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)

NOTICE OF EX PARTE COMMUNICATION OF AT&T CALIFORNIA, THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION, COMCAST PHONE OF CALIFORNIA LLC, CONSOLIDATED COMMUNICATIONS OF CALIFORNIA COMPANY AND CTIA

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Dated: April 1, 2016

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

NOTICE OF EX PARTE COMMUNICATION OF AT&T CALIFORNIA, THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION, COMCAST PHONE OF CALIFORNIA LLC, CONSOLIDATED COMMUNICATIONS OF CALIFORNIA COMPANY AND CTIA

Pursuant to Rule 8.4 of the California Public Utilities Commission Rules of Practice and Procedure, AT&T California (U1001C), New Cingular Wireless PCS, LLC (AT&T Wireless) (U3060C) ("AT&T"); the California Cable & Telecommunications Association ("CCTA");[1] Comcast Phone of California, LLC (U5698C) ("Comcast"); Consolidated Communications of California Company (U1015C) and SureWest Televideo (U6324C) ("Consolidated"); and CTIA;[2] submit this Notice of the following oral *ex parte* communications in the above-referenced proceeding.

On March 29, 2016, David Discher (counsel for AT&T), Lesla Lehtonen (counsel for CCTA), Suzanne Toller of Davis Wright Tremaine LLP (counsel for Comcast), Patrick Rosvall of Cooper, White & Cooper LLP, (counsel for Consolidated) and Jeanne Armstrong of Goodin,

[1] CCTA represents companies providing cable, broadband Internet access and voice services, including Voice over Internet Protocol services, in California. Several of CCTA's member companies or their affiliates have been identified as Respondents in this proceeding.

[2] CTIA-The Wireless Association® is an international nonprofit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. More information about CTIA is available on the Association's website at http://www.ctia.org/about-us. CTIA's participation is on behalf of its member companies who are signatories to this pleading.

MacBride, Squeri & Day LLP (counsel for CTIA), met with John Reynolds, advisor to Commissioner Carla Peterman, from approximately 10:00 to 10:30 am. Later that same day (March 29), Mr. Discher, Ms. Toller, Mr. Rosvall and Ms. Armstrong met with Liz Podolinsky, advisor to President Picker, from approximately 1:35-2:00pm.[3] The meetings were initiated by Comcast and were held at the Commission, 505 Van Ness Avenue, San Francisco, CA 94102. The written materials that were provided are described below and attached to this Notice. .

The purpose of the meetings was to discuss the *Coalition Motion for Reconsideration by the Full Commission of the February 4, 2016 Ruling of the Assigned Administrative Law Judge*, filed March 8, 2016 ("Joint Reconsideration Motion") and the *Coalition Motion for a Partial Stay of the Commission's Order Instituting Investigation and Extension of Time Pending a Ruling on the Stay Request* ("Joint Stay Motion"), filed March 11, 2016.[4]

During the meeting, representatives of the Coalition Movants emphasized the importance of having the full Commission weigh in on its jurisdiction over broadband and voice over internet protocol ("VoIP") services -- especially in light of the restrictions in Public Utilities Code section 710 and the Federal Communications Commission's adoption of its Open Internet Order. They noted that although there were a few Administrative Law Judge ("ALJ") rulings in various dockets that touched on some aspects of the Commission jurisdiction over these services (e.g. in merger dockets), there had not been (to the best of their knowledge) a full Commission decision addressing these fundamental jurisdictional issues. Representatives of Coalition Movants explained that these unique circumstances justified the grant of interlocutory review

[3] Ms. Lehtonen did not attend the afternoon meeting.

[4] These motions were filed by the parties represented at the meetings (AT&T, CCTA, Comcast, Consolidated and CTIA), as well as Frontier Communications of America, Inc. (U5429C), Citizens Telecommunications Co. of California (U1024C), and Frontier Communications for the Southwest Inc. (U1026C); and Verizon California Inc. (U1002C) and Cellco Partnership (U3001C) (collectively, the "Coalition Movants").

and noted that the issuance of a Commission decision would provide much needed guidance to the parties.

Consistent with the position outlined in the Joint Reconsideration Motion, representatives of the Coalition Movants also explained – at a high level – why the code sections cited in the ALJ's February 4, 2016 Ruling in I.15-11-007 did not grant authority over broadband and VoIP services. (To help guide the explanation, Ms. Toller handed out a printout of the code sections cited in the Ruling, a copy of which is attached as Exhibit A; she also provided to Mr. Reynolds a copy of the Joint Reconsideration Motion, which is attached as Exhibit B.) Lastly representatives of Coalition Movants noted that although Verizon Wireless had made a motion seeking to eliminate wireless carriers as respondents from the OII, the ALJ's February 4th ruling provided no rationale for the denial of that motion.

Respectfully submitted:

___/s/_____

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Dated: April 1, 2016

Counsel for Comcast Phone of California

EXHIBIT A

314.

(a) The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths may examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs. Any person, other than a commissioner or an officer of the commission, demanding to make any inspection shall produce, under the hand and seal of the commission, authorization to make the inspection. A written record of the testimony or statement so given under oath shall be made and filed with the commission.

(b) Subdivision (a) also applies to inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, an electrical, gas, or telephone corporation, or a water corporation that has 2,000 or more service connections, with respect to any transaction between the water, electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the water, electrical, gas, or telephone corporation.

(Amended by Stats. 2012, Ch. 224, Sec. 1. Effective January 1, 2013.)

581 Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission.

Every public utility receiving from the commission any blanks with directions to fill them shall answer fully and correctly each question propounded therein, and if it is unable to answer any question, it shall give a good and sufficient reason for such failure.

(Enacted by Stats. 1951, Ch. 764.)

582. Whenever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct.

(Enacted by Stats. 1951, Ch. 764.)

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

(b) No department, agency, commission, or political subdivision of the state shall enact, adopt, or enforce any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law, that regulates VoIP or other IP enabled service, unless required or expressly delegated by federal law or expressly authorized by statute or pursuant to subdivision (c). In the event of a requirement or a delegation referred to above, this section does not expand the commission's jurisdiction beyond the scope of that requirement or delegation.

(c) This section does not affect or supersede any of the following:

(1) The Emergency Telephone Users Surcharge Law (Part 20 (commencing with Section 41001) of Division 2 of the Revenue and Taxation Code) and the state's universal service programs (Section 285).

(2) The Digital Infrastructure and Video Competition Act of 2006 (Division 2.5 (commencing with Section 5800)) or a franchise granted by a local franchising entity, as those terms are defined in Section 5830.

(3) The commission's authority to implement and enforce Sections 251 and 252 of the federal Communications Act of 1934, as amended (47 U.S.C. Secs. 251 and 252).

(4) The commission's authority to require data and other information pursuant to Section 716.

(5) The commission's authority to address or affect the resolution of disputes regarding intercarrier compensation, including for the exchange of traffic that originated, terminated, or was translated at any point into Internet Protocol format.
(6) The commission's authority to enforce existing requirements regarding backup power systems established in Decision 10-01-026, adopted pursuant to Section 2892.1.
(7) The commission's authority relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128.
(8) The Warren-911-Emergency Assistance Act (Article 6 (commencing with Section 53100) of Chapter 1.5 of Part 1 of Division 2 of Title 5 of the Government Code).
(d) This section does not affect the enforcement of any state or federal criminal or civil law or any local ordinances of general applicability, including, but not limited to, consumer protection and unfair or deceptive trade practice laws or ordinances, that apply to the conduct of business, the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), local utility user taxes, and state and local authority governing the use and management of the public rights-of-way.
(e) This section does not affect any existing regulation of, proceedings governing, or existing commission authority over, non-VoIP and other non-IP enabled wireline or wireless service, including regulations governing universal service and the offering of basic service and lifeline service, and any obligations to offer basic service.
(f) This section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints.
(g) This section does not affect the establishment or enforcement of standards, requirements, or procedures, including procurement policies, applicable to any department, agency, commission, or political subdivision of the state, or to the employees, agents, or contractors of a department, agency, commission, or political subdivision of the state, relating to the protection of intellectual property.
(h) This section shall remain in effect only until January 1, 2020, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2020, deletes or extends that date.
(Added by Stats. 2012, Ch. 733, Sec. 3. Effective January 1, 2013. Repealed as of January 1, 2020, by its own provisions.)

EXHIBIT B

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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)

COALITION MOTION FOR RECONSIDERATION BY THE FULL COMMISSION OF THE FEBRUARY 4, 2016 RULING OF THE ASSIGNED ADMINISTRATIVE LAW JUDGE

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BEFORE THE PUBLIC UTILITIES COMMISSION
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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)

COALITION MOTION FOR RECONSIDERATION BY THE FULL COMMISSION OF THE FEBRUARY 4, 2016 RULING OF THE ASSIGNED ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 11.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, AT&T California (U1001C), New Cingular Wireless PCS, LLC (AT&T Wireless) (U3060C); the California Cable & Telecommunications Association ("CCTA");[1] Comcast Phone of California, LLC (U5698C); Consolidated Communications of California Company (U1015C), and SureWest Televideo (U6324C); CTIA;[2] Frontier Communications of America, Inc. (U5429C), Citizens Telecommunications Co. of California (U1024C), and Frontier Communications for the Southwest Inc. (U1026C); and Verizon California Inc. (U1002C) and Verizon Wireless[3] (collectively, the "Coalition Movants") submit this joint motion for reconsideration by the full Commission of the assigned Administrative Law

[1] CCTA represents companies providing cable, broadband Internet access and voice services, including Voice over Internet Protocol services, in California. Several of CCTA's member companies or their affiliates have been identified as Respondents in this proceeding.

[2] CTIA-The Wireless Association® is an international nonprofit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. More information about CTIA is available on the Association's website at http://www.ctia.org/about-us. CTIA's participation is on behalf of its member companies who are signatories to this pleading.

[3] The Verizon Wireless operating entities in California are Cellco Partnership (U3001C) and California RSA No. 4 Limited Partnership (U3038C).

Judge's February 4, 2016 *Ruling on Pending Motions and Issues Discussed at January 20, 2015 Prehearing Conference* ("Joint Reconsideration Motion") on the ground that the Ruling improperly fails to limit the scope of the Commission's Order Instituting Investigation to Assess the State of Competition Among Telecommunications Providers in California ("OII"),[4] as required by state and federal law.

I. INTRODUCTION AND SUMMARY

Coalition Movants consist of a broad range of providers of VoIP, broadband, wireless voice, and wholesale inputs in California, as well as certain industry trade associations. Coalition Movants respectfully seek review by the full Commission of the assigned Administrative Law Judge's February 4, 2016 *Ruling on Pending Motions and Issues Discussed at January 20, 2015 Prehearing Conference* ("ALJ Ruling" or "Ruling"), which declined requests to narrow the scope of the OII. Although Coalition Movants have attempted through motion practice and other means to clarify the preliminary scoping memorandum, to narrow the respondents to regulated public utilities, and to limit certain information requests, none of these efforts has resulted in any material change to the OII or preliminary scoping memorandum. And the limited adjustments made to some of the information requests in the ALJ Ruling have not addressed—and cannot address—Coalition Movants' fundamental substantive objections.

