



**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)

**CONSOLIDATED RESPONSE OF CENTER FOR ACCESSIBLE TECHNOLOGY, THE
GREENLINING INSTITUTE, AND THE UTILITY REFORM NETWORK TO
COMMUNICATIONS INDUSTRY COALITION'S JULY 11, 2016 MOTION FOR
EXTENSION OF PROCEDURAL DEADLINES AND JULY 11, 2016 MOTION TO
CONTINUE OR MODIFY THE SCHEDULE**

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Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure, Center for Accessible Technology (“CforAT”), The Greenlining Institute (“Greenlining”), and The Utility Reform Network (“TURN”) (collectively, “Joint Consumers”) file this consolidated response to the following motions filed by the Communications Industry Coalition (also referred to as “Respondents”) on July 11, 2016:

- Motion for Extension of Procedural Deadlines in the July 1, 2016 Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (hereafter, Motion for Extension); and
- 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 (hereafter, Motion to Suspend).

Joint Consumers oppose these motions. There have been significant delays to the original schedule as adopted by the Commission in the OII and Respondents have had multiple meaningful opportunities to provide input in this proceeding. Additionally, the Commission should reject claims that Respondents did not understand the scope of the proceeding and that the Commission should suspend the schedule to wait for a ruling from the federal Court on a narrow issue related to one witness’ testimony.

I. RESPONDENTS HAVE HAD MULTIPLE MEANINGFUL OPPORTUNITIES TO PROVIDE INPUT IN THIS PROCEEDING.

Respondents’ Motion for Extension states that Respondents have not had the time or opportunity to provide input regarding the issues raised in the proceeding. Contrary to Respondents’ claims, the Assigned Commissioner and Administrative Law Judge have been clear about the scope of this proceeding. Additionally, Respondents have had ample time to provide evidence to the Commission.

A. Throughout this Proceeding, the Assigned Commissioner and ALJ Have Provided Clear and Ample Guidance Regarding the Scope of the Proceeding.

From the commencement of this proceeding, the Commission has provided clear direction as to the scope of this proceeding. As Joint Consumers have noted, this proceeding has been characterized from the time it was initiated by an unusually large number of motions by Respondents, most of which have asked the Commission to narrow the scope of the proceeding and to delay substantive review.¹ In each ruling on those carrier motions, the Assigned Commissioner and Administrative Law Judge have denied the motions and provided additional clarification regarding the scope of the proceeding.² These discussions, as well as the preliminary scoping memo³ and the information requests issued by the Commission,⁴ were wholly consistent with the formal Scoping Memo, which was issued on July 1, 2016.

As the Scoping Memo notes, “[w]hile the attached Outline [providing an organizational framework for addressing the issues] contains more detail than the OII, based on preliminary review of expert testimony we are satisfied that it does not materially expand, or differ from, the scope described by the OII and its attached Information Requests.”⁵ Additionally, the Scoping Memo notes that the questions in the attachment were apparently understood by the carriers

¹ See AT&T Motion to Suspend Preliminary Schedule (Dec. 9, 2015); Verizon Motion to Remove Verizon and Wireless Carriers as Respondents (Dec. 15, 2015); Cox Motion to Modify List of Respondents (Dec. 18, 2015); AT&T Motion to Remove Certain Information Requests and Topics of Investigation (December 22, 2015); Verizon Motion to remove Verizon and Wireless Carriers as Respondents (Dec. 15, 2015); AT&T, CCTA, Citizens, Comcast, Cox, CTIA, Time Warner Cable, and Verizon Comments on ALJ’s Ruling Soliciting Comments Regarding Information Requests (Jan. 11, 2016).

² Ruling on Pending Motions and Issues Discussed at January 20, 2016 Prehearing Conference (Feb. 4, 2016) and AC/ALJ Ruling on TURN’s Motion to Compel, Comcast’s Objection to WGA’s Acknowledgement, Outstanding Motions for Reconsideration, and Other Issues (May 3, 2016);

³ OII at pp. 13-14

⁴ OII, Appendix B; Ruling on Pending Motions and Issues Discussed at January 20, 2016 Prehearing Conference, Attachment 1 (Feb. 4, 2016).

⁵ Scoping Memo at p. 4.

because they provided testimony about those questions.⁶ Respondents' claims that the scope of this proceeding has been unclear are unfounded, and the Commission should thus reject their Motion for Extension.

