BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005 (Filed October 5, 2006)

REPLY COMMENTS OF AT&T CALIFORNIA

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Pacific Bell Telephone Company d/b/a AT&T California (hereinafter, "AT&T California"), pursuant to the Order Instituting Rulemaking dated October 5, 2006 (hereinafter, "OIR"), provides the following reply comments.

I. INTRODUCTION

Californians have been waiting a long time for true video competition. AB 2987 is a significant step toward jump-starting that competition, and toward finally giving Californians the choice they deserve. In the words of AB 2987,

> Increased competition in the cable and video service sector provides consumers with more choice, lowers prices, speeds the deployment of new communication and broadband technologies, creates jobs, and benefits the California economy.[1]

AB 2987 recognizes that, "[i]ncreasing competition for video and broadband services is a matter of *statewide* concern…."[2] To speed competition along, AB 2987 streamlines the franchising process by moving the franchise authority to the state level, with this Commission, and establishing a specific, efficient application process to increase the number of competitors in the video service market quickly. AB 2987 also takes pains to ensure that the Commission has sufficient funds, in part, to "*timely process* applications of video service providers…."[3]

Californians have waited long enough. AT&T California and other competitors are ready to roll out innovative and exciting new video services, and finally offer Californians a true choice for video. To honor the letter and spirit of AB 2987, the Commission must establish a streamlined procedure to quickly enable new competitors to enter old video markets. Californians deserve no less.

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[1] Pub. Util. Code § 5810(a)(1)(B).

[2] Pub. Util. Code § 5810(a)(1) (emphasis added).

[3] Pub. Util. Code § 5810(a)(3) (emphasis added).

II. RESPONSE TO OPENING COMMENTS

A. To Benefit Californians, And Implement Legislative Intent, The Commission Must Establish An Application Process That Does Not Delay Competition.

A number of commentors seek to load up the application process with reporting requirements and procedural hurdles. These extraneous reporting and procedural requirements are road blocks to video competition and would violate the mandates of AB 2987.

1. The Law Does Not Allow Protests Of Initial Applications.

Commentors claim that the Commission must allow protests of video franchise applications. To the contrary, allowing protests would violate AB 2987 and California law. In other words, the Commission cannot legally provide for protests of video service franchises.

First, the highly streamlined and time-specific application process established by AB 2987 does not allow protests and their attendant formal resolution of issues by the Commission. Section 5840 of AB 2987 sets forth the application process for state video franchises and provides,

> The application process described in this section [5840] and the authority granted to the commission under this section *shall not exceed the provisions set forth in this section* [5840].[4]

Section 5840 establishes nine specific items to be included in the application,[5] and then mandates that the Commission "shall issue" a state video franchise if the application is complete.[6] Further emphasizing its objective of quickly allowing new competitors into the video services market, AB 2987 even provides that a franchise is deemed awarded if the Commission fails to act within

[4] Pub. Util. Code § 5840(b) (emphasis added).

[5] Pub. Util. Code § 5840(e).

[6] Pub. Util. Code § 5840(h)(2).

44 calendar days.[7] In sum, section 5840 sets forth the entirety of the permissible steps in the application process and it does not include protests. Therefore, protests are not allowed.

Some commentors may believe that protests should be allowed for video service applications simply because historically they have been part of other Commission proceedings. However, video proceedings are not like any other proceeding before the Commission. The Commission's authority to allow protests in public utility proceedings stems from its authority to regulate public utilities. AB 2987 makes clear that the Commission's video service authority is not "business as usual" by mandating in two separate provisions that video service providers are not to be treated as public utilities.[8] AB 2987 could not have been clearer that processes and regulations applicable to public utilities cannot be applied to video service providers.

Second, California law recognizes that ministerial acts, such as the issuance of state video franchises under AB 2987, are not subject to protest.

> Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial. Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion.[9]

The issuance of a state video franchise under AB 2987 is a ministerial duty. AB 2987 provides that, "if the commission finds the application is complete, it *shall* issue a state franchise

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[7] Pub. Util. Code § 5840(h)(4). The Commission proposes that this provision not apply to applicants who are in violation of final, non-appealable orders. AT&T California believes that is a reasonable reading of the statute and does not object. AT&T California does agree with Verizon that in such circumstances applicants should be promptly notified by the Commission.

