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Decision 06-12-042 December 14, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities.	Rulemaking 00-02-004 (Filed February 3, 2000)

ORDER MODIFYING DECISION (D.) 06-03-013 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

In this decision, we dispose of applications filed by the California Attorney General ("AG") and jointly by The Utility Reform Network and the Division of Ratepayer Advocates ("TURN/DRA") for rehearing of Decision (D.) 06-03-013. In the Decision, we adopted Revised General Order ("G.O.") 168, Market Rules to Empower Consumers and to Prevent Fraud.

We have carefully considered each of the arguments raised by Applicants and are of the opinion that applicants have failed to demonstrate grounds for granting rehearing. However, we shall modify the Decision to: (1) clarify our discussion concerning the applicability of the G.O. 168 rules; and (2) address the substantive issues raised in *Motion of The Utility Reform Network Seeking the Recusal of Commissioner Kennedy and Her Removal as Assigned Commissioner ("TURN's Motion")*, filed May 31, 2005. Additionally, we clarify the Decision in certain respects as discussed herein. Rehearing of D.06-03-013, as modified, is denied.

I. FACTS

In 2004, the Commission issued *Interim Decision Issuing General Order 168, Rules Governing Telecommunications Consumer Protection* [Decision (D.) 04-05-057] (2004) __ Cal.P.U.C.3d __.[1] G.O. 168 established regulations applicable to all providers of telecommunications services to ensure effective consumer protection in light of increasing competition in the telecommunications market. In addition to adopting new consumer protection rules, D.04-05-057 incorporated, with some revisions, the interim rules adopted in *Interim Opinion Adopting Interim Rules Governing the Inclusion of Noncommunications-Related Charges in Telephone Bills* [D.01-07-030] (2001) __ Cal.P.U.C.3d __ and adopted rules governing slamming complaints as a result federal rule changes enacted in 2000 by the Federal Communications Commission. (D.04-05-057, p. 2.)

In January 2005, the Commission issued D.05-01-058, staying D.04-05-057 pending a reexamination of the rules in light of technological changes in the telecommunications industry.[2] (*Order Modifying Decision 04-05-057* [D.05-01-058, p. 1 (slip op.)] (2005) __ Cal.P.U.C.3d __.) On March 2, 2006, the Commission adopted D.06-03-013 ("Decision") which revised G.O. 168. One of the major revisions reflected the Commission's change in policy to emphasize consumer education and enhanced enforcement of existing laws and regulations over prescriptive regulations as the primary means to protect consumers. (D.06-03-013, pp. 3-4.)

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[1] Unless otherwise specified, all decisions discussed in this order were issued in Rulemaking (R.) 00-02-004, *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to all Telecommunications Utilities.*

[2] For purposes of this order, the rules adopted in D.04-05-057 are also referred to as the "stayed rules," while the rules adopted in the Decision are referred to as the "revised rules."

On April 10, 2006, applications for rehearing of D.06-03-013 were filed by the AG and TURN/DRA. The AG challenges the Decision on the grounds that: (1) the Commission failed to comply with the requirements of Public Utilities Code section 2896[3] concerning the Commission's requirement to require telecommunications providers to disclose certain information; (2) the Assigned Commissioner improperly limited discovery on the material issue of consumer complaints, thus causing the Decision to reach improper conclusions on that issue; (3) the Commission abused its discretion by using different standards to evaluate the evidence depending on whether it included or excluded rules; (4) the Commission failed to assess the economic consequences of repealing the stayed rules and the Non-telecommunications Billing Rules as required by Public Utilities Code section 321.1; (5) the decision to repeal the Non-telecommunications Billing Rules and the determination that the stayed rules are unnecessary are not supported by substantial evidence; and (6) the Commission exceeded its jurisdiction by prohibiting the use of the revised rules in private actions. The AG also sets out a list of alleged technical errors in the Decision.

TURN/DRA raise similar arguments as the AG concerning the limitation on private right of action and the standards used to include or exclude rules. They further raised the following challenges: (1) the limitation on discovery violated Civil Procedure Code section 2017 and due process and (2) the Decision erroneously dismissed TURN's Motion for Commissioner Kennedy's removal as Assigned Commissioner and recusal from voting on the case on the ground that the motion was moot and unsupported by the facts.[4]

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[3] Unless otherwise stated, all statutory references are to the Public Utilities Code.

[4] TURN/DRA's rehearing application also notes that they are waiting for a decision on their application for rehearing of D.05-01-058. (TURN/DRA's Rhg. App., p. 1.) However, as a result of adopting the revised rules, that rehearing application was rendered moot and denied. (D.06-03-013, pp. 143 & 159 [OP No. 33].)

Responses to the applications for rehearing were filed by the Wireline Group, Verizon Wireless and jointly by Cingular Wireless, Cricket Communications, Inc., Nextel of California, Inc., T-Mobile, Sprint Telephony PCS, L.P., Sprint Spectrum L.P., Verizon Wireless and CTIA-The Wireless Association. All parties filing responses opposed the rehearing applications.

II. DISCUSSION

A. The Commission properly limited discovery of consumer complaint data.

At the prehearing conference on April 6, 2006, the AG indicated that the Office of the AG would be requesting permission to seek certain information from the carriers as part of the reexamination of the stayed rules. (RT PHC, pp. 27:10 – 28:34.) In response, counsel for T-Mobile voiced a concern that the scope of discovery requested "even in the best of worlds, would drag this proceeding out possibly for years." (RT PHC, p. 30:2-3.) In a ruling dated May 2, 2005, the Assigned Commissioner rejected the AG's request for broad discovery and limited discovery of consumer complaint data to those complaints filed at the Commission. The ruling further stated that discovery of customer complaint data filed with a carrier would be permitted only if the carrier put the data in issue. (*Assigned Commissioner's Ruling* ("*May 2nd Ruling")*, dated May 2, 2005, p. 3.)

