



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

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Order Instituting Rulemaking to Evaluate
Telecommunications Corporations Service Quality
Performance and Consider Modification to Service
Quality Rules.

R. 11-12-001
Filed December 1, 2011

**APPLICATION FOR REHEARING OF DECISION 16-08-021 OF COX CALIFORNIA
TELCOM, LLC, DBA COX COMMUNICATIONS, (U-5684-C)**

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Pursuant to the California Public Utilities Commission’s Rule of Practice and Procedure (“Commission Rules”), Rule 16.1, Cox California Telcom, LLC dba Cox Communications (U-5684-C) hereby timely submits this application for rehearing of D.16-08-021 (“Application”). Consistent with the Commission’s Rules, this Application sets specific grounds demonstrating legal error, and Cox respectfully requests that the Commission expeditiously grant this Application.

The Decision commits legal error in three distinct ways. First, text in the Decision does not include any findings to support two rules included in GO 133-D. Second, the Decision adopts an automatic penalty mechanism without adequate factual, legal or policy support. Third, the Decision lacks legal and factual support for the newly adopted General Order 133-D rule that requires providers of VOIP service, including providers registered with the Commission under Section 285¹ and certificated carriers that provide VoIP service, to submit copies of reports submitted to the FCC’s Network Outage Reporting System (“NORS reports”).

Accordingly, Cox submits this Application and requests that the Commission modify the Decision in the following ways:

- Correct GO 133-D, Rule 3.4(b) to re-instate the existing rule such that adjusted data for the out-of-service metric excludes “Sundays and holidays”;
- Modify GO 133-D, Rule 8 to reflect that the Decision does not discuss, and thus, cannot adopt a rule requiring carriers to submit a refund report;
- Delete the penalty mechanism set forth in GO 133-D, Rule 9; or in the alternative modify the penalty mechanism adopted in GO 133-D, Rules 9.3 (Out of Service Repair Interval

¹ All Sections references are to the California Public Utilities Code, unless stated otherwise.

Fine), Rule 9.4 (Customer Trouble Report Fine) and Section 9.5 (Answer Time for Trouble Reports and Billing and Non-Billing Inquiries Fine); and

- Delete GO 133-D, Rule 4(a)(iv) and delete the reference to VoIP services in GO 133-D, Rule 4(c)(i).

I. Standard for Granting Applications for Rehearing.

This Application complies with the Commission’s rules and applicable law governing adoption of lawful decisions by the Commission. Rule 16.1 permits parties to seek rehearing of decisions that are unlawful or erroneous so as to alert the Commission to legal error that may be expeditiously corrected. Cox sets forth specific grounds for its rehearing requests below.

Section 1757.1² describes the various grounds on which a court may overturn a Commission decision issued in a quasi-legislative proceeding. The court will overturn decisions that are not supported by the findings in the record, that result from the Commission failing to follow the proper process, that result from the Commission acting without, or in excess of, its powers or jurisdiction, and/or that violate the Constitution of the United States or the California Constitution.³

For example, to ensure that a reviewing court will not find the Decision was adopted as a result of an abuse of discretion, the Commission must not only proceed as procedurally required

² All section references are to the California Public Utilities Code, unless otherwise stated.

³ Section 1757.1(a) states: “(a) In any proceeding other than a proceeding subject to the standard of review under Section 1757, review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following occurred:

- (1) The order or decision of the commission was an abuse of discretion.
- (2) The commission has not proceeded in the manner required by law.
- (3) The commission acted without, or in excess of, its powers or jurisdiction.
- (4) The decision of the commission is not supported by the findings.
- (5) The order or decision was procured by fraud.
- (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.”

by law, but it also must make findings that are supported by substantial evidence.⁴ Section 1705 requires the Commission to adopt decisions that “contain, separately stated, findings of fact and conclusions of law . . . on all issues material to the order or decision.” To comply with Section 1705, the Commission must resolve every issue in reaching its ultimate findings and those issues are material to the order the Commission adopts.⁵ Additionally, the Commission must make findings for basic facts to the extent an ultimate finding is based on such facts.⁶ Where evidence is introduced on material issues – such as whether a given proposal is beyond the jurisdiction of the commission – the Commission must make separately stated findings on such issues addressing all relevant record evidence.⁷ The Commission must ensure that it “has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.”⁸

Commission compliance with Section 1705 is critical so that a reviewing court may “determine whether it [the Commission] acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.”⁹ Additionally, since a reviewing court will independently judge whether the Commission has correctly interpreted a statute (i.e. review subject to a commensurably lesser

⁵ *Greyhound Lines, Inc. v. Pub. Util. Comm’n*, 65 Cal. 2d 811, 812 (1967); 1967 Cal. Lexis 390 (citing *Cal. Motor Transp. Co. v. Pub. Util. Comm’n*, 59 Cal.2d 270, 273 (1963); see also *Associated Freight Lines v. Pub. Util. Comm’n*, 59 Cal.2d 583 (1963)).

⁶ *Id.*

⁷ *Id.* at 813.

⁸ *Cal. Hotel & Motel Assn. v. Industrial Welfare Comm’n*, 25 Cal.3d 200, 212 (1979) (citations omitted).