As explained below, Coalition Movants seek this relief on the grounds that state law, federal law, and in some instances both federal and state law, bar the Commission from compelling Coalition Movants to produce the highly detailed, confidential information sought here regarding Voice over Internet Protocol ("VoIP") service, broadband Internet access

[4] Order Instituting Investigation to Assess the State of Competition among Telecommunications Providers in California, and to Consider and Resolve Limited Rehearing of Decision (D.) 08-09-042 (Nov. 12, 2015). As described below, the ALJ Ruling modified certain aspects of the OII but denied the relief sought by the present Joint Reconsideration Motion.

services,[5] wireless voice service, spectrum usage, and wholesale inputs. As described below and in the forthcoming motion for a partial stay of the OII, Coalition Movants seek a ruling by the Commission narrowing the OII, and overturning the ALJ Ruling to the extent that it declined to grant such relief. Specifically, Coalition Movants ask the Commission to modify the OII to: (1) strike—and, pending Commission action on this Joint Reconsideration Motion, stay—portions of all information requests seeking information pertaining to VoIP service, broadband service, wireless voice service, spectrum usage, and wholesale inputs (i.e., Information Requests Nos. 1-3, 5-7 and 12-19); (2) limit the scope of the OII to consideration of traditional wireline (TDM) voice services and strike investigation topics relating to broadband and wholesale inputs (i.e., Investigation Topics (d), (e), and (f)); and (3) remove as respondents to this proceeding all entities to the extent that they provide only VoIP service or broadband service.[6]

The unlawful information requests and investigation topics pertaining to these services are particularly troubling because they seek to compel the production of information that is highly confidential and proprietary, constituting trade secrets under California law.[7] This

[5] Unless otherwise indicated, all references to "broadband" or "broadband service" shall refer to both wireline and wireless broadband Internet access service.

[6] To the extent that the Commission strikes the information requests listed above, the Commission should also eliminate the wireless providers as respondents.

[7] California courts have recognized trade secrets "as a constitutionally protected intangible property interest." *DVD Copy Control Ass'n v. Bunner*, 31 Cal. 4th 864, 880 (2003) (quoting *ITT Telecom Prods. Corp. v. Dooley*, 214 Cal. App. 3d 307, 318 (1989)). The test for trade secrets under California law is "whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret." *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183-84 (C.D. Cal. 2006) (quoting *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002), *rev'd in part on other grounds*, 674 F.3d 1315 (Fed. Cir. 2012)). Public disclosure "is fatal to the existence of a trade secret." *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 304 (2002). Here, the OII demands highly confidential information about Coalition Movants' VoIP, broadband, and wireless services—at an unprecedented level of geographic detail—which Coalition Movants have closely guarded against public disclosure, and which would provide a valuable economic advantage to competitors. Compelled production of such information implicates constitutionally protected rights, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984), and interference with those rights would

includes, for example, data contained on Form 477 reports filed with the Federal Communications Commission ("FCC")—data so competitively sensitive and closely guarded that the FCC has promulgated very specific rules restricting state commission access to such data. The OII even more clearly exceeds the Commission's jurisdiction by requiring non-utility providers of unregulated services to participate in this proceeding as respondents. The Commission should therefore modify the OII to address these fundamental, jurisdictional defects.[8]

The sweeping scope and mandatory nature of the OII's information requests—compounded by the Commission's decision to require providers of VoIP and broadband services to fully participate in this proceeding as "respondents"—are clear assertions of regulatory jurisdiction and control over VoIP and broadband services by the Commission. But the California Legislature has expressly and unambiguously prohibited the Commission from "exercis[ing] regulatory jurisdiction or control" over those very services.[9] And, where the Legislature has authorized information-gathering activities, it has expressly done so only in narrowly circumscribed circumstances not present here.[10] As discussed below, none of the narrow exceptions to the statutory bar on the Commission's exercise of regulatory jurisdiction or

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cause *per se* irreparable harm to Coalition Movants, *see Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

[8] As explained more fully below (*see* Point III, *infra*), the extraordinary importance of the issues presented—coupled with the irreparable harm Coalition Movants face if they do not obtain prompt relief from the Commission—warrant full Commission review of the ALJ Ruling now. Indeed, in light of Coalition Movants' Fourth Amendment interests, such review is constitutionally required before Coalition Movants can be compelled to produce the challenged information.

[9] *See* Pub. Util. Code § 710(a).

[10] *See id.* § 710(c)(4) (preserving "[t]he commission's authority to require data and other information pursuant to Section 716" of the Code, which is limited to the context of petitions filed by incumbent local exchange carriers ("ILECs") with the FCC, seeking forbearance from regulatory requirements).

control over VoIP and broadband services (including the jurisdictional theories articulated in the ALJ Ruling) can support the OII information requests and topics challenged here.

The Commission's requests in the OII pertaining to broadband and wireless voice services, as well as its request for Form 477 data, are also independently preempted by federal law. *First*, the broadband-related information requests are foreclosed by the FCC's *Open Internet Order*,[11] in which the FCC expressly preempted any efforts by state commissions to impose on broadband services data production and reporting obligations of the kind at issue here.[12] In particular, the FCC determined that, under its forbearance approach, broadband providers shall not be subject to burdensome data production and reporting requirements equivalent to those contained in Sections 581 and 582 of the Public Utilities Code, which the ALJ cited as a basis for the present OII.[13] The FCC admonished that "[t]he states are *bound by our forbearance decisions* today,"[14] and that federal forbearance from reporting requirements likewise binds this Commission, and preempts the equivalent data requests in the OII.

Second, the OII seeks information about certain aspects of wireless service (including spectrum usage) and contains other information requests that are contrary to the FCC's exercise of federal regulatory jurisdiction.

Third, the procedures governing the confidentiality of such information must respect the safeguards specified by the FCC. Any departure from those safeguards, including the detailed

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[11] *See Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) ("*Open Internet Order*").

[12] *See id.* at 5612 ¶¶ 37-38.

[13] *See id*. at 5846-47 ¶ 508 (forbearing from application of sections 211, 213, 215, and 218-20 of the federal Communications Act, which would otherwise provide "discretionary powers to compel production of useful information or the filing of regular reports").

[14] *See id.* at 5803 ¶ 432 (emphasis added); *see also id.* ¶ 433 ("[W]e announce our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.").

FCC rules addressing access to Form 477 data by state commissions, would be preempted by federal law.[15]

Finally, even apart from the limitations on Commission authority under Section 710(a) of the Public Utilities Code and the federal preemption principles discussed above, Coalition Movants should not be forced to disclose their trade secrets without prior resolution of their objections to the Commission's legal authority and the unreasonableness of the OII's demands.[16] Settled law under the Fourth Amendment to the U.S. Constitution requires no less.

Accordingly, while the service provider Coalition Movants will use their best efforts to submit reasonably available information regarding the regulated telephone services over which the Commission has jurisdiction—and will do so in accordance with the OII's schedule, as modified by the ALJ—by this motion, Coalition Movants seek a ruling from the full Commission narrowing the scope of the OII, as required by law, and rejecting the contrary conclusions in the ALJ Ruling. Coalition Movants also intend to ask the full Commission to stay the portions of the OII information requests concerning VoIP service, broadband services, and wireless voice services, spectrum usage, and wholesale inputs, and will submit their request for a stay before their responses to the OII are due.

[15] Even if the Commission had the right to the data discussed above—which it does not—the Commission cannot lawfully direct carriers to provide that information to other service providers and/or intervenors in this proceeding. Coalition Movants therefore reserve all rights and options to protect their confidential information, including limiting the disclosure of such information in order to maintain its confidentiality and withholding such information from other parties to this proceeding. Coalition Movants also reserve all rights to submit with their individual responses to the OII additional objections, including on the grounds of, among others, undue burden and lack of relevance.

[16] *See* Points III & VI, *infra*; *see also CBS Corp. v. FCC*, 785 F. 3d 699 (D.C. Cir. 2015) (barring the FCC from ordering cable companies to make proprietary business material available for review by public).

II. PROCEDURAL HISTORY

A. The OII

On November 5, 2015, the Commission issued its OII, with the stated goal of "look[ing] at the state of competition today in the California telecommunications market, or markets, and assess[ing] whether it has produced just and reasonable prices."[17]

Notwithstanding what should be the OII's focus (i.e., on traditional (TDM) telephone service offered by regulated public utilities), the OII includes in its scope several issues relating to competition in the markets for VoIP service, broadband services, and wireless voice service.[18] As noted above, the OII seeks vast amounts of highly confidential data, including FCC Form 477 data, and requires Coalition Movants to create and turn over data at an unprecedented level of specificity (i.e., at the census block level).[19] The OII also names as "Parties to this proceeding" both enumerated "telecommunications carriers" and "*any affiliate* of these utilities providing Voice over Internet Protocol (VoIP), wireless, or broadband transmission service in California."[20]

Other than briefly noting the Commission's obligation under California Public Utilities Code § 451 to ensure that the rates, terms, and conditions of regulated *telecommunications*

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[17] OII at 13; *see also id*. at 1-2 (focusing on "competition in the retail and wholesale telecommunications markets in California" and "competing telecommunications services across California's diverse population").

[18] *See, e.g.*, OII at 21, Ordering Paragraph 1(e), (f) (intent to investigate "[w]hether competition in the provision of advanced telecommunications services has been sufficient to discipline prices and provide competitive options" and "[t]he extent to which competition exists for advanced telecommunications services at the new national standard of 25 Megabits per second (Mbps) down (and 3 Mbps up)."); *id.* at 13 ("We will ask whether and to what extent wireless and wireline services are substitutes in the data and/or voice markets"); *id.*, App. B at B-2 – B-3 (requiring detailed and highly confidential information about VoIP service).

[19] *See, e.g.*, OII, App. B at B-2 – B-3.

[20] OII at 21-22, Ordering Paragraph 3.

services remain "just and reasonable,"[21] the OII makes no mention of any provision of law authorizing its assertion of regulatory jurisdiction or control over VoIP, broadband, and wireless services (including rates of wireless service and spectrum use). Instead, the OII asserts that "we request data and comment on these issues *as an exercise in good government*, and in light of our promise to monitor and inform ourselves about the State's telecommunications infrastructure,"[22] adding that "[t]his data-driven approach does not reflect an intent to regulate *where the Commission lacks regulatory authority*."[23]

The OII also makes clear that the Commission expects responses to the OII to favor disclosure rather than protection of respondents' proprietary information. The OII states that "[r]espondents and other Parties are urged not to withhold information that is anywhere in the public record, or not demonstratively and competitively sensitive."[24] And it adds that, "[a]s to non-public and sensitive data, the Parties are directed to enter into confidentiality agreements *that facilitate the greatest possible sharing of information*."[25]

B. The ALJ Ruling

Preserving all rights, several members of Coalition Movants objected to the OII's attempt to exercise regulatory jurisdiction or control over unregulated affiliates of public utilities and providers of VoIP, broadband, and wireless voice services, as well as wholesale inputs.[26] After conducting a prehearing conference with the assigned Commissioner, the assigned Administrative Law Judge issued the Ruling on February 4, 2016. As relevant here, the ALJ

[21] *Id.* at 2.

[22] *Id.*

[23] *Id.* (emphasis added); *see also id.* at 12 (acknowledging that "spectrum issues are the province of the FCC").

[24] *Id.* at 22, Ordering Paragraph 4.

[25] *Id.* (emphasis added).

[26] *See* ALJ Ruling at n.1 (citing motions).

Ruling (1) declined to eliminate affiliates of public utilities that provide VoIP and broadband services as respondents,[27] (2) declined to strike various information requests, including requests pertaining to broadband services, wireless service, and wholesale inputs,[28] and (3) failed to address requests to eliminate wireless providers as respondents.[29]

The ALJ Ruling acknowledged Public Utilities Code § 710(a) as a potentially relevant limitation on the Commission's authority to issue the OII, but believed that other provisions of the Code rendered Section 710(a) "inapposite."[30]

The ALJ Ruling also modified several of the deadlines included in the OII, including deferring the deadline for production of "Initial Responses" (including FCC Form 477 data[31]) until March 15, 2016.[32]

C. The Protective Order Ruling

On February 18, 2016, the assigned ALJ issued to the parties a proposed Protective Order to govern confidential and highly confidential information requested by the OII. Members of

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[27] *See id.* at 7-10.