Both the AG and TURN/DRA raise various challenges to the *May 2nd Ruling*.[5] Both Applicants charge that the discovery limitation is unjustified and constitutes an abuse of discretion. (AG's Rhg. App., pp. 6-7; TURN/DRA's Rhg. App., p. 6.) TURN/DRA also contend that restricting the ability of parties to seek evidence of

[5] The AG and TURN/DRA also challenge the sufficiency of the evidence to support the Decision's determinations as a result of the discovery limitation. These challenges are addressed in Section II.B, *infra*.

consumer complaints from the carriers violated Code of Civil Procedure section 2017. (TURN/DRA's Rhg. App., p. 3.) They further assert that the restriction constitutes a violation of their due process rights. (TURN/DRA's Rhg. App., p. 7.) Finally, TURN/DRA maintain that the *May 2nd Ruling* is an arbitrary limit on discovery and sets a dangerous precedent for future cases. (TURN/DRA's Rhg. App., p. 7.) We do not find any of these claims compelling.

First, we disagree with the AG's and TURN/DRA's assertions that the limitation was not justified. As parties were aware, we had announced our intent to complete reconsideration of the stayed rules expeditiously and to issue a decision by the end of 2005. (D.05-01-058, pp. 4-5 (slip op.).) However, based on comments made at the prehearing conference, the Assigned Commissioner had good reason to believe that the broad discovery requested by the AG would significantly delay our ability to complete the reexamination of the stayed rules and prevent us from adopting a revised G.O. 168 in a timely manner. Thus, there was a justifiable reason to limit discovery.

There was also no abuse of discretion procedurally in the Assigned Commissioner's actions. Since this was a quasi-legislative hearing, there was no absolute right to hearings or discovery. (See generally, Pub. Util. Code, §§ 1701.1 & 1701.4.) Rather, determining the scope of the proceeding and any limitations on discovery is within the Presiding Officer's duties. (See Pub. Util. Code, § 1701.1, subd. (b).) Further,

> At the time of the ruling, no carrier had voluntarily put its own consumer complaint data in issue by relying on such data, so it was not procedurally inequitable to the opposing parties to circumscribe the limits of discovery in this fashion.

(D.06-03-013, p. 142.) While the AG and TURN/DRA would have liked the administrative record to contain more evidence to support their position, this is not a basis to conclude that the limitation on discovery was an abuse of discretion.

Additionally, although we limited the amount of complaint data in the record, parties were able to analyze the data in the record and present their conclusions of its significance. (D.06-03-013, p. 140.) As TURN acknowledges, the consumer groups were able to use other resources to present their arguments, including the complaint data filed with the Commission. (*Opening Brief of The Utility Reform Network*, filed October 24, 2005, pp. 4-5.) Further, the underlying proceeding is quasi-legislative in nature, and we were acting in our quasi-legislative capacity when adopting G.O. 168. Thus, while there must be a record to support the Commission's findings, parties do not have an absolute right in this instance to present evidence. (See generally, *Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288, 292.) Accordingly, limiting the amount of consumer complaint data in the record would not constitute a denial of due process.[6]

TURN/DRA are further mistaken in their assertion that we must comply with the rules of discovery contained in the Code of Civil Procedure. The Commission's Rules of Practice and Procedure state: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." (Cal. Code Regs., tit. 20, § 13.6, subd. (a).) As discussed above, parties were allowed to present evidence concerning customer complaint data and afforded sufficient due process. These actions are in accordance with Rule 13.6(a). Moreover, even if the Code of Civil Procedure did apply in this instance, TURN/DRA's

[6] We do note, however, that TURN/DRA identify a point of confusion. In our discussion of whether the *May 2nd Ruling* complied with due process requirements, we note: "We concur with the Assigned Commissioner that [the *May 2nd Ruling*] was necessary to move the proceeding forward in the face of what almost certainly would have been unacceptable delays over the significance and discoverability of carriers' interactions with their customers." (D.06-03-013, pp. 141-142.) However, the concerns over possible delays in the proceeding were raised during the prehearing conference, not in the *May 2nd Ruling*. Further, the statement is not relevant to our due process analysis and, thus, appears out of place. Therefore, we shall modify the Decision to eliminate this statement and add further explanation why there was no due process violation with respect to the *May 2nd Ruling*.

assertions are without merit. Section 2017.010 of the Code of Civil Procedure states in relevant part:

> *Unless otherwise limited by order of the court in accordance with this title*, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

(Code Civ. Proc., § 2017.010 (emphasis added).) A court may "limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).) As counsel for T-Mobile noted, the discovery requested by the AG would likely have resulted in significant delays in the proceeding, thus thwarting the Commission's desire to complete its reexamination of the stayed rules by the end of 2005. Additionally, it appeared that the complaint data filed at the Commission had not previously been analyzed and that it was unknown whether the discovery requested by the AG existed. (RT PHC, pp. 30:5 – 31:5.) In light of these considerations, the decision to limit discovery would be consistent with Code of Civil Procedure section 2017.020(a). Accordingly, there is no basis for finding legal error.

B. Evidentiary Challenges

1. The Decision is supported by record evidence.

Both the AG and TURN/DRA maintain that as a result of limiting the consumer complaint data to only those filed with the Commission, the Commission erroneously concluded that there was an inadequate level of complaints to warrant imposing the regulations proposed by the consumer groups. (AG's Rhg. App., pp. 6-7; TURN/DRA's Rhg. App., p. 6.) Additionally, TURN/DRA charge that the limitation on

discovery resulted in an "incomplete record." (TURN/DRA's Rhg. App., p. 3.) The AG further disputes the Commission's conclusion that the evidence in the record did not support retaining the stayed rules or the Non-telecommunications Billing Rules. It maintains that the Decision relied on "insubstantial evidence" and "fail[ed] to consider uncontroverted and weighty evidence" supporting a different conclusion. (AG's Rhg. App., p. 10.) These assertions are without merit.

