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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER MODIFYING DECISION (D.) 07-10-013 AND DENYING REHEARING OF THE DECISION AS MODIFIED

This order addresses applications for rehearing of the decision in Phase II of our proceedings to implement "DIVCA," the Digital Infrastructure and Video Competition Act of 2006. That act is codified at sections 440-444 and 5800-5970 of the Public Utilities Code[1] and at section 107.7 of the Revenue and Tax Code. DIVCA establishes a regulatory scheme under which companies providing video and broadband services are to be regulated—in certain respects—by this Commission. (Cf., Pub. Util. Code, § 5810.) These companies are referred to here as "franchise holders." Our Phase II proceeding addressed several matters, including the two issues raised in the rehearing applications: whether certain data met previously established criteria and should, therefore, be provided to us by franchise holders; and the compensation of intervenors in proceedings relating to DIVCA. As discussed in detail below, we have carefully considered the allegations raised in the rehearing applications and have concluded that, when the holdings of our decisions are properly understood,

[1] In this document, section references indicate the Public Utilities Code, unless otherwise specified.

these claims do not demonstrate error. We will modify our decision to make its reasoning clear and deny rehearing of the decision as modified.

I. BACKGROUND

After DIVCA became law, we conducted the first phase of our proceedings to implement the statute, which resulted in the "Phase I Decision," *Procedures to Implement DIVCA* [D.07-03-014] (2007) __ Cal.P.U.C.3d __, as modified by *Modifying D.07-03-014 and Denying Rehearing* [D.07-11-049] (2007) __ Cal.P.U.C.3d __.[2] The Phase I Decision outlined the nature of the authority DIVCA conferred on us, and adopted our General Order No. 169 ("GO 169"), which contains a series of rules implementing the statute.

Some parties challenged the Phase I Decision by filing applications for rehearing and we denied rehearing in *Modifying D.07-03-014 and Denying Rehearing, supra*. Subsequently, several parties filed petitions for writ of review in the California Court of Appeal. The Court summarily denied these several writ petitions.[3] Although the summary denial of a petition for writ of review does not have the effect of *stare decisis*, it is, nevertheless, a "decision on the merits" and has "the conclusive effect of res judicata ...." (*People v. Western Airlines, Inc.* (1954) 43 Cal.2d 621, 630.) As a result, the issues resolved in the Phase I Decision are now "conclusive" here. (Pub. Util. Code, § 1709.) Further, no court now has jurisdiction to hear "a cause of action arising out of" the Phase I Decision because that the statutory deadline for challenging that decision has passed. (Pub. Util. Code, § 1731, subd. (b)(1).)

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[2] The Phase I Decision was further modified by *Opinion Modifying D. 07-03-014* [D.07-04-034] __ Cal. P.U.C.3d __, which corrected the form of the Video Franchise Certificate. In addition, *Decision Amending General Order 169* [D.08-07-007] (2008) __ Cal.P.U.C.3d __ addressed deadlines, bonding requirements, and the "broadband speed tiers" used in reporting requirements.

[3] (*TURN v. Public Utilities Com.* (May 8, 2008, A120066) [nonpub. order]; *City of Oakland v. Public Utilities Com.* (May 8, 2008, A119929) [nonpub. order] *City of Carlsbad v. Public Utilities Com.* (May 8, 2008, A 120527) [nonpub. order].)

Both the issues raised in the applications for rehearing we are reviewing today were addressed in the Phase I Decision. That decision held that the intervenor compensation provisions of the Public Utilities Act do not apply to proceedings under DIVCA. (Cf., Pub. Util. Code, § 1801-1822.) After considering submissions made by The Utility Reform Network ("TURN") and the Greenlining Institute ("Greenlining"), the Phase I Decision held that we lack statutory authority to award intervenor compensation because the relevant "statutes limit the intervenor compensation program to proceedings involving utilities." (Phase I Decision at p. 208.) DIVCA specifically states that the entities covered by that act are not public utilities. (E.g., Pub. Util. Code, § 5810, subd. (a)(3).)

The Phase I Decision also addressed the type of information we would need in order to exercise the regulatory and enforcement authority DIVCA had conferred upon this Commission. (See Phase I Decision, at pp. 127, 146-147, 284.)[4] The Phase I Decision determined that our authority included the ability to obtain from franchise holders "information necessary for the enforcement of specific DIVCA provisions …." (*Id.* at p. 152.) The Phase I Decision determined that DIVCA's public disclosure requirements—set forth in sections 5920 and 5960—could be "tailor[ed]" to provide much of the information we needed to enforce DIVCA. (*Id*. at p. 178.) However, that decision also held that we had further authority under DIVCA to require franchise holders to provide additional information, because we had "authority to take action as necessary" to enforce certain specific requirements set forth in DIVCA. (*Id.* at pp. 152, 174 (describing extent of enforcement authority).)

The Phase I Decision adopted two criteria that we would use to determine when we should exercise this authority to obtain additional information. We held that we

[4] The Phase I Decision is unpublished, and this order cites to the page numbers in the official version, which is contained in this Commission's formal files and is made available in "PDF" format on our web site. In places, the Phase II Decision cites to the "WORD" version of the Phase I Decision. Consequently, some page number references given in the Phase II Decision will not match the page numbers cited to in this order.

would only require the reporting of additional information if that information was: (i) "truly necessary" for (ii) "the enforcement of specific DIVCA provisions under our regulatory authority." (Phase I Decision at p. 152.) The Phase I Decision also applied these criteria. For example, we found that certain information regarding community centers should be reported, and included rules regarding this information in GO 169. (E.g., Phase I Decision at pp. 150, 152-153; G.O. 169, § VII. D.) The Phase I Decision also included within GO 169 section VII.G which explicitly "reserves the authority to require additional reports" from franchise holders.

In addition, the Phase I Decision found that further consideration should be given to this issue. In the second phase of these proceedings we decided to determine whether any other information met our criteria and, therefore, should be obtained under our regulatory and enforcement authority. (Phase I Decision at p. 147.) We ordered that the Phase II proceedings take up this question and "consider whether the Commission needs additional, more detailed … information for enforcement of specific DIVCA provisions." (*Id.* at p. 284.)

After we conducted the second phase of proceedings, we issued the "Phase II Decision" *Resolving Issues in Phase II* [D.07-10-013] (2007) __ Cal.P.U.C.3d __. Among other things, the Phase II Decision determined that franchise holders must report how many video customers they have in each census tract where they provide video services.[5] This information is referred to as video "subscribership data." The Phase II Decision determined that this information should be reported because it met the two criteria set forth in the Phase I Decision: we needed video subscribership data, and that data related to DIVCA's antidiscrimination provisions. (Phase II Decision at p. 44 (Finding of Fact 4).) Also relevant here, the Phase II Decision followed the Phase I

[5] The Phase II Decision also: (i) established "safe harbor" requirements for "smaller" franchise holders, (ii) amended our Rules of Practice and Procedure, (iii) corrected the attachments to the Phase I Decision, and (iv) determined to address the renewal of video franchises in 2011. Following the issuance of the Phase II Decision, we extended the funding mechanism for our regulatory costs through fiscal year 2012-2013 in *Decision Modifying D.07-10-014* [D.09-04-011] (2009) __ Cal.P.U.C.3d. __.

Decision's holding that intervenor compensation will not be awarded for participation in proceedings related to DIVCA. (Phase II Decision at p. 49.)

Three parties filed applications for rehearing of the Phase II Decision. TURN filed an application for rehearing asserting that the determination not to award intervenor compensation was in error, incorporating by reference claims of error TURN made against the Phase I Decision. AT&T California ("AT&T") and Verizon California, Inc. ("Verizon") filed applications alleging that we do not have authority to obtain subscribership data from franchise holders. These two parties also disagree with our finding that we needed subscribership data to enforce DIVCA's antidiscrimination provisions.

Responses to the rehearing applications were filed by the Division of Ratepayer Advocates ("DRA"), the California Cable and Telecommunications Association ("CCTA"), and AT&T.[6] DRA's response asserts that the Phase I Decision definitively resolved the question of our authority to obtain information from franchise holders, and that AT&T's and Verizon's rehearing applications are statutorily barred. DRA also contends that the requirement to provide subscribership data is consistent with DIVCA's provisions.

Similarly, AT&T's response claims that TURN's rehearing application is statutorily barred because questions of intervenor compensation were resolved in the Phase I Decision. CCTA argues that TURN's claims are invalid as well. CCTA further states that Verizon's rehearing application correctly describes DIVCA's reporting requirements. CCTA also states its agreement with the view that subscribership data is not needed to enforce DIVCA's antidiscrimination provisions.

[6] AT&T's response states, at page 1, that a rehearing application was filed by Greenlining, but the formal record of this proceeding does not contain such an application for rehearing.

