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Decision 07-03-014 March 1, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005 (Filed October 5, 2006)

DECISION ADOPTING A GENERAL ORDER AND PROCEDURES TO IMPLEMENT THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

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DECISION ADOPTING A GENERAL ORDER AND PROCEDURES TO IMPLEMENT THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

I. Summary

The California Public Utilities Commission (Commission) issues this decision and General Order to establish procedures for implementing the Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Assembly Bill (AB) 2987 (Ch. 700, Stats. 2006) (Appendix A hereto).

To promote video service competition in this State, the Legislature created a new state video franchising process in DIVCA.[1] The Legislature directed the Commission to issue state video franchises for the provision of video services in the state. It declared that the state video franchising process should achieve the following objectives:

> Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.
>
> Promote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner regardless of socioeconomic status.
>
> Protect local government revenues and their control of public rights-of-way.
>
> Require market participants to comply with all applicable consumer protection laws.
>
> Complement efforts to increase investment in broadband infrastructure and close the digital divide.[2]

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[1] This process was effected by additions to the Public Utilities Code (Division 2.5, commencing with § 5800, and Article 4, commencing with § 440, to Chapter 2.5 of Part 1, Division 1), as well as by amendments to Public Utilities Code § 401 and Revenue and Taxation Code § 107.7.

[2] CAL. PUB. UTIL. CODE § 5810(2).

In this decision, we set forth procedures, rules, and orders necessary to fulfill the duties and responsibilities assigned to the Commission by DIVCA. We create a regulatory regime consistent with and supportive of the Legislature's stated objectives for the statute.

DIVCA provides that the Commission is the "sole franchising authority" for issuing state video franchises.[3] This role, however, is a limited one. The statute provides that "video service providers are not public utilities,"[4] and a "holder of a state franchise shall not be deemed a public utility as a result of providing video service. . . ."[5] Thus, DIVCA states that the Commission may not "impose any requirement on any holder of a state franchise except as expressly provided by . . ." the Act.[6]

The Commission may promulgate rules only as necessary to enforce statutory provisions on franchising (§ 5840); antidiscrimination (§ 5890); reporting (§§ 5920 and 5960); the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services (§§ 5940 and 5950); and regulatory fees (§ 401, §§ 440-444, § 5840).[7] We shall not adopt proposals that fall outside of the scope of this statutory authority.[8]

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[3] Id. at § 5890.

[4] Id. at § 5810(a)(3).

[5] Id. at § 5840(a).

[6] Id.

[7] With respect to the application process in particular, DIVCA states that the authority granted to the Commission in Public Utilities Code § 5840 "shall not exceed the provisions set forth" in that section. Id. at § 5840(b).

[8] These proposals include, but are not limited to, the following: developing a consumer education program for video service, extending the Commission's supplier diversity program to video franchising, reviewing availability of in-language customer service, and assessing the diversity of cable programming. CCTPG/LIF Opening Comments at 9, 12; Greenlining Opening Comments at 1-6. Many such proposals are discussed further in subject-specific sections below.

We are careful to avoid encroaching on the prerogatives and obligations of local entities. Among other items, local entities are responsible for consumer protection (§ 5900); environmental reviews (§ 5820); initiation of complaints concerning antidiscrimination and build-out obligations (§ 5890); enforcement of PEG channel requirements (§ 5870); management of local rights-of-way (§ 5810); and enforcement of Emergency Alert System standards (§ 5880).

Consistent with statutory restrictions on our authority, the Commission will only adopt regulations if they are necessary for enforcement of specific DIVCA provisions. The Commission will not regulate the rates, terms, and conditions of video services, except as explicitly set forth in DIVCA. Moreover, we find that we lack statutory authority to order intervenor compensation awards in the video service context, because the statutory intervenor compensation program is limited to utilities, a class of entities distinct from video service providers. Statutory restrictions similarly prevent us from accommodating a protest period during the application process. Commission review of applications is tightly circumscribed both in substance and in process.

To the extent that we have authority to act, the Commission fully intends to enforce DIVCA provisions and allow significant public participation in its enforcement proceedings. Our enforcement processes are designed to be transparent and fair. Once an enforcement proceeding is opened, any interested party may participate fully in the proceeding. In addition, even though DIVCA limits who can initiate a proceeding through a formal complaint, any individual or interested party can bring matters to the attention of the Commission via a letter. Upon receipt, the Commission then can investigate and determine an appropriate response. Any subsequent formal enforcement action will permit full participation by all parties and the public.

We will be vigilant in our efforts to enforce antidiscrimination and build-out requirements. Consistent with the express intent of the Legislature, this

decision seeks to encourage "widespread access to the most technologically advanced cable and video services to all California communities."[9] Advanced video and broadband systems are critical to social and economic development in our state. Increased competition among video service providers will help drive down prices for consumers, provide new choices in rate plans, and promote increased programmatic diversity. We encourage video service providers to strive to serve every California community where there is demonstrable demand for their service.

The General Order adopts specific provisions to ensure required reports are straightforward and reasonable. Reports mandated by the Commission provide valuable information concerning our user fees; state employment; broadband and video service access and adoption; antidiscrimination and build-out; collective bargaining agreements; and workplace diversity. Of special import, the annual broadband reports will give the State of California – for the first time – detailed information that it needs to address gaps in broadband access and depressed broadband usage rates.

This General Order also describes the procedures that we will use to enforce the cross-subsidy provisions contained in Public Utilities Code §§ 5940 and 5950. We clarify that the Commission at any time may initiate a formal investigation into alleged financing of video deployment with rate increases for stand-alone, residential, primary line, basic telephone services. Launch of a formal investigation will trigger public hearings.

The Commission fully intends to implement these and other DIVCA provisions in a thorough and swift manner. We act ahead of the mandated statutory deadline to bring new video services to Californians as quickly as possible.

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[9] CAL. PUB. UTIL. CODE § 5810(2)(f).

II. Legislative Background and Procedural History

To promote competition for broadband and video services, the Legislature created a new state video franchising process in DIVCA.[10] This process was effected by additions to the Public Utilities Code (Division 2.5, commencing with § 5800, and Article 4, commencing with § 440, to Chapter 2.5 of Part 1, Division 1), as well as by amendments to Public Utilities Code § 401 and Revenue and Taxation Code § 107.7.

In DIVCA, the Legislature found and declared that "increasing competition for video and broadband services is a matter of statewide concern."[11] The Legislature noted that video providers offer "numerous benefits to all Californians including access to a variety of news, public information, education, and entertainment programming."[12] According to the Legislature, "competition for video service should increase opportunities for programming that appeals to California's diverse population and many cultural communities."[13] The Legislature added that increased video service competition "lowers prices, speeds the deployment of new communication and broadband technologies, creates jobs, and benefits the California economy."[14]

DIVCA directs the Commission to issue state franchises for the provision of video services in the state. It declares that the state video franchising process should achieve the following objectives:

> Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.

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[10] Id. at § 5810(a)(1). The Digital Infrastructure and Video Competition Act of 2006 became effective on January 1, 2007.

[11] Id. at § 5810(a)(1).

[12] Id. at § 5810(a)(1)(A).

[13] Id. at § 5810(a)(1)(D).

[14] Id. at § 5810(a)(1)(B).

> Promote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner regardless of socioeconomic status.
>
> Protect local government revenues and their control of public rights of way rights-of-way.
>
> Require market participants to comply with all applicable consumer protection laws.
>
> Complement efforts to increase investment in broadband infrastructure and close the digital divide.
>
> Continue access to and maintenance of the public, education, and government (PEG) channels.
>
> Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes.[15]

In DIVCA, the Legislature further observed that the public interest is best served when the Commission is appropriately funded and staffed, and thereby able to give timely and full consideration to these and other related issues brought before it.[16]

On October 6, 2006, we initiated this proceeding to adopt a general order and establish procedures for implementing DIVCA. The Order Instituting Rulemaking (OIR) provided a draft General Order for public comment. The OIR also established a cycle of comments and replies that would assess whether the Commission is adopting reasonable rules and procedures to implement the new statute.

Opening Comments were due on October 25, 2006. AT&T California (AT&T); California Cable and Telecommunications Association (CCTA); California Community Technology Policy Group and Latino Issues Forum (CCTPG/LIF); the Consumer Federation of California (CFC); the Cities of Arcadia, Berkeley, Long Beach, Redondo Beach, and Walnut (Joint Cities); the

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[15] Id. at § 5810(2).

[16] Id. at § 5810(3).

City of Pasadena (Pasadena); the City of San Jose (San Jose); the City of Oakland (Oakland); the Division of Ratepayer Advocates (DRA); the Greenlining Institute (Greenlining); the County of Los Angeles (Los Angeles County); the League of California Cities and States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (League of Cities/SCAN NATOA); Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Global Valley Networks, Inc., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company (Small LECs); SureWest Televideo (SureWest); the Communications Workers of America (CWA) (filing late); The Utility Reform Network (TURN); and Verizon California, Inc. (Verizon) filed opening comments.

Reply Comments were due on November 1, 2006. AT&T; the Broadband Institute of California (BBIC); CCTA; CCTPG/LIF; Los Angeles County, the City of Los Angeles, and the City of Carlsbad (Los Angeles and Carlsbad Responders); DRA; Greenlining; League of Cities/SCAN NATOA; Oakland; Small LECs; SureWest; TURN; and Verizon filed reply comments.

III. Scope of Commission Regulatory Authority for Video

DIVCA strictly defines the role of the Commission as the state video franchise authority. While many provisions relating to the Commission are detailed in subject-specific sections below, this section provides an outline of the scope of Commission authority pursuant to DIVCA.

A. Position of the Parties

Los Angeles and Carlsbad Responders contend that "DIVCA does not establish the PUC as the sole franchising authority for cable franchising in

California."[17] First, Los Angeles and Carlsbad Responders argue that "there is nothing in DIVCA which restricts a local entity and an incumbent cable operator from renewing the cable operator's franchise after January 2, 2008."[18] Second, Los Angeles and Carlsbad Responders assert that "DIVCA grants the PUC exclusive franchising authority after January 2 only for operators who have never held a franchise in the area to be served prior to that date."[19]

Similarly, Oakland argues that Public Utilities Code § 5840(c) establishes that the "Legislature did not choose to make a state franchise mandatory unless on January 1, 2008, the person(s) had never obtained a franchise as that term is defined in the bill."[20] Oakland asserts that "the legislation does not intend to repeal local franchising authority under the Government Code," and it argues that "nothing in DIVCA . . . eliminates a local government's authority to renew a local franchise after January 2, 2008."[21]

B. Discussion

We conclude that DIVCA makes the Commission the "sole franchising authority" for issuing video franchises in the state.[22] In arguing to the contrary, the local entities disregard the significance of Public Utilities Code § 5840(c). That statute declares that "[a]ny person or corporation who seeks to provide video service in this state for which a franchise has not already been issued, after January 1, 2008, shall file an application for a state franchise with the commission." In other words, Public Utilities Code § 5840(c) establishes that video service provided in California after January 1, 2008 must be offered

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[17] Los Angeles and Carlsbad Responders Opening Comments on the PD at 1.

[18] Id.

[19] Id.

[20] Oakland Opening Comments at 7.

[21] Oakland Reply Comments on the PD at 2.

[22] CAL. PUB. UTIL. CODE § 5840(a).

pursuant to a state video franchise, unless that service is being offered pursuant to a local franchise that took effect on or before January 1, 2008.

Public Utilities Code § 5840(c) does not give local entities unlimited authority to renew local franchises or issue local franchises to incumbent cable operators that previously received a franchise in their area. Localities arguing to this effect overstate the impact of the exception granted to video service providers offering "video service in this state for which a franchise has . . . already been issued." Any video service for which a local franchise is issued is limited in duration. Like authority to operate a car under a driver's license, the authority to operate under a local franchise agreement has an expiration date. After that date passes, a video service provider will need to come to the Commission if it wants to continue to offer video service within the state.

Local entities similarly misinterpret the significance of DIVCA provisions that allow for temporary continuation of local franchising. DIVCA establishes a transition period, whereby local franchises continue to operate until they expire or are abrogated pursuant to Public Utilities Code § 5840(o). Any flash cut of local franchising provisions is inappropriate under this statutory regime. The Government Code and other provisions that recognize local video franchise operations need to stay in effect so long as some local franchising entities temporarily continue to oversee local franchise agreements.

Our assessment is reaffirmed by the Assembly Analysis.[23] According to the Assembly Analysis, DIVCA provides that "[a]s of January 1, 2008, all video service providers must seek a state franchise instead of a local franchise."[24] "If the incumbent provider's local franchise expires after January 1, 2008, and the incumbent does not opt-in to the state franchise before the franchise expires," the Assembly Analysis further declares that "the incumbent provider must seek a

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[23] Assembly Floor Analysis (Aug. 28, 2006).

[24] Id. at 2.

state franchise at the expiration of the existing local franchise."[25] The Assembly Analysis anticipates that "[e]ventually all video providers will operate under a state-issued franchise instead of a locally issued franchise."[26]

Pursuant to its statutory authority, the Commission may promulgate rules only as necessary to enforce statutory provisions on franchising (§ 5840); antidiscrimination and build-out(§ 5890); reporting (§§ 5920 and 5960); the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services (§§ 5940 and 5950); and application and user fees (§ 401, §§ 440-444, § 5840).[27] We shall not adopt proposals that fall outside of the scope of this authority.[28]

DIVCA imposes clear restrictions on the Commission's ability to promulgate new video rules. The statute expressly provides that "video service providers are not public utilities,"[29] and a "holder of a state franchise shall not be deemed a public utility as a result of providing video service. . . ."[30] Thus, the statute declares that the Commission may not "impose any requirement on any holder of a state franchise except as expressly provided by . . ." the Act.[31]

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[25] Id. at 11.

[26] Id. at 10.

[27] With respect to the application process in particular, DIVCA states that the authority granted to the Commission in Public Utilities Code § 5840 "shall not exceed the provisions set forth" in that section. CAL. PUB. UTIL. CODE § 5840(b).

[28] These proposals include, but are not limited to, the following: developing a consumer education program for video service, extending the Commission's supplier diversity program to video franchising, reviewing availability of in-language customer service, and assessing the diversity of cable programming. CCTPG/LIF Opening Comments at 9, 12; Greenlining Opening Comments at 1-6. Many such proposals are discussed further in subject-specific sections below.

[29] CAL. PUB. UTIL. CODE § 5810(a)(3).

[30] Id. at § 5840(a).

[31] Id.

Under DIVCA, local entities, not the Commission, have sole authority to regulate pursuant to many other statutory provisions, including those addressing franchise fees (§ 5860), PEG channels (§ 5870), the Emergency Alert System (§ 5880), and, notably, federal and state customer service and protection standards (§ 5900).[32] A local entity shall be the lead agency for any environmental review with respect to network construction, installation, and maintenance in public rights-of-way (§§ 5820 and 5885). We shall not exercise our authority in a manner that diminishes these responsibilities afforded to localities.

IV. When Applicants Can/Must Apply for a State Video Franchise

Section III of our General Order addresses when an applicant can or must apply for a state video franchise. Topics addressed in this portion of the General Order include the following: the Commission's role in processing applications; eligibility conditions for obtaining a franchise; the franchise effectiveness date; terms of service offered; the effect of a new competitor's entry into a video market; and the exception for a party to a stipulation and consent judgment approved by a federal district court.

Most provisions found in Section III of the General Order are undisputed. But to the extent that provisions are debated, we divide our discussion of these parts between applicants for new franchises and applicants with existing franchises. The Commission's role as the sole franchising authority is reviewed in Section III above.

A. Applicants for New Franchises

Parties raise potential issues with two determinations regarding applicants for new franchises: (i) the definition of "incumbent" and (ii) eligibility to

[32] The Commission is granted no authority to regulate the rates, terms, and conditions of video services, except as explicitly set forth in DIVCA. Id. at § 5820(c). See also 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

abrogate a local franchise. We discuss and assess parties' comments on these issues below.

1. Positions of the Parties

Seeking to determine the earliest possible effective date for a state video franchise, CCTA and SureWest request clarification that an incumbent cable provider is not considered an incumbent in an area for which it does not possess an expired or effective local franchise.[33] DIVCA does not allow an incumbent cable operator to operate under a state video franchise in its existing video service areas prior to January 2, 2008.[34] Thus, this clarification would allow companies that are incumbent cable operators in some localities to seek a state video franchise for other areas prior to January 2, 2008.

In addition, SureWest objects to our substitution of the term "service area" for "jurisdiction" when describing circumstances under which an existing franchise may be abrogated. The corresponding provision in DIVCA used the term "jurisdiction."[35] SureWest argues that our inadvertent use of the term "service area" instead is important, because this language inappropriately limits the incumbent cable operators' opportunities to abrogate their local franchises. Under DIVCA, an incumbent cable operator may abrogate a local franchise whenever a competitor receives a state video franchise to serve an area within the jurisdiction of the governing local licensing authority – which may encompass a region greater than the incumbent's service area.[36]

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[33] CCTA Opening Comments at 3, n.2; SureWest Opening Comments at 8.

[34] See CAL. PUB. UTIL. CODE § 5930(b).

[35] Id. at § 5840(o).

[36] See SureWest Opening Comments at 10 (describing how this language would affect its operations in Sacramento County).

2. Discussion

We modify the General Order to clarify that an incumbent cable operator is not considered an incumbent in areas outside of its franchise service areas as of January 1, 2007. Like CCTA and SureWest, we find that this result is consistent with the definition of "incumbent cable operator" found in DIVCA. Public Utilities Code § 5830(j) defines "incumbent cable operator" as "a cable operator . . . serving subscribers under a franchise in a particular city, county, or city and county franchise area on January 1, 2007." Moreover, it would be contrary to the Legislative intent for DIVCA if we prevented an incumbent cable operator in one service area from operating under a state video franchise in a new area. An express purpose of DIVCA is to "[p]romote the widespread access to the most technologically advanced cable and video services to all California communities."[37]

As requested by SureWest, we also amend the language in Section III.C.1 of the General Order to replace "service area" with "jurisdiction." We find that this modification makes the General Order consistent with the plain language of Public Utilities Code § 5840(n). Section 5840(n) requires a state video franchise holder to "notify the local entity that the video service provider will provide video service in the local entity's *jurisdiction*."[38]

B. Applicants with Existing Franchises

The OIR tentatively concluded that incumbent cable providers whose local franchises expire prior to January 2, 2008 shall have the option of renewing their local franchises or seeking a state video franchise, and that incumbent cable providers opting to seek a state franchise shall have their existing local franchises extended until January 2, 2008. Parties debate whether an expired local franchise

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[37] CAL. PUB. UTIL. CODE § 5810(2)(B).

[38] Id. at § 5840(n) (emphasis added).

may be automatically extended, or whether an extension only is at the discretion of the local entity.

1. Positions of the Parties

League of Cities/SCAN NATOA lists three reasons for why a local franchise may be extended only at the discretion of the local entity. First, League of Cities/SCAN NATOA cites the Legislature's use of the word "may" in the statutory provision that "a local entity may extend [the expired] franchise on the same terms and conditions through January 2, 2008."[39] League of Cities/SCAN NATOA contends that this use of "may" demonstrates the Legislature's intent to give the local entity sole authority to decide whether or not to extend an expired local franchise.[40] Second, League of Cities/SCAN NATOA references contract law. League of Cities/SCAN NATOA declares that local franchises are negotiated contracts between a video service provider and a local entity, and that consent of both parties to the contract is required for the modification, extension, or renewal of the franchise.[41] Third, League of Cities/SCAN NATOA points to the renewal procedures in the federal Cable Act.[42] League of Cities/SCAN NATOA states that our allowing a video service provider to extend a local franchise unilaterally frustrates the bargaining ability of the local entity and arguably violates federal law.[43]

Oakland and the Los Angeles and Carlsbad Responders echo League of Cities/SCAN NATOA's arguments concerning legislative intent. According to Oakland, "[t]here is nothing in the language which gives the Commission the authority to grant such extensions, or make them automatic and mandatory

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[39] League of Cities/SCAN NATOA Opening Comments at 13 (citing to Public Utilities Code § 5930(b)).

[40] Id. at 13.

[41] Id. at 13; League of Cities/SCAN NATOA Reply Comments at 9.

[42] See 47 U.S.C. 546 (establishing federal video franchise renewal standards).

upon application for a state franchise by an incumbent cable operator with an expired or expiring local franchise."[44] The Los Angeles and Carlsbad Responders add that the Assembly Analysis cannot be used to support a Commission rule that conflicts with the plain language of DIVCA.[45]

The Joint Cities similarly protest expediting conversion of an expired local franchise to a statewide video franchise. The Joint Cities contend that unilateral extension of an expired franchise may represent illegal interference with a local entity's efforts to increase a video service provider's financial support for PEG access.[46]

In contrast, CCTA argues that DIVCA and the accompanying Assembly Analysis contemplate the automatic extension of a local franchise until the effective date of a state video franchise. CCTA cites the Assembly Analysis, which provides that an incumbent cable operator "can request a state franchise that begins on January 2, 2008, and its current local franchise will be extended until that date."[47]

Without an automatic extension of a local franchise, CCTA worries that its members may be exposed to accusations of operating without a franchise and subject to penalties.[48] CCTA states that incumbent video service providers with expired or expiring local franchises will apply for state video franchises "at the earliest possible moment."[49] Yet CCTA contends that local entities may use the threat of prosecution for illegal operation prior to effectiveness of a state video

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[43] League of Cities/SCAN NATOA Opening Comments at 13.

[44] Oakland Opening Comments at 8.

[45] Los Angeles Reply Comments at 3 (citation omitted).

[46] Joint Cities Opening Comments at 5-6.

[47] CCTA Opening Comments at 5.

[48] Id. at 4.

[49] Id.

franchise to extract concessions, regardless of the fact that an incumbent cable operator intends to begin operating pursuant to a state video franchise.[50]

CCTA maintains that the potential disruption to incumbent cable operators and their customers is contrary to Legislature's intent to create a smooth transition period between the two regulatory regimes. In support of its position, CCTA points to the following Assembly Analysis text: "[W]hile the transition period leaves local franchises in place for a period of time, the transition period should not allow local governments to diminish the rights an incumbent cable operator has to occupy the public rights-of-way, any protections or rights provided under federal law, or to frustrate the Legislature's intention in enacting this division."[51]

CCTA adds that incumbent providers whose local franchises expire within sixty days of January 2, 2008 should be able to apply for a state video franchise prior to the local franchise's expiration.[52] This allowance, explains CCTA, would ensure that an incumbent cable operator can attain a state video franchise that is effective on January 2, 2008.[53]

2. Discussion

Public Utilities Code § 5930(b) directly addresses extension of a local video franchise. The statute declares that "[w]hen an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, the local entity may extend that franchise on the same terms and conditions through January 2, 2008."[54]

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[50] Id.

[51] Id. at 5 (citations omitted).

[52] Id.

[53] Id.

[54] CAL. PUB. UTIL. CODE § 5930(b).

Without context, we recognize that the significance of the word "may" in the Public Utilities Code § 5930(b) text is debatable. On the one hand, use of the word "may" could indicate that the Legislature gives the local franchising authority discretion regarding extension of a local franchise. But on the other hand, use of the word "may" could indicate that the Legislature recognizes that an incumbent cable operator may not want to extend its local franchise. The word "may," under this conception, simply captures the uncertainty of the situation. If the Legislature instead replaced the word "may" with "shall," the statute would provide that "local entity shall extend [a] franchise" – even if the incumbent cable operator that is party to the franchise wants to cease offering video service. Forcing an incumbent cable operator to continue offering video service against its will would make little sense.

Additional statutory guidance is found in the express Legislative purposes for DIVCA. These provisions suggest that local franchise extensions should be automatic if requested by the incumbent cable operator. Most illuminating is the Legislature's declaration that DIVCA should "[c]reate a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another."[55] To be consistent with this intent, a locality should not be able to force an incumbent cable operator to agree to extra concessions during the time prior to when an incumbent may operate under a state video franchise.

The Assembly Analysis reaffirms this assessment.[56] If an incumbent cable operator's franchise expires before January 2, 2008, the Assembly Analysis declares that the incumbent "can request a state franchise that begins on January 2, 2008, and its current local franchise will be extended until that date."[57] The

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[55] Id. at § 5810(a)(2)(A).

[56] Assembly Floor Analysis (Aug. 28, 2006).

[57] Id. at 11.

Assembly Analysis adds that this "transition period should not allow local government . . . to frustrate the Legislature's intention in enacting this division."[58]

Furthermore, statutory provisions permitting unilateral abrogation of local franchises contradict the argument that the local franchise, as a negotiated contract, requires both parties' consent prior to any extension. DIVCA establishes that franchise abrogation may only require action by one party. For example, when a competitor provides notice of intent to offer service in all or part of a jurisdiction, an incumbent cable operator in the jurisdiction may opt out of its local franchise without the consent of the local franchising authority. Similarly, when a competitor begins serving a jurisdiction, the local franchising authority may require all incumbent cable operators to seek state video franchises in its jurisdiction even if the incumbents otherwise would not choose to opt into a state franchise.[59]

In this context, invocation of federal Cable Act renewal provisions is not persuasive. With respect to League of Cities/SCAN NATOA's argument that "allowing the video service provider to unilaterally extend the franchise frustrates the bargaining ability of the local entity and arguably violates federal law,"[60] we observe that incumbent cable operators that request an extension of a local franchise are planning to opt out of a local franchise, rather than renew it. The federal Cable Act's requirements pertaining to franchise renewals, therefore, are inapplicable.[61]

We conclude that it is necessary and reasonable to require automatic extension of state video franchises that are held by incumbent cable operators planning to seek state video franchises. We find that this statutory interpretation

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[58] Id.

[59] CAL. PUB. UTIL. CODE §§ 5840(o)(3), 5930(c).

[60] League of Cities/SCAN NATOA Opening Comments at 13 (citation omitted).

[61] See 47 U.S.C. 546 (establishing federal video franchise renewal procedures).

is most consistent with DIVCA and the Assembly Analysis, and does not contradict state or federal law.

We also hold that we will permit incumbent cable operators to apply for state video franchises before expiration of their local franchises. As pointed out by CCTA, failure to allow state video franchise applications in advance of expiration of local franchises would place incumbent cable operators in legal limbo during the time between expiration of their local franchises and issuance of their state franchises. Consequently, applicants could be forced to choose between competing perils of unlawful operation or discontinuation of their video services. We fail to see how either alternative serves consumer interests.

V. Eligibility to Operate Under a State Video Franchise

The draft General Order placed several conditions on what corporate entities are eligible to seek and operate under a state video franchise. First, it declared that entities in violation of the Cable Television and Video Providers Service and Information Act or the Video Customer Service Act are ineligible to hold a state video franchise. Second, the draft General Order stated that a communications company with multiple affiliates in California could only hold a single state video franchise. Third, the draft General Order provided that a state video franchise holder must be the applicant's parent company, or if none, the successful applicant itself.

Parties only comment of the substance of the latter two conditions. In response to these comments, this section considers (i) whether a single corporate enterprise should be allowed to hold more than one franchise and (ii) whether the Commission should place any stipulations on what entities are eligible to apply for and operate under a state video franchise.

A. Position of the Parties

Our proposed limits on when a corporate entity may hold a state video franchise draw a variety of responses. Many parties whose interests typically are

aligned disagree with each other here: Cities differ on whether we should impose all the limits proposed in the OIR, and the only item communications companies can agree on is that a corporate parent should not be required to hold a state video franchise.

DRA, the sole consumer organization to speak on this issue, states that it is "indeed 'necessary and reasonable'" for the Commission to prohibit the holding of multiple franchises through separate affiliates of a single enterprise.[62] According to DRA, this restriction "should serve to reduce the potential for state video franchise holders to evade compliance with statutory requirements."[63] DRA adds that "the Commission should have the flexibility to determine the operating entity of a corporation that shall hold the *single* franchise on behalf of the corporation and its subsidiaries and affiliates in the state."[64]

League of Cities/SCAN NATOA "strongly supports" our proposal to require a parent entity to obtain a single franchise for all its affiliates.[65] League of Cities/SCAN NATOA explains that "[a]llowing multiple franchises to be held under one parent corporation would be confusing, redundant, and an unnecessary waste of the Commission's resources. The public interest will be served and state franchisees will incur no hardship as a result of this requirement."[66]

Los Angeles and Carlsbad Responders state that the Commission should not "sit back and wait until problems arise" before promulgating rules that prohibit a single corporate enterprise from holding of multiple franchises.[67] Their experiences convince them that our "concerns regarding the potential for evasion

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[62] DRA Opening Comments at 6.

[63] Id.

[64] DRA Reply Comments at 12.

[65] League of Cities/SCAN NATOA Opening Comments at 15.

[66] Id.

of statutory obligations, through the holding of multiple state franchises via multiple entities, are 'well founded'":

> In the experience of both the County of Los Angeles and the City of Los Angeles, cable operators often change the entity within the corporate family that actually holds the franchise, sometimes with no notice to the franchising authority, even though the codes and/or franchises in both the County of Los Angeles and the City of Los Angeles require such notice. . . .
>
> In the City of Carlsbad, the undisclosed transfer of the franchise from the owners which the City of Carlsbad approved as the franchise holder to an affiliated entity was not discovered until after the parent owners filed for bankruptcy protection and were forced into a Department of Justice forfeiture proceeding. . . .[68]

Under the local franchising scheme, Los Angeles and Carlsbad Responders explain that "such actions, while problematic, did not necessarily impact [their] ability to enforce franchise provisions," because they "retained their franchise enforcement mechanisms regardless of which entity held the franchise."[69] Under a state franchising scheme, however, the Los Angeles and Carlsbad Responders note that their only mechanism for enforcing many of the statutory provisions is litigation, so "it is vital that local entities have some certainty as to what entity holds the state franchise."[70]

Los Angeles and Carlsbad Responders, however, find that it would be impracticable to impose a rule that requires a parent company to hold a state video franchise:

> Since almost none [of] these parent corporations are California corporations, any lawsuit brought in a state court by a local entity against a parent corporation to enforce the provisions of the statute – even a dispute regarding a franchise fee

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[67] Los Angeles and Carlsbad Responders Reply Comments at 7.

[68] Id. at 6.

[69] Id. at 6-7.

[70] Id. at 7.

> underpayment – would almost certainly be removed by the parent corporation to federal court, on diversity jurisdiction grounds.[71]

The Los Angeles and Carlsbad Responders conclude that a rule to this effect would cause "interpretation and enforcement of California state franchising provisions" to be the "exclusive province of federal courts.[72]

Los Angeles and Carlsbad Responders suggest that a preferable approach addressing enforcement concerns is to mandate that "only one company – which does not have to be the ultimate parent entity – within a family of companies may hold a state franchise . . . ."[73] It adds that we should require that "the one company which may hold the state franchise be a California company."[74]

In their opening comments on the draft decision, Los Angeles and Carlsbad Responders recommend that "the Proposed Decision . . . be modified to include an application affidavit that helps ensure that local entities, as well the PUC, can effectively enforce the applicable provisions of DIVCA."[75] Los Angeles and Carlsbad Responders assert that the "affidavit should include a provision which requires an applicant to attest that a single identifiable entity within a family of companies – one with verifiable assets . . . – organized in the State of California, assumes full responsibility for the applicant's performance of all of its obligations under DIVCA and all other applicable local, state, and federal laws. Further, the applicant must attest that the responsible entity shall accept service of process, and shall submit to the jurisdiction of California courts."[76]

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[71] Id.

[72] Id.

[73] Id.

[74] Id.

[75] Los Angeles and Carlsbad Responders Opening Comments on the PD at 9.

[76] Id. at 8.

Verizon contends that requiring a corporate parent to hold a video franchise is neither necessary nor reasonable. Verizon states that "corporate parents will likely be unable to provide service."[77] In the case of its parent company, Verizon explains that Verizon Communications "is a Delaware-based holding company, owns no network facilities of any kind in California, has no state or local operating permits or business licenses, and is not authorized to conduct business in California."[78] Verizon adds that "requiring the parent to be the franchise holder contravenes the Act."[79] According to Verizon, "[r]equiring a corporate parent to hold a franchise is very different from prohibiting multiple franchises, and the OIR's effort to do so finds no support in the Act or in Commission practice."[80]

Verizon further argues that "'problems' sought to be remedied are largely if not completely hypothetical."[81] With respect to build-out requirements, Verizon asserts that these statutory requirements "apply to 'holders or their affiliates' with telephone customers, and would therefore bind both a video franchise holder providing only video service and its affiliate providing only telephone service."[82] Regarding the cross-subsidization provisions, Verizon contends that any ambiguity in Public Utilities Code § 5940 is clarified by Public Utilities Code § 5950. Verizon alleges that the latter provision "gives specific effect and clear enforcement to the more general prohibition in section 5940 that a holder shall not increase the rate for basic telephone service to finance the cost of deploying a video network."[83] Finally, Verizon turns to reporting

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[77] Verizon Opening Comments at 14.

[78] Id. at 15.

[79] Id.

[80] Id. at 16.

[81] Id.

[82] Id. at 17.

[83] Id.

requirements and claims that "it is highly unlikely that a holder would or even could choose" to assign its broadband customers to an affiliate separate from a video affiliate.[84] Verizon reasons that "the same technology and network that makes video capable also makes broadband capable."[85]

In its opening comments on the draft decision, Verizon – despite its prior assurance that it is "highly unlikely" that any state video franchise holder would assign broadband customers to an affiliate separate from its video affiliate – protests any application of annual broadband reporting requirements to its broadband affiliates. First, Verizon argues "DIVCA is limited to wireline companies and facilities."[86] Second, Verizon contends that the Commission does not have statutory authority to impose reporting requirements on state video franchise holders' broadband affiliates.[87] Third, Verizon asserts that "collection of wireless broadband data is inconsistent with DIVCA."[88]

AT&T supports our proposed limitation of one state video franchise per company.[89] AT&T recognizes that this proposal "is consistent with section 5840(f)" and would "protect the Commission's workload by prohibiting multiple franchise applications from a single enterprise."[90]

AT&T, however, protests our proposal to require the state video franchise to be held by the applicant's parent company. It maintains that requiring the state video franchise to go to the parent company "would force it to be granted to the wrong legal entity."[91] AT&T explains that "it is AT&T California, not AT&T,

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[84] Id. at 18.

[85] Id.

[86] Verizon Opening Comments on the PD at 4.

[87] Id. at 5-6.

[88] Id. at 7.

[89] AT&T Opening Comments at 5.

[90] Id.

[91] Id. at 6.

Inc., that will own and operate the network, and provide video services in California," and by requiring the holder to be some entity other than the one directly providing video service and operating the network, "numerous provisions of DIVCA would be rendered nonsensical or meaningless."[92]

Given these considerations, AT&T puts forth an alternate recommendation. AT&T states that the Commission's enforcement concerns "could be addressed by including in the application certification required by section 5840(e)(1)(B) an assurance from any affiliates that provide telephone or broadband services that such affiliates' operations will be included for the purposes of 5890, 5960, and 5940."[93]

In contrast to AT&T and Verizon, SureWest asks us to reconsider our requirement that would prohibit separate state-issued franchises among affiliated companies.[94] SureWest states that it "does not believe the Commission has an adequate record on which to base a decision to invoke this prohibition."[95] It reasons that "there may be legitimate business reasons that affiliates should have separate state-issued franchises":

> For example video service providers may operate separate systems in the state. An obvious example would be a company that divides its operations between Northern and Southern California. For purposes of allowing those systems to operate as distinctly as possible and to even increase their value as an independent going concern, it would be useful for those systems to possess their own independent operating authorities.[96]

SureWest adds that "the prohibition is ambiguous without any Commission direction regarding how it will define 'affiliate' for purposes of enforcing the

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[92] Id. at 6-7.

[93] Id. at 7.

[94] SureWest Opening Comments at 10.

[95] Id. at 11.

[96] Id.

proposed rule."[97] Thus, SureWest calls upon the Commission to "build[] a record on whether the prohibition is beneficial . . . [and] conduct an inquiry into how it will define 'affiliate' for purposes of applying the proposed rule."[98]

SureWest strongly opposes the proposal to require a parent company to hold a state video franchise. SureWest seems to assume that we would never issue a state video franchise to an applicant's parent company, so it claims that we ignore the statutory definition of "holder" when we proposed that the state video franchise holder would be "a successful Applicant's parent company, or if none, the successful Applicant itself."[99]

SureWest further claims that the OIR's definition of a state video franchise holder "upsets the intended and delicate balance of reporting requirements and other franchise-related obligations set forth in the Franchise Act."[100] SureWest – unlike other parties to this proceeding – contests the scope of reporting obligations imposed by DIVCA. First, SureWest asserts that it "is positive that the Legislature did not intend for smaller providers to be subject to the reporting requirements included in Section 5920(a)."[101] Second, SureWest protests our collection of broadband data. SureWest states that the Commission "has no legal authority to require such reporting from non-regulated affiliates."[102]

Small LECs contends that "franchises should not be imputed to all entities within a corporate family, nor should multiple franchise be prohibited."[103] First,

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[97] Id.

[98] Id.

[99] Id. at 4-5. See also CAL. PUB. UTIL. CODE § 5830(i) ("'Holder' means a person or group of persons that has been issued a state franchise from the commission pursuant to this division.").

[100] SureWest Opening Comments at 4.

[101] Id. at 5.

[102] Id. at 6.

[103] Small LECs Opening Comments at 4.

Small LECs argues that our proposed restrictions "legally expand the definition of 'holder' beyond the language of the statute."[104] Second, Small LECs claims that the "Commission's concerns about franchise holders' attempts to avoid responsibility for the build-out, reporting, and cross-subsidization requirements are unfounded."[105] Small LECs reasons that the "Commission has ample experience in regulating telecommunications subsidiaries and their affiliates, so there is no reason to expect the Commission to experience significant difficulties in regulating similarly-configured companies in the video sector."[106] Third, Small LECs points out that "there may be legitimate business reasons for providers to seek multiple franchises, including situations where a single parent company may have multiple subsidiaries in different geographic areas of the state."[107] Fourth, Small LECs argues that a parent companies likely "will not be the entities that are providing service," so if they were awarded state video franchises, "the legal rights and obligations of the franchisee status would not be conferred on the appropriate entities."[108]

CCTA states that it "strongly oppose[s] any requirement that restricts entities which currently hold local franchises, or any other affiliate of their parent corporation, from obtaining state-issued franchises."[109] According to CCTA, incumbent cable operators "hold franchises in hundreds of communities in California using a myriad of corporate structures," and "[a]ny requirement to 'roll up' or combine these entities into a single parent or other entity will trigger significant unintended consequences, including tax liabilities and other costs."[110]

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[104] Id. at 4.

[105] Id. at 5.

[106] Id.

[107] Id. at 6.

[108] Small LECs Reply Comments at 5.

[109] CCTA Opening Comments at 6.

[110] Id.

CCTA finds that other "measures can be implemented to ensure compliance that are far less onerous and costly than forcing incumbent cable operators into wholesale corporate restructurings . . . ."[111] Recognizing that the "Commission's concerns are not misguided,"[112] CCTA makes the following proposal: "the Commission allow that state-issued franchises be held either: A) in the parent corporation; or that B) multiple legal entities or affiliates of a parent corporation are capable of holding state-issued franchises, but . . . their reports to the Commission be submitted by the parent corporation on behalf of the multiple legal entities, on a 'rolled up' basis, similar to the [Federal Communications Commission's] Form 477, used for reporting broadband connections in individual states. . . ."[113] CCTA adds that the Commission may "craft regulations in the future that address any unforeseen instances that impact reporting requirements."[114]

B. Discussion

This discussion is divided into two parts. First, we outline the issues that we seek to address when placing restrictions on when a video service provider may hold a state video franchise. Second, we assess how best to address these issues in a narrowly tailored manner.

1. Implementation Concerns

Our proposal to place restrictions on when a video service provider may operate under a state video franchise was based upon our desire to ensure effective implementation of DIVCA. Without such restrictions, we feared that it would be difficult, if not impossible, for the Commission to monitor and enforce

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[111] Id. at 8.

[112] Id.

[113] CCTA Reply Comments at 6.

[114] CCTA Opening Comments at 8.

statutory provisions when a single company has multiple communications affiliates.

Our concerns are validated by most parties' comments. Speaking from their own franchising experience, Los Angeles and Carlsbad Responders contends that our "concerns regarding the potential for evasion of statutory obligations, through the holding of multiple state franchises via multiple entities, are 'well founded.'"[115] League of Cities/SCAN NATOA similarly argues that allowing "multiple franchises to be held under one parent corporation would be confusing, redundant, and an unnecessary waste of the Commission's resources."[116] Such considerations lead DRA to conclude that restrictions on when a corporate entity may hold a state video franchise would "reduce the potential for franchisees to evade compliance with statutory requirements."[117]

Also some communications companies – while protesting how we address our concerns – concede that our concerns nonetheless are legitimate. According to CCTA, the "Commission's concerns are not misguided."[118] AT&T adds that prohibiting multiple franchise applications from a single enterprise would "protect the Commission's workload."[119]

Our review of parties' comments reaffirms that it is both necessary and reasonable to adopt restrictions on when a corporate entity may operate under a state video franchise. In particular, these restrictions are especially relevant to

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[115] Los Angeles and Carlsbad Responders Reply Comments at 6.

[116] League of Cities/SCAN NATOA Opening Comments at 15.

[117] DRA Opening Comments at 6. See League of Cities/SCAN NATOA Opening Comments at 15 (arguing that our allowing "multiple franchises to be held under one parent corporation would be confusing, redundant, and an unnecessary waste of the Commission's resources"); Los Angeles and Carlsbad Responders Reply Comments at 6 (finding that "concerns regarding the potential for evasion of statutory obligations, through the holding of multiple state franchises via multiple entities, are 'well founded'").

[118] CCTA Opening Comments at 8.

[119] AT&T Opening Comments at 5.

Commission implementation of three types of statutory provisions: the cross-subsidization prohibitions, build-out requirements, and reporting obligations. All three of these statutory provisions impose requirements that apply to not only video services, but also other communications services. We discuss issues raised by each of these provisions below.

First, we recognize that our ability to enforce build-out requirements may be impaired if a corporate family divides its video or telephone and video services among different operating entities in California. "[H]olders *or* their affiliates with more than 1,000,000 telephone customers in California" are required to meet stringent build-out requirements for provision of video service.[120] Yet a company with video and telephone customers could avoid these statutory obligations if it (like incumbent cable operators) were able to attain a separate franchise for each region where it offered communications services, thereby ensuring no single entity ever had more than one million telephone customers. Alternatively, a company could avoid build-out requirements if it were able to use a video affiliate, separate from its telephone business, to acquire a state franchise. This structural separation would ensure that no one entity in the company would have *both* telephone and video customers, the combination required for the applicability of § 5890(b) build-out requirements.

Second, we determine that our authority and ability to prevent subsidization of video services with telecommunications funds could be challenged if a company divides its video and telecommunications services into two different operating entities. Public Utilities Code § 5940 prohibits cross-subsidization of video rates by a "holder of a state franchise . . . who also provides stand-alone, residential, primary line, basic telephone service. . . ." A company offering both telecommunications and video services, however, would

[120] CAL. PUB. UTIL. CODE § 5890(b) (emphasis added).

not be covered by this statutory provision if it divided its telecommunications and video operations into two different affiliates.[121]

Third, we find that it would be difficult, if not impossible, for us to collect comprehensive broadband and video reports if a company separated its broadband operations from its video operations, or divided its video operations among multiple California entities. Regarding broadband data, a state video franchise holder is required to report information regarding broadband access and usage, to the extent that the "holder makes broadband available in the state."[122] Yet a company could try to avoid the broadband reporting requirements if it assigns all its broadband customers to an affiliate separate and distinct from a video affiliate, which attained the state video franchise. Indeed, we note that AT&T, pursuant to stipulations made during the Ameritech merger, already divides its video services (in AT&T California) and its broadband services (in AT&T Internet Services) between two separate affiliates. Thus, without an affiliate reporting requirement, we would receive no information from the corporate family that currently serves more California broadband subscribers than any other communications company in the state.

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[121] Nevertheless, we find that the existence of other relevant Public Utilities Code provisions largely alleviates these enforcement concerns for the time being. Section XV explains that federal requirements and other Commission regulations already prevent cross-subsidization between telecommunications services and non-telecommunications services. See 47 C.F.R. 64.901 (requiring the accounting separation of telecommunications costs from the non-telecommunications costs for telecommunications utilities); CAL. PUB. UTIL. CODE § 709.2 (directing the Commission determine "that there is no improper cross-subsidization of intrastate interexchange telecommunications service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs"); CAL. PUB. UTIL. CODE § 495.7 (requiring tariffing of basic residential rates). Moreover, the two-year telecommunications basic rate price caps in Public Utilities Code § 5950 give special effect to the cross-subsidization prohibition found in Public Utilities Code § 5940.

[122] CAL. PUB. UTIL. CODE § 5960(b)(1).

With respect to video data, a state video franchise holder is required to report information regarding video access within the holder's "video service area."[123] Implementation of this requirement, however, would be unduly complicated if multiple video entities in a corporate family operate pursuant to individual state video franchises (as requested by incumbent cable operators).[124] These individual operating entities would produce individual reports. Commission staff then would need to review and combine multiple data sets in order to develop a single picture of the corporate family's operations as a whole.

