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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.

Investigation 15-11-007
(Filed November 5, 2015)

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S
RULING REGARDING JULY 20, 2016 EVIDENTIARY HEARING AND
DENYING RELATED PARTY MOTIONS**

Summary

A July 1, 2016, a Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (Scoping Memo) issued in this proceeding. The Scoping Memo found that hearings are not legally required in this proceeding because no change in rules or regulations, and no modification of a previous Commission decision, is before the Commission at this time. This proceeding is a descriptive exercise, aimed at taking a snapshot of the California telecommunications marketplace in 2016, and to that end we have asked the parties to submit information and testimony on issues set out in the form of Information Requests appended to the above Order Instituting Investigation (OII). Although an evidentiary hearing is not required, the Assigned

Commissioner and Assigned Administrative Law Judge (ALJ) believed it “would help us more fully understand the analysis proffered by the parties.”¹

On July 11, 2016, the carrier Respondents² filed the following motions: Respondents Request for Rehearing of Scoping Memo Ruling on Evidentiary Hearings; Motion for Extension of Procedural Deadlines in the July 1, 2016 Scoping Memo; and Respondents’ Motion to Continue or Modify the Schedule in the July 1, 2016 Scoping Memo to Accommodate a Ruling by the Federal Court on a Pending Motion to Enforce the Preliminary Injunction Relative to Dr. Selwyn’s Testimony on Behalf of ORA. These motions are denied, for the reasons set forth below.

1. Motion to Continue or Modify ... to Accommodate a Ruling by the Federal Court

On May 20, 2016, the United States District Court, by Judge Vince Chhabria, entered an Order Granting Motion for Preliminary Injunction (Injunction Order), which enjoined the CPUC “from enforcing the Commission’s May 3, 2016 ruling compelling the plaintiffs to disclose the subscription data to TURN (or other third parties).”³ On June 28, 2016, the plaintiffs in the District Court action (Respondents here) filed a Motion to Enforce Preliminary Injunction

¹ Scoping Memo at 11.

² Respondents are: Consolidated Communications of California Company; Consolidated Communications Enterprise Services, formerly known as Surewest Televideo; Citizens Telecommunications Company of California; Frontier California Inc., Frontier Communications of America, Inc., Frontier Communications of the Southwest, Inc.; AT&T California; New Cingular Wireless PCS, LLC; Comcast Phone of California LLC; Cox California Telcom LLC; CTIA; Charter Fiberlink CA-CCO, LLC; T-Mobile West LLC; Time Warner Cable Information Services (California) LLC.

³ The Injunction Order issued in *New Cingular Wireless PCS LLC et al. v. Picker et al.*, N.D. Cal. Case No 16-cv-02461-VC.

or, in the Alternative, to Clarify the Preliminary Injunction (Motion to Enforce). The gravamen of that Motion is that the Office of Ratepayer Advocates (ORA) violated the Injunction Order by giving such “subscription data” to its expert consultant, Dr. Lee Selwyn in April 2016. The District Court Motion asks for a declaration that this action violated the May 20, 2016 Injunction Order.

It is on the basis of the District Court Motion that Respondents move here to continue or modify the schedule, particularly the July 20, 2016 Evidentiary Hearing, claiming that a CPUC Evidentiary Hearing will interfere with the District Court process.

We see no reason why next week’s evidentiary panel would interfere with the District Court litigation. Plaintiffs/Respondents seek essentially three remedies in the District Court for the alleged violation: (1) a requirement that the CPUC to notify all its employees that they are bound by the preliminary injunction (as interpreted by Plaintiffs); (2) the return by Dr. Selwyn of any subscription data in his possession; and (3) the suppression of Dr. Selwyn’s testimony going forward.

We are informed that the subscription data at issue is found on only one page of Dr. Selwyn’s testimony. Because Respondent carriers declined to execute the Protective Order herein, they each received that page of Dr. Selwyn’s testimony with every other carrier’s data redacted. *None of the parties, besides ORA, has seen that page of Dr. Selwyn’s testimony with any other carrier’s subscription data on it, and other parties – like TURN, Greenlining, Writers Guild, and Center for Accessible Technology – have not seen any of that data.* Accordingly none of the parties could ask Dr. Selwyn about it even if they wanted to. (We direct ORA not to ask any questions regarding specific subscription data, or that would otherwise link a carrier to such subscription data).

If the District Court orders the Commission to strike Dr. Selwyn's testimony *in toto* (both written and oral), the Commission will of course comply, while reserving its rights to seek further review of such an order.

