

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



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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.

I. 15-11-007
(Filed November 5, 2015)

**OPPOSITION OF THE UTILITY REFORM NETWORK TO THE
COMMUNICATIONS INDUSTRY COALITION'S MOTION TO STRIKE AND
OBJECTIONS TO PROPOSED OFFICIAL NOTICE**

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, and the July 26, 2016 Administrative Law Judge's ("ALJ") Ruling, The Utility Reform Network ("TURN") files this opposition to The Communications Industry Coalition's Motion to Strike and Objections to Proposed Official Notice ("Motion" or "Motion to Strike") filed on July 29, 2016.

The Coalition's Motion is an overbroad and unsupported attempt to weaken the record in this docket. The Motion relies on its own image of the scope in this proceeding to argue that parties' testimony goes beyond that scope, ignoring the multiple ALJ and Assigned Commissioner Rulings and the July 1, 2016 Scoping Memo. The Motion's other arguments to strike testimony are based on tortured interpretations of California due process law, federal court motions that have not been fully adjudicated, narrow readings of nondisclosure agreements and arguments regarding the rules of evidence that the Commission has repeatedly found not to apply. The ALJ should deny this Motion to Strike in its entirety.

II. DISCUSSION

A. Notice and Opportunity to Comment in this Proceeding has Been More than Sufficient to Protect Parties' Due Process Rights

The Motion argues that all intervenor, ORA, and Sprint written testimony and oral statements made on July 20, 2016 should be stricken from the record because the Coalition was not provided an opportunity to cross examine these witnesses and the Commission did not hold an evidentiary hearing.¹

¹ Presumably, these arguments, if successful, would require the carriers' prefiled testimony to also be struck from the record.

The Coalition presents an incorrect reading of Commission precedent, statutory mandates, and due process case law. There is no right to a hearing and cross-examination in administrative proceedings.² This is especially the case where there are no disputed issues of fact and the agency is not acting in a quasi-judicial manner.³ Further, Public Utilities Code Section 1708 does not support the Coalition’s arguments because it only requires the Commission provide, “notice to the parties” and “opportunity to be heard as provided in the case of complaints” and only applies where the Commission will “rescind, alter, or amend any order or decision made by it.”⁴ The Scoping Memo makes clear that the Commission does not intend to “rescind, alter or amend” its URF order at this time, but instead to evaluate the state of competition as it exists today and whether to revisit any assumptions made by the Commission.⁵ Finally, recent Commission precedent also acknowledges that written testimony and briefing, or resolving the case “on the papers” is sufficient to satisfy due process claims in non-adjudicatory proceedings.⁶

TURN joins in support of CALTEL’s response to the Coalition Motion. CALTEL provides a more detailed opposition and rebuttal to the Coalition’s due process arguments.

B. TURN’s Witness Testimony is Directly Relevant to the Scoping Memo’s Outline of Issues

The Coalition moves to strike significant portions of TURN’s witnesses’ testimony on the grounds that the testimony is beyond the “defined” scope of the proceeding. However, the Coalition is using its own definition of the scope, ignoring numerous ALJ Rulings and the July 1, 2016 Scoping Memo and attached outline. Expert witness testimony regarding affordability,

² *Oberholzer v. Commission on Judicial Performance* 20 Cal. 4th 371, 390 (1999).

³ *Order Instituting Rulemaking to Promote Policy and Integration of Electric Utility Resource Planning* (R.04-04-003) D.06-06-071, 2006 Cal. PUC LEXIS 237 *49.

⁴ *Id.* at *50. See also, *In the Matter of Application of Kerman Telephone Co.* (A.11-12-011) D.16-06-053, 2016 Cal. PUC LEXIS 379

⁵ Scoping Memo at 9-10.

⁶ *Kerman GRC*, *165-172.

policy recommendations, and competition within and between intermodal competitors is well within the scope of the proceedings.

1. Ms. Baldwin's testimony discusses "affordability" as a metric for measuring just and reasonable rates

The Coalition argues that all witness testimony about affordability should be stricken because the OII states that issues of affordability will be addressed in the LifeLine proceeding.⁷ The text of the Motion does not propose to strike, nor does it even discuss, any of TURN's witnesses' testimony. However, in Appendix A of the Motion, page 4, the Coalition lists two specific Q/A's in Ms. Baldwin's March 15, 2016 testimony as "subject to" the Motion.