Any such evasion of an important statutory provision is untenable. Public Utilities Code § 5840(e)(1)(B) recognizes that both "the applicant" and "its affiliates" must "comply with all federal and state statutes, rules, and regulations," which include provisions found in DIVCA. Moreover, the Legislature states that DIVCA should "[c]reate a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider . . . ."[125] It would be contrary to this express Legislative intent we applied DIVCA in a manner that varied depending on the corporate structure of the company offering video service. We need not develop any further record to reach this conclusion.[126]

We also recognize that it is necessary and reasonable to adopt restrictions to facilitate the regulation by local entities of corporate entities operating under a state video franchise. To enforce DIVCA, local entities need to be able to identify and initiate legal actions against video service providers operating in their jurisdictions pursuant to a state video franchise.

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[123] Id. at § 5960(b)(2)-(3).

[124] CCTA Reply Comments at 7.

[125] CAL. PUB. UTIL. CODE § 5810(2)(A).

[126] But see SureWest Opening Comments at 11 (contending that we need to develop a further record with respect to when a company may receive a state video franchise).

2. Narrowly Tailored Restrictions

The prior section establishes that additional Commission action is necessary for effective enforcement of DIVCA provisions. We now seek to determine the most narrowly tailored means of ensuring this enforcement.

A clear way to ensure effective enforcement of statutory provisions is to limit awards of state video franchises to standalone communications companies. These companies either are (i) not affiliated with any other California communications provider or (ii) responsible for any and all of their corporate family's broadband, telecommunications, and video services in California. The corporate structure of these companies does not allow evasion of cross-sector obligations imposed by DIVCA. Compliance would be demonstrated and assessed for an entire corporate enterprise at one time, not on a piecemeal affiliate-by-affiliate basis.

Our authority to adopt this type of restriction is supported by DRA and Los Angeles and Carlsbad Responders. DRA states that "the Commission should have the flexibility to determine the operating entity of a corporation that shall hold the *single* franchise on behalf of the corporation and its subsidiaries and affiliates in the state."[127] Implicitly recognizing this authority, Los Angeles and Carlsbad Responders make recommendations for what type of operating entity should be allowed to hold a single franchise for a corporate family. The localities recommend that we mandate that "only one company – which does not have to be the ultimate parent entity – within a family of companies may hold a state franchise . . . ."[128] We recognize that there is merit to this proposal.[129]

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[127] DRA Reply Comments at 12.

[128] Los Angeles and Carlsbad Responders Reply Comments at 7.

[129] We agree, upon further review, that we need not require a parent company to hold a state video franchise on behalf of its corporate family. Many parties point out problems with this proposal. AT&T Opening Comments at 6; CCTA Opening Comments at 6; Los Angeles and Carlsbad Responders Reply Comments at 7; Small LECs Reply

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Authority notwithstanding, we, however, conclude that we would impose an unreasonable burden if we required a parent company to hold a state video franchise on behalf of its larger corporate enterprise. Many parties point out problems with our prior proposal.[130] In particular, we recognize that many corporate enterprises currently do not place all their California operations into one single California operating entity. CCTA asserts that many video service providers "hold franchises in hundreds of communities in California using a myriad of corporate structures," and "[a]ny requirement to 'roll up' or combine these entities into a single parent or other entity will trigger significant unintended consequences, including tax liabilities and other costs."[131]

We do not seek to trigger the imposition of new tax burdens or other costs on entities organized in a manner different from that best suited to our enforcement of statutory provisions. Thus, we will design our restrictions with more flexibility as to when a company may apply for a state video franchise.

Instead, we will award a state video franchise only if an applicant states in its application affidavit that it and all its affiliates' operations will be included for the purposes of applying Public Utilities Code §§ 5840, 5890, 5940, and 5960. Specifically, the applicant must attest to compliance with three provisions. First, the applicant or its parent assumes responsibility for producing reports for and on behalf of any and all of its California affiliates. Second, the applicant includes its affiliates' telephone customers for the purposes of determining applicability of build-out requirements. Third, the applicant refrains from using any increase of its or its affiliates' rates for its stand-alone, residential, primary-line, basic

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Comments at 5; SureWest Opening Comments at 4-5; Verizon Opening Comments at 14.

[130] AT&T Opening Comments at 6; CCTA Opening Comments at 6; Los Angeles and Carlsbad Responders Reply Comments at 7; Small LECs Reply Comments at 5; SureWest Opening Comments at 4-5; Verizon Opening Comments at 14.

[131] CCTA Opening Comments at 6.

telephone service to finance the cost of deploying a network to provide video service. These stipulations, detailed in Appendix C, ensure that no state video franchise holder may evade DIVCA requirements due to the specific nature of its corporate structure.

Similar to our definition of affiliate set forth in R.92-08-008, we use the following definition of affiliate in this context:

> "Affiliate" means any company 5 per cent or more of whose outstanding securities are owned, controlled, or held with power to vote, directly or indirectly either by a state video franchise holder or any of its subsidiaries, or by that state video franchise holder's controlling corporation and/or any of its subsidiaries as well as any company in which the state video franchise holder, its controlling corporation, or any of the state video franchise holder's affiliates exert substantial control over the operation of the company and/or indirectly have substantial financial interests in the company exercised through means other than ownership.[132]

This definition addresses SureWest's concern that a rule regarding affiliates is "is ambiguous without any Commission direction regarding how it will define 'affiliate' for purposes of enforcing the proposed rule."[133] In response to SureWest, we determine that it is not necessary to "conduct an inquiry into how [we] will define 'affiliate' for purposes of applying the proposed rule."[134] This definition of "affiliate," as applied to public utilities, has been adequate for our reporting purposes for quite some time.

We further find that it is appropriate that this definition of affiliate encompasses wireless broadband providers affiliated with state video franchise holders. Contrary to Verizon's assertions, collection of wireless broadband data is required and expected by DIVCA. "Broadband," as used in Public Utilities Code § 5960, is not limited to wireline technologies. Public Utilities Code

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[132] R.92-08-008 at 43.

[133] SureWest Opening Comments at 11.

[134] Id.

§ 5830(a) defines "broadband" as "any service defined as broadband in the most recent Federal Communications Commission inquiry pursuant to Section 706 of the Telecommunications Act of 1996 (P.L. 104-104)." The Federal Communications Commission (FCC) currently uses the term "broadband" and "advanced telecommunications capability" to describe services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kilobits per second.[135] Thus, any wireline or wireless service meeting the FCC's speed threshold is subject to DIVCA's broadband reporting requirements.

Public Utilities Code § 5960 even explicitly anticipates collection of data on broadband provided by non-wireline technologies. Among other items required to be included in annual broadband reports, Public Utilities Code § 5960(b)(1)(C) instructs state video franchise holders to give the Commission information on "whether the broadband provided by the holder utilizes wireline-based facilities or another technology." This provision indicates that the Legislature contemplated that broadband reporting requirements would encompass more than just wireline service.

Nonetheless, we recognize and account for operational differences between wireless and wireline technologies in the reporting specifications in Appendix D. These revised specifications recognize that wireless broadband service is provided to general regions, rather than to specific households, and service speed is subject to variation based upon a variety of factors.[136]

Finally, we take Los Angeles and Carlsbad Responders' recommendation and require applicants to make attestations to ensure effective local enforcement

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[135] FEDERAL COMMUNICATIONS COMMISSION, AVAILABILITY OF ADVANCED TELECOMMUNICATIONS CAPABILITY IN THE UNITED STATES, FOURTH REPORT TO CONGRESS, FCC 04-208, 10 (Sept. 9, 2004). This definition, however, is under review by the FCC, and it may evolve in response to rapid technological changes in the marketplace. Id.

[136] These factors include consumer equipment, weather, topography, and environmental considerations.

of DIVCA provisions. We revise the application affidavit to ensure that a single, qualified corporate entity will be responsible for DIVCA compliance. This entity shall accept service of process and submit to the jurisdiction of California courts.

VI. Information Required to Complete an Application

Section IV of our draft General Order described the five steps required to obtain a state video franchise. The OIR sought comments on whether: (i) Section IV is consistent with DIVCA; (ii) the description of our state video franchise application process is clear; and (iii) the proposed application elements are reasonable. We also solicited comments on the design and language of the state video franchise application.

Parties' responses were so extensive that we cannot address them in a single section. Consequently, we divide our assessment of these comments among Sections IV-XI. We begin our review by addressing comments on the information required to complete the application.

A. Service Area and Expected Deployment Information

DIVCA requires an applicant to provide information on both "its video service area footprint" and the "expected date for the deployment of video service." These requirements are split between two parts of Public Utilities Code § 5840(e). First, Public Utilities Code § 5840(e)(6) directs applicants to give "[a] description of the video service area footprint that is proposed to be served, as identified by a collection of United States Census Bureau Block numbers (13 digit) or a geographic information system digital boundary meeting or exceeding national map accuracy standards." Second, Public Utilities Code § 5840(e)(8) requires that a state video franchise application contain "[t]he expected date for the deployment of video service in each of the areas identified in paragraph (6)."

Parties' comments on implementation of these statutory provisions focus on the level of detail that we should seek concerning "the video service footprint" and "expected date for the deployment of video service." Some

parties argue that DIVCA does not provide justification for requiring detailed and disaggregated information, while other parties assert that such information is necessary and important.

1. Position of the Parties

AT&T states that application information regarding the applicant's proposed video service area footprint and expected deployment dates "may include trade secrets."[137] "If cable companies knew exactly where new competition would arrive, and when," AT&T argues, "they could carefully target price promotions and other tactics that would thwart competition and customer choice."[138] Given its concerns, AT&T asks that the General Order include explicit acknowledgement of the Commission's obligation to protect trade secrets.[139]

Verizon maintains that the proposed state video franchise application required deployment information at a much more granular level than specified in DIVCA. According to Verizon, the "census block numbers (13-digits)" referred to in DIVCA are, in "Census Bureau parlance," numbers establishing a census block *group*.[140] Thus, Verizon concludes that the Commission has impermissibly exceeded its authority under DIVCA by requiring deployment data on a census block basis, which is much more granular than a census block group basis.[141]

More generally, Verizon argues that "information should not be required at *any* granular geographic level and should be subject to confidential treatment."[142] "Without adequate measures to protect proprietary business

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[137] AT&T Opening Comments at 4.

[138] AT&T Reply Comments at 10.

[139] AT&T Opening Comments at 4-5.

[140] Verizon Opening Comments at 11.

[141] Id.

[142] Id. at 13 (emphasis added).

information," Verizon contends that "such data will signal future business plans throughout a holder's potential service areas to all competitors. Disclosure of this information will put an applicant at a competitive disadvantage."[143] Accordingly, Verizon recommends that the Commission "provide that any information obtained by cities pursuant to the application process or any process under the Act is subject to the provisions of General Order 66-C as well as these [Penal Code § 637.5(c)] provisions."[144]

In contrast to AT&T and Verizon, TURN supports our collection of granular data. TURN argues that disaggregated data are necessary for the Commission to assess the applicant's "ability and commitment to fulfill the requirements of DIVCA."[145]

DRA states that DIVCA calls for applicants to be required to disclose their expected deployment information on a census block number or geographic information system basis.[146] DRA adds that "neither the proposed area footprint nor the expected deployment dates warrant confidential treatment, but instead should remain as public information."[147] According to DRA, the "[i]ntended deployment areas and dates for intended deployment require notice under relevant sections of Division 2.5 . . . ."[148] DRA also charges that AT&T "failed to provide any cite to the DIVCA to justify its request for confidential treatment."[149]

CCTPG/LIF contends that "[t]he video service footprint data and the plan for build out . . . is absolutely necessary for the Commission to enforce its responsibilities under § 5840(e)(B)(i) and § 5890 . . . [and] must be supplied to the

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[143] Id.

[144] Verizon Reply Comments at 16.

[145] TURN Reply Comments at 10.

[146] DRA Reply Comments at 11.

[147] Id. at 5.

[148] Id.

[149] Id.

Commission, local governments and DRA, as required by § 5890(g). In addition, it should be publicly available to parties interested in combating the Digital Divide."[150] CCTPG/LIF argues that there is no support to the claim that "video service footprint and the plan for build out . . . is proprietary data."[151]

League of Cities/SCAN NATOA notes that "[s]everal parties express concerns that state franchise holders could be required to submit reports and information to the Commission that are overbroad, unnecessary or that require the provider to disclose confidential or proprietary information. The Commission should not be swayed by such arguments."[152]

CCTA recognizes the need for Commission information requests. CCTA states that "the Commission is compelled by the Legislation to collect data and review compliance with discrimination provisions, build-out requirements and cross-subsidy restrictions, and to the extent that the reporting formats facilitate compliance, the Commission should have information at its disposal."[153]

Greenlining states that it "needs more time to assess the implications of the data it wishes to exclude such as the expected date of deployment by census block."[154] It, therefore, declines to take a position on data requested.

2. Discussion

Our analysis begins with an applicant's description of its proposed video service area footprint. Public Utilities Code § 5840(e)(6) gives an applicant two choices for how it may describe its proposed video service area footprint: (i) with "a collection of United States Census Bureau Block numbers (13 digit)" or

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[150] CCTPG/LIF Reply Comments at 5.

[151] Id.

[152] League of Cities/SCAN NATOA Reply Comments at 11.

[153] CCTA Reply Comments at 6.

[154] Greenlining Reply Comments at 5.

(ii) with "a geographic information system digital boundary meeting or exceeding national map accuracy standards."

We conclude that the draft application that we previously proposed requested information at a level inconsistent with Public Utilities Code § 5840(e)(6)(a). We now recognize that "United States Census Bureau Block numbers (13 digit)," cited in Public Utilities Code §§ 5840(e)(6), are equivalent to *census block groups* in standard "Census Bureau parlance."[155] Thus, we revise the application so that it gives applicants the option of describing their proposed video service area footprints as a collection of census block groups, rather than census blocks.

We now turn to the requirement for an applicant to list its expected dates of deployment. Pursuant to Public Utilities Code § 5840(e)(8), applicants must provide "[t]he expected date for the deployment of video service in each of the areas" described in Public Utilities Code § 5840(e)(6). These "areas," pursuant to Public Utilities Code § 5840(e)(6), are either collections of census block groups or regions defined by geographic information system boundaries. DIVCA is silent on how small or large these individual collections or regions may be. Clarification of these requirements is delegated to the Commission.

We conclude that each "area," referenced in Public Utilities Code § 5840(e)(8), is a set of contiguous (i) groupings of census block groups or (ii) regions that are mapped using geographic information system technology. Thus, an applicant must provide an expected date of deployment for the entirety of each noncontiguous grouping or region included in its proposed video service area footprint. These data will help us to anticipate an applicant's future build out, but is not so granular as to put new video service providers in competitive jeopardy. This approach also corresponds to common meanings of the word "area."

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[155] Verizon Opening Comments at 11.

We find that requiring any further level of granularity would be contrary to the intent of DIVCA. We heed Verizon and AT&T's concerns that our requiring granular data could put some applicants "at a competitive disadvantage."[156] We do not want new video market entrants to suffer a competitive disadvantage due to public release of granular estimates of their video deployment dates.[157] This result would be contrary to the intent of DIVCA. As indicated by Public Utilities Code § 5810(a)(2)(A), the statute was designed to "[c]reate a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another."

DRA's and TURN's calls for extremely granular information are unpersuasive.[158] First, reporting at their proposed level of detail is not required by the statute. Second, TURN and DRA fail to acknowledge or address the potential anticompetitive effects of public disclosure of deployment data at the census block level. Third, the consumer organizations disregard the fact that the Commission, pursuant to Public Utilities Code § 5960, has other means of obtaining detailed deployment data, which will be subject to confidentiality protection.[159] Indeed, video deployment data required by Public Utilities Code § 5960 is more useful for our assessment of build-out compliance, because these

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[156] Verizon Opening Comments at 13. See also AT&T Reply Comments at 10 (worrying about "what would happen if cable companies knew exactly where new competition would arrive, and when").

[157] Information contained in the state video franchise application is publicly available due to the Public Utilities Code § 5840(e)(1)(D). This statutory provision requires applicants to send unredacted copies of their state video franchise applications to affected municipalities, and those municipalities are not required to keep the applications' contents confidential. CAL. PUB. UTIL. CODE § 5840(e)(1)(D). Recognizing the public nature of the application, we also will post an unredacted copy of each state video franchise application on the Commission's public website.

[158] See DRA Reply Comments at 11 (requesting detailed, disaggregated data); TURN Reply Comments at 10 (same).

[159] See CAL. PUB. UTIL. CODE § 5960 (requiring detailed video deployment data pursuant to confidentiality protections of Public Utilities Code § 583).

data focus on actual deployment, rather than the mere projections called for at the time of application.[160]

Finally, we find that we cannot afford confidential treatment to expected deployment data or any other portion of the state video franchise application. Despite AT&T's and Verizon's requests, we find no statutory basis for providing such protection.[161] DIVCA does not give the information in the application the same protections that it gives information provided to the Commission in subsequent reports.[162] Moreover, we have no ability to prohibit public distribution of application information. Affected local entities have a right to all the information provided in the application, and DIVCA does not give us authority to impose confidentiality requirements on these local entities.[163]

B. Socioeconomic Status Information

Public Utilities Code § 5840(e)(6) and (7) require an applicant to provide the "socioeconomic status information" of all residents within its proposed video service area and telephone service area (if applicable). The statute, however, does not define what specific data qualifies as socioeconomic status information.

In the context of legislation focused on communications, the OIR interpreted "socioeconomic status information" to include data on household

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[160] We recognize that expected deployment dates are merely estimates and subject to change, and we make clear that we will not hold an applicant strictly accountable to such dates. As Verizon properly acknowledges, "[d]eployment depends on a variety of operational and budgetary factors, including the availability of capital relative to other operational demands, the availability of manpower, and the timing of construction based on local entity permit requirements, weather, and numerous other circumstances beyond a company's reasonable control." Verizon Opening Comments at 12.

[161] See AT&T Opening Comments at 4-5 (urging the Commission to afford application information "trade secret" protection); Verizon Opening Comments at 13 (asking for application information to be "subject to confidential treatment").

[162] See, e.g., CAL. PUB. UTIL. CODE § 5960 (affording annual broadband and video reports confidentiality protections pursuant to Public Utilities Code § 583).

[163] Id. at § 5840(e)(1)(D).

access to and usage of broadband and video services. This section discusses and assesses parties' comments on required socioeconomic status information.

1. Position of the Parties

DRA praises the draft General Order and application for adopting "an efficient and consistent approach for the collection of the required socioeconomic information. . . ."[164] By relying "on the statute itself for guidance," DRA argues that "the Commission here has not overstepped the bounds of its authority. Rather, it has appropriately implemented the requirements of § 5840(e)(6) and (7) by using a definition and requirement which are already in the statute. . . ."[165]

TURN agrees that the socioeconomic status information requested is "precisely the kind of information discussed in the statute."[166] According to TURN, the "identified information is necessary for the Commission to engage in a reasoned assessment of a franchise applicant's credentials and ability and commitment to fulfill the requirements of DIVCA."[167]

"[I]f it is a burden for applicants to immediately provide such data," CCTPG/LIF declares that "it is not a fatal violation of DIVCA" to give applicants additional time to submit socioeconomic status data.[168] CCTPG/LIF does not protest "a four month delay in the data" if "it does not delay the Commission's review and review and reporting, notification to applicants' of potential discrimination and requirements for modification."[169]

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[164] DRA Reply Comments at 4-5.

[165] Id. at 5.

[166] TURN Reply Comments at 10.

[167] Id.

[168] CCTPG/LIF Reply Comments on the PD at 4.

[169] Id.

Verizon argues that the Commission's description of socioeconomic status information is overbroad and inconsistent with the Act."[170] First, Verizon contends that "[n]o need for this level of information exists at the time of application, as its articulated purpose is to enable the Commission to annually compile the aggregated report to the Governor and Legislature. . . ."[171] Second, Verizon asserts that requiring information as of January 1 of the year in which the applicant applies "will be impossible to satisfy for applications submitted early in the year."[172] Third, Verizon argues that defining the socioeconomic status information in this manner "runs afoul of section 5840(b)'s requirement that the application process not exceed the provisions set forth in section 5840."[173] Fourth, "however 'socioeconomic' is defined in normal usage," Verizon declares that "nothing in the Act compels an interpretation that includes access or subscription to broadband or video service. Access to these services is neither a social nor an economic factor."[174]

Given these alleged contradictions, Verizon urges us to modify the application to request only one form of socioeconomic information: residents' income.[175] Verizon reasons that "the only discrimination expressly addressed in the act is discrimination against potential video subscribers based on their income."[176] Furthermore, Verizon maintains that "the application should provide the most currently available Census Bureau income information, which is 2000 data."[177]

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[170] Verizon Opening Comments at 8.

[171] Id.

[172] Id.

[173] Id. at 9.

[174] Id.

[175] Id.

[176] Id.

[177] Id. at 10.

SureWest "concurs with Verizon's proposal to limit the definition of 'socioeconomic status information' to income."[178] SureWest contends that the Legislature did not intend for additional information to be included in the state-issued franchise application, "otherwise it would have indicated as such in Section 5840."[179]

AT&T calls for us to refrain from clarifying what the statute means when it refers to "socioeconomic status information."[180] AT&T lists three reasons for this recommendation: (i) the "collection, preparation and submission of additional data required by the GO and application form would be costly and time-consuming"; (ii) "the additional data are not relevant to the processing of a franchise application; and (iii) the additional requirements are contrary to AB 2987."[181] Alternatively, AT&T requests that, if the specified socioeconomic data are required, "it should be accorded the same confidential treatment it would enjoy if it were reported annual pursuant to section 5960."[182]

Small LECs states that socioeconomic status information should not include broadband availability or video availability data.[183] According to Small LECs, socioeconomic status information "should be limited to income information, since this in the only type of information that could be relevant to the Commission's review of franchise applications."[184]

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[178] SureWest Reply Comments at 12.

[179] SureWest Opening Comments at 19.

[180] AT&T Opening Comments at 4.

[181] Id.

[182] AT&T Reply Comments on the PD at 4.

[183] Small LECs Reply Comments at 6.

[184] Id.

2. Discussion

We, like DRA, find that our definition of "socioeconomic status information" properly relies on the statute for guidance. Our focus on access and adoption of communications services is appropriate in the context of legislation devoted to digital infrastructure and video competition. We have not overstepped the bounds of our authority; rather, we have "appropriately implemented the requirements of § 5840(e)(6) and (7) by using a definition and requirement which are already in the statute. . . ."[185]

We recognize that access and subscription to advanced communication technologies are important socioeconomic indicators. Indeed, broadband and video services now are becoming increasingly important to active participation in our modern-day economy and society. For example, rural California residents may use broadband services to sell or purchase goods they may not otherwise have access to, or they may use online video services to learn about news at home or abroad. Verizon's claim that access to broadband and video services "is neither a social nor economic factor" rings hollow.[186]

In contrast to our proposal, Verizon's recommended definition for socioeconomic status information is unduly constricted.[187] The Merriam-Webster online dictionary defines "socioeconomic" as "of, relating to, or involving a combination of social and economic factors."[188] Looking only at income, as proposed by Verizon, focuses too narrowly on economic factors, and does not encompass "social factors."

Moreover, limiting socioeconomic status information to household income fails to account for the broader legislative purposes to "[p]romote the

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[185] DRA Reply Comments at 5.

[186] See Verizon Opening Comments at 9 (arguing that "nothing in the Act compels an interpretation that includes access or subscription to broadband or video service").

[187] See id. (urging us to focus exclusively on residential income levels).

[188] Merriam-Webster OnLine, *at* http://www.m-w.com/dictionary/socioeconomic.

widespread access to the most technology advanced . . . video services"[189] and "[c]omplement efforts to increase investment in broadband infrastructure and close the digital divide."[190] Income information alone does not provide us appropriate initial benchmarks by which to measure our success in fulfilling these purposes.

Similar to Verizon, AT&T criticizes our proposed definition, but fails to provide an appropriate alternative.[191] AT&T's proposal to not define "socioeconomic" would lead to confusion by applicants as to what information we expect to be filed with the Commission. Indeed, parties' comments demonstrate that reasonable people can disagree regarding the appropriate definition of "socioeconomic status information."[192]

We also find that early collection of broadband and video services information will give us time to address and resolve any data collection and analysis issues that may arise. By the terms of the statute, we have three months to assess extensive broadband and video services data upon their receipt, and we must produce a report on these findings by July 1, 2008. Additional time to prepare for this reporting obligation is critical to ensuring that we are capable of fulfilling the statutory reporting requirement.

We, however, recognize that carriers may have issues with meeting our application reporting requirements. In particular, special issues may arise if a company applies for a state video franchise early in the year. As recognized by

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[189] CAL. PUB. UTIL. CODE § 5819(a)(2)(B).

[190] Id. at § 5819(a)(2)(E).

[191] AT&T Opening Comments at 4 (proposing that we delete, but not replace, our definition of "socioeconomic status information").

[192] Compare DRA Reply Comments at 4-5 (praising our definition of socioeconomic status information), with Verizon Opening Comments at 9 (proposing we replace our definition of socioeconomic status information with an altogether different definition).

AT&T and Verizon, it takes time for a communications company to collect and process year-end internal video and broadband data.[193]

Thus, we will deem the requirement for "socioeconomic status information" satisfied if an applicant attests in its application that it will provide us the requested broadband and video information within 90 calendar days of the date when the Commission issues a state video franchise to the applicant. This modification ensures that we have appropriate broadband and video information for reviewing a company's progress, but does not impose an unnecessary barrier to entry. Also the three-month time period mirrors the amount of time allotted to state video franchise holders for their preparation of annual broadband and video reports.[194]

The revised application now clarifies that applicants shall utilize U.S. Census projections of low-income households available as of January 1, 2007 to determine the number of low-income households. This reporting period is the same as that employed in the annual broadband and video reports required pursuant to Public Utilities Code § 5960.

Finally, we afford socioeconomic status information the same confidential protection as annual broadband and video data submitted pursuant to Public Utilities Code § 5960. The required socioeconomic data are granular: Required reporting is on a "census tract basis," as detailed in Appendix D and Section II of Appendix E. Further explanation of revisions related to how socioeconomic status data are collected are explained and justified in Section XIII below.

C. Additions to the Application and the Affidavit

Based on our review of DIVCA and parties' comments, we conclude that few additions to the state video franchise application and affidavit are

[193] AT&T Opening Comments at 4.

warranted. This section reviews parties' proposed changes to the application and affidavit below.

1. Proposed Changes to the Application

Parties raise concerns regarding the content and clarity of the state video franchise application. Some parties request additional application content, while others request current content to be rephrased or deleted.

a) General Opposition to Expansion of the Application

Several communications companies protest expanding any requirements of the proposed state video franchise application. First, SureWest contends that "nowhere in the Franchise Act is there explicit authorization for the Commission to require" expansion of the application.[195] Second, Small LECs argues that additional application requirements would "unduly increase the costs of the program, and create unnecessary delays and burdens in processing and approving video franchise applications."[196] Third, AT&T protests our requiring any information in the application if the information is not explicitly required by Public Utilities Code § 5840.[197]

In response to these arguments, we note that we will consider each of the requests for changes in light of the statutory application requirements and the statutory constraints on our authority. The limited changes we adopt in the sections below are necessary and reasonable.

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[194] CAL. PUB. UTIL. CODE § 5960(b) (giving state video franchise holders until April 1 to submit annual video and broadband service reports for the prior calendar year).

[195] SureWest Reply Comments at 3.

[196] Small LECs Reply Comments at 8.

[197] AT&T Reply Comments at 6.

b) Information on Corporate Parents

Joint Cities urges us to modify the state video franchise application to "include information on all parent entities, if more than one, including the ultimate parent."[198] We find that this request is reasonable and based upon the statute. Public Utilities Code § 5840(e)(5) states that the applicant must provide the "legal name, address, and telephone number of the applicant's parent company, if any." The statute provides no exception that allows an applicant to omit listing a parent company if the applicant has more than one parent company. Accordingly, we clarify that the Application must include information on all parent entities, including the ultimate parent.

c) Proof of Legal and Technical Qualifications

CFC argues that the "Commission does not explain in Paragraph IV.1.a. of the GO what proof of 'legal' and 'technical' qualification is expected . . . ."[199] We, however, find that our bond requirement eliminates the need for any further explanation. As discussed in SectionVII, the Commission is requiring the submission of a bond in order to provide "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant."[200]

d) Information Coordination with Local Entities

Joint Cities asks the Commission to update annually the local entity contact information for each municipality.[201] According to Joint Cities, the Commission should take "information-gathering steps."[202] Joint Cities encourages

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[198] Joint Cities Opening Comments at 20.

[199] CFC Opening Comments at 3.

[200] CAL. PUB. UTIL. CODE § 5840(e)(9).

[201] Joint Cities Opening Comments at 22-23.

[202] Pasadena Opening Comments at 4.

the Commission to "work with local governments" to develop "standard information solicitation forms" for local entity contact information; gross revenue documentation provided to the local entities by the state video franchise holders; and PEG information.[203]

In response to Joint Cities, we clarify that the Commission will continue to work with local entities to ensure strong communication channels. We view the local entities as our partners in oversight of state video franchise holders. We have worked with and expect to continue to work with individual cities and organizations, such as the League of Cities, to develop communication systems and other documentation to facilitate the success of the new state video franchise system.

Concerning the specific items requested above, we find that these items are best addressed at the administrative level of the Commission. We anticipate that action on these specific items will commence following the staffing of the Commission's new video franchise unit.

e) Discussion of Plans for Complying with Antidiscrimination and Build-Out Requirements

TURN states that the "application process should require applicants to present how they intend to meet the statute's build-out and anti-discrimination requirements."[204] We, however, decline to add this requirement to the application. To address antidiscrimination and build-out issues, we will rely upon the reporting requirements and enforcement procedures already provided by DIVCA and fully described and addressed in Sections XIII, XXIV and XV respectively. Requiring further information on what state video franchise

[203] Joint Cities Opening Comments at 22-23.

[204] TURN Reply Comments at 7.

applicants "intend" is not necessary. Our enforcement will be based on what applicants do, not their initial intentions.

f) Digital Divide and Workplace Diversity Reports

Greenlining calls for imposition of a number of new reporting requirements in the application form.[205] Specifically, Greenlining argues that applicants should be required to provide information on their efforts, over the last three years, to accomplish the following: help close the Digital Divide; fund access to new technology by underserved communities; demonstrate diversity at all levels of employment and management; demonstrate business opportunities created for small, minority-owned, and women-owned businesses; and provide full content access to underserved and minority communities.[206]

We decline to make any such modifications to the application. As discussed in Section IX, DIVCA sets forth the application process with particularity and strictly limits the Commission's role to determining whether the application is complete or incomplete. We, therefore, find no statutory basis or support for including any of Greenlining's proposed reporting requirements in the application form.

Nevertheless, we recognize the particular importance of diversity in workplace, suppliers of goods and services, and video programming. California's population is more diverse than any other state's. That diversity is a tremendous asset to our state. We expect that diversity to be reflected in the employees hired by state video franchise holders, as well as in the programming these employees offer to California residents. Section XIII ensures that we receive annual reports on workplace diversity efforts of state video franchise holders.

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[205] Greenlining Reply Comments at 2-3.

[206] Greenlining Opening Comments at 2.

g) Services in Languages Other Than English

Greenlining urges the Commission to require applicants to "set forth the types of services that will be provided in languages other than English, the names of the languages in which these services will be provided, and the specific capacity of the applicant to provide such services."[207] We find no statutory basis for requiring reporting of services provided in languages other than English. Thus, we impose no such requirement.

2. Proposed Changes to the Affidavit

Many parties ask for additional content in the affidavit. We discuss these requests and respond to each below.

a) Information on Labor Contracts

CWA urges the Commission to require each applicant to "state whether or not its employees are covered by a collective bargaining agreement."[208] For applications for an amended state video franchise, CWA requests that the applicant be required "to state that it has agreed to honor the agreement and pay, or perform obligations under the agreement to the same extent as would be required if the previous franchise continued to operate under the franchise."[209]

We find that there is significant DIVCA support for collective bargaining agreements. First, Public Utilities Code § 5810(c) states that it is "the intent of the Legislature that collective bargaining agreements be respected." Second, Public Utilities Code § 5870(b) provides that when a state video franchise is transferred to a new entity, the transferee must agree "that any collective bargaining agreement entered into by a video service provider shall continue to be honored, paid, or performed to the same extent as would be required if the video service provider continued to operate under its franchise . . . ."

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[207] Id. at 6.

[208] CWA Opening Comments at 1.

[209] Id. at 1.

To reinforce these and other DIVCA provisions, Public Utilities Code § 5840(e)(1)(B) requires that applicants file an affidavit stating that the "applicant or its affiliates agrees to comply with all federal and state statutes, rules, and regulations . . . ." Thus, any applicant for a state video franchise, an amended state video franchise, or the receipt of a state video franchise must attest that it will comply with existing collective bargaining agreements and honor such agreements when transferring a franchise.

More specifically, Public Utilities Code § 5840(e)(1)(B) further requires that an applicant make four statements attesting to its compliance with individual provisions of state law. Compliance with DIVCA labor requirements is not included in these provisions.

To ensure clarity, we mandate an additional statement in the affidavit. We require the affidavit to include a statement that the applicant will fulfill all DIVCA requirements. This addition to the affidavit allows us to address this meritorious claim of CWA. Furthermore, this broad language enables us to address with economy the meritorious claims of other parties discussed below.

If transfer of a state video franchise is sought, we also shall require the transferee to state, by affidavit, that it "agrees that any collective bargaining agreement entered into by a video service provider shall continue to be honored, paid, or performed to the same extent as would be required if the video service provider continued to operate under its franchise for the duration of that franchise unless the duration of that agreement is limited by its terms or by federal or state law." We support CWA's assessment that this stipulation is necessary for implementation of DIVCA collective bargaining provisions.[210] Public Utilities Code § 5970(b) specifically requires that the transferee agree to respect a collective bargaining agreement in this manner.

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[210] Id.

Finally, we direct state video franchise holders to submit annual reports that indicate whether their California employees are covered by a collective bargaining agreement. While submission of this information is outside of the scope of the tightly prescribed application process, we find that this reporting requirement is necessary for ongoing enforcement of DIVCA labor provisions. A regular reporting requirement will help us to ensure that existing collective bargaining agreements are identified and respected during the transfer process.[211]

b) Authority of Affirming Individual

CFC states that the affidavit "does not require sufficient assurances that the affirming individual has authority to speak for and bind the Company."[212] It notes that "[t]here is no requirement that the individual holds a position with the Company that would give him or her that authority."[213] Consequently, CFC urges the Commission to revise the affidavit form to guarantee "that the individual who signs it has personal knowledge of the facts which he or she is affirming."[214]

We find that CFC's proposed alterations are not necessary. The content of our affidavit already adequately addresses CFC's concerns. The affidavit requires the affiant to swear that she or he has "personal knowledge of the facts," is "competent to testify to [the facts]," and has "authority to make this Application on behalf of and to bind the Company."

c) Other Requests for Affidavit Modification

The Cities and Pasadena call for an addition to the section of the affidavit addressing PEG. Specifically, they ask that we require the following statement to be included in the affidavit: "Applicant will timely and fully provide the public,

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[211] See CAL. PUB. UTIL. CODE ("It is the intent of the Legislature that collective bargaining agreements be respected.").

[212] CFC Opening Comments at 4.

[213] Id.

[214] Id.

educational, and governmental access (PEG Access) channels, as well as associated funding and support (such as system interconnection, where applicable), required by AB 2987, as well as any continued institutional network (I-Net) facilities and support required by AB 2987."[215]

The addition of a statement by which the applicant affirms compliance with all DIVCA requirements, as discussed above, meets this concern. No further modification to the affidavit is necessary.

CCTPG/LIF requests that the affidavit "include an additional affirmation that the applicant will provide free community center service as provided by Section 5890(b)(3)."[216]

The addition of a statement by which the applicant affirms compliance with all DIVCA provisions, as discussed above, meets this concern. No further modification to the affidavit is necessary.

Finally, we note that Pasadena, Joint Cities, and League of Cities/SCAN NATOA ask that the application require the franchise applicant to state that the applicant agrees that Commission or state fees do not qualify as franchise fees pursuant to caps imposed by the federal Cable Act.[217] We decline to impose such a requirement. We find that this statement is unnecessary and likely would carry little legal force. This matter is discussed in further detail elsewhere.

VII. Bonding Requirements

Public Utilities Code § 5840(e)(9) declares that a state video franchise application shall include "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way

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[215] Joint Cities Opening Comments at 21; City of Pasadena Opening Comments at 6-7.

[216] CCTPG/LIF Opening Comments at 11.

[217] Pasadena, Opening Comments at 4; Joint Cities Opening Comments at 15; League of Cities/SCAN NATOA Opening Comments at 5. These parties reference 47 U.S.C. § 542(b).

caused by the applicant." "To accomplish these requirements," the statute provides that "the commission may require a bond."[218]

Pursuant to Public Utilities Code § 5840(e)(9), the OIR tentatively required each applicant to "either post a bond valued at $100,000 or produce a financial statement that demonstrates that the applicant possesses a minimum of $100,000 of unencumbered cash that is reasonably liquid and readily available to meet expenses." This section reviews and analyzes comments regarding this proposed bonding requirement.

A. Position of the Parties

Verizon argues that a bond requirement in excess of $100,000 is "neither appropriate nor necessary."[219] It maintains that the "$100,000 financial showing is consistent with that imposed by the Commission on other facilities-based communications companies, and there is no reason to change it here."[220] Verizon adds that proponents of an increase in the bond amount "confuse bonds with two distinct purposes – those provided as a safeguard to cover initial estimated start-up costs, and those addressing specific and actual operational costs which may be drawn down by cities after-the-fact."[221] Verizon argues that the "adequate assurance" determination is intended only "to insure adequate initial capitalization as a start-up business."[222] Verizon explains that local entities "maintain control of the means of access to the public rights of way," which means they may continue "to issue encroachment permits, assess reasonable cost-based fees, and require bonds when appropriate."[223]

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[218] CAL. PUB. UTIL. CODE § 5840(e)(9).

[219] Verizon Reply Comments at 12.

[220] Id.

[221] Id. at 11.

[222] Id. at 11-12.

[223] Id. at 12 (citing Public Utilities Code § 5885(a) and Government Code § 50300).

In its opening comments on the draft decision, Verizon argues that "a bond cannot issue without a franchise effective date."[224] Based upon its experience, Verizon states that "financial institutions cannot issue bonds insuring performance for an obligation that does not yet exist. . . . Any incorrect information in the bond application, e.g., an incorrect 'guess' as to the effective date of the yet-to-be issued franchise, would invalidate the bond . . . ."[225] Verizon asserts that "[t]his problem can be easily rectified by conditioning the holder's ability to provide video service on its posting a bond within a certain period of time, e.g., five business days, from the effective date of the franchise."[226]

With respect to submission of a financial report, Verizon asks the Commission to "clarify that if an applicant chooses to submit a financial report, the latest available audited report should be submitted."[227] Verizon states that the methods used to show the unencumbered cash requirements should include "alternative financial instruments defined in D.91-10-041 and D.95-12-056."[228]

SureWest "believes that the $100,000 bond required by the proposed General Order is appropriate . . . ."[229] If the Commission increases the bond amount, however, SureWest argues that the increase "should not be based on a one-size-fits-all approach."[230] SureWest asserts that a one-size-fits-all increase might impede small providers (like SureWest) from bringing video service to "small areas of the state."[231] SureWest states the Commission could continue the distinction already made between communications companies with less than one

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[224] Verizon Opening Comments on the PD at 9.

[225] Id. at 10.

[226] Id.

[227] Verizon Opening Comments at 6.

[228] Id., Attachment B.

[229] SureWest Reply Comments at 13.

[230] Id.

[231] Id.

million California telephone customers and those with more, and require that the former be subject to the $100,000 bond requirement and the latter be "subject to a higher bond requirement."[232]

In reply comments on the draft decision, Small LECs argues that obtaining an executed bond "could be administratively difficult."[233] Small LECs characterizes this proposed requirement as "unnecessary."[234]

Joint Cities argue that performance bonds do not provide the most protection to local governments.[235] Joint Cities state that bonds "are more difficult for local governments to access," so the preferred security instruments are "letters of credit and security funds controlled by local governments."[236] Nonetheless, Joint Cities maintain that bonds "should be required for all state video franchises."[237]

If the Commission chooses to require bonds, Joint Cities recommend that the bond valuation be "designed to truly protect local governments and their constituents."[238] Specifically, Joint Cities suggests that the Commission eliminate the $100,000 bond amount and instead "(a) determine the proper amount and format of the bond after reviewing the application; (b) inform the applicant of the Commission's determinations; and (c) require that the applicant submit a properly executed bond to the Commission, as well as copies to all affected local governments, no later than sixty (60) days before beginning video system construction."[239]

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[232] Id.

[233] Small LECs Reply Comments on the PD at 4.

[234] Id.

[235] Joint Cities Opening Comments at 7.

[236] Id.

[237] Id. at 8.

[238] Id. at 6.

[239] Id. at 21.

In determining the amount and format of the bonds, Joint Cities urges the Commission to abide by four principles:

> "[W]ith respect to cable systems that have already been constructed, the amounts of the bonds should, at a minimum, be consistent with the valuation amounts of the security instruments to which cable operators have already agreed."[240]
>
> "[W]ith respect to video/high speed data systems that will require considerable future construction in the public rights-of-way, the amount of the bonds should reflect said activity."[241]
>
> "[L]ocal governments in whose areas each state franchised system will operate should be listed as obligees on the pertinent bonds and these bonds should require that these governments timely receive copies of each bond and any modifying instruments. . . ."[242]
>
> "[T]he effective time for government action required by the bonds should be no less than ninety days . . . ."[243]

Joint Cities warns that not heeding its admonitions "create[s] unnecessary liability for the State of California and for the Commission."[244]

Pasadena asserts that "the $100,000 bond is not sufficient for a city the size of Pasadena, and certainly would not adequately protect local governments and the public across much larger franchise areas."[245] Pasadena explains that it has had to "use security instruments to address cable TV and OVS operator deficiencies in meeting franchise agreements . . . [including] recover[ing] unpaid franchise fees, PEG payments, undergrounding costs, and pole attachment fees."[246]

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[240] Id. at 8.

[241] Id.

[242] Id. at 8-9.

[243] Id. at 9.

[244] Id.

[245] Pasadena Opening Comments at 5.

[246] Id. at 3.

Pasadena puts forth a proposal for a tiered bond structure. Pasadena argues that for any "entities that will be constructing plant to serve video customers . . . the Commission . . . [should] require a bond of at least $500,000, or $100,000 for every 20,000 customers served, whichever of these two options is greater."[247] For existing systems, Pasadena states that "the bond amounts should, at a minimum, be consistent with security requirements to which cable operators have already agreed."[248] Pasadena adds that "all local governments in whose areas a video service provider is operating should be identified as obligees on the bond."

Finally, Pasadena argues that the Commission should "eliminate the option of simply providing proof of cash on hand."[249] Pasadena states that, in its experience, "video service providers may have financial resources when an application is filed, but those resources may no longer be available when problems occur."[250] In addition, Pasadena asserts that the video service provider would be under no obligation to use the cash on hand to repair damage to the public rights-of-way.[251]

Los Angeles and Carlsbad Responders argues "[t]he flat $100,000 bond amount, which may be adequate in the case of a state franchise which is operating only in limited areas, appears to be woefully inadequate to secure the performance of a state franchisee which may be operating statewide."[252] Accordingly, Los Angeles and Carlsbad Responders asks the Commission "to clarify that its bond requirement is not a substitute for a state franchise holder

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[247] Id.

[248] Id.

[249] Id.

[250] Id.

[251] Id.

[252] Los Angeles and Carlsbad Responders Reply Comments at 8.

providing any security instrument that may be required by a local entity for persons obtaining permits to do construction in the rights-of-way."[253]

Los Angeles and Carlsbad Responders also endorses a "proportional" approach for the Commission's bonding requirement.[254] By way of example, Los Angeles and Carlsbad Responders states that the cable providers within the City of Los Angeles' fourteen franchise areas must "provide a performance bond or a letter of credit" and that the amount ranges from "$82,000 to $1 million dollars."[255] In determining this amount, Los Angeles and Carlsbad Responders explains that the factors used are "the geographical size of the franchise area, the size of the system to be installed in the City's public-rights-of way, the number of homes passed, and the number of potential subscribers in each of the franchise areas, and other risk factors."[256]

Agreeing that the $100,000 cash bond is "far too low," League of Cities/SCAN NATOA supports the idea of "requir[ing] a bond or unencumbered cash in an amount that varies by service provider, based on the potential number of subscribers in its proposed service area."[257] League of Cities/SCAN NATOA also calls for the Commission to "identify those parties that may be allowed to draw on bonds in the case of default by the obligor, and under what circumstances the bonds may be recovered."[258] In particular, League of Cities/SCAN NATOA urges the Commission to "consider making the bond amounts available to local governments who demonstrate harm arising from the default of the obligor, including harm arising from defaults on franchise fee

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[253] Id.

[254] Id.

[255] Id.

[256] Id.

[257] League of Cities/SCAN NATOA Opening Comments at 14.

