

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.

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

**REPLY COMMENTS OF  
THE OFFICE OF RATEPAYER ADVOCATES  
ON THE PROPOSED DECISION**

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November 14, 2016

## **I. INTRODUCTION**

Pursuant to Rule 14.3(d) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these Reply Comments on the Proposed Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market (PD).

## **II. THE PD DOES NOT EXCEED THE SCOPE OF THIS PROCEEDING**

The Communications Industry Coalition (Coalition or "the carriers") argues that "the PD goes beyond the limited purpose established in the Scoping Memo."<sup>1</sup> However, the Coalition is not correct that "findings concerning the BIAS market exceed [] the limited purpose of this proceeding." The Order Initiating Investigation (OII), which should be considered as a more authoritative source than the Scoping Memo for defining the scope of this proceeding, includes the following issue in the section entitled "General Scope": "How much competition is there for advanced telecommunications services at the new national standard of 25 Mbps down (and 3 Mbps up)?"<sup>2</sup> Attached to the OII is Information Request (IR) #12, which includes the same scoping question. This is a clear statement of the Commission's intent to include broadband in its examination of telecommunications market.

Contrary to the assertion by the carriers, the Scoping Memo did not limit or change the scope of this proceeding. The Scoping Memo specifically notes that some parties "suggested that any inquiry into competition in the wireless and broadband markets be made only adjunct to the main inquiry regarding competition in the landline telephone market." But the Scoping Memo rejected such a limitation, stating "we must conduct a rigorous examination of the telecommunications marketplace to analyze the competitive forces acting upon traditional landline services." The Issues and Briefing Outline attached to the Scoping Memo included the category of "broadband providers" as a separate market, and also included broadband in its consideration of deployment and subscription data. In addition, under "Market Performance and Development," the Issues and Briefing Outline included broadband as a category to analyze.

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<sup>1</sup> Coalition Opening Comments at 6.

<sup>2</sup> See OII at 14. Federal statute defines "advanced telecommunications capability" to include "broadband telecommunications capability." *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014), citing 47 U.S.C. § 1302(d)(1).

These references are consistent with other issues included in the Preliminary Scoping Memo in the OII. For example, another key factor in the argument regarding broadband competition is substitutability. IR #9 asks parties to address “the extent to which wireless and wireline services are substitutes for one another, or separate markets.”

### **III. THE COMMISSION DOES NOT LACK AUTHORITY TO EXAMINE THE STATE OF BROADBAND COMPETITION**

The Coalition states that the Commission “should respect limits on the Commission’s jurisdiction” and remove the provisions of the PD that apply to broadband. The Coalition notes that Public Utilities Code Section 710 limits the Commission’s authority. However, they incorrectly infer that because Section 710 contains *some* limitation on the Commission’s authority, the Commission *has no authority whatsoever*. Section 710 contains exceptions, such as when there is an express delegation of authority to the states by federal law.<sup>3</sup>

Section 710 does not apply to the Commission’s monitoring and data-gathering exercise here. For example, Section 710(f) specifically reserves the “commission’s ability to continue to monitor and discuss VoIP services.” Section 710(c)(4) preserves the “commission’s authority to require data and other information pursuant to Section 716.” Moreover, Section 709 contains a clear mandate to the Commission to ensure that broadband services are widely available and affordable, and that effective competition is flourishing among broadband carriers.<sup>4</sup> Carrying out this mandate necessarily involves measuring and analyzing the state of competition for broadband and VoIP services.

Also, the Coalition disagrees with the PD’s citation to the express delegation of authority to the states contained in 47 U.S.C. Section 1302 (Section 706 of Telecommunications Act of 1996). The Coalition argues that Section 706 does not provide the express delegation referred to in Section 710(a). However, the carriers misrepresent *Verizon v. FCC*, by citing to a statement in the decision that “Congress has not ‘directly spoken’ to the question of whether section 706(a) is a grant of regulatory authority simply by mentioning state commissions in that grant.”<sup>5</sup> This is not mere “dicta,” as the Coalition argues. In fact, that statement was meant to rebut the carrier’s

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<sup>3</sup> PD at Conclusion of Law #4.

<sup>4</sup> Section 709(a) – (h).