As part of its evidentiary challenge, the AG includes various examples of what it considers to be insufficient evidence. (AG's Rhg. App., pp. 11-14.) These examples, however, demonstrate that the AG believed that the Commission needed **more** evidence to support its conclusions, not that there was **no** evidence to support the Commission's conclusions. For example, the AG challenges Findings of Fact. Nos. 14 and 15 on the grounds that there is no record evidence of the "actual costs" that would be incurred by carriers if the stayed rules were reinstated and that the Commission should not rely on statements made by the carriers' and their witnesses concerning the economic incentives for carriers to retain existing customers absent actual evidence demonstrating that the statements are true.[7] (AG's Rhg. App., p. 13.) However, courts have held that if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187.) Further, "a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary." (*Halstead v. Paul* (1954) 129 Cal.App.2d 339, 341 [citations omitted].) In this instance, the record contains

[7] Finding of Fact No. 14 states: "Carriers introduced credible evidence that detailed prescriptive regulations would impose significant new costs on them." Finding of Fact No. 15 states: "When customers have a choice of service providers, investments serve as 'hostages' that create economic incentives to maintain good reputations with customers." (D.06-03-013, p. 146 [Finding of Fact Nos. 14 & 15].)

testimony that implementing the stayed rules would result in increased costs for the carriers, and that for a small rural carrier, these costs would be prohibitively costly on a per customer basis. (See Exh. 6, pp. 3-4 (Stein/U.S. Cellular); see also Exh. 4, p. 14 (Herman/Nextel).) Further, there is testimony that in light of the numerous costs associated with acquiring new customers, the financial incentives to reduce customer turnover and the desire to maintain a good reputation, carriers have strong incentives to keep existing customers satisfied. (See Exh. 5, pp. 4-5 (Walden/Verizon); Exh. 2, p. 7 (Katz/CTIA).) Based on this record evidence, we reasonably inferred Findings of Fact Nos. 14 and 15.[8]

The AG further maintains that "parties could likely have shown a much higher rate of complaints" if they had been allowed to seek discovery of consumer complaints from the carriers. (AG's Rhg. App., p. 7.) However, we considered the consumer complaint data and concluded that it did not identify specific problems warranting new regulations. (D.06-03-013, pp. 21-22.) This determination is consistent with our policy to only adopt regulations in response to clear problems. Therefore, the fact that the AG could show higher complaint levels does not, by itself, demonstrate legal error.

For the reasons discussed above, our determinations in the Decision are supported by the record evidence. Accordingly, there is no basis for granting rehearing on this issue.

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[8] Similarly, we reasonably concluded that nationwide enforcements, such as the Assurance of Voluntary Compliance ("AVC"), may eliminate the need for further rules. This conclusion can reasonably be inferred by the fact that the AVC was signed by three major wireless providers, Cingular, Sprint and Verizon and the attorneys general of over 30 states and the testimony by Verizon that it has mostly standard business practices on a national basis, with uniform operations in its West Area. (Exh. 5, p. 16 (Walden/Verizon) [noting Verizon operates on a uniform basis in West Area].) Further, since the AVC contained similar provisions to what had been contained in the stayed rules, we had a reasonable basis to conclude that adopting specific rules to cover these same areas, such as disclosure, may not be necessary.

2. The Commission properly considered and weighed the evidence in the record.

Both the AG and TURN/DRA raise various challenges with respect to our consideration of the evidence in the record. The AG asserts that the Commission abused its discretion because it allegedly "used different standards to evaluate the evidence depending on whether it included or excluded rules." (AG's Rhg. App., p. 7.) Further, the AG contends that the Decision contains "contrary reasoning" because the Commission uses the same rationale to include certain rules and exclude other rules. (AG's Rhg. App., pp. 8-9.) TURN/DRA raise a similar argument concerning the Commission's rationale for including or excluding certain rules. They include a list of examples which they believe demonstrates that the Decision used inconsistent logic to achieve certain predetermined outcomes. (TURN/DRA's Rhg. App., pp. 15-21.)

As an initial matter, the AG's and TURN/DRA's criticisms generally reflect their unhappiness with our decision to change our policy in G.O. 168 to emphasize consumer education and enforcement of existing laws over adoption of prescriptive rules. However, such a change does not constitute legal error. (See *Motor Vehicle Mfrs. Assn. v. State Farm Mut., supra*, 463 U.S. at p. 42 [noting that "an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' (citation omitted) "].) As further discussed below, our determinations were reasonably drawn from the record and reflected our stated policy to craft narrow rules to address specific problems. (D.06-03-013, pp. 3-4.) Further, there is a "rational connection between the facts found and the choice made." (*Burlington Truck Lines, Inc. v. United States* (1962) 371 U.S. 156, 168.) Consequently, the arguments raised by the AG and TURN/DRA are unfounded.

Many of the alleged contrary statements in TURN/DRA's rehearing application are quoted out of context. When considered in context, we have, in fact, acted consistent with our stated policy. For example, TURN/DRA contend that the

Decision says that adopting rules that incorporate existing law would both cause clarification and confusion. (TURN/DRA's Rhg. App., p. 15.) A closer examination shows that the statements are not inconsistent. With respect to whether to retain the stayed rules addressing disclosure, privacy and consumer fraud was necessary, we determined that while there were many protections already available in the law, consumers were not aware of these protections. (D.06-03-013, p. 42.) Thus, we concluded that incorporating existing law would be confusing and that it would be more beneficial to educate consumers on how to make an informed choice. (D.06-03-013, pp. 115-117.) In contrast, we determined "many [parties] do not understand the key components of the existing cramming statutes." (D.06-03-013, p. 88.) Thus, adopting rules in this instance would serve to clarify the cramming statutes. Accordingly, we did not act inconsistently when we determined that incorporation of existing laws may be confusing in certain situations, while necessary for clarification in others.

The AG and TURN/DRA further maintain that the Commission used different burdens of proof when considering complaints and costs for compliance.[9] (AG's Rhg. App., pp. 7-9; TURN/DRA's Rhg. App., p. 18.) They maintain that if the Commission required the consumer groups to establish a baseline before finding complaints were excessive, then it should also require the carriers to provide actual evidence of costs for compliance. However, while consumer complaint data is both known and can be obtained, the projected costs to comply with proposed rules is unknown and would require the carriers to speculate on their costs for compliance. Thus,

[9] The AG's and TURN/DRA's assertions further imply that the Commission was biased in its consideration of the record evidence. This is also without merit. As previously explained, our determinations are based on record evidence. While the Applicants would have liked us to weigh all evidence equally or give more weight to their evidence, there is no basis for finding bias simply because we declined to do so.

the fact that we required greater analysis of known (i.e., consumer) data versus unknown (i.e., speculative costs) data is not legal error.

