

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: July 7, 2010

To: The Commission
(Meeting of July 8, 2010)

From: Edward Randolph, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 1315 (Fuentes) – Public Utilities Commission: Federal Communications Commission: Forebearance Petitions. As Amended: June 16, 2010**

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: OPPOSE UNLESS AMENDED

SUMMARY OF BILL:

The bill would require the California Public Utilities Commission (CPUC) to make certain determinations and make certain filings to the Federal Communications Commission (FCC) in response to any forbearance petition filed by a former Bell Operating Company (BOC), pursuant to 47 U.S.C. Sec. 160, seeking forbearance within any metropolitan statistical area (MSA) located in California from enforcement of the federal requirements of 47 U.S.C. 251(c)(3) and 47 U.S.C. 271(c)(2)(B)(ii).

These federal statutory provisions require a BOC to provide any competitive telecommunications carrier non-discriminatory access to network elements of the BOC's network on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and non-discriminatory. These provision allow the competitive carrier to use the BOC network elements to access local customers. These requirements were enacted as part of the Telecommunications Act of 1996.

When a BOC makes a filing for forbearance from these provisions with the FCC the BOC bares the burden of showing the rules are no longer necessary and there is effective competition. This bill would require the CPUC to make the same determinations regarding these forbearance petitions as the FCC is required by law to make before the FCC can 1) accept a petition as properly filed (see FCC regulation § 1.54) and 2) grant or deny the petition (see 47 U.S.C. 160).

If the CPUC determines that the petition fails to meet any of the requirements of Sec.

1.54 above, the bill would require the CPUC to timely submit a motion for summary denial of the petition with the FCC identifying and supporting each deficiency identified by the CPUC.

The bill would also require the CPUC to “independently determine the truth and completeness of the facts offered by the petition” to support the prima facie case required under 47 C.F.R. 1.54, and to “consult” with DRA in making this determination.

Once the CPUC made the determinations required by Sec. 10 of the Communications Act (47 U.S.C 160) and independently verified the facts alleged in the petition, the bill would require the CPUC to timely file with the FCC “substantive” comments – both opening and reply -- on the petition. The bill also states what should be included in the comments.

The bill would require the CPUC to require each telephone corporation providing service in the affected MSA to report, pursuant to PU Code Sec. 583, comprehensive and detailed information sufficient to enable the CPUC:

- > Separately analyze the level of retail competitive options available to residential and business customers in each MSA at the wire center level, and determine which of these options rely upon wholesale inputs from the BOC, and
- > Separately analyze the level of wholesale competitive options available to competitive carriers for the last-mile loops and transport circuits in each metropolitan statistical areas at the wire center level.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

The CPUC is actively engaged in FCC proceedings and has filed in the past on several forbearance proceedings. If the goal of this bill is to ensure that the CPUC is participating in forbearance proceedings at the FCC, then there appears to be little need for the bill.

This bill provides a high level of specificity on how the CPUC must respond to an forbearance petition. The micro-management of CPUC actions could limit the ability of the CPUC to respond to petition on an individualized basis and in manor that is in the best interest of telephone customers in California.

The bill mandates that the CPUC make numerous determinations which would require a formal rulemaking or rulemakings. Given the limited time the FCC provides for submittal of comments, these requirements are could result in the CPUC responding to petitions after FCC deadlines.

The requirements in the bill would require the CPUC to duplicate the role of the FCC in determining the merits of these forbearance petitions. It is unclear why this effort would be necessary. Even if the CPUC were able to comply with this bill quickly enough to file

comments with the FCC, the FCC is not obligated to adopt the CPUC findings. The FCC must make its own determinations on the petitions.

SUMMARY OF SUGGESTED AMENDMENTS:

- Delete all of Section 2, and insert:
 - A requirement that the CPUC file comments on any petition for forbearance filed pursuant to Section 160 of the Communications Act by a telecommunications carrier.
 - A requirement that all providers of voice communications operating in the affected MSA – including providers of VOIP service -- provide the CPUC with the information necessary, as determined by the CPUC, to adequately analyze and evaluate the petition (on the three key elements that 47 USC Sec. 160 requires must be met before the petition can be granted?).