[28] *See id.* at 2-7.

[29] Although the ALJ Ruling lists Verizon Wireless's motion to remove wireless carriers as respondents to the OII (ALJ Ruling at 2) and denies that motion (*id.* at 15), the Ruling contains no reasoning in support of that denial.

[30] *See id.* at 9 ("We note that section 710 only prohibits the exercise of 'regulatory jurisdiction or control over [VoIP] and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c).' We have already identified several statutory provisions, both state and federal, which make section 710 inapposite here.").

[31] The ALJ Ruling also rejected objections to the OII's demand for highly confidential FCC Form 477 data. The ALJ acknowledged that "[t]he FCC does show concern about the competitive sensitivity of this information, and requires states to have protections equivalent to those which attend to [Freedom of Information Act] requests, i.e., exceptions to the state Public Records Act that protect competitively sensitive data." ALJ Ruling at 13. The ALJ Ruling further asserted, however, that "[t]he Commission has such protections in place, through Pub. Util. Code § 583, and G.O. 66C, which protect sensitive business data . . . to the Communications Division under § 583." *Id.* The ALJ Ruling did not attempt to reconcile this with the statement in the OII itself that "the Parties are directed to enter into confidentiality agreements *that facilitate the greatest possible sharing of information.*" OII at 22, Ordering Paragraph 4 (emphasis added).

[32] *See* ALJ Ruling at 10.

Coalition Movants, as well as other parties to this proceeding, submitted comments requesting significant changes to the proposed Protective Order.[33]

On March 4, 2016, the assigned ALJ issued a *Ruling Adopting Protective Order* ("Protective Order Ruling"). The Protective Order Ruling repeated the Commission's directive that parties to this proceeding must "err[] on the side of providing as much information to the public record as possible,"[34] and proceeded to reject several of the requested changes to the Protective Order. As relevant here, the Protective Order Ruling rejected the request that commercial parties be restricted from accessing one another's trade secrets, tentatively concluding that a trade association representing many of Coalition Movants' direct competitors is "not engaged in Competitive Decision-Making" and should therefore have access to other parties' confidential and highly confidential information.[35] Moreover, absent a determination

[33] In their comments, submitted on February 29, 2016, the respondent group ("Respondent Group") continued to urge the Commission to rely on publicly-available data in addition to the voluminous data that it already collects from providers under existing law, at least as an initial step in this proceeding, explaining that this would obviate the need for any Protective Order or nondisclosure agreements. As relevant here, the Respondent Group also argued in the alternative that, if the Commission proceeds with the data collection contemplated in the OII, the Commission must put in place a very robust protective order that: (i) strictly limits access to respondents' information or documents respondents produce that are competitively sensitive or otherwise confidential, to non-commercial parties; (ii) limits access to information or documents respondents produce that is Form 477-type and spectrum usage, only to Commission staff; and (iii) finds that certain categories of data sought by the OII information requests are presumptively confidential such that they will not be released by the Commission, pursuant to a Public Records Act request or otherwise, absent an order of the full Commission after notice to and opportunity of the submitting party to object. *See* Respondent Group Comments on Assigned Administrative Law Judge's Proposed Protective Order ("Respondent Group Comments on Protective Order") at 1-2, 4-12.

[34] Protective Order Ruling at 15 (declining to modify a requirement that parties "designate as confidential only those portions of a document that are demonstrably confidential," and stating that a "rule of reason" should govern redactions of confidential material in a way that "reasonably apportions the burden involved, erring on the side of providing as much information to the public record as possible").

[35] *Id.* at 7-8. This includes information such as:

- The number of customers each Coalition Movant serves in each of the TDM wireline, VoIP, and wireless categories; and the percentage of customers who obtain service in each such category. (*See* Information Requests 2a, 2b, 3a and 3b.)
- The number of CLEC customers (business and residential) provisioned over (i) ILEC facilities (breaking out such totals into categories for resold UNE-P, UNE-L, special access, or other last-

that information warrants "Commission Only" treatment (i.e., that dissemination shall be limited to Commission staff), the Protective Order Ruling expressly contemplates that information will be shared among the parties' representatives and agents.[36]

In addition, although the Protective Order Ruling tentatively accepted Group Respondents' request for Commission Only treatment of Form 477 data, it stressed that the assigned ALJ is "loathe to extend this category any more than is necessary," and invited parties "to show that this data is disseminated outside the FCC and state agencies, *or that it should be disseminated outside the FCC and state agencies*."[37] Thus, the Protective Order Ruling contemplated potential disclosure of some or all of this highly confidential to various proceeding participants, including competitors of Coalition Movants, and others.

The Protective Order Ruling also tentatively denied presumptive Commission Only treatment for spectrum-use data, suggesting that "the use of this public resource should be public

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mile access) and (ii) Coalition Movant's own facilities. (*See* Information Requests 14 (a) and (b).)

- The total access lines and other last-mile facilities which ILECs provide to competitive carriers in California, breaking out such totals into categories for resale, loop-and-port combination (UNE-P, UNE-P replacement), UNE loop, special access lines, or other last-mile facilities). The total number of access lines and other last mile facilities provided by the ILEC or any of its affiliate to the ILEC or any of its affiliates. (*See* Information Requests 14 (c) and (d).)
- The number of special access or other transport facilities provided to wireless carriers for backhaul from cell or antenna sites to upstream network nodes (e.g., mobile telephone switching offices). (See Information Request 17.)
- The total number of antenna or cell sites which wireless carriers operate in California, and the providers of backhaul services to these antenna or cell sites. (Information Request 18.)

See Respondent Group Comments on Protective Order at 10-11; Protective Order Ruling at 7-8.

[36] Under the Protective Order adopted by the ALJ (subject to potential revision), a competitor's outside counsel, for example, may obtain access to "Highly Confidential Information" that is not deemed "Commission Only Information." *See* Protective Order Ruling, Exh. A (Protective Order) ¶¶ 3, 6. If the information is deemed "Confidential" (rather than "Highly Confidential"), it is available to an even broader category of individuals, including non-counsel representatives of competitors who are not involved in "Competitive Decision-Making" (as defined in the Protective Order). *See id.* ¶¶ 3, 5.

[37] *Id.* at 8-10 (emphasis added).

information," and placing the burden on the relevant Coalition Movants to show why disclosure of their proprietary spectrum use would create a "business disadvantage" and inviting other parties to "show the contrary."[38] The Protective Order Ruling set a schedule for the filing comments and replies contesting any of these "tentative" aspects of the Protective Order.[39] Under this schedule, however, reply comments are due on the *same day* that Coalition Movants' Initial Responses to the OII are due.[40] The Ruling further provides that, if these issues are not resolved by the March 15 deadline for Initial Responses, Coalition Movants and other respondents must provide all requested data not designated Commission Only to Commission staff, *and to the parties identified on the service list* "*to the full[est] extent possible*," with "Confidential Information" and "Highly Confidential Information" to be disclosed to those parties' designated agents or representatives who have executed an uncontested "Acknowledgement" of confidential treatment.[41]

In light of the ALJ Ruling and Protective Order Ruling, Coalition Movants seek relief from the full Commission before their Initial Responses are due.

III. IMMEDIATE REVIEW OF THE ERRONEOUS ALJ RULING IS WARRANTED.

While the Commission generally disfavors interlocutory appeals from interim rulings by ALJs, it has granted such review where, as here, the issues are of unusual importance and/or the potential disclosure of confidential data is at stake.[42]

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[38] *Id.* at 11.

[39] *See id*. at 16 (requiring comments on the ALJ's tentative rulings regarding "Commission Only" and "highly confidential" treatment to be filed "within five business days of this Ruling," i.e., March 11, 2016, and replies to be filed "two business days after that," i.e. March 15, 2016).

[40] *See id*.

[41] *See id*. (emphasis added); *see also* note 36, *supra*.

[42] *See, e.g.*, D.92-09-082 (allowing interlocutory appeal of ruling denying confidentiality of utility cost study where it would "maintain consistency of rulings between proceedings, and because it demonstrates the need to restate the standards that should govern motions for confidential treatment of data in our

As shown below and in the forthcoming request for a partial stay of the OII, the Coalition Movants have raised fundamental, threshold jurisdictional questions that should be resolved before the burdensome process of the proposed Investigation proceeds. In particular, Coalition Movants will be irreparably harmed if they are forced to produce trade secrets and other highly confidential information to third parties, including direct competitor service providers that the OII names as "respondents" to this proceeding. And, if Coalition Movants are required to turn over this confidential information by the current (March 15, 2016) deadline, the irreparable harm they face could not be undone even if Coalition Movants ultimately prevail on their jurisdictional arguments at the conclusion of this proceeding. By that time, such relief will have come too late. Review of the ALJ Ruling and a partial stay of the OII are therefore warranted *now—before* such irreparable harms can occur. Indeed, given the serious Fourth Amendment concerns presented by the OII's demands for this highly confidential information,[43] review by the Commission is constitutionally required before Coalition Movants can be compelled to produce the challenged information.

Interlocutory review is also appropriate because the authority of the assigned ALJ and assigned Commissioner to entertain material and substantive modifications to the OII is at best

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proceedings"); D.94-08-028 (allowing interlocutory appeal of ruling allowing discovery of information from members of industry association, where ruling would have undesirable chilling effect on public participation in proceedings); D.08-11-004 (allowing interlocutory review of denial of motion to dismiss where error in denying motion would expose ratepayers to significant costs); D.92-10-049 (allowing interlocutory appeal of ALJ ruling regarding electric power resource bidding rules, where incorrect ruling would have disrupted pending bidding process); *see also* D.03-12-057 at n.1 (in appropriate cases, "the Commission may choose to reconsider some interim rulings, including Scoping Memos").

[43] *See* Point VI, *infra*. The Fourth Amendment cases discussed below make clear that pre-disclosure judicial review is constitutionally required where agencies issue similar demands for information. Because a Commission-level decision is generally required before judicial review can be sought before California appellate courts, *see* Pub. Util. Code § 1756(a), the Commission should grant plenary review to comply with these constitutional requirements. *See also CBS Corp. v. FCC*, 785 F. 3d 699 (D.C. Cir. 2015) (Trade Secrets Act barred the FCC from ordering cable operators to make proprietary business material available for review by public in merger review proceeding).

unclear.[44] Coalition Movants therefore have no other option but to ask the full Commission to resolve these issues while promptly seeking a partial stay of the OII until the Commission rules.

Finally, reviewing the merits of the ALJ Ruling now will promote efficiency. If the Commission concludes that it lacks jurisdiction over VoIP, broadband, and wireless services, as Coalition Movants believe it clearly should, that ruling will significantly simplify and expedite the Commission's Investigation, allowing resolution of this proceeding within the timeframe contemplated by the OII.[45]

For all these reasons, Coalition Movants respectfully urge the full Commission to hear the merits of their jurisdictional arguments.

IV. THE COMMISSION HAS NO JURISDICTION TO DEMAND INFORMATION ABOUT COALITION MOVANTS' VOIP AND BROADBAND SERVICES.

A. Under Section 710 of the Public Utilities Code, the Commission Cannot Require Any of Coalition Movants to Provide Information about Their VoIP and Broadband Services, Much Less Compel VoIP and Broadband Providers to Participate in this Proceeding as Respondents.

