission's practices comply with the current requirements and policies of CEQA;
- Promote the development of an advanced telecommunications infrastructure, particularly with regard to facilities that provide broadband facilities; and
- Make certain that the application of CEQA in the area of telecommunications does not cause undue harm to competition, particularly intermodal competition.²

¹ The entities on whose behalf Verizon submits this Response include: Verizon California Inc. (U-1002-C), MCI Communications Services, Inc., d/b/a Verizon Business Services (U-5378-C), MCImetro Access Transmission Services, d/b/a Verizon Access Transmission Services (U-5253-C), TTI National, Inc., d/b/a Verizon Business Services (U-5403-C), Teleconnect Long Distance Services & Systems Company, d/b/a Telecom*USA (U-5152-C), Verizon Enterprise Solutions LLC (U-5658-C), Verizon Long Distance LLC (U-5732-C), and Verizon Select Services Inc. (U-5494-C).

² See D.10-12-056, quoting OIR at 1.

The Commission rearticulated these goals in the Scoping Memo,³ and over the ensuing 4-plus years, the Commission took comments, held multiple workshops, directed parties to meet and confer on consensus proposals, and took additional comments on specific proposals — all in search of a workable solution that would achieve the OIR’s three goals. In the end, two alternatives emerged, both of which were based on substantial record evidence showing that the vast majority of telecommunications construction in California falls within the statutory and categorical exemptions enumerated in the CEQA Guidelines.

The first proposal, sponsored by Verizon and the other Joint Carriers,⁴ would have deferred most environmental review to local agencies consistent with the way intermodal competitors — mobile wireless and video service providers — are treated under GO 159A⁵ and the Digital Information Video Competition Act (“DIVCA”),⁶ respectively. Commission review would be required only when an applicant were to seek a new or modified CPCN. To further promote competitive neutrality, an applicant could request that in lieu of undergoing CEQA review at the time a new CPCN were issued or modified, the Commission could condition future construction authority upon completion of any required local CEQA review.⁷ Finally, Joint Carriers proposed that the Commission adopt practical and specific exemptions for routine

³ See Joint Ruling of Assigned Commissioner and Administrative Law Judge and Scoping Memo (Apr. 18, 2008) at 1.

⁴ See *Joint Carriers’ Response to ALJ Ruling Directing Parties to Meet and Confer and Submit Comments as Follow-up to Workshop* (Aug. 24, 2007) at Attachment (Proposed GO).

⁵ GO 159A (wireless providers subject to local CEQA review).

⁶ Pub. Util. Code § 5820 (DIVCA) (“The local entity shall serve as the lead agency for any environmental review under this division.”)

⁷ See *Joint Carriers’ Response to ALJ Ruling Directing Parties to Meet and Confer and Submit Comments as Follow-Up to Workshop* (August 24, 2007) at Attachment, § 3.

telecommunications projects.⁸ This simple solution would have achieved all the goals of the OIR; and notably, it was the only proposal that the Attorney General believed would comply with CEQA.⁹

The Commission, however, adopted in large part an alternative proposal sponsored by a small group of newer competitive local exchange carriers (“CLECs”) whose certificates of convenience and necessity (“CPCNs”) require that they return to the Commission for permission prior to constructing telecommunications facilities. Although the exemptions contained in the alternative proposal were similar to those of the Joint Carriers, under the alternative proposal, the Commission would for the first time purport to require that “all” wireline carriers’ nonexempt construction projects be reviewed by the Commission under CEQA — *despite* the fact that most carriers had already been granted construction authority, are under no other requirement to obtain Commission preapproval for telecommunications construction, and obtain any required environmental review at the local level.

The result is a Decision that (1) fails to comply with CEQA, (2) imposes unnecessary, duplicative administrative burdens on the deployment of advanced telecommunications infrastructure, and (3) subjects wireline providers, wireless providers, and video providers offering both voice and video services to conflicting environmental regulations, thus contradicting and undermining all three goals of the

⁸ *Id.* at 5, Attachment, § 4.

⁹ See Reply Comments of California Attorney General in Response to Administrative Law Judge’s May 8, 2007, and August 6, 2007, Rulings (Sep. 10, 2007) at 3 (“In these comments, the Attorney General describes the ILEC Group proposal in some detail because, with some minor exceptions, *as drafted* it could serve as the basis for a general order that resolves this rulemaking. By contrast, the Attorney General does not describe the CLEC Group proposal with the same level of detail. While the Attorney General supports the concepts in the CLEC Group’s proposal, as drafted it does not comport with CEQA.”) (Emphasis in original.) See also *id.* at 9 (“With the recommended changes, the Attorney General believes that the ILEC Group proposal would comply with CEQA.”)