DIVISION ANALYSIS:

EXPLANATION OF BILL'S IMPACT ON CPUC PROGRAMS, PRACTICE & POLICY:

Given the extensive mandates in the bill, and the short turn-around period to respond to a petition for forbearance, the bill would likely require hiring of outside consultants to help complete the work in a timely fashion.

An example of FCC Pleading Cycle on these items: On September 6, 2006, Verizon filed for relief from 251 (c) and other Title II requirements in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. On September 14, 2006, the FCC released a notice seeking comments on the petition, with Comments due by October 30, 2006, and Reply Comments due November 29, 2006.

BACKGROUND INFORMATION ON IMPACTED PROGRAMS, PRACTICE OR POLICY:

The current manner in which the CPUC files comments with the FCC does not include a formal rulemaking. The Communications Division works with the Legal Division and a Federal Team that includes representatives of the ALJ, and Policy and Planning Divisions, the DRA and Commissioner Advisors, to draft recommended positions based on staff evaluation and analysis of FCC proposals. Other divisions are included as relevant. Staff recommendations are based on the adopted legislative and regulatory policies in California, and on the impact of the FCC proposal to California ratepayers, industry and its economy.

The Legal Division makes the final decision on what positions to recommend to the CPUC. The Commissioners consider and adopt, edit or reject the recommendations of the staff.

Staff reviews the comments filed by other parties and recommends whether the CPUC should file Reply comments on any comments filed by other parties.

RELEVANT PENDING LITIGATION OR LEGAL ISSUES:

Congressman John Dingell (D-MI) has introduced legislation to delete the requirement in Sec. 10(c) of the Communications Act (47 U.S.C 10(c)) that provides that a forbearance petition is deemed granted if the FCC does not deny the petition within one year of its receipt. (The FCC can extend the proceeding by an extra 90 days.) However there has been no action on the legislation to date.

If AT&T and Verizon flood the FCC with forbearance petitions after June, these filings could seriously impede the FCC's ability to allocate staff to implementing the National Broadband Plan and might result in congressional action on the Dingell bill.

STATE LEGISLATIVE HISTORY:

Unknown.

OTHER PERTINENT INFORMATION:

The conditions imposed on the merger of SBC/AT&T and Verizon/MCI expire at the end of June 2010. One of the conditions imposed on these merged entities was a prohibition on seeking forbearance under Sec. 160 of the Communications Act from the Title II unbundling requirements addressed in this bill.

Many if not most of the competitive local exchange carriers in California are to a great degree reliant on the legacy wireline facilities of AT&T or Verizon to serve their end-users. These carriers are very concerned that immediately upon expiration of the merger conditions; AT&T and/ or Verizon will file forbearance petitions with the FCC to forbear from enforcing these provisions in large metropolitan areas where AT&T and /or Verizon believe there is competition.

The FCC must deny a forbearance petition within one year of filing or the petition is deemed granted. The courts have held that such an outcome cannot be appealed because the FCC did not take any action.

STATUS: AB 1315 is pending referral to the Senate Appropriations Committee.

SUPPORT/OPPOSITION:

Support: California Association of Competitive Telecommunications Companies (CALTEL) – (sponsor)

Small Business California
The Utility Reform Network (TURN)

Oppose: None on file.

STAFF CONTACTS:

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BILL LANGUAGE:

BILL NUMBER: AB 1315 AMENDED
BILL TEXT

AMENDED IN SENATE JUNE 16, 2010
AMENDED IN ASSEMBLY MAY 5, 2009

INTRODUCED BY Assembly Member ~~Ruskin~~
Fuentes

FEBRUARY 27, 2009

~~An act to amend Sections 305, 307, and 308 of the Public Utilities Code, relating to the Public Utilities Commission.~~

An act to add Section 716 to the Public Utilities Code, relating to telecommunications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1315, as amended, ~~Ruskin~~ Fuentes
. Telecommunications: Public Utilities
~~Commission.~~ Commission: Federal Communications
Commission: forbearance petitions.

The federal Communications Act of 1934, as amended by the federal Telecommunications Act of 1996, establishes a program of cooperative federalism for the regulation of telecommunications to attain the goal of local competition, while implementing specific, predictable, and sufficient federal and state mechanisms to preserve and advance universal service, consistent with certain universal service principles. The act authorizes an incumbent local exchange carrier, as defined, to file a forbearance petition with the Federal Communications Commission (FCC) to require the FCC to forbear from applying any regulation or any provision of the act to a telecommunications carrier, as defined, or telecommunications service, as defined, in any or some of its or their geographic markets, if the FCC makes certain determinations.

Under existing law, the Public Utilities Commission (PUC) has regulatory authority over public utilities, including telephone corporations, as defined.

This bill would provide that if an incumbent local exchange carrier files a forbearance petition with the FCC requesting that the FCC forbear from enforcing that carrier's duty to provide to any requesting telecommunications carrier nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, within any metropolitan statistical area located in the state, the PUC would be required to first determine if the petition meets certain legal requirements pursuant to a specified regulation adopted by the FCC, and if the PUC determines that the petition fails to meet those requirements, to timely submit a motion for summary denial of the petition with the FCC. If the PUC determines that the petition meets those requirements, the bill would

require the PUC to review and analyze the petition and make determinations relative to matters that are pertinent to the petition. The bill would require the PUC to file substantive comments with the FCC relative to those determinations. The bill would require the PUC to require each telephone corporation providing service within a metropolitan statistical area to report comprehensive and detailed information sufficient to enable the PUC to file its substantive comments to the petition and to undertake certain analysis.

Under existing law, a violation of the Public Utilities Act or any order, decision, rule, direction, demand, or requirement of the PUC is a crime.

Because the provisions of this bill are within the act and certain of the bill's provisions require action by the PUC to implement, a violation of these provisions would impose a state-mandated local program by creating a new crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~The California Constitution establishes the Public Utilities Commission, with jurisdiction over all public utilities, as defined. The California Constitution grants the commission certain general powers over all public utilities, subject to control by the Legislature, and authorizes the Legislature, unlimited by the other provisions of the Constitution, to confer additional authority and jurisdiction upon the commission, that is cognate and germane to the regulation of public utilities. Existing law requires the Governor to designate the president of the commission from among its members and requires the president to direct the executive director, the attorney, and other staff of the commission, except for the Division of Ratepayer Advocates.~~

~~This bill would require the commission to appoint a president of the commission from among its members. The bill would repeal the requirement that the president direct commission staff.~~

~~Existing law authorizes the attorney for the commission, if directed to do so by the president, except as otherwise directed by vote of the commission, to intervene, if possible, in any action or proceeding involving any question arising pursuant to the Public Utilities Act. Existing law requires the attorney for the commission to commence, prosecute, and expedite the final determination of all actions and proceedings, and to generally perform all duties and services as attorney to the commission, as directed or authorized by the president, except as otherwise directed or authorized by vote of the commission.~~

~~This bill would authorize the attorney for the commission, if directed to do so by the commission, to intervene, if possible, in any action or proceeding involving any question arising pursuant to the Public Utilities Act. This bill would require the attorney for the commission to commence, prosecute, and expedite the final determination of all actions and proceedings, and to generally perform all duties and services as attorney to the commission, as directed or authorized by the commission.~~

~~Existing law requires the executive director for the commission to keep a full and true record of all proceedings of the commission, issue all necessary process, writs, warrants, and notices, and perform such other duties as the president, or vote of the commission, prescribes. Existing law provides that the president may authorize the executive director to dismiss complaints or applications when all parties are in agreement thereto, in accordance with rules that the commission may prescribe.~~

~~This bill would require the executive director to keep a full and true record of all proceedings of the commission, issue all necessary process, writs, warrants, and notices, and perform the other duties the commission prescribes. The bill would provide that the commission may authorize the executive director to dismiss complaints or applications when all parties are in agreement thereto, in accordance with rules that the commission may prescribe.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: ~~no~~ yes .

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) The federal Telecommunications Act of 1996 (Public Law 104-104) amended the federal Communications Act of 1934 (47 U.S.C. Sec. 151 et seq.), to establish a program of cooperative federalism for the regulation of telecommunications to attain the goal of local competition, while implementing specific, predictable, and sufficient federal and state mechanisms to preserve and advance universal service, consistent with certain universal service principles.

(b) Consistent with the federal Telecommunications Act of 1996, state law declares the policies for telecommunications for California to include removal of the barriers to open and competitive markets and promoting fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choices, while continuing our universal service commitment.

(c) Section 10 of the federal Communications Act of 1934 (47 U.S.C. Sec. 160) permit an incumbent local exchange carrier to file a forbearance petition with the Federal Communications Commission (FCC), pursuant to the practice and procedure regulations for forbearance proceedings adopted by the FCC (47 C.F.R. 1.53 to 1.59), requesting that the FCC forbear from enforcing that carrier's duty to provide to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (47 U.S.C. Sec. 251(c)(3) and Sec. 271(c)(2)(B)(ii)).

(d) The California Constitution establishes the Public Utilities Commission (PUC) with jurisdiction over all public utilities and grants the PUC certain general powers over all public utilities, subject to control by the Legislature. The California Constitution authorizes the PUC to fix the rates and charges for every public utility, while existing state law requires that those rates and charges be just and reasonable.

(e) In order to fulfill the state's policies for telecommunications, when an incumbent local exchange carrier that is a telephone corporation subject to the authority and jurisdiction of the PUC, files a forbearance petition with the FCC requesting that the FCC forbear from enforcing that carrier's duty to provide nondiscriminatory access to network elements on an unbundled basis, it is necessary for the PUC to monitor and evaluate the petition and to act to advance the interests of ratepayers whenever forbearance would likely result in rates and charges that are not just and reasonable or whenever forbearance would likely have an adverse effect on product and price competition.

SEC. 2. Section 716 is added to the Public Utilities Code , to read:

716. (a) If an incumbent local exchange carrier files a forbearance petition with the Federal Communications Commission pursuant to Section 10 of the federal Communications Act of 1934 (47 U.S.C. Sec. 160), requesting that the Federal Communications Commission forbear from enforcing that carrier's duty to provide to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (47 U.S.C. Sec. 251(c)(3) and Sec. 271(c)(2)(B)(ii)), within any metropolitan statistical area located in the state, the commission shall first determine whether the petition for forbearance meets each of the requirements of Section 1.54 of Title 47 of the Code of Federal Regulations. If the commission determines that the petition fails to meet any of the requirements of that section, the commission shall timely submit a motion for summary denial of the petition with the Federal Communications Commission identifying and supporting each deficiency identified by the commission.

(b) If an incumbent local exchange carrier files a forbearance petition with the Federal Communications Commission pursuant to Section 10 of the federal Communications Act of 1934 (47 U.S.C. Sec. 160), requesting that the Federal Communications Commission forbear from enforcing that carrier's duty to provide to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (47 U.S.C. Sec. 251(c)(3) and Sec. 271(c)(2)(B)(ii)), within any metropolitan statistical area located in the state, after making its determination and taking any action required pursuant to subdivision (a), the commission shall review and analyze the petition and do all of the following:

(1) Consistent with paragraph (1) of subsection (a) of Section 160 of Title 47 of the United States Code, determine whether enforcement of the carrier's duty to provide nondiscriminatory access to network elements on an unbundled basis is not necessary to ensure that the charges, practices, classifications, or regulations of that carrier are just and reasonable and are not unjustly or unreasonably discriminatory.