In 2012, the California Legislature passed SB 1161, which established Section 710 of the Public Utilities Code.[46] The express purpose of SB 1161 was to "reaffirm California's current

[44] The OII authorized the ALJ to "schedule a Prehearing Conference to discuss further refinements to the scope, schedule, and procedural issues in this proceeding." OII at 17. It is unclear, however, whether the Commission believed that the potential "refinements" it authorized could include material and substantive modifications to the OII. *See, e.g.*, OII at 23 (authorizing "[t]he Assigned Commissioner or the Assigned ALJ" to "modify the activities and schedule established in this Order Instituting Investigation as necessary for the efficient conduct of this proceeding, *consistent with the scope of this proceeding set forth above*") (emphasis added). While several Coalition Movants sought relief before the ALJ in order to preserve all rights, given the material changes to the OII requested by this Joint Reconsideration Motion and the exceptional importance of the threshold issues raised, plenary review by the Commission is appropriate.

[45] *See* OII at 17 (noting that "we expect this proceeding to be concluded within 18 months of the data of the Scoping Memo"). To simplify the Commission's review, Coalition Movants have endeavored to find common arguments that they can present in a joint motion (rather than filing multiple separate motions).

[46] Chapter 733, Stats. 2012 ("SB 1161"). The law became effective on January 1, 2013.

policy of regulating Internet-based services *only as specified* by the Legislature."[47] The legislative history acknowledges that the Commission "has never regulated VoIP or IP-enabled services like traditional telephone service," and states that the bill was designed to ensure that California adheres to the longstanding (state and federal) policy of "preserv[ing] the vibrant and competitive free market" for Internet-based services.[48] To safeguard the "current regulatory structure"—which has enabled "[t]he Internet and Internet Protocol-based (IP-based) services [to] flourish[]"[49]—Section 710 broadly prohibits the Commission from regulating VoIP and broadband services, unless it is "expressly" authorized to do so by statute.[50]

1. The plain text of Section 710 unambiguously prohibits the Commission from exercising regulatory jurisdiction or control over VoIP and broadband services.

Section 710(a) expressly provides that "[t]he commission *shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services* except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c)."[51]

Where, as here, the Commission has issued demands for data pertaining to VoIP and broadband services—under threat of sanctions for non-compliance[52]—there can be no doubt that the Commission is "exercis[ing] regulatory jurisdiction or control over" those services in direct conflict with Public Utilities Code Section 710(a). Forcing an entity to turn over voluminous,

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[47] SB 1161, § (1)(b) (emphasis added).

[48] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing Apr. 17, 2012) at 6.

[49] SB 1161, § 1(a)(4).

[50] Pub. Util. Code § 710(a).

[51] *Id.* (emphasis added).

[52] *See, e.g.*, D.16-01-014, mimeo at 37 (compliance with Commission orders is "mandatory," and "[t]he Commission's orders are not party invitations where the Respondent may *R.S.V.P.* as it sees fit").

nonpublic, and highly confidential data against its wishes is a classic example of exercising "control" over the entity and its related services,[53] as the Legislature recognized when it added an express exception in Section 710(c)(4) that allows the Commission to "require data and other information" from VoIP providers only in the limited context of responding to pending ILEC forbearance petitions under Section 716 of the Code.[54] Moreover, compelling such production of sensitive information under circumstances where the entity faces risk of incurring substantial penalties for non-compliance clearly subjects the entity and its services to the agency's "regulatory jurisdiction."[55] Indeed, the assertion of regulatory jurisdiction and control is all the more clear here because the Commission has compelled VoIP and broadband provider *affiliates* of regulated utilities to participate in this proceeding as respondents.[56] If this is not subjecting those entities and the services they provide to the Commission's "regulatory jurisdiction or control," it is hard to imagine what is. On its face, then, the OII's assertion of regulatory jurisdiction and control over the broadband and VoIP services provided by these unregulated entities violates the plain text of Section 710(a).

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[53] *See, e.g.*, Black's Law Dictionary 378 (9th ed. 2009) (defining "control" as, among other things, "[t]o exercise power or influence over," as in "the judge controlled the proceedings"); *see also id.* at 654 (defining "exercise" as "[t]o make use of; to put into action"); Merriam Webster's Collegiate Dictionary 252 (10th ed. 1993) (defining "control" as, among other things, "to exercise restraining or directing influence over" and "to have power over").

[54] *See* Pub. Util. Code § 710(c)(4), 716; *see also* Point IV.B.2.a, *infra*.

[55] Pub. Util. Code § 710(a); *see also* note 52, *supra* & Commission Rule 1.1. Courts have described agencies as exercising their "regulatory jurisdiction" when they are investigating matters asserted to be within their jurisdiction. *See, e.g.*, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 173 F. Supp. 2d 41, 42 (D.D.C. 2001) (discussing an investigation by the Consumer Product Safety Commission (CPSC), and noting that "[t]he CPSC enjoys *regulatory jurisdiction* over 'consumer products,' as defined by 15 U.S.C. § 2052(a)(1), and pursuant to this authority, the CPSC staff has been *investigating* sprinkler heads manufactured by [plaintiff]") (emphasis added), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003).

[56] *See* OII at 21-22.

The ALJ's contention that the Commission "is not now proposing to adopt any new or additional regulations that might affect [broadband]," but is instead merely "gathering information,"[57] is therefore unavailing.[58] The statutory text does not refer to Commission attempts to impose "new or additional regulations"; it is expressly framed in terms of Commission efforts to "exercise regulatory jurisdiction or control" over VoIP and broadband services. And that is precisely what the OII improperly seeks to do here.

Because data requests pertaining to VoIP and broadband services (both wireline and wireless) conflict with the Legislature's express limitations of the Commission's jurisdiction, they must be stricken.

2. The statutory text and legislative history confirm that Section 710 is intended to address the exercise of regulatory jurisdiction or control over VoIP and broadband *services*, regardless of the regulatory classification of the service provider.

Section 710(a)'s prohibition of any attempt by the Commission to exercise regulatory jurisdiction or control over VoIP and broadband turns on the provision of *services*—not the type of service provider at issue.[59] Thus, Section 710(a)'s prohibition extends to the VoIP- and broadband-related requests issued to *all* Coalition Movants, including "telephone corporations." This follows from both the plain text of the statute and the legislative history.

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[57] *See* ALJ Ruling at 5.

[58] Beyond that statement, the ALJ seemingly conceded that Section 710(a) is at least *prima facie* applicable, though he appeared to rest on the exception to that provision discussed below. *See* Point IV.B, *infra*; *see also* ALJ Ruling at 9 ("We note that section 710 only prohibits the exercise of 'regulatory jurisdiction or control over [VoIP] and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c).' We have already identified several statutory provisions, both state and federal, which make section 710 inapposite here.").

[59] In contrast, other provisions of the Code—including provisions that *confer* jurisdiction on the Commission (as opposed to Section 710(a), which expressly *limits* the Commission's jurisdiction)—focus on the nature of the service provider. *See, e.g.*, Pub. Util. Code §§ 581 & 582 (governing "public utilities"); *see also* pp. 28-29, *infra*.

First, Section 710(a) is framed expressly in terms of *the services* over which the Commission may not exercise regulatory jurisdiction or control—not the regulatory classification of the entity that provides service. The statutory text provides that "[t]he commission shall not exercise regulatory jurisdiction or control over *Voice over Internet Protocol and Internet Protocol enabled services*," subject to narrow exceptions discussed below.[60]

Second, the legislative history confirms the statute's focus on the services at issue. During consideration of SB 1161, interconnected VoIP services were described as being offered by, for example, "*a local exchange carrier* (i.e., AT&T's U-verse or Verizon's FiOS)."[61]

The California legislature was thus well aware that several entities with Commission Certificates of Public Convenience and Necessity ("CPCNs"), offer both traditional landline service and IP-enabled service. Rather than making the application of Section 710 turn on the status of the service provider, however, the statute was deliberately structured to focus on the nature of the service.[62]

Toward this end, the law adopted the following recommendation to strike the word "providers":

> 710(a). The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled service ~~providers~~ except as expressly directed to do so by statute or as set forth in subdivision (c).[63]

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[60] Pub. Util. Code § 710(a) (emphasis added).

[61] Senate Energy, Utilities and Communications Committee, analysis SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing Apr. 17, 2012) at 3.

[62] *Id.* at 7 (the "bill only prohibits state regulation of VoIP and other IP-enabled services") (emphasis added).

[63] *Id.* at 8. While the enacted version of Section 710(a) was slightly different, it also did not include the word "providers."

This confirms that the Commission cannot ignore the plain text of Section 710(a) by attempting to indirectly compel the production of broadband- and VoIP-related information via the certificated affiliate of a broadband/VoIP provider. Any such attempt would disregard Section 710(a), and flout the California Supreme Court's admonition that general provisions of the Public Utilities Code providing the Commission with jurisdiction over public utilities and "related entities" cannot overcome specific statutory prohibitions. As the Supreme Court held in *Assembly of State of California v. Public Utilities Commission*, "[w]hatever may be the scope of regulatory power under this section, it does not authorize disregard by the commission of express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law."[64]

For these reasons, the ALJ Ruling erred in suggesting that any jurisdictional obstacles under Section 710 are obviated to the extent that the OII can be construed as requiring only "*a certificated carrier* . . . to provide all relevant information about [its] *non-utility affiliate*."[65] Provisions of law generally authorizing the Commission to take actions with respect to regulated public utilities "*do[] not authorize disregard by the commission of express legislative directions to it*."[66] Thus, the Commission cannot require Coalition Movants that are "telephone corporations" to turn over information concerning the VoIP and broadband services provided by their VoIP and broadband provider affiliates.

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[64] *Assembly of State of Cal. v. Pub. Utils. Comm'n*, 12 Cal. 4th 87, 103-04 (1995) (quoting *Pacific Tel. & Tel. Co. v. Pub. Utils. Com.*, 62 Cal. 2d 634, 653 (1965)).

[65] *See* ALJ Ruling at 9-10 (citing OII, Ordering Paragraph 3) (emphasis added); *see also id.* at 10 (asserting that the OII "does not otherwise subject utility affiliates to the jurisdiction of this Commission").

[66] *Assembly of State of Cal.*, 12 Cal. 4th at 103-04 (emphasis added).

B. None of the Exceptions to Section 710(a)'s Jurisdictional Limitation that Were Cited by the ALJ Ruling Apply Here.

1. Any exceptions to the broad prohibition on VoIP and broadband regulation must be narrowly construed.

On its face, Section 710(a) contains a narrow exception to the prohibition on the Commission's exercise of regulatory jurisdiction or control over VoIP and broadband services *only* where such exercise is "required or *expressly* delegated by federal law or *expressly* directed to do so by statute or as set forth in subdivision (c)."[67] The Legislature's repetition of the word "expressly" manifests its intent that only a clear and unmistakable statement granting the Commission such regulatory authority will suffice to overcome the general prohibition.[68] Indeed, an opinion by the Legislative Counsel Bureau discussing Section 710 has recognized as much.[69] Moreover, allowing anything less than a clear and explicit statement would render the statute's repeated uses of the word "expressly" superfluous—a reading contrary to fundamental principles of statutory construction.[70]

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[67] Pub. Util. Code § 710(a) (emphasis added).

[68] *See, e.g.*, *In re Marriage of Benson*, 36 Cal. 4th 1096, 1107 (2005) (law requiring "express" declaration and written statement to change the character of community property requires "express written language" and "clear understanding" of intention to effect a change in the character of the property); *RJ Cardinal Co. v. Ritchie*, 218 Cal. App. 2d 124, 135 (1st App. Div. 1963) ("It has been held that 'expressly' means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'") (citation omitted); *see also* Merriam-Webster Online Dictionary (defining "express" as "said or given in a clear way," including "explicitly stated").

[69] *See* June 18, 2015 opinion letter from Daniel S. Vandekoolwyk, Deputy Legislative Counsel, to The Honorable Ian C. Calderon, at 2 n.3 (noting definition of "expressly" in U.S. Supreme Court precedent "to denote 'precision of statement, as opposed to ambiguity, implication, or inference,'" and California Supreme Court precedent "to mean 'in an express manner; in direct or unmistakable terms'") (citing cases). Deputy Legislative Counsel's opinion letter was attached as Attachment 1 to the January 15, 2016 *Reply of AT&T California and New Cingular Wireless PCS, LLC to Opposition to AT&T Motions filed on December 9, 2015*.