B. Respondents Have Had Ample Opportunity to Provide Input in This Proceeding.

Respondents have also had ample time to provide testimony in this proceeding. This proceeding is now entering its ninth month, and, if it proceeds consistent with the schedule in the Scoping Memo, will be complete in no less than thirteen total months.⁷ It is worth noting that in similarly complex proceedings, Respondents have argued that those proceedings could be resolved in much shorter timeframes. For example, in the Comcast/Time Warner Cable proceeding, the applicants asked for the Commission to complete its review in five months,⁸ the applicants in the Verizon/Frontier proceeding asked for a review period of ten months,⁹ and in the Charter/Time Warner Cable proceeding, the applicants asked for the Commission to complete its review in four months.¹⁰ Respondents' claim that they have not had sufficient time

⁶ Scoping Memo at p. 4, note 6.

⁷ Scoping Memo at p. 15.

⁸ Application at p. 29, Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a), A.14-04-013 (April 11, 2013).

⁹ Application at pp. 38-39, In the Matter of the Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U 5429 C) Verizon California Inc. (U 1002 C), Verizon Long Distance, LLC (U 5732 C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California Inc. and Related Approval of Transfer of Assets and Certifications, A.15-03-005 (Mar. 18, 2015).

¹⁰ Application at p. 35, Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CC0, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks

to provide testimony is not only contradicted by their assertions in prior proceedings, but in reality is a problem of their own making.¹¹ Respondents have had ample opportunity to work toward producing data and testimony, but have chosen instead to use their resources to file multiple motions challenging the OII,¹² as well as additional litigation in federal court. Respondents' claims that they have not had a "meaningful opportunity to provide input" are unfounded and should be rejected by the Commission.

C. The Respondents Are Sophisticated and Experienced, and the Commission Should Reject any Claim that Respondents Did Not Understand the Scope or Schedule of This Proceeding.

Any ruling on the Respondents' Motion for Extension should be made in the context of the fact that the parties in this proceeding are sophisticated, intimately familiar with the issues in this proceeding, and have a long history of participating in Commission proceedings. The Commission's information requests, along with the discussion in the OII and preliminary scoping memo, were clear and invited a wide range of responses. Many of the information requests specifically invited the carriers to provide the kind of policy input and analysis that Respondents now claim they have not had the opportunity to provide.¹³ Respondents point to

Information Services (California), LLC (U6955C), to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C), A.15-07-009 (July 2, 2015).

¹¹ Respondents, Motion at p. 2-3, also characterize the schedule as a "hurried approach" and suggest there is no need for the tight timelines. The Scoping Memo clearly makes the case for the schedule it imposes due to concerns about staff resources being dragged out, data getting stale and the quick pace of the market. Scoping Memo at p. 13. This is also, in part, of the carriers' making as they requested delays in this proceeding.

¹² Response and Opposition of The Utility Reform Network, The Greenlining Institute, and Center for Accessible Technology to Pending Procedural Motions at p. 15 (Jan. 8, 2016).

¹³ See, *inter alia*, Question 20 ("Identify the metrics and sources of data that you believe would be most useful and useable by the Commission to measure competition..."); Question 21 "How should the Commission determine whether the prices of telephone services are just and reasonable?"; Question 22 ("What information does the Commission need to collect going forward, in order to timely monitor

isolated statements by the Assigned Commissioner and ALJ regarding the path forward in this docket and attempt to argue that those statements contribute to a lack of clarity about Respondents' ability to provide input in this proceeding. However, given the sophisticated nature of the parties and their counsel, along with the numerous Rulings and discussions regarding the scope of this docket, any assertion that Respondents did not understand the scope of the proceeding is not credible. Respondents' failure to properly utilize their numerous opportunities to provide evidence to the Commission is better understood as a result of strategic decisionmaking than lack of understanding. Additionally, despite Respondents' claims that they have further potential discovery and further evidence they wish to offer, it is not clear from the Respondents' *three motions* filed on the same day how they would use the extra time they are requesting, or even, if granted additional time, whether they would respond with substantive information. Given the Respondents' sophistication and experience, coupled with their lack of any offer of proof regarding further evidence, the Commission should reject contentions that Respondents have not had the opportunity to provide input in this docket.

II. RESPONDENTS VASTLY OVERSTATE THE IMPACTS OF A SINGLE PAGE OF TESTIMONY.

On the same day that respondents filed their Motion for Extension, they also filed the separate Motion to Suspend, in which they asked the Commission to “continue or modify” the schedule in light of pending events related to litigation before the federal District Court.¹⁴ The purpose and value of this Motion to Suspend is unclear when considered in the context of the

whether (a) the telecommunications market is operating efficiently, and (b) the rates for telephone service are just and reasonable?