(2) Consistent with paragraph (2) of subsection (a) of Section 160 of Title 47 of the United States Code, determine whether enforcement of the carrier's duty to provide nondiscriminatory access to network elements on an unbundled basis is not necessary to protect consumers.

(3) Consistent with paragraph (3) of subsection (a) of Section 160 of Title 47 of the United States Code, determine whether forbearance from enforcing the carrier's duty to provide nondiscriminatory access to network elements on an unbundled basis is consistent with the public interest, including whether forbearance will promote competitive market conditions.

(4) Independently determine the truth and completeness of the facts offered by the petition, pursuant to subsection (b) of Section 1.54 of Title 47 of the Code of Federal Regulations, to support a prima facie case for forbearance.

(c) In making its evaluation and determinations pursuant to subdivision (b), the commission shall consult with the Division of Ratepayer Advocates.

(d) Upon making its determinations pursuant to subdivision (b), the commission shall timely file substantive comments to the petition with the Federal Communications Commission, pursuant to paragraph (4) of subsection (b) of Section 1.55 of Title 47 of the Code of Federal Regulations. The substantive comments shall include opening and reply comments, shall describe the determinations made by the commission and the basis for those determinations, shall identify how the petition potentially impacts the telecommunications policies of the state identified in Section 709, and shall include detailed recommendations regarding the adoption or denial of the petition based upon the determinations of the commission.

(e) Not later than _____, in order to gather independent data regarding the level of competition in the metropolitan statistical areas of the state, the commission shall require each telephone corporation providing service within a metropolitan statistical area to report, pursuant to Section 583, comprehensive and detailed information sufficient to enable the commission to do the following:

(1) File substantive comments to any petition for forbearance pursuant to subdivision (d).

(2) Separately analyze the level of retail competitive options available to residential and business customers in each metropolitan statistical area at the wire center level, and determine which of these options rely upon wholesale inputs from the incumbent local exchange carrier.

(3) Separately analyze the level of wholesale competitive options available to competitive carriers for last-mile loops and transport circuits in each metropolitan statistical area at the wire center level.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

~~SECTION 1. Section 305 of the Public Utilities Code is amended to read:~~

~~305. The commission shall designate a president of the commission from among the members of the commission. The president shall preside at all meetings and sessions of the commission.~~

~~—SEC. 2.— Section 307 of the Public Utilities Code is amended to read:~~

~~—307. (a) The commission may appoint as attorney to the commission an attorney at law of this state, who shall hold office during the pleasure of the commission.~~

~~—(b) The attorney shall represent and appear for the people of the State of California and the commission in all actions and proceedings involving any question under this part or under any order or act of the commission. If directed to do so by the commission, the attorney shall intervene, if possible, in any action or proceeding in which any such question is involved.~~

~~—(c) The attorney shall commence, prosecute, and expedite the final determination of all actions and proceedings directed or authorized by the commission, advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally perform all duties and services as attorney to the commission that the commission may require of him or her.~~

~~—SEC. 3.— Section 308 of the Public Utilities Code is amended to read:~~

~~—308. (a) The commission shall appoint an executive director, who shall hold office during its pleasure. The executive director shall be responsible for the commission's executive and administrative duties and shall organize, coordinate, supervise, and direct the operations and affairs of the commission and expedite all matters within the commission's jurisdiction.~~

~~—(b) The executive director shall keep a full and true record of all proceedings of the commission, issue all necessary process, writs, warrants, and notices, and perform the other duties the commission prescribes. The commission may authorize the executive director to dismiss complaints or applications when all parties are in agreement thereto, in accordance with rules that the commission may prescribe.~~

~~—(c) The commission may appoint assistant executive directors who may serve warrants and other process in any county or city and county of this state.~~