[258] Id.

payments, failure to pay fines for customer service violations, or damage to the public rights-of-way."[259]

Greenlining endorses the Joint Cities' "position regarding a higher bond level and far higher initial fees."[260] Greenlining reasons that "it would be better for the CPUC to eliminate bonds than to suggest that a token amount can protect the public."[261] In addition, Greenlining "supports the League's position that the $100,000 cash bond is too low and the purposes and uses of such bonds are vague."[262]

DRA urges the Commission to consider "a sliding or tiered scale for establishing a bond or unencumbered cash amount."[263] DRA, however, does not recommend any specific bond amounts.[264]

B. Discussion

We conclude that we should impose a bond requirement. Like most commenting parties, we find that requiring a bond is a satisfactory and efficient way to determine whether applicants possess financial, legal, and technical qualifications necessary to be state video franchise holders.[265]

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[259] Id. at 15.

[260] Greenlining Reply Comments at 11.

[261] Id.

[262] Id.

[263] DRA Reply Comments at 12.

[264] Id.

[265] See League of Cities/SCAN NATOA Opening Comments at 14 (supporting a bond requirement); Pasadena Opening Comments at 3 (same); SureWest Reply Comments at 13 (same); Verizon Reply Comments at 12 (same). Joint Cities voices the concern that performance bonds, as compared to other security instruments, "are more difficult for local governments to access." Joint Cities Opening Comments at 7. As explained below, however, we do not expect that local entities will be accessing the bond imposed by the Commission.

The rest of this section assesses specific features of the bond requirement proposed in the OIR. In response to comments, we modify some of the specifics of this requirement.

1. Purpose of the Bond

Public Utilities Code § 5840(e)(9) guides our assessment of the purpose for a bond. The statute declares that the Commission may require a bond to establish that an applicant possesses "the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant."[266] Public rights-of-way, in this context, include the areas "along and upon any public road or highway, or along or across any of the waters or lands within the state."[267]

Verizon too narrowly defines the purpose of the bond when it states that the Legislature merely intended for a bond "to insure adequate initial capitalization as a start-up business."[268] Public Utilities Code § 5840(e)(9) expressly directs that a bond, in part, would serve as adequate assurance of an applicant's qualifications to "operate the proposed system."

Nevertheless, we, like Pasadena and Los Angeles and Carlsbad Responders, conclude that our bond requirement is not a perfect substitute for a "state franchise holder providing any security instrument that may be required by a local entity."[269] The Commission's bond requirement only demonstrates that an applicant possesses the "qualifications" necessary to offer video service. While we cannot grant local entities any new authority to impose security instruments, we recognize that some local entities also may require security

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[266] CAL. PUB. UTIL. CODE § 5840(e)(9).

[267] Id. at § 5830(o).

[268] Verizon Reply Comments at 12.

[269] Los Angeles and Carlsbad Responders Reply Comments at 8.

instruments in their oversight of local rights-of-way. DIVCA tasks local entities with governing "time, place, and manner" of a state video franchise holder's use of the local rights-of-way.[270] In overseeing time, place and manner of this use, local entities may issue rights-of-way permits, and these local permits may require further security instruments to ensure that a state video franchise holder fulfills locally regulated obligations.[271] Locally required security instruments can best take into account size and scope of a state video franchise holder's local construction and operations.

2. Amount of the Bond

Many parties urge us to abandon the one-size-fits-all approach to the bond requirement proposed in the OIR. Parties advocating for tiered bonding requirements include Pasadena; Los Angeles and Carlsbad Responders; DRA; and League of Cities/SCAN NATOA.[272] Upon further review of the comments, we are persuaded to adopt a bond requirement that bases the size of the bond on the number of a state video franchise holder's potential customers. We wish to

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[270] CAL. PUB. UTIL. CODE § 5840(e)(1)(C) (providing that a state video franchise holder must comply with "all lawful city, county, or city and county regulations regarding the time, place, and manner of using the public rights-of-way, including, but not limited to, payment of applicable encroachment, permit, and inspection fees"). See also id. at § 5885(a) ("The local entity shall allow the holder of a state franchise under this division to install, construct, and maintain a network within public rights-of-way under the same time, place, and manner as the provisions governing telephone corporations under applicable state and federal law, including, but not limited to, the provisions of Section 7901.1.").

[271] Id. at § 5840(e)(1)(C) (recognizing that state video franchise holders must abide by lawful local regulations regarding "the time, place, and manner of using the public rights-of-way").

[272] Pasadena Opening Comments at 3; Los Angeles and Carlsbad Responders Reply Comments at 8; DRA Reply Comments at 12; League of Cities/SCAN NATOA Opening Comments at 14. See also SureWest Reply Comments at 13 (stating any increase of the bond amount proposed in the OIR "should not be based on a one-size-fits-all approach").

neither under- or over-assess the bond amount required to demonstrate applicants' qualifications.

Specifically, we revise the bond amount to require state video franchise holders to carry a bond in the amount of $100,000 per 20,000 households in a proposed video service area, with a required $100,000 minimum per state video franchise holder. Given that that the requirements of DIVCA are intended to spur competition, rather than stymie it, we will place a cap of $500,000 on the bond requirement imposed on each state video franchise holder.

In establishing this requirement, we considered various factors that could be used in crafting appropriate bond levels. We found that there is no standard set of criteria, and no specific value assigned to each criterion, to which local franchising authorities agree to when developing local bonding requirements. A review of publicly available franchises finds a huge discrepancy in required terms.[273]

Similarly, comments reflect different considerations. Some parties, like Pasadena and League of Cities/SCAN NATOA, suggest that the Commission tier its bond requirement solely on the basis of the number of video customers served.[274] In contrast, Los Angeles and Carlsbad Responders ask us to consider a

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[273] For example, the City of Pittsburgh requires a $75,000 line of credit (http://www.city.pittsburgh.pa.us/cable/sections_13-16.html#13.4); the City of Oklahoma requires a $100,000 bond during construction, which drops to $25,000 after construction is completed (http://www.okc.gov/pim/pim_library/CableAgreement.html); the Cities of Palo Alto, East Palo Alto, Menlo Park, and Atherton, and the Counties of Santa Clara and San Mateo together require a $1,000,000 bond that decreases to $500,000 after construction is completed (http://www.city.palo-alto.ca.us/cable/franchise-agreement.html#11); Montgomery County, Maryland requires a $2,000,000 bond throughout the life of the franchise and $100,000 in cash (http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/cableOffice/June98franchise.asp).

[274] Pasadena Opening Comments at 3; League of Cities/SCAN NATOA Opening Comments at 14. See also SureWest Reply Comments at 13 (proposing a tiered requirement if we decide to raise the baseline bond amount).

far wider range of criteria when setting a bond amount. These criteria include the following: "the geographical size of the franchise area, the size of the system to be installed in the City's public-rights-of way, the number of homes passed, and the number of potential subscribers in each of the franchise areas, and other risk factors."[275]

Upon review of these comments, we conclude that we should base the size of the bond on the number of households in an applicant's proposed video service area. These households would only include those in the state video franchise holder's proposed state video service area; homes subject to local franchise agreements are excluded from this count. Some of the other proposed criteria – such as "the geographical size of the franchise areas . . . [and] the size of the system to be installed in the City's public-rights-of-way . . ." – are liabilities that can be accounted for in local entities' permits. We need not entirely duplicate local security instruments. Also we declined to use "the number of homes passed," because this figure does not adequately take into account future construction and operational demands. We expect that state video franchise holders will quickly expand beyond the number of homes they had passed at the time they filed their application.

Turning to the specific amounts of bond requirements, we adopt a requirement that ensures that a bond is sufficient to establish a state video franchise holder's qualifications, but does not place a significant barrier to entry on applicants that are qualified to provide video service. In particular, our bonding requirement is sensitive to SureWest's concern that imposing a significant bond requirement "might impede small providers . . . from bringing video service to "small areas of the state."[276] DIVCA is intended to spur

[275] Los Angeles and Carlsbad Responders Reply Comments at 8.

[276] SureWest Reply Comments at 13.

competition to the benefit of California consumers. Thus, the bond requirement should not be unduly burdensome or unnecessarily complex.

3. Issuance and Notice of the Executed Bond

We clarify that we require that the bond be issued by a corporate surety authorized to transact surety business in California. The Commission shall be listed as the obligee on the bond. We, however, decline to list other entities as obligees, as recommended by the League of Cities/SCAN NATOA and Pasadena.[277] Only the Commission should be an obligee on a bond designed to prove to the state franchising authority that an applicant possesses adequate qualifications to be a state video franchise holder. As is their current practice, local entities may require additional security instruments to ensure proper treatment of their local residents and usage of their local rights-of-way.

Since a bond typically needs a franchise effective date to be issued, we will not require an applicant to provide the Executive Director a copy of its executed bond until five business days after the effective date of its state video franchise.[278] This copy must be provided to the Commission before a state video franchise holder begins offering video service pursuant to a state video franchise. The applicant shall attest to the amount and future execution of the required bond in the affidavit included in its application. Pursuant to Public Utilities Code § 5840(e)(1)(D), the state video franchise holder also must provide a copy of this affidavit to affected local entities.

Outside of its application, a state video franchise holder need not provide further notice of the state bond to local entities in its video service area. We find

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[277] League of Cities/SCAN NATOA Opening Comments at 15 (asking the Commission to consider determining that those local governments that demonstrate harm arising from the default of the obligor should be listed as obligees on the bond); Pasadena Opening Comments at 3 (advocating that "all local governments in whose areas a video service provider is operating should be identified as obligees on the bond").

[278] CAL. PUB. UTIL. CODE § 5840(d)(9)(E).

no statutory basis for Joint Cities' and Pasadena's recommendation to require a state video franchise holder to provide a copy of the executed bond sixty days before it commences video system construction in a local jurisdiction.

A state video franchise holder may not allow its bond to lapse during any period of its operation pursuant to a state video franchise. During all periods of operation, a state video franchise holder must continue to possess requisite legal, technical, and financial qualifications.

4. Alternative to Submit Financial Statement

As an alternative to a bond, the OIR allowed applicants to demonstrate "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications" to be a state video franchise holder by producing a financial statement that demonstrates that the applicant possesses unencumbered cash that is reasonably liquid and readily available to meet expenses.[279] The amount of unencumbered cash was required to be an amount equal to that of the proposed bond.

Upon further review of the statute and comments, we, however, remove this option from the General Order. We agree with Pasadena that it is inappropriate for us to allow the option of "simply providing proof of cash on hand."[280] This option is not expressly permitted by DIVCA. Moreover, it is unclear whether the financial statement qualifies as "adequate assurance" that the applicant possesses "legal" and "technical qualifications" necessary to be a state video franchise holder. The statute only directs that a bond may provide this adequate assurance.

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[279] See id. at § 5840(e)(9) (stating that a state video franchise application shall include "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant").

[280] Pasadena Opening Comments at 3.

We decline to address further suggested revisions to the financial statement option.[281] These comments are moot due to our decision to remove the financial statement option from the General Order.

VIII. Application Fee

Public Utilities Code § 5840(c) declares that "[t]he commission may impose a fee on the applicant that shall not exceed the actual and reasonable costs of processing the application and shall not be levied for general revenue purposes." Pursuant to this statutory authority, the OIR tentatively concluded that an application fee of $2,000 would be sufficient to recover the costs of processing an application.

Parties suggest various changes to the Commission's administration of its application fee, including the following: increasing the fee; basing the fee on the size of the proposed service area; and assessing the application fee on tasks other than an initial application. We review and analyze these comments below.

A. Position of the Parties

Joint Cities contends that the Commission's proposed application fee of $2,000 is grossly underestimated.[282] Joint Cities explains that the Commission's proposed fee is far lower than the fee charges by local franchising authorities.[283] According to Joint Cities, the Commission has "gravely underestimated" the number of hours that the Commission "will actually be required to devote to the few franchise applications submitted to [the] Commission in 2007."[284] Joint Cities argues that an "initial application fee of $7,500 to $10,000 would likely better

[281] These comments include Verizon Opening Comments at 6 and League of Cities/SCAN NATOA Opening Comments at 14.

[282] Joint Cities Opening Comments at 16.

[283] Id.

[284] Id.

reflect the Commission's actual costs."[285] Joint Cities adds that the Commission could offset a portion of the user fee if it raised the application fee.[286]

In addition, Joint Cities argues that the Commission's decision to "forego application fees for other types of Commission activity required by franchisee requests is against the public interest."[287] Joint Cities maintains that state video franchise holders that "create additional work for the Commission should be required to provide the appropriate remuneration to the Commission."[288]

Pasadena declares that the Commission's proposed application fee is "significantly underestimated."[289] The city explains that its initial application fee is set at $15,000 in order to "cover basic staff time reviewing franchise applications."[290] Based on its experience, Pasadena asserts that a higher application fee "would more accurately reflect the Commission's actual review costs."[291] Pasadena also argues that the Commission could reduce the user fee if it raised the application fee.[292]

Verizon maintains that the Commission's proposed application fee should not be compared to the fee assessed by the local franchising authorities, because the "state franchising process is quite different and far more ministerial."[293] Verizon contends that the local franchising authorities' "costs of funding

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[285] Id.

[286] Id.

[287] Id.

[288] Id. at 17.

[289] Pasadena Opening Comments at 4.

[290] Id. at 4-5.

[291] Id.

[292] Id. at 5.

[293] Verizon Reply Comments at 10.

consultants and attorneys in lengthy local franchise negotiations and review processes bears no relation to the Commission's streamlined process."[294]

Verizon adds that the Commission should not assess application fees on franchise-related processes, such as service territory amendments and change of control notifications.[295] According to Verizon, "[m]ost of these functions are subject to the *notice* provisions of section 5840(m), not the application *review* process of section 5840(h). Therefore, another application fee is not authorized."[296]

SureWest maintains that a standard application fee for all applications is inappropriate. It argues that "applicants requesting a state-issued franchise for larger service areas will require substantially more review by the Commission," and a one-size-fits-all application fee may result in larger companies being subsidized by smaller ones.[297] Accordingly, SureWest urges the Commission to "charge an application fee for any application, whether it is an initial application, an amendment or a renewal, and the charge should be based on . . . criteria that is more reflective of the cost the Commission will incur in processing the particular application."[298] SureWest suggests calculating the application fee based on "the number of households in an applicant's proposed service area."[299]

B. Discussion

We decline to modify the amount of our application fee or assess an application fee for anything other than an application for an initial or renewed state franchise. We conclude that the proposed application fee of $2,000 is reasonable for recovering our costs to process an application. We expect that this

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[294] Id. at 10, n.37.

[295] Id. at 11.

[296] Id.

[297] SureWest Opening Comments at 13.

[298] Id. at 14.

[299] Id.

amount will compensate us for forty hours of employee time when the employee's compensation, including benefits, will cost the state approximately $100,000 per year.

We agree with Verizon's assertion that "state franchising process is quite different" from the franchising process at the local level.[300] As explained in Section IX, DIVCA has established an application review process that is streamlined and strictly limited in duration.[301] We expect that forty hours of staff time will be sufficient to review a state franchise application under these conditions. Moreover, we note that if actual workload related to the application review process differs from the Commission's estimates, the Commission has the statutory authority to revisit its calculation of the application fee.

SureWest did not convince us that the size of an applicant's proposed video service area will have a significant impact on the amount of staff resources needed to determine whether an application is complete. When arguing that we align the application fee with the size of an applicant's proposed video service territory, SureWest failed to give any detail on how much the size of a proposed video service area would affect the length of time necessary for application review.[302]

We further find that collecting application fees for additional specific Commission activities is outside the scope of our statutory authority.[303] While DIVCA states that the Commission may assess a fee to recover the "actual and reasonable costs of processing the application," DIVCA contains no provision

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[300] Verizon Reply Comments at 10. Verizon rebuts Pasadena's and Joint Cities' requests to raise the application fee. See Joint Cities Opening Comments at 16 (urging the Commission to increase the amount of the application fee); Pasadena Opening Comments at 4-5 (same).

[301] CAL. PUB. UTIL. CODE § 5840(h).

[302] SureWest Opening Comments at 14.

[303] Extending the scope of application fees was supported by Joint Cities and Pasadena. Joint Cities Opening Comments at 16; Pasadena Opening Comments at 5.

that authorizes the Commission to assess fees for individual tasks other than application review.[304] DIVCA explicitly contemplates that the remainder of the costs of administering the state video franchise program will be recovered through our annual user fee.[305]

IX. Commission Review of the Application

Public Utilities Code § 5840, which establishes the state video franchise application process, directs that our authority to oversee the state video application process "shall not exceed the provisions set forth in this section."[306] These provisions only provide the Commission the authority to evaluate whether a state video franchise application is complete or incomplete.[307] We must inform an applicant of whether its state video franchise application is complete within thirty calendar days of receipt of its application.[308]

Public Utilities Code § 5840 makes no allowance for protests. Finding Section 5840 does not provide for any protest to the Commission's issuance of a state video franchise, the OIR tentatively concluded that none should be permitted. We determined that DIVCA did not afford the Commission discretion in its review of state video franchise applications. The rest of this section reviews and assesses the parties' comments.

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[304] CAL. PUB. UTIL. CODE § 5840(c).

[305] See id. at § 401(b) (stating that the Legislature intended for the user fee to fund the Commission's "authorized expenditures for each fiscal year to regulate . . . applicants and holders of a state franchise"); id. at § 441 ("The annual fee shall be established to produce a total amount equal to that amount established in the authorized commission budget for the same year . . . less the amount to be paid from reimbursements, federal funds, and any other revenues, and the amount of unencumbered funds from the preceding year.").

[306] Id. at § 5840(b).

[307] Id. at § 5840(h).

[308] Id. at § 5840(h)(1).

A. Position of Parties

Verizon supports the determination and reasoning that led us to conclude that we should permit no protests to applications for a video franchise. According to Verizon, the "44-calendar-day timeframe set forth in the Act for review and issuance of a franchise do not lend themselves to the opportunity for protest as that term is generally understood in Commission practice."[309] Verizon adds that substantive issues raised by a protest would be outside the scope of the Commission's review: "[T]he application criteria are very detailed and capable of objective determination, making the approval process largely . . . ministerial . . . . [C]onsider[ing] additional factors in issuing a franchise . . . would violate section 5840(b), which strictly limits the application process and the Commission's authority to the provisions of section 5840."[310]

AT&T puts forth an argument similar to Verizon. AT&T contends that "section 5840 sets forth the entirety of the permissible steps in the application process and it does not include protests. Therefore, protests are not allowed."[311]

Small LECs agrees that "AB 2987 does not provide for a protest mechanism, so the Commission should not modify the legislation by enacting one."[312] SureWest supports this position of Small LECs and of other communications companies without argument.[313]

In contrast to the communications companies, CCTPG/LIF maintains that we must allow parties to review franchise applications and protest deficiencies. CCTPG/LIF gives three reasons for its position. First, CCTPG/LIF contends that it is "inappropriate to exercise such an important function of Commission

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[309] Verizon Opening Comments at 7.

[310] Id. (citations omitted).

[311] AT&T Reply Comments at 3.

[312] Small LECs Opening Comments at 7.

[313] SureWest Opening Comments at Exhibit A (mark-up of Attachment B at 14).

discretionary authority without an opportunity for interested parties to be heard":

> If the applicant's initial definition of its service territory (required by Sec. 5840(e)(6), (7)) and/or its plan for build-out (required by Sec. 5840(e)(8)) is discriminatory or deficient, interested parties must be given the opportunity to protest. The build-out provisions of AB 2987, if not other parts of the application process, are sufficiently complex and include enough Commission discretion, such that the Commission's grant of an application is not a merely ministerial action.

Second, CCTPG/LIF contends that "AB 2987's timeline of allowing 44 days between a complete application and the granting of a franchise allows for a public application process and a protest process."[314] Third, CCTPG/LIF points out that "[t]here is simply no language anywhere in AB 2987 that restricts the Commission" from permitting protests to the applications for video franchises.[315]

CFC argues that the proposal to prohibit protests on applications is inconsistent with the statutory scheme. In particular, CFC asserts that our failure to allow protests would "preclud[e] the public from calling to the Commission's attention certain facts surrounding the application which the Commission is required to consider, *e.g*. compliance with fee payment requirements, discrimination against low-income households."[316]

DRA concurs that the Commission should permit protests. According to DRA, "[p]ermitting protests, providing for a limited time period within which they can be submitted and requiring identification of specific deficiencies will not harm the Commission's ability to efficiently process Applications, but will provide necessary due process rights and assist the Commission in identifying areas where an Application is incomplete or otherwise deficient."[317]

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[314] CCTPG/LIF Opening Comments at 5.

[315] Id. at 4.

[316] CFC Opening Comments at 4-5.

[317] DRA Opening Comments at 3.

TURN argues that the reasoning that led to the conclusion in the OIR that the Commission should not permit protests "is strained at best, and worst case, is an abuse of discretion."[318] TURN reasons that "[t]he ability to protest an application is an essential vehicle for interested parties to ensure that adequate procedures are in effect to comply with the legislative intent and the letter of the law."[319] It also asserts that a protest period "is consistent with the statutorily mandated deadlines"[320]

TURN argues that a variety of parties should be able to file protests. First, TURN claims localities should be able to file protests, because it is logical to conclude that localities "are served the application to ensure that they are satisfied with the application and to be able to file a protest if necessary."[321] Second, TURN contends that Public Utilities Code § 5900 envisions a special role for DRA, which should include the ability to file protests.[322] Third, TURN declares that "since the Legislature anticipated the need for consumer advocacy on . . . matters by singling out DRA, all interested parties should be permitted to protest initial applications . . . ."[323]

The Joint Cities contend that local governments "should be allowed to file comments regarding the granting of any state video franchise that will affect the local government . . . ."[324] The Joint Cities argue that their comments are "instrumental to the Commission making an informed decision in the best

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[318] TURN Opening Comments at 3.

[319] Id. at 5.

[320] Id.

[321] Id. at 4.

[322] Id. at 4. See CAL. PUB. UTIL. CODE § 5900(k) ("The Division of Ratepayer Advocates shall have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950.").

[323] TURN Opening Comments at 4.

[324] Joint Cities Opening Comments at 2.

interest of . . . communities":[325] "[L]ocal governments will often possess comprehensive and unique evidence relevant to an applicant's financial, legal and technical qualification. This will be especially true where those applicants have operated one or more franchised cable systems in a community for many years"[326]

Joint Cities assert that DIVCA anticipates comments concerning applications. Far from "expressly prohibit[ing] the filing of comments concerning applications," Joint Cities point out that DIVCA requires the Commission "to collect adequate assurance that an applicant possesses the financial, legal, and technical qualification necessary to construct and operate the proposed system and promptly prepare any damage to the public right-of-way."[327] Joint Cities add that "DIVCA expressly gives local government the opportunity to review every application from applicants that intend to provide service in that local government's jurisdiction."[328]

League of Cities/SCAN NATOA similarly calls for a protest period. It argues that the OIR's tentative finding that there is no legal basis for permitting protests does not constitute a "valid reason for the Commission to abandon its general practice of accepting protests from interested parties of all kinds of applications submitted by entities, whether or not they are subject to the Commission's jurisdiction."[329] Further arguments made by League of Cities/SCAN NATOA echo those made by Joint Cities.

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[325] Id. at 3.

[326] Id.

[327] Id.

[328] Id. at 4.

[329] League of Cities/SCAN NATOA Opening Comments at 8-9.

B. Discussion

The plain language of DIVCA does not afford the Commission discretion in its review of state video franchise applications. As such, there is no role for protests in our review of applications. A protest here "would be an idle act" that "could accomplish nothing."[330] This interpretation is further supported by the short statutory review period and the Legislature's explicit lack of provisions for protests.

DIVCA strictly constrains our authority to review applications. Public Utilities Code § 5840(b) states that the "application process described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section."

We have no discretion over the substance or timing of our review of applications. The substance of our review is limited to the task of determining whether the application is complete. DIVCA states that "[i]f the commission finds the application is complete, it *shall* issue a state franchise before the 14th calendar day after that finding."[331] The only stated grounds for rejecting an application is incompleteness.[332] If an application is incomplete, the Commission must explain "with particularity" how and the applicant has an opportunity to amend the application to overcome the defects.[333]

Timing under all circumstances is tightly circumscribed. We must notify an applicant within thirty calendar days if an application is complete.[334] If we determine an application is complete, we must issue a state video franchise

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[330] Irvine v. Citrus Pest Dist., 62 Cal.App.2d 378, 383 (Cal. Ct. App. 1944).

[331] CAL. PUB. UTIL. CODE § 5840(h)(2) (emphasis added).

[332] Id. at § 5840(h)(1).

[333] Id. at § 5840(h)(3).

[334] Id. at § 5840(h)(1).

before the fourteenth calendar day after that finding.[335] Our failure to act on an application within the forty-four calendar days of its receipt "shall be deemed to constitute issuance of the certificate applied for without further action on behalf of the applicant."[336] If we find an application is incomplete, the Commission must make this finding "before the 30th calendar day after the applicant submits the application."[337] The applicant may amend its application, and once an application is amended, the Commission has thirty calendar days to review for completeness.[338]

We find that the Commission is duty bound to stay within the application review constraints prescribed by DIVCA. In addition to express restrictions found in DIVCA, California courts more generally have recognized that "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion."[339] Here the statute at issue, DIVCA, "clearly defines the specific duties or course of conduct a governing body must take." DIVCA states that the Commission "shall" issue a state video franchise if an application is complete,[340] and California courts have confirmed that "[t]he word 'shall' indicates a mandatory or ministerial duty."[341] Thus, we find that there is no room for discretion, and as a result, no process or time for protests.

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[335] Id. at § 5840(h)(2).

[336] Id. at § 5840(h)(4).

[337] Id. at § 5840(h)(1).

[338] Id. at § 5840(h)(3).

[339] Rodriguez v. Solis, 1 Cal.App.4th 495, 504-505 (1991) (citing Great Western Sav. & Loan Assn. v. City of Los Angeles, 31 Cal.App.3d 403, 413 (1973)).

[340] CAL. PUB. UTIL. CODE § 5840(h)(2).

[341] Lazan v. County of Riverside, 140 Cal.App.4th 453, 460 (2006).

We find no merit in parties' arguments that the OIR used "strained" reasoning in support of the decision to limit protests.[342] Although its language was abbreviated, the OIR contained the essence of the legal analysis above.

Parties point out that our argument that the statute fails to envision protests is not a good reason for prohibiting them.[343] We agree with this position. The reason for not permitting protests is that the statute explicitly calls for a review of applications that does not involve Commission discretion. As a result, no protests can be allowed, since to introduce a protest process brings in the Commission's use of discretion. The fact that the statute did not explicitly permit or require protests is simply a supporting indication that we are correct to find that we are not afforded discretion in our review of applications.

Similarly, the fact that we have a tightly prescribed time frame to review an application supports the interpretation that no protests are contemplated by DIVCA. Parties that argue that the thirty-day interval allotted for review of application completeness is sufficiently long to permit a protest period, which necessarily includes opportunity for reply comments, show scant understanding of typical Commission processes. We note that Verizon's review of "the Commission's website (the contents of which are subject to official notice) shows that over the past two years, 79 protested advice letters took an average of approximately six months to reach decision."[344] This observation comports with our own understanding of Commission processes.

We find that it would be difficult, if not impossible, to allow even limited protests like those advocated by DRA.[345] If we permitted protests limited to

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[342] See, e.g., TURN Opening Comments at 3 (characterizing the Commission's rationale regarding protests as "strained at best, and worst case, is an abuse of discretion").

[343] See, e.g., League of Cities/SCAN NATOA Opening Comments at 8-9 (making this argument).

[344] Verizon Reply Comments on the PD at 3, n.16.

[345] See DRA Opening Comments at 3 (urging the Commission to allow limited protests).

factors that could assist us in our review, due process and fairness would necessitate (i) an opportunity for applicants to respond to the protest and (ii) a detailed resolution of the issue by the Commission. The thirty-day review period would preclude this level of scrutiny.

Arguments of CFC and CCTPG/LIF also are not persuasive.[346] They fail to address statutory provisions envisioning a limited role for the Commission.

TURN, likewise, fails to convince us that DRA and local entities, or any other parties, have a right to protest. We find no statutory basis for TURN's assertion that DRA – due to the role given to it by Public Utilities Code § 5900(k) – has a special right to protest.[347] Public Utilities Code § 5900(k) expressly gives DRA a right to advocate "regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950," but no part of DIVCA gives DRA the express right to advocate regarding a state video franchise application (which is governed by the review process established in Public Utilities Code § 5840).

TURN and Joint Cities further misconstrue DIVCA when they assert that Public Utilities Code § 5840(e)(1)(D) indicates local entities may file protests.[348] Section 5840(e)(1)(D) simply states "[t]hat the applicant will concurrently deliver a copy of the application to any local entity where the applicant will provide service."[349] The statute provides no express grant of a right to review and comment on the application; it only provides a local entity notice that a video service provider filed an application to offer video service within its jurisdiction. Moreover, we find that this service requirement may be justified solely on the basis that a local entity needs advance notice to prepare for its new duties under

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[346] CCTPG/LIF Opening Comments at 5; CFC Opening Comments at 4-5.

[347] TURN Opening Comments at 4.

[348] Joint Cities Opening Comments at 4; TURN Opening Comments at 4.

[349] CAL. PUB. UTIL. CODE § 5840(e)(1)(D).

DIVCA. Thus, we do not find that an affected local entity's receipt of a copy of an application gives it the right, either expressly on implicitly, to file a protest.

We are similarly unconvinced by Joint Cities' argument that they hold key information concerning the applicant's legal, financial and technical qualifications, and, therefore, they should be permitted to file a protest.[350] We do not need comments to determine whether an applicant possesses these qualifications. A bond – which we require – in and of itself provides adequate assurance that an applicant possesses these qualifications.[351] Thus, our decision regarding compliance with Public Utilities Code § 5840(e)(9) does not require extensive substantive review: We need only check for evidence of a bond.

To the extent an applicant is ineligible for a state video franchise pursuant to Public Utilities Code §§ 5840 or 5930, we note that a local entity's decision to bring this information to the Commission would not constitute a protest. Section X explains that the Commission could independently verify this information. We then could reject an application for, suspend, and/or invalidate a state video franchise.

X. Announcement of Application Review Results

Public Utilities Code § 5840 contains detailed instructions on notice and issuance procedures for our review of a state video franchise. Based upon this statute, the draft General Order included procedures addressing the following: (i) notification of state video franchise application completeness or incompleteness; (ii) issuance of a state video franchise by the Executive Director;

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[350] Joint Cities Opening Comments at 3. In support of this argument, Joint Cities cite Public Utilities Code § 5840(e)(9). This statute provides that the "application for a state franchise . . . shall include . . . [a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant. To accomplish these requirements, the commission may require a bond." CAL. PUB. UTIL. CODE § 5840(e)(9).

[351] CAL. PUB. UTIL. CODE § 5840(e)(9).

and (iii) failure of the Commission to act on a state video franchise application. This section is devoted to review of parties' comments on these procedures.

A. Notification of Application Status

A variety of parties ask for information related to our review of a state video franchise application. These information requests encompass an application's submission, contents, and review results. This section describes and assesses the merits of various parties' requests.

1. Position of the Parties

CCTA argues that a copy of a state video franchise application must be provided to affected incumbent cable operators, just as a copy of the application is provided to each affected local entity.[352] CCTA reasons this notice provision "will facilitate compliance with the obligations required by the Legislation, as well as allow the incumbent to be fully advised of its rights, obligations and opportunities triggered by the holder of the state-issued franchise."[353]

Small LECs agrees that incumbent cable operators should receive copies of state video franchise applications.[354] According to Small LECs, this notice should come from the local franchising authority.[355]

DRA "recommends that notice of submitted franchise applications be posted on the Commission's website within 24 hours of their receipt by the Commission. Ideally, the non-proprietary portions of the Applications should be posted on the Commission's website as well."[356] DRA sees this notice as essential

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[352] CCTA Opening Comments at 11-12.

[353] Id.

[354] Small LECs Opening Comments at 6.

[355] Id.

[356] DRA Opening Comments at 4-5.

to enabling parties to file timely protests (which DRA urges us to permit in the application process).[357]

League of Cities/SCAN NATOA support DRA's proposals concerning the posting of non-proprietary portions of state franchise applications or other related notices on the Commission's website.[358]

When we are "approving or denying a franchise application, or requesting more information from an applicant," Joint Cities urges the Commission to "provide written copies of the pertinent documentation to affected or potentially affected local governments concurrently with the provision of this documentation to the applicant."[359] Joint Cities explains that this access to information is necessary "to successfully complete tasks respectively allocated to the Commission and the City by DIVCA."[360]

2. Discussion

There is significant statutory support for Joint Cities' request for information regarding state video franchise applications. Public Utilities Code § 5840(h) directs us to "notify . . . any affected entities [of] whether the applicant's application is complete or incomplete" and "specify with particularity the items in the application that are incomplete . . . ."[361] Accordingly, the Executive Director shall provide notice of incompleteness and the specific reason for incompleteness in the same document. A copy of this document shall be provided to the "affected local entities."

If the Commission requests more information from an applicant, we find that the applicant shall provide a copy of this information to any affected local

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[357] DRA Opening Comments at 4.

[358] League of Cities/SCAN NATOA Reply Comments at 13-14.

[359] Joint Cities Opening Comments at 22-23.

[360] Id. at 22.

[361] CAL. PUB. UTIL. CODE § 5840(h)(1),(3).

entities. This procedure obviates the need for the Commission to notify the affected local entities whenever we request additional data. Also, it is consistent with the statute's intent that local entities receive a copy of materials submitted when an applicant applies for a state video franchise.[362]

Regarding notice of other parties, we find no legal basis for requiring applicants or affected local entities to provide copies of state video franchise applications to incumbent cable operators. DIVCA does not require applicants to serve their applications on incumbent cable operators, and nothing in DIVCA otherwise vests in incumbent cable operators a right to concurrent service.[363] Thus, we will not impose application distribution requirements urged by CCTA and Small LECs.

We, however, recognize that it is valuable for incumbent cable operators to have notice of our receipt of a state video franchise application. Thus, we promptly will post state video franchise applications and any responses to corresponding information requests on the Commission's public website. We will post these documents as expeditiously as possible, likely within three business days of receipt of an application document. We find that this measure – supported by DRA and League of Cities/SCAN NATOA – will ensure that interested parties are advised of state video franchise activity in California.[364]

B. Notification of Statutory Ineligibility

The draft General Order provided that an application will not be deemed granted due to the Commission's failure to act when the applicant is statutorily

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[362] See id. at § 5840(e)(1)(D) (requiring an applicant to "concurrently deliver a copy of [its] application to any local entity where the applicant will provide service").

[363] Public Utilities Code § 5840(e)(1)(D) requires copies of state video franchise applications to be served concurrently on affected local entities, but does not provide for notice to incumbent cable operators.

[364] See DRA Opening Comments at 4-5 (urging the Commission to post state video franchise applications on our public website); League of Cities/SCAN NATOA Reply Comments at 13-14 (supporting DRA's recommendation).

ineligible. This provision would apply whether or not the Commission is aware of the statutory ineligibility of an applicant.

We tentatively adopted this provision pursuant to Public Utilities Code § 5840(d). This statute establishes that no person or corporation shall be eligible for a new or renewed state video franchise if that person or corporation is in violation of any final nonappealable order relating to either the Cable Television and Video Providers Customer Service and Information Act or the Video Customer Service Act.[365]

While no party protests our proposed response to statutory ineligibility, Verizon asks that "[t]he General Order . . . provide that staff should notify the applicant of any specific ground for ineligibility . . . ."[366] We find that this request is reasonable. We, therefore, modify the General Order to provide that the Commission will give the applicant and affected local entities notice and rationale for a determination that an applicant is statutorily ineligible to receive a state video franchise.

Finally, we note that any party at any time can bring us information that demonstrates an applicant, pursuant to Public Utilities Code §§ 5840 or 5930, is ineligible to obtain a state video franchise. Such information is relevant to the Commission's review of an application, and providing it does not constitute a protest to an application. Upon validation of evidence of ineligibility, we can respond in a number of ways, including rejection of an application, immediate suspension of a state video franchise, and/or issuance of an order to show cause for why a state video franchise should not be deemed invalid.

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[365] CAL. PUB. UTIL. CODE § 5840(d) (citing CAL. GOVT. CODE §§ 53054 et seq. and CAL. GOVT. CODE §§ 53088 et seq.).

[366] Verizon Opening Comments at 7.

C. State Video Franchise Issuance by the Executive Director

CFC and Small LECs dispute whether it is appropriate for the Commission to delegate authority to the Executive Director to issue franchises. This section reviews and assesses these parties' positions.

CFC asserts that the Commission's "delegation of authority to its Executive Director to issue franchises to anyone capable of completing an application does not adequately protect the public."[367] According to CFC, the "Commission has delegated its authority to review the application and issue the franchise to the Executive Director, without any guidelines for exercise of that delegated power."[368]

Small LECs rebuts that CFC's opposition of delegated authority to the Executive Director is "inconsistent with the Legislature's intent under AB 2987. Since the Commission's role in reviewing franchise applications is intentionally limited, handling these applications through the Executive Director is particularly appropriate."[369]

Like Small LECs, we find that delegated authority to the Executive Director is suitable for our statutorily limited role in reviewing state video franchise applications. The Commission, as described in detail in Section IX, must operate under tight timelines and may only determine whether an application is complete or incomplete. The Executive Director currently fulfills this role at the Commission, and it is appropriate to assign this role to the Executive Director.

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[367] CFC Opening Comments at 1.

[368] Id. at 4.

[369] Small LECS Reply Comments at 5.

XI. Notice of Imminent Market Entry

Public Utilities Code § 5840(n) provides that a state video franchise holder must provide a local entity notice that it will begin offering service in the entity's jurisdiction. This notice of imminent market entry "shall be given at least 10 days, but no more than 60 days, before the video service provider begins to offer service."[370] This section describes and assesses comments on the state video franchise holder's notice of imminent market entry.

A. Positions of Parties

CCTA argues that a copy of the notice of imminent market entry must be provided to affected incumbent cable operators, just as they are provided to affected local entities.[371] CCTA argues that this notice provision "will facilitate compliance with the obligations required by the Legislation, as well as allow the incumbent to be fully advised of its rights, obligations and opportunities triggered by the holder of the state-issued franchise."[372]

Likewise, DRA urges us to require state video franchise holders to provide notice of imminent market entry to incumbent cable operators. DRA states that "[t]his is a public notice, too, supplied to potential competitors or the 'incumbent' provider of video services in that area."[373]

League of Cities/SCAN NATOA states that local entities have no duty to provide notice of imminent market entry to incumbent cable operators.[374] It argues that there is "no basis in state law or Commission regulatory authority" for the Commission to require local governments to provide this notice.[375]

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[370] CAL. PUB. UTIL. CODE § 5840(n).

[371] CCTA Opening Comments at 11-12.

[372] Id.

[373] DRA Reply Comments at 4.

[374] League of Cities/SCAN NATOA Reply Comments at 12.

[375] Id.

B. Discussion

We, like CCTA and DRA, conclude that we should require state video franchise holders to provide concurrent notice to affected incumbent cable operators.[376] The basis for this conclusion is Public Utilities Code § 5840(o)(3). Public Utilities Code § 5840(o)(3) specifies that an incumbent cable operator's right to abrogate a local franchise is triggered when "a video service provider that holds a state franchise provides . . . notice . . . to a local jurisdiction that it intends to initiate providing video service in all or part of that jurisdiction."[377] Implicit in this abrogation right is the assumption that an incumbent cable operator will know when a state video franchise holder provides notice of imminent market entry. To ensure this assumption is fulfilled, we modify the General Order to require state video franchise holders to provide affected incumbent cable operators concurrent notice of imminent market entry.[378]

In addition, this concurrent notice requirement is consistent with the Legislature's express intent that DIVCA create "a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider . . . over another."[379] If incumbent cable operators are given a right to opt into a state video franchise but are not given notice that allows them to exercise that right, incumbent cable operators may be unduly disadvantaged when competing against state video franchise holders that begin offering service in the incumbents' service areas.

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[376] See DRA Reply Comments at 4 (calling for this notice requirement); League of Cities/SCAN NATOA Reply Comments at 12 (same).

[377] CAL. PUB. UTIL. CODE § 5840(o)(3).

[378] We agree with League of Cities/SCAN NATOA's conclusion that we have no regulatory authority to mandate local entities to provide this notice. See League of Cities/SCAN NATOA Reply Comments at 12 (arguing that there is "no basis in state law or Commission regulatory authority" for the Commission to require local governments to provide any notice).

[379] CAL. PUB. UTIL. CODE § 5810(a)(2)(A).

XII. User Fee

DIVCA calls for the Commission to determine and collect a user fee for state video franchise holders. Just as we can impose fees on most other entities providing service pursuant to Commission jurisdiction, DIVCA provides for us to place the state video franchise holder's fee payments into a subaccount of our Utilities Reimbursement Account.[380] User fees paid to the Commission should "produce enough, and only enough, revenues to fund the commission with (1) its authorized expenditures for each fiscal year to regulate . . . applicants and holders of a state franchise to be a video service provider, less the amount to be paid from [other] special accounts . . , reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) any adjustment appropriated by the Legislature."[381]

Pursuant to this statutory guidance, the draft General Order determined the amount required for the Commission to perform its video franchising functions. We also developed a system whereby state video franchise holders would pay their user fee in quarterly installments. Each state video franchise holder's user fee would be based on its total number of customers in proportion to the total number of customers for all state video franchise holders. In setting specific fees, we tentatively required state video franchise holders to provide us quarterly customer data, so that we could adjust the quarterly user fee payments to reflect the number of a state video franchise holder's customers.

We proposed an alternative mechanism for assessing fees for our first fiscal year of acting as the state video franchising authority (Year 1). Given that most state video franchise holders likely will have few or no customers in the first fiscal year, we proposed that the total amount of money required for

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[380] Id. at § 440(b).

[381] Id. at § 401(b).

Commission operations should be funded by fees divided equally among all state video franchise holders.

Based on the comments and further review of DIVCA, this section clarifies and modifies aspects of the proposed user fee. Specific topics addressed include (i) compliance with the federal Cable Act; (ii) determination of our video franchising program budget; and (iii) calculation and collection of user fees.

A. Federal Cable Act Compliance

Public Utilities Code § 442(b) states that the user fees for supporting the Commission's state video franchising activities "shall be determined and imposed by the commission consistent with the requirements of Section 542 of Title 47 of the United States Code." Section 542 limits the amount of a federally-defined "franchise fee" to five percent of a video service provider's gross revenues in a twelve-month period.[382] This limit, however, does not apply to the following, among other items: (1) "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers)"; or (2) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[383]

1. Position of the Parties

League of Cities/SCAN NATOA criticizes the Commission for failing to find that the Commission's fees are not "franchise fees" as defined by Section 542 of the Federal Communications Act.[384] Absent such a finding, League of Cities/SCAN NATOA states that "the Commission's fees would appear to be

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[382] 47 U.S.C. § 542(b).

[383] Id. at § 542(g)(2).

[384] League of Cities/SCAN NATOA Opening Comments at 5.

contrary to the Legislature's express mandate that local governments must be kept financially whole."[385]

Accordingly, League of Cities/SCAN NATOA urges the Commission to find that the user fee is a "fee of general applicability" and therefore, excluded from the federal definition of "franchise fee."[386] League of Cities/SCAN NATOA adds that applicants should be required to certify that Commission fees are not franchise fees.[387]

Los Angeles contends that the Commission should acknowledge that the user fee paid to the Commission by state video franchise holders is "not a franchise fee within the meaning [of] federal law, and in no way impacts the obligation of state franchises to pay to local governments the full franchise fee imposed pursuant to Section 5860 of AB 2987."[388]

Oakland asserts that it is "important that the Commission's rules distinguish the user fee by recognizing that it is not a franchise fee within the meaning of federal law, and therefore has no impact on the obligation of state franchisees to pay to local governments the full franchise fee imposed pursuant to Section 5860 of AB 2987."[389] According to Oakland, "it seems clear that in AB 2987, the legislature intended that the user fee be a 'fee of general applicability.'"[390]

Pasadena and Joint Cities maintain that the Commission should "calculate and administer all DIVCA fees in a manner that does not create or appear to create legal justifications for offsetting these fees, wholly or in part, against

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[385] Id.

[386] Id.

[387] Id.

[388] Los Angeles County Opening Comments at 4.

[389] Oakland Opening Comments at 5.

[390] Id. at 6.

franchise fees owed local governments."[391] In addition, Pasadena and Joint Cities contend that the state video franchise application should be amended to require an agreement by the applicant that fees assessed by the Commission or by the State of California do not constitute franchise fees and may not be used to offset any fees or obligations owed to local governments.[392]

2. Discussion

In response to local governments' requests, we clarify that the Commission's user fees are not "franchise fees" as defined by Section 542 of the Federal Communications Act.[393] Any fees levied by the Commission pursuant to DIVCA are either fees of "general applicability"[394] or fees "incidental to the awarding or enforcing of the franchise."[395] Consistent with the intent of Public Utilities Code § 442(b), we will enforce our rules in a manner that does not permit state video franchise holders to use our fees as an offset against franchise fees owed to local governments.[396]

But while we respect concerns regarding the Commission's fees, we do not amend the application to stipulate that our user fees shall not be used to offset

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[391] Pasadena Opening Comments at 4; Joint Cities Opening Comments at 15.