¹⁴ See, Case No. 3:16-cv-02461-VC, *Plaintiffs' Notice of Motion and Motion to Enforce Preliminary Injunction or, in the Alternative, to Clarify the Preliminary Injunction*, filed June 28, 2016 requesting that the District Court find the Commission in violation of the preliminary injunction as a result of use of Form 477 Data by ORA witness Selwyn in his June 1, 2016 testimony.

Respondents' more specific Motion for Extension. Moreover, the requested relief in the Motion to Suspend is unclear and possibly contradictory to the proposed schedule in the Motion for Extension, because it proposes no timeframes and merely suggests restarting the proceeding at some point after the District Court rules on the pending federal motion.

Joint Consumers oppose the Motion to Suspend. First, the Motion seeks an open-ended delay in the schedule. There is no set schedule for the District Court to rule on Respondents' federal motion, and neither this Commission nor the Respondents have any control or insight into how the Court will handle the federal motion. The Respondents' note that the hearing on the federal motion is calendared for August 1, but can only make vague promises that a ruling will quickly follow. This Commission should not derail the schedule of this multi-party, months-long, public policy proceeding on the basis of a guess when the Respondents' federal motion will be resolved.

Second, as the Commission states in its opposition to the Respondents' federal motion, just filed yesterday, the motion pending in federal court impacts a single page of Dr. Selwyn's testimony.¹⁵ While the Respondents' Motion to Suspend leads the reader to believe that Dr. Selwyn's entire testimony is tainted, that is not the case. The impacted section of the testimony of this single witness is quite manageable, and any changes to that testimony that may result from the outcome in federal court are hardly worth the risk of imposing an open-ended delay of this proceeding. Even if the Court ultimately grants Respondents' federal motion, the small part of Dr. Selwyn's testimony relying on Form 477 data and any related supplemental testimony or cross examination during the single day of panel hearings, can easily be removed from the record if so warranted, thus mitigating any harm that the federal Court may find.

¹⁵ See, 3:16-cv-02461(VC) *Defendants' Opposition to Plaintiffs' Motion to Enforce Preliminary Injunction or, in the Alternative, to Clarify the Preliminary Injunction*, filed July 12, 2016 at p. 7.

Third, Respondents' Motion to Suspend and the basis for its requested relief essentially request that the Commission pre-judge the federal court motion; if it were to grant the motion, it would effectively have to find that Respondents were somehow harmed by ORA's actions and further find potential for additional harm by moving forward with the current schedule. Respondents reargue their federal court motion in this request for suspension of the schedule and jump to the conclusion that moving forward with the schedule will cause "further irreparable harm" without first proving or demonstrating initial irreparable harm from ORA's use of the data. Respondents' success on their federal motion is far from guaranteed. ORA's June 23, 2016 letter to the Respondents on this issue and the Commission's opposition to the Respondents' federal motion filed yesterday, make a strong argument that the data was properly handled by the Commission and no violations occurred.¹⁶ Neither Respondents nor the Commission (nor any other interested party) can thus predict the outcome of the federal motion.

Finally, Joint Consumers note the irony in Respondents' argument that they would be "prejudiced" by Dr. Selwyn's testimony and hearing participation, "unless they obtain one another's Form 477 data" so that they can properly respond to his analysis or "even know what to respond to."¹⁷ TURN has made this same exact argument in its filings before this Commission and the federal District Court as to why it would be unfair or prejudicial to TURN to be denied access to Form 477 data if the Commission uses that data to support its decision in this docket. For the carriers to make the same argument here while seeking to dismiss TURN's concerns by asserting that any harm to TURN is minimal or nonexistent shows bad faith by the Respondents.

¹⁶ It is critical to note that the Form 477 data at issue here continues to be treated as Highly Confidential information and has not been shared with other parties to the proceeding thus mitigating, or indeed eliminating, any harm that Respondents claim they have suffered. See, Commission Opposition to Plaintiffs' federal court motion, pg. 7-8.

¹⁷ Motion to Suspend at p. 7.

This bad faith is highlighted by the fact that Respondents advocate upending the schedule with regard to a narrow use of the data in one witness' testimony, while denying that TURN's ability to participate in the overall proceeding is affected in any way.

III. CONCLUSION

For the above-stated reasons, Joint Consumers respectfully request that the Motion for Extension and the Motion to Suspend both be denied.

Dated: July 13, 2016

Respectfully submitted,

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