⁹ *Greyhound Lines, Inc. v. Pub. Util. Comm’n*, 65 Cal. 2d at 813 (citing *Pacific Tel. & Tel. Co. v. Pub. Util. Comm’n*, (1965) 62 Cal.2d 634, 648).

degree of judicial deference), the Commission must ensure that it did not act in excess of its powers and jurisdiction when adopting the requirements set forth in the Decision and subject to this Application.¹⁰

To comply with Section 1757.1 and to otherwise ensure that the Commission adopts reasonable and reasoned findings, Cox recommends that the Commission grant rehearing as described below.

II. Decision Does Not Include Findings that Support Certain GO 133-D Rule Changes.

To withstand judicial review, the Commission must adopt decisions that include findings on relevant issues which are based on the entire record of the proceeding. For the two rule changes identified below, the Decision errs (1) by modifying GO 133-C Rule 3.4 without any explanation and without consideration of comments in the record; and (2) including text in the Decision that conflicts with a requirement in the newly adopted GO 133-D, Rule 8. Cox requests that the Commission grant rehearing and modify GO 133-D as described below.

First, Section 2.2.2 in the Decision addresses changes to the out-of-service repair metric. As part of this discussion, the Decision states that under GO 133-C, adjusted data *excludes* Sundays and federal holidays, as well as events beyond carriers' control. While the Decision orders carriers to continue to provide adjusted results, it does not mention or discuss any intention or proposal to no longer exclude Sundays and federal holidays. Yet, GO 133-D, Rule 3.4(b) does not list "Sundays and federal holidays" as being excluded. Cox raised this issue in comments,¹¹ and yet, the Decision fails such comments or remedy the error. Accordingly, Cox

¹⁰ See *Santa Clara Valley Transp. Auth. v. Pub. Util. Comm'n*, 124 Cal. App. 4th 346, 360 (2004); *Morris v. Williams*, 67 Cal. 2d 733 (1967).

¹¹ See Corrected Cox Comments on Proposed Decision, pp. 4-5 (dated April 11, 2016).

requests that the third paragraph in GO 133-D, Rule 3.4(b) be revised to be the same as the existing requirement in GO 133-C:

The adjusted measurements exclude Sundays and federal holidays and repair tickets when maintenance is delayed due to circumstances beyond the carrier's control. Typical reasons for delay include, but are not limited to: outage caused by cable theft, third-party cable cut, lack of premise access when a problem is isolated to that location, absence of customer support to test facilities, or customer's requested appointment. Deferred maintenance or lack of available spares are not circumstances beyond a carrier's control. Changed appointments shall be reported separately by identifying the number of such appointments and the time, in hours and minutes, associated with these appointments.¹²

Second, Section 2.3 in the Decision reflects that Staff's proposal would have required carriers to provide a refund in the event a customer was out of service for 24-hours. The Decision goes on to state that Staff subsequently determined that its proposal was not necessary because companies have already implemented refund policies. The Decision does order carriers that have not implemented a refund policy, to do so and this rule is incorporated in GO 133-D.

The Decision does not otherwise discuss carriers being required to submit a monthly report detailing refunds provided under their tariffs. Yet, GO 133-D, Rule 8 requires carriers to submit such report. The Decision lacks any reference to this proposed rule, let alone any analysis as to basis and reasonableness for adopting such.¹³ For example, the record reflects that the proposed reporting requirement would increase carriers' operational costs which could result in rate increases, without any measureable benefit to consumers in terms of service quality or otherwise.¹⁴ Since the Decision does not address this rule and the record does not support

¹² The corresponding portion of GO 133-C, Rule 3.4(b) states as follows: "The measurements exclude Sundays and federal holidays and tickets when maintenance is delayed due to circumstances beyond the carrier's control."

¹³ See Corrected Cox Comments on Proposed Decision, p. 10 (dated April 11, 2016).

¹⁴ Cox Opening Comments on November Proposed Decision, p. 14 (dated December 2, 2015); Cox Opening Comments on February Staff Report, pp. 22-24; See Cox Reply Comments on February Staff Report, pp. 5-7. Frontier Reply Comments on Proposed Decision, pp. 3-4 (dated April 18, 2016).

Commission adoption of such, rehearing is reasonable and appropriate. Accordingly, the second paragraph in GO 133-D, Rule 8 must be deleted.

III. The Record Does Not Support The Commission Adopting an Industry-Wide Penalty Mechanism, or the Specific Penalties Amounts Included in GO 133-D, Rule 9.

A. The Record Does Not Support the Commission finding that there is an Industry-Wide Problem That an Automatic Penalty Mechanism Would Resolve.

The record does not support the Commission adopting an industry-wide penalty mechanism, and if not corrected, the Decision will be the result in an abuse of Commission discretion. There is no data or other evidence and thus no findings in the record indicating that there is an industry-wide problem that the Commission should remedy and/or findings that show it is reasonable for the Commission to adopt the proposed penalty mechanism as a response to the data that carriers have submitted pursuant to GO 133-D.

The Commission opened this rulemaking “to review telecommunications carriers’ performance in meeting GO 133-C service quality performance standards in 2010, and to assess whether the existing GO 133-C service quality standards and measures meet the goals of the Commission, are relevant to the current regulatory environment and market, and whether there is a need to establish a penalty mechanism for substandard service quality performance.”¹⁵ Yet, the OIR, the various Staff reports and the comments in the record all demonstrate that the focus of this proceeding concerns the past performances of the two largest incumbent LECs in the state - AT&T and Verizon.