[70] *See, e.g.*, *City of Alhambra v. County of L.A.*, 55 Cal. 4th 707, 724 (2012) ("'Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary.'") (citation omitted); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (noting "rule against superfluities" in statutory construction).

2. None of the purported exceptions to Section 710 cited by the ALJ Ruling provide jurisdiction here.

a. Pub. Util. Code § 710(c)(4)

The ALJ's Ruling cites Section 710(c)(4) of the Code—a provision governing the Commission's authority to "require data and other information" in the specific context of responding to ILEC forbearance petitions before the FCC.[71] In relying on this provision, the Ruling seemingly interpreted Section 710(c)(4) to operate as a broad exception to Section 710(a)'s prohibition on any exercise by the Commission of regulatory jurisdiction or control over VoIP and broadband.[72] But the opposite is true; Section 710(c)(4) does not provide authority for the data requests here. In fact, as described below, its inclusion as an express and limited exception to Section 710(a) in the context of responding to ILEC forbearance petitions shows that the Commission *does not* have broad authority to seek VoIP and broadband data in other contexts.

As the ALJ Ruling recognized, the Commission's authority to "acquire data and other information" under Section 710(c)(4) is limited to information-gathering "pursuant to Section 716" of the Code.[73] Section 716, in turn, is limited to petitions filed with the FCC by ILECs who seek forbearance from regulatory requirements, and in that particular context, Section 716 merely requires that VoIP providers and others may be required to provide information relevant to such forbearance petitions.[74] However, the Commission has not cited to any such petitions in

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[71] *See* ALJ Ruling at 8 & n.20 (stating in a single sentence that "section 710 (c)(4) preserves the 'commission's authority to require data and other information pursuant to Section 716'").

[72] Section 710(c) provides that Section 710 does not "affect or supersede" several specific statutes, including the statute (discussed below) enumerated in Section 710(c)(4).

[73] *See* Pub. Util. Code § 710(c)(4).

[74] Section 716 provides that, "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) . . . [a]ll providers of voice communications services, including, but not limited to,

the OII, nor to the best of Coalition Movants' knowledge are any such forbearance petitions currently pending before the FCC that pertain to California.

This analysis shows that Sections 710(c)(4) and 716 *undermine*—rather than support—the Commission's assertion of jurisdiction here: The fact that Section 716 is the only context in which the Commission retains data request authority over VoIP providers (and, in accordance with Section 716, in the narrow context of ILEC forbearance petitions) confirms that the Commission does *not* have the sweeping power asserted here. This follows from the familiar canon of statutory construction that the expression of some things in a statute necessarily means the exclusion of other things not expressed.[75]

In short, then, Section 710(c)(4) does not displace Section 710(a)'s express limitation of the Commission's jurisdiction concerning VoIP and broadband services. In fact, it reinforces it.

b. Pub. Util. Code § 710(f)

The ALJ Ruling also relied on Code Section 710(f), which authorizes the Commission to "monitor and discuss" VoIP services.[76] But that provision, too, cannot overcome Section 710(a).

Particularly when it is read in context and in conjunction with the relevant legislative history, Section 710(f) makes clear that the Commission's authority to monitor and discuss VoIP services is limited, and does *not* encompass the sweeping authority asserted here. Rather, Section 710(f) is cabined to the narrow context of monitoring "customer complaints"—a

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local exchange carriers, interexchange carriers, mobile telephony service providers, and providers of facilities-based interconnected Voice over Internet Protocol (VoIP) service, shall provide all data and other information *relevant to the forbearance petition* requested by the commission pursuant to this section." Pub. Util. Code § 716 (emphasis added).

[75] *See, e.g.*, *Southern Cal. Gas Co. v. Pub. Utils. Comm'n*, 24 Cal. 3d 653, 659 (1979) (finding the Commission's general power to supervise and regulate utilities did not permit imposing a mandatory program on certain utilities when the Legislature had expressly enacted a permissive program).

[76] The ALJ cited Section 710(f) in a single sentence, without any analysis or explanation. *See* ALJ Ruling at 8 ("Section 710(f) specifically reserves the commission's 'ability to continue to monitor and discuss VoIP services.'").

conclusion that is consistent with the rule of construction that statutory provisions should not be rendered superfluous.[77] If Section 710(f) were as broad as assumed in the ALJ Ruling (i.e., covering *any* type of information-gathering regarding VoIP in order to "monitor and discuss" that service), Section 710(c)(4)—discussed above—would have been entirely redundant.

But that is not the way the statute was written. Rather, Section 710(f) is framed more narrowly to provide:

> This section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, *the number and type of complaints received by the commission from customers*, and to respond informally to *customer complaints*, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing *complaints*.[78]

The repeated references to "complaints" underscore the narrow focus of this provision on customer complaints. And the legislative history—of which the ALJ Ruling made no mention[79]—also makes clear that 710(f)'s "monitor and discuss" language is inextricably tied to the monitoring of customer complaints:

> [T]his bill does not limit PUC's ability to continue to monitor, track and report to FCC and the Legislature, within its annual report to the Legislature, *the number and type of complaints received by PUC from customers, and to respond informally to customer complaints*, including providing VoIP customers who contact PUC for information regarding available options under state and federal law for addressing complaints.[80]

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[77] *See* note 70, *supra*.

[78] Pub. Util. Code § 710(f) (emphasis added).

[79] *See* ALJ Ruling at 8.

[80] Senate third reading of SB 1161 as amended Aug. 16, 2012, page 7 (emphasis added).

This circumscribed focus is also evident from a hearing of the Assembly Committee on Utilities and Commerce, which made clear that Section 710(f) was specifically intended to ensure that consumers of VoIP and IP-enabled services have a "venue other than the FCC to raise complaints":

> To the extent the Legislature can ensure consumers of VoIP and IP-enabled services have a venue other than the FCC to raise complaints, the author and this committee may wish to amend Section 710(f) as follows: This section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the FCC and the Legislature, within its Annual Report to the Legislature, *the number and type of complaints received by the commission from customers, respond informally to customer complai*nts, including providing VoIP customers who contact the commission information regarding available options under state and federal law *for addressing complaints*.[81]

The upshot is that Section 710(f) was *not* intended to expand the Commission's power to monitor beyond the specific and narrow context of customer complaints. Any other reading of Section 710(f) would render Section 710(c)(4) superfluous, again contrary to fundamental canons of statutory construction.

c. Pub. Util. Code § 314(b)

The ALJ Ruling's reliance on Section 314(b) of the Code is equally misplaced. Section 314(a)—a legacy monopoly-era statute that long pre-dates Section 710—gives the

[81] Assembly Committee on Utilities and Commerce (Hearing June 18, 2012) at 6 (emphasis added). Beyond authorizing the Commission to monitor customer complaints, the legislative history of SB 1161 does not discuss any other context in which the Commission is authorized to monitor VoIP or broadband service providers. Language found in the Assembly Committee on Appropriations (Hearing Aug. 8, 2012) again confirms the narrow, complaint-oriented focus of Section 710(f): The committee stated that SB 1161 provides that the "limitations . . . on the PUC regulation of VoIP and IP enabled service do not affect '[t]he PUC's ability to monitor and discuss VoIP services, *including responding informally to customer complaints* and to inform VoIP customers who contact the PUC about options under state or federal law *for addressing complaints*.'" Hearing at 1 (emphasis added).

Commission inspection authority over public utilities to ensure just and reasonable rates.[82] Section 314(b), in turn, gives the Commission *more limited inspection authority* over unregulated affiliates or subsidiaries (collectively, "affiliates") of such utilities, restricting any such inquires "to any *transaction between*" the utility and the unregulated affiliate.[83]

As an initial matter, to the extent that the ALJ Ruling asserts that Section 314(b)—a provision that is not part of Section 710—operates as an exception to Section 710(a)'s limitation on the Commission's jurisdiction, that theory would improperly render Section 710(a) a dead letter, as it would presumably allow *any* provision of the Public Utilities Code to overcome Section 710(a) itself. Nor does Section 314(b) "require[]" or "expressly direct[]" the information requests issued here—a necessary prerequisite for any exception to Section 710(a)'s limitation of Commission jurisdiction to apply.[84] Section 314(b) is a legacy provision—predating Section 710—that merely *authorizes* certain Commission action.[85] It therefore cannot operate as a provision of law that trumps Section 710(a). Again, as the California Supreme Court has instructed, "[w]hatever may be the scope of regulatory power under this section, it does not

[82] *See, e.g.*, Pub. Util. Code §§ 314(a), 581-588.

[83] *Id*. § 314(b) (emphasis added).

[84] *See* Pub. Util. Code § 710(a) (exception to Section 710(a) only where "*required* or expressly delegated by federal law or *expressly directed* to do so by statute or as set forth in subdivision (c)) (emphasis added).

[85] *See* Pub. Util. Code § 314(a) ("The commission, each commissioner, and each officer and person employed by the commission *may*, at any time, inspect the accounts, books, papers, and documents of any public utility") (emphasis added); *id.* § 314(b) (applying the same permissive—rather than mandatory—inspection power to "inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, [enumerated public utilities], with respect to any transaction between the [the utility] and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the water, electrical, gas, or telephone corporation.").

authorize disregard by the commission of express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law."[86]

Even if it could operate in this manner, however, Section 314(b) does not apply by its own terms. Those terms authorize the Commission to inspect transactions between a regulated utility and its unregulated affiliates solely to ensure that such transactions do not skew the reasonableness of the utility's rates (i.e., cross-subsidization), involve the sharing of utility customer data, or other similar inter-affiliate dealings.[87] The Commission, moreover, has developed various "affiliate transaction rules" consistent with this proper interpretation of the provision.[88]

Legislative history confirms what the plain language of Section 314(b) says—namely, that the provision "limits the PUC's investigative authority to matters involving *intercompany transactions*, or to information directly related to cross-subsidization of unregulated activities by ratepayers."[89] Critically, while the Assembly's version of the bill would have extended the Commission's authority "to a subsidiary or affiliate of a telephone corporation regarding *any*

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[86] *Assembly of State of Cal.*, 12 Cal. 4th at 103-04.

[87] *See* note 85, *supra* (quoting text of Section 314, which links inspection authority under subsection (b) to "transaction[s]" between the utility and its affiliate).

[88] Section 314(b) has been mentioned in two cases and only one of those cases, *PG&E Corp. v. Public Utilities Commission*, 118 Cal. App. 4th 1174 (2004), discussed the section in any length. *PG&E Corp* involved the Commission's authority to enforce conditions imposed on a utility in approving a change of control. The utility's holding company challenged the Commission's authority to enforce the conditions against the holding company, arguing, among other things, that the Commission's regulatory authority with respect to holding companies and other affiliates was cabined by § 314(b). In rejecting this argument, the court discussed legislative history which suggested that subsection (b) was meant to expand the Commission's inspection authority to encompass unregulated affiliates and, as such, "does not support a conclusion that the PUC lacks authority to enforce conditions imposed by the PUC pursuant to [the sections authorizing its review and approval of change of control and other enumerated transactions]." *Id.* at 1205. The court did not focus on or address the language in Section 314(b) limiting the scope of the Commission's inspection authority to transactions between a utility and its unregulated affiliates.