Respondents argue that there is no harm to extending the procedural schedule of this administrative proceeding. The Scoping Memo addressed this issue, noting that there is harm if the data becomes stale, which is why the Commission seeks to complete this phase of the proceeding while the data is still relevant.⁴ Accordingly, the motion to continue or modify the schedule should be denied.

2. Respondents' Request for Rehearing of [the] Scoping Memo Ruling on Evidentiary Hearings

Respondents Request for Rehearing is premised on an alleged violation of Section 1708 of the Public Utilities Code, and the contention that a one-day evidentiary hearing is insufficient to satisfy that statute. Section 1708 provides in relevant part as follows: "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it." As we have explained above, and in the Scoping Memo, the Commission does not seek here to rewrite the *Uniform Regulatory Framework* decisions of eight and ten years ago respectively. Rather, the Commission seeks to determine what the market looks like as of December 31, 2016. Decision 15-11-023 granting rehearing of *URF II*, D.08-09-042, explains:

⁴ Scoping Memo at 13, noting that the data submitted by the carriers is "as of" December 31, 2015. Carriers have previously called the Commission to task for basing conclusions on out-of-date or "stale" data. [cites]. The Scoping Memo also expressed concern about the further expenditure of staff and utility time through each successive delay in this case. *Id.*

We note that it would be unreasonable, and possibly unproductive, to conduct the limited rehearing focused only on the time period when D.08-09-042 was issued. In the intervening seven years, the state of competition and the market – not to mention the state of technology – have all changed substantially. Yet the underlying question – whether competition is sufficient to keep rates within just, reasonable and affordable bounds – remains the same.⁵

Thus, the question of rescission, alteration or amendment of a prior order is not before the Commission, nor is the predicate of Respondents' Request, and the motion for rehearing of the scoping memo should be denied.

3. Motion for Extension of Procedural Deadlines

This motion addresses an alleged “unreasonably short timeframe provided for further testimony, hearings, briefing and other procedural events,” or in other words, the entire schedule set out in the Scoping Memo. In particular, Respondents object to the scheduling of “final rebuttal/supplemental” testimony only “nine business days from the date of the Scoping Memo.

What Respondents fail to acknowledge is that they have had the OII Information Requests, the most concrete expression of the scope of this OII, since on or about November 5, 2015. Since then, three separate tranches of testimony have been served: on or about March 15, April 15, and June 1, 2016. Because some of the OII Information Requests were open-ended, so is the testimony that we have received.⁶ Because, however, Respondents maintained at the June 22, 2016 Prehearing Conference that they had not been able to present their full case, or respond to the June 1, 2016 testimony, the Scoping Memo provided for one

⁵ Slip Op. at 12-13.

⁶ See Scoping Memo at 13.

last opportunity to provide any data or testimony that the parties felt is lacking in the record. We do not believe this time frame is unreasonable. As of today, Respondents have had the June 1, 2016 testimony in their possession for forty-two days. The motion for extension of the procedural deadlines should be denied.

4. Conduct of the July 20, 2016 Evidentiary Hearing

As set forth in the Scoping Memo, an evidentiary hearing will be held on July 20, 2016 at the Commission Courtroom at 505 Van Ness Avenue, San Francisco, California, 94102. We anticipate having two panels of expert witnesses, one in the morning and another in the afternoon.

At the beginning of each panel, the panel witnesses will have the opportunity to make introductory statements if they choose. Those statements will be limited to three minutes per panelist. The remaining time will be available for parties to ask questions of the members of each panel or of the panel as a whole. Parties are urged to consolidate their questioning as much as feasible. If parties are unable to consolidate questioning, then time limits will be imposed.

The hearing will start at 9 a.m., and will continue until 4 p.m. with a break for lunch at approximately 12 p.m.

The morning panel will include experts from:

AT&T
ORA
CforAT
T-Mobile
Sprint
Consolidated/Sure West
Frontier/Citizens

The afternoon panel will include experts from:

Verizon Wireless

TURN

Greenlining

Cox

Comcast/Charter/Time Warner

Writers Guild of America West

IT IS RULED that:

1. The three motions filed by Respondents on July 11, 2016, which request to continue or modify the schedule, extend the procedural deadlines in the Scoping Memo, and rehear the Scoping Memo, are denied.
2. The evidentiary hearing on July 20, 2016 shall include expert panels as described in this ruling.

Dated July 13, 2016, at San Francisco, California.

/s/ CARLA J. PETERMAN

Carla J. Peterman
Assigned Commissioner

/s/ DOROTHY J. DUDA for

Karl J. Bemederfer
Administrative Law Judge