The AG also contends that the Commission "disregarded" surveys submitted by the consumer groups and incorrectly relied on an expert's opinion concerning the carriers' economic incentives to avoid consumer complaints. Additionally, the AG finds fault with the Decision's conclusions concerning the consequences of the Non-telecommunications Billing Rules and maintains the evidence presented would suggest a different conclusion. The AG argues that the Commission may not make any conclusions unless there is "affirmative evidence" to support them. (AG's Rhg. App., p. 14.)

Most of these assertions simply demonstrate the AG's disagreement with how we weighed the evidence in the record. While the AG believes we should have given more weight to evidence which supported retaining the stayed rules and the Non-telecommunications Billing Rules, this is not a basis for granting rehearing. (See *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915 [noting that it is the Commission and not the court that weighs the evidence].) Further, the AG cites to no authority to support its assertions that "affirmative" evidence must support each and every determination made by the Commission. As discussed above, reasonable inferences drawn from the record are sufficient, even if there is direct evidence to the contrary. (See *Lorimore v. State Personnel Board, supra,* 232 Cal.App.2d at p. 187; *Halstead v. Paul, supra,* 129 Cal.App.2d at p. 341.) In this instance, there is more than ample evidence to support our conclusions. Verizon Wireless noted that it operates on a uniform basis in its West Area, which comprises of 12 states and a part of Texas. (Exh. 5, p. 16 (Walden/Verizon).) Nextel witness Herman explained in detail the complexity and costs associated with developing state specific billing systems. (Exh. 4, pp. 4-15 (Herman/Nextel).) Further, as witness Katz pointed out, "a situation in which different states adopted their own, possibly conflicting, rules for authorization would also be expected to raise costs and trigger customer confusion." (Exh. 2, p. 32 (Katz/CTIA).) In

light of this, we reasonably inferred that the Non-telecommunications Billing Rules could impede billing developments in other states.[10] (D.06-03-013, p. 83.)

In sum, the allegations of inconsistency claimed by the AG and TURN/DRA are without merit. Accordingly, we find no grounds for granting rehearing.

C. The Decision shall be modified to clarify the applicability of the G.O. 168 rules.

In D.06-03-013, we expressed our desire for individuals with grievances based on G.O. 168 to bring these grievances to the Commission for resolution. As we explained, we were concerned that "private litigation may undermine the effectiveness of the Commission." (D.06-03-013, p. 59.) Consequently, we included the following limitation in all parts of G.O. 168: "These rules [adopted in G.O. 168] shall not be interpreted to create any new private right of action, to abridge or alter a right of action under any other statute or federal law, or to create liability that would not exist absent the foregoing rules." (D.06-03-013, Appendix A.)

Both the AG and TURN/DRA challenge this limitation on various grounds. The AG contends that prohibiting the use of the G.O. 168 rules in private actions is contrary to sections 243 and 2106.[11] Further, it maintains that there is insufficient evidence to prohibit private right of actions to all of the revised rules. Therefore, it asserts that the Commission has abused its discretion. (AG's Rhg. App., p. 15.) TURN/DRA maintain that the Commission cannot effectuate a prior restraint on a

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[10] We also note that the AG's main criticism concerning our action in this instance is that it believes that "evidence *suggests strongly* that technology or economics, not rules, are the primary reasons no telecommunications company has yet ventured into non-telecommunications billing in this country." (AG's Rhg., App., p. 14 (emphasis added).) Therefore, the AG is not alleging that our conclusions are not reasonably inferred from the record, but rather that it would have drawn a different conclusion from the evidence. This, however, is not a basis for granting rehearing.

[11] Section 243 prohibits waiver of a person's statutory rights. (Pub. Util. Code, § 243.) Section 2106 permits a private party to bring an action for damages against any public utility that violates a Commission order "in any court of competent jurisdiction." (Pub. Util. Code, § 2106.)

consumer's right of private action, as the Commission's claim of blanket preemption is both in violation of section 2106 and unsupported by case law. (TURN/DRA's Rhg. App., pp. 11-12.)

Upon consideration of the AG's and TURN/DRA's arguments, we find that we need to clarify our discussion concerning the applicability of the G.O. 168 rules. Our intent in limiting the applicability of the rules was not to foreclose the ability of private individuals from filing claims under section 2106 or limit any existing rights. Rather, it was to indicate that we believe that all alleged violations of the G.O. 168 rules should be brought to the Commission for resolution, as we have primary jurisdiction over these matters. (See, *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 295-296.) As discussed in the Decision, we shall be implementing a variety of consumer education programs and developing several initiatives to enhance enforcement of existing statutes and regulations as part of our consumer protection initiative. It is important that the interpretation and application of the rules are consistent with these programs and initiatives. Therefore, the Commission, and not the courts, should interpret the application of the G.O. 168 rules.

The arguments raised by the rehearing applicants suggests that they may have misunderstood our intent due to the use of the term "private right of action" Therefore, we shall modify the Decision and G.O. 168 to clarify that all parties alleging violation of the G.O. 168 Rules shall bring their complaints to the Commission for resolution.[12] Further, we shall modify Conclusion of Law No. 4 and delete Conclusion

[12] Although we modify the Decision in this respect, we are not restricting the ability of the AG or other law enforcement authorities to enforce consumer protection laws based on alleged violations of the G.O. 168 Rules. However, we would expect that these officials will consult with the Commission's General Counsel prior to initiating any such actions. (See generally *People ex rel Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132.)

of Law No. 30 and Ordering Paragraph Nos. 4 and 5. With these changes, we find no grounds for granting rehearing.