[392] Pasadena Opening Comments at 4; Joint Cities Opening Comments at 15.

[393] See League of Cities/SCAN NATOA Opening Comments at 5 (urging this clarification); Los Angeles County Opening Comments at 4 (same); Oakland Opening Comments at 5 (same); Pasadena Opening Comments at 4 (same); Joint Cities Opening Comments at 15 (same).

[394] See 47 U.S.C. § 542(g)(2) (establishing that the term "franchise fee," as defined by Section 542, does not include "any tax, fee, or assessment of general applicability").

[395] See id. (establishing that the term "franchise fee," as defined by Section 542, does not include "requirements or charges incidental to the awarding or enforcing of the franchise").

[396] See CAL. PUB. UTIL. CODE § 442(b) (declaring that the Commission's user fees "shall be determined and imposed by the commission consistent with the requirements of Section 542 of Title 47 of the United States Code").

franchise fees owed to local entities.[397] If every requirement, condition, and obligation contained in DIVCA were to be reflected in the application, the application form would quickly become unwieldy. Moreover, we find that the Commission's analysis here sufficiently protects local entities' ability to collect franchise fees required by DIVCA.

B. Commission Budget

This section reviews and addresses comments regarding the budget for our state video franchise program. The OIR tentatively set the Fiscal Year 2007-2008 budget at $1 million. Although we decline to make any major modifications to the amount of the budget for Fiscal Year 2007-2008, we provide further clarification regarding the basis for our state video program budget.

1. Position of the Parties

Joint Cities are "generally supportive of funding the division in a manner sufficient to satisfy the regulatory authority granted to the Commission under DIVCA."[398] Joint Cities, however, requests "clarification regarding specifics of this budget (e.g., identification of the five largest expenses by category and amount)."[399]

Greenlining calls our proposed video franchising budget "inadequate.[400] It notes that based on an estimated 6.8 million cable customers in the state, "this amounts to just 15 cents a subscriber."[401] In contrast, Greenlining suggests a "minimum first year fee" of $2 to $3 million.[402] It argues that this figure is what

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[397] See League of Cities/SCAN NATOA Opening Comments at 5 (requesting an amendment to the application); Pasadena Opening Comments at 4 (same); Joint Cities Opening Comments at 15 (same).

[398] Joint Cities Opening Comments at 16.

[399] Id.

[400] Greenlining Opening Comments at 7.

[401] Id.

[402] Id. at 8.

will be needed "for the Commission to be equipped to fully implement its policies and fulfill its legislative mandates without unforeseen budget constraints."[403] Along with Oakland, Greenlining adds that there is not enough funding to staff DRA appropriately.[404]

League of Cities/SCAN NATOA disagrees with parties that recommend an increase to the proposed year-one estimate. It argues that an increase would "expand the Commission's regulatory role beyond the clear boundaries of AB 2987."[405]

League of Cities/SCAN NATOA further argues that the Commission's first year expenses "appear to be excessive."[406] They cite four different reasons in support of this position. First, "the application process is intended to be quick and ministerial in nature."[407] Second, "the Commission will likely see only a handful of applications in the first year."[408] Third, "the only other significant costs to the Commission under AB 2987 will be the reviews of reports and investigations related to build-out and anti-discrimination provisions . . . [which] will not trigger significant Commission activity for nearly two years."[409] Fourth, "the impact that those fees could potentially have on local revenues would be most profound now, when they will have to be shared among a limited number of state franchise holders."[410] Given these concerns, League of Cities/SCAN

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[403] Id.

[404] Greenlining Reply Comments at 7; Oakland Opening Comments at 4.

[405] League of Cities/SCAN NATOA Reply Comments at 3.

[406] League of Cities/SCAN NATOA Opening Comments at 6.

[407] Id.

[408] Id.

[409] Id. at 7.

[410] Id.

NATOA asks for more information regarding how our state video franchising budget was derived.[411]

AT&T urges the Commission to make it clear that it "will ensure that the total annual user fee for video franchise holders will reflect the limited duties delegated to the Commission under AB 2987."[412] Accordingly, AT&T urges the Commission to enunciate "explicit criteria it will apply in determining the annual user fee for video franchise holders."[413] In particular, AT&T calls for the Commission to "state that: (a) the total user fee to be collected from statewide video franchise holders will be commensurate with only the incremental budgetary needs of the Commission in administering AB 2987; and (b) such fees shall reflect the limited duties related to franchise application processing (§ 5840), specified anti-discrimination requirements (§ 5890), reporting of employment (§ 5920) and deployment (§ 5960), basic telephone price increases (§§ 5940 and 5950), and specified annual (§§ 401 and 440-444) fees."[414]

2. Discussion

The budget for our state video franchising program shall be established in accordance with the clear guidance found in DIVCA.[415] Pursuant to Public Utilities Code § 401(b), the user fee will "*produce enough, and only enough, revenues to fund the commission* with (1) its authorized expenditures for each fiscal year to

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[411] Id.

[412] AT&T Opening Comments at 11-12.

[413] Id. at 12.

[414] Id.

[415] Without modification by the Legislature, Public Utilities Code § 401(b) guidelines apply to the program budget for this fiscal year and all subsequent fiscal years. We find that this legislative direction is sufficient response to AT&T's and League of Cities/SCAN NATOA's requests for delineation of specific criteria we will use in developing future user fees. League of Cities/SCAN NATOA Reply Comments at 3; AT&T Opening Comments at 12. We add that user fees only will be used for functions within the statutory authority of the Commission and DRA, as articulated in Sections III and XV.

regulate . . . applicants and holders of a state franchise to be a video service provider, less the amount to be paid from special accounts except those established by this article, reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) any adjustment appropriated by the Legislature."[416] This user fee necessarily includes funding for DRA, whose budget is included in the Commission budget as a separate line item.

In response to requests for details on the Commission's video franchising budget,[417] we point parties to the Governor's Budget for the Commission during Fiscal Year 2007-2008, which is available online at http://www.ebudget.ca.gov/DDf/GovernorsBudget/8000/8660.pdf. The Budget includes $950,000 and 10.3 positions to implement DIVCA. This Budget, when considered in light of our responsibilities pursuant to DIVCA, should alleviate any party's concerns that our budget either is too great or too small.[418]

We further observe that affected parties have ample opportunities to raise issues concerning the size of our annual budget and scope of our activities. The Commission's budget is subject to oversight by both the Administration and the Legislature. Moreover, if we find in practice that our budget needs to be

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[416] CAL. PUB. UTIL. CODE § 401(b) (emphasis added).

[417] See Joint Cities Opening Comments at 16 (asking for clarification regarding specifics of this budget); League of Cities/SCAN NATOA Opening Comments at 7 (same).

[418] We observe that our state video franchising responsibilities are greater than what League of Cities/SCAN NATOA asserts. We find that League of Cities/SCAN NATOA makes two unfounded assumptions when arguing that our budget is too great. First, League of Cities/SCAN NATOA provides no evidence as to why "the Commission will likely see only a handful of applications in the first year." League of Cities/SCAN NATOA Opening Comments at 6. Second, the League of Cities/SCAN NATOA claims that the "only other significant costs to the Commission under AB 2987 will be the reviews of reports and investigations related to build-out and anti-discrimination provisions." League of Cities/SCAN NATOA Opening Comments at 7. This assessment fails to account for amendments to applications and reporting requirements we must fulfill pursuant to DIVCA.

modified, we retain the right to augment our budget as necessary, pursuant to approval by the Department of Finance.

C. Procedures for Calculating and Collecting User Fees

This section reviews the many different comments on calculation and collection of the user fee. We modify both the Year 1 and subsequent user fees in response to parties' comments.

1. Position of the Parties

DRA raises concerns about using the number of subscribers to determine the amount of the fee. It argues that it "has long supported revenue-based fees assessed per subscriber according to usage, and see[s] no reason in this proceeding to depart from that preference."[419]

Verizon argues that the Commission's proposed system for collecting fees is "too complex and administratively burdensome for both Commission staff and the holders, and therefore prone to human error, delay, and confusion."[420] According to Verizon, we should establish a user fee mechanism "in the same manner [as the telecommunications user fee] and allow providers to pay their assessment quarterly."[421] Verizon asserts that "[t]he dates should be aligned with the telecommunications user fee so that providers pay on the 15th of the month following the close of the quarter, thus minimizing the number of separate reporting dates and reports, and the possibility of error."[422] It adds that consistency between the two programs would "streamline the process for all

[419] DRA Opening Comments at 7.

[420] Verizon Opening Comments at 24.

[421] Id.

[422] Id.

concerned," and the proposed reporting schedule is "not well-aligned with the availability of Verizon's month-end data."[423]

With respect to Year 1 fees, Verizon argues that to "avoid undue burden[s] on smaller holders who may apply during the initial year, the Commission should consider apportioning the total budget estimate among holders on a pro rata basis by either intrastate telephone revenues or telephone lines."[424] It reasons that "all holders during the first year will almost certainly be telephone corporations."[425]

"AT&T California supports the Commission's payment proposals and appreciates the OIR's efforts to allocate user fees equitably among video subscribers."[426] AT&T states that the proposed method in the OIR "is an equitable and appropriate method that balances the burden of user fees on video franchise holders according to their market position."[427]

AT&T asserts that Verizon's alternate proposal relies upon "irrelevant factors for the purpose of determining video user fees."[428] AT&T argues that "tying the amount of a . . . user fee to the number of telephone lines or intrastate telephone revenues does not make sense for new franchise holders because they are all similarly situated – without a single video customer."[429]

AT&T also is critical of DRA's proposal. AT&T finds that "DRA's proposal for a revenue-based assessment according to usage is inappropriate for

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[423] Id.

[424] Id. at 23.

[425] Id.

[426] AT&T Opening Comments at 11.

[427] AT&T Reply Comments at 13.

[428] Id.

[429] Id.

video franchise holders which are not public utilities and for which the Commission's duties are limited."[430]

Greenlining asserts that the Commission's "proposed methodology for determining each video franchise holder's user fees is appropriate."[431] According to Greenlining, "[u]tilizing the number of statewide subscribers as reported each quarter will ensure that fees are accurate and relevant to the cable consumer base."[432]

Greenlining, however, voices concerns regarding the possibility that "Verizon and AT&T may be forced to pay almost all of these first year user fees."[433] In response, Greenlining proposes two alternative solutions. First, Greenlining "suggests that this first year fee be prorated by subscriber over a four year period. That is, Verizon and AT&T pay the first year fee but receive subsequent rebates based on total subscribers from 2008-2010."[434] Second, Greenlining recommends that we delay collection of the first year user fee, combine the first and second year fee payments in Year Two, and "borrow up to $2 million, payable in 2009 after the fees for 2008 are collected."[435] Greenlining notes that "every major bank in California would be willing to finance this at a preferred rate of interest."[436]

Small LECs raises strong concerns about the Year 1 user fee allocation proposal. According to Small LECs, the proposal is "grossly inequitable to smaller video providers."[437] Small LECs reasons that small providers "could bear

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[430] Id.

[431] Greenlining Opening Comments at 7.

[432] Id.

[433] Id.

[434] Id.

[435] Id. at 8.

[436] Id. at 8.

[437] Small LECs Opening Comments at 2.

a disproportionately large share of total program costs relative to their small customer bases."[438] This cost could create an "enormous disincentive to smaller video providers who might otherwise apply for franchises in the first year of the program."[439] Moreover, Small LECs asserts that the OIR's proposal for allocating user fees after Year 1 implicitly acknowledges the principle that small providers should not bear a responsibility for franchising costs that is equal to the responsibility of large providers with millions of customers.[440]

Small LECs recommends replacing the Commission's proposal with one in which the Year 1 costs of the program are divided among state video franchise holders with customers, on a pro rata subscriber basis.[441] Alternatively, "if no providers have subscribers by September 15, 2007," Small LECs contends that "the Commission should apportion payments based on a calculation of the total population covered by a franchise."[442]

In reply comments, Small LECs specifically urges us to "allocate the first-year user fee expenses to holders based on the anticipated number of households within each holder's state-issued franchise footprint."[443] Small LECs adds that the Verizon proposal "could be workable, but only if all of the applicants in the first year are telephone companies."[444]

SureWest's argues that "[i]t is unfair that only companies holding state-issued video franchises in Year 1 must cover the Commission's higher start-up

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[438] Id. at 3.

[439] Id.

[440] Id.

[441] Id. at 4.

[442] Id.

[443] Small LECS Reply Comments at 7.

[444] Id.

implementation costs."[445] It contends that the plan for Year 1 fees "is economically, unduly burdensome on small video providers such as SureWest."[446]

SureWest recommends the Commission always "base its user fee on potential households within the service areas covered by a state-issued video franchise."[447] For Year 1 fees, SureWest urges the Commission to amortize "the Commission's Year One regulatory costs over a period of years based on households covered by state franchises issued."[448]

SureWest raises several concerns with Verizon's alternate proposal for allocating Year 1 fees. First, SureWest questions whether Voice over Internet Protocol lines will be included when calculating the user fee.[449] Second, SureWest argues that "there is no direct nexus between telephone lines and the decision to file for a state-issued franchise."[450] Third, SureWest contends that it is important that non-telephone companies that apply for a state video franchise also share in the cost.[451]

Joint Cities argue that the Commission could reduce its user fee by raising the application fee.[452] It advocates our imposing an application fee of an amount between $7,500 and $10,000.[453]

The League of Cities/SCAN NATOA supports an amortization schedule to pay for Year 1 costs.[454] League of Cities/SCAN NATOA also argues that the

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[445] SureWest Reply Comments at 11.

[446] SureWest Opening Comments at 14.

[447] Id. at 15.

[448] SureWest Reply Comments at 11.

[449] Id.

[450] Id.

[451] Id.

[452] Joint Cities Opening Comments at 16.

[453] Id.

[454] League of Cities/SCAN NATOA Reply Comments at 3.

Commission could avoid problems with its user fee by establishing additional task-specific fees, which would enable the Commission to recover its costs.[455] For example, League of Cities/SCAN NATOA asserts that the Commission should assess fees for franchise amendments in order to recover the cost of staff time spent processing the amendments.[456] League of Cities/SCAN NATOA contends that these additional fees will "likely reduce the amount of the Commission's annual assessment fee and would be less likely to be considered franchise fees under 47 U.S.C. § 542."[457]

2. Discussion

In determining how to set and collect user fees, we are mindful of the guidance of Public Utilities Code § 5810(a)(3). The statute states that it "is the intent of the Legislature that, although video service providers are not public utilities or common carriers, the commission shall collect any fees . . . in the same manner and under the same terms as it collects fees from . . . public utilit[ies] . . . ."[458] Any user fees levied by the Commission should "not discriminate against video service providers or their subscribers."[459]

a) Fees for Fiscal Year 2008-2009 and Subsequent Years

Given the legislative intent articulated in Public Utilities Code § 5810(a)(3), we conclude that we should make our user fees more like the fees we impose on utilities. Utilities' fees are calculated pursuant to revenue-based model, so we find that we should employ a revenue-based model in the video context.

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[455] League of Cities/SCAN NATOA Opening Comments at 7.

[456] Id. at 8.

[457] Id.

[458] CAL. PUB. UTIL. CODE § 5810(a)(3).

[459] Id. at § 5810(a)(3).

We, like DRA and Verizon, also recognize that there are significant policy and administrative benefits to harmonizing our collection of user fees.[460] When relying upon a revenue-based system that uses our traditional payment schedule, the Commission can draw upon its significant experience in employing the revenue-based model for other utilities' fees. Use of a revenue-based model aligns our treatment of state video franchise holders with our treatment of public utilities subject to our jurisdiction. Moreover, we expect that state video franchise holders already will be compiling gross revenue data, because DIVCA requires them to pay a gross revenue-based franchise fee to local entities.[461]

Accordingly, we developed a fee process for Fiscal Year 2008-2009 and all future years that mirrors our practices in collection of public utilities' user fees. Under this process, the user fee shall be based upon the percentage of all state video franchise holders' gross state video franchise revenues that is attributable to an individual state video franchise holder. The Commission shall annually determine the fee to be paid by each state video franchise holder. The calculation will rely upon reported annual state video revenues, as defined in Public Utilities Code § 5860(d). These state video revenues for the prior calendar year will be used to calculate a user fee per dollar of revenue for the next fiscal year. For example, the user fee for Fiscal Year 2008-2009 will be based on gross state video franchise revenues recorded in calendar year 2007. Consistent with standard Commission practice, the Commission will adopt the user fee per dollar of revenue before the start of Fiscal Year 2008-2009. The user fee shall be calculated to produce a total amount equal to the amount established in the authorized Commission video franchise program budget for the same fiscal year.

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[460] DRA Opening Comments at 7 (calling for better alignment of video user fees with utility user fees); Verizon Opening Comments at 24 (same).

[461] See CAL. PUB. UTIL. CODE § 5860 (requiring state video franchise holders to pay local entities a franchise fee that is based upon gross revenues).

The payment schedule will depend upon the amount of the state video franchise holder's gross state video franchise revenues.[462] State video franchise holders with annual gross state video franchise revenues of $750,000 or less shall pay the fee to the Commission on an annual basis on or before January 15. State video franchise holders with annual gross state video franchise video revenues greater than $750,000 shall pay the user fee to the Commission on a quarterly basis, between the first and fifteenth days of July, October, January, and April.

If the Commission collects a fee in error during a Fiscal Year, it shall issue refunds pursuant to Public Utilities Code § 442(e). As proposed in the OIR, the Commission shall refund the amount no later than three months after discovering the error.

Finally, we decline to replace or reduce our annual user fee with task-specific user fees advocated by League of Cities/SCAN NATOA and Joint Cities. As explained above, we prefer for our annual user fee to be consistent with fees assessed on utilities subject to our jurisdiction.

b) Fees for Fiscal Year 2007-2008

While it is preferable in subsequent years, a revenue-based model for user fees is insufficient to support the Commission's initial operations as the state video franchising authority. We expect that state video franchise holders will have little or no revenues from their video services during Year 1, although we expect that our start-up costs will be significant.

Under these circumstances, we conclude that it is preferable to base our user fees on the number of households that may serve as future sources of a state video franchise holder's revenue. We find that this system more fairly appropriates the fee burden on state video franchise holders based upon the size of their potential customer base, which is listed in applicants' applications.

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[462] See id. at § 433 (establishing a fee payment schedule based on gross intrastate revenues above or below a threshold of $750,000).

For Fiscal Year 2007-2008, each state video franchise holder will be required to pay an annual user fee based upon its pro rata share of households existing in its proposed video service area as of the most recent publicly available U.S. Census. Applicants must submit this information at the time of application.

State video franchise holders that have franchises issued by or before November 30, 2007 will be required to pay the full Fiscal Year 2007-2008 user fee by March 31, 2008. The Commission will calculate the amount owed for Fiscal Year 2007-2008 and determine the amount due per household and the resulting amount due for each carrier in a Commission resolution adopted no later than January 31, 2008.

State video franchise holders that have franchises issued at any time during Fiscal Year 2007-2008 will pay for the full Fiscal Year 2007-2008. Those state video franchise holders whose application for a franchise is approved too late for inclusion in the resolution adopting a user fee for Fiscal Year 2007-2008 shall calculate a user fee based on the number of households in their service territory at the rate set in the resolution. This user fee will be due either on March 31, 2008 or thirty calendar days after issuance of the franchise.

In designing the revised Year 1 user fee mechanism, we paid particular attention to Small LECs' and SureWest's comments.[463] We are sensitive to their concern that the OIR fee proposal could create "enormous disincentive to smaller video providers who might otherwise apply for franchises in the first year of the program."[464] We do not desire to stymie competition posed by these smaller video service providers. DIVCA was designed to "create a fair and level playing field" that encourages "the most technologically advanced" services to reach "all

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[463] Small LECS and SureWest (respectively) urge us to adopt a user fee based upon the "anticipated number of households" or "potential households" within a state video franchise holder's footprint. Small LECS Reply Comments at 7; SureWest Opening Comments at 15.

[464] Small LECs Opening Comments at 3.

California communities," including rural areas served by small video service providers.[465] Basing the user fee on a state video franchise holder's potential customers appears to best respond to this legislative intent.[466]

Other parties' comments are less convincing. Regarding Verizon's proposal, we find that it would be unfair to base user fees on "telephone revenues or telephone lines," because there is no direct nexus between telephone lines and provision of video service.[467] The mere fact that some state video franchise holders also will offer telephone service is no reason to tie the user fee to telephone lines, particularly since some Year 1 applicants may not offer telephone service. It would be unfair if we allowed some state video franchise holders to avoid pay Year 1 user fees.

Both of Greenlining's Year 1 proposals have serious flaws too. First, Greenlining's proposal to allow Verizon and AT&T to seek rebates in following years is unnecessary and may be unduly cumbersome to administer. It is fair to place the burden of the Commission's work on the companies that are most responsible for this work, i.e., the companies that are using our services in Year 1. Also rebates may be complicated if a number of companies apply for state video franchises in Year 1. Second, Greenlining's proposal to charge Year 1 user fees in Year 2 is untenable, because the Commission has an obligation to collect fees in the year in which the Governor has authorized our spending.[468]

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[465] CAL. PUB. UTIL. CODE § 5810(a)(2)(A)-(B).

[466] We find no factual basis for SureWest's and Small LECs' fears that AT&T and Verizon will not apply for a state video franchise, and thus, leave Year 1 user fees to be shouldered by a small number of video service providers. SureWest Opening Comments on the PD at 3; Small LECs Opening Comments on the PD at 3. If, however, AT&T and Verizon do not apply for a state video franchise in Year 1, then parties are invited to file a petition to modify this decision and propose a method for assessing fees that will not act as a barrier to entry.

[467] Verizon Opening Comments at 23.

[468] Greenlining Opening Comments at 7-8.

XIII. Reporting Requirements

Several types of reports are expressly addressed in DIVCA. These reports are as follows: (i) reports used for the collection of the user fee (Public Utilities Code § 443), (ii) annual employment reports (Public Utilities Code § 5920); and (iii) annual broadband and video service reports (Public Utilities Code § 5960).

As indicated in the OIR, we further recognize that additional reports may be necessary for enforcement of specific DIVCA provisions. For example, we need reports on free service delivered to community centers in order to enforce Public Utilities Code § 5890(b)(3).

This section seeks to impose reporting requirements in a straightforward and reasonable way that is not unduly burdensome. Accordingly, we review parties' comments on reports proposed in the OIR, and we make modifications to the reports as needed.

A. Position of Parties

Comments on proposed reporting requirements are mixed. On the one hand, consumer organizations support our proposed annual reporting requirements, and one even offers recommendations for ways to enhance them. On the other hand, multiple communications companies greatly protest our proposed reporting requirements.

1. Consumer Organizations

CCTPG/LIF proposes a number of additional reporting requirements. First, CCTPG/LIF recommends that the Commission require submission of detailed build-out data. CCTPG/LIF states that companies should be "required to submit this information for every community they plan to provide service in" (at a census block basis), and "the specific technology offered should be reported."[469] CCTPG/LIF asserts that this more detailed information is

[469] CCTPG/LIF Opening Comments at 11; CCTPG/LIF Reply Comments at 4-5.

particularly important to determining whether "franchisees are making substantial and continuous efforts to meet the anti-discriminatory build-out requirements of § 5890."[470] State video franchise holders' reports, according to CCTPG/LIF, should be made public, or at least made available to non-market participant intervening parties.[471] Second, CCTPG/LIF urges the Commission to require communications companies to report on "the number of women and minorities in various job titles."[472] Third, CCTPG/LIF states that the Commission may seek reports on whether state video franchise holders are complying with customer protection standards.[473]

CCTPG/LIF also endorses the Commission's proposed reporting requirements regarding provision of free service to community centers. According to CCTPG/LIF, "[u]nless this information on free service to community centers is reported to the Commission there is no way for the Commission to know if the law is being adhered to."[474] CCTPG/LIF adds that "actual locations of community centers should be reported as part of the . . . report of information on service to community center."[475]

DRA argues that the Commission has the authority to require additional reports consistent with DIVCA. DRA explains that "it is necessary that the Commission be able to obtain information above and beyond that which is

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[470] CCTPG/LIF Opening Comments on the PD at 6.

[471] CCTPG/LIF Opening Comments at 11; CCTPG/LIF Reply Comments on the PD at 3.

[472] CCTPG/LIF Opening Comments at 12. CCTPG/LIF also calls upon the Commission to subject all video franchise holders to Public Utilities Code § 8281 et seq. (requiring a plan for increasing women, minority, and disabled veteran business enterprises) and General Order 156 (which establishes minimum long-term goals for the percentage of enterprises owned by minorities, women, and disabled veterans). Id.

[473] Id. at 8.

[474] CCTPG/LIF Reply Comments at 5.

[475] CCTPG/LIF Opening Comments on the PD at 6.

specifically enumerated in [DIVCA] in order to fulfill its statutory duties under" the Act.[476]

TURN maintains that "the information detailed in the G.O. is precisely the kind of information discussed in the statute."[477] In particular, TURN declares that "the information required for reporting purposes including any additional information the Commission deems 'legitimate' is precisely the data necessary for the Commission to fulfill its statutory responsibilities. Anything less makes a mockery of the authority delegated to the Commission by the Legislature."[478]

BBIC praises the OIR's proposed reporting requirements. In particular, BBIC applauds our "emphasis on census tract rather than the zip code methodology. . . ."[479] BBIC contends that "absence of sufficient data" may be the chief limitation on the government's ability to address the Digital Divide.[480]

2. Communications Companies

In contrast to these consumer organizations, Verizon opposes many of the reporting requirements proposed in the OIR. First, Verizon argues that elements of our proposed broadband and video reporting requirements "result in unjustified expansion of the Act."[481] To remedy this "unjustified expansion," Verizon proposes that we permit approximation of all broadband data, and it states we should not require any showing that this approximation is necessary and appropriate.[482] Second, Verizon asks that we permit low-income information

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[476] DRA Reply Comments at 9.

[477] TURN Reply Comments at 10.

[478] Id.

[479] BBIC Reply Comments at 2.

[480] Id.

[481] Verizon Opening Comments at 19.

[482] Id. at 19-20.

to be reported as of January 1, 2007.[483] Verizon reasons that this allowance is consistent with the statute and gives state video franchise holders a "known, identifiable, and constant target in assessing their build and deployment plans."[484]

Verizon further emphasizes "the need for confidentiality in a market where new entrants compete with established players."[485] According to Verizon, "DIVCA is easily harmonized with existing law by allowing submitting parties to assert confidentiality at the time information is submitted, and rely on such treatment unless and until the Commission orders otherwise."[486] Verizon, in particular, asserts that we should acknowledge the possibility that we may need to alter the presentation of aggregated broadband and video data included in reports to the Governor and Legislature.[487] "Although the aggregated data presented in the report[s] will in all likelihood not be competitively sensitive," Verizon reasons that "it is possible that some information will be deemed competitively sensitive."[488]

Verizon also clarifies that it "offers service in the geographical areas reached by its wirecenters," rather than by whole census tracts.[489] Accordingly, Verizon asks that the Commission recognize that "the boundaries of wireless centers will frequently bisect census tracts."[490]

While not objecting to a community center reporting requirement, Verizon maintains that "any additional reports should be used sparingly."[491] It declares

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[483] Id. at 20.

[484] Id. at 20-21.

[485] Verizon Reply Comments on the PD at 1.

[486] Id. at 1.

[487] Verizon Opening Comments at 22.

[488] Id. at 21.

[489] Verizon Opening Comments on the PD at 11.

[490] Id.

[491] Verizon Opening Comments at 22.

that "the potential for other future reports would not seem to be objectionable so long as they are requested for legitimate reasons consistent with the Act."[492]

AT&T argues that we do not have the ability to require additional reports: "AB 2987 provides for specified reporting in sections 5920 and 5960; the Commission may not impose any other reporting requirements."[493] In particular, AT&T contests our proposal to require reporting of community center data. According to AT&T, "AB 2987 does not grant the Commission authority to require community center reporting, and AT&T California objects to such expanded reporting because provision of data would reveal competitive data."[494]

AT&T also contests several features of our proposed broadband and video reporting requirements. First, AT&T contends that we should not request information on the extent to which a broadband provider uses different technologies to provide broadband access. AT&T asserts that DIVCA "requires only a statement without quantification of the amount of each of the various technologies provided, which would be much less burdensome . . ." and would avoid "potential ambiguities regarding how to count and compare various technologies."[495] Second, AT&T argues that that the Commission should allow approximation of *all* categories of broadband and video data[496]. According to AT&T, "the intent was always that holders of video franchises could approximate all categories of information required by section 5960."[497] AT&T adds that it "would be irrational to permit approximating for just broadband availability when all of the categories in the report are in one way or another

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[492] Id.

[493] AT&T Reply Comments at 15.

[494] AT&T Opening Comments at 9.

[495] Id. at 8.

[496] AT&T Reply Comments at 18.

[497] Id.

subsets of each other. . . ."[498] Third, AT&T maintains that "it is important to accord trade secret protection" to the broadband and video reports and all other information provided pursuant to reporting requirements of DIVCA.[499]

In addition, AT&T clarifies that "there are instances in which AT&T California's telephone service area only partially covers a census block group."[500] AT&T plans to only offer video service within its telephone footprint, and accordingly, it requests that the Commission "indicate that this approach is acceptable."[501]

Finally, AT&T raises concerns regarding our employment reporting requirements. It states that "requiring the parent company to hold the franchise would create . . . illogical employment reporting. AT&T California's ultimate parent company does not have any employees that would work directly on the provision of video services. . . ."[502]

Small LECs states that the "Commission should not categorically preclude build-out data from being marked as confidential . . . ."[503] First, Small LECs argues that "data need not qualify as confidential under Section 5960 to be deemed confidential. . . . If it qualifies for confidential treatment under the Commission's existing rules, it should be treated as" confidential.[504] Second, Small LECs asserts that "the Commission's statements that build-out data will not be granular cannot be squared with the discussion of build-out requirements for providers with less than one million customers."[505] Small LECs notes that

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[498] Id. at 19.

[499] Id. at 17-18.

[500] AT&T Opening Comments on the PD at 5.

[501] Id. at 6.

[502] AT&T Opening Comments at 8.

[503] Small LECs Opening Comments on the PD at 10.

[504] Id.

[505] Id.

"smaller providers have no set build-out requirements, so the type of information that might be required from them is not yet established."[506] Thus, Small LECs urges the Commission to "not prejudge the confidentiality status of build-out data that has not yet been identified."[507]

With respect to our proposal regarding submission of workplace diversity data, Small LECs argues that the "EEO-1 'Employment Information Report' should only be provided for applicants who are currently required to submit the report."[508] "Under 29 C.F.R. § 1602.7," Small LECs points out that "the requirement to file form EEO-1 applies only to employers with '100 or more employees.' Since many of the smaller LECs do not have 100 or more employees, many of them do not currently file this form."[509]

SureWest states that the Commission should not reserve "broad authority to collect any information it deems necessary": "Subjecting video providers to unlimited obligations to produce information to the Commission sounds precisely like an attempt to regulate video providers as though they were public utilities. . . ."[510]

With respect to user fee reports, SureWest asks the Commission to modify requirements for holders to submit quarterly subscriber information.[511] It argues that the Commission should provide more time to submit the quarterly information or "preferably, conform its process to that used by local franchising entities."[512] SureWest encourages the Commission to allow state video franchise

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[506] Id.

[507] Id.

[508] Id. at 6.

[509] Id.

[510] SureWest Opening Comments at 15-16.

[511] Id. at 19.

[512] Id.

holders to "pay the user fee and provide the number of subscribers with the fee payment."[513]

SureWest also raises multiple issues regarding our proposed broadband and video reporting requirements. First, SureWest argues that community center reporting requirements should only apply to larger video providers. SureWest explains that "the clear intent of the Franchise Act was to limit this requirement to those holders or their affiliates with more than 1,000,000 telephone customers in California."[514] Second, SureWest protests how we define "telephone service area." SureWest asserts that it should not be required to report on the number of households encompassed by its Certificate of Public Convenience and Necessity (CPCN), because SureWest does "not serve most of those areas and certainly should not be required to report on the number of households outside its actual service area. Rather, applicants should be reporting on the number of households where they or their affiliates actually provide service."[515]

Moreover, SureWest claims that "requiring smaller providers to gather data on a census tract basis is an obvious defect in the Franchise Act."[516] Attributing this "defect" to "insufficient vetting," SureWest alleges that reporting information on a census tract basis would require "massive alterations" to its billing database and would force the company "to incur significant costs."[517] SureWest even questions whether "such changes could be effected."[518] Nevertheless, SureWest "does not object to the proposed General Order with respect to its implementation of the census tract requirement. . . ."[519] SureWest

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[513] Id.

[514] Id. at 13.

[515] Id. at 12.

[516] Id. at 16.

[517] Id.

[518] Id.

[519] Id. at 17.

reiterates that it is appropriate for the Commission to "follow the letter of the law when adopting its rules."[520] To the extent SureWest takes issue with law, SureWest states that it will propose "clean-up" legislation.[521]

In contrast to SureWest, CCTA does not question whether the Commission's annual broadband and video reporting requirements can be fulfilled. CCTA states that "the requirement to report on the basis of census tracts can be met."[522] According to CCTA, "unless the holder also currently collects funds from the California High Cost Fund-B (CHCF-B) (which requires collection of data using census block group information, which can be "rolled up" into census tracts), the holder will necessarily have to purchase or develop the systems to correlate the holder's customer street address data to add the ability to comply with the census tract requirement."[523] Thus, the primary operational issue is just the "expense to the holder of a state franchise."[524]

CCTA focuses more on its argument that "the Commission must allow for confidential treatment of the information."[525] It argues that the Legislature acknowledges the confidential nature of the required information in its requirements that the data submitted be aggregated and be disclosed to the public only as provided by Public Utilities Code § 583.[526]

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[520] Id.

[521] Id.

[522] CCTA Opening Comments at 13.

[523] Id. CCTA adds that the "final GO reporting requirements should also make clear that the broadband reporting obligations extend only to areas served under the state-issued franchise(s) of a video service provider. Id. at 13, n.7.

[524] Id. at 13.

[525] Id. at 14.

[526] Id. at 13.

B. Discussion

This section assesses parties' divergent comments on the proposed reporting requirements. The reporting requirements include (i) user fee reports, (ii) employment reports, (iii) broadband and video service reports, (iv) antidiscrimination and build-out reports, and (v) additional reports necessary for our enforcement of specific DIVCA provisions.

1. Reports for Collection of the User Fee

Public Utilities Code § 443(a) allows the Commission to "require a video service provider . . . to furnish information and reports to the commission, at the time or times it specifies, to enable it to determine" the user fee. Pursuant to this statutory authority, the OIR tentatively concluded that the user fee should be based on subscribership, and it called for state video franchise holders to submit quarterly video subscribership reports in support of this fee system.

As discussed in Section XII, we now conclude that user fees subsequent to Fiscal Year 2007-2008 should be based on annual gross state video franchise revenues, as defined in Public Utilities Code § 5860(d). In order to complete the alignment of the video user fee process with processes followed for other utilities subject to Commission jurisdiction, the Commission now will calculate user fees annually. This calculation will be based upon annual reports of each state video franchise holder's gross state video franchise revenue. These reports will be due to the Commission no later than April 1 of each year following the calendar year upon which the report is based.

Although we have substantially altered our user fee reporting requirements, some of AT&T and SureWest's arguments remain applicable in this context. We discuss each of these parties' comments in turn.

First, we find value in Verizon's and AT&T's contention that we should recognize "the need for confidentiality in a market where new entrants compete

with established players."[527] Currently state video franchise revenues are not publicly disclosed: The video revenue-related data AT&T and other similarly situated companies provide to the FCC are not separately broken out from other unregulated services. Given the sensitivity of this nonpublic revenue data, we will release individual state video franchise holder's annual state video franchise revenue data only if we determine that the disclosure of the data is made as provided for pursuant to Public Utilities Code § 583.[528]

Second, we decline to adopt SureWest's recommendation to modify our reporting requirements to permit state franchise holders to submit user fees and the data upon which the fees are based at the same time. We could not determine a state video franchise holder's pro rata payment unless the base number of all state video franchise holders' subscribers (or other applicable criterion) is known. Under our new fee system, the fee payment would necessarily be nothing more than a guess if the state video franchise holder were allowed to submit the amount of its gross intrastate revenues along with its fee payment. The state video franchise holder would not know the ratio of its gross intrastate revenues to the amount of total gross intrastate revenues received by state video franchise holders.

We further note that the procedures for reporting, setting, and receiving user fees closely track the user fee procedures currently used by California telecommunications carriers. Thus, we do not anticipate implementation problems arising from these long-standing procedures. Any exceptional procedures, such as those proposed by SureWest, are unnecessary.

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[527] Verizon Reply Comments on the PD at 1. See also AT&T Reply Comments at 17-18 (calling upon the Commission to accord "trade secret protection" to information provided pursuant to the reporting requirements of AB 2987).

[528] See CAL. PUB. UTIL. CODE § 5960(d) ("All information submitted to the commission and reported by the commission pursuant to this section shall be disclosed to the public only as provided for pursuant to Section 583.").

2. Annual Employment Reports

Public Utilities Code § 5920 imposes specific employment reporting requirements that direct state video franchise holders with more than 750 California employees to report upon the number and types of jobs held by their employees in California.[529] Additionally state video franchise holders must provide projections of new hires expected an upcoming year.[530]

We decline to modify implementing regulations proposed by the OIR. No parties challenge the substance of these proposed reporting requirements, which closely adhere to the text of Public Utilities Code § 5920.

Despite AT&T's and Verizon's requests, we do not afford confidential treatment to this employment data.[531] To do so would violate the express language of DIVCA. Public Utilities Code § 5920(b) requires the Commission to make "the information required to be reported by holders of state franchises . . . available to the public on its Internet Web site." Unlike annual broadband and video reports produced pursuant to Public Utilities Code § 5960, DIVCA does not direct that our employment reports aggregate information provided by state video franchise holders; instead, these reports are supposed to convey "information . . . reported by holders" without any further stipulation. The Legislature could have imposed an aggregation requirement, but it chose not to here. Thus, we find it is most consistent with the statute to make individual reports submitted pursuant to Public Utilities Code § 5920 available to the public.

We addressed concerns related to requiring the parent company to hold the state video franchise in Section V above.

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[529] Id. at § 5920(a)(1)-(3).

[530] Id. at § 5920(a)(4).

[531] See AT&T Reply Comments at 17-18 (asking for confidential treatment for all information provided pursuant to reporting requirements of DIVCA); Verizon Reply Comments on the PD at 1 (similarly recognizing the need for confidential treatment of a wide variety of data submitted pursuant to DIVCA).

3. Annual Reports on Broadband and Video Services

Public Utilities Code § 5960 requires state video franchise holders to produce detailed annual reports on broadband and video services. While we recognize that a video service area may only cover parts of certain census tracts, statutorily required deployment and subscribership data nonetheless must be submitted on a census tract basis.

These broadband and video reporting requirements fulfill a number of statutory purposes. We do not consider the requirements to only be build-out reporting requirements, as a number of parties do.[532] That interpretation too narrowly construes the purpose of the annual broadband and video reports. The Legislature intended for DIVCA to "[c]omplement efforts to . . . close the digital divide," and possessing broadband and video data also will enable us to support a variety of voluntary efforts to increase broadband adoption.[533]

This section discusses parties' issues regarding these important annual broadband and video services reporting requirements. We address parties' comments on an issue-by-issue basis below.

a) Approximation of Census Tract Data

To the greatest extent possible, we seek to attain broadband and video data that cleanly falls within census tracts. This approach is most consistent with DIVCA reporting requirements and DIVCA's stated policy objectives.

The plain language of the DIVCA reporting requirements does not allow state video franchise holders to elect to approximate most broadband and video services data submitted to the Commission. With the exception of § 5960(a),[534]

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[532] See, e.g., CCTPG/LIF Opening Comments at 11 (characterizing video data required pursuant to Public Utilities Code § 5960 as "build-out data").

[533] CAL. PUB. UTIL. CODE § 5810(a)(2)(E).

[534] Id. at § 5960(a) (allowing approximation only for certain broadband availability data).

Public Utilities Code § 5960 expressly directs state video franchise holders to report broadband and video data on a "census tract basis."[535]

With respect to policy, BBIC rightly recognizes that the "absence of sufficient data" may be the chief limitation on the government's ability to address the Digital Divide in a meaningful and targeted way.[536] With sufficient data, California has the information it needs to address broadband access gaps (by technology type) and depressed usage rates. For example, the Commission could map areas where broadband access is unavailable and use these maps to craft incentives to encourage competitive entry into unserved markets.

The value of broadband and video data is enhanced when correlated with U.S. Census demographic information (reported by census tract). Then, we will know where broadband is offered, and what regions, or populations, are most likely to take advantage of the technology. Moreover, we anticipate that state video franchise holders will combine U.S. Census data and video and broadband availability data in order to establish compliance with Public Utilities Code §§ 5890(b)(1)-(2) (non-discrimination provisions) and 5960(b)(3)(ii) (reporting requirements), both of which require state video franchise holders to determine the percentage of low-income households offered access to their services.

We, however, do not seek to ask the impossible. As supported by AT&T's and SureWest's comments, we recognize that it may be difficult for state video franchise holders and their affiliates to report information on households that the companies merely pass, rather than serve.[537] A communications company may not have a database of all households that it is capable of serving. Thus, we will deem data on broadband and video availability to be collected "on a census tract

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[535] Id. at § 5960(b) ("Every holder . . . shall report to the commission on a census tract basis . . . .").

[536] BBIC Reply Comments at 2.

[537] AT&T Reply Comments at 19; SureWest Opening Comments at 16.

basis" if a company uses a geocoding application that assigns its potential customers' addresses in the manner prescribed in Appendix D.

Subscribership data does not require similar accommodations. As recognized by CCTA, communications companies maintain billing databases that include subscriber addresses, and any company may "purchase or develop the systems to correlate the holder's customer street address data to add the ability to comply with the census tract requirement."[538] Moreover, a communications company collecting CHCF-B funds likely already has such systems in place.[539] We, therefore, require subscribership data to be based upon customers' individual addresses. These addresses shall be geocoded to specific, corresponding census tracts or other census units that nest within census tracts.

Regarding broadband data required by Public Utilities Code § 5960(B)(1)(A), we decline to alter our assessment of when a state video franchise holder may elect to approximate data reported on a "census tract basis." The statute provides that this approximation is allowed only if the state video franchise holder (i) "does not maintain this information on a census tract basis in its normal course of business" and (ii) the alternate reporting methodology "reasonably approximate[s]" census tract data." Despite Verizon's protests,[540] our requiring a showing that these conditions are met is both reasonable and explicitly supported by the text of DIVCA.

b) Confidential Treatment of Data

As called for by CCTPG/LIF, we plan to make aggregated broadband and video data available to the public.[541] Public Utilities Code § 5960(c) requires the

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[538] CCTA Opening Comments at 13.

[539] See id. (recognizing that CHCF-B "requires collection of data using census block group information, which can be 'rolled up' into census tracts").

[540] Verizon Opening Comments at 19-20.

[541] CCTPG/LIF Opening Comments at 11 (stating that "reports should be made available to the public so that the public can assess the progress that is being made").

Commission to submit annually "to the Governor and the Legislature a report that includes based on year-end data, on an aggregated basis, [broadband and video] information submitted by holders . . . ." Thus, we will publish availability and adoption statistics combined for all reporting broadband providers.

Any release of more granular data (e.g., data for individual technologies used) will be subject to Commission discretion pursuant to Public Utilities Code § 583. AT&T, CCTA, SureWest, and Verizon rightly recognize that the Commission should allow for confidential treatment of broadband and video services data.[542] Thus, we modify the General Order to clarify that we will release non-aggregated annual broadband and video data only if we determine that disclosure of these data is provided for pursuant to Public Utilities Code § 583.[543]

c) Gradation of Submitted Data

AT&T and CCTPG/LIF dispute how much detail the Commission should require of broadband and video data. AT&T prefers less detail; CCTPG/LIF seeks more detail. We find merit only in CCTPG/LIF's requests.

AT&T's proposal to scale back our broadband reporting requirements runs contrary to the statute. While the language of Public Utilities Code § 5960(b)(1)(C) is subject to dispute, the express principles underlying DIVCA convince us that we should interpret the statute to require quantification of broadband technologies offered.[544] The Legislature stated that, among other

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[542] AT&T Reply Comments at 17-18; CCTA Opening Comments at 13-14; SureWest Reply Comments on the PD at 4; Verizon Opening Comments at 21-22.

[543] See CAL. PUB. UTIL. CODE § 5960(d) ("All information submitted to the commission and reported by the commission pursuant to this section shall be disclosed to the public only as provided for pursuant to Section 583.").

[544] Public Utilities Code § 5960(b)(1)(C) requires state video franchise holders to provide information on "[w]hether the broadband provided by the holder utilizes wireline-based facilities or another technology." Given this language, it is unclear whether the requirement for information on "the broadband provided" means that the state video franchise holder only needs to indicate what technologies it uses to provide service in a given census tract, or if it means that the state video franchise holder must quantify

Footnote continued on next page

objectives, it intended for DIVCA "promote the widespread access to the most technologically advanced cable and video services to all California communities" and "complement efforts to increase investment in broadband infrastructure."[545] To ensure that we are indeed promoting access to "the most technologically advanced" services, we need information on the form of technology used.