OIR. The Decision is fatally flawed as a matter of law and must be modified as described below.

II. ARGUMENT

A. The Decision Errs in Applying CEQA to “All” Carriers Despite the Fact that Most Carriers Are Not Required to Obtain Commission Preapproval for Construction.

Verizon agrees with Joint Carriers and the Cities that the Decision fundamentally errs in concluding as a matter of law that the Commission “must review” the construction projects of “all” wireline telephone corporations in order to comply with CEQA.¹⁰ This clearly erroneous legal conclusion violates a bedrock principle expressly codified in the act, *i.e.*, that CEQA applies only to “discretionary projects proposed to be carried out or approved by public agencies.”¹¹ The Office of Planning and Research (“OPR”) reinforces this basic rule in its implementing regulations, which are commonly referred to as the “CEQA Guidelines.” With respect to “private activities” specifically, the Guidelines expressly provide that CEQA applies *only* if such “activities ... require approval from a government agency” through issuance of a “lease, permit, license, certificate, or other entitlement for use,” and *even then* only when the agency is required to “use its judgment in deciding whether and how to carry out or approve a project.”¹² But as Joint Carriers correctly note, the vast majority of telephone corporations that the Decision purports to include within the scope of GO 170 were

¹⁰ D.10-12-056 at Conclusion of Law 1 (“This Commission must review construction projects by telephone corporations as defined in California Public Utilities Code Section 234 and telegraph corporations as defined in California Public Utilities Code Section 236 for compliance with CEQA”); *id.* at 2, 21, 26, 28, 35, 36 (purporting to apply the new CEQA rules to “all” nonexempt telephone corporation construction projects).

¹¹ See Cal. Pub. Res. Code § 21080(a).

¹² 14 Cal. Code Regs. §§ 15002(b)(3) (defining the types of “government action” required for CEQA applicability), 15002(i)(1) (defining the scope of “discretionary action” required for CEQA applicability), 15378(a)(3) (defining the scope of a reviewable “project” required for CEQA applicability).

previously granted construction authority by statute or Commission decision; consequently, they are not required to obtain Commission approval prior to constructing telecommunications facilities.¹³ Accordingly, the Decision’s attempt to apply CEQA to “all” wireline construction projects — despite the fact that the Commission does not exercise “discretionary approval” authority over “all” such projects — violates the express provisions of the act and the CEQA Guidelines and must be stricken.

Although the Commission may exercise its own independent judgment to adopt “objectives, criteria, and specific procedures ... for administering its responsibilities under CEQA,” such objectives, criteria and procedures must be “consistent with CEQA and the[CEQA] Guidelines.”¹⁴ Clearly, the Commission must follow any limitations on its authority that the Legislature duly adopts. In addition, the CEQA Guidelines, duly adopted by the OPR, “are prescribed by the Secretary for Resources to be followed by all state and local agencies in California” and “are binding on all public agencies in California.”¹⁵ Accordingly, as Joint Carriers correctly state in their Application for Rehearing, an “agency cannot unilaterally decide it wants to conduct environmental review for a given project”; on the contrary, the agency “must have authority to take an action approving [or disapproving] the project in order to undertake CEQA review.”¹⁶ This is black-letter CEQA law, and the Decision’s conclusion to the contrary constitutes reversible legal error under Public Utilities Code section 1757.1(a)(2).

¹³ See Joint Carriers’ Application for Rehearing (Jan. 24, 2011) at § II.

¹⁴ 14 Cal. Code Regs. § 15022(a).

¹⁵ *Id.*, § 15000.

¹⁶ Joint Carriers’ Application for Rehearing (Jan. 24, 2011) at 4.

The Commission, therefore, must modify this Conclusion of Law and the Applicability section of GO 170 to state that the Commission will apply the new CEQA rules *only* when a telephone corporation is otherwise required by the terms of its Certificate of Public Convenience and Necessity (“CPCN”), or other applicable legal authority, to obtain discretionary Commission approval prior to constructing telecommunications facilities.