II. DISCUSSION

The two different aspects of the Phase II Decision addressed in the rehearing applications are discussed separately, below.

A. Claims Regarding Intervenor Compensation

In the Phase I Decision, we considered whether or not we could award intervenor compensation to those parties that represented consumer interests in proceedings involving DIVCA. We determined that the intervenor compensation provisions in the Public Utilities Act only apply in proceedings involving public utilities. (Phase I Decision at p. 209; see also Pub. Util. Code, § 1801.2, subd. (a).) We further determined that DIVCA classified video services as a separate service, to be distinguished from public utility service. (Phase I Decision at p. 209; see also Pub. Util. Code, § 5910, subd. (a)(3).) As a result, the Phase I Decision concluded that the Commission did not "have the authority to impose intervenor compensation obligations on video franchise holders. State video franchise customers, i.e., customers of a non-utility service, are not afforded the same statutory right to intervenor compensation funding like traditional utilities customers." (Phase I Decision at p. 209.)

As TURN notes in its application for rehearing, TURN alleged that the Phase I Decision was in error when it made this determination. TURN's application for rehearing of the Phase I Decision was still pending when the Phase II Decision issued, and in the absence of a rehearing, the Phase II Decision followed the Phase I Decision's holdings. TURN's rehearing application addressed the portions of the Phase II Decision that it believed would have been in error had it prevailed in its challenge to the Phase I Decision on this issue.

This question has now been conclusively resolved. *Modifying D. 07-03-014* [D.07-11-049], *supra,* denied TURN's application for rehearing of the Phase I Decision and the Court of Appeal summarily denied TURN's petition for writ of review on this question. (*TURN v. Public Utilities Com.* (May 8, 2008, A120066) [nonpub. order].) As a result, the Phase I Decision's findings are "conclusive" and no longer subject to challenge. (Pub. Util. Code., § 1709.) When this Commission's "determinations within

its jurisdiction have become final they are conclusive in all collateral actions and proceedings." (*People v. Western Airlines, supra*, 42 Cal.2d at p. 630.) TURN's application for rehearing should, therefore, be denied for reasons of issue preclusion, and because it fails to demonstrate error. It has now been conclusively established that the determination not to award intervenor compensation in proceedings under DIVCA was legally correct.

B. Claims Regarding the Reporting of Video Subscriber Information

1. Verizon and AT&T's Main Claims Rely on an Interpretation of DIVCA's Reporting Provisions

Verizon and AT&T challenge our determination to exercise the regulatory and enforcement authority conferred upon us by DIVCA by requiring franchise holders to provide us with video subscribership data. (See Phase II Decision at p. 48.) These two parties base their challenge on an interpretation of DIVCA derived from the statute's annual, public disclosure provisions (sections 5920 and 5960), which they assert contain the only provisions establishing the scope of our authority to obtain information. Verizon and AT&T also rely on portions of DIVCA's franchising provisions (section 5840). AT&T claims broadly that under DIVCA, "the Commission has very limited authority over video services and video service providers." (AT&T's Rehearing Application at p. 1.) Verizon's rehearing application advances several more specific arguments to support its conclusion that "DIVCA as lawfully interpreted expressly prohibit[s] such reporting." (Verizon's Rehearing Application at p. 6 (emphasis omitted).) Both rehearing applications also discuss the statute's legislative history. (E.g., AT&T's Rehearing Application at p. 3.)

DIVCA is a complex statute that contains a wide variety of provisions. Our Phase I Decision, which outlines the nature of the regulatory scheme established under DIVCA, is 284 pages long. Analyzing the claim that an implicit restriction on our authority to gather information is to be found by applying techniques of statutory interpretation to sections 5840, 5920 and 5960 requires consideration of DIVCA's

statutory language in light of the legislation's overall nature and purposes. "The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. To do so, a court first examines the actual language of the statute, giving the words their ordinary common sense meaning." (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406.) We will take that approach in this order. The portions of DIVCA that set forth the Legislature's explicit statements of intent and the relevant statutory requirements are outlined in detail below, in Section II.B.2. Next, Section II.B.3 will summarize how the Phase I and Phase II Decisions implement that statutory language. After this overview, Section II.B.3 will discuss the merits of AT&T and Verizon's specific claims, concluding that AT&T and Verizon do not properly interpret the statute.

2. DIVCA Establishes a Uniform Regulatory Scheme Under Which We Have Authority to Investigate and Adopt Enforcement Measures

The main purposes of DIVCA, as described in its Legislative findings, are: (i) to spur increased competition, and (ii) to create a uniform regulatory scheme for all types of video service providers. (Pub. Util. Code, § 5810, subd. (a).) Under this scheme, the role of this Commission (and other authorities) is clearly delineated. DIVCA establishes this Commission as "the sole franchising authority" for video service providers. (Pub. Util. Code, § 5840, subd. (a).) Although franchise holders are not regulated as public utilities they are subject to numerous specific requirements. (E.g. Pub. Util. Code, §5890.) The act also sets up a mechanism to fund our activities, guaranteeing that there will be "adequate staff… to ensure full compliance with the requirements of this division [i.e., DIVCA]." (Pub. Util. Code, § 5810, subd. (a)(3).)

Prior to DIVCA, the two different types of companies that provided video services were subject to different sets of inconsistent regulation. Cable companies (which historically provided only television service) were exempt from all but incidental regulation by this Commission. (*Television Transmission, Inc. v. Public Utilities Com.* (1956) 47 Cal.2d 82.) Cable companies were regulated by local governments, from whom they obtained numerous, geographically limited, franchises in exchange for paying

fees. (See Gov. Code, § 53066; cf. Pub. Util. Code, § 5840, subd. (a).) On the other hand, we regulated telephone corporations (which historically provided voice telephone service) as utilities. (Pub. Util. Code, §§ 216, 234.1.) In contrast, telephone companies generally operated as statewide concerns, and were not subject to local regulation. (*Orange County Air Pollution Control Dist. v. Public Utilities Com.* (1971) 4 Cal.3d 945, 951.)

When advances in technology made it possible for cable and telephone companies to provide similar services, competition between there firms was hampered by the overlapping regulatory structure. (See Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 2987 (2005-2006 Reg. Sess.) as Amended August 28, 2006, page 2.) DIVCA dismantled this system and made the offering of video services subject to a single set of rules, under a single state-wide franchise. (E.g., Pub. Util. Code, § 5840.) The statute specified which of its rules would be administered by us, and what role local governments would play. (E.g., Pub. Util. Code, § 5970, subd. (g).)

The Legislature expected that this regulatory regime would establish a "level playing field" where all service provides were subject to the same rules, and that competition would increase. (Pub. Util. Code, § 5810, subd. (a)(2)(A).) This, in turn, was expected to provide public benefits, such as increasing the deployment of video and broadband services, decreasing the price of these services, and stimulating the overall economy. (Pub. Util. Code, § 5810, subds. (a)(1), (a)(2).)

Part of DIVCA's single set of rules is the statewide franchise that is applicable to all companies that provide video services. (See, Pub. Util. Code, § 5810, subd. (a)(4).) Section 5840, subdivision (a) ("section 5840(a)") establishes this Commission as the franchising authority, and makes provisions in the Government Code establishing the previous regulatory structure inapplicable. Under DIVCA, we play a role that is different from the role we play as a utility regulator. We are to issues franchises and regulate franchise holders according to the requirements of DIVCA, rather than pervasively regulating franchise holders as utilities. (Compare, Pub. Util. Code, §§ 5820(c) (video franchise holders not utilities) with Pub. Util. Code, §§ 451, 454,

701, 761, (extensive regulation of utilities).) In other industries, we also exercise authority over non-public-utility firms. For example, moving companies are not public utilities, but are regulated by this Commission under the Household Goods Carriers Act. (Pub. Util. Code, §§ 5101-5535.)

Notably, economic regulation of franchise holders' rates and financial activities is not provided for in DIVCA. The role established for us in DIVCA reflects the Legislature's determination that the benefits of improved video and broadband services should be achieved by fostering competition between video franchise holders, as opposed to through hands-on regulation. (Cf., Pub. Util. Code, § 5810, subd. (a)(1).) The Phase I Decision determined that this Commission's role in reviewing and approving franchise applications was essentially ministerial, with our authority being strictly constrained. (Phase I Decision at p. 93.) By way of contrast, DIVCA gives us an important role in ensuring that franchise holders follow certain standards as they build out their networks and serve customers. DIVCA establishes both general and specific requirements that franchise holders must follow. (E.g., Pub. Util. Code, § 5890, subds. (a)-(e).) We are charged with enforcing both these provisions and DIVCA as a whole, and we have authority to open investigations and impose various sanctions on franchise holders. (Pub. Util. Code, § 5890, subds. (g)-(h).)