The Commission should deny the Motion to Strike Ms. Baldwin's testimony. It appears that the Coalition did a word search for the term "affordability" in each parties' testimony and blindly included the pages and lines where the term occurred in the Appendix. But even a high-level read of those pages in Ms. Baldwin's testimony identified in the Appendix inevitably leads to a conclusion that she is drawing a *distinction between* the concept of affordability and just and reasonable rates, not improperly arguing about whether rates are affordable or whether the Commission should make rates affordable. Specifically, in response to Information Request Question 21 (and the related Scope Outline 3(e)) regarding the "metrics" of just and reasonable rates, Ms. Baldwin argues that the Commission should not conflate the two concepts when considering "specific factors or metrics" to determine whether prices are just and reasonable. This material should not be stricken.

The Coalition's citation to D.14-03-004, here and elsewhere in the Motion, is not helpful except that the Commission acknowledges there is a presumption for the admissibility of

⁷ Motion at p. 12-13 *citing* to Order Instituting Rulemaking Ordering Paragraph 2.

evidence and the burden is on the party arguing to strike the material to prove otherwise.⁸ The Commission should approach this Motion to Strike no differently and find that the Coalition has not met its burden. Moreover, in D.14-03-004, the Commission granted motions to strike sections of a party's legal briefs, not testimony (the party did not submit testimony), and noted that not only did those briefs attempt to introduce facts in a way that was "legally problematic," but the party itself acknowledged its brief addressed a "greater issue" than the narrow scope of that phase of the proceeding. TURN cannot disagree with the truism as stated by the Commission in that case that briefing issues outside the scope of a phase of a proceeding, "wastes the time and resources of both parties and Commission staff." But that statement begs the question of what is outside the scope and does nothing to bolster the Coalition's arguments specific to this case.

2. TURN's witness testimony presents recommendations and remedies as requested by the Preliminary Scoping Memo and Scoping Outline

The Coalition's Motion to Strike argues that several sections of Dr. Roycroft's and Ms. Baldwin's testimony should be stricken because the witnesses have "advance[d] policy proposals and proposed regulations that are irrelevant to the consideration of the extent of competition in the market for voice services."⁹ A line-by-line refutation of the Coalition's argument is unnecessary.¹⁰ The Coalition's Motion itself acknowledges that the Commission's July 1

⁸ See, D.14-03-004, "Generally, all relevant evidence is admissible unless otherwise provided by law." Citing to Cal Evid. Code, Section 350) at p. 16

⁹ Motion at p. 13.

¹⁰ Any attempt to go line by line would also result in confusion. For example, In the Appendix, the Coalition only inconsistently moves to strike those sections of Dr. Roycroft's Executive Summary that link to the testimony they are also moving to strike. See, for example, proposal to strike Pages 140:13-141:8 of Dr. Roycroft's testimony but not the exact same language on page xiv of the Executive Summary while proposing to strike other sections of the Executive Summary but not the related text. This inconsistency denies TURN the ability to comprehensively rebut the Motion's claims.

Scoping Memo squarely places TURN's testimony on these issues in the scope of the proceeding. The Motion notes that the July 1 Scoping Memo states that this proceeding solicited policy recommendations regarding how to "address bottlenecks in the competitive landscape."¹¹ Indeed, each of TURN's witnesses' recommendations flow directly from their written testimony and is in response to the Information Requests, Preliminary Scoping Memo, final Scoping Outline, and carrier testimony. The Coalition's Motion does not attempt to argue otherwise.

Once again it appears that the Coalition is indiscriminately moving to strike testimony that uses the terms "should" or "recommend" without reference to what the testimony is actually saying.¹² Dr. Roycroft's recommendations about back up power, price caps, monitoring the wireless market and monitoring the relationship between prices and reliability, all listed in the Motion's Appendix A, are directly addressing IR1 (usefulness of existing publicly available reports), IR 4 (analyzing changes in "mass market options" for basic phone service), IR 9-12 (identifying barriers to substitution, identifying geographic distinctions, and differences in business and residential markets), IR 20-23 (asking for input on how the Commission should go about monitoring competition, just and reasonable rates, and market failures and further asking for suggestions to "ameliorate the problems") and Scoping Outline Issues 2 (a) (monitoring deployment to "measure the market"), 3 (a) (analyzing the market based on what constitutes a competitive market); 3(d) (analyzing the market by looking at market performance and

¹¹ Motion, footnote 16, citing July 1, 2016 Scoping Memo at pg. 7.

