

**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)

**OPENING COMMENTS OF AT&T CALIFORNIA
ON ASSIGNED COMMISSIONER'S RULING
AND SCOPING MEMO FOR PHASE III,
ISSUED MARCH 27, 2008**

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Pacific Bell Telephone Company d/b/a AT&T California (“AT&T California” or “AT&T”) hereby provides the following comments on the **Assigned Commissioner’s Ruling And Scoping Memo For Phase III**, issued March 27, 2008 (hereinafter, “Scoping Memo”).

I. INTRODUCTION

AT&T California supports the Scoping Memo’s proposals regarding extension applications and bond requirements. AT&T California also supports the Scoping Memo’s goals of increasing broadband competition and investment, and closing the “digital divide.”¹ For its part, AT&T is on track to have invested more than \$1 billion by year end 2008 to expand and improve our broadband and video capabilities in California, and AT&T now offers broadband access to all of its California service area.

Although issues remain, the World Economic Forum recently recognized that the United States has risen from seventh to fourth in its “Networked Readiness Index,” behind only Denmark, Sweden and Switzerland.² The Federal Communications Commission (“FCC”) similarly has concluded that “broadband services are currently being deployed to all Americans in a reasonable and timely fashion.”³ Within the United States, the California Broadband Task Force reports that “California is better positioned than most states on broadband availability and adoption....”⁴

These advances are attributable in large part to the FCC’s 2005 decision to sharply limit federal and pre-empt state regulatory burdens on broadband services. That decision sparked investment in broadband facilities, and established federal policy consistent with the directive of the United States Congress, which declared “[i]t is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁵ This focus on competition, rather

¹ Scoping Memo, p. 7.

² See 2008 World Economic Forum, *The Global information Technology Report*, “Assessing the State of the World’s Networked Readiness: Insight from the Networked Readiness Index 2007-2008,” available at <http://graphics8.nytimes.com/packages/pdf/technology/09internet_networkreadiness.pdf>, Table 2, p. 9.

³ Federal Communications Commission, “FCC Expands, Improves Broadband Data Collection,” (News Release Mar. 19, 2008), available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280909A1.doc>, p. 1.

⁴ *Report to the Governor*, “The State of Connectivity: Building Innovation Through Broadband” (Final Report of the California Broadband Task Force – January 2008) (“California Broadband Task Force Report”), available at <http://www.calink.ca.gov/pdf/CBTF_FINAL_Report.pdf>, p. 7.

⁵ 47 U.S.C. § 230(b)(2) (emphasis added).

than regulation, is reinforced by the California Legislature’s finding and declaration in The Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”) that, “[i]ncreasing *competition* for video and broadband services is a matter of statewide concern....”⁶ It is further confirmed in Governor Schwarzenegger’s Executive Order S-23-06, which focuses on removing barriers, creating choice, and streamlining.⁷

AT&T California agrees that a vibrant, competitive, and *unfettered* broadband market is crucial to spur even greater broadband deployment and development. Instead of regulation, AT&T California supports further advancement of broadband through partnerships, collaborative efforts, and voluntary support from the Commission and other state and local agencies. These are the approaches embraced by the California Broadband Task Force Report, which recommends “key actions” that advance incentives, develop partnerships and expand opportunities—not further regulation.⁸ To the contrary, state regulation “will have the unintended consequence of retarding the expansion of the Internet,”⁹ and potentially make California less attractive when competing with other states for investment dollars.

For these reasons, AT&T California cannot support the additional broadband reporting requirements proposed in the Scoping Memo. Those reporting requirements, and the further regulation that is likely to follow, threaten to reverse the advances of recent years. Moreover, as discussed below, the additional reporting requirements are pre-empted by federal law, contrary to DIVCA, and would impose discriminatory and ineffective regulation. Instead, AT&T California

⁶ Pub. Util. Code § 5810(a)(1) (emphasis added). All statutory references are to the Public Utilities Code unless otherwise indicated.

⁷ Executive Order S-23-06 (Nov. 28, 2006) (“WHEREAS a technology-neutral approach to *removing barriers to broadband deployment* will encourage lower prices and *creation of more consumer choices*,” “WHEREAS State action is needed to continue investment in, stimulate adoption of, and *remove further barriers to the development of world-class broadband networks*,” “This Task Force will bring together public and private stakeholders to *remove barriers to broadband access*...,” “This report shall make specific recommendations for how California can take advantage of opportunities for and *eliminate any related barriers to broadband access* and adoption.” “BTH shall lead a statewide effort to *streamline* ROW permitting.”) (emphasis added).

⁸ California Broadband Task Force Report, p. 8.

⁹ *Vonage Holdings Corp. v. Minnesota PUC*, 290 F.Supp.2d 993, 1003 (D.Minn. 2003) *aff’d* 394 F.3d 568 (8th Cir. 2004). The *Vonage* Court’s conclusion was later confirmed by the FCC. *In The Matter of Vonage Holdings Corporation Petition for Declaratory Ruling re Order of Minnesota PUC*, WC Docket No. 03-211, *Memorandum Opinion and Order*, FCC 04-267, 19 F.C.C.R. 22404 (Nov. 9, 2004).

proposes that it voluntarily provide the California Public Utilities Commission with the California broadband data AT&T is required to report to the FCC.