[8] Pub. Util. Code § 5820(c) ("The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division. This division shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in this division."); Pub. Util. Code § 5810(a)(3) ("video service providers are not public utilities or common carriers").

[9] *Rodriguez v. Solis* (1991), 1 Cal.App.4th 495, 504-505, 2 Cal.Rptr.2d 50 (citing *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973), 31 Cal.App.3d 403, 413).

before the 14th calendar day after that finding."[10] California courts have confirmed that, in legislation, "[t]he word 'shall' indicates a mandatory or ministerial duty."[11] Thus, AB 2987 clearly defines the course of conduct the Commission must take, and the Commission is under a mandatory duty to issue a franchise when an applicant submits a complete application. That would be enough to make the issuance of a state video franchise a ministerial act, but AB 2987 goes even further. *AB 2987 makes the required contents of the application ministerial* by decreeing that the application "shall" include nine specific items,[12] and no more.[13]

Implicitly conceding that no other provision could conceivably involve a non-ministerial act, some commentors[14] seize on the requirement that the application include "[a]dequate

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[10] Pub. Util. Code § 5840(h)(2).

[11] *Lazan v. County of Riverside* (2006), 140 Cal.App.4th 453, 460.

[12] Pub. Util. Code § 5840(e). The nine items are:

> 1. A sworn affidavit, affirming an applicant (a) has filed or will file with the FCC forms required by the FCC, (b) will comply with specific federal and state requirements, (c) will comply with lawful time place and manner requirements, and (d) will deliver a copy of the application to certain local entities;
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> 2. The applicant's legal name and any name it does business as;
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> 3. The address and telephone number of the applicant's principal place of business, along with contact information for the person responsible for ongoing communications with department;
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> 4. The names and titles of the applicant's principal officers;
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> 5. The legal name, address, and telephone number of the applicant's parent company, if any;
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> 6. A description of the video service area footprint, including socioeconomic information;
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> 7. If the applicant is a telephone corporation, or an affiliate, a description of the telephone service territory, including socioeconomic information;
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> 8. The expected date of deployment in the video service area(s); and
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> 9. "Adequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant. *To accomplish these requirements, the commission may require a bond.*" (emphasis added)

[13] Pub. Util. Code § 5840(b) (emphasis added).

[14] Comments of League of California Cities, *et al.* ("LCC"), p. 9; Comments of City of Arcadia ("Arcadia"), p. 3; Comments of City of Berkeley ("Berkeley"), p. 3; Comments of City of Long Beach ("Long Beach"), p. 3; Comments of City of Redondo Beach ("Redondo Beach"), p. 3; Comments of City of Walnut ("Walnut"), p. 3; Comments of City of Pasadena ("Pasadena"), p. 2.

assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant."[15] However, the last sentence of this provision specifies that, "[t]o accomplish these requirements, the commission may require a bond."[16] As provided by AB 2987, the Commission has required a bond, or equivalent financial showing, to accomplish these requirements. Therefore, if an applicant posts a bond or makes the required showing, the Commission *must* find this requirement is met.

Since the performance of a ministerial act is a mandatory duty, no purpose would be served by allowing protests of the act. Indeed, California courts have held that protesting a ministerial decision "would be an idle act and could accomplish nothing."[17] Thus, California law does not allow protests of video service applications.

2. The Law Does Not Allow Protests of Renewals or Transfers.

Contrary to the claims of some commentors,[18] AB 2987 does not allow protests of renewals or transfers.

Renewals of a state video franchise are subject to the same criteria and process as initial applications, except as provided in section 5850, "and the commission shall not impose any additional or different criteria."[19] As discussed above, initial applications cannot be protested. Because section 5850 does not include any additional provisions allowing protests, renewals

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[15] Pub. Util. Code § 5840(e)(9).

[16] *Id.*

[17] *Irvine v. Citrus Pest Dist.* (1944), 62 Cal.App.2d 378, 383.