Also relevant here, DIVCA contains several provisions addressing this Commission's authority to obtain the information it needs to discharge its mandate under DIVCA. As noted above this Commission has authority to "open an investigation on its own motion" to enforce DIVCA. (Pub. Util. Code, § 5890, subd. (g).) This Commission also has authority to obtain "information and reports ... at the time or times it specifies, to enable it to determine" the amount of the user fee established under DIVCA. (Pub. Util. Code, § 433, subd. (a).)

Additionally, DIVCA contains two annual, public disclosure requirements for franchise holders. Under section 5960, franchise holders must provide us with certain information, which, in turn, we are required to aggregate (so private and commercially sensitive data is obscured) and report to the Governor and the Legislature. (Pub. Util.

Code §, 5960, subds. (c), (d).) This information includes: the number of broadband subscribers (on a census tract basis), the number of customers who are offered video service, and the number of low-income customers who are offered video service. Similarly, franchise holders with more that 750 employees in California must provide us with employment information, including, for example, "types and numbers of jobs by occupational classification held by residents of California … and the average pay and benefits of those jobs …." (Pub. Util. Code, § 5920, subd. (a)(3).) We must report this employment information to Legislative committees, and place the information on the internet. (Pub. Util. Code §, 5920, subd. (b).)

3. The Phase I Decision Definitively Established the Parameters of Our Enforcement Authority

The Phase I Decision provided detailed guidance on how we would implement DIVCA. (E.g., Phase I Decision at pp. 14-103 (process for issuing franchises).) Relevant here, the Phase I Decision described how we would carry out the regulatory and enforcement responsibilities that DIVCA conferred on us. (*Id.* at pp. 154-199.) The Phase I Decision also discussed the reporting requirements we planned to include in GO 169 and how those requirements would assist us as we exercised our regulatory and enforcement powers. (*Id.* at pp. 127-154.)

The Phase I Decision determined that we would exercise our enforcement powers in those areas where DIVCA had "expressly identified" our "authority to regulate[.]" (Phase I Decision at p. 174.) Those areas are: franchising, antidiscrimination and build out, reporting, the use of rate increases for stand-alone services to subsidize video deployment, and annual user fees. (*Ibid.*) We determined that we would conduct the investigations mandated by DIVCA in those areas—including questions of discrimination. (*Id.* at p. 175.)

This description of how we would exercise our authority reflected the nature and extent of the authority conferred on us by DIVCA. As noted above, although DIVCA gives us authority to issue franchises and to regulate franchise holders, we do not act as a utility regulator under DIVCA. (Pub. Util. Code, § 5820, subd. (c).) Further, as

the Phase I Decision points out, DIVCA also gives local governments authority over certain matters. (Phase I Decision at p. 193.) As a result, when we act under DIVCA, we exercise only the specific authority conferred upon us by the Legislature in DIVCA. By listing the areas where we had been granted regulatory authority, and by establishing that our regulatory program should only concern those areas, we adopted a regulatory framework that reflected the nature of the authority granted to us by the Legislature in DIVCA. (E.g., Phase I Decision at pp. 12-13.)

Although our powers are limited to particular areas, the Phase I Decision made it clear that in those areas where the Legislature had granted us authority, we would vigorously exercise that authority. For example, the Phase I Decision reiterated our "resolve to enforce the antidiscrimination and build-out requirements contained in DIVCA." (Phase I Decision at p. 178.) The Phase I Decision also construed section 5840(a) which states that requirements imposed by this Commission under the authority granted by DIVCA must be "expressly provided" for in the statute, holding: "We interpret this statute to mean that we may not impose a regulation on a state video franchise holder unless we deem the regulation necessary for enforcement of a specific DIVCA provision." (*Id.* at p. 209.)

In addition, the Phase I Decision explained the mechanisms we would use to exercise our enforcement authority, so that parties knew what to expect when we discharged our mandate under DIVCA. (Phase I Decision at p. 169.) The Phase I Decision determined that an "investigation" conducted pursuant to DIVCA would be a formal proceeding that we initiated either in response to a local government's complaint, or on our own motion. (*Id.* at p. 180.) When we conducted an investigation on our own motion, we would, at a public meeting, "consider and formally vote upon an order to show cause or an order instituting investigation." Such an order would "contain a report prepared by Commission staff and/or declarations of Commission witnesses pertaining to facts that demonstrate that an investigation … is warranted." (*Ibid.*) This "enforcement strategy" contemplates that staff will have access to data that indicates whether or not franchise holders are likely complying with DIVCA's requirements. "The Commission

will undertake significant monitoring for enforcement of the antidiscrimination and build out requirements .... On a confidential basis, the Commission's staff will study this ... data closely ...." (*Id.* at p. 179.) Under this approach, if the data we obtain suggests that a franchise holder is not complying with DIVCA, staff will rely on this data to prepare for our consideration at a formal meeting the necessary documents showing that an investigation is warranted.

The Phase I Decision also explained how we will obtain the data that our staff will use to monitor compliance with DIVCA. Much of the information we need will be obtained by scrutinizing the reports we would normally receive as part of the annual, public disclosure process. (Phase I Decision at p. 179.) We pointed out that we had taken action to "tailor ... [GO 169's] reporting requirements to ensure that we routinely receive key information pertaining to antidiscrimination and build-out requirements." (*Id.* at p. 178.)

However, we also determined that we had the authority to obtain any further information that we needed to discharge our enforcement responsibilities. (Phase I Decision at p. 127.) As a result, the Phase I Decision concluded, at page 152, that we had:

> the authority to take actions necessary for our enforcement of specific DIVCA provisions.... [W]e hold that this authority extends to our ability to impose additional reporting requirements. We, like DRA, find that "it is necessary that the Commission be able to obtain information above and beyond that which is specifically enumerated in [DIVCA] in order to fulfill its statutory duties under" the Act.

In response to proposals that we use this authority to include in GO 169 extensive additional reporting requirements, the Phase I Decision held that we should only exercise our authority to require additional information "sparingly." (Phase I Decision at p. 152.) The Phase I Decision articulated a test, which it applied consistently throughout its discussion of our authority to require franchise holders to provide additional information. We would "require the production of new reports only if they are

truly necessary for the enforcement of specific DIVCA provisions under our regulatory authority." (*Ibid.*) This test has two criteria: (i) the additional information is necessary, and (ii) this additional information relates to the enforcement of one of the DIVCA provisions that we had determined gave us "regulatory authority," including questions of discrimination.

The Phase I Decision determined that some information identified in the Phase I proceeding met this test. As a result, the Phase I Decision included in GO 169 a requirement that some franchise holders provide information on the number of community centers to which they were providing free service, as required by section 5890, subdivision (b)(3). The Phase 1 Decision states:

> [u]nless this information on free service to community centers is reported to the Commission there is no way for the Commission to know if the law is being adhered to. We adopt reporting requirements, like this one, if they mandate reports that are necessary for enforcement of specific DIVCA provisions.
>
> (Phase I Decision at page 151.)

The Phase I Decision also included in GO 169 a regulation reflecting its holding that DIVCA granted us authority to obtain "additional information" from franchise holders. Section VII.G of the general order states:

> The Commission reserves the authority to require additional reports that are necessary to enforcement of specific DIVCA provisions.

Because we took this approach, the reporting requirements adopted in the Phase I Decision are based on several different sources of statutory authority. Requirements relating to the calculation of user fees (GO 169, § VII.A) are based on section 443. Requirements relating to annual reporting and disclosure (GO 169, §§ VII.B and VII.C) are based on sections 5920 and 5960. Requirements to provide additional information (e.g., GO 169, §§ VII.D and VII.G) are based on our authority to regulate franchise holders and enforce DIVCA's provisions in the specific areas we enumerated, including section 5890, subdivisions (b)(3) and (g).

In addition to determining that franchise holders were required to provide additional information, the Phase I Decision also found that we would need to conduct further proceedings to determine what specific additional information franchise holders should be required to provide. (Phase I Decision at p. 147.) The Phase I Decision held that the next phase of this rulemaking should consider if any additional information met the criteria of being "necessary to the enforcement of specific DIVCA provisions…." (*Id.* at p. 152.) Ordering Paragraph 21 states: "Phase II of this rulemaking will consider whether the Commission needs additional, more detailed broadband and video information for enforcement of specific DIVCA provisions." (*Id.* at p. 284.)