Indeed, the OIR shows that the Commission opened this proceeding, in large part, due to severe rainstorms in 2010 and 2011 which resulted in a state of emergency flooding situation and

¹⁵ OIR, pp. 3-4.

over 250,000 AT&T and Verizon customers in twelve counties losing service for various periods of time. In light of such extended outages by these two companies, State Senator Alex Padilla requested the Commission obtain additional information regarding those carriers' service restoration efforts.¹⁶

Throughout this proceeding, Cox filed comments demonstrating that the Commission does not have a sufficient record to adopt industry-wide rules based on the alleged poor performance of just two carriers.¹⁷ No party filed substantive comments that dispute Cox's comments. Still, the Decision is entirely silent on this issue in contravention of Section 1705 which requires the Commission to make findings on evidence introduced on this material issue.¹⁸

Other carriers filed comments highlighting the lack of record supporting an industry-wide penalty mechanism and that the proposed decision did not address disputed issues in a material way.¹⁹ In fact, the record includes comments showing that the underlying premise of Staff proposing and the Commission adopting a new penalty mechanism is based on an assumption that the largest ILECs not meeting the service quality metrics equates to poor service quality.²⁰

¹⁶ See, OIR at 5-12.

¹⁷ For example, in Cox's comments on the proposed decision include the following: "The focus of this proceeding has been on the performance of just two carriers – AT&T and Verizon (now Frontier) – and not the industry as a whole.[] Adopting the general regulations based on a record of only two providers' performance is fundamentally unfair, anti-competitive, will have adverse competitive consequences and the PD cannot withstand legal scrutiny. Neither the facts, the public interest nor good public policy are on the Commission's side on this proposal. Accordingly, Cox respectfully requests the Commission withdraw the penalty mechanism." Corrected Cox Opening Comments on Proposed Decision, p. 2 (dated April 11, 2016) (Footnote omitted).

¹⁸ See Cox Reply Comments on Proposed Decision, pp. 1-2 (dated April 18, 2016) (summarizing that substantive comments on the penalty mechanism were not reflected in the Proposed Decision).

¹⁹ See Opening Comments of Consolidated on Proposed Decision, p. 1-3 (dated April 11, 2016) (commenting on "the lack of the legally necessary foundation" to adopt an industry-wide penalty mechanism); Opening Comments of Small LECs on Proposed Decision, pp. 1-2 (dated April 11, 2016); Reply Comments of Frontier on Proposed Decision, pp. 1-2 (dated April 18, 2016).

²⁰ AT&T Opening Comments on Proposed Decision, pp. 1-10 (dated April 11, 2016); See also AT&T Reply Comments on Proposed Decision, pp. 1-3 (dated April 18, 2016);

Consistent with the scope expressly stated in the OIR, the record demonstrates that the Commission errs in adopting a penalty mechanism, without first considering a threshold issue of whether the existing standards are the appropriate measures that should or could be retained and/or modified, let alone serve as a basis for an industry-wide penalty mechanism. Since parties introduced evidence on these material issues, the Commission must make separately stated findings on such issues addressing all relevant record evidence.²¹

Moreover, during the course of this proceeding, Verizon sold its California ILEC operation to Frontier and Frontier committed to improving service quality in the Verizon California/Frontier California service territory as part of the Commission approving that transaction. As such, the Commission cannot rely on the past alleged poor performance of Verizon as justification for an automatic penalty mechanism.²²

Accordingly, the Commission erred by ignoring record evidence, even though it must consider all relevant comments on material issues. The Commission cannot simply avoid issues, and instead must resolve every issue in reaching its ultimate findings. Without considering evidence in the record on an issue that the Commission has deemed material, the Commission has failed to proceed as required by law.

B. The Adopted Penalty Amounts Are Not Reasonable and Not Supported by the Record.

Even if the record could support the Commission adopting an industry-wide penalty mechanism, the record nonetheless demonstrates that the proposed penalty mechanism is (a) not consistent with the methodology in decisions on which the Commission relies; and (b) otherwise arbitrary and capricious, and will have a disparate application, imposing excessive penalties.

²¹ *Greyhound Lines, Inc. v. Pub. Util. Comm'n*, 65 Cal. 2d at 813.

²² Cox Corrected Comments on Proposed Decision, p. 2, n. 2 (dated April 11, 2016).

Since, the Commission does not address any of the relevant comments in the record that detail these errors, the Decision is not supported by substantial evidence and must be modified. If the Commission were to consider the record on material issues concerning penalty amounts, it must grant rehearing and either eliminate or give further consideration to the penalty framework.

Accordingly, Cox recommends the Commission grant rehearing with respect to the penalty amounts adopted in GO 133-D, Rules 9.3 (Out of Service Repair Interval Fine), Rule 9.4 (Customer Trouble Report Fine) and Section 9.5 (Answer Time for Trouble Reports and Billing and Non-Billing Inquiries Fine).