In contrast, we find there is merit in CCTPG/LIF's request that we better define the type of video technology reported to the Commission. CCTPG/LIF rightly observes that DIVCA build-out requirements only apply to certain types of video service.[546] Accordingly, we modify our video reporting requirements so that they require submission of data on the specific type of video service access at issue in Public Utilities Code § 5890.

Also we join CCTPG/LIF in its concern that "customers in low-income communities" may be "offered inferior technology."[547] This result would be contrary to the Legislature's intent that DIVCA will (i) "promote the widespread access to the most technologically advanced cable and video services" and (ii) "complement efforts to increase investment in broadband infrastructure and

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how much it uses various technologies to provide broadband to households in a given census tract.

[545] CAL. PUB. UTIL. CODE § 5810(a)(2)(B); id. at § 5810(a)(2)(E).

[546] CCTPG/LIF Opening Comments on the PD at 5. See CAL. PUB. UTIL. CODE § 5890(j)(4) ("'Access' means that the holder is capable of providing video service at the household address using any technology, other than direct-to-home satellite service, providing two-way broadband Internet capability and video programming, content, and functionality, regardless of whether any customer has ordered service or whether the owner or landlord or other responsible person has granted access to the household. If more than one technology is utilized, the technologies shall provide similar two-way broad band Internet accessibility and similar video programming.").

[547] CCTPG/LIF Opening Comments on the PD at 6. See CCTPG/LIF Opening Comments at 11 (suggesting that we require state video franchise holders to submit information on specific technologies used in the offering of broadband services); CCTPG/LIF Reply Comments at 4-5 (recommending the broadband data be submitted at a census block level).

close the digital divide."[548] We also note that the statute expects that state video franchise holders will demonstrate "a substantial and continuous" effort to meeting build-out requirements.[549] Given that parties have not evaluated the import of these statutory provisions in detail, Phase II of this rulemaking will consider whether the Commission needs additional, more detailed broadband and video information for enforcement of specific DIVCA provisions.

d) Low-Income Data

We modify the draft General Order to require low-income household information that utilizes the most recent U.S. Census projections available as of January 1, 2007. Upon further review, we find that this requirement is most consistent with the definition of "low-income household" found in Public Utilities Code § 5890(j)(2).[550] Also defining low-income household in this manner will ensure that the data collected will be useful for assessing compliance with Public Utilities Code § 5890.[551] Public Utilities Code § 5890(b) establishes low-income build-out requirements that are benchmarked upon household income available as of January 1, 2007.[552]

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[548] CAL. PUB. UTIL. CODE § 5810(a)(2).

[549] See id. at § 5890(f)(4) (allowing the Commission to grant an extension of build-out requirements only if the state video franchise holder demonstrates a "substantial and continuous effort" to meet its build-out requirements).

[550] Id. at § 5890(j)(2) ("'Low income household' means those residential households located within the holder's existing telephone service area where the average annual household income is less than $35,000 based on the United States Census Bureau estimates adjusted annually to reflect rates of change and distribution through January 1, 2007.").

[551] See Verizon Opening Comments at 20 (arguing that this "information provides holders a known, identifiable, and constant target in assessing their build and deployment plans").

[552] CAL. PUB. UTIL. CODE § 5890(b) (providing specified state video franchise holders a set amount of time by which to build out their networks so that a designated percentage of households with access to their service qualify as "low-income households").

Appendix E to this decision clarifies our expectations regarding submission of U.S. Census data. This Appendix describes what U.S. Census data may be submitted to fulfill various demographic reporting requirements.

e) Definition of "Telephone Service Area"

Pursuant to Public Utilities Code § 5960(b)(2), a state video franchise holder must provide video availability data on households in its "telephone service area." DIVCA, however, does not define "telephone service area."

The OIR defined "telephone service area" as area where the Commission has granted an entity a Certificate of Public Convenience and Necessity (CPCN) to provide telephone service. We decline to alter this definition of "telephone service area." We find that our decision to use a company's CPCN to define its telephone service area is most consistent with DIVCA. Although the statute does not provide an explicit definition of a "service area," we note that the statute considers a "video service area footprint" to be an area "that is proposed to be served."[553] Likewise, our proposal, by relying on a company's CPCN, effectively defines a telephone service area as the area that has been proposed to be served by a telecommunications provider.

We also note that employing this definition will benefit the Commission, while imposing little burden on SureWest and other CLECs. To the extent a company does not have customers in a region, the company need only collect and report updated U.S. Census demographic data for that region. Having ready access to data on where a company is, and is not, serving will help us determine whether a state video franchise holder is providing service in a nondiscriminatory manner.

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[553] Id. at § 5840(e)(6).

4. Information for Antidiscrimination and Build-Out Assessments

To be able to enforce the antidiscrimination and build-out provisions, we must be able to determine whether a state video franchise holder fulfills its build-out requirements.[554] We also need to be prepared to judge whether a state video franchise holder has made a "substantial and continuous effort" to meet the build-out requirements.[555] This latter evaluation is critical to our decision as to whether to grant a state video franchise holder an extension for fulfilling its build-out requirements.

a) Video Availability Data

Reports on video availability will allow the Commission to gauge whether a state video franchise holder has made a "substantial and continuous effort" to meet the build-out requirements established by Public Utilities Code § 5890.[556] The Commission, therefore, shall require state video franchise holders to submit annual reports on video service offered, both to California households generally and to low-income households specifically. State video franchise holders will be required to provide these data on a census tract basis. Details on the standards used for these reports are outlined in Section XIII.B.3.

b) Community Center Data

The OIR imposed additional build-out reports to ensure that statutorily specified state video franchise holders provide free service to community centers in underserved areas, at a ratio of at a ratio of one community center for every 10,000 video customers.[557] Only three parties comment on the substance of the

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[554] See id. at § 5890 (imposing build-out requirements on state video franchise holders).

[555] Id. at § 5890(f)(4).

[556] Id. at § 5890(f)(4).

[557] See id. at § 5890(b)(3) (requiring this provision of free service to community centers in underserved areas).

OIR's proposed community center reporting: AT&T opposes the reporting, CCTPG/LIF supports the reporting, and Verizon neither supports nor opposes the reporting.[558] Of these three parties, we agree most with CCTPG/LIF. We recognize that it is necessary to require information on individual community centers provided free service pursuant to Public Utilities Code § 5890(b)(3). The consumer organization rightly points out that "[u]nless this information on free service to community centers is reported to the Commission there is no way for the Commission to know if the law is being adhered to."[559] We adopt reporting requirements, like this one, if they mandate reports that are necessary for enforcement of specific DIVCA provisions.

In contrast, SureWest focuses on applicability of the community center requirements. It argues that the Legislature did not intend for Public Utilities Code § 5890(b)(3) – or related enforcement measures – to apply to state video franchise holders that alone, or in conjunction with their affiliates, have less than one million California telephone customers.[560] Upon review of Public Utilities Code § 5890(b), we agree with SureWest's reading of the statute.[561] We, therefore, modify the community center reporting requirement so that it only applies to state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone subscribers.

c) Confidential Treatment of Data

Like AT&T, Small LECs, and Verizon we find that it is reasonable to allow for confidential treatment of build-out data, just as we allow for confidential

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[558] AT&T Opening Comments at 9; CCTPG/LIF Reply Comments at 5; Verizon Opening Comments at 22.

[559] CCTPG/LIF Reply Comments at 5.

[560] SureWest Opening Comments at 13.

[561] See CAL. PUB. UTIL. CODE § 5890(b) (only requiring "Holders or their affiliates with more than 1,000,000 telephone customers in California" to provide free service to community centers).

treatment of data required by Public Utilities Code § 5960.[562] Build-out data present competing confidentiality concerns. On the one hand, build-out data may be just (if not more) granular than data afforded special confidentiality protections in Public Utilities Code § 5960.[563] On the other hand, restricting public access to build-out data might unduly impede external stakeholders' ability to monitor compliance with build-out requirements. We conclude that it is appropriate to balance these concerns on a case-by-case basis. Accordingly, we modify the General Order to clarify that we will release individual state video franchise holder's build-out data only if we determine that the disclosure of the data is made as provided for pursuant to Public Utilities Code § 583.[564]

5. Additional Information

Section XV explains that we have the authority to take actions necessary for our enforcement of specific DIVCA provisions. Despite AT&T's and SureWest's protests to the contrary, we hold that this authority extends to our ability to impose additional reporting requirements.[565] We, like DRA, find that "it is necessary that the Commission be able to obtain information above and

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[562] AT&T Reply Comments at 17-18; Small LECs Opening Comments on the PD at 10; Verizon Reply Comments on the PD at 1.

[563] Indeed, data on individual locations of community centers receiving free service is equivalent to "individually identifiable customer information," which Public Utilities Code § 5960(d) prohibits from being publicly disclosed. Also Small LECs are correct to note that it is unclear what, if any additional, build-out data may be required to enforce build-out requirements that we have yet to establish for state video franchise holders that alone, or in conjunction with their affiliates, have less than one million telephone customers. Small LECs Opening Comments on the PD at 10.

[564] See CAL. PUB. UTIL. CODE § 5960(d) ("All information submitted to the commission and reported by the commission pursuant to this section shall be disclosed to the public only as provided for pursuant to Section 583.").

[565] See AT&T Reply Comments at 15 (arguing that the Commission does not have the authority to require reports other than those specified in Public Utilities Code §§ 5920 and 5960); SureWest Opening Comments at 15-16 (stating that the Commission's asserting the authority to require further reports suggests that the Commission is seeking to regulate video service providers like public utilities).

beyond that which is specifically enumerated in [DIVCA] in order to fulfill its statutory duties under" the Act.[566]

We, however, also heed Verizon's words of caution. Verizon is correct that "any additional reports should be used sparingly."[567] We will require production of new reports only if they are truly necessary for the enforcement of specific DIVCA provisions under our regulatory authority. Thus, we do not require new reports suggested by CCTPG/LIF.[568] We find that ordering new proposed reports on workplace diversity and customer service, while desirable for public policy reasons, is outside the scope of our statutory authority.

With respect to workplace diversity in particular, we conclude that there are other means of ensuring that we are informed about state video franchise holders' employment practices. Most notably, we find that state video franchise holders can participate voluntarily in Commission diversity efforts, such as the outstanding efforts of the California Utilities Diversity Council (CUDC).[569] Established under the leadership of President Michael Peevey, CUDC pursues diversity in five major areas: governance; customer service and marketing; philanthropy; procurement; and employment. CUDC reports on its results to the Commission at a daylong hearing held each fall. The Commission is pleased to see marked progress in every area by our CUDC participants. We expect that in the near future state video franchise holders, like CUDC participants, will

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[566] DRA Reply Comments at 9. See also TURN Reply Comments at 10 (stating that it would be "a mockery of the authority delegated to the Commission" if the Commission failed to request additional data needed for enforcing DIVCA).

[567] Verizon Opening Comments at 22.

[568] See CCTPG/LIF Opening Comments at 8, 12 (recommending expanded reporting requirements).

[569] Although "video service providers are not public utilities or common carriers," we expect that state video franchise holders' voluntary participation in CUDC nonetheless would be valuable. CAL. PUB. UTIL. CODE § 5810(a)(3).

provide data regarding governance; customer service and marketing; philanthropy; procurement; and employment.

If it declines to provide workplace diversity data equivalent to that of other CUDC members, we will require a state video franchise holder that submits Employment Information Report EEO-1 (EEO-1) filings to the federal Department of Labor to provide us copies of these future filings. An EEO-1 form is attached as Appendix F. EEO-1 reports include data on race and gender of workers by job category. For multi-establishment employers, we expect that state video franchise holders subject to this requirement will provide us EEO-1 reports that describe workplace diversity of the parent company as a whole, as well as diversity of its California affiliates in particular.

Unlike requiring a new report, we find that requesting copies of EEO-1 filings places a minimal burden upon state video franchise holders. We are merely requesting a copy of reports that are already produced.[570] Moreover, all company-specific reports and company-specific information received from these filings to the Commission will be kept confidential. We only will release aggregate video industry data at the statewide level.

Finally, we conclude that a collective bargaining reporting requirement is necessary for the enforcement of DIVCA labor provisions. If a state video franchise is being transferred, we must be aware of existing collective bargaining agreements to ensure, pursuant to Public Utilities Code § 5970(b), that the transferee agrees to respect any such preexisting agreement. Collective bargaining provisions are discussed in greater detail in Section VI above.

XIV. Antidiscrimination and Build-Out Requirements

The Legislature intended for DIVCA to "[p]romote the widespread access to the most technologically advanced . . . video services to all California

communities in a nondiscriminatory manner regardless of socioeconomic status."[571] To effect this worthy goal, the Legislature enacted two types of provisions in Public Utilities Code § 5890. First, the Legislature prohibited state video franchise holders from "discriminat[ing] against or deny[ing] access to service to any group of potential residential subscribers" on the basis of "income of the residents in the local area in which the group resides."[572] Second, the Legislature required certain state video franchise holders to offer video service to California consumers within predetermined time periods (build-out requirements). Commission enforcement of these build-out requirements ensures that state video franchise holders abide by the Legislature's antidiscrimination prohibition.

If state video franchise holders that are not also regulated public utilities or cable companies experience difficulties accessing utility structures (e.g. poles and conduit), their ability to build-out their networks under DIVCA could be impeded. Therefore, the Commission clarifies in Section XIV.C, below, that state video franchise holders have the right to access the support structures and rights-of-way of large and mid-sized incumbent local exchange carriers and investor-owned utilities under the same rates, terms and conditions established in the Commission's Rights-of-Way Decision (D.98-10-058).

Multiple parties request that we describe how we intend to interpret and enforce the antidiscrimination and build-out provisions. In response to these parties, this section clarifies how we intend to impose antidiscrimination and build-out requirements on state video franchise holders. Section XV then describes how we will enforce these requirements imposed by DIVCA.

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[570] We, like Small LECs, recognize that it is inappropriate to require state video franchise holders with less than one hundred employees to file a form they do not already produce. Small LECs Opening Comments on the PD at 6.

[571] CAL. PUB. UTIL. CODE § 5810(a)(2)(B).

[572] Id. at § 5890(a).

A. Position of Parties

CCTPG/LIF calls for the Commission to "propose processes that institute Sec. 5890."[573] Although some build-out requirements need not be met until multiple years pass after a state video franchise holder begins offering service, CCTPG/LIF argues that it would be useful for the Commission to "monitor the progress of or assist franchise holders toward meeting the Section's requirement."[574] It also contends that the Commission may need to address some build-out issues – such as whether a state video franchise holder drew its proposed video service area in a discriminatory manner – at the outset of the state video franchise program.[575]

CCTPG/LIF urges the Commission to make several specific proposals at this juncture. First, CCTPG/LIF asks the Commission to define what action the Commission "will take if an application makes an initial service territory definition that is discriminatory."[576] CCTPG/LIF encourages the Commission to reject such applications.[577] Second, CCTPG/LIF states that "the Commission should discuss how community centers will receive free service, which is also a strategy for build-out."[578] CCTPG/LIF calls for a public participation hearing so that the Commission can receive input on this topic.[579] Third, CCTPG/LIF calls upon the Commission to establish a process for review of build-out data.[580]

Commenting on the draft decision, CCTPG/LIF voices special concerns regarding the "implementation of build-out requirements on franchisees with

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[573] CCTPG/LIF Opening Comments at 10.

[574] Id.

[575] Id. at 3.

[576] Id.

[577] Id.

[578] Id. at 10.

[579] Id.

[580] Id. at 11.

less than a million telephone customers (under § 5890(c)), which are much less clear-cut than those franchisees with more than a million telephone customers."[581] CCTPG/LIF asks the Commission to initiate a "second phase of this proceeding, or a separate proceeding, . . . in order to establish the regulations that will implement § 5890(c), as well as any other provisions of § 5890 that require more specific Commission guidelines."[582] According to CCTPG, the "'reasonableness' standard of § 5890(c) is simply too vague to provide initial guidance. . . . It is in the best interests of all involved to have further guidance on this issue."[583]

Greenlining argues that that the Commission should monitor and ensure enforcement of build-out requirements.[584] It urges the Commission to develop "a plan to ensure that service providers maximize build-out in a nondiscriminatory way (not targeting specific areas or seeking franchise areas based on socioeconomic makeup)."[585]

TURN contends that "the application process should require applicants to present how they intend to meet the statute's build-out and anti-discrimination requirements."[586] According to TURN, the "application process should provide an opportunity for the Commission as well as interested parties to assess whether an applicant is fit and meets the requirements established by the statute including the specific concerns clearly identified by the Legislature."[587]

"To the extent that franchise holders are required to provide services at community centers in underserved areas," TURN asks the Commission to

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[581] CCTPG/LIF Opening Comments on the PD at 7.

[582] Id.

[583] CCTPG/LIF Reply Comments on the PD at 2.

[584] Greenlining Reply Comments at 9.

[585] Id. at 10.

[586] TURN Reply Comments at 7.

[587] Id.

"require that those community centers be accessible to people with disabilities."[588] Specifically, TURN states that "the Commission should require that all community centers be compliant with the access standards of Title 24 of the California Code of Regulations . . . and the Americans with Disabilities Act Access Guidelines. . . ."[589] "In the event that some aspects of the community centers are not fully compliant with those standards," TURN contends that "[t]he Commission should ensure, at the very least, that people with disabilities can safely access the services provided at such centers."[590]

In contrast to the consumer organizations, Verizon argues that it is unnecessary to create process to monitor or assist video franchise holders in meeting statutory build-out requirements.[591] Verizon reasons that "these requirements are spelled out very clearly in the Act, and consist of submission of specific information by holders."[592]

Commenting on the draft decision, CCTA contends that the requirement in § 5890(c) is a "nondiscrimination requirement," not a "buildout requirement."[593] It asserts that "§ 5890(e) specifies . . . [that] holders with fewer than 1 million telephone customers do not have buildout requirements under the state franchise. This is because applicants with fewer than 1 million telephone customers are generally comprised of incumbent cable operators that have already built out their video service networks to their entire franchise area, pursuant to their existing local franchise requirements."[594] Given this analysis, CCTA asks the Commission "to provide that where the applicant . . . has fewer

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[588] TURN Opening Comments at 16.

[589] Id.

[590] Id.

[591] Verizon Reply Comments at 7.

[592] Id.

[593] CCTA Opening Comments on the PD at 5.

[594] Id. at 6.

than 1 million telephone customers the applicant may include in its application a statement that its telephone customers have access to its video service to meet the nondiscrimination requirement."[595]

SureWest maintains that "Section 5890(c) was written to provide a reduced level of oversight for video system build-out within the service areas of incumbent local exchange carriers with fewer than one million telephone customers."[596] Consistent with that interpretation, SureWest argues that "providers should have the option to demonstrate what qualifies as a 'reasonable time' on a case-by-case basis, not pursuant to generic rules."[597] It asserts that a state video franchise holder that "wishes to seek some sort of advance 'reasonableness' analysis of the build-out plans of smaller providers" should be able to do so through a "streamlined and expedited process."[598] It adds that the "Commission could establish 'safe harbor' standards for smaller providers in Phase II of this rulemaking, by which smaller providers could demonstrate compliance with the 'reasonableness' requirement . . . ."[599]

Small LECs contends that "the Commission should simply rely on the general 'reasonableness' standard for build-out set forth in DIVCA":

> Smaller providers should be given the discretion to build out their networks in a flexible and organic manner in accordance with what is reasonable under the circumstances. Given the many dynamic factors that can influence providers' build-out strategies, it would be inappropriate and unnecessary for the Commission to attempt to micromanage build-out plans in advance. To the extent that the Commission or an interested party perceives that a company's build-out plan is 'unreasonable,' it will have ample opportunity to

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[595] Id. at 7.

[596] SureWest Opening Comments on the PD at 5.

[597] Id. at 6.

[598] Id. at 7.

[599] Id.

> address the situation through an investigation, a complaint procedure, or another appropriate procedure.[600]

Alternatively, "at a minimum," Small LECs states that the "anticipated procedure associated with build-out requirements" should be "carefully specified."[601]

B. Discussion

While we find that many build-out requirements "are spelled out very clearly in the Act," we disagree with Verizon's assessment that "[n]o further Commission process or detail is required."[602] The substance of some of the antidiscrimination and build-out requirements is subject to disputes among the parties, while other build-out provisions explicitly require further Commission action.[603] Thus, this section and Section XIII (Reporting Requirements) clarify the Act's antidiscrimination and build-out requirements.[604]

1. Build-Out Requirements Imposed on State Video Franchise Holders that Alone, or in Conjunction with Their Affiliates, Have More than One Million California Telephone Customers

Many of the build-out requirements imposed on state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers need little interpretation, because these requirements are clear on their face. In particular, build-out provisions in

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[600] Id. at 8.

[601] Small LECS Opening Comments on the PD at 9.

[602] Verizon Reply Comments at 7.

[603] See, e.g., CAL. PUB. UTIL. CODE § 5890(c) (stating that the Commission will determine whether a state video franchise holder with less than one million California telephone customers offers video service to customers within their telephone service area within a reasonable amount of time).

subsections (b)(1)-(2) and (e) of Public Utilities Code § 5890, which apply to the entire video service area, clearly require these state video franchise holders to (i) offer service to a certain percentage of households in their telephone service areas in a designated time period, depending on the technology used and (ii) ensure that a certain percentage of households offered video access are "low-income households." Public Utilities Code § 5890(j)(2) defines a low-income household as a household with an annual income of less than $35,000.[605]

Yet a number of parties commented on one build-out provision imposed on state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers. Multiple parties requested that we address the provision that requires these state video franchise holders to provide free service to community centers in underserved areas. As mentioned, CCTPG/LIF requests that we discuss how community centers will receive free service, while TURN urges us to impose disability accessibility requirements on community centers receiving free service.

Public Utilities Code § 5890(b)(3) describes the number of community centers eligible for free service, qualifications of eligible community centers, and the specific type of service that will be provided to a center pursuant to this section. Accordingly, we find that the statute is clear on its face and requires no further interpretation. Should disputes arise, any party may file a petition to modify or clarify this decision based on the facts of a particular dispute, and to request a public participation hearing on a particular disputed issue.

In response to CCTPG/LIF, we agree that clarification is warranted as to the type of "free service" that must be offered to community centers. This

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[604] Additional issues related to the definition of a "state video franchise holder" are addressed in Section V.

[605] CAL. PUB. UTIL. CODE § 5890(j)(2). This annual household income is based on U.S. Census Bureau estimates adjusted annually to reflect rates of change and distribution through January 1, 2007. Id.

guidance is not provided by DIVCA. Yet the Legislature gives us related direction in its statement of the principles on which DIVCA is based. According to Public Utilities Code § 5810(a)(2), DIVCA was intended to *both* (i) "promote the widespread access to the most technologically advanced cable and video services" and (ii) "complement efforts to increase investment in broadband infrastructure and close the digital divide." We seek to interpret the statute in a manner that is most consistent with these express legislative intentions. Thus, we hold that "free service" provided to community centers must include both broadband and video services.

Regarding TURN's recommendation, we decline to impose any further eligibility requirements on community centers able to receive free service. Public Utilities Code § 5890(b)(3) fully establishes the requirements for a community center eligible for a video franchise holder's free broadband and video service: The community center must be a facility that (i) qualifies for the California Teleconnect Fund, (ii) makes the state video franchise holder's service available to the community, and (iii) only receives service from one state video franchise holder at a time.[606] Since the statute explicitly lists these conditions on eligibility, we find that community center eligibility requirements should not extend beyond those expressly delineated by the Legislature.[607]

2. Build-Out Requirements Imposed on State Video Franchise Holders that Alone, or in Conjunction with Their Affiliates, Have Fewer than One Million California Telephone Customers

Next we turn to build-out requirements imposed on state video franchise holders that alone, or in conjunction with their affiliates, have fewer than one

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[606] Id. at § 5890(b)(3).

[607] While we cannot require disability accessibility, we nonetheless find that the request for this accessibility is laudable. We expect that community center operators will do their best to make their facilities accessible to the disability community.

million California telephone customers. Public Utilities Code § 5890(c) states that these holders will satisfy the antidiscrimination and build-out section if they "offer video service to all customers within their telephone service area within a reasonable time, as determined by the Commission. However, the commission shall not require the holder to offer video service when the cost to provide video service is substantially above the average cost of providing video service in that telephone service area." This section discusses the import of this statute for both incumbent cable companies and smaller telecommunications companies.

We find that Public Utilities Code § 5890(c) imposes build-out requirements on all state video franchise holders that alone, or in conjunction with their affiliates, have fewer than one million California telephone customers. The statute, contrary to the claims of CCTA,[608] does not merely reiterate the general prohibition against discrimination found in Public Utilities Code § 5890(a). Instead, Public Utilities Code § 5890(c) instructs the Commission to "determine[]" what is "a reasonable time" for certain state video franchise holders to build out their networks. The only reasonable interpretation of this provision is that we are required to establish build-out requirements.

Despite its general applicability, we, nevertheless, clarify that we expect that this requirement will have little or no impact on incumbent cable operators. We interpret Public Utilities Code § 5890(c) to call for build-out requirements only to the extent that a state video franchise holder does not "offer video service" to all of its *telephone* customers within its "telephone service area." If all of a state video franchise holder's telephone customers have access to its video service (as is typically the case for incumbent cable operators), then we need not impose any further obligation on the holder. Such a state video franchise holder

[608] CCTA Opening Comments on the PD at 5 (claiming that the statute merely reiterated the "nondiscrimination requirement").

shall establish this condition in an affidavit submitted to the Commission within 30 days of issuance of its state video franchise.

For all other state video franchise holders subject to Public Utilities Code § 5890(c), the Commission will establish additional "safe harbor" standards in Phase II of this rulemaking. SureWest rightly recognizes that our establishing safe harbor provisions may help smaller video service providers to more readily demonstrate compliance with the "reasonableness requirement."[609]

We also will give state video franchise holders the option of demonstrating "what qualifies as a 'reasonable time' on a case-by-case basis. . . ."[610] If it does not meet any of our safe harbor conditions, a state video franchise holder subject to Public Utilities Code § 5890(c) shall file an application with the Commission that proposes "reasonable" build-out requirements. The application shall be filed any time in the calendar year in which a communications company with fewer than one million California telephone customers applies for a state video franchise. The application will lead to a proceeding that will consider the proposed build-out requirements. Any interested party may protest the proposed standards. A vote of the full Commission will conclude the proceeding. We find that these build-out procedures are "carefully specified," as Small LECs requests.[611]

As indicated by requirements found in DIVCA, the design of build-out requirements is a fact-specific endeavor. The statutorily imposed build-out requirements are conditioned upon (i) the type of technology predominantly used by the state video franchise holder, (ii) the number of customers in the state video franchise holder's existing telephone service area, and (iii) the date when the state video franchise holder begins providing video service pursuant to DIVCA. Further, we can envision special circumstances (e.g., challenging

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[609] See SureWest Opening Comments on the PD at 7 (recognizing that safe harbor standards may be of assistance to smaller video service providers).

[610] Id. at 6.

[611] Small LECS Opening Comments on the PD at 9.

terrain, long distances to potential subscribers' homes, and rights-of-way issues) that make it difficult for us to set uniform "reasonable" time frames.

Our design of any build-out requirements will take into account policies and facts relevant to whether video service will be offered to customers "within a reasonable time." The design process will consider, among others, those policies and facts considered by the Legislature in its design of build-out requirements. Thus, our build-out requirements will be conditioned upon (i) the type of technology predominantly used by the state video franchise holder, (ii) the number of customers in the state video franchise holder's existing telephone service area, and (iii) the date when the state video franchise holder will begin providing video service pursuant to DIVCA. We also will consider whether it is prudent to include build-out safety valves, similar to those afforded to other state video franchise holders in Public Utilities Code § 5890(e)(3)-(4).

In establishing requirements, we will remain cognizant of the Legislature's guidance regarding provision of video service in high-cost areas. Pursuant to Public Utilities Code § 5890(c), we will not design any build-out provision that requires a state video service holder to offer video service when the cost of doing so is substantially above the average cost of providing video service in that telephone service area. We envision that application of this statute will require fact-specific inquiries as to costs of video service provision in areas where the state video service holder alleges that providing service is uneconomic.

3. Rebuttable Presumption that Discrimination in Providing Video Service Has Not Occurred

Public Utilities Code § 5890(d) establishes that when "a holder provides video service outside of its telephone service area, is not a telephone corporation, or offers video service in an area where no other video service is being offered, other than direct-to home satellite service, there is a rebuttable presumption that discrimination in providing service has not occurred within those areas." Thus, if not rebutted, the existence of any one of these three factors is sufficient to

prove that a state video franchise holder is not discriminating in its provision of video service.

If a party contests this presumption, the statute provides that the Commission "may review the holder's proposed video service area to ensure that the area is not drawn in a discriminatory manner."[612] The Legislature's decision to apply this provision to a "holder" rather than an "applicant" is significant. The statute effectively provides that the Commission may conduct its review of a proposed video service area after a state video franchise is awarded.

Seeking to accelerate this review, CCTPG/LIF asks that we examine a state video franchise holder's video service area for evidence of discrimination during the application process. We, however, find that there is no statutory basis for CCTPG/LIF's request. First, Public Utilities Code § 5890(d) only gives us express authority to review whether a "holder's" proposed video service area is not drawn in a discriminatory manner.[613] The statute provides no such authority with respect to *applicants*. Second, Public Utilities Code § 5840(h)(1) affords the Commission just thirty calendar days to review an application to determine whether it is complete. This strict time constraint on the application process is ill-suited for reviewing a proposed video service area. Assessing how a proposed video service area is drawn would extend well beyond merely reviewing whether an application is complete, and may require more than thirty calendar days to finish.

We find that review of a proposed video service area at the time of application is not necessary for proper enforcement of DIVCA. If a state video

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[612] CAL. PUB. UTIL. CODE § 5890(d).

[613] Our explicit authority to review the boundaries of a video service area for signs of discrimination only applies in the presence of one of three conditions: (i) a state video franchise holder is providing video service outside of its telephone service area, (ii) a state video franchise holder is not a telephone corporation, or (iii) a state video franchise holder is offering video service in an area where no other video service is being offered, other than direct-to home satellite service. Id.

franchise holder's service area is drawn in a discriminatory manner, Public Utilities Code § 5890(g) permits local governments to bring complaints concerning discrimination to the Commission. Furthermore, we can open our own investigations on discrimination matters.

4. Extension of Time for Meeting Build-Out Requirements

We conclude by noting that DIVCA provides two types of extensions for state video franchise holders that are unable to meet the schedule for the build-out requirements. First, Public Utilities Code § 5890(e)(2)-(3) establishes automatic extensions for build-out requirements imposed by Public Utilities Code § 5890(e)(1)-(2). These extensions go into effect if a significant percentage of households fail to subscribe to a state video franchise holder's service. Second, Public Utilities Code § 5890(f) affords the Commission discretionary authority to grant an extension for the build-out requirements imposed in subsections (b), (c), and (e). The statute states that we may grant this extension only if "the holder has made substantial and continuous effort to meet the requirements of the subsections."[614] In determining whether this effort was made, the statute directs us to conduct public hearings and consider a number of factors outside of the state video franchise holder's control.[615] We must establish a new compliance deadline if we grant an extension.[616]

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[614] Id. at § 5890(f)(4).

[615] Id. at § 5890(f)(2)-(3).

[616] Id. at § 5890(f)(4).

C. State Video Franchise Holder Access to Utility Support Structures and Rights-of-Way

DIVCA authorizes state video franchise holders to use local entities' public rights-of-way even though such providers are not public utilities.[617] The Commission clarifies that such video service providers also may utilize support structures of the large and mid-sized incumbent local exchange carriers and investor-owned electric utilities such as utility poles, conduit and ducts, as well as rights-of-way, as established by the Commission in D.98-10-058.[618]

Confirming that state video franchise holders have access to necessary utility infrastructure is consistent with the Legislature's express intent that DIVCA create "a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider . . . over another."[619] The inability of some state video franchise holders to access utility support structures that other franchised video service providers may access pursuant to D.98-10-058 if they happen to be telecommunications utilities or cable companies, creates a competitive distortion. To correct this imbalance, all state video franchise holders shall be entitled to access the support structures and rights-of-way of large and mid-sized ILECs and investor-owned electric utilities under the same rates, terms and conditions set forth in D.98-10-058 for access by telecommunications companies and cable operators.

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[617] *See* §5830(s) (defining video service as "video programming services, cable service, or OVS service provided through facilities located at least in part in public rights-of-way without regard to delivery technology ….")

[618] Decision 98-10-058, Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Oct. 22, 1998.

[619] CAL. PUB. UTIL. CODE § 5810(a)(2)(A).

XV. Enforcement of Statutory Provisions

Parties' comments on the draft General Order establish that there is significant public interest in the details regarding how we plan to enforce DIVCA. We agree that more information on enforcement will not only better inform and guide all parties, but it will highlight this Commission's resolve to enforce the law vigorously. Thus, this section and Section XIII (Reporting Requirements) provide further detail on how we intend to enforce provisions of DIVCA.

In this section, we describe the Commission's authority to enforce DIVCA provisions and review specific procedures that the Commission will use to guide its administration of the statute. We also clarify the role of DRA in the administration of DIVCA.

A. Enforcement Actions Pursuant to Division 2.5

Division 2.5 of DIVCA establishes most of the Commission's responsibilities as the state video franchising authority.[620] Division 2.5 gives the Commission the ability to promulgate rules on franchising, antidiscrimination, and reporting. It also instructs the Commission to prevent any rate increases for stand-alone, residential, primary line, basic telephone services that will finance the deployment of video services.

Public Utilities Code § 5890(g) outlines key actions the Commission may take to enforce Division 2.5:

> Local governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section, or the state franchising authority may open an investigation on its own motion. The state franchising authority shall hold public hearings before issuing a decision. The commission may suspend or revoke the franchise

[620] Commission authority to impose user fees is established in Public Utilities Code §§ 440-444, which are not part of Division 2.5.

> if the holder fails to comply with the provisions of this division.[621]

The OIR relied on Section 5890 when reaching tentative conclusions regarding the scope of our authority to resolve complaints by local governments, open an investigation on our own motion, hold public hearings, and suspend or revoke a state video franchise.

1. Position of Parties

AT&T argues that the OIR defined the scope of our investigative authority too broadly. AT&T bases its position on the following portion of Public Utilities Code § 5890(g) (emphasis added): "Local governments may bring complaints to the state franchising authority that the holder is not offering video service *as required by this section* or the state franchising authority may open an investigation on its own motion."[622] According to AT&T, the text of this provision "must be read in context to mean that local governments may complain regarding matters 'required by this section' or the Commission may investigate regarding matters 'required by this section.' To conclude otherwise implies language that is simply not there, namely that the Commission has authority to open an investigation on its own motion regarding 'any matter addressed by the AB 2987.'"[623]

CCTA similarly argues that the investigative authority of the Commission is limited. Reviewing Public Utilities Code § 5890(g), CCTA concludes that "complaints filed at the Commission by local government, and the Commission's ability to open investigations on its own motion, are both limited to the issue of nondiscriminatory access, and do not extend to all provisions of the legislation."[624]

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[621] CAL. PUB. UTIL. CODE § 5890(g).

[622] AT&T Opening Comments at 10.

[623] Id. at 10-11.

[624] CCTA Opening Comments at 9.

CCTA adds that to "read the Legislation to authorize Commission review of all requirements under the bill unlawfully expands the Commission's authority.[625]

In contrast, DRA argues that we have authority to institute investigations on any matter within the scope of Division 2.5 of DIVCA. DRA states that its opposition is incorrect when it asserts that "nothing in . . . the bill . . . provides the Commission the authority to open investigations on issues outside § 5890."[626] Rebutting the communications companies, DRA points to the text of Public Utilities Code § 5890(g):

> [T]he statutory language not only refers to complaints from local governments regarding the requirements of "this section," meaning § 5890, but *also* to the authority of the Commission to "suspend or revoke the franchise if the holder fails to comply with the provisions of *this division*." "This division" refers to the new Division 2.5 of the Public Utilities Code, *The Digital Infrastructure and Video Competition Act of 2006*, which is the entire video franchising law, not merely one section of it.[627]

DRA concludes that we have broad investigative authority, pursuant to the broad revocation authority granted by Public Utilities Code § 5890(g).

TURN argues that it "undermines the legislative intent" to limit the Commission's investigative powers to issues related to possible discrimination.[628] According to TURN, it is "absurd" and "illogical" that DIVCA would prohibit cross-subsidization and give DRA authority to advocate on a variety of matters without granting the Commission authority to investigate corresponding issues.[629] TURN adds that to "limit the Commission inherent investigative powers would directly contravene" the principle that DIVCA is intended to "maintain all

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[625] Id.

[626] DRA Reply Comments at 6 (criticizing AT&T).

[627] Id.

[628] TURN Reply Comments at 9.

[629] Id.

existing authority of the . . . Commission as established in state and federal statutes."[630]

CCTPG/LIF asserts that nothing "in § 5890(g) restricts local governments from complaining, or restricts Commission investigative authority, to the issue of build out."[631] As "demonstrated by the provisions of DRA advocacy regarding § 5900 and § 5950, as well as § 5890," CCTPG/LIF states "Commission regulatory and investigative authority extends to at least all of these areas."[632]

2. Discussion

Public Utilities Code § 5890(g) provides that the scope of our revocation authority extends to all provisions of "this division," i.e., Division 2.5. Accordingly, we conclude that the Commission may suspend or revoke a state video franchise if it finds any of the following:

> a. The state video franchise holder has failed to comply with any demand, ruling, or requirement of the Commission made pursuant to and within the authority of Division 2.5.
>
> b. The state video franchise holder has violated any provision of Division 2.5 or any rule or regulation made by the Commission under and within the authority of this division.
>
> c. A fact or condition exists that, if it had existed at the time of the original application for the state franchise (or transfer or renewal thereof), reasonably would have warranted the Commission's refusal to issue the state video franchise originally (or grant the transfer or renewal thereof).

Like CCTPG/LIF, DRA, and TURN, we interpret Public Utilities Code § 5890(g) to give us broad authority to suspend or revoke a state video franchise.[633]

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[630] Id. (quoting Public Utilities Code § 5810(a)(2)(G)).

[631] CCTPG/LIF Reply Comments at 2.

[632] Id.

[633] Id.; DRA Reply Comments at 6; TURN Reply Comments at 9.

We find, however, that our investigative authority is not similarly broad. DIVCA expressly restricts our use of other enforcement actions. With respect to Division 2.5 provisions, we have specific authority to impose a fine when a state video franchise holder is in violation of Public Utilities Code § 5890.[634] We are given authority to address local entities' complaints only when the complaints arise under Public Utilities Code § 5890.[635]

The scope of our authority to initiate an investigation is less defined. Public Utilities Code § 5890(g) provides that "the state franchising authority may open an investigation on its own motion." But unlike the other enforcement actions described above, DIVCA is silent on the scope of our authority to initiate an investigation. Thus, we look to other DIVCA provisions to clarify the extent of this enforcement authority.

Our authority to regulate, as expressly identified and assigned in DIVCA, serves as a marker of the scope of our authority to enforce statutory and regulatory provisions. DIVCA endows the Commission with authority to regulate franchising (§§ 5840 and 5950), antidiscrimination (§ 5890), reporting (§§ 5920 and 5960), the prohibition on the use of rate increases for stand-alone, residential, primary line, basic telephone services to finance video deployment (§§ 5940 and 5950), and annual user fees (§ 401, §§ 440-444, § 5840). For other provisions, the Commission lacks explicit regulatory authority. Localities are afforded the authority to regulate collection and payment of franchise fees (§ 5860), PEG channel requirements (§ 5870), the Emergency Alert System (§ 5880), and, notably, federal and state customer service and protection standards (§ 5900).

This statutory guidance convinces us that no party appropriately characterizes the scope of our investigative authority. Those arguing that we

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[634] CAL. PUB. UTIL. CODE § 5890(g).

[635] Id.

may initiate investigations only if Public Utilities Code § 5890 is implicated fail to consider the other provisions we are charged with regulating. Those contending that we may initiate investigations regarding any portion of Division 2.5 confuse our statutory authority to initiate investigations with our authority to revoke a state video franchise.

Our review of our regulatory authority persuades us that the Commission only may initiate investigations regarding franchising; antidiscrimination and build-out; reporting; annual user fees; and the prohibition on the use of rate increases for stand-alone, residential, primary line, basic telephone services to finance video deployment.[636] It would make little sense for us to initiate an investigation if we do not have authority to regulate in response to investigative findings. Matters regulated by local entities should be investigated by local entities. In these instances, local entities are best able to tailor enforcement actions to the facts of a particular case. Indeed, DIVCA expressly anticipates that enforcement of the Act's provisions often will be resolved in courts, which serve as a venue for local entities to pursue claims against state video franchise holders.[637]

These limits on our ability to initiate investigations guide our determination of when we are required to hold public hearings. Public Utilities Code § 5890(g) does not specify whether the requirement to "hold public hearings before issuing a decision" applies to matters raised pursuant to a division or particular section(s). This ambiguity, however, is easily resolved when we consider our authority to launch investigations. A public hearing is used as a tool for gathering information in an investigation. If we do not have

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[636] Pursuant to our statutory authority under Division 2.5, the Commission will initiate investigations as to the following: Public Utilities Code §§ 5840, 5890, 5920, 5940, 5950, and 5960.

[637] Court resolution is explicitly envisioned by Public Utilities Code §§ 444(d), 5850(d), 5860(i), 5870(p), 5890(i), and 5900(h).

authority to investigate a matter, it would be unreasonable to find that we are required to hold public hearings on the matter. Thus, we conclude that that Commission is required to hold hearings only in formal proceedings regarding franchising; antidiscrimination and build-out; reporting; the prohibition of financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services; or user fees.

DIVCA does not define the type of required "public hearing." Public Utilities Code § 5890(g) gives the Commission flexibility to determine which type of public hearing could best develop the record needed for deciding an individual matter. Given current Commission practice, an investigation accordingly may include evidentiary, full panel, and public participation hearings conducted in public.[638]

B. Enforcement of Statutory Provisions Subject to Commission Regulation

This section describes how the Commission will enforce specific DIVCA provisions subject to Commission regulation. As noted above, DIVCA tasks us with regulating franchising; antidiscrimination and build-out; reporting; the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services; and user fees.

1. Franchising

Pursuant to Public Utilities Code §§ 5840 and 5930, we determine that the Commission has the authority to reject an application or suspend and/or invalidate any state video franchise that was issued to an applicant that was ineligible for the franchise at the time of application. As discussed in Section X,

[638] The Commission currently holds four different types of public hearings: evidentiary hearings, quasi-legislative hearings, full panel hearings before the Commission, and public participation hearings. We, however, know of no situation where a complaint proceeding included quasi-legislative hearings, so we have removed this type of hearing from the available options.

any interested party can bring facts to the Commission that are relevant to our determination of eligibility pursuant to Public Utilities Code §§ 5840 or 5930.

We also find that the Commission has the authority to suspend or revoke a state video franchise if it determines that a fact or condition exists that, if it had existed at the time of the original application for the state video franchise (or transfer or amendment thereof), reasonably would have warranted the Commission's refusal to issue the state video franchise originally (or grant the transfer or amendment thereof). This enforcement authority flows from (i) our general enforcement powers in Public Utilities Code § 5890(g) and (ii) our specific authority to administer the state video franchise application process, pursuant to Public Utilities Code § 5840.[639]

Pursuant to Public Utilities Code § 5890(g), we may open an investigation to determine whether an applicant failed to comply with DIVCA franchising provisions. An investigation, consistent with standard Commission practices, shall be launched pursuant to formal action of the Commission. The initiation of the investigation shall require a majority vote at a Commission meeting. In particular, an allegation of a material misstatement or omission will likely trigger either (i) an order to show cause for why a franchise should not be suspended, revoked, or declared invalid or (ii) an order initiating a broad investigation into the appropriate Commission response to the alleged facts. The order shall either contain a report or the declarations of Commission witnesses pertaining to facts that demonstrate an investigation of Public Utilities Code § 5840 compliance is warranted. An order also could temporarily restrain a state video franchise holder from offering video service until further Commission action.

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[639] See CAL. PUB. UTIL. CODE § 5840 (granting us authority to review a state video franchise application and determine whether it is complete).

Any formal Commission investigation shall include public hearings, with the particular form of public hearing determined by Commission ruling.[640] If we initiate a formal investigation, interested parties may make motions to the Commission for permission to participate in the investigation and hearing process. Any such investigation would be conducted following the Commission's procedures for adjudicatory matters.

2. Antidiscrimination and Build-Out Requirements

Many parties ask us to provide more detail on how we plan to enforce antidiscrimination and build-out requirements. Because of the great interest in this topic, we set forth the Commission's specific enforcement strategy related to these franchise obligations, and we tailor our reporting requirements to ensure that we routinely receive key information pertaining to antidiscrimination and build-out requirements. Related reporting requirements are described in detail in Section XIII. The Commission reiterates its resolve to enforce the antidiscrimination and build-out requirements contained in DIVCA.

a) Positions of Parties

Many consumer organizations urge us to describe our enforcement mechanisms, especially as they relate to antidiscrimination and build-out requirements. Parties calling for more such discussion include CCTPG/LIF,[641] Greenlining,[642] DRA,[643], CFC,[644] and TURN.[645]

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[640] Id. at § 5890(g).