[18] LCC, pp. 8-11; Arcadia, pp. 2-4; Berkeley, pp. 2-4; Long Beach, pp. 2-4; Redondo Beach, pp. 2-4; Walnut, pp. 2-4; Comments of The Utility Reform Network ("TURN"), p. 4; *see also* Pasadena, p. 2.

[19] Pub. Util. Code § 5850(b).

cannot be protested either. Moreover, contrary to the comments of several cities,[20] the renewal provision of the Commission's proposed general order properly ensures compliance with federal requirements,[21] and the affidavit required by the Commission's proposed application form makes sure a franchise will not be renewed if a video service provider is in violation of any final non-appealable court order issued pursuant to AB 2987.[22]

Moreover, under AB 2987 transfers of a state franchise are allowed if the holder of the franchise provides the Commission with notice within 14 business days of the transfer.[23] A protest would be pointless because notice of the transfer is required only *after* the transfer has occurred.[24] Because the section of AB 2987 addressing transfers does not provide for protests, they are not allowed.[25]

3. The Required Application Information Cannot Exceed That Specified In Section 5840.

Despite the requests of many commentors,[26] the information required in the application cannot exceed that specified in section 5840, for the reasons stated above and in the comments of SureWest and Verizon.[27] Section 5840 establishes nine specific items to be included in the application,[28] and "[t]he application process described in this section [5840] and the authority

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[20] Arcadia, p. 12; Berkeley, p. 12; Long Beach, p. 12; Redondo Beach, p. 12; Walnut, p. 12; Comments of County of Los Angeles ("LA"), pp. 8-9.

[21] Pub. Util. Code § 5850(c).

[22] Pub. Util. Code § 5850(d).

[23] Pub. Util. Code § 5840(m)(4).

[24] *Id.*

[25] Pub. Util. Code § 5840(a) ("Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division*.") (emphasis added).

[26] *See*, *e.g.*, Comments of LCC, Greenlining, Arcadia, Berkeley, Long Beach, Redondo Beach, Walnut.

[27] Comments of SureWest ("SureWest"), p. 19; Comments of Verizon California ("Verizon"), p. 9.

[28] Pub. Util. Code § 5840(e).

granted to the commission under this section *shall not exceed the provisions set forth in this section* [5840]."[29] Accordingly, commentors' proposals to require the submission of additional information with the application would violate AB 2987.

4. The Proposed Road Blocks To Competition Demonstrate The Danger Of Allowing Protests.

Despite the clear intent of AB 2987 to jump-start video competition through a streamlined application and approval process, commentors propose an array of potential road blocks that, if adopted, would slow or strangle the promise of video competition. The panoply of wish-lists proposed by commentors vividly illustrates the morass into which applications could be thrown if protests were allowed. Commentors want higher fees[30] and lower fees,[31] more fees[32] and different fees,[33] smaller franchise areas[34] and larger franchise areas,[35] a bigger bond[36] and a different bond,[37] pre-event notification followed by post-event notification,[38] video service in multiple languages,[39] and of course, the potential for hearings.[40] Indeed, these myriad demands

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[29] Pub. Util. Code § 5840(b) (emphasis added).

[30] Arcadia, p. 16; Berkeley, p. 16; Long Beach, p. 16; Redondo Beach, p. 16; Walnut, p. 16; Comments of Greenlining Institute ("Greenlining"), pp. 7-8

[31] Verizon, p. 23; SureWest, p. 14; *see also* LCC, pp. 3-4, 6-7.

[32] Arcadia, p. 16; Berkeley, p. 16; Long Beach, p. 16; Redondo Beach, p. 16; Walnut, p. 16; LCC, pp. 7-8.

[33] Verizon, p. 24; Comments of Division of Ratepayer Advocates ("DRA"), p. 7; SureWest, pp. 13-15; Greenlining, pp. 7-8; LCC, pp. 7-8.

[34] Arcadia, pp. 17-19; Berkeley, pp. 17-19; Long Beach, pp. 17-19; Redondo Beach, pp. 17-19; Walnut, pp. 17-19; SureWest, p. 12.

[35] LCC, p. 16.

[36] Arcadia, pp. 6-9; Berkeley, pp. 6-9; Long Beach, pp. 6-9; Redondo Beach, pp. 6-9; Walnut, pp. 6-9; Pasadena, p. 3; LCC, p. 14.