D. The Commission complied with the requirements of Public Utilities Code section 2896.

As part of its opening testimony, the Wireline Group prepared a list of existing laws and regulations protecting telecommunications consumers. (See Exh. 3.) In light of these existing laws and regulations, we determined that certain of the stayed rules were not necessary and should be repealed. (D.06-03-013, pp. 38-42.) The AG asserts that by failing to retain rules concerning disclosure of certain information by all telecommunications carriers, the Commission has failed to comply with section 2896. It argues that section 2896 requires the Commission to adopt rules that would create a "level playing field" among all types of telecommunications carriers. (AG's Rhg. App., p. 3.) TURN/DRA also argue that the Commission has an obligation to adopt disclosure rules pursuant to section 2896. Further, they maintain that the Decision incorrectly states that section 2896 imposes certain disclosure obligations on carriers. (TURN/DRA's Rhg. App., p. 21.) These arguments are without merit.

Section 2896 states:

> The commission shall require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following:
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> (a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services which it offers.
>
> (b) Ability to access a live operator by dialing the numeral "0" as an available, free option. The commission may authorize rates and charges for any operator assistance service provided subsequent to access.

> (c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.
>
> (d) Information concerning the regulatory process and how customers can participate in that process, including the process of resolving complaints.

(Pub. Util. Code, § 2896.) While the AG and TURN/DRA are correct that the Commission is responsible for requiring telecommunications to provide certain disclosure information, they are incorrect that section 2896 requires the Commission to adopt specific disclosure rules. Rather, section 2896 gives the Commission broad discretion to determine how to best meet this requirement.

The AG and TURN/DRA appear to believe that consumer protection and creation of a "level playing field" can only be achieved through the adoption of prescriptive rules. We do not. Rather, we feel that in this instance, these objectives can best be achieved through increased enforcement of existing laws and regulations, and education of consumers on the information necessary to make an informed choice of telecommunications services. (D.06-03-013, pp. 102-103 & 117-119.) As we stated in the Decision:

> "Consumer education is the cornerstone to empowering and protecting consumers in a competitive telecommunications market. Education coupled with clearly delineated rights, a competitive marketplace, and effective enforcement of regulations, laws, and guidelines arms consumers with the tools necessary to empower themselves when making decisions about telecommunications products and services."

(D.06-03-013, p. 110.) As specified in Appendix F of the Decision, we will be educating consumers on the information they should be requesting from carriers in order to make an informed choice. This includes the disclosure information listed in section 2896. The fact that we determined that this was the best means to meet the requirements of section

2896 is within our discretion and not a basis for finding legal error. Accordingly, we find no grounds for granting rehearing on this issue.

Finally, we note that TURN/DRA's arguments that the Decision has misstated the Commission's and carriers' obligations under section 2896 indicate that there is some confusion concerning our policy with respect to that code section. TURN/DRA are correct to the extent that carriers do not have an independent obligation to comply with section 2896, but rather that the Commission must require carrier compliance. However, TURN/DRA are mistaken that the Commission has not imposed such a requirement on the carriers. Although we believe we had signaled our intent to require carriers to comply with section 2896 in prior enforcement proceedings,[13] to eliminate any uncertainty, we hereby state that all telecommunications carriers are required to provide the information and services mandated in section 2896 to their customers. In particular, carriers shall provide the disclosure information listed in section 2896(a) and (d) in a manner which will permit consumers to make an informed choice. Moreover, we put all carriers on notice that we intend to enforce these provisions if the carriers fail to adequately inform consumers.

E. The Decision complies with Public Utilities Code section 321.1.

The AG maintains that the Decision did not analyze the economic consequences of carriers' conduct absent the stayed rules. Consequently, it contends that the Commission violated section 321.1 when it repealed the stayed rules. (AG's Rhg. App., pp. 9-10.) This challenge is without merit.

Section 321.1 states in pertinent part: "It is the intent of the Legislature that the commission assess the economic effects or consequences of its decisions as part of

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[13] See, e.g., *Utility Consumers Action Network v. Pacific Bell* [D.01-09-058] (2001) __ Cal.P.U.C. 3d __.

each ratemaking, rulemaking, or other proceeding, and that this be accomplished using existing resources and within existing commission structures." (Pub. Util. Code, § 321.1.) The plain language of the statute only requires the Commission to "assess" the economic effects of a decision. It does not require the Commission to perform a cost-benefit analysis or consider the economic effect of its decision on specific customer groups or competitors.

In this instance, we have complied with the requirements of section 321.1. The Assigned Commissioner specifically requested that parties address the costs and benefits of any proposed solutions on consumers and carriers during evidentiary hearings. (*Assigned Commissioner's Ruling Establishing Hearing Procedures*, dated September 19, 2005, p. 2.) On pages 17-35 of the Decision, we discussed this evidence as part of our consideration whether to retain the stayed rules and concluded that "in the absence of a convincing showing that most prescriptive rules would effectively respond to real problems, we decline to impose most of the rules included in the original G.O. 168." (D.06-03-013, p. 35.) The fact that the AG is unhappy with our conclusion, however, does not constitute a violation of section 321.1 and is not grounds for granting rehearing.

F. The Commission properly denied the *Motion of The Utility Reform Network Seeking the Recusal of Commissioner Kennedy and Her Removal as Assigned Commissioner*.

On May 31, 2005, TURN filed a motion seeking the recusal of Commissioner Kennedy and her removal as Assigned Commissioner. (*Motion of The Utility Reform Network Seeking the Recusal of Commissioner Kennedy and Her Removal as Assigned Commissioner ("TURN's Motion"),* filed May 31, 2005.) *TURN's Motion* alleged that Commissioner Kennedy met the disqualification standard set forth in *Association of Nat. Advertisers, Inc. v. F.T.C. ("ANA")*, (D.C. Cir. 1979) 627 F.2d 1151. (*TURN's Motion*, p. 5.) The Decision denied *TURN's Motion* on the ground that it was moot, as Commissioner Kennedy had resigned from the Commission on December 31,

2005. (D.06-03-013, p. 143.) The Decision further determined that even if that were not the case, TURN's allegations were not supported by the facts. (D.06-03-013, p. 143.)