¹² As an example of the over-breadth of the Motion, the Motion proposes to strike all of Ms. Baldwin's testimony entitled "Remedies" including the sentence that says, "While I recognize comprehensive structural reform is beyond the scope of what the Commission is considering (or could implement) through the current docket, the Commission should acknowledge that there are fundamental and systemic problems with the current system that, in turn, inhibit competition in both the wholesale and consequently retail market." (p. 45:10-14). The Motion does not explain how this sentence is out of the scope of either the Information Requests or the Scoping Outline.

improvements, or lack of improvements, in service quality, 3(g) (“how” should the Commission promote competition and reduce barriers to entry”).

Ms. Baldwin’s recommendations in her March 15 testimony not only go directly to the questions asked in Information Requests 20-23, but also multiple Scoping Outline sections asking for comment on how the Commission should define and measure the market as well as rates charged by telecommunications’ service providers. Her June 1 and July 15 testimony not only incorporates her March testimony but provides additional observation and recommendation regarding the IP transition, data reporting, and participation in federal proceedings that relate to several Information Requests and Scoping Outline issues 3(d) and 3(g).

The Coalition notes, repeatedly, that the scope of this docket will not include “setting rules for the industry or a subset of the industry.”¹³ TURN does not dispute that this phase of the proceeding will not “alter or amend” the current pricing flexibility scheme for basic local service or impose new obligations on carriers, one reason why a hearing is not required. But the Commission can, and has, still solicit, analyze, and incorporate policy recommendations regarding how to approach its own statutory and policy obligations as well as how to analyze the competitive marketplace. TURN’s witnesses’ recommendations and remedies are in the context of and serve to support their expert opinion and analysis. The Commission has the discretion to give it as much or as little weight as it deems appropriate.

TURN’s witness testimony on the matters of policy recommendations, Commission monitoring efforts, resources dedicated to federal matters, and considerations for promoting competition and just and reasonable rates should remain in the record.

¹³ Motion, page 13.

3. *Dr. Roycroft's testimony appropriately analyzes the "ecosystem" of telecommunications competition in California*

The Coalition moves to strike almost 70 pages of Dr. Roycroft's testimony on the grounds that the testimony "exclusively" addresses competition "only among wireless providers, only among broadband providers, or ... competition for other services."¹⁴ First, the proposed deletions of Dr. Roycroft's testimony in Appendix A, demonstrate such an indiscriminate effort that it suggests there may be a misunderstanding of Dr. Roycroft's testimony and TURN's affirmative case. Dr. Roycroft is very clear in his expert opinion, analysis and findings, and in the context of the Commission's preliminary scoping memo and supported by the July 1, 2016 scoping memo, that,

The low levels of consumer choice, and high levels of market concentration, discussed in this testimony suggest that a close examination of California telecommunications markets is appropriate.

Absent regulatory oversight, market performance will reflect consumers' ability to choose from alternative services and suppliers, and the ease with which consumers can switch between those alternatives. If choice is limited and consumers cannot easily switch between providers, then, other things being equal, consumers will pay higher prices and firms will earn higher profits.¹⁵

Dr. Roycroft and Ms. Baldwin both tie their testimony directly to the OII and Scoping Memo Outline as they argue that the Commission must look at all "alternative services and suppliers" even if the ultimate question for the Commission will be focused on basic service voice. It is precisely the consumers' choices and ease of movement among these suppliers that should help inform the Commission's analysis, and Dr. Roycroft presents testimony relevant to

¹⁴ Motion, page 15.

¹⁵ June 1 Testimony of Dr. Trevor Roycroft, pg. v.

those issues.¹⁶ The fact that the Coalition may not agree with Dr. Roycroft's statements does not make them out of the scope of this proceeding.