[89] *See* Assembly Bill No. 116 (1985-1986 Reg. Sess.) Concurrence in Senate Amendments at 2 (emphasis added).

matter reasonably connected with the PUC's jurisdiction over the telephone corporation," Senate amendments were adopted to "[l]imit the expanded authorization to inspection of materials documenting *transactions between* the telephone corporation and the affiliate, or matters affecting rates or expenses of the telephone corporation."[90]

Notwithstanding this limitation, the OII's information requests are sweeping, untethered to any given transaction between regulated respondents and their unregulated affiliates, and concern the general state of competition in various communications market segments (e.g., Basic Service, fixed and mobile broadband, business services, and advanced telecommunications services).

The ALJ Ruling attempted to bridge this gap by asserting that "'transactions' in [the] context [of Section 314(b)] is quite broad, encompassing 'any transaction . . . on any matter that might adversely affect the interests of the ratepayers."[91] But this rationalization—which appears nowhere in the Commission's OII itself—essentially rewrites Section 314(b) along the lines the California Assembly originally proposed but rejected (i.e., "any matter reasonably connected with"). It also errs in disregarding the narrower scope of the Commission's inspection authority finally adopted by the Legislature—which, as shown, expressly restricts any such inquiry to "transactions between" a regulated utility and its unregulated affiliates.[92] As noted above, the OII never identifies any affiliate transaction into which the Commission is inquiring. Thus, the bottom line remains that the ALJ Ruling does not explain how the sweeping and industry-wide data requests at issue here have anything to do with the type of "transactions" that Section 314(b) concerns—and they plainly do not.

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[90] *Id.* (emphasis added).

[91] ALJ Ruling at 7.

[92] *See* note 85, *supra*.

d. Pub. Util. Code §§ 581 and 582

Without analysis or explanation, the ALJ Ruling also cites Sections 581 and 582 of the Code as sources of authority for the OII.[93] To the extent that the Ruling understood these provisions to operate as exceptions to Section 710(a)'s limitations on Commission jurisdiction, this theory fails for the same reason as the Ruling's apparent theory of jurisdiction under Section 314(b).[94] In any event, neither Section 581 nor 582 supports the Commission's information requests concerning VoIP and broadband services—much less provides a basis for compelling unregulated service providers to participate in this proceeding as respondents for the express purpose of producing such information.

First, neither provision provides a sufficiently clear and unmistakable (i.e., an "express") grant of authority over VoIP and broadband services to overcome Section 710(a)'s prohibition on the Commission's exercise of regulatory jurisdiction or control over such services.[95]

Second, the expansive reading of Sections 581 and 582 proposed by the ALJ Ruling would render superfluous other narrowly drawn exceptions to Section 710(a)—specifically, Section 710(c)(4), discussed above, which would otherwise be completely unnecessary.

Third, Sections 581 and 582—by their express terms—solely apply to "public utilities,"[96] yet the ALJ Ruling did not find that providers of broadband and VoIP services could constitute

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[93] *See* ALJ Ruling at 8 n.19 ("Pub. Util. Code § 581 states, '[e]very public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission.'"); *see also* ALJ Ruling at 8 (noting that "Pub. Util. Code § 582, for instance, provides '[w]henever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct.'").

[94] *See* pp. 25-26, *supra*.

[95] *See* Point IV.B.1, *supra*.

public utilities under the Code. Indeed, it apparently conceded that *they are not*.[97] And that concession is consistent with the Commission's disavowal in the OII of any attempt to treat such providers as regulated entities.[98] As a result, Sections 581 and 582 cannot authorize the Commission's actions with respect to VoIP and broadband providers.[99]

e. Pub. Util. Code § 709

Finally, Public Utilities Code Section 709—another provision cited in the ALJ Ruling—likewise fails to overcome the broad prohibition on any attempt by the Commission to exercise regulatory jurisdiction or control over VoIP and broadband services.

As the ALJ Ruling acknowledged, Section 709 is a mere statement of policy,[100] and courts have recognized that such statements "do not create 'statutorily mandated responsibilities.'"[101] Section 709 therefore does not "require[]" or "expressly direct[]" the

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[96] *See* Pub. Util. Code § 216(a) (defining "public utility" to include, among other things, any "telephone corporation").

[97] *See* ALJ Ruling at 9 (referring to the "principle outlined above that a certificated carrier has a duty to provide all relevant information about a *non-utility affiliate* providing communications services") (emphasis added).

[98] *See* OII at 17, 21-22 (distinguishing between (1) "certificated wireless and cable telephone providers" that qualify as "telecommunications carriers" and (2) "their affiliates" that provide broadband and VoIP services).

[99] As discussed below, the ALJ's reliance on Sections 581 and 582 is also misguided, as any such reading—even if permissible under state law—would be preempted by federal law. *See* Point V.A, *infra.*

[100] *See* ALJ Ruling at 6 ("Section 709 of the Public Utilities Code *declares the telecommunications policies of the State of California* to be, *inter alia*, '[t]o continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians," "[t]o encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services," and "[t]o remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.'") (emphasis added).

[101] *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (citation omitted).

information requests issued here—a necessary prerequisite for any exception to Section 710(a)'s limitation of the Commission's jurisdiction.[102]

Moreover, even if Section 709 were viewed as a grant of jurisdiction, as explained above,[103] such general provisions must give way to more specific statutory limitations on the Commission's authority—here, the express prohibition in the very next section of the statute against exercising regulatory jurisdiction or control over VoIP and both wireline and wireless broadband services.[104]

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In sum, even if the Commission could rely on sources of authority that were not articulated in the OII—which it cannot[105]—none of the theories articulated in the ALJ Ruling for overcoming the clear and express limitation on the Commission's jurisdiction as to VoIP and

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[102] *See* Pub. Util. Code § 710(a) (exception to Section 710(a) only where "*required* or expressly delegated by federal law or *expressly directed* to do so by statute or as set forth in subdivision (c)) (emphasis added).

[103] *See* pp. 29-30, *supra*.

[104] The ALJ Ruling (at 9 & n.22) cites two cases in support of the OII's scoping memorandum and inspection requests regarding VoIP and broadband services, but neither can salvage those requests. *First*, *Younger v. Jensen*, 26 Cal. 3d 397 (1980), involved the California Attorney General's subpoena authority under a different provision of California law not at issue in this proceeding. California Government Code Section 11180 "empowers the Attorney General to investigate any subject under his Department's jurisdiction." *Id.* at 402, 816. Nor do the unique considerations of "cooperative federalism" entailed by dual federal-state efforts to enforce antitrust laws apply here. *See id.* at 406, 818 ("[t]he present investigation has both interstate and intra-California aspects," and "while conducting the investigation the Attorney General properly may be concerned not only with the possibilities of prosecution in California courts but also with formulations of enforcement policy in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation."). *Second*, *Millan v. Restaurant Enterprises Group, Inc.*, 14 Cal. App. 4th 477 (1993), a case involving an administrative subpoena in the labor context, is similarly far afield. The question in that case was not the scope of an administrative agency's jurisdiction—much less the Commission's. Instead, it was whether an agency may seek information "merely on suspicion" of misconduct or whether it must have a pending claim of a rule violation before it can launch an enforcement investigation. The quantum of evidence necessary to institute an investigation, however, has nothing to do with whether an agency has regulatory jurisdiction over the matter.

[105] *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 85 Cal. App. 4th 1086, 1096-97 (2000) ("We cannot accept appellate counsel's *post hoc* rationalizations for agency action.") (citations and quotation marks omitted).

broadband services is tenable. The OII's information requests and topics of investigation seeking information about unregulated VoIP and broadband services violate Section 710(a), and therefore must be stricken. Furthermore, and for the same reasons, all entities should be removed from the OII as "respondents" to the extent they provide only VoIP or broadband services.

V. THE CHALLENGED INFORMATION REQUESTS ARE INDEPENDENTLY PREEMPTED BY FEDERAL LAW.

A. The Information Requests Concerning Broadband are Preempted by the FCC's Forbearance Decisions in the *Open Internet Order*.

The ALJ Ruling's reliance on Sections 581 and 582 of the Public Utilities Code[106] highlights that the OII's broadband-related information requests are unlawful on the additional and independent ground that they are preempted by the FCC's *Open Internet Order*. Sections 581 and 582 are decades-old ratemaking provisions authorizing regulators to inquire into the business and operations of "public utilities."[107] Federal law contains the same counterparts in Sections 218 and 219 of the federal Communications Act of 1934.[108] But the

[106] *See* p. 28, *supra*.

[107] *See* Pub. Util. Code § 581 ("[e]very public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission"); *id.* § 582 ("[w]henever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct.").

[108] *See* 47 U.S.C § 218 ("The [FCC] may inquire into the management of the business of all carriers subject to this chapter, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."); 47 U.S.C. § 219 (authorizing the FCC to

FCC specifically forbore from these federal counterparts in the *Open Internet Order* and expressly decided to preempt all analogous state actions.

Specifically, in the *Open Internet Order*, the FCC has explicitly forborne from applying Sections 218 and 219 of the Communications Act, which would otherwise permit the FCC to impose expansive informational and financial reporting requirements covering the manner in which a broadband provider operates its business, delivers its services, and conducts its financial affairs.[109]

Communications Act Sections 218 and 219 include the same broad information-gathering and inspection powers contained in counterpart Public Utilities Code Sections 581 and 582. Thus, state entities, including the Commission, are prohibited by the *Open Internet Order* from regulating in areas the FCC has specifically forborne from regulating. Indeed, the FCC left no doubt about its intent to preempt any contrary state law: "*We . . . make clear that the states are bound by our forbearance decisions today*. Under section 10(e), '[a] State commission may not continue to apply or enforce any provision' from which the [FCC] has granted forbearance."[110]

The ALJ's reliance on Sections 581 and 582 thus underscores that the broadband-related requests in the OII directly conflict with the forbearance decisions of the FCC in the *Open Internet Order*, and are therefore preempted by federal law.

"require annual reports from all carriers subject to this chapter, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, any such carrier").

[109] *See id.* at 5612 ¶¶ 37-38, 5846 at ¶ 508 & n.1548 ("[A]lthough some commenters advocate that the Commission retain provisions of the Act that provide 'discretionary powers to compel production of useful information or the filing of regular reports,' we find the section 10(a) factors met and grant forbearance.").

[110] *See id.* at 5803 ¶ 432 (emphasis added); *id.* at 5804 ¶ 433 ("[W]e announce *our firm intention to exercise our preemption authority* to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.") (emphasis added).

B. The Data Requests Concerning Wireless Voice Service, Spectrum Usage, and Wholesale Inputs are Preempted by Federal Law or are Otherwise Unlawful.

1. Wireless voice service

The OII's information requests concerning wireless voice service must reflect the limitations on the Commission's jurisdiction in this area. The Commission's jurisdiction over wireless carriers' services is limited to the terms and conditions. Federal law preempts the Commission from regulating the rates of wireless carriers, as well as their entry into any market.[111] Courts have broadly interpreted the reach of federal preemption in such regard. For example, courts have held that any efforts by state commissions to regulate any aspect of the construction or operation of wireless carriers' networks are preempted.[112]

The OII improperly ignores the well-established bounds of the Commission's jurisdiction over wireless carriers by demanding detailed, confidential information regarding the network facilities, network operations, services, and customer base of wireless carriers. The Commission's requests seeking confidential information regarding wireless voice service lack a reasonable, cogent nexus between the Commission's jurisdiction and its responsibility to assure just and reasonable rates in the market for traditional wireline telephone service. Nothing in the OII or ALJ Ruling demonstrates that such highly sensitive information regarding *wireless* network facilities, operations, services and customer base is needed to investigate the current marketplace for regulated *wireline* services in California. To the extent the Commission is seeking to determine whether "other competitive market forces" such as wireless voice are keeping the rates of traditional landline service just and reasonable,[113] ample information already exists in the public domain for it do so. For instance, the FCC routinely publishes reports

[111] 47 U.S.C. § 332(c)(3)(A).