TURN challenges this portion of the Decision.[14] It maintains that the Decision erroneously concludes that *TURN's Motion* was moot, because the issue of an Assigned Commissioner's involvement in developing the record in the proceeding is both relevant to the adequacy and fairness of the determinations in D.06-03-013 and capable of repetition. (TURN/DRA's Rhg. App., p. 9.) In addition, it asserts that the Commission's mootness determination is a result of the Commission's delay in ruling on *TURN's Motion* in a timely manner. (TURN/DRA's Rhg. App., p. 9.) TURN further argues that the determination that the *Motion* has no factual basis is unsupported by the evidence, and therefore the Commission abused its discretion. (TURN/DRA's Rhg. App., p. 10.) Finally, TURN argues that the Decision makes no findings with respect to *TURN's Motion* and, thus, fails to comply with section 1705. (TURN/DRA's Rhg. App, p. 10.) These arguments are without merit.

As a general matter, we are not required to rule on a party's motion within a specified time period. Indeed, it is not uncommon for the Commission to dispose of procedural motions as part of a decision or order. Consequently, disposing of *TURN's Motion* in the Decision does not constitute an abuse of discretion. Since Commissioner Kennedy was no longer on the Commission at the time it was considered and voted on, the issue of whether she should be recused from voting on a decision arising out of the reexamination of the stayed rules was moot. Consequently, we properly dismissed this portion of *TURN's Motion* on mootness grounds.

Turning towards the remainder of TURN's arguments, we take this opportunity to articulate more clearly our grounds for denying TURN's motion. On this

[14] As noted in their rehearing application, DRA was not a party to TURN's Motion. (TURN/DRA's Rhg. App., p. 8, fn. 11.)

matter, we find that the facts alleged by TURN in its motion fail to meet the standards articulated in *ANA.* As explained in *ANA*, there is a general presumption of administrative regularity that can only be rebutted upon "a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." (*Association of Nat. Advertisers, Inc. v. F.T.C., supra,* 627 F.2d at p. 1170.) "The mere discussion of policy or advocacy on a legal question, however, is not sufficient to disqualify an administrator." (*Id.* at p. 1171.) Moreover, while courts recognize that parties have a right to an impartial decisionmaker, that does not mean the decisionmaker must be uninformed or hold no policy views. (*Id.* at p. 1174.) The facts relied on by TURN demonstrate, at best, that Commissioner Kennedy had strong views on the appropriate policy for consumer protection. However, these facts do not demonstrate that these views were set in stone or could not be changed in the course of the proceeding. (See, *Housing Study Group v. Kemp* (D.C. Cir. 1990) 736 F.Supp. 321, 333.) Further, as we have already discussed, we find that Commissioner Kennedy's role as Assigned Commissioner did not deny the consumer groups due process. Therefore, TURN has fallen far short of the clear and convincing showing required to have Commissioner Kennedy removed as Assigned Commissioner from this proceeding.[15]

Accordingly, we shall modify the Decision to clarify this point. Finally, we note that since disposition of *TURN's Motion* was not a material issue in this Decision, we were not required to make a finding under section 1705. However, for the sake of clarity, we shall modify the Decision to include further discussion and a conclusion of law disposing of the substantive claims raised in *TURN's Motion*.

[15] Had the issue of Commissioner Kennedy's recusal from voting on the decision not been rendered moot, it would have been denied on these same grounds.

G. Alleged Technical Errors

The AG alleges a number of technical errors in the Decision. (AG's Rhg. App., pp. 15-17.)[16] These alleged errors are discussed below.

The AG raises various arguments concerning inconsistency among various Conclusions of Law and circular statements arising out of the Commission's limitation on the private right of actions. (AG's Rhg. App., pp. 15-17.) TURN/DRA also point out that the language is confusing and needs to be clarified. (TURN/DRA's Rhg. App., pp. 13-14.) As discussed above, we are modifying the Decision to clarify the applicability of the G.O. 168 Rules. With these modifications, the alleged errors are rendered moot.

The AG also raises the technical challenges concerning the Consumer Right to Disclosure contained in Part 1 of G.O. 168 on the grounds that: (1) the first right is less protective of consumers than Business & Professions Code section 17500 and (2) the second right could be interpreted by carriers as an attempt to adopt the filed rate doctrine. (AG's Rhg. App., p. 16.) Both of these technical challenges reflect the AG's misunderstanding of the purpose of the Consumer Bill of Rights and Freedom of Choice Principles. As explained in the Decision, the enumerated rights and principles "serve the same purpose as a statement of legislative intent that will help guide governmental action to promote consumer protection and freedom of choice in a competitive telecommunications market." (D.06-03-013, p. 44.) We are unaware of any requirement that when a state agency proposes broad principles with respect to a certain policy, the principles must specifically mirror existing statutory language. Further, since the purpose of Part 1 is clearly stated as providing guidance to the *Commission*, it is unlikely that a *carrier* would see it as conferring some right or protection that it would not otherwise

[16] The AG also notes that the Non-Discrimination Right refers to "unreasonable prejudice and discrimination" and recommends that the phrase be revised to "prejudice and unreasonable discrimination." (AG's Rhg. App., p. 16.) We agree that this clerical error should be corrected.

have.[17] Accordingly, the AG is mistaken in its claim that the rights concerning disclosure are "confusing" and in need of "correction."

The AG next claims that "the description of the pre-paid phone card provisions at page 42 is loosely worded so as to add confusion" and requests that it be revised to track the statute. (AG's Rhg. App., p. 16.) However, the AG fails to explain what portion of the description it considers to be confusing. Further, we are unsure whether the alleged confusion is related to the Decision's description of Public Utilities Code section 885, discussed on page 41, or of Business & Professions Code section 17538.9(b), discussed on page 42. Consequently, we decline to make any changes to the Decision.