The Motion's arguments on this point continue to perpetuate a vision of the scope of this docket that does not exist, except in the carriers' pleadings and numerous motions. The carriers would have the scope of this docket be so narrow as to allow parties to discuss basic voice services and "intermodal" competition issues only within the same sentence and limited to such snail-paced broadband and stand alone wireless services that no party has demonstrated are offered anywhere in California.¹⁷ The carriers put forth a tortured reading of the multiple rulings, PHC transcripts, and OII. Each of these documents put the parties on notice that discussion of multiple technology platforms would be included in the record.¹⁸

Numerous issues presented by the Scoping Outline make discussion of the broadband and wireless markets, separate and apart from basic service voice, highly relevant to the Commission's analysis. The Outline asks parties to address the impact of bundles, facilities based services, the reverse substitution (or "vice versa" of wireless and wireline competition), fixed wireline broadband submarkets, wireless broadband, geographic and demographic differences in the various technology platforms as compared to each, market concentration using a single market/intermodal analysis, trends in market performance for each platform, and

¹⁶ While the Coalition argues this material is outside the scope of the proceeding, the carriers' witnesses do not seem to agree. For example, Dr. Aron and Dr. Topper, witnesses for AT&T and the cable companies respectively, urge the Commission to look at new and state-of-the-art communications technologies such as Facebook, WhatsApp or Kik to conclude that consumers have alternatives to voice services. (See, June 1st Testimony of Dr. Debra Aron (page 7-8) and Dr. Michael Topper (page 7, 27)) Presumably the Commission must understand how, where, and when these alternatives compete in the marketplace to make such a finding.

¹⁷ Rebuttal Testimony of Michael L. Katz on behalf of AT&T, July 15, 2016, page 11012.

¹⁸ See, for example, February 4th ALJ Ruling, page 3-5 (Necessary to continue to monitor the communications network as a whole."); May 3rd, 2016 ALJ/AC Ruling pg. 9.

monitoring and metrics of the prices generally of “telecommunications services,” competition and barriers to entry.

The July 1 Scoping Memo notes that the Commission must conduct a “rigorous examination of the telecommunications marketplace to analyze the competitive forces acting upon traditional landline services.”¹⁹ As discussed above, Dr. Roycroft notes one must look at the effectiveness of competition within and among each platform to then determine whether a particular technology can effectively compete with wireline voice services throughout California. It is this “telecommunications ecosystem” that the Scoping Memo states must be understood as part of the Commission’s analysis in this phase of the docket.²⁰

4. Witnesses testimony does not qualify as impermissible legal conclusions

The Motion moves to strike portions of Dr. Roycroft’s and Ms. Baldwin’s testimony on the basis that they address “questions of law and legal conclusions” and are not a proper subject for “unqualified lay witnesses.”²¹ TURN disagrees. Neither witness purports to be offering a “legal opinion” but instead, both TURN witnesses rely on their extensive experience and expertise in the area of telecommunications regulatory policy, as evidenced by the qualifications attached to their testimony, to support their discussion of relevant federal and state statutes. This discussion, in turn, serves the purpose of supporting the remaining analysis and recommendations that both witnesses put forth. Moreover, both witnesses clearly note those statements where they relied upon information and analysis provided by TURN’s legal counsel, which, in turn, informed their expert opinion on matters of regulatory policy. The Coalition will have opportunity in its brief to take issue with the TURN witnesses’ qualifications and

¹⁹ Scoping Ruling at page 2.

²⁰ Scoping Ruling at p. 2.

²¹ Motion at p. 24.

conclusions on these issues. Any perceived flaws should go to the weight of the matter, not the admissibility of these statements. The testimony should stand.

C. The Commission must Clarify its Intent to Place Material in the Record

TURN opposes the Coalition's attempt to remove what it claims are "advocacy documents" from the record. One of the documents listed in Appendix A of the OII is the 2009 report authored by Dr. Roycroft entitled, "Why 'Competition' is Failing to Protect Consumers." The Coalition claims that this document, along with others, lacks indicia of analytical objectivity. This is a highly data-driven, publicly available report that has stood the test of time. As has been stated numerous times, the Commission is not bound by the technical rules of evidence and in a ratesetting proceeding such as this and should be allowed to consider evidence from all sources.²² The Coalition has had ample notice of Dr. Roycroft's report and opportunity to comment or rebut its findings.

Nevertheless, if the Commission determines that this report should not be included in the record through the official notice process, TURN requests leave to file its own Motion to include the document in the record as an exhibit to Dr. Roycroft's testimony. Dr. Roycroft relies on this document but does not officially attach it to his testimony because it was included in the OII and in Appendix A. TURN will move to included it in the record if necessary.

III. CONCLUSION

For the above-stated reasons, TURN respectfully requests that the Motion to Strike be denied.

Dated: August 2, 2016

Respectfully submitted,

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²² Public Utilities Code Section 1701.