B. The Decision Violates Due Process as it Clearly and Substantially Contradicts the Express Goals of the OIR, Resulting in a Scoping Modification Without Proper Notice and Opportunity for Comment.

Although the Commission is not required to accept any single party’s policy recommendations, the Commission is required to abide by its own procedural and scoping rulings when considering such recommendations, and to give parties meaningful notice and an opportunity to be heard before adopting final rules that so clearly contradict such rulings.¹⁷ The Commission failed to do so here. Accordingly, the Decision violates parties’ due process rights, constituting reversible error under Public Utilities Code section 1757.1(a)(6).

The disconnect between the final rules adopted in the Decision and the goals articulated in the OIR is substantial and inexplicable. The Commission ignored comments from the Attorney General¹⁸ and Joint Carriers¹⁹ that attempting to apply

¹⁷ *So. Cal. Edison v. PUC* (2006) 140 Cal. App. 4th 1085, 1106 (holding that the Commission violated its own procedural rules by considering a new issue beyond the scope of the scoping memo and providing parties with only three business days to respond.)

¹⁸ See Attorney General Comments on OIR, Nov. 9, 2006, at 8–9 (asserting that pursuant to the express language of the statute, CEQA “applies only to the Commission’s discretionary approval of projects”), citing Pub. Res. Code § 21080, subd. (a). See also Reply Comments of California Attorney General in Response to Administrative Law Judge’s May 8, 2007, and August 6, 2007, Rulings (Sep. 10, 2007) at 12 (“Further, in order for an agency to become lead agency, it must have before it a discretionary decision. Absent from the CLEC Group proposal is the recognition that a carrier that “elects” the Commission as lead agency must apply to the Commission for authority to construct the facility. The

CEQA to “all” wireline carriers — even those carriers which had previously been granted construction authority without any continuing need for Commission approval — would violate CEQA since the act applies only when a private party is required to obtain discretionary approval from a public agency prior to constructing facilities, as discussed above. By ignoring such comments, the Decision fails to achieve the first and most important goal expressly articulated in the OIR: compliance with CEQA.

In creating new rules that are unnecessary and inconsistent with CEQA, and potentially duplicative of local requirements, the Decision also fails to achieve the second goal of the OIR: minimization of administrative burdens that stifle deployment of advanced communications infrastructure.

Finally, in adopting final rules that directly contradict the way mobile wireless carriers are treated under GO 159A²⁰ and video service providers²¹ are treated under DIVCA, the Decision fails to achieve the third and final goal of the OIR: competitive neutrality and avoidance of competitive harm, “particularly [with respect to] intermodal competition.”²² Worse, the Decision creates needless confusion regarding which set of

Commission cannot simply provide “CEQA review” of a project for no other purpose than to provide CEQA review.”)

¹⁹ See, e.g., Opening Comments of Verizon on OIR (Nov. 9, 2006) at 3–4 (commenting that application of CEQA in the absence of discretionary approval authority for telecommunications projects would violate CEQA); Joint Carriers’ Reply Comments to ALJ Ruling Directing Parties to Meet and Confer and Submit Comments as Follow-up to Workshop (Sept. 10, 2007) at 8–9 (same); Joint Carriers’ Comments on the October 20, 2010 Proposed Decision of Commissioner Bohn Adopting General Order Specifying Review Procedures Pursuant to California Environmental Quality Act (Nov. 9, 2010) at 1–2, 3, 5, 6, 7 (same); Joint Carriers’ Reply Comments on the October 20, 2010 Proposed Decision of Commissioner Bohn Adopting General Order Specifying Review Procedures Pursuant to California Environmental Quality Act (Nov. 15, 2010) at 2 (same).

²⁰ See GO 159A (wireless providers subject to local CEQA review).

²¹ Pub. Util. Code § 5820 (DIVCA) (“The local entity shall serve as the lead agency for any environmental review under this division.”)

²² OIR at 1.

rules (GO 170 or DIVCA) applies when facilities capable of providing *both* voice services and video services are deployed (often in the same trench).

The gulf between the final rules and the goals articulated in the OIR is so vast that the only reasonable conclusion to draw here is that the Commission modified the scope of this proceeding without meaningful notice or opportunity for comment. This outcome violates due process and warrants reversal under Public Utilities Code section 1757.1(a)(6) and *So. Cal. Edison v. PUC* (2006) 140 Cal. App. 4th 1085, 1106.²³

C. The Commission Has the Authority to Adopt Exemptions from the New CEQA Rules, and the Exemptions that the Commission Adopted Have Ample Record Support.