[112] *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000).

[113] ALJ Ruling at 3.

concerning the state of competition for wireless services.[114] There is thus no basis for the Commission to reach beyond its jurisdictional limitations and no reason to seek highly confidential data.

2. Spectrum usage

The OII directs wireless carriers to provide both data and competitive analyses regarding their Radio Frequency ("RF") spectrum. But Congress has entrusted *the FCC*—not the Commission—with exclusive jurisdiction over allocation of RF spectrum under Title III of the federal Communications Act.[115] The FCC oversees and develops binding national policy regarding the allocation of spectrum "as public interest, convenience, and necessity requires,"[116] and it views the promotion of competition as a "vital part of [its] public interest mandate."[117] Indeed, the FCC has been active in developing new rules and procedures to promote the availability of RF spectrum and efficient use of spectrum, issuing several major decisions in this area within the last year.[118]

The OII itself recognizes that "spectrum issues are the province of the FCC,"[119] but goes on to assert that "a comprehensive examination of the wholesale marketplace necessarily includes a review of spectrum in California."[120] That conclusion, however, does not follow from

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[114] *See, e.g.*, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Eighteenth Report, DA 15-1487 (rel. Dec. 23, 2015).

[115] 47 U.S.C. § 303.

[116] *Id.* § 303(a).

[117] *Policies Regarding Mobile Spectrum Holdings Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6133, 6137 ¶ 7 (2014).

[118] *See, e.g.*, *Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd. 7493 (2015); *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, 30 FCC Rcd. 3959 (2015).

[119] OII at 12.

[120] *Id.*

the OII's premise. The Commission has no authority to regulate access to or use of RF spectrum. Consequently, the Commission can neither adopt rules or policies that depart from the FCC's policies regarding, nor conclude that the FCC's policies do not provide sufficient access to, RF spectrum to ensure robust competition. Because any such regulation would be impermissible, the Commission has no basis for compelling the production of related confidential information (as in OII Information Request 19, which directs wireless carriers to provide both data and competitive analysis regarding RF spectrum).

Such demands are particularly troubling because spectrum-use information is highly sensitive, as Coalition Movant CTIA and other service providers will further explain in their forthcoming comments on the ALJ's Protective Order Ruling.[121] Despite these concerns, the Protective Order Ruling tentatively determines that spectrum-use data shall not be presumptively limited to Commission staff and will therefore generally be available to Coalition Movants' competitors, among others.[122]

3. Wholesale inputs

Many of the information requests regarding the provision of wholesale inputs from one service provider to another seek information on issues that already have been decided by the FCC. In the federal Telecommunications Act of 1996, the FCC established rules regarding the regulation of wholesale inputs used for local wireline telephone service, and state commissions

[121] CTIA will address the FCC's spectrum auction in a separate filing.

[122] *See* Protective Order Ruling at 10. Under the Protective Order adopted by the ALJ (subject to potential revision), a competitor's outside counsel, for example, may obtain access to "Highly Confidential Information" that is not deemed "Commission Only Information." *See* Protective Order Ruling, Exh. A (Protective Order) ¶¶ 3, 6. If the information is deemed "Confidential" (rather than "Highly Confidential"), it is available to an even broader category of persons, including non-counsel representatives of competitors who are not involved in "Competitive Decision-Making" (as defined in the Protective Order). *See id.* ¶¶ 3, 5.

are charged with implementing those rules.[123] Among the FCC's rules are those that determine exactly which network elements must be "unbundled."[124] Thus, the Commission's use of the OII (and, in particular, Information Requests 13-19) to conduct a separate and far-reaching generic investigation into whether and which wholesale inputs should be made available as unbundled network elements ("UNEs") exceeds the Commission's authority because those decisions have already been made by the FCC.

A few of these "wholesale input" requests bear separate discussion, as they underscore that the OII's disregard for the Commission's jurisdictional bounds is of particular concern because the information demanded will not shed any light on the Commission's central inquiry. For instance, Information Request 15 can have no bearing on whether *retail* rates for non-VoIP wireline telephone service are reasonable; on its face, that request requires an analysis of competition in "segments of the *wholesale* market"—i.e., a market other than the retail market.[125] Since the purpose of the OII is to investigate the retail market for voice telephone service, there is no basis for compelling separate data and analysis of the wholesale market.[126]

Information Request 16 compels Coalition Movants to create and produce an analysis of whether competitive carriers will "have adequate access to [the] network elements [discussed in

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[123] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[124] *See, e.g., In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd. 16978 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[125] *See* OII, App. B at B-5 (emphasis added).

[126] While some might assert that conditions in the wholesale market can affect competition in the retail market, that puts the cart before the horse. Unless and until there is a finding of market failure at the retail level, an information request that compels production of data and testimony regarding the wholesale market is not reasonably related to an investigation of non-VoIP wireline retail rates for telephone service, and imposes further burdens on Coalition Movants that far outweigh any potential benefits.

Request 15] after the network is fully transitioned to IP-enabled technologies[.]"[127] In addition to calling for speculation about market conditions that do not yet exist, this request asks about a matter currently under consideration by the FCC, and therefore is not reasonably related to the Commission's rate authority over non-VoIP wireline telephone service. The FCC alone decides which network elements must be provided as UNEs at cost-based rates. And, even if parties offered only speculation in response to this request, any such responses would have no bearing on evaluating the reasonableness of rates for non-VoIP wireline telephone services today.

Information Requests 17 and 18 ask for extensive data on "backhaul from cell or antenna sites to upstream network nodes (e.g., mobile telephone switching offices)."[128] As with the other "wholesale input" questions, these requests are not reasonably related to the Commission's regulatory authority over rates for retail wireline telephone service. Whether rates are reasonable is evaluated at the retail level and from the perspective of retail end-users. Wireless carriers offer retail services, and consumers decide whether to use those services (or others). How wireless carriers obtain the wholesale inputs necessary to provide their service has no bearing on whether consumers view those carriers' retail services as alternatives or complements to wireline voice service.[129]

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[127] OII, App. B at B-6.

[128] *See id.*

[129] The same is true regarding the OII's request for extensive data on, among other things, cell sites and towers. *See* OII, App. B at B-6. The OII and ALJ Ruling offer no explanation of how compelled disclosure of extremely confidential and competitively sensitive network details of that kind, and the burdens it involves, would shed any light on the reasonableness of rates for non-VoIP retail wireline telephone service.

C. Any Attempt by the Commission to Seek Form 477 Data in a Manner Inconsistent with FCC Requirements Would Be Preempted.

The OII contains various requests for FCC Form 477 information.[130] As shown above, because the data-gathering requests concerning broadband services are equivalent to reporting obligations from which the FCC has expressly forborne in the *Open Internet Order*, those requests are preempted by federal law.[131] In addition to that preemption problem, the OII's requests for Form 477 data run afoul of federal law for the separate reason that they purport to mandate Commission access to confidential Form 477 data outside the FCC's prescribed process for doing so, and without the federally prescribed protections for such data (including a requirement not to disclose the data outside the relevant state commission).

As discussed above, Form 477 reports include highly competitively sensitive data. Service providers collect and report the data pursuant to an FCC mandate that acknowledges the competitive concerns posed by *any* release of the confidential data on a carrier-specific basis (and sometimes even on an aggregated basis).[132] The Form 477 data provide a basis on which to identify specific geographic areas where a provider's service has not yet been launched, but also contain detailed subscriber information regarding active broadband connections, by location, service type (i.e., commercial or residential), speed, and facility type (e.g., wireless, coax, fiber), as well as active VoIP subscriptions by location, type of connection (e.g., copper, cable, FTTP) and type of last-mile facility (e.g., over-the-top or supplier-provided, and service type). The data

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[130] Information Requests 5-7 seek all the data Respondents provide to the FCC in various Form 477 reports. Request 5 seeks Form 477 data from "voice providers," Request 6 seeks Form 477 data from "broadband provider[s]," and Request 7 seeks Form 477 data from "mobile voice and/or broadband services providers." ALJ Ruling, Att. 1 at 4-6.

[131] *See* Point V.A, *supra*.

[132] *Local Competition and Broadband Reporting*, 15 FCC Rcd. 7717, 7758 ¶ 88 (2000) ("*FCC Reporting Order*"); *Modernizing the FCC Form 477 Data Program*, 28 FCC Rcd. 9887, 9896 ¶ 19 (2013) ("*2013 Form 477 Order*").

can be extremely granular, containing highly competitively sensitive information. Companies filing Form 477s can designate data as confidential by checking a box on the Form, or in some instances by requesting confidential treatment and explaining the reasons for that treatment.[133]

The FCC has developed detailed rules specifying a protective process for state commissions to obtain access to confidential Form 477 data. In particular, the FCC will allow such access upon request, only "provided the commissions have appropriate confidentiality protections in place."[134] The necessary protections are set out in the FCC's standard letter agreement for state commissions. As that letter agreement states:

> Pursuant to Section 0.291 of this Commission's rules, we grant you access to these data subject to your agreement to treat this information in accordance with procedural and substantive protections that are equivalent to or greater than those afforded under Federal confidentiality statutes and rules, including the Freedom of Information Act (*see* 5 U.S.C. § 552(b)), the Trade Secrets Act (*see* 18 U.S.C. § 1905), and Sections 0.457, 0.459, and 0.461 of the Commission's rules (*see* 47 C.F.R. §§ 0.457, 0.459, 0.461), specifically including Section 0.461(d)(3). To the extent that Federal confidentiality statutes and rules impose a higher standard of confidentiality than state law, the state is required to adhere to the higher Federal standard.[135]

Any state commission seeking access to Form 477 data therefore must *agree to all these conditions* in order to obtain such state-specific confidential data. In addition, the FCC requires the state commission to "affirm[]" that "the requested data *will not be shared with any individuals who are not direct employees of*" the commission.[136]

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[133] 47 C.F.R. § 1.7001(2) & (3) & 0.459; *2013 Form 477 Order*, 28 FCC Rcd. at 9920-25 ¶¶ 78-87.

[134] *2013 Form 477 Order*, 29 FCC Rcd. at 9896 ¶ 19; *FCC Reporting Order*, 15 FCC Rcd at 7761-62 ¶ 95.

[135] https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf.

[136] *Id*. (emphasis added).

Notwithstanding those federally prescribed prerequisites to state commissions obtaining confidential Form 477 data, the OII, ALJ Ruling, and Protective Order Ruling purport to compel the production of such data to this Commission *without* the Commission's agreeing to abide by any of the statutes and FCC regulations cited in the letter agreement.[137] Nor has the Commission agreed—as required—not to disclose confidential Form 477 data outside the Commission itself. Indeed, nothing in the ALJ's Protective Order Ruling suggests that the Commission would be prevented from unilaterally disclosing any category of confidential information in a future decision without an opportunity for Coalition Movants to object[138]; the Protective Order Ruling

[137] The ALJ Ruling (at 13) asserted that "[t]his Commission has such protections in place, though Pub. Util. Code § 583, and G.O. 66C, which protect sensitive business data from [Public Records Act and Freedom of Information Act] disclosure." But the Ruling never reconciled this statement with (1) the lack of any express agreement by the Commission to abide by the statutes and federal regulations cited in the FCC's letter agreement, as the FCC's rules require, and (2) the statement in the OII itself—reiterated in the Protective Order Ruling—that "the Parties are directed to enter into confidentiality agreements *that facilitate the greatest possible sharing of information*" (OII at 22, Ordering Paragraph 4 (emphasis added); *see also* Protective Order Ruling at 1). Moreover, although the Protective Order Ruling purports to require "procedures that are consistent with the FCC's procedures" for confidential treatment of Form 477 data (Protective Order Ruling at 8), the suggestion that parties other than Coalition Movants may show that Form 477 data "*should be disseminated outside the FCC and state agencies*" (*id.* (emphasis added)) would in itself contradict established FCC procedures, which condition access to Form 477 data by state regulatory commissions on an agreement that "the requested data will *not* be shared with any individuals who are not direct employees of the [state commission]." *See* note 135, *supra* (FCC Form 477 Data-Sharing Agreement with State Regulatory Commission) (emphasis added).