1. Prior Decisions Referenced in the Decision Do not Support the Newly Adopted Penalty Framework.

The record demonstrates that it is unreasonable and otherwise unlawful for the Commission to rely primarily on a single decision adopted over fifteen years ago in a complaint case concerning the largest ILEC with respect to violations that occurred over a multi-year period as a basis for adopting an *industry-wide* penalty mechanism in this rulemaking.²³ The record also shows that even if the Commission could rely on that decision, D.01-12-021, the adopted penalty mechanism is not consistent with that decision.

In D.01-12-021, the Commission first determined “whether a decline in service quality can constitute a violation of § 451” and then went on “to examine the data presented in the proceeding to see if the data show a violation of § 451.”²⁴ In undertaking that review, the Commission did not look solely at then-current GO 133-C data, but also considered ARMIS data. In other words, the Commission did not find, or even suggest that a decline in service quality metric reporting under GO 133 alone equates to an automatic violation of Section 451 or

²³ Cox Comments, pp. 18-21 (dated March 30, 2015).

²⁴ Id., p. 8.

that a penalty should be imposed. In this rulemaking, the Commission collected far less data, did not substantively examine it or the import of it, and did not consider whether a carrier missing any service quality metrics could rise to the level of a Section 451 violation, and yet, the Commission concluded that carriers should be subjected to an industry-wide automatic penalty mechanism.

Cox and other parties otherwise demonstrated that D.01-12-021 and D.98-12-075 are not reasonable models for the Commission adopting the penalty framework in this proceeding.²⁵ While the Decision reflects that Cox commented on the applicability of a third decision, D.08-12-032, the Decision does not include any findings about Cox or other parties' comments concerning D.01-12-021 and D.98-12-075.²⁶ At a minimum, the Decision contravenes Section 1705 since the Commission did not consider record evidence on a material issue. Moreover, had the Commission considered such comments and analysis, it would not be able to demonstrate a rational connection between the record as a whole and the adoption of the penalties in GO 133-D.

2. The Decision Does Not Adopt Penalties That are Consistent with the Methodology Adopted in D.01-12-021 or Sections 2107 and 2108.

In D.01-12-021, the Commission ordered Pacific Bell to satisfy the repair standards for initial and repeat out-of-service repair intervals established therein *on an annual basis*.²⁷ While

²⁵ See Cox Comments, pp. 17-22 (dated March 30, 2015).

²⁶ For example, the record shows that In D.98-12-075, the Commission *did not* adopt an automatic penalty mechanism and that the Commission has also previously declined to impose a penalty in response to an advice letter filing, on the grounds that the advice letter and resolution procedure “does not allow sufficient due process to determine penalties for infractions.” Cox Comments, p. 18 (dated May 30, 2015) (citing Resolution G-3282. West Coast Gas Incorporated (WCG) requests authority to revise its tariff schedules and Preliminary Statement, Finding No. 6).

²⁷ Specifically, in response to comments by Pacific Bell, the Commission revised its initial proposal and concluded, “Namely, we will examine the *annual data* to determine whether Pacific has met our benchmark. If Pacific fails to meet the standards for that calendar year, Pacific will be *subject to*

the Commission adopted a \$10,000 per day fine in that decision, it did so for purposes of calculating a \$300,000 *monthly* fine to correspond to the *monthly period of time being measured* - both the period of time being measured and the penalty were monthly.²⁸ Here, the out-of-service repair (“OOS”) interval is calculated on a *daily* basis: 90% of out of service trouble reports restored within 24 hours is the set minimum standard.²⁹ The Decision errs by subjecting a carrier that does not meet the metric to a \$750,000 monthly base fine (based on a \$25,000 per day fine).³⁰

To be consistent with D.01-12-021, the Commission must examine the applicable GO 133-D, OOS data to determine if the *daily* metric is met in a given month, and if not, impose a penalty for the days of the calendar month for which the given carrier did not sustain the OOS metric (as compared to imposing a monthly fine based on the carrier missing every day of a given month). Correct implementing of the methodology in D.01-12-021 will result in the Commission adopting *lesser penalty amounts* than those in the Decision since the fines being imposed under GO 133-D are for a much shorter period of time and for a less severe noncompliance than was addressed in D.01-12-021.³¹

Additionally, while the Decision and GO 133-D state the fines are represented as daily, their actual application will be on a monthly basis, and thereby, contravene Sections 2107 and 2108. Section 2107 allows the Commission to impose a penalty for a given offense and Section

penalties for each month of that calendar year in which Pacific exceeds the standard.” D.01-12-021, p. 2 (emphasis added); See also *Id.*, pp. 39-43, Ordering Paragraph 6 (referring to the two annual standards).

²⁸ *Id.*, p. 43.

²⁹ GO 133-C, Rule 3.4(c). The data for this metric are compiled monthly and reported quarterly. *Id.* Rule 3.4(e).

³⁰ A carrier is subject to a base fine of \$750,000 for OOS and such penalty will be scaled down based on the size of the company. GO 133-D, Rule 9.3.

³¹ See Corrected Cox Comments on Proposed Decision, pp. 2-3 (dated April 11, 2016); Cox Comments on Alternate Proposed Decision, pp. 6-7 (dated July 12, 2016).

2108 allows for the Commission to impose penalties as “each day’s continuance thereof shall be a separate and distinct offense.” The Commission does not have the authority to and cannot assess a penalty for days in which the provider *has met* the given service quality metric.³² Again, the Commission has no authority to impose a *monthly* penalty for daily non-compliance.