After the Phase I Decision was issued, no party challenged that decision's determinations regarding the nature of our regulatory authority or the mechanisms we would use to discharge our enforcement authority. Specifically, no party challenged the finding that this Commission had authority to obtain necessary information as it exercised its enforcement authority and its authority to regulate. (See *Modifying D.07-03-014 and Denying Rehearing* [D.07-11-049], *supra.*)

In compliance with our previous order, the Phase II proceedings addressed whether any additional information should be reported to us because it met the criteria adopted in the Phase I Decision. We reviewed several different proposals from the parties and ultimately decided to adopt only "one additional requirement, namely the number of video customers that a state video franchise holder is serving [i.e., subscribership data]." (Phase II Decision at p. 19.)

When we determined to obtain video subscribership data, we noted that many of the parties who objected simply disagreed with the Phase I Decision's finding that we had authority to require franchise holders to provide additional information as part of the enforcement process. In Phase II, these parties had presented "precisely the [] arguments that the Commission already considered and rejected in the Phase I Decision…." (Phase II Decision at p. 21.) We pointed out that the purpose of the Phase II proceedings was not to "relitigate" the holdings of the Phase I Decision, but to apply those holdings. (*Ibid.*) Because video subscribership data was necessary for us to

enforce DIVCA's antidiscrimination requirements, we determined that franchise holders should report this data. (*Id.* at p. 44 (Finding of Fact 4).) The Phase II Decision therefore added section VII.C.1.(3)(a)(iii) to GO 169, which requires video subscribership data to be reported along with the data collected pursuant to section 5960.

4. AT&T and Verizon's Allegations Are Not Only Precluded by Law, But They Also Ignore DIVCA's Enforcement Provisions and Misinterpret Its Reporting Provisions

AT&T and Verizon both allege that the Phase II Decision commits legal error when it determines that video subscribership data should be reported. According to the rehearing applications, the provisions of DIVCA that establish its annual public reporting requirements should be interpreted to contain an implicit limitation that restricts the type of information we may obtain from franchise holders under any circumstances. The rehearing applications rely on sections 5840, subdivision (a), 5920, and 5960 to make this claim. AT&T also predicates its allegations of error on a claim that DIVCA should be read to limit our authority. Verizon and AT&T further claim that subscribership data is not necessary to enforce DIVCA's antidiscrimination provisions, and both parties note that the subscribership data is commercially sensitive.

The merits of each allegation of error will be discussed below. Before considering these claims on an individual basis, however, it is important to note that allegations of error claiming that our authority is limited, as a general matter, or, more specifically, that we do not have authority to obtain information for enforcement purposes address the findings of the Phase I Decision—not the Phase II Decision. Such arguments are legally barred, and cannot properly be raised here. (Pub. Util. Code, §§ 1731, subd. (b)(1), 1732, 1709.) In addition, many of the arguments raised by the parties are too vague and/or too incomplete to be fully analyzed here. Neither rehearing application addresses the fact that both the Phase I Decision and GO 169 authoritatively provide that we have the ability to obtain additional information pursuant to DIVCA. Neither party effectively discusses the effect of this Commission's enforcement authority, and AT&T, in particular, does not explain why DIVCA should be read to establish

restrictions on our authority that are not stated on the statute's face. Before considering the specific allegations made by AT&T and Verizon, we will discuss the legal effects of these general considerations.

a) Sections 1731 and 1709 Clearly Bar Claims Challenging the Phase I Decision's Finding That We Have Authority to Obtain Information from Franchise Holders

The claim that DIVCA prevents us from obtaining any information from franchise holders other than the information that will be gathered as part of the annual, public reporting process impermissibly seeks to overturn the holdings of the Phase I Decision. Sections 1731, and 1709 bar such claims. Once a Commission decision has issued, that decision must be challenged within 30 days. If a decision is not timely challenged, a Court has no jurisdiction to hear a cause of action arising out of that or decision. Further, once a Commission determination has become final, that determination is "conclusive" in subsequent proceedings.

Section 1731 states, in relevant part:

> No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within [relevant statutory deadlines].

Section 1709 further states:

> In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

As discussed above, the Phase I Decision determined that DIVCA allowed this Commission to obtain information "necessary for [the] enforcement of specific DIVCA provisions"—even if that information was not part of DIVCA's annual, public disclosure requirements. (E.g., Phase I Decision at p. 152.) The Phase I Decision implemented this holding by adopting in GO 169 a set of reporting requirements that expanded upon DIVCA's annual public disclosure provisions and explicitly stating that

we had authority to obtain additional information, when needed. (*Id.* at pp. 150, 284 (Ordering Paragraph 21).)

The Phase II Decision did not reconsider this issue; it merely implemented the Phase I Decision's holdings. (See Phase II Decision at p. 44 (Finding of Fact 4).) The Phase II Decision specifically rejected arguments seeking to "relitigate" the Phase I Decision, and noted that AT&T had conceded that its objection to the requirement to provide subscribership data merely repeated claims that had been "considered and rejected in the Phase I Decision." (Phase II Decision at p. 21.)

To properly challenge the Phase I Decision's holding that we have authority to require franchise holders to provide information relevant to our enforcement activities, parties were required to have filed an application for rehearing of the Phase I Decision by April 4, 2007—30 days after the Phase I Decision issued. (Pub. Util. Code, § 1731, subd. (b)(1).) The "failure to apply for an application for rehearing, or, in the event of its denial, for a review by the supreme court, must necessarily, therefore, operate as a waiver of any objection, except, perhaps, the one that the order of the commission is absolutely void on its face." (*Marin Municipal Water Dist. v. North Coast Water Co.* (1918) 178 Cal. 324, 328.) Parties may not avoid the effect of this statutory bar by filing an application for rehearing against, or seeking judicial review of, the Phase II Decision. (Cf., *Northern Cal. Assn. to Preserve Bodega Head v. Public Utilities Com.* (1964) 61 Cal.2d 126, 135.)

Moreover, because the Phase I Decision has become final, its findings are conclusive in Phase II of this proceeding. This Commission's "decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law." (*Sale v. Railroad Com.* (1940) 15 Cal.2d 612, 616.) Further, section 1709 clearly provides that in "all collateral actions and proceedings, the orders and decisions of the [C]omission which have become final shall be conclusive." (See also, *People v. Western Airlines, supra,* 42 Cal. 2d at p. 630.) Because we determined in an earlier phase of this same proceeding that we had the ability to obtain information for enforcement purposes, and appellate review of our determinations is complete, that

determination is final and conclusive. No legal error results when a subsequent decision in the same proceeding, involving the same parties, applies the holding we made previously. DRA, a party to this proceeding, specifically asserts that the rehearing applications represent an "impermissible collateral attack…." (DRA's Response at p. 4.)

b) The Rehearing Applications' Claims Are Impermissibly Vague

Section 1732 requires a party to "set forth specifically the ground or grounds on which the applicant believes the decision or order to be unlawful." In contravention of this requirement, AT&T's rehearing application cites to sections 5840(a), 5920, and 5960 when it makes its claims of error, but does not explain how those code sections have the effects that are claimed for them.[7] Similarly, Verizon bases its claims of error on principles of statutory construction, but does not identify any ambiguity or inconsistency in DIVCA that requires the statue to be interpreted using these techniques. (Cf., *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800.) Nor does Verizon explain why we are legally compelled to accept the interpretation Verizon derives from the statute when the techniques that Verizon employs are, for example, subjective guidelines, not strict rules of construction. (Compare Verizon's Rehearing Application at p. 3 with *Estate of Banerjee v. Bank of America* (1978) 21 Cal.3d 527, 539.) Simply identifying a legal principle or argument, without explaining why it applies in the present circumstances does not meet the requirements of section 1732.

Moreover, neither AT&T nor Verizon contend with DIVCA's enforcement provisions, or account for the preclusive effect of the final determinations made in the

[7] Many claims in AT&T's rehearing application merely state that party's conclusions without providing any analysis. For example, AT&T contends that the requirement to provide subscribership data is "contrary to the plain language of DIVCA and the clear intent of the Legislature" because subscribership data is not mentioned in sections 5920 or 5960. But AT&T does not explain why statutory language addressing public reporting is germane to questions about how we are to enforce DIVCA. (AT&T's Rehearing Application at p. 3.) Because its rehearing application does not present an analysis to support its legal claims, AT&T fails to describe how sections 5920 and 5960 actually establish a restriction on our ability to gather information. Consequently, we are forced to guess how AT&T believes that law operates, and we cannot properly analyze those claims.

Phase I Decision. Only Verizon discusses 5980, claiming briefly that we may not rely on this authority "to override express prohibitions found elsewhere in DIVCA." (Verizon's Rehearing Application at p. 5.) Yet Verizon provides no citation to the "express prohibitions" that are to be found "elsewhere" nor any analysis showing why the authority conferred in section 5890 must give way to the authority Verizon believes is controlling.[8] Similarly, Verizon provides no citation or analysis when it asserts that the conclusion that we have authority to obtain additional information is "illogical, erroneous, and fails the most basic scrutiny." (Verizon's Rehearing Application at p. 5.) Because these claims lack substance or specificity, they provide no basis allowing us to consider whether or not there are aspects of our decision that might be legally problematic. It is ultimately impossible to determine, based on the claims presented in the applications for rehearing, why AT&T and Verizon believe the law requires us to conform our decision to their views about DIVCA's requirements or why, as a matter of law, their views supersede the conclusive holdings of the Phase I Decision.