[37] Arcadia, pp. 6-9; Berkeley, pp. 6-9; Long Beach, pp. 6-9; Redondo Beach, pp. 6-9; Walnut, pp. 6-9; Pasadena, p. 3; LCC, p. 14.

[38] Arcadia, pp. 10-11; Berkeley, pp. 10-11; Long Beach, pp. 10-11; Redondo Beach, pp. 10-11; Walnut, pp. pp. 10-11.

[39] Greenlining, p. 6.

[40] DRA, pp. 5, 7.

confirm the Legislature's wisdom in declaring that video service should not be deemed a public utility service.

5. Intervenor Compensation Is Not Available For AB 2987-Related Proceedings.

The wish-lists of various commentors also demonstrate—as CCTA, SureWest, and Verizon recognize—that intervenor compensation should not be made available for AB 2987-related proceedings. As explained below, the law is clear that intervenor compensation is not available for AB 2987-related proceedings, and there is no legal basis for attempting to apply it here.

AB 2987 took pains to make clear that "*video service providers are not public utilities*,"[41] and that the Commission has no more authority over video service providers than that expressly granted in AB 2987.[42] The Legislature has made equally clear that *the intervenor compensation program only applies to public utilities*. In creating the intervenor compensation program, the Legislature declared its intent that "[t]he provisions of this [intervenor compensation] article shall apply to all formal proceedings of the commission *involving electric, gas, water, and telephone utilities*."[43] Moreover, the intent of the intervenor compensation program is to "encourage[] the effective and efficient participation of all groups that have a stake in the *public utility regulation process*."[44]

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[41] Pub. Util. Code § 5810(a)(3) (emphasis added).

[42] *See, e.g.,* Pub. Util. Code § 5840(a) ("Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement* on any holder of a state franchise except as expressly provided in this division."); Pub. Util. Code § 5840(b) ("The application process described in this section and *the authority granted to the commission under this section shall not exceed the provisions set forth in this section*.")

[43] Pub. Util. Code § 1801.3(a) (emphasis added).

[44] Pub. Util. Code § 1801.3(b) (emphasis added).

Accordingly, the intervenor compensation program creates a means of compensation for specified costs "to *public utility customers* of participation or intervention in any proceeding of the commission."[45] The "customers" entitled to compensation are defined as customers of "any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission,"[46] not video service customers.[47] Thus, throughout the intervenor compensation statutes, the Legislature makes clear that the program only applies to public utilities.

Further, the unavailability of intervenor compensation in AB 2987-related proceedings is confirmed by the fact that AB 2987 specifically outlines the role to be played by the Division of Ratepayer Advocates ("DRA"),[48] while conspicuously omitting any role for intervenors.

The Commission, moreover, has no inherent authority to grant intervenor compensation in this context. The Commission's unquestionably broad, general grants of authority in the Constitution (Article XII) and the Public Utilities Code (*e.g.*, § 701) are premised on its regulation of public utilities ("may supervise and regulate *every public utility* in the State" and "which are necessary and convenient in the exercise of such power and jurisdiction.").[49] Again, AB 2987 is explicit that "video service providers are not public utilities or common carriers."[50] It has long been the statutory and case law in California that, attorney fees are left to the parties

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[45] Pub. Util. Code § 1801 (emphasis added).

[46] Pub. Util. Code § 1802(b)(1)(A).

[47] Moreover, the intervenor compensation program provides that any intervenor compensation award "paid by a public utility…shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility…so that the amount of the award shall be fully recovered within one year from the date of the award." Pub. Util. Code § 1807. The Commission has no authority to establish video service rates (*see, e.g.,* Pub. Util. Code § 5820(c)), thus this provision could not be applied to video service providers.

[48] Pub. Util. Code § 5900(k).

[49] *Id.* (emphasis added)

[50] Pub. Util. Code § 5810(a)(3); § 5820(c).

"[e]xcept as attorney's fees are specifically provided for by statute…."[51] The law is clear that the Commission does not have the authority to grant intervenor compensation in video service proceedings.

B. <u>The Application Process Should Allow Timely, Extensive, and Efficient Competition.</u>

1. New Competitors Need Confidentiality And Flexibility In Describing Service Area And Rollout Plans.

CCTA's request that the Commission force new competitors to provide cable companies with the competitors' rollout plans, including specific service areas and dates of entry,[52] plainly demonstrates the need for trade secret protection of such information, as explained in our Opening Comments[53] and in Verizon's.[54] If cable companies knew exactly where new competition would arrive, and when, they could carefully target price promotions and other tactics that would thwart competition and customer choice. In other words, rather than reduce prices across the state immediately, cable companies could target that particular area with price reductions at certain areas and implement them only in advance of specific rollouts to blunt competitive loss. CCTA's claimed need for notice of its ability to "opt into" a state franchise[55] is met by AB 2987's ten-day notice requirement.[56] Thus, CCTA's demand that new competitors

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[51] Code of Civ. Proc. § 1021.

[52] *See* Comments of California Cable and Telecommunications Association ("CCTA"), pp. 11-12.

[53] Comments of AT&T California ("AT&T"), pp. 4-5.

[54] Verizon, pp. 13, 21-22.

[55] CCTA, p. 11.

[56] Pub. Util. Code § 5840(n).

publicly disclose their business plans is unnecessary and would benefit no one—except the cable companies.[57]

For similar reasons, the Commission must reject the cities' proposal to impose stringent requirements on how large service areas can be and how often they can be modified.[58] If service areas were required to be very small, it would be more difficult for new competitors to protect the confidentiality of their rollout plans. Moreover, the cities' proposal to limit modifications to the service area is directly contrary to AB 2987, which expressly provides that franchise holders need only notify the Commission fourteen (14) business days after "[a] change in one or more of the service areas…that would increase or decrease the territory within the service area."[59] New competitors need this flexibility to quickly and cost-effectively adapt to issues that may arise during service rollout.

Finally, CCTA's attempt to contain new competitors within a limited initial service area that could only be amended through a formal process[60] is just another ploy to constrain video competition by delaying product roll outs. CCTA argues this is necessary because section 5890(d) allegedly requires review of certain service areas for discrimination during the application process.[61] However, this section refers to review of "the holder's" proposed video service area. Because "holder" means "a person or group of persons that *has been issued* a state

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[57] AT&T California also agrees with SureWest (p. 8) that the OIR should be revised to make clear that holders of existing cable franchises with localities can apply for a state franchise in order to offer video service in other areas. AT&T California further agrees with SureWest (p. 12) that the proposed definition of "Telephone Service Area" should be revised to exclude areas served as a competitive local exchange carrier ("CLEC"). AT&T California proposes the definition be modified to read as follows: "'Telephone Service Area' means the area where the Commission has granted an entity a Certificate of Public Convenience and Necessity to provide telephone service *as an incumbent local exchange carrier*."

[58] Arcadia, pp. 17-19; Berkeley, pp. 17-19; Long Beach, pp. 17-19; Redondo Beach, pp. 17-19; Walnut, pp. 17-19; LCC, pp. 15-16.

[59] Pub. Util. Code § 5840(m)(6).

[60] CCTA, pp. 11-12.

franchise from the commission pursuant to [the Digital Infrastructure and Video Competition Act of 2006],"[62] section 5890(d) applies only after an applicant has been awarded a state franchise. This is further confirmed by the fact that, as discussed above, AB 2987 prohibits the Commission from imposing any application requirements other than those set forth in section 5840,[63] which does not require review of service areas for discrimination.[64]

2. The State Franchise Should Be Issued To The Entity Providing Service, Not Its Parent Company.

For the reasons set forth in our Opening Comments, and echoed in the comments of CCTA, SureWest, Verizon and the Small LECs, the franchise should be issued to the legal entity that will actually provide the video service, not to its parent company. As indicated in our Opening Comments, the Commission's concerns regarding affiliates could be addressed by including in the application certification required by section 5840(e)(1)(B)[65] an assurance from any affiliates that provide telephone or broadband services that such affiliates' operations will be included for purposes of sections 5890, 5960, and 5940.

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[61] Pub. Util. Code § 5890(d).

[62] Pub. Util. Code § 5830(i) (emphasis added).

[63] Pub. Util. Code § 5840(b) (emphasis added).

[64] Pub. Util. Code § 5840. AT&T California also notes that CCTA is wrong to suggest that the Commission must review, at any time, all service areas for discrimination. Section 5890(d) applies to a limited set of circumstances, namely video service provided by an entity other than a telephone corporation, outside of the telephone corporation's telephone service area, or where there is no video provider other than direct-to-home satellite.

[65] Pub. Util. Code § 5840(e)(1)(B) requires that the applicant for a state franchise include a "sworn affidavit, signed under penalty of perjury by an officer or another person authorized to bind the applicant, that affirms…[t]hat the applicant or its affiliates agrees to comply with all federal and state statutes, rules, and regulations, including, but not limited to…" specified requirements.

3. The User Fee Burden Should Be Borne Equally.

The OIR proposal to apportion the "total amount of annual user fee" according to the ratio of the holder's number of subscribers to the total number of subscribers for state video franchise holders is an equitable and appropriate method that balances the burden of user fees on video franchise holders according to their market position. Some commentors suggest different and untenable ideas that would unjustifiably shift the user fee contribution to others or simply lead to raising video user fees that do not reflect the Commission's ongoing obligations under AB 2987.

In this respect, DRA's proposal[66] for a revenue-based assessment according to usage is inappropriate for video franchise holders which are not public utilities and for which the Commission's duties are limited. Similarly, tying the amount of a video franchise holder's user fee to the number of telephone lines or intrastate telephone revenues does not make sense for new franchise holders because they are all similarly situated—without a single video customer.[67] Intrastate telephone revenues and the number of telephone lines of a video franchise holder or affiliate are irrelevant factors for the purpose of determining video user fees and therefore should be rejected. Such an approach would unfairly favor certain new competitors over others.

As AT&T California stated in its opening comments, the Commission's proposed method to determine user fees equitably distributes user fees among video franchise holders. However, to provide clear guidance for its implementation the Commission should explicitly state in the GO that the annual user fees collected from video franchise holders should reflect the Commission's actual and limited duties related to video services in contrast to its duties concerning regulated public utilities.

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[66] DRA, p. 7.

C. Video Service Providers Are Not To Be Regulated As Utilities

As indicated above, AB 2987 includes two separate statements making clear that video service providers are not be treated as public utilities.[68] Moreover,

> Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division*.[69]

Several conclusions flow from these principles.

1. The Commission Has Limited Investigative And Enforcement Authority Under AB 2987.

As explained in our Opening Comments, the Commission has specific and limited authority to investigate video service matters. AB 2987 clearly limits the Commission's authority to open an investigation to claims of discrimination or denial of access, as specified in section 5890. Notably, DRA agrees.[70] Contrary to the comments of the League of Cities, the authority of local entities to bring complaints to the Commission is similarly limited.[71] In other words, local entities are not permitted to bring issues to the Commission over which the Commission has no authority.

Some commentors argue that because AB 2987 allows DRA to advocate regarding customer service standards,[72] and Public Utilities Code section 309.5 indicates that DRA

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[67] Verizon, p. 23.

[68] Pub. Util. Code § 5820(c) (" The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division. This division shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in this division."); Pub. Util. Code § 5810(a)(3) ("video service providers are not public utilities or common carriers").

[69] Pub. Util. Code § 5840(a) (emphasis added).

[70] DRA, p. 5.

[71] *See* AT&T, pp. 9-11; Pub. Util. Code § 5890(g) ("Local governments may bring complaints to the state franchising authority that a holder is not offering video service *as required by this section*….") (emphasis added).

[72] "The Division of Ratepayer Advocates shall have authority to advocate on behalf of video customers

advocates before the Commission, the Commission must have jurisdiction over customer service standards.[73] This argument fails for two reasons. *First*, section 309.5 applies only to public utilities,[74] and as mentioned above AB 2987 could not have been clearer that video service providers are not be treated as public utilities. *Second*, the argument is directly contrary to AB 2987, which expressly states that "[t]he local entity shall enforce all of the customer service and protection standards of this section with respect to complaints received from residents within the local entity's jurisdiction…."[75]

2. Reporting Requirements Must Be Limited To Those Set Forth In AB 2987.

As mentioned above, the Commission may not "*impose any requirement on any holder of a state franchise except as expressly provided in*" AB 2987.[76] AB 2987 provides for specified reporting in sections 5920 and 5960; the Commission may not impose any other reporting requirements. Thus, AB 2987 prohibits the Commission from requiring the granular accounting data demanded by TURN,[77] the community center reporting that SureWest proposes be applied only to large providers,[78] the general data request authority in the proposed GO,[79] and every other

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regarding renewal of a state-issued franchise and enforcement of Sections 5890, 5900, and 5950." Pub. Util. Code § 5900(k).

[73] DRA, pp. 1-2; Comments of California Community Technology Policy Group and Latino Issues Forum ("CCTPG/LIF"), pp. 6-9; Comments of City of Oakland ("Oakland"), pp. 3-4; LA, pp. 2-3.

[74] Pub. Util. Code § 309.5(a) ("There is within the commission a Division of Ratepayer Advocates to represent and advocate on behalf of the interests of *public utility* customers and subscribers within the jurisdiction of the commission.") (emphasis added).

[75] Pub. Util. Code § 5900(c).

[76] Pub. Util. Code § 5840(a) (emphasis added).

[77] TURN, pp. 10-15.

[78] SureWest, p. 13.

[79] AT&T, p. 9; SureWest, pp. 15-16.

proposed reporting requirement that is not expressly and specifically set forth in section 5920 or 5960.[80]

Perhaps the most misguided request to impermissibly expand AB 2987 is TURN's proposal that certain applicants, such as AT&T California, be required to report extensive accounting data. Reporting of such accounting data is not included in section 5920 or 5960; therefore, requiring it would violate AB 2987. Moreover, TURN's claim that this data is necessary to prevent "cross-subsidies" from basic rates is inaccurate. AB 2987 includes two sections addressing basic rates, both of which impose restrictions on *increases* in basic service rates:

> **5940.** The holder of a state franchise under this division who also provides stand-alone, residential, primary line, basic telephone service *shall not increase this rate* to finance the cost of deploying a network to provide video service.
>
> **5950.** The *commission shall not permit a telephone corporation* that is providing video service directly or through its affiliates pursuant to a state-issued franchise as an incumbent local exchange carrier *to increase rates* for residential, primary line, basic telephone service above the rate as of July 1, 2006, until January 1, 2009, unless that telephone corporation is regulated under rate of return regulation. …

Section 5950 simply freezes basic rates until January 1, 2009—the Commission doesn't need "granular" accounting data to enforce this requirement. Section 5940 prohibits an increase in basic rates to finance video deployment. Because those rates are frozen (by section 5950), AT&T will not increase basic rates before January 1, 2009. Holding up video competition while numerous parties debate detailed accounting issues would violate the spirit and letter of AB 2987, and would be especially misguided because there is no possibility of even implicating section 5940's requirements regarding rate increases before January 1, 2009.

[80] Verizon, p. 22.

Finally, for the record, AT&T California states that AT&T's ARMIS data submitted to the FCC in accordance with federal cost allocation rules under Code of Federal Regulations Part 64 are consistent with all federal requirements. Any suggestions by TURN that AT&T California sends a mixed signal in its filings are unfounded and without merit. All data submitted under Part 64 are subject to independent biennial audit requirements.[81] AT&T California complies with all applicable requirements.

3. Reporting Requirements Should Not Be Interpreted To Impose Unreasonable Burdens.

The Commission must hew closely to the reporting requirements set forth in AB 2987, and should not interpret those requirements to impose unreasonable burdens on state franchise holders. For example, to protect competitors' business plans and other proprietary information, it is important to accord trade secret protection to such information provided pursuant to the

---

[81] 47 C.F.R. § 64.904, Independent Audits:

(a) Each carrier required to file a cost allocation manual shall elect to either have an attest engagement performed by an independent auditor every two years, covering the prior two year period, or have a financial audit performed by an independent auditor every two years, covering the prior two year period. In either case, the initial engagement shall be performed in the calendar year after the carrier is first required to file a cost allocation manual.