Finally, the AG contends that the Decision appears to exclude consumer groups from participating in the reinstituted Regulatory Complaint Resolution ("RCR") Forum. It maintains that clarification is necessary, as it believes it would be "improper to have such important matters as complaint resolution processes" addressed without input from consumer groups. (AG's Rhg. App., p. 16.) This argument, however, is based on policy, rather than legal grounds. Therefore, the AG has not demonstrated legal error and its request for clarification is denied.[18]

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[17] Indeed, the carriers themselves recognize that Part 1 is not a list of regulation, but a set of consumer protection principles to guide the Commission. (See *Reply Comments of CTIA-The Wireless Association on Proposed Decision of Commissioners Kennedy and Peevey*, filed January 23, 2006, p. 3, fn. 7.)

[18] Although we find that no clarification is necessary, we do note that while the Decision does not specifically include consumer groups as members of the RCR Forum, it also did not explicitly limit the reinstated RCR Forum to only Commission and carrier representatives. We believe that it is more appropriate to address whether and how consumer groups shall participate in the RCR Forum once the revised goals for the Forum are finalized. Further, the RCR Forum is one of several initiatives by the Commission to address consumer complaints. (D.06-03-013, pp. 94-102.) Thus, even if consumer groups are ultimately not part of the RCR Forum, this does not mean that consumers will not have a say in complaint resolution processes.

III. CONCLUSION

For the reasons discussed herein, we modify the Decision as set forth in the Ordering Paragraphs. Rehearing D.06-03-013, as modified, is denied.

THEREFORE IT IS ORDERED that:

1. D.06-03-013 is modified as follows:

a. The last paragraph of page 141, which continues onto page 142 is deleted and replaced with the following:

> "Finally we hold that no due process violation occurred when Commissioner Kennedy ruled to preclude discovery of carrier complaint records. Because this proceeding was quasi-legislative in nature, parties did not have an absolute right in this instance to present evidence.[19] In this instance, although the amount of complaint data was limited, the consumers groups were able to use other resources to present their arguments, including the complaint data filed with the Commission.[20] Further, at the time of the ruling, no carrier had voluntarily put its own consumer complaint data in issue by relying on such data, so it was not procedurally inequitable to the opposing parties to circumscribe the limits of discovery in this fashion."

b. Section 6, "Applicability of G.O. 168 Rules", commencing on page 58, is deleted in its entirety and replaced with the following:

> "**6. Applicability of G.O. 168 Rules**
>
> This Part discusses applicability of the G.O. 168 rules. Specifically we focus on the extent to which these rules may be the basis for court action by private individuals or public law enforcement officials.

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[19] See generally, *Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288, 292.

[20] *Opening Brief of The Utility Reform Network*, filed October 24, 2005, pp. 4-5.

> We are concerned that private litigation may undermine the effectiveness of the Commission. Instead, we believe that individuals with grievances based on the G.O. 168 rules should come to the Commission for resolution, as we know how resolution of an individual matter would affect our continuing policies and programs. Further, we have a staff dedicated to assisting consumers who have complaints about telecommunications carriers. These considerations convinced us to include limiting language regarding applicability of the rules in Part 2 (Consumer Protection and Public Safety Rules). The applicability section of Part 2 stated that "[t]hese consumer rights and regulations shall not be interpreted to create a private right of action or form the predicate for a right of action under any other state or federal law."[21]
>
> Parties to this proceeding criticize the applicability language in two different ways. On the one hand, the AG voices concerns that the private right of action language goes too far and may limit the AG's ability to bring cases under the Unfair Competition Law, Bus. & Prof. Code § 17200 et seq.[22] A violation of another statute or regulation may qualify as an unlawful act that is actionable under the Unfair Competition Law, and the AG fears that our applicability language may limit its authority to protect consumers from violations of the proposed rules.[23] On the other hand, the Wireline Group calls for tightening language regarding the private right of action and reasonable consumer standard even further, as it requests that we "expressly state that the rules should only be construed by the Commission."[24] It also requests that we

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[21] We included no equivalent provision in Part 3 (Rules Governing Slamming Complaints).

[22] AG Opening Comments, p. 11. DRA echoes these concerns. Reply Comments of the Division of Ratepayer Advocates on Commissioners Peevey and Kennedy's Proposed Decision on Telecommunications Consumer Bill of Rights, pp. 2-3 (Jan. 23, 2006) ("DRA Reply Comments").

[23] AG Opening Comments, p. 11.

[24] Wireline Group Opening Comments, p. 6. CTIA provides more general support for the private right of action language included in the decision. Reply Comments of CTIA – The Wireless Association on Proposed Decision of Commissioners Kennedy and Peevey, p. 3 (Jan. 23, 2005) ("CTIA Reply Comments").

extend the modified language to the slamming rules.[25] We assess and make modifications in response to both sets of comments below.

Our intent in drafting the decision's applicability language was to assert our jurisdiction over resolving grievances based on the G.O. 168 rules. There was no intent to restrict or limit any existing rights. As discussed elsewhere in this decision, we are implementing a variety of consumer education programs and developing several initiatives to enhance enforcement of existing statutes and regulations as part of our Consumer Protection Initiative. Consequently, resolution of any grievances arising from G.O. 168 needs to take into consideration our overall objectives and programs. Therefore, all violations of these rules should be brought to the Commission for resolution to ensure uniform application of the rules.[26]

This restriction does not limit the AG's ability to bring suit against a carrier under the Unfair Competition Law, Bus. & Prof. Code § 17200 et seq. Enforcement of the Public Utilities Code and our decisions by public law enforcement officials such as the Attorney General and district attorneys is essential for broader consumer protection. Under Pub. Util. Code § 2101, the Commission may request these public officials to assist the Commission in its enforcement program.

More importantly, collaboration with other law enforcement officials is to our mutual benefit. For example, penalties under the Unfair Competition Law and P.U. Code are cumulative, so coordination with local law enforcement officials may afford greater relief to California consumers. Moreover, while the Commission has primary jurisdiction to regulate utilities under the Public Utilities Code, actions by public law enforcement officials based upon the Commission's regulations are permitted as long as these actions are coordinated with the Commission and do not

[25] *Id.*

[26] See *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 295-296.

interfere with any of the Commission's regulatory policies.[27] Therefore, we would assume that these officials would coordinate any enforcement actions with the Commission's General Counsel prior to filing actions based upon the Public Utilities Code or our decisions and general orders to ensure consistency with the Commission's regulatory policies.