<sup>5</sup> *Verizon v. FCC*, 740 F.3d 623, at 638.

argument that “Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities.” The DC Circuit Court found that, despite Verizon’s objections, Congress had in fact done exactly that when it passed Section 706, affirming that Section 706 is an express delegation of authority to the states. The PD also correctly notes that the FCC’s *Open Internet Order* reclassified broadband service as a telecommunications service and required any resulting state action to be “consistent” with its ruling.<sup>6</sup>

#### **IV. THE PD WAS CORRECT TO ADOPT 25/3 AS THE STANDARD FOR BROADBAND IN CALIFORNIA**

The Coalition claims that the “PD points to no plausible basis for using the 25/3 definition as a reasonable baseline for a competitive analysis of the market for BIAS or the telecommunications market in general.”<sup>7</sup> This is incorrect – there are many reasons, not only plausible but compelling, to adopt 25/3 (not less than 25 megabits per second (Mbps) download speed and not less than 3 Mbps upload speed) as the standard. First and foremost, it is the standard recently adopted by the FCC because it represents “a useful, reasonable, and forward-looking dividing point to define a “high-speed” broadband tier.”<sup>8</sup>

The Coalition next argues that it is not reasonable “to assume that speeds of 10, 15, or 20 Mbps are not economic alternatives for speeds of 25 Mbps or more.”<sup>9</sup> However, the Coalition’s arguments focus narrowly on the issue of whether 25/3 is required to offer VoIP service. But the PD correctly rejects this argument, stating that it is “irrelevant to the broader question as to whether – generally speaking – fixed and wireless broadband are substitutes or complements.”<sup>10</sup> The PD notes that broadband customers are “transitioning to faster broadband services when they are available, with almost no subscription at the low data rates the carriers suggest are adequate for VoIP.”<sup>11</sup>

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<sup>6</sup> PD at 144.

<sup>7</sup> Coalition Opening Comments at 12.

<sup>8</sup> PD at 33-34.

<sup>9</sup> Coalition Opening Comments at 12-13.

<sup>10</sup> PD at 41.

<sup>11</sup> *Ibid.*

Without question, the future requires faster broadband speeds.<sup>12</sup> Any evaluation of the current marketplace must take into consideration that older slower Internet speeds will be irrelevant. As the FCC’s Chairman Wheeler stated, “[a] 25 Mbps connection is fast becoming “table stakes” in 21st century communications...At 25 Mbps, there is simply no competitive choice for most Americans. Stop and let that sink in...three-quarters of American homes have no competitive choice for the essential infrastructure for 21[st] century economics and democracy.”<sup>13</sup>

ORA’s testimony supports that consumer purchasing patterns demonstrate that the relevant broadband market is for wireline service with speeds of at least 25/3 Mbps. As stated by ORA witness Adam Clark:

Consumer demand is for fast broadband services capable of supporting advanced communications capabilities. In aggregate, over 84% of the residential broadband customers (in California) served by AT&T, Charter, Comcast, Cox, Surewest, Frontier or Time Warner Cable purchase service with download speeds equal to or greater than 25 Mbps, and 81% purchase service with download speeds equal to or greater than 50 Mbps.<sup>14</sup>

Mr. Clark also points out that the conduct and business practices of broadband service providers “lend ample evidence of this understanding. For example, Cox Communications’ online tool “Speed Advisor” suggests that a typical household should purchase speeds of at least 25/3 Mbps, and recommends its “Internet Preferred” service which can provide speeds of up to 50 Mbps download.”<sup>15</sup> AT&T recently issued a press release to introduce the company’s launch of “ultra-fast” broadband speeds of up to 1,000 Mbps (or 1 Gbps) in certain Bay Area

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<sup>12</sup> In the USDA Broadband Opportunity Council Report and Recommendations, August 20, 2015, at Appendix C, [https://www.whitehouse.gov/sites/default/files/broadband\\_opportunity\\_council\\_report\\_final.pdf](https://www.whitehouse.gov/sites/default/files/broadband_opportunity_council_report_final.pdf), the Council stated: “our definition of what constitutes high-speed internet or broadband has evolved as consumers engage in more activities online,” and noted that businesses and community anchor institutions need 100 Mbps or higher to function.

<sup>13</sup> Prepared Remarks of Chairman Wheeler “Facts and Future of Broadband Competition” presented at the 1776 Headquarters, Washington, D.C., September 4, 2014, at 3, 4. <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition>

<sup>14</sup> Exhibit ORA-20 at 2.

<sup>15</sup> Id. at II-3, II-4.

communities.<sup>16</sup> In that press release, Jeni Bell (vice president and general manager, Northern California and Northern Nevada at AT&T) stated:

By expanding AT&T GigaPower to additional cities in the Bay Area beyond Cupertino, we are demonstrating our continued commitment to our customers whose appetite for high-speed data continues to grow. As the ways in which we communicate and seek entertainment become more data-intensive, our customers will benefit from our expansion of our AT&T GigaPower service.<sup>17</sup>

Respectfully Submitted,

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<sup>16</sup> Id. at II-4.

<sup>17</sup> Ibid.