Although the Decision errs in its overly broad application of CEQA as discussed above, the Commission was well within its rights under the act and the CEQA Guidelines to adopt reasonable, record-based exemptions from the new CEQA rules, contrary to the Cities' objections. Indeed, the CEQA Guidelines expressly grant public agencies the authority to "identify[] the activities that are exempt from CEQA," in any or all of following circumstances:

1. The agency has determined that "there is no possibility that the activity in question may have a significant effect on the environment,"²⁴ (commonly referred to as the "common-sense exemption");
2. The agency has determined that the activity does not constitute a "project" or requires only "ministerial" review;²⁵ and/or,

²³ See *supra* at note 17.

²⁴ 14 Cal. Code Regs. § 15022(a)(1)(A).

²⁵ *Id.* at § 15022(a)(1)(B).

3. The agency has found that the activity falls within one or more of the categorical exemptions enumerated in the CEQA Guidelines.²⁶

Notably, the Cities do not challenge the Commission's determination that the activities contained in Section IV of GO 170 fall within the categorical exemptions enumerated in the CEQA Guidelines. Instead the Cities assert, erroneously, that the Commission lacks sufficient basis to exempt the additional activities listed in Section III of GO 170 because, in their view, the Commission did not make "a separate finding, for each of the activities listed in Section III, that each and every activity of this type ever to be performed in California could never have a significant, CEQA-defined environmental effect."²⁷ The Cities are wrong.

As a preliminary matter, such a sweeping assertion defies the rule of reasonableness. How could any agency purport to find that a particular activity "could never" have an environmental impact in all circumstances now and in the future? This is an impossibly high standard that could rarely if ever be met. Common sense itself disproves the Cities' assertion.

In addition, the sole case the Cities cite in alleged support of their assertion, *Davidson Homes v. City of San Jose*, also shows that the Cities have greatly overstated the legal standard for application of the common-sense exemption. In that case, San Jose adopted an ordinance providing that a particular type of ground soil testing was exempt from CEQA under the common-sense exemption "without any further comment or explanation."²⁸ In stark contrast to the legal standard that the Cities claim is required,

²⁶ *Id.* at § 15022(a)(1)(C).

²⁷ Cities Application for Rehearing (Jan. 24, 2011) at 12.

²⁸ *Davidson Homes v. City of San Jose* (Cal. App. 6th Dist. 1997) 54 Cal. App. 4th 106, 113.

the *Davidson* court applied a “substantial evidence” test and determined that the ordinance was improper because it was based on a record “devoid of any evidence regarding possible environmental impacts resulting from the geological studies ordered as part of Ordinance No. 24680, with the exception of the written and oral objections interposed by appellant.”²⁹ Accordingly, the court overturned the ordinance, holding that an “agency’s exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.”³⁰

The facts in the *Davidson* case clearly do not apply here. The parties in this proceeding were given multiple, specific notices and opportunities for comment on the issue of exemptions;³¹ and the exemptions that the Commission ultimately adopted

²⁹ *Id.* at 114.

³⁰ *Id.* at 117.

³¹ See Order Instituting Rulemaking (OIR) at 37 (seeking comment on the following questions, among other things: “5. Do any of the statutory or categorical exemptions set forth in CEQA and the CEQA Guidelines apply to projects by telecommunications carriers under our jurisdiction? 6. Should we submit a request for a categorical exemption for certain types of actions by telecommunications carriers under our jurisdiction to the Office of Planning and Research? If so, what should be the scope of the recommendation to the Office of Planning and Research?”). See also Administrative Law Judge’s Ruling Directing Parties to Meet and Confer and to Submit Comments as Follow-up to Workshop (May 8, 2007) at 2–3. In that Ruling, the ALJ solicited additional comments on the following specific questions regarding exemptions:

- Are there certain types of construction activities performed by telecommunications providers that generally fall within existing statutory and/or categorical exemptions under CEQA? Please specifically describe each type of construction activity, state the exemption(s) that you believe would apply, and any circumstances under which a proposed categorical exemption(s) would not apply.
- Should the Commission pursue the establishment of a new categorical exemption for certain construction activities by telecommunication providers in existing, disturbed public rights of way and utility easements, as proposed in the reply comments of NextG?
- Should the Commission adopt an expedited procedure for reviewing the applications of telecommunications providers to perform construction activities that are claimed to be exempt from CEQA, such as the process adopted in D.06-04-030, Attachment E (Application of NewPath Networks LLC for a Modification of its Certificate of Public Convenience and Necessity)? What process do the parties suggest?