[641] CCTPG/LIF Opening Comments at 3.

[642] Greenlining Opening Comments at 3.

[643] DRA Opening Comments at 15.

[644] CFC Opening Comments at 4.

[645] TURN Reply Comments at 5.

b) Discussion

The Commission will undertake significant monitoring for enforcement of the antidiscrimination and build-out requirements. Although the Commission will provide public reports regarding video and broadband services "on an aggregated basis,"[646] each state video franchise holder will report to the Commission the data underlying the public reports at a high level of disaggregation. On a confidential basis, the Commission's staff will study this disaggregated data closely, in order to determine and track the progress that each state video franchise holder is making towards fulfilling its build-out requirements. This detailed review will have direct bearing on any request for an extension of time for meeting the build-out requirements. Public Utilities Code § 5890(f)(4) dictates that we may grant an extension only if a state video franchise holder has "made substantial and continuous effort" toward meeting build-out requirements.

Formal investigation of antidiscrimination and build-out compliance may be launched in two ways: (i) in response to a complaint filed by a local government, or (ii) on the Commission's own motion. Under the first scenario, a local government may bring a complaint concerning a state video franchise holder's failure to meet the requirements of Public Utilities Code § 5890 by filing a standard complaint at the Commission. The complaint shall include sworn declarations pertaining to the facts that the local government believes demonstrate a failure to fulfill obligations imposed by Public Utilities Code § 5890. In addition, the local entity filing a complaint shall clearly identify that the complaint pertains to a failure to meet an obligation imposed by Public Utilities Code § 5890.

Under the second scenario, an investigation will be launched pursuant to formal action of the Commission. At a Commission meeting, we shall consider

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[646] CAL. PUB. UTIL. CODE § 5890(c).

and formally vote upon an order to show cause or an order instituting an investigation. Consistent with current practice, the document initiating the investigation will contain a report prepared by Commission staff and/or declarations of Commission witnesses pertaining to facts that demonstrate an investigation of Public Utilities Code § 5890 compliance is warranted.

If the Commission initiates an investigation involving alleged failure to meet build-out requirements, interested parties may make motions to the Commission for permission to participate in the investigation and hearing process. DIVCA requires the Commission to hold public hearings in conjunction with an antidiscrimination or build-out investigation, and the Commission will determine through rulings which form or forms of hearings to use.[647]

Multiple penalties may be imposed if the Commission finds that a state video franchise holder is not complying with Public Utilities Code § 5890. First, the Commission can impose fines. Specifically, "in addition to any other remedies provided by law," the Commission may "impose a fine not to exceed 1 percent of the holder's total monthly gross revenue received from provision of video service in the state each month from the date of the decision until the date that compliance is achieved."[648] Second, the Commission may suspend a state video franchise holder's state franchise.[649] Finally, in more serious cases, the Commission may revoke a state video franchise holder's state franchise.[650]

3. Reporting Requirements

We find that is unlawful for any applicant or state video franchise holder willfully to make any untrue statement of a material fact in any application,

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[647] Id. at § 5890(g) (declaring that the "state franchising authority shall hold public hearings before issuing a decision").

[648] Id. at § 5890(h).

[649] Public Utilities Code § 5890(g) states that "[t]he commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division."

[650] CAL. PUB. UTIL. CODE § 5890(g).

notice, or report filed with the Commission under DIVCA. Similarly, it is unlawful for any applicant or state video franchise holder willfully to omit to state in any such application, notice, or report any material fact which is required to be stated by DIVCA.

Formal investigation of compliance with DIVCA reporting requirements may be launched on the Commission's own motion.[651] An investigation also may be initiated in response to a complaint filed by a local government if the reporting requirement at issue is used to monitor compliance with Public Utilities Code § 5890.[652] Procedures regarding investigations parallel those outlined in the prior section. Enforcement actions, if any, will be consistent with the facts of the case and the authority granted to the Commission under DIVCA.

If the Commission initiates a formal investigation, interested parties may make motions to the Commission for permission to participate in the investigation and hearing process. DIVCA requires the Commission to hold public hearings in conjunction with a formal complaint or an investigation.[653]

With regard to penalties, Section VII.G of the draft General Order (Enforcement of Reporting Requirements) provided notice that failure to comply with reporting requirements could lead to suspension or revocation of a state video franchise. No party filed comments pertaining to this section of the General Order. Lacking any objection or comments, we conclude that our statement of how we will act to enforce reporting requirements generated little controversy, and the sanctions of franchise suspension and revocation are consistent with our statutory authority.[654]

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[651] Id.

[652] Id.

[653] Public Utilities Code § 5890(g) states that the "state franchising authority shall hold public hearings before issuing a decision."

[654] Public Utilities Code § 5890(g) states that "[t]he commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division."

We also conclude that we may levy fines in two instances. First, we may fine a company if it fails to provide financial reports required by Public Utilities Code § 443. Pursuant to Public Utilities Code § 444(a), we may assess "a penalty not to exceed 25 percent of the amount [a state video franchise holder's estimated user fee], on account of the failure, refusal, or neglect to prepare and submit the report" required by Public Utilities Code § 443. Second, we may fine a state video franchise holder if it fails to provide accurate reports needed to enforce antidiscrimination and build-out provisions. In particular, a key function of the annual broadband and video reporting requirements (§ 5960) is to enable the Commission to enforce Public Utilities Code § 5890. Thus, our authority to impose penalties pursuant to Public Utilities Code § 5890(g) flows to instances where a state video franchise holder misstates or omits information required by Public Utilities Code § 5960.

4. Prohibition Against Financing Video Deployment with Increases to Rates of Stand-Alone, Residential, Primary Line, Basic Telephone Service

Two DIVCA provisions prohibit use of rate increases for stand-alone, residential, primary line, basic telephone services to finance video deployment. First, Public Utilities Code § 5940 states that the "holder of a state franchise . . . who also provides stand-alone, residential, primary line, basic telephone service shall not increase this rate to finance the cost of deploying a network to provide video service." Second, Public Utilities Code § 5950 prohibits incumbent local exchange carriers that obtain a state video franchise from changing any rate for basic telephone service until January 1, 2009, unless the incumbent is subject to rate-of-return regulation.

a) Position of Parties

DRA criticizes the draft General Order for not including language that directly addresses the cross-subsidization provisions.[655] To overcome this perceived deficiency, DRA urges the Commission to add the following new section to the General Order:

> Holders of a state video franchise who provide stand-alone, residential, primary line, basic telephone service must report to the Commission and the Division of Ratepayer Advocates on a quarterly basis commencing on April 1, 2008 with annual information as of January 1, 2008 and each year thereafter: (1) increases in the rate for stand-alone, residential, primary line, basic telephone service by wire center or such other geographical division as is employed by the service provider when pricing this service; (2) financial and engineering information showing the cost of deploying its network to provide (a) basic residential primary line telephone service, and (b) video service in those wire centers or geographical divisions where there have been increases in the rate for stand-alone, residential, primary line, basic telephone service.
>
> The Commission and the Division of Ratepayer Advocates retain full authority provided in Public Utilities Code to audit state franchise holders who are also providers of stand-alone, residential, primary line, basic telephone service to enforce the Public Utilities Code § 5940 prohibition against cross-subsidy.[656]

DRA contends that this additional language appropriately accounts for how DIVCA "adds to" our obligations to ensure that "telephone utilities do not cross-subsidize the operations of their non-regulated services with revenues from the regulated utility."[657]

TURN similarly disapproves of our failure to provide "any procedures to ensure that Public Utilities Code Section 5940's prohibition on cross-

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[655] DRA Opening Comments at 3.

[656] DRA Opening Comments, Attachment B, at 34.

[657] Id. at 3.

subsidization is enforced."[658] TURN provides an elaborate analysis and alleges that "the ILECs are 'laying fiber away' on their regulated books of account, to be recovered from future basic service rate increases."[659] Given its concerns, TURN argues that the Commission must establish additional reporting requirements: "[F]rom a reporting perspective, there must be procedures established in California that further develop ARMIS-based data, and result in a consistent set of procedures that allow the tracking of video-related investment."[660]

AT&T responds to both of TURN's arguments. First, AT&T takes issue with TURN's allegation that ILECs are "laying fiber away" on their regulated books of account:

> AT&T California states that AT&T's ARMIS data submitted to the FCC in accordance with federal cost allocation rules under Code of Federal Regulations Part 64 are consistent with all federal requirements. Any suggestions by TURN that AT&T California sends a mixed signal in its filings are unfounded and without merit. All data submitted under Part 64 are subject to independent biennial audit requirements. AT&T California complies with all applicable requirements.[661]

Second, AT&T declares that holding up the granting of a state video franchise "while numerous parties debate detailed accounting issues would violate the spirit and letter of AB 2987."[662] AT&T notes that DIVCA freezes basic residential telephone rates until January 1, 2009, so in any event, there is no current need for reports to look into whether companies are increasing rates of stand-alone, residential, primary line, basic telephone services to finance video deployment.[663]

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[658] TURN Opening Comments at 2.

[659] Id.

[660] Id. at 14.

[661] Id. at 17 (citations omitted).

[662] AT&T Reply Comments at 16.

[663] Id.

SureWest agrees that the "Commission should not adopt revisions proposing comprehensive regulations related to cross-subsidization."[664] SureWest contends that these comprehensive regulations are not needed, due to the freeze on basic rates adopted DIVCA.[665] SureWest adds that nothing in DIVCA authorizes the expansive reporting requirements requested by TURN and DRA.[666]

Verizon contends that "expanded ILEC-only cross-subsidy monitoring is unnecessary and inconsistent with the Act."[667] It argues that "TURN's cross-subsidy analysis is a classic example of the kind of anticipatory regulation that the Commission should avoid."[668] Verizon presents a multi-part rebuttal of TURN's arguments. Among other points, Verizon asserts that "TURN's own data clearly show that video costs are being properly allocated to non-regulated accounts, not vice versa, as TURN contends."[669] Verizon also asserts that TURN's analysis ignores D.06-08-030, which found that local telecommunications markets are competitive. Verizon states that this decision establishes that "[b]asic residential price increases . . . cannot be assumed to 'automatically' violate Section 5940 since they are constrained by competition, not driven by the need 'to finance' the cost of deploying a video network."[670]

b) Discussion

California telecommunications companies already are subject a variety of measures designed to prevent unlawful cross-subsidization between telecommunications costs and non-telecommunications costs. These measures,

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[664] SureWest Reply Comments at 8.

[665] Id. at 8-10.

[666] Id.

[667] Verizon Reply Comments at 19.

[668] Id. at 20.

[669] Id.

[670] Id. at 21.

imposed by both the federal and state government, obviate the need for additional rules to prevent financing of video deployment with rate increases for stand-alone, residential, primary line, basic telephone services.

With respect to the federal government, the FCC's Part 64 regulations require the accounting separation of telecommunications costs from the non-telecommunications costs for telecommunications utilities, such as Verizon, AT&T, and SureWest.[671] These communications accounts also are subject to independent biennial audits. Verizon's data suggests that there is no merit in TURN's attempt to cast doubt regarding the maintenance of these accounts.

With respect to the state government, this Commission has a variety of protections in place to ensure that there is no illegal cross-subsidization. Cross-subsidization has long been a concern of this Commission. Public Utilities Code § 709.2, which authorized the Commission to open intrastate interexchange telecommunications services to competition, requires the Commission to determine "that there is no improper cross-subsidization of intrastate interexchange telecommunications service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs."

We remain vigilant in our efforts to enforce Public Utilities Code § 709.2. For example, the Commission spent four years reviewing affiliate transactions for the period of 1997 to 1999. Our subsequent decision found that although there were some "problems with the internal controls . . . , regulated operations are adequately compensated and do not subsidize unregulated aspects of the business."[672]

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[671] 47 C.F.R. 64.901.

[672] D.04-09-061 at 63.

Public Utilities Code § 495.7 further requires tariffing of basic residential rates. Tariffing entails special Commission reviews, which give us the opportunity to reject or suspend any price increases that lead to unlawful cross-subsidization.[673] A telecommunications carrier must file an advice letter with the Commission before it increases its basic residential rates, and the carrier must give consumers thirty-day advance notice of this change. The Commission need only reject the advice letter if it determines a proposed rate increase will result in unlawful cross-subsidization. Alternatively, if need be, the Commission may rescind any non-complying tariff that goes into effect.

In the video context, Public Utilities Code § 5950 imposes special price controls that are designed to prevent illegal cross-subsidization. The statute prohibits incumbent local exchange carriers that obtain a state video franchise from changing any rate for basic telephone service until January 1, 2009, unless the incumbent is subject to rate-of-return regulation.[674] This provision ensures that there is no opportunity for basic residential rates to be increased to support video service operations for approximately the next two years.

Furthermore, even after January 1, 2009, stand-alone, residential, primary line, basic telephone service remains subject to tariff restrictions. It will be relatively easy to review any changes to rates of stand-alone, residential, primary line basic telephone service, either prospectively or retrospectively, to ensure that the increase is not used to finance video deployment.

A formal investigation into alleged illegal cross-subsidization may be initiated by the Commission at any time.[675] Due to Public Utilities Code § 1702, as implemented by Rule 4.1 of the Commission's Rules of Practice and Procedure,

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[673] We note that D.06-08-030 and DIVCA have frozen basic residential rates until January 1, 2009. In addition, D.06-12-044 makes it clear that all advice letter filings for tariff changes remain subject to protest and possible rescission.

[674] CAL. PUB. UTIL. CODE § 5950.

[675] Id. at § 5890(g); id. at § 798.

local governments or individual consumers, among others, also may bring cross-subsidization complaints to the Commission.[676]

Any filing of a cross-subsidization complaint relying upon, at least in part, Public Utilities Code §§ 5940 or 5950 will trigger the requirement of a public hearing.[677] Once again, interested parties may make motions to us to participate in the investigation and hearing process associated with any complaint or investigation initiated by the Commission.

With respect to penalties for noncompliance, we find that a violation of the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services could subject a communications company to a wide range of sanctions. Sanctions for a telecommunications affiliate may include monetary sanctions pursuant to Public Utilities Code § 798[678] and possible reparations to harmed consumers pursuant to

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[676] Rule 4.1 of the Commission's Rules of Practice and Procedure ("A complaint may be filed by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.").

[677] See CAL. PUB. UTIL. CODE § 5890(g) ("The state franchising authority shall hold public hearings before issuing a decision.").

[678] Id. at § 798 ("Whenever the commission finds and determines that any . . . telephone corporation has willfully made an imprudent payment to, or received a less than reasonable payment from, any subsidiary or affiliate of, or corporation holding a controlling interest in, the . . . telephone corporation in violation of any rule or order of the commission, adopted and published by the commission prior to the transaction but after notice to, and an opportunity to comment by, the affected corporation, and the corporation has sought to recover the payment in any proceeding before the commission, the commission may, following a hearing, levy a penalty against the corporation not to exceed three times the required or prohibited payment, as the case may be, if the commission finds that the payment, in whole or part, was made or received by the corporation for the purpose of benefiting its subsidiary, affiliate, or holding corporation.").

the broad authority afforded to us by Public Utilities Code § 451.[679] Sanctions for a video affiliate may include suspension or revocation of its state video franchise.[680]

5. Submission of Regulatory Fees

Enforcement actions pursuant to Public Utilities Code § 444 are straightforward and uncontroversial. No party commented on this topic.

Public Utilities Code § 444 provides the Commission with specific enforcement authority to (i) impose penalties for the late submission of user fees, (ii) revoke or suspend a franchise when the state video franchise holder is in default for payment of the user fee for 30 days or more, and (iii) pursue collection of user fees in courts of competent jurisdiction. Before any such enforcement action is taken, the Commission will initiate an investigation and hold public participation hearings on alleged noncompliance.[681] Procedures for a Commission investigation here follow those used in enforcing other DIVCA provisions regulated by the Commission.

C. Enforcement of Consumer Protection Requirements

Section 5900(c) of DIVCA provides that the "local entity shall enforce all of the customer service and protection standards of this section with respect to complaints received from residents within the local entity's jurisdiction . . . ."[682] With this legislative directive in mind, the OIR envisioned a minimal role for the Commission in consumer protection.

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[679] See, e.g., D.04-09-062 (ordering Cingular to pay fines and make reparations in the amount of more than $12 million).

[680] CAL. PUB. UTIL. CODE § 5890(g).

[681] Id.

[682] Id. at § 5900(c).

1. Position of Parties

Some parties raise concerns related to consumer protection in their comments. On the one hand, CCTPG/LIF, and CFC comment in such a manner that clearly envisions a process whereby the Commission enforces and perhaps develops consumer protection rules.[683] On the other hand, the opposition of AT&T,[684] CCTA,[685] SureWest,[686] Small LECs,[687] and Verizon[688] to protests clearly envisions a limited role for the Commission in enforcing consumer protection laws. A more detailed description of these comments is available in Section IX.

Also several parties ask the Commission to develop its own consumer protection regulations. "Greenlining proposes that a detailing of initial consumer protections should be requested of consumers and the cable companies in a separate hearing that is part of this OIR and will lead to final consumer protection rules by the end of 2007."[689] Likewise, TURN laments the "lack of specific provisions in the OIR and G.O. for enforcing . . . consumer protection requirements" of DIVCA.[690]

2. Discussion

We have carefully reviewed the record in this proceeding and the specific language of Public Utilities Code § 5900(c). Based on the plain language of the

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[683] CCTPG/LIF cites Public Utilities Code § 5840(i)(3) as implying Commission authority to enforce consumer protection rules. CCTPG/LIF Opening Comments at 7. CFC concludes that the Commission has a role in consumer protection. CFC Opening Comments at 8. Neither of these parties, however, calls for the development of specific consumer protection rules.

[684] AT&T Reply Comments at 2.

[685] CCTA Reply Comments at 8-10.

[686] SureWest Reply Comments at 5-7.

[687] Small LECs Opening Comments at 2.

[688] Verizon Opening Comments at 7.

[689] Greenlining Opening Comments at 11.

[690] TURN Reply Comments at 6.

statute, we find that the local entity is empowered with the primary enforcement of consumer protection laws and is the place where the Legislature intended video consumers should bring complaints concerning customer service.

DIVCA is explicit about how local entities should enforce the consumer protection provisions. DIVCA orders local entities to adopt a schedule of penalties for any material breach of the consumer protection provisions.[691] For any alleged material breach of consumer protection standards, a local entity must provide the state video franchise holder written notice of the alleged breach and give the holder at least thirty days to remedy the specified material breach.[692] DIVCA also sets forth the method for compounding penalties[693] and prescribes the distribution of penalty proceeds between the local entity and the Digital Divide Account.[694] Any interested person may seek judicial review of a local entity's decision in a court of appropriate jurisdiction.[695]

As compared to a local entity, the Commission's role in enforcement of consumer protection provisions is considerably more limited. DIVCA neither provides for us to initiate investigations against a state video franchise holder, nor does DIVCA ask us to determine whether material breaches of the consumer protection standards have occurred. We find that we have no statutory authority to adjudicate parties' complaints concerning alleged violations of consumer protection provisions.

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[691] CAL. PUB. UTIL. CODE § 5900(d).

[692] Id. at § 5900(e).

[693] Id. at § 5900(f).

[694] Id. at § 5900(g). CCTPG/LIF similarly requests that fines "assessed on state franchise holders for not complying" with Public Utilities Code § 5890 "should go into the Digital Divide Account, established pursuant to Cal. Public Util. Code Sec. 280.5." CCTPG/LIF Opening Comments at 9. We, however, find no statutory basis for this request. The Digital Divide Account was established only for receipt of penalties collected pursuant to Public Utilities Code § 5900.

[695] CAL. PUB. UTIL. CODE § 5900(h).

The Commission's authority to respond to a violation of a consumer protection provision is limited to suspension or revocation of a state video franchise.[696] Given that the Commission has no independent regulatory authority over consumer protection, we find that it is appropriate for us to exercise this authority to revoke or suspend a state video franchise only in response to pattern and practice of material breaches that are established by local entities or the courts.

The Commission may initiate a legal proceeding to examine the extent of a state video franchise holder's pattern and practice of consumer protection breaches, as found by local entities or courts. In conducting this legal proceeding, the Commission shall not consider the merits of alleged material breaches de novo. Instead, the Commission only will consider whether enforcement actions and penalties assessed by a local entity were either uncontested or sustained by courts and whether these enforcement actions and penalties rise to a level such that state video franchise suspension or revocation is warranted. We will rely upon these considerations when determining whether a state video franchise holder's actions warrant suspension or revocation of the state video franchise.

D. Procedures for Conducting Investigations or Hearing Complaints

When we address complaints by local entities and conduct investigations, the OIR tentatively concluded that we will follow our current Rules of Practice and Procedure to the extent that doing so is consistent with the authority granted to this Commission by the Legislature. We also tentatively concluded that the

[696] Id. at § 5890(g) (giving the Commission the authority to "suspend or revoke the franchise if the holder fails to comply with the provisions of this division").

Commission will decide matters brought before it by making findings that are "supported by substantial evidence in light of the whole record."[697]

1. Comments of Parties

League of Cities/SCAN NATOA argues that the Commission should adopt "clear and concise rules and procedures that would permit the League/SCAN NATOA members as well as their cable and video service customers to timely and appropriately contribute in all phases of the state-issued franchise process . . . ."[698] In particular, League of Cities/SCAN NATOA states that "[t]he Commission's Rules of Practice and Procedure must be amended to accommodate complaints to be filed by local government."[699] League of Cities/SCAN NATOA voices concerns "that such procedures would be made binding upon local governments without any modifications of the current complaint procedure set forth in Article 4, Chapter 1, Title 20 of the California Code of Regulations . . . ."[700] League of Cities/SCAN NATOA points out that "Rule 4.1 does not now address complaints against video service providers in connection with their provision of video services."[701]

Similarly, Greenlining argues that the Commission must "amend its rules of practice and procedure to allow complaints to be filed by local governments."[702]

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[697] CAL. CIV. PROC. CODE § 1094.5. In cases other than those "in which the court is authorized by law to exercise its independent judgment on the evidence, . . . abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." Id. at § 1094.5(b). AB 2987 does not authorize an independent review of the evidence, so this formulation of the abuse of discretion standard governs our review issues arising under the statute.

[698] League of Cities/SCAN NATOA Reply Comments at 13.

[699] League of Cities/SCAN NATOA Opening Comments at 16.

[700] Id. at 17.

[701] Id. at 17.

[702] Greenlining Reply Comments at 11.

Greenlining considers its and other consumer organizations' participation to be an important consumer protection in Commission proceedings.[703]

2. Discussion

In conducting investigations and hearing complaints filed by local entities, the Commission needs rules of practice and procedure to guide the conduct of its hearings and ensure that it does not act in an arbitrary way. Accordingly, the OIR proposed to follow the existing Rules of Practice and Procedure to the extent that doing so is consistent with the authority granted to this Commission by the Legislature.

As League of Cities/SCAN NATOA demonstrates, sections of the Commission's Rules of Practice and Procedure do not apply. In particular, Rule 4.1 restrictions that limit filing of complaints to actions done or omitted by utilities is not relevant and inconsistent with DIVCA. DIVCA expressly provides that "[l]ocal governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section [5890]."[704] We, therefore, conclude that sections of the Rules pertaining to who can complain and what they can complain about cannot apply to proceedings regarding DIVCA.

This conclusion raises an important question: How can local entities and other parties participating in a complaint or investigation know which sections of the Rules of Practice and Procedure remain applicable in a specific situation? Since parties to this proceeding have not addressed this matter in detail, we will address these issues in Phase II of this proceeding. We will invite parties to this proceeding to propose deletions or modifications to any rules in the Commission's Rules of Practice and Procedure that the parties believe are inconsistent with DIVCA.

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[703] Greenlining Opening Comments at 9.

[704] CAL. PUB. UTIL. CODE § 5890(g).

Finally, we agree with Greenlining's comment that participation of consumer groups such as itself plays a valuable role in Commission proceedings. Once a local government or the Commission initiates a proceeding, interested parties then may contribute the proceeding.

E. The Role of DRA

Pursuant to Public Utilities Code § 5900(k), the "Division of Ratepayer Advocates shall have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950. For this purpose, the division shall have access to any information in the possession of the commission subject to all restrictions on disclosure of that information that are applicable to the commission." The OIR did not expound further on the role of DRA.

Many parties filed comments concerning the appropriate role for DRA as the Commission assumes its new role as sole state franchising authority. The comments indicate that DRA and parties require guidance on the role that DRA will play. Thus, this section clarifies the role of DRA in the administration of DIVCA.

1. Positions of Parties

DRA asks us to revise the General Order to "to clarify [its] responsibilities and to explicitly include DRA in various notification, service, and data production requirements."[705] In its attachment to its opening pleading, DRA amends the General Order to (i) name itself as a mandated recipient of all reports and notices;[706] (ii) require the Commission to provide notice to DRA on the completeness of a franchise application;[707] (iii) enable itself to file protests to

[705] DRA Opening Comments at 2-3.

[706] Id., Attachment B, at 12, 19-20, 22-25, 27-28, 31-35.

[707] Id. at 13.

franchise applications and require other protestants to service notices on DRA;[708] and (iv) empower itself to file complaints against franchise holders at any time.[709]

Local entities call for clarification regarding DRA's role. Los Angeles County laments that neither the OIR nor the draft General Order refer to DRA or its role in Commission proceedings.[710] Likewise, Oakland notes the advocacy role assigned to DRA, and also argues that "[t]he GO also does not explain how DRA will make that advocacy manifest."[711]

Pursuant to statutory language, TURN,[712] CCTPG/LIF,[713] AT&T,[714] and SureWest,[715] support DRA's special role in enforcing DIVCA. CCTPG/LIF also supports an enforcement role for DRA under the statute.

Despite SureWest's support for DRA's role, SureWest argues that DRA only has a "limited role" in enforcing DIVCA:

> DRA is only authorized to advocate on behalf of video customers with respect to franchise renewals, compliance with build-out requirements, compliance with customer service and privacy requirements, and the rate freeze imposed on telephone companies. Section 5900(k) does not give DRA the authority to participate in the initial application process. The Legislative Counsel Digest confirms DRA's limited role in the video franchise process . . . .

AT&T similarly notes that DIVCA "specifically outlines" DRA's role.[716]

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[708] Id. at 14-15.

[709] Id. at 18.

[710] Los Angeles County Opening Comments at 2.

[711] Oakland Opening Comments at 4.

[712] TURN Opening Comments at 4.

[713] CCTPG/LIF Opening Comments at 6, n.2.

[714] AT&T Reply Comments at 9.

[715] SureWest Opening Comments at 19.

[716] AT&T Reply Comments at 9.

2. Discussion

DIVCA limits DRA's role to advocacy and enforcement actions related to Public Utilities Code §§ 5890, 5900, and 5950.[717] Section 5890 contains the non-discrimination and build-out requirements. Section 5900 pertains to the enforcement of customer service and consumer protection standards. Section 5950 includes the statutory prohibition on increasing basic residential telecommunications rates until after January 1, 2009.

DIVCA further provides that DRA may have access to information in the Commission's possession "for this purpose" of enforcing the Code sections listed above.[718] Since DIVCA limits the advocacy role of DRA to Public Utilities Code §§ 5890, 5900, and 5950, we decline to amend the General Order as DRA has requested. We see no public purpose in routinely requiring applicants, state video franchise holders, and the Commission to serve all application materials, reports, and notices on DRA. Routine distribution of information is at odds with DIVCA. DIVCA created a narrowly tailored role for DRA, and we have no statutory authority to expand DRA's role in the application context.[719]

Upon further review, however, we elect to revise our previously proposed procedures regarding DRA's ability to access video information. We make these revisions out of an abundance of caution. We do not intend for our procedures

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[717] CAL. PUB. UTIL. CODE § 5900(k). DRA has no statutory authority to advocate or initiate enforcement actions pursuant to Public Utilities Code § 5840, the section pertaining to applications. We also find that we have no statutory obligation to provide DRA with special notification concerning our action on a state video franchise application. As a courtesy, however, we will provide DRA an e-mail notice at the time of our action on an application. The Commission's action on a state video franchise application is a matter of public record and will be announced on the Commission's website.

[718] Id. at § 5900(k).

[719] Public Utilities Code § 5840(b) states that the "authority granted to the Commission under this section shall not exceed the provisions set forth in this section." This section, pertaining to the franchise application, does not give the Commission the ability to assign a related role to DRA.

regarding DRA's access information to be unduly burdensome. Accordingly, we shall provide DRA with unfettered access to any video information possessed by the Commission. Upon review of this information, DRA may copy only that information required for it to fulfill its obligations pursuant to DIVCA, i.e., obligations pertaining to state video franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950.

We also remind DRA that any information it accesses may be subject to our restrictions on disclosure. In particular, we note that information provided under Public Utilities Code § 5960 is subject to the protections of Public Utilities Code § 583, which states that "no information . . . shall be . . . made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." Pursuant to Section 583, the Commission, not DRA, determines which information shall be made public.

With respect to protests on state video franchise applications, we reiterate our decision in Section IX that we will not allow protests on applications. Protests are inconsistent with DIVCA provisions on state video franchise applications. We, therefore, will not accept a protest from DRA on a matter pertaining to a state video franchise application.

Regarding complaints, DIVCA expressly gives local government entities, not DRA, the right to file complaints concerning the performance of a company pursuant to Public Utilities Code § 5890. We find that there is no statutory basis for similarly permitting DRA to file complaints. We, therefore, will not allow DRA to file complaints concerning the actions of state video franchise holders.[720] Granting DRA additional authority to file complaints before us is neither consistent with DIVCA nor needed for DRA to fulfill the role assigned to it.

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[720] But once the Commission opens an investigation on the action of a particular state video franchise holder, then DRA, as well as other parties, is welcome to participate.

DRA possesses alternate, ample avenues under DIVCA whereby DRA can fulfill its statutory obligations. First, DRA can always write a letter bringing a matter to the attention of the Commission, which then will be able to determine the appropriate steps to take. If the Commission opens an investigative proceeding, DRA would be able to participate fully in the proceeding. Second, DRA can partner with a local entity to bring a joint complaint before this Commission. Third, DRA can participate fully in any enforcement action or investigation independently initiated by the Commission.

We further note that DRA can protect consumers by bringing consumer protection matters before local entities or courts of competent jurisdiction, as DRA deems appropriate.[721] In particular, we find that DRA's role in advocating on behalf of consumers on issues relating to Public Utilities Code § 5900 is a matter that DRA will need to resolve with local government entities and the courts. Consumer service and protection standards are entrusted to local government entities for enforcement, including the development of schedules for fines. Since DRA's role in addressing these issues is not a matter that affects the role of this Commission in implementing DIVCA, we decline to set a particular role for DRA.

XVI. Intervenor Compensation Disallowed

Pursuant to Public Utilities Code §§ 1801 et seq., we have awarded reasonable compensation to eligible intervenors making substantial contributions to utility proceedings. Parties in this proceeding debate whether similar awards are appropriate in the video context. This section reviews and assesses these parties' comments.

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[721] We note that authority over consumer protection issues is not assigned to the Commission, and we lack the statutory authority to investigate consumer protection issues. As a result, filing a complaint before this Commission on a consumer protection matter would serve no purpose.

A. Position of Parties

Consumer organizations and communications companies sharply divide over whether the Commission should award intervenor compensation for participation in video franchising proceedings. CCTPG/LIF, CFC, DRA, Greenlining, and TURN all call for the Commission to allow intervenor compensation awards in video proceedings, whereas AT&T, CCTA, Small LECs, SureWest, and Verizon contend that an intervenor compensation award is never appropriate in the video context.

TURN argues that Public Utilities Code "provisions express a legislative intent to encourage broad participation in Commission proceedings."[722] According to TURN, Public Utilities Code §§ 401 and 5810(3) "specifically provide that the Commission should treat its new video franchising responsibilities in the same manner as the Commission treats its other regulatory duties . . . ," and to "prohibit compensation because the companies subject to [Commission] processes and procedures are not called 'public utilities' would be totally at odds with the intent of the intervenor compensation statute."[723] TURN adds that nothing in Public Utilities Code §§ 1801 et seq. suggests that the Commission had discretion to declare proceedings "off-limits for intervenor compensation purposes."[724]

CCTPG/LIF asserts that the "Commission must encourage customer participation in video franchising regulation similarly to its other regulated utilities."[725] In support of this contention, CCTPG/LIF makes several claims: (i) "AB 2987 placed video franchises within the jurisdiction of the Commission as a regulated utility," (ii) "franchise holders will be companies already

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[722] TURN Reply Comments at 12.

[723] Id. at 12-13.

[724] TURN Opening Comments at 7.

[725] CCTPG/LIF Opening Comments at 6.

participating in the intervenor compensation program through telecommunications regulation," and (iii) without intervenor compensation, "community groups will be effectively blocked from participating in video franchising regulation because of their inability to cover staff costs."[726]

Greenlining agrees that intervenor compensation "is important . . . to ensure that the unserved and the underserved are fully protected."[727] According to Greenlining, intervenor compensation is especially "necessary at this time" due to the fact that state video franchising regulation "is a new field," and it "is unclear that the user fees . . . are adequate to ensure that the CPUC is adequately staffed."[728] Given these concerns, Greenlining adds that the Commission also may "wish to consider some other methods for encouraging, at least in this proceeding, greater participation."[729]

CFC links intervenor compensation with Commission review of state video franchise applications. According to CFC, an "eligible intervenor who raises significant compliance issues should be compensated for bringing these matters to the Commission's attention."[730]

DRA maintains that its "role in advocating for consumers of video services under the Act should not be used as an excuse to deny others access to the Commission terms that allow that access to be effective."[731] It contends that "no one entity can speak for all consumers, nor should one be expected to."[732]

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[726] Id.

[727] Greenlining Opening Comments at 9.

[728] Id.

[729] Id. (suggesting that "[o]ne mechanism would be to provide a fund of $250,000 to secure input from a broad range of nonprofits with expertise in the areas covered by the OIR who primarily represent underserved communities").

[730] CFC Opening Comments at 5.

[731] DRA Reply Comments at 13.

[732] Id.

In contrast to the consumer organizations, Verizon argues that "the Commission lacks authority to impose intervenor compensation obligations on holders of state franchises."[733] It explains that "video service customers are not 'public utility' utility customers," and the statutory intervenor compensation program only provides for funding of "public utilities" customers.[734] Verizon further asserts that DIVCA prohibits imposition of a requirement on any state franchise holder other than as "'expressly provided' in the Act."[735] According to Verizon, the "level playing field principles of the Act dictate" that all state video franchise holders – including those who are also telephone corporations – "should be treated equally . . . and should not be subject to intervenor compensation obligations when others are not."[736]

AT&T agrees that "intervenor compensation is not available for AB 2987-related proceedings."[737] Reviewing applicable Public Utilities Code provisions, AT&T reasons that there is "no legal basis" for applying intervenor compensation in video service proceedings:

> AB 2987 took pains to make clear that "*video service providers are not public utilities*," and that the Commission has no more authority over video service providers than that expressly granted in AB 2987. The Legislature has made it equally clear that *the intervenor compensation program only applies to public utilities*.[738]

AT&T contends that "the unavailability of intervenor compensation in AB 2987-related proceedings is confirmed by the fact that AB 2987 specifically outlines the

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[733] Verizon Opening Comments at 4.

[734] Id.

[735] Id. at 4-5.

[736] Id. at 4.

[737] AT&T Reply Comments at 8.

[738] Id. (citations omitted).

role to be played by [DRA], while conspicuously omitting any role for intervenors."[739]

AT&T further argues that the Commission "has no inherent authority to grant intervenor compensation" in the video context.[740] According to AT&T, the "Commission's unquestionably broad, general grants of authority in the Constitution (Article XII) and the Public Utilities Code (e.g., § 701) are premised on its regulation of public utilities. . . ."[741] Also AT&T notes that "[i]t has long been the statutory and case law in California that, attorney fees are left to the parties '[e]xcept as attorney's fees are specifically provided for by statute."[742]

SureWest contends that there are two primary reasons for why intervenor compensation should not apply in video franchise matters. First, the Commission's authority in the video franchising area "is highly circumscribed."[743] Second, "the Franchise Act does not provide the Commission the authority to award intervenor compensation for franchise-related proceedings."[744]

CCTA concurs that there is no role for intervenor compensation in proceedings arising directly out of DIVCA. According to CCTA, the "Commission cannot permit intervenor compensation . . . , because the holders of a state-issued franchise are not public utilities. . . ."[745] Moreover, CCTA maintains that "even if the Commission were to allow intervenor compensation (which it lawfully cannot), intervention would be necessarily limited to investigations regarding those limited matters over which the Commission has authority."[746]

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[739] Id. at 9.

[740] Id.

[741] Id.

[742] Id. at 9-10.

[743] SureWest Opening Comments at 17.

[744] Id. at 18.

[745] CCTA Opening Comments at 12.

[746] CCTA Reply Comments at 12.

Small LECs argues that "intervenor compensation is inappropriate in proceedings involving video franchise applicants and franchise holders, since these entities are not necessarily public utilities."[747] They add that "AB 2987 makes no provision for intervenor compensation, and the Commission should not inject such a requirement into this framework."[748] Small LECs reasons that since "there is no role for protests, there is also no role for intervenor compensation in franchise application proceedings."[749]

B. Discussion

Before considering any policy arguments, we first must establish whether the Commission has the statutory authority to grant intervenor compensation in the video services context. Our review of the Public Utilities Code and comments leads us to the threshold conclusion that we lack this statutory authority. We, therefore, decline to reach policy arguments for or against intervenor compensation awards.

Our analysis begins with the intervenor compensation statutes. Like Verizon, we find that these statutes limit the intervenor compensation program to proceedings involving utilities. The statutorily defined purpose of the intervenor compensation program "is to fund participation by 'public utility' customers; its provisions 'shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities' to encourage participation of those with 'a stake in the public utility regulation process,' and intervenor compensation awards are to be paid by 'the public utility which is the

[747] Small LECs Reply Comments at 4.

[748] Id. at 5.

[749] Small LECs Opening Comments at 7.

subject of the . . . proceeding. . . .'"[750] Similarly, statutes granting us broad, general grants of authority are largely premised upon our regulation of public utilities.[751]

Next we look at how DIVCA classifies and describes our authority to regulate video services. Although DIVCA never directly addresses intervenor compensation, we find that the plain language of the statute explicitly considers the classification of video service. DIVCA states that "video service providers are not public utilities or common carriers."[752] "The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division."[753] With respect to our authority to regulate video service, Public Utilities Code § 5840(a) declares that the Commission may not "impose [a] requirement" on state franchise holders other than one "expressly provided" in the Act.[754] We interpret this statute to mean that we may not impose a regulation on a state video franchise holder unless we deem the regulation necessary for enforcement of a specific DIVCA provision.

Considering these statutory analyses together, we conclude that we do not have the authority to impose intervenor compensation obligations on video franchise holders. State video franchise customers, i.e., customers of a non-utility service, are not afforded the same statutory right to intervenor compensation funding like traditional utilities customers. Moreover, our ability to impose intervenor compensation obligations on state video franchise holders is sharply curtailed by DIVCA. The statute prohibits our imposing intervenor

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[750] Verizon Opening Comments at 3 (citing Public Utilities Code §§ 1801, 1801.3, and 1807).

[751] As noted by AT&T, examples of such statutes include Article XII of the California Constitution and § 701 of the Public Utilities Code. AT&T Reply Comments at 9.

[752] CAL. PUB. UTIL. CODE § 5810(a)(3).

[753] Id. at § 5820(c).

[754] Id. at § 5840(a).

compensation obligations – or any other requirement not necessary for enforcement of a specific DIVCA provision.

Our decision here applies uniformly to all state video franchise holders. We find merit in Verizon's legal argument that state video franchise holders that also are telephone companies should not be subject to intervenor compensation obligations if other state video franchise holders are not subject to the same requirements.[755] While a state video franchise holder may be "a public utility with respect to the provision of telephone service, it is not one with respect to the provision of video service, which is *not* regulated as a public utility service by the Commission."[756] Also we find that our decision to treat all state video franchise holders alike is consistent with the Legislature's intent that DIVCA "create a fair and level playing field for all market competitors. . . ."[757] Thus, there is no legal basis for funding intervenor compensation in video proceedings.

XVII. Modifications to a State Video Franchise

Section VI of the General Order addressed, among other items, transfer of and amendments to state video franchises. No parties commented on transfer of state video franchises. We find that our transfer provisions are reasonable and follow the statutory text, so we decline to alter them.

A number of parties commented on procedures a state video franchise holder must follow when amending its proposed video service area. Although we have express authority to adopt amendment procedures, many parties

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[755] Verizon Opening Comments at 4.

[756] Id. at 3-4. Verizon cites Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[w]hether an entity in a given case is to be considered a common carrier" turns not on its typical status but "on the particular practice under surveillance") and Nat'l Ass'n Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others") in support of this proposition. Id.

[757] CAL. PUB. UTIL. CODE § 5810(a)(2)(A).

debated features of the specific amendment procedures proposed in the draft General Order.[758]

A. Size of the Proposed Video Service Area

Multiple parties ask the Commission to consider placing restrictions on (i) the size of the proposed video service area and (ii) when this area may be amended. We review and assess these comments below.

1. Position of Parties

CCTA urges the Commission to require applicants to include their entire contemplated video service areas in their initial franchise applications.[759] CCTA adds that any amendments to a video service area should be limited to contiguous areas.[760] CCTA argues that unwarranted and unnecessary tax consequences could result from our awarding multiple non-contiguous franchise service areas by amendment.[761] It adds that its proposed clarifications would make it easier to assess a state video franchise holder's compliance with DIVCA.[762]

League of Cities/SCAN NATOA contends that "[m]ultiple amendments redefining the holder's service territory could be difficult to track, could cause confusion for local governments and the public, and could impose an unnecessary burden on the Commission's resources."[763] It notes that regular changes to service territory boundaries "will be particularly burdensome to local

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[758] See id. at § 5840(f) (expressly granting the Commission the authority to "establish procedures for a holder of a state-issued franchise to amend its franchise to reflect changes in its service area").

[759] CCTA Opening Comments at 11.

[760] Id. at 11-12.

[761] Id.

[762] Id. at 11.

[763] League of Cities/SCAN NATOA Opening Comments at 16.

governments."[764] Thus, League of Cities/SCAN NATOA urges the Commission to dictate that a video service area encompass "the entire service territory the provider contemplates servicing."[765] Any amendments to these areas would be "limited to circumstances not reasonably foreseeable to the applicant."[766]

Joint Cities maintains that statewide video franchises make it difficult for the Commission and/or local entities to monitor compliance with statutory obligations, such as PEG access, franchise fees, and customer service.[767] Joint Cities, therefore, argues that state video franchise holders should be permitted to hold more than one franchise, and that franchise service areas should be limited to 750,000 households, with an allowance made for cities with more than 750,000 households.[768] Joint Cities adds that initial state video franchise applications and amendments should specify the entire video service area the video service provider intends to serve within five years after submission of the application or amendment.[769]

2. Discussion

We decline to impose any new regulations that would restrict the size or modification of a video service area. It is unclear whether limiting the size of video service areas as suggested by Joint Cities would help or harm government efforts to monitor state video franchise holders' compliance with DIVCA. Local entities disagree about what is the optimal size for effective government monitoring.[770] Moreover, we find that CCTA's caution concerning tax

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[764] Id.

[765] Id.

[766] Id.

[767] Joint Cities Opening Comments at 18-19.

[768] Id. at 19.

[769] Id.

[770] Compare League of Cities/SCAN NATOA at 16 (arguing that government monitoring will be optimized if a proposed video service area encompassed all areas an

Footnote continued on next page

implications does not require Commission action.[771] An applicant is best able to determine the tax consequences of its individual business plan, and, if preferable, an applicant is free to request a single state video franchise for the entire state of California. Affording this flexibility is consistent with the Legislature's intent that DIVCA "[c]reate a fair and level playing field for all market competitors . . . ."[772]

B. Process for Amending Video Service Areas

Two DIVCA provisions are central to parties' comments on our proposed process for amending video service areas. First, Public Utilities Code § 5840(f) gives the Commission general authority to "establish procedures for a holder of a state-issued franchise to amend its franchise to reflect changes in its service area." Second, Public Utilities Code § 5840(m) states that the Commission "shall require a holder to notify the commission and any applicable local entity within 14 business days of . . . a change in one or more of the service areas of division that would increase or decrease the territory within service area. The holder shall describe the new boundaries of the affected service areas after the proposed change is made." We consider the significance of these two statutes below in considering issues raised as to video service area amendment.

1. Position of the Parties

While admitting the Commission has authority to adopt amendment procedures, AT&T asserts that the Legislature "carefully circumscribe[ed] the permissible content" of any procedures for amending video service areas.[773]

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applicant contemplates serving), with Joint Cities Opening Comments at 19 (contending that monitoring will be optimized if a proposed video service area is capped at 750,000 households).

[771] CCTA Opening Comments at 11-12.

[772] CAL. PUB. UTIL. CODE § 5810(2)(A).

[773] AT&T Opening Comments at 2-3.