We therefore modify our applicability language to make our position clear. G.O. 168, as revised, states: "All claims alleging violations of these rules shall be brought to the Commission, which has primary jurisdiction over these matters." Also we modify our applicability language that specifically addresses our relationship with the AG. The new language provides: "The Commission intends to continue its policy of cooperating with law enforcement authorities to enforce consumer protection laws."

Our response to the Wireline Group's comments is mixed. Based on our clarification of the applicability language, we have indicated that the Commission has primary jurisdiction to interpret the G.O. 168 rules. With respect to the reasonable consumer standard in particular, we agree with the AG that we have no "specialized expertise that would suggest [we are] more capable than the courts to define a term used generally in consumer protection law."[28] We recognize that California courts already have defined the term "reasonable consumer,"[29] and we do not seek to create a scenario where "carriers and the public would have to operate under two different standards for the same concept."[30]

We do, however, agree that we should extend the applicability language and the reasonable consumer standard to all the rules adopted in the General Order. This extension provides consistency among the rules, as we have the same

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[27] *People ex rel Orloff v. Pacific Bell*, *supra*, 31 Cal.4th at p. 1151.

[28] AG Reply Comments, p. 2.

[29] *See, e.g., Lavie v. Proctor & Gamble Co*., 105 Cal. App. 4th 496, 504-513 (Cal. 2003) (applying the reasonable consumer standard to a case brought under the Unfair Competition Law).

[30] AG Reply Comments, pp. 2-3.

response to these issues in all rules that we adopt. Also our modifications to the applicability language sufficiently address the AG's concern that this extension would "weaken[] any enforcement possibilities."[31] Thus we modify language regarding the applicability of the rules and the reasonable consumer standard, and extend this text to all rules included in G.O. 168.

c. Conclusion of Law No. 4 on page 150 is deleted and replaced with the following:

"4. All violations of the G.O. 168 rules shall be brought to the Commission, which has primary jurisdiction over these matters."

d. Conclusion of Law No. 30 on page 152 is deleted.

e. Ordering Paragraph No. 4 on page 154 is deleted.

f. Ordering Paragraph No. 5 on page 154 is deleted.

g. Section 16.1, "Motion of TURN to Recuse Commissioner Kennedy", commencing on page 142 is deleted in its entirety and replaced with the following:

"**16.1 Motion of TURN to Recuse Commissioner Kennedy**

On May 31, 2005, TURN filed a motion seeking the recusal of Commissioner Kennedy and her replacement as Assigned Commissioner.[32] Since Commissioner Kennedy was no longer serving on the Commission as of January 1, 2006, TURN's request that she be recused from voting on any decision arising from this proceeding is now moot.

[31] *Id*. at 2.

[32] Motion of TURN Seeking the Recusal of Commissioner Kennedy and Her Replacement as Assigned commissioner (May 31, 2005) ("Recusal Motion"),

Moreover, we find that the facts alleged by TURN[33] fail to meet the standard articulated in *Association of Nat. Advertisers, Inc. v. F.T.C. ("ANA")*, (D.C. Cir. 1979) 627 F.2d 1151.[34] As explained in *ANA*, there is a general presumption of administrative regularity that can only be rebutted upon "a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."[35] "The mere discussion of policy or advocacy on a legal question, however, is not sufficient to disqualify an administrator."[36] Moreover, while courts recognize that parties have a right to an impartial decisionmaker, that does not mean the decisionmaker must be uninformed or hold no policy views.[37] The facts relied on by TURN in its Recusal Motion demonstrate, at best, that Commissioner Kennedy had strong views on the appropriate policy for consumer protection. However, these facts do not demonstrate that these views were set in stone or could not be changed in the course of the proceeding.[38] Accordingly, we find that TURN has failed to establish that Commissioner Kennedy should have been recused from this proceeding. For these reasons, we deny the Recusal Motion."

h. The following Conclusion of Law is added:

"40. TURN's motion seeking the recusal of Commissioner Kennedy and her replacement as Assigned Commissioner should be denied on two grounds: (i) the motion is moot, and (ii) TURN failed to provide facts that meet the recusal standard articulated in *Association of Nat. Advertisers, Inc. v. F.T.C. ("ANA")*, (D.C. Cir. 1979) 627 F.2d 1151."

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[33] Recusal Motion, p. 5.

[34] *See* Recusal Motion, pp. 6-12.

[35] *Association of Nat. Advertisers, Inc. v. F.T.C., supra*, 627 F.2d at p. 1170.

[36] *Id*. at p. 1171.

[37] *Id.* at p. 1174.

[38] See *Housing Study Group v. Kemp* (D.C. Cir. 1990) 736 F.Supp. 321, 333.

2. General Order 168 is modified as follows:

a. In Part 1, "Consumer Bill of Rights and Freedom of Choice", the Non – Discrimination Right is modified to read:

> "Consumers have the right to be treated equally to all other similarly-situated consumers, free from prejudice or unreasonable discrimination."

b. In Part 2, "Consumer Protection and Public Safety Rules", the fifth paragraph in Section A, "Applicability" is deleted and replaced with the following:

> "Parties with grievances based upon the rules contained in this Part shall bring these complaints to the Commission, which has primary jurisdiction over these matters."

c. In Part 3, "Rules Governing Slamming Complaints", the fifth paragraph in Section A, "Purpose and Scope" is deleted and replaced with the following:

> "Parties with grievances based upon the rules contained in this Part shall bring these complaints to the Commission, which has primary jurisdiction over these matters."

d. In Part 4, "Rules Governing Cramming Complaints", the fourth paragraph in Section A, "Applicability" is deleted and replaced with the following:

> "Parties with grievances based upon the rules contained in this Part shall bring these complaints to the Commission, which has primary jurisdiction over these matters."

3. Rehearing of Decision 06-03-013, as modified, is denied.

This order is effective today.

Dated December 14, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners