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)

THE CENTER FOR ACCESSIBLE TECHNOLOGY'S RESPONSE 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 Judge Bemesderfer's ruling issued on July 20, 2016, the Center for Accessible Technology (CforAT) hereby files our opposition to the Communications Industry Coalition's Motion to Strike and Objections to Proposed Official Notice (Coalition Motion), which was filed on July 22, 2016, as it addresses the testimony of Dmitri Belser (adopted by Melissa Kasnitz at hearing) and Katheryn Woodford. The Commission should reject the Coalition's efforts to strike substantial portions of the testimony submitted on behalf of CforAT and our constituency of telecommunications customers with disabilities. The Commission should also reject the Coalition's broad arguments that they have been denied their due process rights.

II. OVERVIEW

Ten years after the telecommunications market in California was generally deregulated via the URF proceeding, this proceeding is intended to evaluate whether the expectations of URF have been realized. Thus the Commission is now evaluating whether, as predicted in URF, competition has resulted in a market that provides quality telecommunications service at just and reasonable rates to all people in California. While the carriers continually seek to conduct the review at the broadest possible level, aggregating the experiences of different communities and different customer segments, policymakers cannot answer the question presented by looking at averages. No individual customer experiences an "average" market, and the choices available to an affluent customer in the Silicon Valley are not comparable to those of a low-income, disabled customer on the Oregon border. The reality is not somewhere in the middle between each of these customers – the actual experience of each of these customers experience is valid and must be given consideration by the Commission as it considers

whether the public has access to telecommunications services at just and reasonable rates such that the service supports public "safety, health, comfort, and convenience."[1]

In order to evaluate whether reliance on the telecommunications market supports the state's policy goals in ensuring access to adequate service at just and reasonable rates, the Commission must actually evaluate whether all Californians, including vulnerable customers who face substantial obstacles in obtaining reliable and affordable service, are adequately served by competition. The actual experiences of such vulnerable customers, including customers with disabilities, is directly relevant and important for policymakers to consider in evaluating whether the market provides adequate service at just and reasonable rates for all Californians.

III. THE COMMISSION SHOULD REJECT EFFORTS TO STRIKE THE TESTIMONY OF DMITRI BELSER, AS ADOPTED BY MELISSA KASNITZ, ON BEHALF OF CFORAT

The Coalition Motion seeks to strike the Testimony of Dmitri Belser, which was adopted at hearing by Melissa Kasnitz due to Mr. Belser's unexpected illness causing him to be unavailable (the Belser/Kasnitz Testimony).[2] The Coalition argues that that this testimony is outside the scope of this proceeding as it concerns affordability,[3] that it is

[1] Cal. Pub. Util. Code §451.

[2] In addition to the general arguments made by the Coalition to strike the Belser/Kasnitz Testimony, addressed below, the Coalition Motion argues that this testimony should be stricken because it does not include the qualifications of Ms. Kasnitz. Coalition Motion at p. 25, fn. 36. This was addressed directly at hearing: [by Ms. Kasnitz] "[A]s a procedural matter, I should ask whether I should update that testimony to have it come from myself and substitute my background and experience. ALJ BEMESDERFER: I don't think that will be necessary." Tr. 117:9-15. To the extent that the Commission considers the Coalition Motion on this point, CforAT requests an opportunity to proffer Ms. Kasnitz's experience and qualifications to address the information provided in the Belser/Kasnitz Testimony.