AT&T argues that Section 5840(m)(6) provides that a state video franchise holder is only required to give notice of "new boundaries of the affected service areas after the proposed change is made."[774] According to AT&T, the Commission's proposed procedures, which require advance notice and submission of a supplemental application, conflict with Section 5840(m)(6), which only requires notice after the fact.

Largely echoing AT&T's arguments, Verizon proposes a means of harmonizing Section 5840(f) with Section 5840(m)(6).[775] The amendment process, under Verizon's proposal, would be a "ministerial process to conform an existing franchise to service territory changes *that have already occurred*" (emphasis in original).[776] Verizon argues this amendment process is necessary, because unlike other changes listed in Section 5840(m)(6), "service area changes are not simple ones that the Commission can implement itself by appending information to the franchise (e.g., as with a name change or transfer). Rather the holder must submit either a new 'electronic template' or a new GIS boundary in digital format on a CD."[777]

League of Cities/SCAN NATOA argues that nothing in Public Utilities Code § 5840(m)(6) limits the authority granted to the Commission to adopt procedures for service area amendments.[778] League of Cities/SCAN NATOA characterizes the notice requirements in Section 5840(m)(6) as a floor, not a ceiling, for Commission authority.[779]

DRA maintains that Public Utilities Code 5840(m)(6), when read in context of Section 5840 in its entirety, "demonstrates that the Commission's proposed

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[774] Id. at 3 (citations omitted).

[775] Verizon Reply Comments at 17-19.

[776] Id. at 18.

[777] Id.

[778] League of Cities/SCAN NATOA Reply Comments at 11-12.

procedures set forth in draft GO at VI.B.2 are wholly within the scope of the legislation."[780]

2. Discussion

We determine that Public Utilities Code §§ 5840(f) and 5840(m)(6) are not in conflict and do not limit the Commission's authority. We, therefore, decline to modify our amendment process.

When read in the context of DIVCA as a whole, we find that the notice contemplated by Public Utilities Code § 5840(m)(6) refers to a change in the geographic service area *independent of* a state video franchise holder's decision to increase or decrease its own footprint in the service area. This conclusion is informed by the plain language of the statue and the manner in which DIVCA establishes other procedures. As an example, we can foresee that a new residential subdivision is built just outside a video franchise holder's existing service area, and that the local entity will want the holder to extend its geographic service area to cover this new subdivision.

As an initial matter, Section 5840(m)(6) requires state video franchise holders to give notice of "[a] change in one or more of the service areas of this division that would increase or decrease the territory within the service area."[781] It is inconsistent with the organization of DIVCA to presume that the Legislature would give the Commission the authority to "*establish procedures* for a holder of a state-issued franchise to amend its franchise to reflect changes in its service area,"[782] and then establish the procedures itself and include the procedures in a list of changes unrelated to the increase or decrease of a service area. For example, with respect to the application process for a state franchise, the

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[779] Id.

[780] DRA Reply Comments at 3.

[781] CAL. PUB. UTIL. CODE § 5840(m)(6).

[782] Id. at § 5840(f) (emphasis added).

Legislature did not include a broad provision giving the Commission authority to establish application procedures, and then establish application procedures itself. Instead, the Legislature simply established the procedures and directed the Commission to follow them. Thus, the Legislature gave the Commission the authority to establish procedures for a holder to change its service area boundaries, and was not seeking to do so itself in Section 5840(m)(6).

In its proposal to "harmonize" Sections 5840(f) and 5840(m), Verizon observes that "unlike the other changes enumerated in section 5840(m), service area changes are not simple ones that the Commission can implement itself by appending information to the franchise (e.g., as with a name change or transfer)."[783] Although Verizon offers this argument in support of its harmonization proposal, the Commission regards the distinction between service territory changes and the other changes enumerated in Section 5840(m)(6) as further support that the Legislature did not intend that Section 5840(m)(6) would permit video service providers to notify the Commission after the fact of an increase or decrease in their service territory.

Because we conclude that Public Utilities Code § 5840(m)(6) refers to a change in the service territory independent of a video service provider's decision to amend its footprint within the territory, there is no need for the Commission to alter its procedures for holders that seek to amend the service territory in their state franchises. The amendment procedures proposed in the OIR afford flexibility to state video franchise holders, while ensuring that the Commission and local entities remain fully informed of changes to video service areas.

Nevertheless, we modify the General Order to assure there is no confusion regarding these amendment procedures. The revised General Order clarifies that the Commission's supplemental application process tracks the state video franchise application process.

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[783] Verizon Reply Comments at 18.

XVIII. Renewal of a State Video Franchise

We remove state video franchise renewal provisions from the General Order. Formal consideration of comments on state video franchise renewals is deferred to Phase II.[784] In Phase II, we will address renewal issues only to the extent possible at the time of the proceeding. We recognize that we must develop a renewal process that is consistent with federal and state law applying to state video franchise holders,[785] but federal and state law may change between now and 2017, the earliest a state video franchise may be renewed.[786]

XIX. Comments on the Proposed Decision

The proposed decision of the assigned Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. AT&T; CFC; CCTA; CCTPG/LIF; DRA; Greenlining; Los Angeles and Carlsbad Responders; Small LECs; SureWest; TURN; and Verizon filed comments on February 5, 2007. AT&T; CCTA; CCTPG/LIF; DRA; Greenlining; Los Angeles

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[784] Multiple parties argue that state video franchise renewals are governed by the federal Cable Act, which requires opportunities for public comment. Joint Cities Opening Comments at 11-13; Los Angeles County Opening Comments at 8-9; Oakland Reply Comments at 2-3. In addition, CCTA contends that the Commission exceeded its authority when tentatively concluding that only state video franchise holders in good standing are eligible to seek renewal of their franchises. CCTA Opening Comments at 8-9 (asserting that state video franchise holders are eligible to seek renewals of their state video franchises unless they are in violation of a final nonappealable court order or, pursuant to Public Utilities Code § 5890(g), in violation of nondiscrimination requirements). But see League of Cities/SCAN NATOA Reply Comments at 10 (arguing that whether a state video franchise holder is in compliance with the terms and conditions of its state video franchise is relevant to an applicant's financial, legal, and technical qualifications, which are subject to review during the renewal process).

[785] See CAL. PUB. UTIL. CODE § 5850(c) ("Renewal of a state franchise shall be consistent with federal law and regulations.").

[786] See id. at § 5850(a) ("A state issued franchise shall only be valid for 10 years after the date of issuance, and the video service provider shall apply for a renewal of the state franchise for an additional 10-year period if it wishes to continue to provide video services in the area covered by the franchise after the expiration of the franchise.").

and Carlsbad Responders; Oakland; Small LECs; SureWest; TURN; and Verizon filed reply comments on February 13, 2007.

DRA provided extensive comments on the draft decision. It discusses issues concerning access to data, administrative procedures for implementing DIVCA, and the scope of the Commission's authority. It addition, DRA requests further proceedings concerning the issue of cross-subsidization. We describe each argument and respond serially.

DRA asserts that the draft decision unlawfully restricts its access to information.[787] To support its argument, DRA cites Public Utilities Code § 5900(k):

> The Division of Ratepayers Advocates shall have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950. *For this purpose, the division shall have access to any information* in the possession of the commission subject to all restrictions on disclosure of that information that are applicable to the commission.[788]

DRA then argues that Public Utilities Code § 5900(k) grants DRA rights to all information held by the Commission. Furthermore, DRA states that the procedures for its access to information, as proposed in an earlier draft of this decision, are burdensome. DRA adds that "[t]he PD's restrictions placed on DRA's access to information held by the Commission are also inconsistent with Public Utilities Code § 309.5(e)."

In response, we note that the first principle of statutory interpretation is to refer to the words of the statute. Yet DRA's analysis ignores the explicit language of the statute, specifically the limiting words "[f]or this purpose." Any argument regarding the language "shall have access to information" must be

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[787] DRA Opening Comments on the PD at 2.

[788] Id. at 2 (emphasis added to citation).

reconciled with this limitation. It is clear that the statutory language seeks to provide DRA with access to the information it needs to fulfill its statutory purposes – not to provide it with the ability to make unlimited demands on the Commission for information. If the Legislature intended the latter, it would not have included the "[f]or this purpose" qualification.

In addition, we are puzzled by DRA's citation to Public Utilities Code § 309.5(e). Section 309.5(e) provides that "[t]he division may compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner." We find that this statutory provision supports a review process which, like the one initially proposed in the draft decision, balances the (i) need to provide DRA with access to data with (ii) rights of communications companies to avoid unreasonable requests for data. Public Utilities Code § 309.5 does not support DRA's unreasonable request to receive automatically every piece of data supplied to the Commission.

We find merit only in DRA's argument that our previously proposed procedures could pose a burden to it. Although we do not believe the procedures for obtaining access to information would be as unduly burdensome as DRA claims, out of an abundance of caution, we elect to revise the procedures so that DRA has full access to the Commission's information.

Thus, we shall provide DRA with unfettered access to any video information possessed by the Commission. Upon review of this information, however, DRA may copy only that information required for it to fulfill its obligations pursuant to DIVCA, i.e., obligations pertaining to state video

franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950.

We also remind DRA that any information it accesses may be subject to our restrictions on disclosure. In particular, we note that information provided under Public Utilities Code § 5960 is subject to the protections of Public Utilities Code § 583, which states that "no information . . . shall be . . . made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." Pursuant to Section 583, the Commission, not DRA, determines which information shall be made public.

In addition to its discussion of access to Commission data, DRA argues that our proposed policies would unreasonably prohibit DRA from bringing complaints to the Commission.[789] DRA argues that under DIVCA it is not "prohibited from bringing complaints to the Commission."[790] Likewise, DRA argues that the "scope of investigations is not limited by DIVCA."[791]

We find little merit to either of DRA's arguments. First, DRA's comments fail to acknowledge that the statutory language clearly enumerates who may initiate a complaint proceeding.[792] DRA is not among those enumerated. Second, DRA's argument that the Commission's scope of investigations is not limited by DIVCA simply repeats blanket assertions made in its prior comments and fails to address our express assignment to specific regulatory and enforcement duties contained in Public Utilities Code §§ 5840, 5890, 5920, 5940, 5950, and 5960.

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[789] Id. at 5.

[790] Id. at 6.

[791] Id. at 12.

[792] See CAL. PUB. UTIL. CODE § 5890(g) (providing that "[l]ocal governments may bring complaints to the state franchising authority").

DRA also asserts that it is inconsistent for us to find that DRA has authority to initiate an enforcement action concerning cross-subsidization of video service by residential primary line service, but DRA lacks the authority to bring complaints on other matters. DRA recommends that we resolve this alleged inconsistency by granting it authority to bring complaints under DIVCA.

We are not convinced by DRA's allegation of inconsistency. As discussed in Section XV, the issue of cross-subsidization falls under both existing Commission authority and new authority granted by DIVCA. DRA already has the right to initiate a proceeding concerning cross-subsidization pursuant to its authority under Public Utilities Code § 798, which addresses payments from a public utility to its affiliates. The new assignment of specific responsibilities to the Commission to enforce Public Utilities Code § 5940 does not limit the existing regulations and enforcement procedures pursuant to Public Utilities Code § 798.

Moreover, there is no inconsistency in our reasoning: The enforcement procedures under public utilities law simply are different than those under the video franchise law. DIVCA is clear that it intends to treat state video franchise holders differently from public utilities, and we have consistently applied this principle throughout the decision.

Concerning DRA's ability to fulfill its statutory obligations under DIVCA, we find that DRA possesses ample avenues under DIVCA whereby DRA can fulfill its statutory obligations. First, DRA can always write a letter bringing a matter to the attention of the Commission, which then will be able to determine the appropriate steps to take. If the Commission opens an investigative proceeding, DRA would be able to participate fully in the proceeding. Second, DRA can partner with a local entity to bring a joint complaint before this Commission. Third, under DIVCA, DRA can protect consumers by bringing consumer protection matters before local entities or courts of competent

jurisdiction, as DRA deems appropriate.[793] Fourth, DRA can participate fully in any enforcement action or investigation independently initiated by the Commission.

DRA further argues that our enforcement of Public Utilities Code § 5940 requires an additional phase of this proceeding to develop detailed reporting requirements that would supplement federal reporting schemes. We are unconvinced that such reporting mechanisms are necessary. First, DRA fails to recognize the import of our tariffing basic residential rates or the FCC's long-standing Part 64 "separation" regulations.[794] Federal and state provisions already make it extremely difficult to transfer funds from a regulated utility to unregulated operations. Second, DRA's proposal for broad reporting requirements does not acknowledge the narrow scope of cross-subsidization prohibition found in Public Utilities Code § 5940. DIVCA's cross-subsidization prohibition is triggered only when (i) there is an increase to stand-alone, residential, primary line, basic telephone service rates and (ii) that increase is used to finance deployment of a video network.[795] Third, DRA's comments wrongly suggest that the Commission is currently considering elimination of the requirement that carriers file tariffs applicable to this prohibition.[796] As noted in

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[793] We note that statutory authority over consumer protection issues is not assigned to the Commission, but instead to local entities. We lack the authority to investigate consumer protection issues. As a result, filing a complaint before the Commission on a consumer protection matter would serve no useful purpose.

[794] See Verizon Reply Comments on the PD at 3 (noting that the FCC's cost allocation rules and cost allocation manual are specifically designed to "prevent improper cross-subsidization in services to affiliates"). Telecommunications companies must meet federally mandated biennial audit requirements.

[795] CAL. PUB. UTIL. CODE § 5940 (focusing only on one specific issue: whether "[t]he holder of a state franchise under this division who also provides stand-alone, residential, primary line, basic telephone service . . . increase[s] this rate to finance the cost of deploying a network to provide video service").

[796] DRA Opening Comments on the PD at 10.

Section XV, Public Utilities Code § 495.7 requires tariffing of basic residential rates, and the Commission cannot detariff these services.

TURN echoes DRA's concerns that our protections against cross-subsidization are insufficient. TURN argues that "D.06-08-030 allows the carriers to file advice letters on one day's notice, which is insufficient time for the Commission the [sic] engage in a fact-based analysis of cross-subsidization, especially with no data on costs."[797] TURN further alleges that "carriers may not be complying with Part 64 rules. How AT&T can roll out significant amounts of extra fiber, and not increase its unregulated investments . . . should be of great concern to the Commission."[798] Accordingly, TURN urges us to adopt our "own allocation approach . . . ."[799]

Concerning tariff review, we find that TURN misstates procedures adopted in D.06-08-030. The Commission need not limit its review of a tariff to "one day." Even after a tariff has gone into effect, the Commission may suspend a tariff and conduct an investigation to ensure that the new prices do not result in prohibited subsidization of video services.

Under current telecommunications law and regulation, we further note that TURN may file a complaint with the Commission if it has evidence that AT&T or any other communications company is failing to comply with accounting rules. There is no need for a new omnibus investigation into design of accounting rules. Current cost allocation procedures have been the subject of countless hours of regulatory reviews.

TURN also argues that the Commission has interpreted its statutory authority and responsibility under DIVCA too narrowly.[800] TURN claims "the PD

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[797] Id.

[798] TURN Opening Comments on the PD at 5.

[799] Id. at 6.

[800] Id. at 7.

finds the Commission's role is primarily ministerial (although that term in never used in DIVCA)."[801] In addition, TURN argues that the decision "curtails access to information,"[802] and it objects to the applicability of the confidentiality protections enumerated in California Public Utilities Code § 583.[803]

We are not convinced by any of TURN's arguments regarding the scope of our statutory authority. First, we note that this decision finds that the determination of the completeness of an application is strictly limited by DIVCA, but this decision does not find that the Commission's primary role is ministerial. Indeed, the decision contains lengthy sections outlining the processes that the Commission will follow to enforce the provisions of DIVCA that require the exercise of administrative discretion. Second, TURN's charge that the Commission has sought to limit access to data has no merit. Our implementation of DIVCA is guided by the plain language of the statute, and the revised procedures adopted above provide DRA with unfettered access to data, as envisioned by DIVCA. Third, we are not persuaded by TURN's request that the Commission ignore Public Utilities Code § 583 when implementing DIVCA. We note that Public Utilities Code § 5960 explicitly makes data reported to the Commission subject to the protections of Public Utilities Code § 583.

Finally, TURN argues that the Commission would commit legal error if it adopted a prohibition on intervenor compensation for proceedings arising under DIVCA. TURN cites the purpose of Public Utilities Code § 1801 as "provid[ing] compensation for [fees and costs] to public utility customers of participation or intervention in <u>any</u> proceeding of the commission."[804] TURN then references Public Utilities Code §§ 1802, 1803, and 1804 as further evidence for the

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[801] <u>Id</u>. at 7.

[802] <u>Id</u>. at 9.

[803] <u>Id</u>. at 9.

[804] <u>Id</u>. at 11.

proposition that "eligibility [for intervenor compensation] focuses on whether the Commission is engaged in a formal proceeding, rather than whether a regulated utility is involved in the proceeding. . . ."[805]

TURN's citations to the Public Utilities Code are unduly selective, and consequently unconvincing. TURN fails to acknowledge other provisions in the same article that declare that the intervenor compensation program "shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities" to encourage participation of those with "a stake in the public utility regulation process," and that intervenor compensation awards are to be paid by "the public utility which is the subject of the . . . proceeding. . . .'"[806] It is inappropriate for the Commission to extend the statutory intervenor compensation program given the Legislature's express delineation of its scope.

Moreover, Public Utilities Code § 5840(a) limits the Commission's ability to impose requirements on franchise holders unless "expressly provided" for in the Act.[807] TURN has provided no argument that would lead us to reverse our interpretation of this provision. Thus, we stand by our conclusion that this statute prevents us from requiring a state video franchise holder to pay intervenor compensation.

CCTPG/LIF criticizes our interpretation and implementation of DIVCA provisions pertaining to applications for a state video franchise. CCTPG/LIF argues that the oversight of build-out requirements should begin at the application stage.[808] According to CCTPG/LIF, proposed build-out plans "can be judged against already delineated standards, for example, such as these

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[805] Id. at 11-12.

[806] CAL. PUB. UTIL. CODE §§ 1801.3; id. at 1807.

[807] Id. at § 5840(a).

[808] CCTPG/LIF Opening Comments on the PD at 1.

described in § 5890(b)."[809] CCTPG/LIF calls upon the Commission to require applicants to include a high level of granularity concerning projected deployment in their applications.[810] CCTPG/LIF adds that since review of applications is not ministerial, protests of applications should be permitted.[811]

Other CCTPG/LIF comments call for further expansion of the Commission's role as state video franchising authority. CCTPG/LIF requests further rules concerning build-out and a participatory process for review of network build-out;[812] permanent rules and reporting requirements designed to prevent cross-subsidization;[813] an unrestricted advocacy role for DRA;[814] awarding of intervenor compensation;[815] and changes in reporting requirements.[816]

In response, we find that we already addressed most of CCTPG/LIF's arguments concerning the application process. Our implementation strategy, which facilitates entry into the video market and enforces DIVCA requirements based on the actions of state video franchise holders, is consistent with the text of DIVCA.[817] The elaborate pre-entry reviews proposed by CCTPG/LIF are not.[818] We also note that the primary case relied upon by CCTP/LIF, Friends of

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[809] Id. at 2.

[810] Id. at 4.

[811] Id. at 3.

[812] Id. at 6.

[813] Id. at 7.

[814] Id. at 8-10.

[815] Id. at 11.

[816] Id. at 5-6.

[817] See e.g., CAL. PUB. UTIL. CODE § 5840(h)(2) (limiting Commission review of an application to a determination of whether the application "is complete"); id. at § 5840(h)(1) (requiring that the Commission reach its determination of whether an application is complete within thirty days of receipt of the application).

[818] CCTP/LIF also disregards the legislative history associated with DIVCA, which states that "[u]like the local franchising process, the state franchising process is intended to be largely ministerial." Senate Floor Analysis (Aug. 28, 2006).

Westwood, Inc. v. City of Los Angeles, is inapposite, because it analyzes terms at issue as they appear in the California Environmental Quality Act, not DIVCA.[819]

Regarding build-out requirements, we note that Section XIV revises how we address build-out provisions for communications companies with fewer than one million telephone customers. DIVCA establishes clear build-out requirements for all other state video franchise holders. If the Commission determines that facts warrant an investigation of build-out compliance or a local entity files a formal complaint regarding this compliance, the resulting investigative process is fully participatory.

Concerning the points raised by CCTPG/LIF on cross-subsidization, the role of DRA, and the issue of intervenor compensation, we find that CCTPG/LIF's arguments parallel those raised by DRA and TURN. We address these arguments above; no additional changes are warranted.

CCTPG/LIF's proposed modifications to reporting requirements are addressed in Section XIII. We have nothing further to add.

We now turn to the comments of Greenlining. Greenlining asks the Commission to either (i) apply GO-156 reporting requirements to state video franchise holders franchise holders or (ii) require state video franchise holders to describe their supplier diversity programs in detail.[820] Greenlining further requests reports on the diversity of directors, boards, officers, and high paid employees; reports on corporate philanthropy; and reports on steps state video franchise holders are taking to surmount the Digital Divide; and reports on content diversity and on the deployment of hi-speed technologies by "racial and

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[819] Friends of Westwood, Inc. v. City of Los Angeles, 191 Cal. App. 4th 1177 (2005). See also Verizon Reply Comments on the PD at 2 (providing further discussion of this case).

[820] Greenlining Opening Comments on the PD at 5.

ethnic make-up."[821] Greenlining urges the Commission to initiate annual hearings on service to underserved communities.[822]

With respect to participation in Commission proceeding, Greenlining, like others, requests the ability to file a protest on any matter.[823] It also requests that the Commission award intervenor compensation in proceedings arising pursuant to DIVCA.[824]

In response, we note that Greenlining's arguments are mere *policy arguments* for a wish list of items that lie outside the Commission's statutory authority. Greenlining's arguments fail to "focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record," which the Commission's Rules of Practice and Procedure require of all comments on a draft decision.[825] We nevertheless note that to the extent that the policies proposed by Greenlining are consistent with DIVCA, we have incorporated such policies into our General Order. We also find that we have addressed protests and intervenor compensation issues at length in Section IX and XVI (respectively), and no further discussion of these topics is warranted.

CFC contends that the grant of a state video franchise is not a ministerial act. In support of this argument, CFC declares that DIVCA uses "general standards" and that this use of "general standards" makes the franchise process "discretionary."[826] CFC further asserts that "the imposition of conditions on the issuance of a franchise,"[827] the "waiver of a filing requirement,"[828] and the

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[821] Id. at 14, 16.

[822] Id. at 18.

[823] Id. at 22.

[824] Id. at 25.

[825] Rule 14.3 of the Commission's Rules of Practice and Procedure.

[826] CFC Opening Comments on the PD at 2.

[827] Id. at 6.

"disallowance of intervenor compensation"[829] demonstrate that the Commission's authority is not ministerial. CFC adds that it is inappropriate for the Commission to require a bond to determine whether an applicant has provided "[a]dequate assurance that the applicant possesses the financial legal and technical qualifications necessary to construct and operate the proposed system promptly and to repair any damage to the public right-of-way . . . ."[830]

We find that CFC confuses the act of interpreting and implementing DIVCA, which clearly requires an exercise of discretionary judgment, with the review of a state video franchise application, which does not. Our latter authority to review an application is strictly delineated by DIVCA. Public Utilities Code § 5840(h)(2) states that "[i]f the commission finds the application is complete, it *shall* issue a state franchise before the 14th calendar day after that finding." The use of the word "shall" indicates that the action of issuing a franchise directly follows whenever an evaluation is "complete." Protests serve no useful purpose in this context.

CCTA's comments express broad support for the approach taken in the draft decision.[831] Nevertheless, CCTA argues that the proposed decision requires modification in three areas. First, CCTA contends that current video holders are

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[828] Id. at 8.

[829] Id. at 9.

[830] Id. at 3 (citing CAL. PUB. UTIL. CODE § 5840(e)(9)). CFC argues that "[i]f the legislature had intended to only require a bond, it would have said so." Id. at 4. We are puzzled by this statement, because, in fact, the Legislature did say it would allow for a bond to satisfy the required showing of financial, legal, and technical qualifications. The complete text of Public Utilities Code § 5840(e)(9) declares that an applicant must provide "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant. *To accomplish these requirements, the commission may require a bond.*" CAL. PUB. UTIL. CODE § 5840(e)(9) (emphasis added).

[831] CCTA Opening Comments on the PD at 1.

not subject to build-out requirements.[832] Second, CCTA asserts that the definition of telephone service area should be modified.[833] Third, CCTA states that our decision to require a bond may result in "duplicate bonding requirements."[834] It explains that "an applicant now will face a bond requirement not only to demonstrate unspecified 'qualifications' necessary to be a state franchise holder . . , but also be compelled to financially assure local governments as part of their right of way management."[835]

In response to CCTA, we first note that we have discussed CCTA's comments on the build-out requirements in great detail in Section XIV. No further clarification is necessary here.

Section XIII above discusses our definition of "telephone service area," which currently tracks that in a carrier's CPCN. We note that to the extent a company does not have customers in a region, the company need only collect and report updated U.S. Census data for that region. No rule adopted herein requires a telecommunications company to expand its video service footprint and provide service throughout the entire state.

Concerning our bond requirement, we note that the bond is based on the plain language of Public Utilities Code § 5840(e)(9) and seeks only to provide assurance that the applicant possesses the financial, legal, and technical qualifications to provide video service. This bond does not replace any local bonds currently associated with local rights-of-way permitting processes. Our bonding requirement anticipates that these processes may continue to include bonds, but our bonding requirement does not provide any new right for a local entity to require a bond. Thus, we disagree with CCTA's contention that

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[832] Id. at 4.

[833] Id. at 7. See also SureWest Opening Comments on the PD at 4 (making a similar argument).

[834] CCTA Opening Comments on the PD at 8.

[835] Id. at 8.

imposition of our bonding requirement will result in a state video franchise holder's facing "twice the bonding requirements."[836]

The comments of SureWest and Small LECs sound several common themes, so we address these comments together. First, SureWest and Small LECs express concerns that if AT&T and Verizon fail to apply for a state video franchise, then the methodology for assessing Year 1 user fees will prove burdensome.[837] Second, SureWest and Small LECs argue that build-out requirements should not be developed for smaller video providers.[838]

In response, we note that we do not anticipate that SureWest's and Small LECs' fears regarding the user fee will be realized. We have no reason to believe that Verizon and AT&T will fail seek a state video franchise in Year 1. But if these companies do not apply for a state video franchise in Year 1, we invite parties to petition to modify this decision and propose a method for assessing fees that will not act as a barrier to entry.

Issues regarding build-out requirements are addressed in Section XIV above. We plan to establish related safe harbor standards in Phase II.

SureWest also argues that our reporting requirements create disparate treatment of broadband providers, as broadband providers without a video affiliate will not be subject to a reporting requirement.[839] We, however, find that our reporting requirements are consistent with DIVCA. We also do not suspect that the disparate impact is so significant as to distort market competition.

Small LECs raises other concerns related to our reporting requirements. First, Small LECs argues that copies of EEO-1 reports should be provided only by

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[836] Id. at 9.

[837] SureWest Opening Comments on the PD at 3; Small LECs Opening Comments on the PD at 3.

[838] SureWest Opening Comments on the PD at 5; Small LECs Opening Comments on the PD at 8.

[839] SureWest Opening Comments on the PD at 1.

state video franchise holders that are currently required to submit the report.[840] Second, Small LECs states that build-out data should be treated as confidential.[841] Third, Small LECs asserts that "it is unnecessary for video franchise holders to submit annual reports regarding whether their employees are covered by a collective bargaining agreement."[842]

We find merit in some of Small LECs' arguments. Concerning the employment reporting issues raised by Small LECs, we revised Section XIII to provide that we will not require submission of EEO-1 reports from communications companies that otherwise are not obligated to complete them. We also modified Section XIII to clarify that we will consider requests for confidential treatment of build-out data on a case-by-case basis. We do, however, continue to require reporting on collective bargaining agreements. As explained in greater detail in Section XIII, we find that these reports are necessary for ensuring that collective bargaining agreements are respected during transfers of state video franchises.[843]

Finally, Small LECs asks that a letter of credit be deemed acceptable in lieu of the bond requirement.[844] We find no statutory basis for this request, and we, therefore, decline to provide this alternative. Further justification for our position on alternatives to a bond requirement is available in Section VII.

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[840] Small LECs Opening Comments on the PD at 6.

[841] Id. at 10.

[842] Id. at 11.

[843] See CAL. PUB. UTIL. CODE § 5970(b) (providing that a state video franchise may not be transferred unless "[t]he transferee agrees that any collective bargaining agreement entered into by a video service provider shall continue to be honored, paid, or performed to the same extent as would be required if the video service provider continued to operate under its franchise for the duration of that franchise unless the duration of that agreement is limited by its terms or by federal or state law"). See also id. at § 5810(c) ("It is the intent of the Legislature that collective bargaining agreements be respected.").

[844] Small LECs Opening Comments on the PD at 7.

We turn now to the comments of Verizon. Verizon comments principally on technical bonding issues, reporting issues associated with wireless broadband, and other narrow issues concerning the reporting of information required in the application and the annual reports. We have addressed the comments on these issues in Sections VI, VII, and XIII above.

Verizon also argues that the proposed decision inappropriately requires hearings for certain proceedings. Verizon asserts that we misread Public Utilities Code § 5890(g) when we find that the statute requires us to hold a public hearing whenever we conduct formal investigations regarding franchising; anti-discrimination and build-out; reporting; cross-subsidization; or user fees. According to Verizon, "[t]his view ignores the plain language of § 5890(g) and a long-standing rule of statutory interpretation, *noscitur a sociis:* 'a word takes meaning from the company it keeps.'"[845] Since "the reference to a 'decision' follows *immediately* after the sentence that allows local governments to complain, or the Commission to investigate allegations 'that a holder is not offering video service as required by this section,'" Verizon asserts that the requirement to hold hearings applies only to investigations regarding anti-discrimination and build-out provisions of Public Utilities Code § 5890.[846] Alternatively, Verizon argues that the we need not rely on Public Utilities Code § 5890(g) to define our investigative authority.[847] Instead, Verizon states that the Commission should have full discretion to determine the appropriate type of hearing in any future proceeding.[848]

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[845] Verizon Opening Comments on the PD at 14.

[846] Id. at 14 (emphasis omitted). Specifically, Verizon states that, under DIVCA's provisions, "the Commission *must* hold hearings in *only* two instances: (1) if a holder requests an extension of time to meet its non-discrimination or build-out obligations, and (2) before issuing a decision regarding a violation of § 5890 pursuant to a complaint by local government or investigation on the Commission's own motion." Id. at 14-15.

[847] Id. at 16.

[848] Id. at 17.

We are not persuaded by Verizon's arguments regarding hearings. In reaching this conclusion, we look to the text of Public Utilities Code § 5890(g):

> Local governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section, or the state franchising authority may open an investigation on its own motion. The state franchising authority shall hold public hearings before issuing a decision. The commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division.

When we examine Verizon's principal argument, that a word in legislation derives its meaning from "the company that it keeps," we note that the requirement to hold public hearings sits closest to the statutory language that allows the Commission to open an investigation on its own motion. As a result, we conclude that whenever the Commission is conducting an enforcement investigation, then it must hold public hearings. Our application of the interpretive principle cited by Verizon simply confirms our decision to hold public hearings in conjunction with any formal enforcement investigation opened on the Commission's own motion.

AT&T's comments focus principally on data-related issues. We addressed these comments directly in Sections VI and XIII and will not repeat this discussion here.

Los Angeles and Carlsbad Responders make three principal arguments. First, Los Angeles and Carlsbad Responders asserts that DIVCA does not establish that the Commission is the sole franchising authority.[849] Second, Los Angeles and Carlsbad Responders contends that DIVCA does not permit or grant an automatic extension of franchises that expire in 2007.[850] Third, Los Angeles and Carlsbad Responders states that the Commission should include additional provisions in the application affidavit to "ensure that local entities can

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[849] Los Angeles and Carlsbad Responders Opening Comments on the PD at 1.

[850] Id. at 4-7.

effectively enforce applicable provisions of DIVCA."[851] We address all three of these arguments in Sections III, IV, and V (respectively).

In conclusion, we note that we have made many revisions to clarify portions of the proposed decision (as requested by parties), to correct typographical errors, and to improve the overall readability of the decision. Often we made these revisions without comment or discussion. While we carefully considered all parties' comments on the draft decision, space and time required that we restrict our discussion of individual comments.

XX. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Timothy J. Sullivan is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. DIVCA became effective on January 1, 2007.

2. Preventing an incumbent cable operator in one video service area from operating under a state video franchise in a new area would not promote widespread access to the most technologically advanced cable and video services in California.

3. The ability of a local entity to force an incumbent cable operator to agree to extra concessions during the time following the expiration of a local video franchise but prior to when the incumbent may operate under a state video franchise would disadvantage incumbent cable operators over new entrants and create an unfair and unlevel playing field for market competitors.

4. Like a driver's license, the authority to operate under a local franchise agreement has an expiration date.

5. According to the Assembly Analysis, DIVCA provides that as of January 1, 2008, all video service providers must seek a state video franchise instead of a local franchise.

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[851] Id. at 7.

6. Appropriate implementation of DIVCA, which is designed to create a fair and level playing field for all video service providers, requires the automatic extension of local video franchises that (i) expire before January 2, 2008 and (ii) are held by incumbent cable operators planning to seek state video franchises.

7. If an incumbent cable operator's local franchise expires before January 2, 2008, the Assembly Analysis declares that (i) the incumbent can request a state video franchise that begins on January 2, 2008 and (ii) its current local franchise will be extended until that date.

8. Failure to allow state video franchise applications in advance of the expiration of local franchises would place incumbent cable operators in legal limbo during the time between expiration of their local franchises and issuance of their state video franchises.

9. It is reasonable and consistent with DIVCA's objectives to permit incumbent cable operators to apply for state video franchises before expiration of their local franchises.

10. Without further Commission action, the potential for evasion of statutory obligations increases through the holding of multiple state video franchises via multiple entities.

11. Placing restrictions on when a video service provider is eligible to operate under a state video franchise will decrease the complexity of the application review process and reduce the potential for state video franchise holders to evade compliance with statutory obligations.

12. Restrictions placed on when a video service provider is eligible to operate under a state video franchise are relevant to implementation of statutory provisions concerning build-out requirements; broadband and video reporting obligations; and the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services.

13. Without further Commission action, the Commission's ability to enforce build-out requirements could be impaired if a corporate family divides its telephone and video services among different operating entities in California.

14. Without further Commission action, the Commission's authority and ability to prevent subsidization of video deployment with rate increases for stand-alone, residential, primary line, basic telephone services could be challenged if a communications company divides its video and telecommunications services between two different operating entities.

15. Without further Commission action, it could be difficult, if not impossible, for the Commission to collect comprehensive broadband and video reports if a company separated its broadband operations from its video operations, or divided its video operations among multiple California entities.

16. The proposal to limit the award of a state video franchise to the parent company in a corporate family would be unduly burdensome.

17. It is necessary and reasonable to condition an applicant's eligibility for a state video franchise on its stipulating in its application affidavit that it and all its affiliates' California operations will be included for the purposes of applying Public Utilities Code §§ 5840, 5890, 5940, and 5960.

18. The stipulations enumerated in Appendix C ensure that no state video franchise holder may evade DIVCA requirements due to the specific nature of its corporate structure.

19. It is reasonable to use the definition set forth in R.92-08-008 as a basis for the definition of "affiliate" contained herein, because that definition is longstanding and commonly used in this forum.

20. "Affiliate," when the R.92-08-008 definition is modified for the video context, means any company 5 per cent or more of whose outstanding securities are owned, controlled, or held with power to vote, directly or indirectly either by a state video franchise holder or any of its subsidiaries, or by that state video franchise holder's controlling corporation and/or any of its subsidiaries as well as any company in which the state video franchise holder, its controlling corporation, or any of the state video franchise holder's affiliates exert substantial control over the operation of the company and/or indirectly have substantial

financial interests in the company exercised through means other than ownership.

21. The Commission has found the definition of affiliate contained in R.92-08-008 as adequate for reporting purposes for quite some time.

22. The FCC currently uses the term "broadband" and "advanced telecommunications capability" to describe services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kilobits per second.

23. It is reasonable to require broadband data reporting by affiliates of state video franchise holders that use non-wireline technologies.

24. There are operational differences between wireless and wireline broadband technologies.

25. Appendix D recognizes and accounts for operational differences between wireless and wireline technologies in its reporting specifications.

26. It is reasonable to require applicants to make attestations to ensure effective local enforcement of DIVCA provisions.

27. It is reasonable to require that a single, qualified corporate entity be responsible for DIVCA compliance, accept service of process, and submit to the jurisdiction of California courts.

28. It is reasonable to allow state video franchise applicants to describe their proposed video service area footprint with a collection of census block groups or a geographic information system digital boundary meeting or exceeding national map accuracy standards.

29. It is reasonable to define areas in the proposed video service area footprint as (i) collections of contiguous census block groups or (ii) regions defined by geographic information system boundaries. These definitions provide adequate information about the footprint to the Commission and comport with common understanding of an "area."

30. It is reasonable to require a state video franchise applicant to provide an expected date of deployment for each area in the proposed video service area footprint (as defined herein).

31. Requiring the provision of deployment data at a greater level of granularity in the application could place some applicants at a competitive disadvantage to other applicants.

32. Data contained in the application are not subject to confidentiality protections.

33. The Commission will receive video and broadband deployment data at a high level of granularity through reports that a state video franchise holder must submit. These data shall be disclosed to the public only as provided for pursuant to Public Utilities Code § 583.

34. Access and subscription to advanced communication technologies are important socioeconomic indicators.

35. Broadband and video services are becoming increasingly important to active participation in our modern-day economy and society.

36. Restricting socioeconomic indicators to income alone focuses too narrowly on economic factors, and fails to encompass social factors.

37. DIVCA's legislative purposes include promoting widespread access to the most technologically advanced video services and closing the Digital Divide.

38. It is reasonable to require submission of information on access and subscription to advanced communications services as part of the socioeconomic information collected pursuant to DIVCA.

39. AT&T's proposal to not define "socioeconomic indicators" would lead to confusion by applicants as to what information we expect to be filed with the Commission.

40. The diversity of parties' comments on the definition of "socioeconomic status information" demonstrates that reasonable people can disagree regarding the appropriate definition.

41. The early collection of broadband and video services information will give the Commission time to address and resolve data collection and analysis issues that arise.

42. The first annual report on broadband and video services data is due July 1, 2008.

43. Due to the timing of data collection, requiring the submission of extensive socioeconomic data simultaneously with the filing of a state video franchise application is not reasonable.

44. Permitting an applicant for a state video franchise to attest in its application that it will provide the Commission with company-specific socioeconomic status information within 90 calendar days of state video franchise issuance ensures that the Commission will have appropriate baseline information for reviewing a company's progress, but does not impose an unnecessary barrier to entry.

45. A 90 calendar day period for submitting socioeconomic data mirrors the amount of time allotted to state video franchise holders for their preparation of annual broadband and video reports.

46. It is reasonable to permit an applicant for a state video franchise to attest in its application that it will provide the Commission with company-specific socioeconomic status information within 90 calendar days of being issued a state video franchise.

47. It is not reasonable to deem an application incomplete when an applicant has attested that it will provide the Commission with company-specific socioeconomic status information within 90 calendar days of being issued a state video franchise.

48. It is reasonable for a state video franchise application to include information on all parent entities, if more than one.

49. It is reasonable to require that applicants determine the number of low-income households by utilizing U.S. Census projections of low-income households available as of January 1, 2007.

50. Since the Commission is requiring submission of a bond to provide adequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage it causes to the public right-of-way, it is not necessary to establish other means by which a state video franchise holder may demonstrate that it possesses the requisite financial, legal, and technical qualifications.

51. Coordination and exchange of information with local entities will facilitate the success of the new state video franchise system.

52. The staff of the Commission's new video franchise unit is best suited for developing plans to coordinate with local entities.

53. It serves no useful purpose to require applicants to show how they intend to meet build-out and antidiscrimination requirements; rather, the focus should be on their concrete actions, or lack thereof, as state video franchise holders.

54. Monitoring the actions of a state video franchise holder through the Commission's reporting requirements will enable the Commission to determine whether a state video franchise holder is complying with build-out and antidiscrimination requirements.

55. Pursuant to Public Utilities Code § 5810(c), it is the intent of DIVCA that collective bargaining agreements be respected.

56. Pursuant to Public Utilities Code § 5870(b), a transferee of a state video franchise must agree that any collective bargaining agreement entered into by a video service provider shall continue to be honored, paid, or performed to the same extent as would be required if the video service provider continued to operate under its state video franchise.

57. To ensure the Commission is adequately informed of collective bargaining requirements when a state video franchise is transferred, it is consistent with DIVCA to require state video franchise holders to produce annual reports that indicate whether their employees are subject to a collective bargaining agreement.

58. When transfer of a state video franchise is sought, it is consistent with DIVCA to require a transferee to complete an affidavit that attests it will respect existing collective bargaining agreements.

59. The application affidavit requires the affiant to swear that she or he has "personal knowledge of the facts," is "competent to testify to [the facts]," and has "authority to make this Application behalf of and to bind the Company."

60. It is reasonable for the Commission to impose a bond requirement to determine whether applicants possess financial, legal, and technical qualifications necessary to be state video franchise holders.

61. A bond typically cannot issue without a franchise date.

62. The Commission's bond requirement only demonstrates that the applicant possesses the "qualifications" necessary to offer video service. It does not substitute for security instruments required by local entities as part of their oversight of local rights-of-way.

63. A tiered bonding requirement can be sufficient to establish a state video franchise holder's qualifications, without placing a significant barrier to entry on applicants that are qualified to provide video service.

64. It is reasonable to adopt a tiered bonding requirement and base the size of the bond on the number of a state video franchise holder's potential customers.

65. A requirement that state video franchise holders carry a bond in the amount of $100,000 per 20,000 households in a proposed video service area, with a required $100,000 minimum and a cap of $500,000 per state video franchise holder, is reasonable in light of the record of this proceeding that demonstrated a range of bonding requirements currently in use.

66. A cap of $500,000 per state video franchise holder on the bond requirement will not discourage competition.

67. It is reasonable to require state video franchise holders to carry a bond in the amount of $100,000 per 20,000 households in a video service area, with a required $100,000 minimum and a cap of $500,000 per state video franchise holder on the bond requirement.

68. It is reasonable to require that a corporate surety authorized to transact a surety business in California issue the state video franchise holder's bond, because the bond is to fulfill state purposes.

69. It is reasonable to require that the bond list the Commission as the obligee and no other obligees for two reasons: (i) the bond is designed only to prove to the Commission that the applicant possess adequate qualification to be a state video franchise holder and (ii) local entities may require additional security instruments pursuant to their existing authority.

70. It is reasonable to require a state video franchise holder to provide a copy of its executed bond to the Executive Director (i) within five business days after receipt of a state video franchise and (ii) prior to initiating video service.

71. It is reasonable to require an applicant to attest to the amount and future execution of the required bond in its application affidavit.

72. It is not reasonable to require a state video franchise holder to provide a copy of the executed bond sixty days before it commences video system construction in a local jurisdiction, because notice of the bond is provided through the receipt of the application affidavit.

73. It is reasonable to require that a state video franchise holder not allow its bond to lapse during any period of its operation pursuant to a state video franchise.

74. An application fee of $2,000 is reasonable for recovering the costs to process a state video franchise application.

75. It is reasonable to give state video franchise holders that are not also regulated utilities or cable companies access to utility support structures and rights-of-way, because their services will be disadvantaged without such access in a manner contrary to the intent of the Legislature when it enacted DIVCA to establish a level playing field for video service providers in California.

~~75.~~76. The state video franchising process is strictly limited by DIVCA and less complex than the franchising process now in place at the local level.

~~76.~~77. It is not necessary to impose additional fees to cover other tasks associated with administering the state video franchise program. Such expenses will be recovered through annual user fees.

~~77.~~78. Since DIVCA does not envision that the Commission will have discretion in its review of an application, it is not reasonable to permit protests of a state video franchise application.

~~78.~~79. It would not be feasible to entertain protests, responses to protests, and Commission action to resolve the protests during the short period set by DIVCA for the review of a state video franchise application.

~~79.~~80. The submission of information indicating that an applicant has violated a final nonappealable order relating to either the Cable Television and Video Providers Customer Service and Information Act or the Video Customer Service Act does not constitute a protest.

~~80.~~81. It is reasonable for the Commission to provide notice of application incompleteness and the specific reason for incompleteness in the same document.

~~81.~~82. It is reasonable for the Commission to provide affected local entities, as well as the applicant, notice of application incompleteness and the specific reason for incompleteness.

~~82.~~83. It is reasonable for the Commission to provide notice of the statutory ineligibility of an applicant, if known, to the applicant.

~~83.~~84. It is reasonable that an application will not be deemed granted due to the Commission's failure to act when the applicant is statutorily ineligible to hold a state video franchise.

~~84.~~85. Since DIVCA specifies that an incumbent cable operator's right to abrogate a local franchise is triggered when a state video franchise holder provides notice to a local jurisdiction that it intends to initiate providing service in all or part of that jurisdiction, it is reasonable to require the state franchise holder to provide notice of imminent market entry to the incumbent cable operators operating in that jurisdiction.