As a result, the legal analysis in the rehearing applications is incomplete and does not meet the requirements of section 1732. We should not be forced to guess how our decisions might be in error by extrapolating from such claims. Rule 16.1 of our Rules of Practice and Procedure points out that an application for rehearing is required to make specific claims because its purpose is "to alert the Commission to a legal error, so that the Commission may correct it expeditiously." (Cal. Code Regs., tit. 20, § 16.1, subd. (c).) If the parties do not explain, with specificity, in their applications for rehearing why a decision is in error, we have no opportunity to correct our decisions.

[8] Verizon may be referring to its views about the effect of section 5960. However those views are not based on "express prohibitions" stated in that code section, but on the result of applying certain principles of statutory construction favored by Verizon to derive a prohibition from the statute that does not appear on its face. (E.g., Verizon's Rehearing Application at p. 3.)

c) No Restriction on Our Ability to Gather Information Appears in DIVCA's Annual Public Disclosure Provisions—And No Principle of Statutory Construction Supports Reading Such a Restriction Into the Statute

In addition to being precluded, the rehearing application's claims fail to demonstrate error because they do not describe DIVCA's provisions correctly. For its part, AT&T's rehearing application claims that "sections 5920 and 5960 set forth *the* reporting requirements of DIVCA." (AT&T's Rehearing Application at p. 1.) Based on this assumption, the rehearing application asserts that sections 5920 and 5960 comprehensively "enumerate[] the reporting requirements that the Commission may impose[.]"[9] (AT&T's Rehearing Application at p. 3.)

This argument characterizes 5920 and 5960 in a way that is not based on DIVCA's actual language. A review of sections 5920 and 5960 shows that these two provisions state a positive requirement that certain information be provided to this Commission, and then reported, often in a different format, to Legislators, to the Governor, or to the public generally. Neither code section contains any provisions addressing our ability to obtain information from franchise holders in other circumstances. Neither section contains any restrictions or negative requirements. Finally, neither code section contains any language that addresses the specific issue relevant here: this Commission's ability to gather the information it needs to exercise the investigative and regulatory authority conferred by section 5890. (See also, Pub. Util. Code, § 5810, subd. (a)(3).)

Moreover, the underlying claim that sections 5920 and 5960 serve to collect in one place "*the* reporting requirements of DIVCA" is factually incorrect. (Cf., AT&T's Rehearing Application at p. 1.) Sections 5920 and 5960 do not appear together in the statute, being separated by section 5930 (addressing video service providers holding local

[9] These two quotations state the entire extent of AT&T's claims regarding sections 5920 and 5960.

franchises), section 5940 (prohibiting a franchise holder from cross-subsidizing the cost of building its network with revenue from telephone service) and 5950 (prohibiting certain telephone rate increases). Section 443, subdivision (a), which is also part of DIVCA, contains further disclosure provisions, allowing this Commission to obtain "information and reports… at the time or times it specifies" to enable to it to establish franchise fees. As previously noted, DIVCA also allows us to "open an investigation on [our] own motion" to enquire into franchise holders' conduct. (Pub. Util. Code, § 5890, subd. (g).) This review shows that the Legislature distributed a number of different and unrelated provisions governing reporting, investigation, and disclosure throughout DIVCA. Contrary to AT&T's claims, no place in the statute sets out "*the* reporting requirements of DIVCA." (AT&T's Rehearing Application at p. 1.)

The only relationship between the disclosure requirements in sections 5920 and 5960 and DIVCA's other reporting-related provisions was established by us in the Phase I Decision. There, we determined that we could tailor section 5920 and 5960's annual disclosure requirements to ensure that we received most of the information we needed for enforcement purposes, while explicitly holding that some additional material would be required. (Phase I Decision at p. 127; GO 169, § VII.G.) The determination to obtain data for enforcement purposes by reviewing the information that would be provided in any case under a statutorily-established annual disclosure process was a matter of administrative efficiency. The fact that we adopted this approach—and at the same time determined that we had authority to obtain additional information—does not mean that sections 5920 and 5960 contain an exclusive list of the information that we can obtain pursuant to DIVCA.

Similarly, in GO 169, we grouped all of our requirements relating to data collection together in section VII, labeled "Reporting Requirements." However, this does not mean that all of GO 169's requirements arise from the reporting provisions of sections 5920 and 5960. GO 169 is based on several of the reporting-related requirements of DIVCA, including sections 443, 5920, 5960 and 5980. (See GO 169, §§ VII.A, VII.D.) In fact, as discussed below with respect to Verizon's application for

rehearing, the Phase I Decision conclusively determined that DIVCA provided us with several different types of authority to obtain information, and GO 169 reflects the different categories of information that can be obtained under these different statutory provisions.

It is possible, however, that by grouping all the requirements relating to data collection in a single section of GO 169, labeled "Reporting," we caused AT&T to mistakenly conclude that the underlying statute contained one single reporting requirement. Further we have carefully reviewed GO 169 as a result of the allegations made in the rehearing applications and noted that the requirement to report subscribership data was added to section VII.C(3)(a) and was not distinguished from other requirements in that section that were explicitly based on section 5960. (See GO 169 at fn. 55.) We will modify the Phase II Decision to correct the ordering paragraph adding section VII. C (3)(a)(iii) to GO 169 so that the requirement to provide video subscribership data is distinguished from requirements based on section 5960. Instead of appearing with those requirements, the requirement to provide video subscribership data should appear with enforcement related provisions, for example the requirement to provide community center data. We also take this opportunity to make one effect of this distinction clear: only information that we obtain pursuant to section 5960 should be routinely reported to the Governor and the Legislature. The extent to which other information is provided to other branches of government should be decided on a case-by-case basis.

For its part, Verizon makes similar arguments, but relies only on section 5960. Verizon's rehearing application characterizes its claims as relying on both the "plain language" of DIVCA and on "basic principles of statutory interpretation." (Verizon Rehearing Application at p. 2.) However Verizon does not cite to or quote any language in section 5960 containing a restriction on our ability to gather information pursuant to DIVCA. As discussed above, section 5960 states only positive requirements about what we, and franchise holders, must do to comply with DIVCA's annual, public disclosure provisions. The claim that section 5960 states a limitation on our authority is

not based on DIVCA's statutory language but, instead, on an interpretation that seeks to read an implicit limitation into the statute when none appears on its face.

Verizon's rehearing application claims its interpretation of DIVCA is supported by a number of technical factors. For example, Verizon's rehearing application asserts that a comparison of the provisions of subdivisions (b)(1)(B) and (b)(2) shows that DIVCA should be read to impose an implicit limitation on our ability to gather information from franchise holders. Subdivision (b)(1)(B) states that providers of broadband service must disclose "*both* availability and subscribership data" so that information can be included in an annual, public reports. (Verizon's Rehearing Application at p. 3.) Pursuant to subdivision (b)(2), providers of video service need only report data on the availability of video service for inclusion in an annual public report. The rehearing application contends the difference between these two provisions supports a conclusion about the Legislature's intent regarding the Commission's ability to obtain video subscriber information under all circumstances. "[H]ad the Legislature intended to require reporting of the number of video subscribers this would have been the place to do it." (Verizon Rehearing Application at p. 3.)

However, this claim is speculative. Neither the language or the structure of DIVCA support Verizon's attempt to derive a limitation on our ability to gather information for enforcement purposes by comparing section 5960, subdivisions (b)(1)(A) and (b)(2). What section 5960 provides is this: subscribership data for broadband must be collected by this Commission, which has an obligation to report an aggregated version of that data to the Governor and the Legislature, while subscribership data for video is not included in this mandatory, public reporting process. DIVCA provides no indication that these annual public reporting and disclosure provisions should be referred to when determining what information we can obtain when we act pursuant to it section 5890. Nor do any provisions in DIVCA's plain language suggest that the Legislature chose section 5960 as "the place" to define the Commission's ability to obtain information from franchise holders regardless of the purpose for which the information will be used. (See Verizon's Rehearing Application at p. 3.) As discussed above, DIVCA contains several

different sets of requirements relating to reporting, disclosure and investigations. The requirements at issue here, sections 5890 and section 5960, appear in separate places in the statute, with nothing to indicate that their requirements are related.