3. The Penalty Rules Will Have a Disparate Impact.

The Decision commits legal error because the Commission did not either consider or give any weight to the relative performance of carriers missing the service quality metrics. The record includes the example set forth below – and yet neither the Decision nor the adopted penalty mechanism address or otherwise incorporate it or the substantive underlying concept. Lacking such consideration, the Decision fails to consider all relevant factors.

For example, Carrier A and Carrier B are approximately the same size in terms of the number of access lines they serve. If Carrier A reports 40% for the OOS metric (instead of the standard reporting level of 90%) for three consecutive months, then it would be subject to a fine of \$750,000. If Carrier B reports 89% for the OOS metric for the same three consecutive month period, then it would have a much better performance than Carrier A and would be extremely close to meeting the 90% benchmark, yet Carrier B would be required to pay the same \$750,000 penalty as Carrier A. This result is neither logical, reasonable, nor fair. Carrier A was never close to satisfying the metric, whereas as Carrier B missed the metric by only 1%.³³ This example also emphasizes the need for the Commission to adhere to basic due process requirements prior to imposing a penalty under Section 2107.³⁴

³² See Corrected Cox Comments on Proposed Decision, p. 4 (dated April 11, 2016); AT&T Opening Comments on Proposed Decision, pp. 13-14 (dated April 11, 2016).

³³ See Corrected Cox Opening Comments on Proposed Decision, pp. 3-4 (dated April 11, 2016); AT&T Opening Comments on Proposed Decision, p. 13 (dated April 11, 2016); Frontier Reply Comments on Proposed Decision, pp. 2-3 (dated April 18, 2016).

³⁴ See Cox Comments, pp. 17-18 (dated March 30, 2015).

To be lawful, the Decision must include some rationale – both on legal and public policy grounds – for Carrier B paying the same penalty amount as Carrier A. The Decision would also need to address the inherent unfairness of the adopted mechanism and the adverse competitive consequences that will result. Accordingly Cox requests rehearing be expeditiously granted on this issue.

IV. The Decision Erroneously Orders Providers of VoIP Services to Comply with GO 133-D, Rule 4.

The Decision orders interconnected VoIP service providers that are registered with the Commission under Section 285 and certificated carriers that “offer both TDM-based and VoIP services” to comply with GO 133-D, Rule 4, Major Service Interruption.³⁵ Specifically, GO 133-D orders such entities to do the following: (a) provide written NORS reports – both initial and final versions - submitted to FCC; (b) in cases involving a large number of customers or otherwise great severity, promptly submit an additional report; (c) submit reports concurrently to the Communications Division and ORA; and (d) submit reports that meet the FCC’s reporting threshold, “regardless of whether the affected communications in California independently meet the FCC’s reporting threshold.”³⁶ The Decision lacks statutory analysis and findings that support these newly adopted requirements, and moreover, the record itself does not include the necessary support that would allow the Commission to modify the decision in support of this requirement.

The Decision erroneously rejects arguments that Section 710 prohibits the Commission from ordering providers of VoIP service to submit their NORS reports to the Commission by finding that the Commission is not imposing or extending service quality rules to VoIP providers

³⁵ GO 133-D, Rule 4(a)(iv).

³⁶ GO 133-D, Rule 4(c)(1).

and that Section 710(f) “expressly provides” the Commission authority to monitor and discuss VoIP services.³⁷ The Decision also misinterprets Sections 710(c)(6) and (c)(7) as exceptions to the blanket prohibition against the Commission adopting regulations applicable to VoIP services in Section 710(a).³⁸ Finally, in addition to misinterpreting applicable law, the Decision lacks factual support for the few statements included in the Decision.

Cox respectfully details below the specific basis for which the rehearing must be granted and requests the Commission expeditiously correct these errors by deleting GO 133-D, Rule 4(a)(iv) and delete the reference to “and VoIP services” in GO 133-D, Rule 4(c)(i).

A. Section 710(a) Prohibits Regulation of VoIP Services and The New Reporting Requirement Does Not Fall Within the Scope of Section 710(f).

Section 710(a) states as follows:

The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c). In the event of a requirement or a delegation referred to above, this section does not expand the commission’s jurisdiction beyond the scope of that requirement or delegation.

Section 710(a) plainly bars the Commission from adopting orders that impose regulatory requirements on VoIP services, unless expressly authorized to do so under a delegation of federal law, as expressly provided under a given statute or as set forth in Section 710(c). Notably, the Decision does not rely on any delegation of federal law.

Nonetheless, the Decision extends GO 133-D, Rule 4 Major Service Interruption to “VoIP providers subject to Pub. Util. Code § 285” and to certificated carriers that provide “both TDM-based and VOIP services,”³⁹ and thereby, requires them to provide NORS reports to the

³⁷ GO 133-D, Rule 4.

³⁸ Decision, p. 26.

³⁹ GO 133-D, Rule 4(c)(i).

Communications Division, as well as the Office of Ratepayer Advocates (“ORA”).⁴⁰ The Decision erroneously finds that the Commission has the authority to adopt these rules pursuant to Section 710(f), yet, the plain language of this statute does not directly or indirectly authorize the Commission to impose GO 133-D regulations on providers of VoIP service, or any other regulatory requirement. Section 710(f) states that the Commission may “continue to monitor and discuss VoIP services” in the context of consumer complaints, and it does not authorize the Commission to order VoIP providers to submit NORS reports to the Commission and ORA. As detailed below, the Commission’s interpretation of Section 710(f) fails for numerous, substantive reasons.

First, the Decision fails to implement the plain language of Section 710(f) and give the language in the statute its usual and ordinary meaning. In this instance, where the plain language is clear, the Commission must adhere to the literal meaning of the words in the statute.⁴¹ Section 710(f) does not include an affirmative grant of authority which would allow the Commission to impose outage reporting rules (or any other type of regulatory requirement) on VoIP services. Instead, Section 710(f) expressly states that the Commission’s ability “to continue to discuss and monitor” VoIP service in certain contexts concerning consumer complaints is not limited by Section 710. The Decision errs in interpreting Section 710(f) as a grant of authority allowing the Commission to adopt rules – i.e. exercise its regulatory authority – which require providers of VoIP service to submit their confidential NORS reports to the Commission, as well as ORA.⁴² Again, Section 710(a) provides clear mandatory language: the Commission “shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol services.” The Decision errs

⁴⁰ GO 133-D, Rule 4(c)(ii).

⁴¹ *Southern Cal. Edison Co. v. Pub. Util. Comm’n*, 85 Cal. App. 4th 1086, 1103 (2000).

⁴² GO 133-D, Rule 4(c)(ii).

by ordering providers of VoIP service to comply with GO 133-D Rule 4 since that order plainly contradicts the express mandate in Section 710(a) and the plain language in Section 710(f) which only allows the Commission to continue to monitor and discuss VoIP services.

Second, had the Legislature wished to allow or require the Commission to collect data from providers of VoIP service as an exception to Section 710(a), it would have included such language as an exception to Section 710(c). Indeed, in Section 710(c)(4), the Legislature expressly granted the Commission the “authority to *require data and other information* pursuant to Section 716.”⁴³ (Emphasis added). Yet, the Legislature did not include a similarly-worded exception in Section 710(c) with respect to service outage reporting, or any reporting of data for that matter. As such, the Commission erred by interpreting Section 710(f) as a source of authority for imposing GO 133-D, Rule 4 on providers of VoIP service.

Third, the interpretation of Section 710(f) included in the Decision is not reasonable in that the Commission did not give meaning to all the words in that statute. Section 710(f) necessarily limits Commission action for which it can “continue.” There are no existing Commission requirements concerning VoIP service outages that the Commission could continue under Section 710(f). Notably, the Decision cites to none. The Decision not only fails to provide any support for the interpretation, but the Commission ignored record evidence showing that Commission Staff confirmed that there no existing requirements. The Commission’s Office of Governmental Affairs stated, in a memorandum concerning then-pending universal service legislation, that “VoIP services are not regulated by the CPUC,” and that “[t]he CPUC does not have service quality data or major outage data on VoIP service in California due to PU Code §

⁴³ See also, Section 2896. This section states “The commission *shall require* telephone corporations to provide customer service to telecommunication customers” Emphasis added.

710, although these outages are reported to the FCC”⁴⁴ Indeed, GO 133-C does not apply to VoIP services and providers of VoIP services are not otherwise required to submit outage reports (including NORS reports) or other similar data or reports to the Commission.

Fourth, the Decision does not otherwise fully recite or incorporate all of the text in Section 710(f). By ignoring certain words, the Commission failed to reasonably interpret the statute. Section 710(f), in full, states, as follows:

This section does not limit the commission’s ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints. (Emphasis added).

The Legislature drafted Section 710(f) in the context of “complaints” about VoIP service that the commission receives directly from customers. The repeated references to “complaints” makes clear the scope of Section 710(f), and yet, the Commission ignored those words when interpreting the statute. In doing so, the Commission failed to interpret the words in the given context⁴⁵ and it also effectively made them superfluous - contrary to two long-established principles of statutory construction.⁴⁶ NORS reports do not reflect complaints about service outages, nor do they include complaints that the *Commission receives from customers*. The

⁴⁴ CCTA Reply Comments on Proposed Decision, p. 4 (dated April 18, 2016).

⁴⁵ “When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.” [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.” *Santa Clara Valley Transp. Auth. v. Pub. Util. Comm’n*, 124 Cal. App. 4th 346, 359-60 (2004).

⁴⁶ See CCTA Comments on Proposed Decision, p. 6 (dated April 11, 2016) (citing *City of Alhambra v. County of L.A.*, 55 Cal. 4th 707, 724 (2012) (“Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary.”) (citation omitted); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (noting “rule against superfluities” in statutory construction)).

Commission’s overbroad interpretation of Section 710(f) is not consistent with text in the statute and will not withstand independent judicial review.⁴⁷

Finally, if Section 710(f) were ambiguous (which it is not), the Legislative history confirms that the Legislature included Section 710(f) to ensure that consumers of VoIP and IP-enabled services had a “venue other than the FCC to raise complaints.” The Senate Floor Analysis preceding passage of the bill makes clear that the Legislature intended for the FCC to administer “public safety and consumer protection requirements” on VoIP service, and for the Commission to have the much more, narrow role of monitoring and responding to consumer complaints.⁴⁸

Requiring providers of VoIP service to comply with GO 133-D, Rule 4 is not consistent with the plain language of Section 710(f), does not set forth a continuing reporting requirement or effort, otherwise contravenes the broad prohibition against Commission regulation of or control over VoIP service set forth in Section 710(a) and is not consistent with the Legislature history.

B. Section 710 Prohibits Regulation of VoIP Services, and the Exceptions in Sections 710(c)(6) and 710(c)(7) Do Not Apply.

As stated above, Section 710(a) plainly bars the Commission from adopting orders that impose regulatory requirements on VoIP services, unless expressly authorized to do so as set forth in Section 710(c) (or federal or other state delegation of law). While the Decision relies on

⁴⁷ “Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth.” *Santa Clara Valley Transp. Auth. v. Pub. Util. Comm’n*, 124 Cal. App. 4th at 359.

⁴⁸ See CCTA Comments on Proposed Decision, pp. 6-7 (dated April 11, 2016) (detailing the legislative history of Section 710).

Sections 710(c)(6) and (c)(7) as legal support for newly adopted rules applicable to VoIP Services, neither the plain language nor any reasonable interpretation of such statutes provides lawful support that could sustain the conclusions in the Decision. Moreover, the record reflects that Legislature did not intend for these exceptions to become overbroad exceptions to the express regulatory prohibition in Section 710(a).

Section 710(c)(6) is not remotely related to the new reporting requirement in GO 133-D as this statute reserves the Commission's authority "to enforce existing requirements regarding backup power systems established in Decision 10-01-026, adopted pursuant to Section 2892.1."⁴⁹ The Decision does not mention back-up power, let alone discuss how the submission of NORS reports relates to the Commission enforcing D.10-01-026. For example, the Decision does not indicate that outages related to backup power are specifically reported or identified in NORS reports. Moreover, the Decision cannot be modified to include the necessary type of discussion since the record is simply and plainly void on this issue. Finally, even if the Commission wished to adopt requirements related to the enforcement of Decision 10-01-026, it would need to give notice and an opportunity to be heard on that matter. Such notice and opportunity to be heard were not provided in this rulemaking, or to those parties in the proceeding Rulemaking 07-04-015 (the rulemaking in which the Commission adopted D.10-01-026).

Nor is Section 710(c)(7) an applicable exception to the broad prohibition identified in Section 710(a). Section 710(c)(7) preserves the Commission's "authority relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128." Nothing in this

⁴⁹ Decision 10-01-026, adopted prior to Section 710 being adopted and codified), addresses electrical power outages and does not adopt requirement related to outages of telephone service or VoIP service.

section suggests, let alone expressly states that the Commission has authority to adopt rules in its service quality rulemaking applicable to VoIP services.⁵⁰

Moreover, the Decision is wholly silent on record evidence that demonstrates the Legislature did not intend for Section 710(c)(7) to be interpreted to allow the Commission to impose service outage report for VoIP services. Specifically, the record reflects that in adopting Section 710 the Legislature was aware that the FCC had required VoIP service providers to report outages with respect to “any facilities that [interconnected VoIP providers] own, operate, lease, or otherwise utilize,” and thereby made clear that the FCC is and will continue to be responsible for facilities utilized by VoIP service providers.⁵¹ Contrary to the Decision unsupported statement about facilities going unmonitored, the Legislature determined that the FCC should serve that monitoring role, not the Commission.⁵² The Commission is not free to disregard that legislative determination and the Decision commits legal err in doing so.

The plain language of the text in Sections 710(c)(6) and (c)(7) in no way grants the Commission authority to adopt rules applicable to VoIP services. These two statutory exceptions cannot reasonably be interpreted to imply such authority. Finally, record evidence detailing the Legislative history of Section 710 plainly contradicts the unsupported statements in the Decision about the scope of these two sections. Accordingly, Cox requests the Commission grant rehearing on this matter.

⁵⁰ It is also worth noting that in 2015 while this proceeding was pending, the Commission concluded R.14-08-012 in which it adopted a Decision 15-01-005 (titled “A Decision Amending GO 95).

⁵¹ CCTA Opening Comments on Proposed Decision, pp. 8-9 (dated April 11, 2016).

⁵² Id.

C. The Decision’s Reliance on Sections 311 and 314, the California Constitution Article XII, § 6, and Government Code, section 11180 and Resolution ALJ-195 Is Not Appropriate.

The Decision concludes that even if Section 710 does not provide applicable statutory support for the Commission to order the submission of NORS reports by interconnected VoIP providers, the Commission nonetheless has broad authority to obtain information from such providers/for such services. For “support” of this sentence, the Commission included a single parenthetical which refers to Sections 311, 314, the California Constitution Article XII, § 6, and Government Code, section 11180 and Resolution ALJ-195.⁵³ The Decision does not recite, let alone discuss any of these laws and resolution.⁵⁴

This portion of the Decision must be deleted as there are no findings or legal analysis of any of the laws and regulations in the parenthetical. Nor does the Decision incorporate parties’ comments that carefully detail why such laws and resolution (among others not referenced in the Decision) are not applicable.⁵⁵ The Decision’s complete silence on the applicability of these laws and resolution - especially in light of the fact that they all predate the Legislature adopting Section 710 - is an abuse of discretion since there are no findings or statutory interpretation supporting the ultimate conclusion.⁵⁶

D. The Record Lacks Factual Support for the Commission to Order Providers of Interconnected VoIP Service to Submit their NORS Reports.

As a rationale for ordering the submission of NORS reports by interconnected VoIP service providers that submit such reports to the FCC, the Decision states the FCC has already

⁵³ Id. at 26.

⁵⁴ Id.

⁵⁵ See CCTA Opening Comments on Proposed Decision, pp. 9-12 (dated April 11, 2016).

⁵⁶ “It is well settled that a later statute may supersede, modify, or so affect the operation of an earlier law as to repeal the conflicting earlier law by implication.” *Santa Clara Valley Transp. Auth. v. Pub. Util. Comm’n*, 124 Cal. App. 4th at 600.

adopted reporting requirements for such providers due to significant outages,⁵⁷ and submitting such reports to the FCC and as such is an efficient means of informing the Commission of service outages.⁵⁸ The Decision also states that “there is [an] extremely limited administrative burden” for interconnected VoIP providers to submit their NORS reports to the Commission.⁵⁹ The Decision further states that the Commission wishes to treat interconnected VoIP providers in the same manner as other communication providers⁶⁰ and that VoIP service is becoming more prevalent and marketed as a substitute for traditional telephone service.⁶¹

The Decision errs as the record does not include evidence that would allow the Commission to reasonably adopt such statement as findings. To include these statements as findings, there would need to be both, underlying factual and legal support in the record, and the record is void of such. For example, the FCC adopting a requirement applicable to interconnected VoIP service providers – a service for which the FCC has regulatory jurisdiction - cannot be the basis for the Commission adopting the same or similar requirement. This is especially true in light of the FCC recently determining it would not grant the Commission’s pending petition requesting access to the FCC’s NORS database, and instead, concluding that additional consideration of confidentiality and other issues is necessary prior to state commissions having access to such reports.⁶²

⁵⁷ Decision, pp. 12, 24.

⁵⁸ Id., p. 11.

⁵⁹ Id., pp. 12, 24.

⁶⁰ Id., p. 12.

⁶¹ Id., pp. 12, 24.

⁶² *In re Amendments to Part 4 of the Commission's Rules in re Disruptions to Communs.*, 2016 FCC LEXIS 1806 * 104, 64 Comm. Reg. (P & F) 1487 (F.C.C. May 26, 2016) (FCC 16-63, ¶ 81) (Footnote omitted).

Additionally, the Decision relies on customers migrating to VoIP service. Even if the record were to document such migration, the Decision does not (and could not be modified) explain or provide any analysis as to why or how such migration could expand the Commission's regulatory authority. The act of customers migrating to VoIP services does not in itself provide support for the Commission to adopt regulations for services and entities it has not previously regulated and/or otherwise does not have authority to regulate.⁶³

Closely related, GO 133-D, Rule 4 requires VoIP service providers to submit their FCC NORS reports without regard to whether the California-specific portion of the given outage being reported meets the FCC's reporting threshold. There is no discussion or record evidence that does or could support the Commission requiring outage reports which primarily concern service outages *outside of California*.

Further, the Decision does not refer to any corresponding support in the record for the statement that there would be little administrative burden for the given entities to send a copy of a FCC report to the Commission, but again, there is no discussion of this issue. In fact, the adopted rule requires providers of VoIP service to do far more than simply transmit a report previously filed with the FCC. As an example, GO 133-D, Rule 4 requires VoIP service providers to make a determination as to whether an outage impacts a large number of customers or if the outage results in "great severity" (and neither "large numbers of customers" or "great severity" are defined in the rule) and then make a prompt report about such outages. To comply with this rule, a provider would need to adopt and implement processes and procedures to

⁶³ Moreover, to the extent the record showed that customers are migrating to VoIP services, this indicates there is no deficiency in terms of service quality. See CCTA Opening Comments on November Proposed Decision, p. 6 (dated December 2, 2015).

ensure *compliance* with GO 133-D Rule 4. The Commission cannot adopt a finding that the administrative burden is trivial because the record does not support such a finding.

Finally, the Decision does not address the rationale or reasonableness of ordering VoIP service providers to submit their NORS reports to the Office of Ratepayer Advocates, since such providers are not necessarily public utilities, and thereby, within the scope of issues that the Legislature charged ORA with addressing.⁶⁴

V. Conclusion.

Cox respectfully requests that the Commission grant this Application for all the reasons stated above, and thereby, as stated in Cox’s comments submitted in this proceeding, which Cox hereby incorporates by reference. Cox acknowledges that issues discussed in this Application have also been addressed in comments that Cox and other carriers submitted prior to the Commission adopting the Decision. However, Cox is not merely re-arguing its position, but rather submits this Application to demonstrate that the Decision commits legal error in that the Commission did not adequately consider all relevant record evidence, did not adopt findings on all material issues, and did not adopt findings with a rational connection to record evidence or applicable laws.

Accordingly, Cox respectfully submits this Application and requests the Commission grant rehearing as described herein.

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⁶⁴ See Section 309.5(a). See Comments of CCTA on November Proposed Decision, p. 7 (dated December 2, 2015).

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Respectfully submitted,

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