~~85.~~86. Requiring a state video franchise holder to provide concurrent notice of imminent market entry to affected local entities and incumbent cable operators is reasonable in light of the legislative intent that DIVCA create a fair and level playing field for all market competitors.

~~86.~~87. It is reasonable to determine and collect a user fee from state video franchise holders to finance the costs of administering the state video franchise program.

~~87.~~88. The Commission determines the utility user fee for all utilities based on revenues.

~~88.~~89. It is reasonable for the Commission to base its user fees on gross state video franchise revenues reported by state video franchise holders.

~~89.~~90. There are significant policy and administrative benefits to harmonizing our collection of user fees across all fee payers by relying on a revenue-based system that uses the Commission's traditional payment schedule and processes.

~~90.~~91. The budget adopted by the Commission to administer the costs of the video franchising program is reasonable.

~~91.~~92. It is reasonable to base a user fee upon the percentage of all state video franchise holders' gross state video franchise revenues that is attributable to an individual state video franchise holder.

~~92.~~93. It is reasonable to determine the user fee to be paid by each state video franchise holder annually.

~~93.~~94. The payment schedule developed herein for the payment of user fees is reasonable and consistent with Commission collection of user fees from public utilities.

~~94.~~95. The replacement or reduction of our user fee with task-specific fees is inconsistent with the procedures used to assess fees on public utilities subject to Commission jurisdiction.

~~95.~~96. For Fiscal Year 2007-2008, it is not practical to assess user fees based on state video franchise holders' revenues.

~~96.~~97. For Fiscal Year 2007-2008, it is reasonable to assess user fees based on the pro rata share of households existing in a state video franchise holder's video service area.

~~97.~~98. The procedures for collecting user fees for Fiscal Year 2007-2008 as discussed herein, including the requirement that all state video franchise holders pay for an entire year, are reasonable.

~~98.~~99. Basing a user fee for Fiscal Year 2007-2008 on a state video franchise holder's potential number of subscribers best responds to the legislative desire to create a fair and level playing field and ensure small video service providers are not placed at a competitive disadvantage.

~~99.~~100. Basing user fees on telephone revenues or telephone lines is not reasonable, because there is no direct nexus between telephone lines and the provision of video service.

~~100.~~101. The proposal to collect Year 1 user fees in Year 2 is not reasonable, because the Commission has a legal obligation to collect user fees in the year in which the state has authorized spending.

~~101.~~102. It is reasonable to allow for confidential treatment of information provided pursuant to the revenue reporting requirements of DIVCA.

~~102.~~103. It is not reasonable to permit state video franchise holders to submit simultaneously user fees and the data upon which the user fees are based. Such a procedure would not permit the determination of the appropriate user fee.

~~103.~~104. The procedures for reporting, setting, and receiving user fees contained herein are reasonable and necessary for the implementation of DIVCA.

~~104.~~105. The procedures for reporting, setting, and receiving user fees closely track the user fee procedures currently used by California telecommunications carriers and should not raise novel implementation issues.

~~105.~~106. The employment reports required in General Order 169 are reasonable.

~~106.~~107. It is reasonable to make employment reports available to the public.

~~107.~~108. It is reasonable to deem data on broadband and video availability to be collected "on a census tract basis" if a company uses a geocoding application that assigns its potential customers' addresses in the manner prescribed in Appendix D.

~~108.~~109. It is reasonable to require subscribership reports to be based upon customers' individual addresses and geocoded to specific, corresponding census tracts or other census units that nest within census tracts.

~~109.~~110. It is reasonable to require the reporting of all broadband data on a census tract basis. It is reasonable to permit approximation of these data only if the state video franchise holder (i) does not maintain this information on a census tract basis in its normal course of business and (ii) the alternate reporting methodology reasonably approximates census tract data.

~~110.~~111. The annual reporting requirements pertaining to broadband and video services discussed herein are reasonable.

~~111.~~112. It is reasonable to release annual broadband and video data only if the Commission determines that this disclosure is made "as provided for pursuant to Section 583."

~~112.~~113. It is reasonable to determine in Phase II if additional, more detailed broadband and video information is required for enforcement of specific DIVCA provisions.

~~113.~~114. Given the sensitivity of nonpublic state video franchise revenue data, it is reasonable to release individual state video franchise holders' annual state video franchise revenue data only if we determine that disclosure of the data is made "as provided for pursuant" to Public Utilities Code § 583.

~~114.~~115. It is reasonable to expect that aggregated broadband and video data presented in statutorily required reports will not be competitively sensitive.

~~115.~~116. It is reasonable to allow for confidential treatment of granular broadband and video data submitted by state video franchise holders, because such information may be competitively sensitive.

~~116.~~117. The level of detail required by the Commission for the reporting of annual broadband and video data is reasonable.

~~117.~~118. Since Public Utilities Code § 5890(b) establishes low-income build-out requirements that are benchmarked upon household income data available as of January 1, 2007, it is reasonable and useful for enforcement to require low-income household information that utilizes the most recent U.S. Census projections available as of January 1, 2007.

~~118.~~119. It is reasonable to define "telephone service area" as the area where the Commission has granted an entity a CPCN.

~~119.~~120. To the extent a company does not have customers in a portion of its telephone service area, the company need only collect and report updated U.S. Census demographic data for that region.

~~120.~~121. The information and reports required to enforce the antidiscrimination and build-out provisions, as set forth herein, are reasonable.

~~121.~~122. Reports on video availability will allow the Commission to gauge whether a state video franchise holder has made a "substantial and continuous effort" to meet the build-out requirements established by Public Utilities Code § 5890.

~~122.~~123. The build-out requirements of Public Utilities Code § 5890 apply to a state video franchise holder's entire video service area, rather than individual subdivisions of a state video franchise holder's service territory.

~~123.~~124. It is reasonable to require state video franchise holders to submit annual reports on video service offered, on a census tract basis both to California households generally and to low-income households specifically.

~~124.~~125. Unless information on free service to community centers is reported to the Commission, there is no way for the Commission to know if a state video franchise holder is adhering to Public Utilities Code § 5890(b)(3).

~~125.~~126. The reporting requirements pertaining to the provision of free service to community centers, adopted herein, are reasonable and necessary for enforcement of specific DIVCA provisions.

~~126.~~127. Restricting public access to aggregate build-out data would unduly impede external stakeholders' ability to monitor compliance with build-out requirements.

~~127.~~128. It is not reasonable to give confidential treatment to aggregate build-out data.

~~128.~~129. It is reasonable to allow for confidential treatment of build-out data on a case-by-case basis and to release individual state video franchise holder's build-out data only if we determine that the disclosure of the data is made as provided for pursuant to Public Utilities Code § 583.

~~129.~~130. Participation by state video franchise holders in Commission diversity efforts is in the public interest.

~~130.~~131. If they decline to provide workplace diversity data equivalent to that provided by CUDC members, it is reasonable to require state video franchise holders that submit Employment Information Report EEO-1 (EEO-1) filings to the federal Department of Labor to provide us copies of these future filings.

~~131.~~132. The filing of a copy of EEO-1 report places a minimal burden on state video franchise holders.

~~132.~~133. It is reasonable (i) to afford information provided on individual EEO-1 filings confidential treatment and (ii) release aggregate state video franchise workplace diversity data only at the statewide level.

~~133.~~134. Pursuant to Public Utilities Code § 5810(a)(2), DIVCA was intended to both (i) "promote the widespread access to the most technologically advanced cable and video services" and (ii) "complement efforts to increase investment in broadband infrastructure and close the digital divide." It, therefore, is reasonable to find that "free service" provided to community centers must include both broadband and video services.

~~134.~~135. It is not reasonable to impose eligibility requirements on community centers receiving free service beyond those requirements imposed in Public Utilities Code § 5890(b)(3).

~~135.~~136. The build-out requirements pertaining to state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers are reasonable.

~~136.~~137. As contained in the attached General Order, the provisions for determining the build-out requirements pertaining to state video franchise holders that alone, or in conjunction with their affiliates, have less than one million California telephone customers are reasonable.

~~137.~~138. Since DIVCA's build-out requirements apply to holders of a video franchise (and not to applicants) and since DIVCA affords only thirty calendar days for review to determine the completeness of an application, it is not reasonable to assess whether a proposed video service area is drawn in a discriminatory fashion at the time of application.

~~138.~~139. A review of a proposed video service area at the time of application is not necessary for proper enforcement of DIVCA, because local governments can bring complaints concerning discrimination to the Commission, which may open an investigation on discrimination matters at any time after the award of a state video franchise.

~~139.~~140. It is reasonable for the Commission to limit its initiation of investigations to issues regarding franchising; antidiscrimination and build-out; reporting; the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services; and annual user fees.

~~140.~~141. It is not reasonable for the Commission to initiate an investigation if we do not have authority to regulate in response to investigative findings.

~~141.~~142. It is reasonable for the Commission to hold public hearings as a part of formal investigations regarding franchising; antidiscrimination and build-out; reporting; the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services; or user fees.

~~142.~~143. Under current Commission practice, an investigation typically may include evidentiary, full panel, and public participation hearings conducted in public.

~~143.~~144. It is reasonable that any formal investigation to determine whether an applicant failed to comply with DIVCA franchising provisions follow standard Commission procedures for the initiation of an investigation. These procedures include a majority vote of the Commission on an order initiating the investigation (which either contains a report or declarations of Commission witnesses pertaining to facts that demonstrate an investigation of Public Utilities Code § 5890 compliance is warranted).

~~144.~~145. It is reasonable to determine the procedures for the conduct of a proceeding concerning compliance with franchising provisions in Phase II of this proceeding.

~~145.~~146. It is reasonable for the Commission to undertake significant monitoring for the enforcement of the antidiscrimination and build-out requirements discussed herein.

~~146.~~147. It is reasonable to require that a local government's complaint alleging that a state video franchise holder has failed to meet the antidiscrimination and build-out requirements of Public Utilities Code § 5890 include sworn declarations pertaining to the facts that the local government believes demonstrate a failure to fulfill obligations imposed by Public Utilities Code § 5890.

~~147.~~148. It is reasonable that the Commission require a local entity filing a complaint to clearly identify that the complaint pertains to a failure to meet an obligation imposed by Public Utilities Code § 5890.

~~148.~~149. In any proceeding investigating a state video franchise holder's compliance with the antidiscrimination and build-out provisions of Public Utilities Code § 5890, it is reasonable to allow interested parties to petition the Commission to participate in the investigation and hearing process.

~~149.~~150. The procedures described herein for initiating and conducting a proceeding investigating allegations of a state video franchise holder's failure to comply with the antidiscrimination and build-out provisions of Public Utilities Code § 5890 are reasonable.

~~150.~~151. The procedures described herein for initiating a proceeding to investigate allegations of a state video franchise holder's failure to comply with the reporting requirements of DIVCA are reasonable.

~~151.~~152. It is reasonable to determine the procedures for conducting a proceeding regarding a state video franchise holder's failure to comply with the reporting requirements of DIVCA in Phase II of this proceeding.

~~152.~~153. The procedures adopted herein to enforce DIVCA reporting requirements are reasonable.

~~153.~~154. The Commission has remained vigilant in enforcing existing prohibitions on unlawful cross-subsidization of intrastate telecommunications services.

~~154.~~155. The freezing of basic residential rates adopted in Public Utilities Code § 5950 ensures that there is no opportunity for basic residential rates to be increased to support video service operations during the period of the freeze.

~~155.~~156. The Commission has reasonable requirements in place to prevent financing of video deployment with rate increases for stand-alone, residential, primary line, basic telephone services.

~~156.~~157. The procedures discussed herein for investigation and sanctioning of the unlawful cross-subsidization of video services are reasonable.

~~157.~~158. The procedures contained in General Order 169 for enforcing the submission of user fees are reasonable.

~~158.~~159. It is reasonable for the Commission to exercise its authority to revoke or suspend a state video franchise in response to a pattern and practice of material breaches that is established by local entities or the courts.

~~159.~~160. The procedures for initiating and conducting a proceeding concerning whether a pattern and practice of violations of DIVCA provisions

that are regulated by local entities warrant suspension or revocation of the state video franchise are reasonable.

~~160.~~161. In conducting a proceeding concerning whether a pattern and practice of violations of DIVCA provisions that are regulated by local entities warrants suspension or revocation of the state video franchise, it is not reasonable for the Commission to consider the merits of alleged material breaches de novo.

~~161.~~162. It is not clear which of the Commission's Rules of Practice and Procedure remain applicable in a specific situation pertaining to a proceeding conducted pursuant to DIVCA.

~~162.~~163. The procedures adopted herein to provide DRA with access to information submitted to the Commission pursuant to DIVCA are reasonable and afford DRA unfettered access to that data.

~~163.~~164. It is reasonable to permit DRA, upon review of this information, to copy that information required for it to fulfill its obligations pursuant to DIVCA, i.e., obligations pertaining to state video franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950.

~~164.~~165. It is reasonable to permit DRA to copy information submitted by state video franchise holders to the Commission when the information copied is necessary for DRA's advocacy and enforcement actions based upon Public Utilities Code §§ 5890, 5900, and 5950.

~~165.~~166. The procedures adopted herein concerning amendments to a state video franchise are reasonable.

~~166.~~167. It is not reasonable to adopt state video franchise renewal provisions at this time.

Conclusions of Law

1. Increasing competition for video services is a matter of statewide concern.

2. DIVCA directs the Commission to issue state video franchises for the provision of video services in California.

3. Pursuant to Public Utilities Code § 5810, DIVCA declares that a state video franchising process should:

a. Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.

b. Promote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner regardless of socioeconomic status.

c. Protect local government revenues and their control of public rights of way.

d. Require market participants to comply with all applicable consumer protection laws.

e. Complement efforts to increase investment in broadband infrastructure and close the digital divide.

f. Continue access to and maintenance of the public, education, and government (PEG) channels.

g. Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes.

4. DIVCA provides that the Commission is the "sole franchising authority" for issuing state video franchises. As of January 2, 2008, the Commission is the only government entity that may grant a video service provider a franchise to operate within California.

5. DIVCA establishes a transition period, whereby local franchises continue to operate until they expire or are abrogated pursuant to Public Utilities Code § 5840(o).

6. Pursuant to DIVCA, video service providers are not public utilities, and a holder of a state franchise shall not be deemed a public utility as a result of providing video service.

7. Pursuant to DIVCA, the Commission may not impose any requirement on any holder of a state video franchise, except as expressly provided by DIVCA.

8. DIVCA grants local entities, not the Commission, sole authority to regulate pursuant to many statutory provisions, including those addressing franchise fees

(§ 5860), PEG channels (§ 5870), the Emergency Alert System (§ 5880), and, notably, federal and state customer service and protection standards (§ 5900).

9. Pursuant to DIVCA, the local entity is the lead agency for any environmental review with respect to network construction, installation, and maintenance in public rights-of-way (§§ 5820 and 5885).

10. It would not be consistent with DIVCA for the Commission to exercise its authority in a manner that diminishes the statutory responsibilities afforded to local entities.

11. Pursuant to DIVCA, the Commission may promulgate rules only as necessary to enforce statutory provisions on franchising (§ 5840); antidiscrimination and build-out (§ 5890); reporting (§§ 5920 and 5960); the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services (§§ 5940 and 5950); and regulatory fees (§ 401, §§ 440-444, § 5840).

12. It would not be consistent with DIVCA for the Commission to adopt regulatory proposals that fall outside the scope of its statutory authority.

13. An incumbent cable operator should not be considered an incumbent in areas outside of its local franchise areas as of January 1, 2007.

14. Public Utilities Code § 5840(n) requires a state video franchise holder to notify an affected local entity that it will provide video service in the local entity's jurisdiction.

15. Pursuant to Public Utilities Code § 5930(b), when an incumbent cable operator is providing service under an expired local franchise or a local franchise that expires before January 2, 2008, the local entity may extend that franchise on the same terms and conditions through January 2, 2008.

16. It is consistent with DIVCA to require automatic extension of local video franchises that expire before January 2, 2008 if they are held by incumbent cable operators seeking state video franchises.

17. DIVCA seeks to create a fair and level playing field for all market competitors that does not disadvantage or advantage one video service provider or technology over another.

18. Permitting incumbent cable operators to apply for state video franchises before expiration of their local franchises is consistent with DIVCA.

19. Public Utilities Code § 5840(e)(1)(B) recognizes that both "the applicant" and "its affiliates" must "comply with all federal and state statutes, rules, and regulations," which include provisions found in DIVCA.

20. To ensure enforcement of DIVCA provisions cutting across communications sectors, the Commission has the authority to require an applicant to stipulate that it and all its affiliates' California operations will be included for the purposes of applying Public Utilities Code §§ 5840, 5890, 5960, and 5940.

21. It is consistent with Public Utilities Code § 5840(f) to require an applicant to include a statement in its affidavit that it and all its affiliates' California operations will be included for the purposes of applying Public Utilities Code §§ 5840, 5890, 5960, and 5940.

22. The restrictions adopted herein on whom may hold a state video franchise are consistent with DIVCA.

23. Reliance on the definition of "affiliate" set forth in R.92-08-008 and contained herein is consistent with DIVCA and prior Commission precedent.

24. The definition of "affiliate" set forth herein is consistent with DIVCA's statutory scheme.

25. Public Utilities Code § 5830(a) defines "broadband" as "any service defined as broadband in the most recent Federal Communications Commission inquiry pursuant to Section 706 of the Telecommunications Act of 1996 (P.L. 104-104)."

26. Since the FCC currently uses the term "broadband" and "advanced telecommunications capability" to describe services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer)

transmission speed of more than 200 kilobits per second, "broadband," as used in Public Utilities Code § 5960, is not limited to wireline technologies.

27. Public Utilities Code § 5960 explicitly anticipates collection of data on broadband provided by non-wireline technologies.

28. Public Utilities Code § 5960(b)(1)(C) instructs state video franchise holders to give the Commission information on whether the broadband provided by the holders utilizes wireline-based facilities or another technology.

29. Pursuant to DIVCA, the Commission should collect broadband data for both wireline and non-wireline technologies used by state video franchise holders or their affiliates.

30. DIVCA assigns specific enforcement responsibilities to local entities, and the application process should require the applicant to make attestations to ensure effective local enforcement of DIVCA provisions.

31. Pursuant to DIVCA's enforcement scheme, a single, qualified corporate entity should be responsible for DIVCA compliance, accept service of process, and submit to the jurisdiction of California courts.

32. Pursuant to Public Utilities Code § 5840(e)(6), permitting applicants to describe their proposed video service area footprints with a collection of census block groups or a geographic information system digital boundary meeting or exceeding national map accuracy standards is consistent with DIVCA.

33. Pursuant to Public Utilities Code §§ 5840(e)(6) and 5840(e)(8), defining areas in the proposed video service area footprint as collections of contiguous census block groups or regions defined by geographic information system boundaries is consistent with DIVCA.

34. Pursuant to Public Utilities Code § 5840(e)(8), requiring a state video franchise applicant to provide an expected date of deployment for each area in the proposed video service area footprint pursuant to the definition proposed herein is consistent with DIVCA. The resulting provision of an expected date of

deployment for the entirety of each non-contiguous grouping or region included in an applicant's proposed video service area footprint is consistent with DIVCA.

35. DIVCA does not provide the Commission the authority to impose confidentiality restrictions on expected deployment data submitted in an application. Specifically, DIVCA does not give the Commission authority to impose confidentiality restrictions on local entities that receive information on expected deployment dates in a state video franchise application.

36. Requiring the submission of information on access and subscription to advanced communications services is consistent with DIVCA and its statutory purposes.

37. It is inconsistent with DIVCA to require applicants to provide information in their application concerning the applicants' efforts over the last three years to help close the Digital Divide; demonstrate diversity at all levels of employment and management; and demonstrate business opportunities created for small, minority-owned, and women-owned businesses, because all such requirements are inconsistent with DIVCA's application process, which sets forth requirements with particularity and strictly limits the Commission's role to determining whether the application is complete.

38. It is inconsistent with DIVCA to require the reporting of customer services provided in languages other than English.

39. It is consistent with DIVCA to deem (i) an application that contains an attestation that the applicant will submit company-specific socioeconomic data, including data on access and subscription to advanced communications services, within 90 calendar days of the date when the Commission issues a state video franchise as equivalent to (ii) an application that contains the data.

40. As amended pursuant to the discussion herein, the application form and the affidavits are consistent with DIVCA.

41. Public Utilities Code § 5840(e)(9) permits the Commission to require a bond to establish that an applicant for a state video franchise possesses the

financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant.

42. Public Utilities Code § 58940(e)(1)(C) tasks local entities with governing the "time, place, and manner" of a state video franchise holder's use of local rights-of-way.

43. DIVCA does not preclude local entities from requiring further security instruments to ensure that a state video franchise holder fulfills locally regulated obligations.

44. The requirement to name the Commission as an obligee of the bond required pursuant to Public Utilities Code § 5840(e)(1)(C) is consistent with DIVCA.

45. The requirement that the state video franchise holder submit a copy of the executed bond to the Executive Director (i) within five business days after receipt of a state video franchise and (ii) prior to initiating video service is consistent with DIVCA.

46. DIVCA does not permit the submission of a financial statement (in lieu of a bond) to demonstrate an applicant is qualified to hold a state video franchise.

47. DIVCA allows state video franchise holders access to the public rights-of-way regardless of whether they are public utilities and also expresses the Legislature's intent to create "a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider . . . over another." Therefore, video service providers also may utilize support structures such as utility poles, conduits and ducts of the large and mid-sized incumbent local exchange carriers and investor-owned electric utilities, as well as the rights-of-way of such utilities, as established by the Commission in D.98-10-058.

~~47.~~48. An application fee of $2,000 is consistent with DIVCA.

~~48.~~49. If the workload related to the application review process differs from current Commission estimates, the Commission has the statutory authority to revise its calculation of the application fee and change the fee.

~~49.~~50. DIVCA does not provide authority to collect fees for other Commission franchise actions.

~~50.~~51. Public Utilities Code § 5840 directs that the Commission's authority to oversee the state video franchise application process shall not exceed the provisions set forth in that section.

~~51.~~52. Public Utilities Code § 5840 provides the Commission with authority to evaluate whether a state video franchise is complete or incomplete. This authority is limited to specific tasks delineated in the statute.

~~52.~~53. Public Utilities Code § 5840 provides that the Commission must inform an applicant of whether its state video franchise application is complete within thirty calendar days of receipt of its application.

~~53.~~54. DIVCA provides the Commission with no discretion over the substance or timing of its review of state video franchise applications. The substance of the Commission's review is limited to the task of determining whether the application is complete.

~~54.~~55. If the Commission determines an application is complete, DIVCA requires the Commission to issue a state video franchise before the fourteenth calendar day after that finding.

~~55.~~56. The only stated ground for rejecting an application is incompleteness.

~~56.~~57. If an application is incomplete, the Commission must explain with particularity how the application is incomplete, and the applicant has an opportunity to amend the application to overcome the defects.

~~57.~~58. Public Utilities Code § 5840 does not provide for protests.

~~58.~~59. The protest of a Commission review when the Commission has no discretion would be an idle act and could accomplish nothing.

~~59.~~60. The failure of the Commission to act on an application within forty-four calendar days of its receipt is deemed to constitute issuance of the state video franchise applied for and requires no further action on behalf of the applicant.

~~60.~~61. An amended application must be reviewed for completeness within thirty calendar days of submission.

~~61.~~62. There is no statutory basis for the assertion that DRA has the right to protest a state video franchise application.

~~62.~~63. TURN and Joint Cities misconstrue DIVCA when they assert that Public Utilities Code § 5840(e)(1)(D) permits local entities to file protests. The statute only requires that local entities receive a copy of the state video franchise application.

~~63.~~64. The Commission should accept no protests to any state video franchise application.

~~64.~~65. The Commission should receive any information indicating that an applicant has violated a final nonappealable order relating to either the Cable Television and Video Providers Customer Service and Information Act or the Video Customer Service Act. Provision of such information does not constitute a protest.

~~65.~~66. The requirement of a bond provides adequate assurance that an applicant possesses the necessary financial, legal, and technical qualifications to operate pursuant to a state video franchise.

~~66.~~67. Pursuant to Public Utilities Code § 5840(h), notification of affected local entities of whether an applicant's application is complete or incomplete and the particular items that are incomplete is consistent with DIVCA.

~~67.~~68. DIVCA establishes that no person or corporation shall be eligible for a new or renewed state video franchise if that person or corporation is in violation of any final nonappealable order relating to either the Cable Television and Video Providers Customer Service and Information Act or the Video Customer Service Act.

~~68.~~69. Pursuant to Public Utilities Code § 5840(b), a state video franchise holder must provide a local entity notice that it will begin offering service in the entity's jurisdiction. This notice of imminent market entry shall be given at least ten calendar days but no more than sixty calendar days, before the video service provide begins to offer service.

~~69.~~70. Implicit in the incumbent cable operator's right to abrogate its franchise with the local entity is the assumption that an incumbent cable operator will know when a state video franchise holder provides notice of imminent market entry.

~~70.~~71. Pursuant to Public Utilities Code § 5810(a)(2)(A), the Commission shall place all user fees into a subaccount of the Commission's Utilities Reimbursement Account.

~~71.~~72. The user fees assessed by the Commission on state video franchise holders are not "franchise fees," as defined by Section 542 of the Federal Communications Act.

~~72.~~73. User fees levied by the Commission pursuant to DIVCA are either fees of "general applicability" or fees incidental to the awarding or enforcing the state video franchise.

~~73.~~74. Pursuant to Public Utilities Code § 401(b), the user fee shall produce enough, and only enough, revenues to fund the Commission with (i) its authorized expenditures for each fiscal year to regulate applicants and state video franchise holders, less the amount to be paid from special accounts (with designated exceptions); (ii) an appropriate reserve; and (iii) any adjustment appropriated by the Legislature.

~~74.~~75. The user fee should include funding for DRA, whose budget is included in the Commission budget.

~~75.~~76. Pursuant to Public Utilities Code § 5810(a)(3), collection of user fees from state video franchise holders in the same manner and under the same terms as collection of user fees from public utilities is consistent with DIVCA.

~~76.~~77. Pursuant to Public Utilities Code § 5810(a)(3), any user fees levied by the Commission should not discriminate against video service providers or their subscribers.

~~77.~~78. Pursuant to Public Utilities Code § 442(e), the Commission should issue refunds if it collects a fee in error.

~~78.~~79. The methodology and procedures for assessing a user fee for Fiscal Year 2007-2008 are consistent with DIVCA.

~~79.~~80. The methodology and procedures for assessing user fees for Fiscal Years following Fiscal Year 2007-2008 are consistent with DIVCA.

~~80.~~81. Pursuant to Public Utilities Code § 443(a), the Commission has the authority to require a video service provider to furnish information and reports needed to assess a user fee.

~~81.~~82. Public Utilities Code § 5920 imposes specific employment reporting requirements that direct state video franchise holders with more than 750 California employees to report upon the number and types of jobs held by their employees in California.

~~82.~~83. Pursuant to Public Utilities Code § 5920, state video franchise holders must provide projections of new hires expected during an upcoming year.

~~83.~~84. Granting confidential treatment to employment data provided pursuant to DIVCA would violate the express language of Public Utilities Code § 5920(b), which requires the Commission to make the employment data available on its public website.

~~84.~~85. Pursuant to Public Utilities Code § 5960, state video franchise holders must submit detailed annual reports on broadband and video services.

~~85.~~86. The reporting requirements pertaining to broadband and video services adopted in General Order 169 are consistent with DIVCA and fulfill a variety of statutory purposes. In addition to enabling the Commission to monitor build-out, the reports enable the Commission to support voluntary efforts to increase broadband adoption.

~~86.~~87. Given the sensitivity of nonpublic revenue data, the Commission should release individual state video franchise holder's annual state video franchise revenue data only if it determines that the disclosure of the data is made as provided for pursuant to Public Utilities Code § 583.

~~87.~~88. The procedures for reporting information on broadband and video availability contained in General Order 169, including the reporting methodology contained in Appendix D, are consistent with DIVCA.

~~88.~~89. The procedures for reporting broadband and video subscribership data contained in General Order 169 and discussed herein are consistent with DIVCA.

~~89.~~90. Pursuant to Public Utilities Code § 5960(B)(1)(A), a state video franchise holder may elect to approximate certain broadband availability data only if the state video franchise holder (i) "does not maintain this information on a census tract basis in its normal course of business" and (ii) the alternate reporting methodology "reasonably approximate[s]" census tract data.

~~90.~~91. Pursuant to Pursuant to Public Utilities Code § 5960(d), annual broadband and video data reported to the Commission shall be disclosed to the public only as provided for pursuant to Public Utilities Code § 583.

~~91.~~92. Scaling back our broadband reporting requirements, as proposed by AT&T, contravenes the principles underlying DIVCA, including its goals to promote widespread access to the most technologically advanced cable and video services to all California communities and to complement efforts to increase investment in broadband infrastructure.

~~92.~~93. Requiring the reporting of low-income household information that utilizes the most recent U.S. Census projections available as of January 1, 2007 is consistent with the definition of low-income household found in Public Utilities Code § 5890(j)(2).

~~93.~~94. Public Utilities Code § 5890(b) establishes low-income build out requirements that are benchmarked upon household income data available as of January 1, 2007.

~~94.~~95. The reporting requirements pertaining to the provision of free service to community centers, adopted herein, are consistent with the enforcement of specific DIVCA provisions.

~~95.~~96. Pursuant to Public Utilities Code § 5890(b)(3), the community center reporting requirement should apply to state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone subscribers.

~~96.~~97. The submission of information pertaining to employment, such as CUDC information or EEO-1 forms, is consistent with DIVCA's interest in tracking new jobs created by state video franchise holders.

~~97.~~98. Pursuant to Public Utilities Code § 5890, the Legislature required certain state video franchise holders to offer video service to California consumers within predetermined time periods.

~~98.~~99. Build-out provisions in subsections (b)(1)-(2) and (e) of Public Utilities Code § 5890 clearly require state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers to (i) offer service to a certain percentage of households in their telephone service areas in a designated time period, depending on the technology used by the holders and (ii) ensure that a certain percentage of households offered video access are "low-income households."

~~99.~~100. As contained in the attached General Order, the provisions for determining build-out requirements for state video franchise holders that alone, or in conjunction with their affiliates, have fewer than one million California telephone customers are consistent with DIVCA.

~~100.~~101. Public Utilities Code § 5890(j)(2) defines a low-income household as one with an annual household income of less than $35,000.

~~101.~~102. Pursuant to Public Utilities Code § 5890(b)(3), state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers must provide free service to community centers at the ratio of one community center per 10,000 customers.

~~102.~~103. Pursuant to Public Utilities Code § 5890(b)(3), a community center eligible for free service must be a facility that (i) qualifies for the California Teleconnect Fund, (ii) makes the state video franchise holder's service available to the community, and (iii) only receives service from one state video franchise holder at a time.

~~103.~~104. The build-out requirements adopted herein that pertain to state video franchise holders that alone, or in conjunction with their affiliates, have more than one million California telephone customers are consistent with DIVCA.

~~104.~~105. Pursuant to DIVCA, the design of build-out requirements is a fact-specific endeavor based upon conditions affecting individual video service providers.

~~105.~~106. The procedures adopted herein for determining the build-out requirements pertaining to state video franchise holders that alone, or in conjunction with their affiliates, have fewer than one million California telephone customers are consistent with DIVCA.

~~106.~~107. Pursuant to Public Utilities Code § 5890(d), "[w]hen a holder provides video service outside of its telephone service area, is not a telephone corporation, or offers video service in an area where no other video service is being offered, other than direct-to-home satellite service, there is a rebuttable presumption that discrimination in providing service has not occurred within those areas."

~~107.~~108. If not rebutted, the existence of any one of the three factors listed in the prior Conclusion of Law is sufficient to prove that a state video franchise holder is not discriminating in its provision of video service.

~~108.~~109. It is consistent with Public Utilities Code § 5890(d), which applies non-discrimination provisions to a "holder" rather than an "applicant," that the Commission's review of the antidiscrimination and build-out provisions take place after a state video franchise is awarded.

~~109.~~110. DIVCA's build-out requirements apply to a state video franchise holder's video service area as a whole, not a per-contiguous-area basis.

~~110.~~111. Pursuant to Public Utilities Code § 5890(g), local governments may bring complaints concerning discrimination to the Commission for resolution, and the Commission itself may open investigations on discrimination matters.

~~111.~~112. Public Utilities Code § 5890(e)(2)-(3) establishes automatic extensions for build-out requirements imposed by Public Utilities Code § 5890(e)(1)-(2). These extensions go into effect if a significant percentage of households fail to subscribe to a state video franchise holder's service.

~~112.~~113. Public Utilities Code § 5890(f) affords the Commission discretionary authority to grant an extension for the build-out requirements imposed in subsections (b), (c), and (e).

~~113.~~114. Pursuant to Public Utilities Code § 5890(g), the Commission may suspend or revoke a state video franchise if it finds any of the following: (i) The state video franchise holder has failed to comply with any demand, ruling, or requirement of the Commission made pursuant to and within the authority of Division 2.5; (ii) The state video franchise holder has violated any provision of Division 2.5 or any rule or regulation made by the Commission under and within the authority of this division; or (iii) A fact or condition exists that, if it had existed at the time of the original application for the state franchise (or transfer thereof), reasonably would have warranted the Commission's refusal to issue the state video franchise originally (or grant the transfer thereof).

~~114.~~115. DIVCA expressly limits the Commission's use of enforcement actions, such as investigations.

~~115.~~116. Pursuant to DIVCA, the Commission may impose a fine only when a state video franchise holder is in violation of a provision concerning user fees or antidiscrimination/build-out requirements.

~~116.~~117. Pursuant to Public Utilities Code § 5890(g), the Commission is given authority to address local entities' formal complaints based on DIVCA only when the complaints arise under Public Utilities Code § 5890.

~~117.~~118. It is consistent with DIVCA for the Commission to limit its initiation of investigations to those situations where DIVCA explicitly assigns the Commission authority to regulate.

~~118.~~119. Pursuant to Public Utilities Code § 5890(g), the Commission has the flexibility to determine which type of public hearing could best develop the record needed for deciding an individual matter.

~~119.~~120. Pursuant to Public Utilities Code §§ 5840 or 5930, any party at any time can bring the Commission information that demonstrates an applicant is ineligible to obtain a state video franchise. Such information is relevant to the Commission's review of an application, and providing it does not constitute a protest to an application.

~~120.~~121. Upon validation of evidence of ineligibility pursuant to Public Utilities Code §§ 5840 or 5930, the Commission can respond in a number of ways, including rejection of an application, immediate suspension of a state video franchise, issuance of an order to show cause for why a state video franchise should not be deemed invalid, and/or any other appropriate action consistent with the Commission's authority.

~~121.~~122. Pursuant to (i) our general enforcement powers in Public Utilities Code § 5890(g) and (ii) our specific authority to administer the state video franchise application process pursuant to Public Utilities Code § 5840, the Commission has the authority to investigate allegations that a fact or condition exists that, if it had existed at the time of the original application for the state video franchise (or transfer or amendment thereof), reasonably would have warranted the Commission's refusal to issue the state video franchise originally (or grant the transfer or amendment thereof).

~~122.~~123. Pursuant to Public Utilities Code § 5890(g), the Commission may open an investigation to determine whether an applicant failed to comply with DIVCA franchising provisions.

~~123.~~124. It is consistent with DIVCA to require that any formal investigation to determine whether an applicant failed to comply with DIVCA franchising

provisions follow standard Commission procedures for the initiation of an investigation. These procedures include a majority vote of the Commission on an order initiating the investigation that either contains a report or the declarations of Commission witnesses pertaining to facts that demonstrate an investigation of DIVCA compliance is warranted.

~~124.~~125. Pursuant to DIVCA, formal investigation of antidiscrimination and build-out compliance may be launched in two ways: (i) in response to a complaint filed by a local government, or (ii) on the Commission's own motion.

~~125.~~126. The procedures discussed herein concerning complaints filed by local governments alleging the failure of a state video franchise holder to comply with antidiscrimination and build-out requirements are consistent with DIVCA.

~~126.~~127. The procedures discussed herein concerning Commission-initiated investigations on the failure of a state video franchise holder to comply with antidiscrimination and build-out requirements are consistent with DIVCA.

~~127.~~128. Failure to comply with antidiscrimination and build-out provisions of Public Utilities Code § 5890 may lead to multiple penalties, including fines, suspension of a state video franchise, and/or revocation of a state video franchise.

~~128.~~129. Pursuant to DIVCA, it is unlawful for any applicant or state video franchise holder willfully to make any untrue statement of material fact in any application, notice, or report filed with the Commission.

~~129.~~130. Pursuant to DIVCA, it is unlawful for any applicant or state video franchise holder willfully to omit to state in any application, notice, or report any material fact that is required to be stated by DIVCA.

~~130.~~131. Consistent with DIVCA, a formal investigation into compliance with reporting requirements may be launched (i) on the Commission's own motion or (ii) initiated in response to a complaint filed by a local government if the reporting requirement at issue is used to monitor compliance with Public Utilities Code § 5890.

~~131.~~132. Pursuant to Public Utilities Code § 444(a), the Commission may impose a penalty for failure to provide financial reports required by the Commission. In particular, the Commission may assess a penalty not to exceed 25 percent of the amount of a state video franchise holder's estimated user fee, on account of the failure, refusal, or neglect to prepare and submit the report required by Public Utilities Code § 443.

~~132.~~133. Pursuant to DIVCA, the Commission may fine a state video franchise holder if it fails to provide accurate reports needed to enforce antidiscrimination and build-out provisions.

~~133.~~134. The authority to impose penalties pursuant to Public Utilities Code § 5890(g) flows to instances where a state video franchise holder misstates or omits information required by Public Utilities Code § 5960.

~~134.~~135. Current federal and state law subject California telecommunications companies to a variety of measures designed to prevent unlawful cross-subsidization between telecommunications costs and non-telecommunications costs.

~~135.~~136. As discussed herein, the Commission has ample authority to investigate allegations of unlawful cross-subsidization.

~~136.~~137. Pursuant to Public Utilities Code § 5950, the Commission prohibits incumbent local exchange carriers that obtain a state video franchise from changing any rate for basic telephone service until January 1, 2009, unless the incumbent is subject to rate-of-return regulation.

~~137.~~138. The procedures discussed herein for investigation and sanctioning of unlawful cross-subsidization of video services are consistent with DIVCA.

~~138.~~139. The procedures contained in General Order 169 for enforcing the submission of user fees are consistent with DIVCA.

~~139.~~140. DIVCA explicitly empowers local entities to enforce its consumer protection provisions.

~~140.~~141. DIVCA limits the Commission's role in enforcement of consumer protection provisions.

~~141.~~142. The procedures discussed herein regarding initiation of a proceeding to determine whether a pattern and practice of violating consumer protection laws warrants suspension or revocation of a state video franchise are consistent with DIVCA.

~~142.~~143. It is necessary to ensure that the Commission's Rules of Practice and Procedure are consistent with DIVCA.

~~143.~~144. DIVCA limits DRA's role to advocacy and enforcement actions related to state video franchise renewal and Public Utilities Code §§ 5890, 5900, and 5950.

~~144.~~145. DIVCA provides that DRA may have access to information in the Commission's possession "for this purpose" of enforcing the Public Utilities Code sections referenced in the preceding Conclusion of Law.

~~145.~~146. The procedures adopted herein whereby DRA has unfettered access to all information submitted to the Commission and the ability to make a copy of the information that it requires to fulfill its obligations pursuant to DIVCA (i.e., obligations pertaining to state video franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950) are consistent with DIVCA.

~~146.~~147. The procedure in the prior Conclusion of Law is consistent with DIVCA's intention to provide DRA with access any information that it requires for the purpose of advocating on behalf of video customers regarding state video franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950.

~~147.~~148. DIVCA does not allow for the Commission to order a grant of intervenor compensation.

~~148.~~149. The procedures adopted herein concerning amendments to a state video franchise are consistent with DIVCA.

~~149.~~150. Federal and state law may change between now and 2017, the earliest a state video franchise may be renewed.

O R D E R

IT IS ORDERED that:

1. A state video franchise holder shall not allow its bond to lapse during any period of its operation pursuant to a state video franchise.

2. The Executive Director shall provide notice of application incompleteness and the specific reason for incompleteness in the same document and shall provide this notice both to the franchise applicant and to affected local entities.

3. The Executive Director shall provide notice of statutory ineligibility for a state video franchise, when known, to the applicant.

4. A state video franchise holder shall provide a local entity and affected incumbent cable operators notice that it will begin offering service in the entity's jurisdiction. This notice of imminent market entry shall be given at least ten calendar days but no more than sixty calendar days, before the state video franchise holder begins to offer service.

5. The Executive Director shall place all state video franchise holders' user fee payments into a subaccount of the Commission's Utilities Reimbursement Account.

6. The Commission shall annually determine the user fee to be paid by each state video franchise holder pursuant to the methodology and procedures discussed herein.

7. The Commission shall refund any user fee collected in error.

8. State video franchise holders shall provide the Commission with the reports and information needed to assess annual user fees according to the method and schedule discussed herein.

9. The General Order attached to this decision is hereby adopted.

10. Applicants and state video franchise holders shall follow the procedures and comply with the requirements of General Order 169.

11. The Commission shall provide for a public hearing in any formal proceeding where franchising; antidiscrimination and build-out; reporting; the

prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services; or user fee provisions are at issue.

12. Any formal investigation initiated by the Commission regarding whether an applicant failed to comply with DIVCA franchising provisions shall follow standard Commission procedures for the initiation of an investigation. These procedures include, among other things, a majority vote of the Commission on an order initiating the investigation (which either contains a report or declarations of Commission witnesses pertaining to facts that demonstrate an investigation of Public Utilities Code § 5840 compliance is warranted). Such an investigation shall include public hearings and proceed in the manner discussed herein.

13. Any complaint by a local government alleging that a state video franchise holder has failed to meet the antidiscrimination and build-out requirements of Public Utilities Code § 5890 shall include sworn declarations pertaining to the facts that the local government believes demonstrate a failure to fulfill obligations imposed by Public Utilities Code § 5890. In addition, the local government filing a complaint shall clearly identify that the complaint pertains to a failure to meet an obligation imposed by Public Utilities Code § 5890.

14. The document initiating a Commission investigation on whether a state video franchise holder has failed to meet the antidiscrimination and build-out requirements of Public Utilities Code § 5890 shall contain a report prepared by Commission staff and/or declarations of Commission witnesses pertaining to facts that demonstrate an investigation of Public Utilities Code § 5890 compliance is warranted. Such an investigation shall proceed in the manner discussed herein, including public hearings.

15. DIVCA requires the Commission to hold public hearings in conjunction with any formal antidiscrimination or build-out investigations, and the

Commission will determine through rulings which form or forms of hearings to use.[852]

16. Any investigation into allegations that a state video franchise holder has failed to meet the reporting requirements of DIVCA shall follow the procedures discussed herein.

17. Any investigation into allegations that a state video franchise holder has violated the provisions of DIVCA prohibiting the financing of video deployment with rate increases for stand-alone, residential, primary line, basic telephone services shall follow the procedures discussed herein.

18. Any investigation into allegations that a state video franchise holder has violated the user fees requirements of DIVCA shall follow the procedures used in enforcing other DIVCA provisions regulated by the Commission.

19. The Commission shall follow the procedures discussed herein regarding initiation of a proceeding to determine whether a pattern and practice of DIVCA violations warrants suspension or revocation of a state video franchise. In conducting this legal proceeding, the Commission shall not consider the merits of alleged material breaches de novo. Instead, the Commission shall only consider whether enforcement actions and penalties assessed by a local entity were uncontested or sustained by courts and whether these enforcement actions and penalties rise to a level such that state video franchise suspension or revocation is warranted.

20. Phase II of this proceeding shall determine which of the Commission's Rules of Practice and Procedure remain applicable in proceedings conducted pursuant to DIVCA.

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[852] Id. at § 5890(g) (declaring that the "state franchising authority shall hold public hearings before issuing a decision").

21. Phase II of this rulemaking shall consider whether the Commission needs additional, more detailed broadband and video information for enforcement of specific DIVCA provisions.

22. In Phase II of this proceeding, the Commission shall establish "safe harbor" standards for compliance with Public Utilities Code § 5890(c).

23. DRA shall have unfettered access to all information provided to the Commission pursuant to DIVCA. DRA may copy any such information needed to fulfill its obligations pursuant to DIVCA, i.e., obligations pertaining to state video franchise renewals and enforcement of Public Utilities Code §§ 5890, 5900, and 5950.

24. The Commission shall not consider any protest to a state video franchise application, and no such protest shall be docketed.

25. No party shall be awarded intervenor compensation in a proceeding arising under DIVCA.

26. Phase II of this proceeding shall address renewal issues to the extent possible at the time of the proceeding.

27. State video franchise holders shall have access to rights-of-way and support structures of the large and mid-sized incumbent local exchange carriers and the investor-owned electric utilities under the same rates, terms and conditions as wireline communications systems of telecommunications providers and cable companies pursuant to D.98-10-058.

This order is effective today.

Dated March 1, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG

TIMOTHY ALAN SIMON
Commissioners

D0703014 Appendix A-G