In particular, we disagree with the claim that the law requires us to rely on speculation about what the Legislature might have intended to read limitations that do not appear on the face of the statute into section 5960. Verizon does not rely on the Legislature's stated intent when it asserts that "the Legislature did not intend to require census tract level reporting for video subscribership[.]" (Compare Verizon's Rehearing Application at p. 3 with Pub. Util. Code, § 5810.) The rehearing application only relies on a counterfactual argument: certain statutory provisions "would have" been included in section 5960 if, hypothetically, the Legislature had intended to allow the Commission to obtain subscribership data. (Verizon's Rehearing Application at p. 3.) According to Verizon, the absence of this hypothetical intent should be relied upon to read into DIVCA a restriction on our ability to collect subscribership data for enforcement purposes. Verizon's guess about why the Legislature determined that certain information should be reported to it annually, and to the Governor, is simply not relevant to the question of whether or not we may obtain subscribership data pursuant to different statutory authority, in order to accomplish a different purpose. "[W]e do not inquire what the [L]egislature meant; we ask only what the statute means." (*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1575.)

If it were necessary, the proper way to consider the Legislature's intent in this circumstance would be to review the Legislature's actual, stated goals for enacting DIVCA. This Legislative intent is set forth in section 5810. Review of these provisions shows that those goals will be accomplished if sections 5890, subdivision (g) and section 5960 are given the straightforward reading adopted in the Phase I Decision. Under this reading, we are to obtain several different types of information pursuant to DIVCA, based on the different types of statutory authority granted to this Commission in DIVCA's various provisions. The Phase I Decision, at page 137, broke down the reporting requirements required under GO 169 into five different categories:

> (i) user fee reports, (ii) employment reports, (iii) broadband and video service reports, (iv) antidiscrimination and build-out reports, and (v) additional reports necessary for our enforcement of specific DIVCA provisions.

Each of these categories of report is based on a different statutory authority. User fee reports are obtained pursuant to section 443, subdivision (a). (*Id.* at p. 137.) Annual employment reports are obtained pursuant to section 5920. (*Id*. at p. 139.) Broadband and video service reports are to be provided as required by section 5960. (*Id.* at p. 141.) Information "to enforce the antidiscrimination and build-out provisions" is obtained pursuant to section 5890.[10] (Phase I Decision at p. 149, fn. 554.) Finally, the ability to obtain "additional reports" is based on parties' comments relying on section 5890 to claim that this Commission had authority to obtain necessary information "in order to fulfill its statutory duties." (Phase I Decision at p. 152, citing Reply Comments of DRA at pp. 9-10.)

This reading of the statute is consistent with DIVCA's intent section, which declares that we are to "ensure full compliance with the requirements of" DIVCA. (Pub. Util. Code, § 5810, subds. (a), (a)(3).) This declaration supports the conclusion that we may obtain information that we need to investigate whether or not franchise holders are complying with DIVCA's antidiscrimination provisions. The Legislature also found that competition between franchises holders should be relied upon to provide public benefits such as: choice of services for consumers (including services appropriate to California's diverse cultures), speedy deployment of new technology, job creation, and the provision of advanced services to "all residents of the state." (Pub. Util. Code, § 5810, subds. (a), (a)(1).) The public disclosure provisions contained in sections 5920 and 5960 ensure that the public, the Governor, and the Legislature can review information about the extent to which a competitive market is providing these expected benefits. Nothing in section

[10] Section 5890 includes: subdivision (b), which requires the provision of service at community centers; subdivision (f), which allows a franchise holder to submit a request for certain extensions relying on specific factors; and subdivision (g), which authorizes investigations.

8010 suggests that Legislature intended to restrict our enforcement authority when it added annual public disclosure requirements to DIVCA.

Verizon also claims that the principle *expressio unius est exclusio alterius* ("*expresio unius*") supports its interpretation of section 5960. According to Verizon, when *expressio unius* is applied to section 5960, the ability to obtain subscribership data can be "deemed prohibited" because it is not specifically enumerated by the statute. (Verizon's Rehearing Application at pp. 3-4.) Verizon cites *United Farm Workers v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303 and *Dean v. Superior Court* (1998) 62 Cal.App.4th 638 in support of this proposition.

Expressio unius is a "Latin maxim" stating that the mention of one thing in a statute "implies the exclusion of another thing." (*Estate of Banerjee v. Bank of America* (1978) 21 Cal. 3d 527, 532, 540.) This maxim is used as a tool of construction, where appropriate, and it does not contain a rigid rule. "It is not in all cases where it may appear to be applicable that, in the construction of statutes, the maxim, *expressio unius est exclusio alterius*, should be invoked." (*Blevins v. Mullally* (1913) 22 Cal.App. 519, 529.) The California Supreme Court has cautioned that "*expressio unius est exclusio alterius* is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions ...." (*Estate of Banerjee v. Bank of America*, *supra*, at p. 539.)

We do not believe that this principle of construction should be applied to insert a prohibition into DIVCA for several reasons. As an initial matter, there is no ambiguity or lack of clarity in either DIVCA's public disclosure provisions or its enforcement provisions that requires technical rules of statutory construction, such as *expressio unius*, to be applied. Verizon's rehearing application appears to make no attempt to identify any conflict or ambiguity in DIVCA, and that omission is "telling[.]" (Cf., *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1443.) Without identifying any unclear words or phrases or potentially ambiguous language, Verizon seeks to "deem" certain actions "prohibited" by applying technical tools of construction. "[W]here there is no need for construction ... courts [and others considering a statute's

meaning] *should not indulge in it*." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800.) Courts have explicitly stated their "skepticism about looking beyond the statutory language when trying to discern the Legislature's meaning." (*Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 280, fn. 5.)

Similarly, Verizon does not explain why the extent of our authority to obtain information for enforcement purposes should be determined by applying principles of construction to DIVCA's public disclosure provisions. The legislature clearly expressed, in DIVCA's antidiscrimination and build-out provisions, that we had the power to investigate franchise holders, yet Verizon's rehearing application does not consider this point. *Expressio unius* will not be applied to negate a well-established principle of law, and it should also not be applied here to negate an explicit Legislative grant of authority that has, in addition, been definitively construed. (Cf., *Western Union. Tel. Co. v. Superior Court* (1911) 15 Cal.App. 679; Pub. Util. Code, § 1709.)

We also do not believe, as a technical matter, that Verizon has correctly applied this Latin maxim. Generally, *expressio unius* is applied "to a specific statute, which contains a listing of items to which the statute applies." (*In re Sabrina H.* (2007) 149 Cal.App.4th 1402, 1411.) One court described the principle behind the maxim as follows: "where exceptions to a general rule are specified by the statute, other exceptions are not to be implied or presumed." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190. 195; see also *O'Grady v. Superior Court, supra*.)[11]

DIVCA, on the other hand, contains no such listing of items to which *expression unius* can be applied. The statute states a variety of provisions about our ability to collect information, in several different places. As discussed above, sections 443, subdivision (a), 5890, subdivision (g), 5920 and 5960 all appear in different places in the statute and contain significantly different provisions describing what information

[11] The cases cited by Verizon involve such circumstances. *United Farm Workers v. Agricultural Labor Relations Bd., supra,* concerns the Ketchum Act, which contained an "express enumeration of the types of actions" an agency could bring in court. (*Id.* at pp. 316-317.) *Dean v. Superior Court, supra,* addressed provisions in the Elections code listing the topics a candidate could address in a statement. (*Id.* at p 639.)

we may obtain from franchise holders and how we should treat that information. Not only is the information that we are to obtain pursuant to DIVCA not listed in any one place, it is not always described with specificity. While sections 5920 and 5960 describe particular information that is to be provided to us, sections 443 and 5980, subdivision (g) simply grant us general authority to conduct an investigation or to obtain needed information. *In re Cathey* (1961) 55 Cal.2d 679, 689 determined not to apply *expressio unius* in circumstances where the provisions of the relevant statutes "are not a systematic and complete scheme" and that logic is applicable here.[12] In fact, it is unclear whether *expressio unius* can be applied to a statute as a whole, rather than to a specific section of a statute. (*In re Sabrina H., supra,* at p. 1411.) In such cases, courts also apply the rule that an agency "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted ...." (*In re Cathey, supra,* at p. 689.)

d) DIVCA "Expressly Provide[s]" That We Have Authority to Investigate Franchise Holders

In addition to discussing DIVCA's public reporting requirements, both AT&T and Verizon rely on section 5840, subdivision (a) ("section 5840(a)") which establishes this Commission as the sole franchising authority under DIVCA. The language implementing this uniform franchising scheme states:

> The [C]ommission is the sole franchising authority for a state franchise to provide video service under this division. Neither the [C]ommission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division. Sections 53066, 53066.01, 53066.2, and 53066.3 of the Government Code shall not apply to holders of a state franchise.