[3] Coalition Motion at pp. 12-13.

proffered by unqualified witnesses,[4] and that it contains unspecified hearsay.[5] None of these arguments have merit.[6]

First, the testimony proffered by CforAT is within the scope of the proceeding. The Coalition's arguments to the contrary are based on their ongoing mischaracterization of the scope of the proceeding as limited to "whether rates for traditional landline voice services are just and reasonable within the existing competitive landscape." Even if the issue of whether rates for traditional landline voice service are just and reasonable is the ultimate issue, the Commission has clearly explained, on multiple occasions, that its determination of that issue requires a broad inquiry. In Appendix A of the Scoping Memo, the Commission provides a comprehensive Issue & Briefing Outline listing a wide scope of issues. The Belser/Kasnitz Testimony responds directly to questions posed in the Issue & Briefing Outline, including questions of how the Commission should best determine whether prices are just and reasonable (Issue 3(e)). Given that policymakers are charged with ensuring that prices are just and reasonable for all Californians (that is, to the public at large in California, not just the "average" Californian), it is appropriate to consider the extent to which customers can afford service that reliably meets their telecommunications needs. The Belser/Kasnitz Testimony appropriately describes some of the specialized needs of customers with disabilities, and the hurdles these customers face in obtaining necessary and adequate service in the existing market.

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[4] Coalition Motion at pp. 24-25.

[5] Coalition Motion at pp. 25-27.

[6] In addition to the arguments noted above, the Coalition references the Belser/Kasnitz Testimony in its Appendix A on the issue of service quality (Appendix A at p. 3). To the extent that the body of the motion argues that service quality issues are outside of the scope of the proceeding, it only identifies the testimony of Enrique Gallardo, on behalf of ORA, as addressing this issue. Coalition Motion at p.p. 10-11.Because the Coalition Motion does not address the Belser/Kasnitz Testimony in its argument on service quality, the inclusion of a reference to this testimony in the "service quality" section of Appendix A should be disregarded. Similarly, the Coalition references Ms. Kasnitz's testimony at the evidentiary hearing as addressing issues of competition among broadband or wireless carriers. Appendix A at p. 13. In the section of the Coalition Motion addressing this issue, the Coalition identifies multiple witnesses as touching on the issue of broadband/wireless competition, but does not identify Ms. Kasnitz. Coalition Motion at pp. 15-17. Thus the reference to Ms. Kasnitz's testimony in Appendix A should be disregarded.

Not only is the proffered testimony relevant and within the scope of the proceeding, it is also offered by qualified witnesses. The Coalition Motion objects to certain portions of the Belser/Kasnitz Testimony as expert opinion regarding economics offered by witnesses who are not economic experts. The Motion does not specify which portions of the Belser/Kasnitz Testimony it perceives as economic opinion, nor does it make any specific argument about CforAT's testimony. Rather, it collectively asserts that portions of this testimony, along with portions of the testimony provided by Greenlining and WGAW "primarily addresses economic theory, market definitions and metrics, market power, market shares, product substitutability an evaluation of market pricing."[7] There is no additional discussion of the testimony that is the subject of the Motion to Strike.

This argument fails for multiple reasons. First, it provides an insufficient basis for the Commission to even consider exclusion, in that it fails to identify with any specificity either the testimony that the Coalition finds objectionable or the basis on which it should be excluded. If the Commission nevertheless considers the Coalition's request to strike certain testimony, it should still be denied because there is no requirement that only economists may submit relevant testimony for the Commission's consideration of the state of competition in California.

Neither Mr. Belser nor Ms. Kasnitz claims specific expertise in economics. Both witnesses, however, have substantial expertise with the experiences of people with disabilities in California, including their experience and needs in seeking and obtaining appropriate telecommunications services. Mr. Belser's experience is grounded in his background working in the disability community for 35 years, including work as the Director of Pacific Bell's Deaf and Disabled Services and regular experience providing testimony before the Commission on the interests of the disability community as they are

[7] Coalition Motion at p. 24. *See also* Appendix A to Coalition Motion at p. 19 purporting to identify certain testimony as "unqualified expert opinion regarding economics" with no specific discussion of any such testimony.

affected by regulated utilities, including testimony in the URF proceeding itself.[8] Accordingly, Mr. Belser has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert" on the subject of "the particularized needs and concerns" of telecommunications customers with disabilities, a customer segment that has needs and concerns "that are different from those of the average customer."[9] This expertise is directly relevant to the proffered testimony.[10] Accordingly, the Commission should reject the Coalition's request to strike portions of the Belser/Kasnitz testimony based on the witness' credentials.

Finally, the Coalition Motion's assertion that the Belser/Kasnitz Testimony includes inadmissible hearsay has no merit. First, the Motion fails to make any hearsay argument specific to any portion of the Belser/Kasnitz Testimony, stating only "certain statements from Mr. Belser's testimony should be struck for the same reasons."[11] This single sentence represents the entirety of the hearsay argument regarding the Belser/Kasnitz Testimony.[12] Because the Coalition provides no basis, written or otherwise, for its hearsay objections to the testimony Belser/Kasnitz Testimony, the Commission should deny the Coalition's request to strike that testimony.

Even if the Commission were to consider the amorphous objection to the Belser/Kasnitz Testimony, it should be rejected because hearsay testimony may be admitted into evidence in administrative proceedings. This evidentiary standard is

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[8] Belser Testimony at pp. 1-2. As noted above, to the extent that the Commission takes the Coalition Motion argument on qualifications under consideration, CforAT requests permission to proffer Ms. Kasnitz's background and expertise, which includes 20 years of representation of the interests of people with disabilities before state and federal courts as well as the Commission, and substantial policy experience on telecommunications matters affecting this constituency.

[9] Belser Testimony at pp. 1-2.

[10] To the extent that any consideration is given to the Coalition argument opposing this testimony, it should go to its weight, not its admissibility.

[11] Coalition Motion at p. 27.

[12] Appendix A of the Coalition Motion references three segments of the Belser/Kasnitz Testimony under the heading of "Testimony Constituting Impermissible Hearsay," but provides no additional discussion of such testimony. Coalition Motion, Appendix A at p. 19.

addressed in greater detail below with regard to the Woodford Testimony. To the extent that the Commission has any concerns about the unspecified hearsay evidence in the Belser/Kasnitz Testimony, this should go to the weight it accords such testimony, not its admissibility.

IV. THE COMMISSION SHOULD REJECT EFFORTS TO STRIKE THE TESTIMONY OF KATHERYN WOODFORD SUBMITTED ON BEHALF OF CFORAT

The Coalition Motion seeks to strike the Testimony of Katheryn Woodford, which provides information about the actual experiences of people with disabilities and organizations that serve people with disabilities in obtaining reliable and affordable telecommunications services that meet their needs. The Coalition argues that this testimony is outside the scope of the proceeding as it concerns affordability,[13] that it is proffered by an unqualified witness, [14] and that it contains hearsay.[15] None of these arguments have merit.

First, as with the Belser/Kasnitz Testimony, the Woodford Testimony directly responds to issues identified in the Scoping Memo for this proceeding, including the issue of how to determine if rates are just and reasonable for all customers in California, and whether the market has successfully provided vulnerable customers in California with access to services that meet their needs.

Not only is the testimony relevant and within the scope of the proceeding, it is also proffered by a qualified witness. As is the case with the Belser/Kasnitz Testimony, the Coalition Motion provides an insufficient basis for the Commission to even consider exclusion, in that it fails to identify with any specificity either the testimony that the Coalition finds objectionable or the basis on which it should be excluded.

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[13] Coalition Motion at pp. 12-13.

[14] Coalition Motion at pp. 24-25.

[15] Coalition Motion at pp. 25-27.

Additionally, as with Mr. Belser and Ms. Kasnitz, Ms. Woodford makes no claim of economic expertise, and there is no basis for the Coalition to assert that only economists are qualified to offer evidence of the state of competition in the communications market in California. Ms. Woodford has the experience and skills to conduct the outreach she described in order to provide information on the actual experiences of vulnerable telecommunications customers in various California communities and their ability to obtain services that meet their needs via the telecommunications market.[16] This real world experience is entitled to consideration along with the theoretical arguments by economists about who expound on how the market "should" operate, and who are likely to "assume a can opener"[17] rather than acknowledge that some customers are left without appropriate options.

Finally, the Coalition Motion objects to portions of Ms. Woodford's testimony as impermissible hearsay regarding the experiences of the people interviewed by Ms. Woodford about their ability to obtain reliable telecommunications services that meet their needs via the telecommunications market.[18] This argument too has no merit.

First, the Coalition argues the general rule against hearsay, referencing the California Evidence Code, without acknowledging that this rule is not binding in administrative proceedings.[19] As a policymaking body, the Commission is free to consider input from sources that may not be available in a court proceeding, and any further consideration of information obtained through such sources should go to weight, not admissibility.

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[16] *See* Woodford Testimony at pp. 1-3.

[17] Wikipedia characterizes the phrase "assume a can opener" as "a catchphrase used to mock economists and other professionals who base their conclusions on unrealistic or unlikely assumptions," noting that it derives from a joke in which a physicist, a chemist, and an economist are stranded on a desert island with no implements and a can of food. The physicist and the chemist each devised an ingenious mechanism for getting the can open; the economist merely said, "Assume we have a can opener"! https://en.wikipedia.org/wiki/Assume_a_can_opener

[18] Coalition Motion at pp. 25-27.

With regard to evidence of the specific nature as that proffered by Ms. Woodford, consisting of direct feedback from affected customers of a regulated industry and community organizations that serve such customers, the Commission has a long and uninterrupted history of accepting such testimony. Similar testimony regarding the experiences of telecommunications customers with disabilities was accepted into the record in the URF proceeding, as proffered by Disability Rights Advocates, the predecessor organization representing the interests of such consumers before the Commission prior to that role being taken by CforAT.[20] Similar testimony has also been accepted in other telecommunications proceedings, including the prior Complaint proceeding regarding AT&T's basic service rate.[21] In energy proceedings, CforAT and before that Disability Rights Advocates have routinely submitted similar testimony on the experiences of people with disabilities on obtaining necessary supplies of electricity to meet essential needs at affordable rates.[22] This proceeding is no different from any of the past proceedings in which such testimony was accepted, and the outcome should be the same.

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[19] *See* Rule 13.6(a) of the Commission's Rules of Practice and Procedure noting that the Commission is not bound by "technical rules of evidence."

[20] *See* Testimony of Stephanie Cox, submitted in conjunction with the Opening Brief of Disability Rights Advocates in R.05-04-005 (URF) on March 3, 2006. In that proceeding, Ms. Cox, who was the outreach coordinator at Disability Rights Advocates, submitted feedback from "individuals with disabilities and representatives of organizations that provide disability-related services about their concerns with telecommunications and this proceeding." Cox URF Testimony at para. 4.

[21] *See* Testimony of Henry Contreras submitted in C.13-12-005.

[22] *See e.g.* testimony submitted on behalf of CforAT in R.12-06-013 (RROIR – Contreras Testimony), A.11-10-002 (SDG&E 2012 GRC Phase 2 – Bolster Testimony), A.11-06-007 (SCE 2012 GRC Phase 2 – Bolster Testimony) and on behalf of Disability Rights Advocates in A.10-03-014 (PG&E 2011 GRC Phase 2 – Reyes Testimony).

V. THE COMMISSION SHOULD REJECT THE COALITION'S DUE PROCESS ARGUMENTS

The Coalition Motion argues that carrier have been denied their due process right in that they have not been allowed to cross-examine testimony.[23] On this issue, CforAT joins in support of CALTEL's comments that contain a more detailed discussion of this issue.[24] Accordingly, the Commission should reject the Coalition's request to strike testimony on those grounds.

VI. CONCLUSION

For the foregoing reasons, CforAT respectfully requests that the Coalition Motion be rejected in its entirety as it relates to the Belser/Kasnitz Testimony and the Woodford Testimony.

Respectfully submitted,

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[23] Motion to Strike at p. 6.

[24] *See generally* California Association of Competitive Telecommunications Companies (CALTEL) Response to the Communications Industry Coalition's Motion to Strike, filed on August 2, 2016.