enjoy ample record support.³² Indeed, one of the multiple workshops that the Commission held in this proceeding was devoted to “developing a list of activities that are exempt from review under the California Environmental Quality Act (CEQA).”³³ Consequently, the exemptions adopted in GO 170 are well supported by the findings — exceeding the “substantial evidence” test articulated in *Davidson* — and should be affirmed. If, however, the Commission determines that additional input is needed to bolster the record in this proceeding, then the Commission should give all parties specific notice and an opportunity for comment and stay the Decision in full pending the outcome of that review. The Commission should not eliminate or reduce any of the exemptions absent notice and an opportunity for comment as the Decision was effective immediately upon adoption. Modifying the substance of the adopted exemptions absent additional notice and comment would thus violate basic due process in addition to Public Utilities Code section 1708.

³² See Attorney General Comments on OIR, Nov. 9, 2006 at 6 (supporting the Commission’s development of exemptions based on existing categorical exemptions in the CEQA Guidelines as a way to streamline the CEQA review process); DRA Opening Comments on OIR, Nov. 9, 2006, at 9–10 (same); Comments of Technology Network (Technet) (Nov. 9, 2006) at 7, 8 (proposing specific exemptions consistent with prior Commission decisions); Verizon Opening Comments on OIR (Nov. 9, 2006) at §§ 1, 3, 5 and passim (proposing exemptions for “routine telecommunications construction”); Reply Comments of NextG Networks of California, Inc. on Order Instituting Rulemaking (Nov. 21, 2006) at 2, 3 (proposing specific exemptions consistent with the categorical exemptions enumerated in the CEQA Guidelines and pursuant to the common-sense exemption); Joint Carriers’ Response to ALJ Ruling Directing Parties to Meet and Confer and Submit Comments as Follow-up to Workshop (Aug. 24, 2007) at 5–6 (discussing proposed exemptions contained in attachment), Attachment at § 4 (proposing specific exemptions in a draft GO); Joint Carriers’ Opening Comments on the October 20, 2010 Proposed Decision on Commissioner Bohn Adopting General Order Specifying Review Procedures Pursuant to California Environmental Quality Act (Nov. 9, 2010) at § V and Attachment A (proposing specific additions and modifications to the exemptions contained in Draft GO 170).

³³ Administrative Law Judge’s Ruling Setting Workshop (Feb. 15, 2007) at 1.

III. CONCLUSION

For the reasons discussed above, the Commission should modify Conclusion of Law No. 1 and GO 170 to make it clear that the new CEQA rules apply only when a telephone corporation is otherwise required by statute or another Commission decision to obtain Commission approval prior to constructing telecommunications facilities, consistent with the express provisions of CEQA providing that the act applies only to “discretionary projects proposed to be carried out or approved by public agencies,”³⁴ not to “all” projects as the Decision erroneously purports to require. In addition, the Commission should disregard the Cities calls to eliminate or reduce the exemptions contained in GO 170 as the exemptions are well supported in the record, and the Commission was well within its rights under section 15022 of the CEQA Guidelines to adopt the exemptions. The Commission should not eliminate or reduce any of the exemptions without first giving all parties notice and an opportunity to be heard consistent with Public Utilities Code section 1708.

February 8, 2011

Respectfully submitted,



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³⁴ See Cal. Pub. Res. Code § 21080(a).

CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 711 Van Ness Avenue, Suite 300, San Francisco, California 94102; I have this day served a copy of the foregoing,

RESPONSE OF VERIZON TO APPLICATIONS FOR REHEARING OF DECISION 10-12-056 FILED BY (1) AT&T CALIFORNIA, FRONTIER, SUREWEST, AND THE SMALL LECs AND (2) THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC. by electronic mail to those who have provided an e-mail address and by U.S. Mail to those who have not, on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of February, 2011 at San Francisco, California.

/s/ Christine Becerra
CHRISTINE BECERRA

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[TOP OF PAGE](#)
[BACK TO INDEX OF SERVICE LISTS](#)