[12] *In re Barnett* (2003) 31 Cal.4th 466, 477 overruled portions of *In re Cathey, supra,* on different grounds that were related to habeas corpus.

This language displaces the regulatory scheme previously established in the Government Code, under which cable companies provided video services pursuant to local franchises. The specific portion of section 5840(a) that the rehearing applications rely on provides that under DIVCA we are to grant exclusive franchises, and that neither a local government nor this Commission may require additional franchises to be obtained or impose requirements on franchise holders that are not "expressly provided in" DIVCA.

In the Phase I Decision, we construed section 5840(a). At page 209, we held (footnotes omitted):

> With respect to our authority to regulate video service, Public Utilities Code § 5840(a) declares that the Commission may not "impose [a] requirement" on state franchise holders other than one "expressly provided" in the Act. We interpret this statute to mean that we may not impose a regulation on a state video franchise holder unless we deem the regulation necessary for enforcement of a specific DIVCA provision.

However, Verizon and AT&T assert that the use of the phrase "expressly provided" in section 5840(a) has the effect of preventing us from obtaining video subscribership data. According to AT&T, the Phase II Decision does not comply with section 5840(a) because we did not base the requirement that franchise holders provide subscribership data on statutory provisions, but instead "merely" made a determination that this data was, in our view, "necessary[.]" (E.g., AT&T's Rehearing Application at pp. 2, 3.) [13]

This claim does not properly describe the basis supporting our determination to obtain subscribership data, or the requirements of section 5840(a). We explicitly based our determination to obtain subscribership data on the authority conferred upon us by

[13] AT&T also describes language explaining why we will not adopt certain reporting requirement proposed by other parties as the Phase II Decision's "attempt[] to justify this additional reporting requirement ...." (AT&T's Rehearing Application at p. 2.) We will clarify this language to make it clear that it states general policies. The rationale for obtaining video subscribership data is stated, among other places, at pages 22-24 and 40-43.

section 5890, as definitively construed by the Phase I Decision. The Phase II Decision, moreover, stated that "video subscriber data will be necessary information for the Commission so that it can determine whether to initiate action on its own motion [pursuant to section 5890, subdivision (g)] to enforce section 5890(a)." (Phase II Decision at p. 24.) This language cites to and quotes from the statutory provisions in DIVCA that underlie our determination to obtain subscribership data. Contrary to AT&T's claims, this language does not state that we are requiring franchise holders to provide subscribership data because we believe we have some form of inherent authority, not based on DIVCA, that allows us to obtain data simply because it is necessary. AT&T's rehearing application gives no reason why the statutory authority we relied upon does not "expressly provide[]" us with the authority we exercised. (Cf., Pub. Util. Code, §§ 1731, 1732.)

In addition, the Phase II Decision's finding that subscribership data is "necessary information" shows we based our decision to require disclosure of this data on the Phase I Decision's criteria for when we could "impose a regulation" and still satisfy section 5840(a)'s requirements, and for when we could require the disclosure of additional information. (Compare Phase II Decision at p. 44 (Finding of Fact 4) with Phase I Decision at pp. 152, 209.) By finding that subscribership data was "necessary information … in enforcing [section 5980's] non-discrimination requirements" we determined that subscribership data was "necessary for enforcement of a specific DIVCA provision" and, therefore, in the category of information about which we could adopt a regulation under the Phase I Decision's interpretation of section 5840(a). (Phase II Decision at p. 44 (Finding of Fact 4); Phase I Decision at p. 209.) When the Phase II Decision stated that subscribership data was "necessary" it also demonstrated that this data met the test for when additional data should be reported, that is the data was "truly necessary for the enforcement of specific DIVCA provisions ...." (Compare Phase II Decision at pp. 24, 44 with Phase I Decision at p. 12.)

As discussed above at pages 12-15 and 17-19, the Phase II Decision explicitly determined it would not "relitigate" the Phase I Decision's holdings about the

extent of our authority and instead applied the criteria developed in the Phase I Decision to subscribership data. (Phase II Decision at p. 21.) Both the general determination that we could impose regulations necessary for the enforcement of a specific DIVCA provision, and the specific holding that "this authority extends to our ability to impose additional reporting requirements[,]" have become final and are therefore conclusive in the second phase of this proceeding. (Phase I Decision at pp. 152, 209; Pub. Util. Code, § 1709.) AT&T's rehearing application is incorrect to imply that because the Phase II Decision applied these holding by determining that subscribership data was necessary, and did not further discuss these settled questions, we did not base our determination to obtain subscribership data on DIVCA's express provisions. The language from the Phase II Decision quoted by AT&T clearly indicates that subscribership data meets the Phase I Decision's requirements, which are, in turn, based on DIVCA's express provisions. (E.g., AT&T's Rehearing Application at p. 2.) Yet AT&T's application for rehearing does not cite to, or discuss, any of this statutory or decisional authority. (See Pub. Util. Code, § 1731, subd. (b)(1).)

In addition to claiming that the ability to obtain subscribership data is not "expressly provided" for in DIVCA because we cannot rely on our inherent authority to obtain subscribership data, AT&T also claims that it cannot locate an express provision allowing us collect subscribership data in sections 5920, 5960, or in other parts of DIVCA. However, the authority to collect data does not appear in sections 5920 or 5960 because it stems from the authority to investigate conferred by section 5890. The Phase I Decision definitively construed these statutory provisions, and AT&T cites no authority for its indirect claim that the authority to investigate franchise holders does not include the authority to collect data from franchise holders. DIVCA contains many express grants of authority, some of which state specific, particular requirements (e.g., Pub. Util. Code, § 5840, subd. (h)), and some of which grant us broad authority and discretion (e.g., Pub. Util. Code, § 5890, subds. (c), (f)(4)). AT&T's rehearing application simply fails to account for the nature of this authority. In particular, the rehearing application fails to discuss the enforcement mechanisms we adopted in the Phase I Decision to give

specificity and clarity to the general grant of authority to conduct investigations in section 5890, subdivision (g).[14] Because it focuses on sections 5920 and 5960 and overlooks section 5890, AT&T's application for rehearing fails to show that the Phase II Decision's determination to collect subscribership data is not based on the explicit provisions of DIVCA. (See Pub. Util. Code, § 1731, subd. (b)(1).)

We are also obliged to note that nothing in DIVCA supports AT&T's general claim that the statute "repeatedly emphasizes that the Commission has very limited authority over video services and video service providers." (AT&T's Rehearing Application at p. 1.) The Phase I Decision Definitively construed the nature of our authority under DIVCA. That decision pointed out that in some respects, such as issuing franchises, the DIVCA "does not afford the Commission discretion[.]" However, the Phase I Decision also made it clear that in certain areas we had "authority to regulate" and in those areas we would completely and fully discharge the mandate given to us by the statute. (*Id.* at pp. 93, 174.) The Phase I Decision explicitly stated our "resolve to enforce the antidiscrimination and build-out requirements contained in DIVCA." (Phase I Decision at p. 178.)

The specific claims AT&T makes to support its description of the extent of our authority are also without merit. AT&T's rehearing application refers, in several places, to provisions in DIVCA that designate franchise holders as non-public-utilities. The rehearing application does not state with specificity what the effect of these provisions is in this case. However, it appears that AT&T is attempting to claim that we

[14] Under the Phase I Decision's approach, we will implement "reporting requirements to ensure that we routinely receive key information pertaining to antidiscrimination and build-out requirements." (See Phase I Decision at p. 178.) "On a confidential basis, the Commission's staff will study" the information reported to us. Ultimately, if necessary, a formal investigation would be launched at a meeting with a vote determining whether or not to issue an order to show cause or an order instituting an investigation. The document opening such a formal investigation would "contain a report prepared by Commission staff and/or declarations of Commission witnesses pertaining to facts that demonstrate an investigation… is warranted." (*Id.* at p. 180.) As a result, obtaining data from franchise holders is an integral part of the enforcement program under which our staff will monitor franchise holders' conduct to determine whether or not we should open an investigation on our own motion under section 5890, subdivision (g).

relied on our authority to regulate public utilities when we adopted the requirement that subscribership data be reported. (See AT&T's Rehearing Application at pp. 1, 3; cf., Pub. Util. Code, § 1732.) As explained above—and at page 42 of the Phase II Decision—we did not attempt to exercise our public utility authority to obtain subscribership data; we exercised our authority under DIVCA. AT&T's claim that "the Commission's authority to regulate public utilities does not allow it to impose a video subscriber reporting requirement[,]" is, therefore, irrelevant. (Cf., AT&T's Application for Rehearing at p. 3.)