(b) The attest engagement shall be an examination engagement and shall provide a written communication that expresses an opinion that the systems, processes, and procedures applied by the carrier to generate the results reported pursuant to § 43.21(e)(2) of this chapter comply with the Commission's Joint Cost Orders issued in conjunction with CC Docket No. 86–111, the Commission's Accounting Safeguards proceeding in CC Docket No. 96–150, and the Commission's rules and regulations including §§ 32.23 and 32.27 of this chapter, and § 64.901, and § 64.903 in force as of the date of the auditor's report. At least 30 days prior to beginning the attestation engagement, the independent auditors shall provide the Commission with the audit program. The attest engagement shall be conducted in accordance with the attestation standards established by the American Institute of Certified Public Accountants, except as otherwise directed by the Chief, Enforcement Bureau.

(c) The biennial financial audit shall provide a positive opinion on whether the applicable date shown in the carrier's annual report required by § 43.21(e)(2) of this chapter present fairly, in all material respects, the information of the Commission's Joint Cost Orders issued in conjunction with CC Docket No. 86–111, the Commission's Accounting Safeguards proceeding in CC Docket No. 96–150, and the Commission's rules and regulations including §§ 32.23 and 32.27 of this chapter, and § 64.901, and § 64.903 in force as of the date of the auditor's report. The audit shall be conducted in accordance with generally accepted auditing standards, except as otherwise directed by the Chief, Enforcement Bureau. The report of the independent auditor shall be filed at the time that the carrier files the annual reports required by § 43.21(e)(2) of this chapter.

reporting requirements of AB 2987.[82] Also, applicants should be allowed to use their most recent audited financial statements, as Verizon proposes.[83]

It would also impose an unacceptable burden if the Commission interpreted certain reporting requirements not to allow reasonable approximations. SureWest suggests that "clean up" legislation is necessary to correct a perceived "discrepancy" regarding the extent to which a state franchise holder may approximate census tract information for purposes of the reporting required by section 5960. In fact, no clean up legislation is necessary because the ability to approximate should apply to all categories of reporting and can be adequately addressed by the Commission in its final rules.

First, the intent was always that holders of video franchises could approximate all categories of information required by section 5960. This was one of the central issues in the debate over the reporting requirements. The industry insisted that it must have the ability to approximate the data because generally speaking companies do not maintain these data by census tract, as was being demanded, and requiring them to do so would essentially turn them into demographers. The final compromise language submitted to Legislative Counsel for inclusion in the bill unequivocally permitted approximating for all reporting requirements. Whatever the reason the language was not returned exactly as it was submitted, it certainly was not a policy decision to permit approximating for just one category of the report—broadband availability. Such a distinction would make no sense as a practical matter.

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[82] AT&T California notes that Verizon and CCTA agree with this point.

[83] Verizon, p. 6.

Second, it would be irrational to permit approximating for just broadband availability when all of the categories in the report are in one way or another subsets of each other. For example, for AT&T California, broadband availability will be a subset of its telephone footprint. Broadband subscription and video availability will be subsets of broadband availability. And low income households will be a subset of its telephone footprint and video availability. One household could fall into multiple categories and have broadband access, subscribe to it, have video access and be low income. Requiring a provider to create multiple reports using different methodologies for the same household would be unnecessary and unreasonable.

III. CONCLUSION

For all the reasons set forth above, and in our Opening Comments, AT&T California requests that the Commission adopt its proposed General Order and application form after amending them as described above and in our Opening Comments.

Respectfully submitted,

/s/

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DATED: November 1, 2006

404507

CERTIFICATE OF SERVICE

I, Thomas J. Selhorst, hereby certify the following:

I am a citizen of the United States, State of California, am over eighteen years of age, and am not a party to the within cause.

My business address is 525 Market Street, San Francisco, California 94105.

On November 1, 2006, I sent copies of the foregoing **REPLY COMMENTS OF AT&T CALIFORNIA** in R.06-10-005 to each party named via electronic mail, U.S. mail, and/or hand-delivery.

Executed this 1st day of November 2006 in San Francisco, California.

AT&T CALIFORNIA
525 Market Street
San Francisco, CA 94105

/s/
Thomas J. Selhorst

CALIFORNIA PUBLIC UTILITIES COMMISSION
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