II. DISCUSSION

A. Federal Law Preempts The California Commission From Regulating Broadband Services.

“The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law.”¹⁰ Pre-emption occurs when Congress expresses a clear intent to pre-empt state law, when there is actual conflict between federal and state law, where compliance with both federal and state law is impossible, “where there is implicit in federal law a barrier to state regulation,” where Congress has occupied an entire field of regulation leaving no room for state law, or where state law is an obstacle to achievement of the full objectives of Congress.¹¹ In addition, “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”¹² The Scoping Memo’s proposal to impose broadband reporting requirements is pre-empted pursuant to a number of these principles, but most plainly because the FCC has acted within the scope of its congressionally delegated authority to pre-empt state regulation of broadband.

In its 2005 *Wireline Broadband Report and Order*, the FCC determined that “the appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch.”¹³ Thus, the FCC concluded that, “wireline broadband Internet access service provided over a provider’s own facilities is an information service.”¹⁴ As an information service, broadband is not subject to telecommunications regulation,¹⁵ and state regulations “that have the effect of regulating information services are in conflict with

¹⁰ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

¹¹ *Id.* at 368-69.

¹² *Id.* at 369.

¹³ *In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, etc.*, CC Docket Nos. 02-33, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 F.C.C.R. 14853, 14856, at ¶ 3 (Aug. 5, 2005) (hereinafter, “*Broadband Report and Order*”), *aff’d Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007).

¹⁴ *Broadband Report and Order* at 14862, ¶ 12 (citing *Wireline Broadband NPRM*, 17 F.C.C.R. 3019, 3032-33, ¶ 24).

¹⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, FCC 98-67, 13 F.C.C.R. 11501, 11523, at ¶ 43 (April 10, 1998) (noting the “intention of the drafters of both the House and Senate bills ... that information service providers not be subject to telecommunications regulation.”)

federal law and must be pre-empted.”¹⁶ The California Commission has itself confirmed that “this Commission does not have jurisdiction over information services.”¹⁷ Moreover, in 2007 the FCC declared a consistent framework for wireless broadband Internet access service,

This approach is consistent with the framework that the [FCC] established for cable modem Internet access service, wireline broadband Internet access service, and Broadband over Power Line (BPL)-enabled Internet access service and it establishes a minimal regulatory environment for wireless broadband Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans.¹⁸

Accordingly, the broadband reporting requirements proposed by the Scoping Memo are pre-empted by federal law. The imposition of reporting requirements, and the accompanying penalties for failure to comply, constitutes regulation.¹⁹ Because this regulation would apply to an information service, it has been pre-empted by Congress and the FCC.

This is particularly true where, as here, the FCC continues to “occupy the field.” As the Scoping Memo acknowledges, the FCC has adopted an order to “increase the precision and quality of broadband subscribership data collected every six months from broadband services providers,”²⁰ by expanding the number of broadband reporting speed tiers.²¹ The FCC’s new requirements are also intended to “improve the accuracy of information the [FCC] gathers about mobile wireless broadband deployment.”²² Thus, the FCC is actively “occupying the field” of broadband reporting.

¹⁶ *Vonage Holdings Corp. v. Minnesota PUC*, 290 F.Supp.2d 993, 1002 (D.Minn. 2003) *aff’d* 394 F.3d 568 (8th Cir. 2004). The *Vonage* Court’s conclusion was later confirmed by the FCC. Memorandum Opinion and Order, *In The Matter Of Vonage Holdings Corporation*, FCC 04-267, 19 F.C.C.R. 22404 (Nov. 9, 2004).

¹⁷ See, e.g., *Muhammad v. MCI, Inc.*, Decision No. 07-01-005, *Decision Dismissing Complaint for Lack of Jurisdiction*, 2007 WL 1794922 (Cal.P.U.C. Jan. 11, 2007).

¹⁸ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, FCC 07-30, ¶ 2 (Mar. 23, 2007) (footnotes omitted).

¹⁹ *Advocates for Effective Regulation v. City of Eugene* (1999), 981 P.2d 368, 377 (“To ‘regulate,’ in turn, means ‘to govern or direct according to rule[;]...to bring under the control of law or constituted authority[.]’ [Citation omitted.] There can be no question but that the Right to Know Initiative sets forth an authoritative rule that governs the reporting of hazardous substances. As such, it constitutes a ‘regulation’ within the meaning of the statute.”).

²⁰ FCC News Release, p. 1.