[138] *First*, by its own terms, the Protective Order applies only to "Carrier and . . . Non-Carrier Parties," as defined therein, and does not govern disclosure of confidential information by the Commission or its staff, including the Office of Ratepayer Advocates (ORA). *See* Protective Order at 1, ¶ 2 (stating that ORA "is bound instead by the confidentiality requirements of Pub. Util. Code § 583 and General Order 66-C"). *Second*, the Protective Order also provides that, upon termination of the proceeding, specified limits on retention of confidential information "shall not apply to the Commission or its staff, although such Documents and Information will continue to be protected by Public Utilities Code § 583 and General Order 66-C." *Id.* at 13 ¶ 17. *Third*, although a party submitting confidential information to the Commission can request confidential treatment under General Order 66-C, the California Public Records Act ("CPRA"), or other relevant statutes, the Commission has broad discretion to disclose such information to the public "by an order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." Pub. Util. Code § 583; *see also Cal. Edison Co. v. Westinghouse Elec. Corp.*, 892 F.2d 778, 783 (9th Cir. 1989) (observing that "the commission's authority to issue such orders is unrestricted"). *Fourth*, proposed amendments to these procedures would further exacerbate these risks. For example, the Commission has proposed a revision to General Order 66-C "*to increase public access to records furnished to the CPUC by the entities we regulate*," and to more closely align the

expressly provides that restrictions on access to, and use of, confidential information "shall not be construed to apply to the Commission or its staff."[139] Further, although the Protective Order Ruling tentatively accepts Coalition Movants' proposal for "Commission Only" treatment of Form 477 data, it states that it is "loathe to extend this category any more than is necessary" and invites parties "to show that this data is disseminated outside the FCC and state agencies, *or that it should be disseminated outside the FCC and state agencies*."[140] Thus, the door remains wide open for potential disclosure of some or all of this highly confidential data to various proceeding participants—including *direct competitors* of Coalition Movants or their agents.[141]

This contravenes the FCC's carefully crafted procedures regarding disclosure of confidential Form 477 data to state commissions and prohibition on further disclosure. Compelling the production of the Form 477 data to a state commission that has not provided the required agreement to confidentiality—and, to make matters worse, compelling sharing that directly *undermines* the FCC's confidentiality protections—defeats the objectives of federal law, and is therefore preempted. As the Supreme Court has explained, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," and federal

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Commission's confidentiality rules with the CPRA, which expressly favors disclosure. *See* Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act, R.14-11-001, mimeo at 1 (emphasis added). And, in the most recent proposal put forward in that proceeding, Commission Legal Division staff would handle CPRA requests under delegated authority, and *there would be no need for an order by a Commissioner (or the full Commission) before a confidential document is released*. *See* R.14-11-011, Aug. 11, 2015, Assigned Commissioner's Scoping Memo and Ruling, Attachment A, Draft Proposal.

[139] Protective Order Ruling at 7.

[140] *Id.* at 8-10 (emphasis added).

[141] Some service providers do provide certain Form 477 data to the Commission under the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). Even in that limited context, however—and setting aside whether the DIVCA procedures must be construed to comport with the FCC's requirements—the Commission has unequivocally and explicitly provided that any such information provided will be afforded confidential treatment in accordance with Pub. Util. Code § 583 and General Order 66-C. GO 169, Section VIII(C).

preemption extends to state actions that sidestep or undermine the federal "'specially designed procedures . . . to obtain uniform application of [Congress's] substantive rules.'"[142] Where federal law reflects a specific policy judgment as to how a law's objectives would best be promoted, any state requirements "that upset the careful balance struck by Congress . . . stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress" and are preempted.[143] These same preemption principles apply to orders and regulations that the FCC adopts to implement federal communications statutes, such as its rules regarding disclosure of Form 477 data to state commissions.[144]

The ALJ appeared to believe that these preemption problems could be avoided if state commissions obtain the confidential Form 477 data "directly from carriers."[145] But that would equally undermine federal objectives, and is preempted for the same reasons. Common sense dictates that, where state commissions are restricted by federal law in how and when they can obtain service providers' sensitive information from the FCC, they cannot simply evade those restrictions by demanding the information—without the concomitant protections—from the service providers themselves.

If the Commission wants to take advantage of the FCC's authority to compel production of confidential Form 477 data, it must also abide by the FCC's procedures for allowing state commissions' access to that data.

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[142] *Amalgamated Ass'n of Str., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971) (quoting, in part, *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953)); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (conflict preemption applies where state regulation[s] "interfere[] with the methods by which the federal statute was designed to reach [the federal] goal").

[143] *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982) (plurality op.).

[144] *See, e.g.*, *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988) ("[S]tatutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

[145] ALJ Ruling at 12.

VI. FORCING COALITION MOVANTS TO DISCLOSE THEIR TRADE SECRETS WITHOUT PRIOR RESOLUTION OF THEIR OBJECTIONS TO THE COMMISSION'S LEGAL AUTHORITY AND THE UNREASONABLENESS OF THE OII'S DEMANDS WOULD INFRINGE ON COALITION MOVANTS' FOURTH AMENDMENT RIGHTS.

As explained above and in the forthcoming motion for a partial stay, the OII requires production of highly confidential information regarding VoIP, broadband services, and wireless voice service—including information at an unprecedented level of granularity (such as requests for voice- and broadband-related subscription information at the census block level)—as well as particular assessments of the extent of competition in various market segments. This information goes to the heart of Coalition Movants' network investments and competitive strategy in California, and is treated by Coalition Movants as trade secrets.[146] Other information requests in the OII also demand highly confidential information—which, under the Protective Order Ruling, may be available to agents of Coalition Movants' competitors, among other parties—and other activities exclusively or pervasively regulated by the FCC.

The OII's demands for this highly sensitive information therefore implicate Coalition Movants' constitutionally-protected rights and interests in their trade secrets and other proprietary data.[147] Courts have held that "commercial privacy interests" are protected under the Fourth Amendment, and that a government agency infringes such rights if its investigation exceeds the agency's authority.[148] Although the Fourth Amendment's protection of "commercial

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[146] *See* forthcoming Motion for Partial Stay, Exhibit A (supporting declarations from Coalition Movants).

[147] *See* note 7, *supra* (test for trade secrets under California law); *see also* note 16, *supra* (citing *CBS Corp. v. FCC*, 785 F.3d 699 (vacating FCC order that failed to sufficiently protect confidential and proprietary business information in connection with merger review proceeding)).

[148] *See Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440, 448 (9th Cir. 1994) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950), in turn, quoting *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 208 (1946)); *see also See v. City of Seattle*, 387 U.S. 541, 544 (1967) (recognizing Fourth Amendment protections for commercial privacy rights); *Brovelli v. Superior Ct. of L.A. Cnty.*, 56 Cal. 2d 524, 529 (1961) (examining whether demand for inspection is "one which the agency demanding production is authorized to make").

privacy interests" generally is more limited, the Ninth Circuit has applied a defined test to determine whether administrative investigations of commercial interests comport with the Fourth Amendment, and that test includes a requirement that the inquiry be "within the authority of the agency. . . ."[149]

As shown above, the instant inquiry does not pass this test because the Commission lacks authority to compel responses to several of the OII's information requests.[150] Nor has the Commission shown, let alone justified, why such highly sensitive information—including information that will be burdensome for several of Coalition Movants to assemble in the form requested—is needed for the Commission to investigate the current marketplace for regulated telecommunications services in California, particularly given that the FCC already routinely publishes reports addressing the state of competition for voice services, wireless and broadband services.[151] The compelled disclosure of highly confidential information—including information

[149] *Reich*, at 448 (emphasis added). Similarly, the Commission itself has acknowledged that it can seek data from non-utilities only in cases where there is a "rational relationship to *public utility regulation*." (*See* Resolution ALJ-195 at 6; D.08-04-062, mimeo at 5-6 (modifying Resolution ALJ-195) (emphasis added); *see also* ALJ Ruling at 7-8 & n.17 (citing Resolution ALJ-195).

[150] *See* Points IV and V, *supra*. The test applied by the Ninth Circuit also requires that the demand not be "too indefinite" and that the information sought be "reasonably relevant." Certain of the OII's information requests fail these additional requirements as well. *See, e.g.*, OII, App. B at B-5 (Requests 14(a)-(d)).

[151] *See, e.g.*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Seventeenth Report*, 29 FCC Rcd. 15311 (2014); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eleventh Broadband Progress Notice of Inquiry, 30 FCC Rcd. 8823 (2015); *see also In re Local Competition & Broadband Reporting*, 15 FCC Rcd. 7717, 7720 ¶ 4 (2000) ("it is our expectation that this data will enhance our subsequent annual reports and facilitate a more comprehensive understanding of the deployment of advanced telecommunications capabilities and broadband services").

implicating Coalition Movants' "commercial privacy interests"—would therefore infringe on Coalition Movants' Fourth Amendment rights.[152]

Equally important here, courts have also routinely held that commercial parties are entitled to "obtain judicial review of the reasonableness of the demand *prior* to suffering penalties for refusal to comply."[153] Consistent with that precedent, the Commission should address Coalition Movants' threshold objections before compliance with the challenged aspects of the OII is required. Like the parties in the cases cited above, Coalition Movants are plainly entitled to have these questions heard and resolved by the Commission "*prior to suffering penalties for refusing to comply*."[154] Indeed, "it is these rather minimal limitations on administrative action which . . . are *constitutionally required*."[155]

CONCLUSION

For the reasons described above, the Commission should modify the OII to (1) strike portions of information requests pertaining to VoIP service, broadband services, wireless voice service, spectrum usage, and wholesale inputs (i.e., Information Requests Nos. 1- 3, 5-7 and 12-19); (2) limit the scope of the OII to a consideration of traditional wireline (TDM) voice issues

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[152] Because Coalition Movants' trade secrets constitute "property" under state law and Fifth Amendment cases (*see* note 7, *supra*), and because the Commission lacks authority to issue the challenged information requests (*see* Points IV and V, *supra*), any compelled disclosure of such trade secrets would constitute a deprivation of property in violation of substantive due process, as well as an uncompensated taking in violation of the Takings Clause. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (holding that to the extent proprietary business information is "cognizable as a trade-secret property right under [state] law, that property right is protected by the Taking Clause of the Fifth Amendment.").

[153] *City of Seattle*, 387 U.S. at 544-45 (emphasis added); *California Rest. Ass'n v. Henning*, 173 Cal. App. 3d 1069, 1075 (1985) ("The Fourth Amendment also requires that there exist a mechanism by which validation, modification, or nullification of the subpoena can be judicially resolved, without penalty, before compliance with the subpoena can be exacted."); *see also* note 52, *supra* (Commission precedent concerning risk of sanctions for non-compliance with information demands).

[154] *Henning*, 173 Cal. App. 3d at 1076 (citation omitted).

[155] *Id.*

and strike investigation topics relating to broadband and, wholesale inputs (Investigation Topics (d), (e), and (f)); and (3) remove as respondents to this proceeding all entities to the extent that they provide only VoIP service or either broadband service. In addition, the ALJ Ruling should be vacated to the extent it held to the contrary.

Respectfully submitted:

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For Coalition Movants[156]

Dated: March 8, 2016

[156] Pursuant to Rule 1.8(d), counsel for Coalition Movants authorizes Davis Wright Tremaine LLP to sign and file this Motion on behalf of Coalition Movants.