²¹ *Id.*

²² *Id.*

B. The Imposition Of Additional Broadband Reporting Requirements Is Contrary To DIVCA.

DIVCA repeatedly emphasizes that the Commission has very limited authority over video services and video service providers. In two separate provisions, DIVCA clarifies that the Commission’s broader authority over public utilities does not apply to video service providers. Section 5810(a)(3) states that “video service providers *are not public utilities* or common carriers,”²³ and section 5820(c) confirms that “[t]he holder of a state [video] franchise *shall not be deemed a public utility* as a result of providing video service....”²⁴

Consistent with this intent, the plain and express language of DIVCA carefully limits the Commission’s authority:

Neither the commission nor any local franchising entity or other local entity of the state may ... *impose any requirement* on any holder of a state franchise *except as expressly provided* in [DIVCA].²⁵

DIVCA sections 5920 and 5960 set forth *the* reporting requirements of DIVCA. Neither of these sections, nor any other section, of DIVCA requires each franchise holder to report the additional broadband data proposed in the Scoping Memo. Thus, the imposition of such a requirement would be unlawful.

The Scoping Memo’s proposed additional reporting requirements depart from the Commission’s authority even further than those adopted in the Phase II Decision²⁶ of this proceeding. The Phase II Decision requires each franchise holder to report the number of households in each census tract of its service area that subscribe to its video service,²⁷ claiming this “data will be useful for ensuring enforcement of the non-discrimination and build-out provisions of Section 5890,”²⁸ among other things.²⁹ Here, there can be no claim that the proposed broadband

²³ Section 5810(a)(3) (emphasis added).

²⁴ Section 5820(c) (emphasis added).

²⁵ Section 5840(a) (emphasis added).

²⁶ *Opinion Resolving Issues in Phase II*, Decision No. 07-10-013 (Oct. 4, 2007).

²⁷ See D.07-10-013, *mimeo*, pp. 48-49 (Ordering Paragraph 2.c).

²⁸ *Id.* at 22-23.

²⁹ As AT&T explained previously in its Application for Rehearing dated November 5, 2007, this Phase II reporting requirement violates DIVCA and will not assist the Commission in enforcing § 5890(a). The Commission has not acted on AT&T’s Application for Rehearing, and, as required by § 1735, AT&T has recently reported the data required by the Phase II decision. These data have been provided subject to and without waiver of the arguments advanced here and in AT&T’s pending Application for Rehearing.

reporting would aid the Commission in enforcing related requirements—the Commission is pre-empted from regulating broadband.

C. The Proposed Broadband Reporting Requirements Would Be Ineffective And Discriminatory.

The Scoping Memo would impose additional broadband reporting requirements on only a small segment of the broadband providers in California—video franchise holders and their affiliates. As the California Broadband Task Force Report acknowledges,

There are a number of broadband technologies already deployed, or beginning to be deployed, in California today, including: cable, copper-based digital subscriber lines (DSL), fiber-to-the-home (FTTH), fixed and mobile wireless (also known as 3G/4G), satellite, and Wi-Fi/Wi-Max. Each of these broadband technologies has its advantages and a place in the larger broadband market.³⁰

Many, if not most, of the providers offering this wide range of broadband technologies are not video franchise holders or affiliates of video franchise holders. Thus, contrary to its assumption,³¹ the Scoping Memo’s broadband reporting requirement would not yield data that could be used to identify unserved or underserved areas in California. The fact that no video franchise holder (or affiliate) reports serving a particular area would not be a reliable indicator that no broadband service is available in that area from some other provider. Indeed the data that would be reported are particularly unlikely to address the primary availability issue identified in the California Broadband Task Force Report—the “1.4 million mostly rural Californians [who] lack broadband access at any speed.”³² Large portions of those rural areas are served by companies that do not currently have state video franchises.

Finally, imposing burdensome new reporting requirements on only a small slice of broadband providers would result in discriminatory regulation and skew the free market. Both California and federal law prohibit discriminatory regulation.³³ Moreover, because the reporting requirements would impose significant costs and potential penalties on only one segment of a very competitive industry, they would distort the market and result in bad public policy.

³⁰ California Broadband Task Force Report, p. 22.

³¹ Scoping Memo, pp. 8-9.

³² California Broadband Task Force Report, p. 7.

³³ See, e.g., U.S. Const., amend. XIV, § 1; see also *In re Petersen* (1958), 51 Cal.2d 177, 187 (citing, *inter alia*, *Title Guarantee & Trust Co. v. Garrott* (1919), 42 Cal.App. 152, 155).

III. CONCLUSION

For the reasons set forth above, AT&T California cannot support the additional broadband reporting requirements proposed in the Scoping Memo. Instead, AT&T California proposes that it voluntarily provide the California Public Utilities Commission with the California broadband data AT&T is required to report to the FCC.

Respectfully submitted,

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DATED: April 16, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **OPENING COMMENTS OF AT&T CALIFORNIA ON ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO FOR PHASE III, ISSUED MARCH 27, 2008**, on all known parties to **R.06-10-005**, by e-mail, U.S. Mail, and/or hand-delivery to each party named in the official Service List.

Executed this 16th day of April 2008, at San Francisco, California.

By: /s/
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CALIFORNIA PUBLIC UTILITIES COMMISSION

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