Moreover, the statutory language that AT&T cites provides support for our decision. That language explicitly states that we should have sufficient authority to carry out our regulatory responsibilities under DIVCA. The operative provisions of section 5810, subdivision (a)(3), establish a user fee to fund this Commission's activities pursuant to DIVCA that is modeled on the fees collected from public utilities. The fee is designed to ensure that we have "sufficient funds… to provide adequate staff… to ensure full compliance with the requirements of this division [i.e., DIVCA]." (Pub. Util. Code, § 5810, subd. (a)(3).) The language AT&T quotes from this subdivision is incidental language clarifying that we are to regulate franchise holders under the provisions of DIVCA (Division 2.5 of the Public Utilities Code), despite the fact that the scheme for funding our activities is borrowed from the portions of the Public Utilities Code that relate to public utility regulation (Division 1 of the Public Utilities Code).

Similarly, Public Utilities Code section 5820, subdivision (c) does not state an intent to restrict this Commission when it exercises the regulatory authority granted to it by DIVCA. That subdivision notes that the effect of classifying franchise holders as non-public-utilities is to ensure that their rates and economic terms and conditions of service are not regulated, consistent with the goal of fostering competition. (Cf., Pub. Util. Code, § 5810, subd. (a)(1)(C).) This statutory provision has the effect of preventing us from regulating franchise holders' rates and terms and conditions of service, but it says nothing about how we are to regulate franchise holders in the areas where DIVCA grants us authority, such as the prevention of discrimination.

Verizon's rehearing application does not make claims about the nature or extent of our authority, but it does assert that section 5840(a) gives further weight to its arguments based on section 5960. According to Verizon, because DIVCA does not contain a provision specifically referring to video subscribership data, the statute makes a "deliberate omission" rendering it "unlawful under § 5840(a)" for the Commission to obtain such data. (Verizon's Rehearing Application at p. 3.)

This claim, too, does not properly apply the language of section 5840(a). As an initial matter the Phase I Decision conclusively determined that section 5840(a) permitted us to impose regulations that we deem necessary for the enforcement of a specific DIVCA provision. (Phase I Decision at p. 209.) In addition, nothing in the Phase I Decision or the Phase II Decision seeks to enlarge upon section 5960's public disclosure provisions when it determines this Commission should obtain subscribership data. Rather, those decisions sought to adopt mechanisms that would implement language in DIVCA that "expressly provided" us with authority to open an investigation into franchise holders' conduct. (Pub. Util. Code, § 5890, subd. (g).) The Phase I Decision conclusively determined that this power included the authority to obtain information from franchise holders. (Pub. Util. Code § 1709; see Phase I Decision at p. 152.) Because DIVCA contains an express provision allowing the Commission to investigate franchise holders' conduct, the requirement that franchise holders provide subscribership data in no way contravenes section 5840(a).

In addition, the arguments Verizon and AT&T make based on section 5840(a) misapply rules of statutory construction. Neither AT&T nor Verizon point to any ambiguity or contradiction in DIVCA that would require looking to section 5840(a), read in parallel with section 5960, to determine the extent of our authority to obtain subscribership data—especially when that authority is based on section 5890. (See Pub. Util. Code, § 1732.) When a statute is clear and there is no uncertainty as to Legislative intent a court will "look no further ...." (*Utility Consumers' Action Network v. Public Utilities Com.* (2004) 120 Cal.App.4th 644, 658-659.) Further, a reading that relies on section 5840(a) to prevent us from obtaining data we need to exercise our power to

investigate reads section 5890, subdivision (g) out of the statute, in contravention of rules of statutory construction. (E.g., *Cal. Manufacturers Assn v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)

e) The Legislative History of DIVCA Does Not Support the Rehearing Applications' Faulty Interpretations of DIVCA

The rehearing applications filed by AT&T and Verizon also claim that those parties' reading of DIVCA is supported by the legislative history of Assembly Bill 2897 of the 2005-2006 Regular Session ("AB 2897"). That bill enacted DIVCA.

The parties refer to the successive bill drafts to make their argument. Before August 23, 2006, AB 2897 did not contain provisions on reporting and public disclosure. On August 23, 2006, the bill was amended to add a new, twice-yearly, public disclosure requirement. This requirement was placed in section 5840, which, at the time, described some of the powers the Commission was to exercise as the franchising authority.

In this version of the bill, the data reported by franchise holders was to be transmitted to the Governor and the Legislature in its raw form, i.e., without any screening of commercially sensitive information. (Sen. Amend. to Assem. Bill No. 2897 (2005-2006 Reg. Sess.) Aug. 23, 2006, § 5840, subd. (n).) The data was also to be posted on the internet in its raw form. The data to be made public in this version of the bill included: descriptions of the socioeconomic status of portion of each census tract where the franchise holder offered service, a certification that the franchise holder was complying with DIVCA's antidiscrimination provisions, a description of any problems encountered by a franchise holder seeking to deploy broadband and video services, and subscribership data for video services. (*Ibid.*)

On August 28, 2006, AB 2897 was again amended. Among other things, the August 28 amendments entirely removed the twice-yearly reporting requirement that had been added on August 23. (Sen. Amend. to Assem. Bill No. 2987 (2005-2006 Reg. Sess.) Aug. 28, 2006.) The August 28 amendments also added a new section, section 5960, to the bill. The requirements stated in the new section 5960 remained in the

version of the bill that became law. (Compare Pub. Util. Code, § 5960 with Sen. Amend. to Assem. Bill No. 2987 (2005-2006 Reg. Sess.) Aug. 28, 2006, § 5960.) These provisions are entirely different from those removed from section 5860. For example, both the certification of compliance with DIVCA's antidiscrimination provisions and the requirement to report subscriber information for video services were eliminated. Further, the adopted public disclosure requirements do not require raw data to be made public. Instead, raw data is provided, confidentially, to this Commission, which prepares public reports that contain only aggregated information. (Compare Sen. Amend. to Assem. Bill No. 2897 (2005-2006 Reg. Sess.) Aug. 23, 2006, § 5840, subd. (n) with Sen. Amend. to Assem. Bill No. 2987 (2005-2006 Reg. Sess.) Aug. 28, 2006, § 5960.)

What can be seen from analysis of these successive drafts is that the Legislature initially proposed to adopt a twice-yearly requirement that involved public disclosure of raw data. Ultimately, however, the Legislature established a completely different set of requirements. The development of the bill along these lines does not show that the Legislature intended to remove any particular disclosure requirement from DIVCA because the successive bill drafts show that the entire scheme for public disclosure was re-written.

As a result, the claim that the Legislature intended to bar us form obtaining subscribership data for enforcement purposes is not supported by the language of the successive bill drafts. The provisions establishing our authority to commence investigations had already been placed in the bill by the time the Legislature determined to add public disclosure provisions to DIVCA. These provisions were only slightly revised by the amendments that added DIVCA's current disclosure provisions. (E.g., Sen. Amend. to Assem. Bill No. 2897 (2005-2006 Reg. Sess.) Aug. 23, 2006, § 5840, subd. (g).) Further, the committee reports describing these amendments provide no indication that subscribership data was an issue considered by the Legislature.

Neither rehearing application explains why the fact that subscribership data was once part of a public reporting requirement is germane to the question of whether we may obtain this information as we discharge our enforcement responsibilities under

DIVCA. Put more bluntly, the fact that the Legislature chose not to require raw video subscribership data to be published on the internet twice each year does not reflect a legislative intent to restrict our access to that information, on a confidential basis, when we exercises our enforcement authority.

Further, contrary to AT&T and Verizon's claims, the Phase II Decision does not attempt to "include the omitted provision" in DIVCA's requirements. (Cf., AT&T's Rehearing Application at p. 3.) The Phase II Decision does not require franchise holders to make raw data public, or to provide certificates of compliance, or follow a reporting scheme structured on the "omitted provision[.]" Rather, the Phase II Decision requires franchise holders to provide data that Commission staff will use to monitor franchise holders' compliance with section 5890, as the Commission exercises its enforcement authority.

Finally, rules of statutory construction provide that legislative history is to be consulted only if a statute's requirements cannot be determined from the plain meaning of its provisions. Successive bill drafts "may be helpful" in interpreting a statute in cases "when its meaning is unclear." (*Pac. Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 279, citing *State Farm Mut. Auto. Ins. Co. v. Haight* (1988) 205 Cal.App.3d 223, 236.) But in this case, DIVCA is clear. Certain information must be reported, aggregated and publicly disclosed each year. Further, the Commission has authority to investigate that includes the ability to obtain necessary information. These provisions straightforwardly describe the Commission's authority, and the rehearing applications state no reason why the statute's meaning is so unclear that the Legislative history must be examined in an attempt to clarify what DIVCA requires.

5. The Phase II Decision Properly Explains Why Subscribership Data is Necessary to Enforce DIVCA's Antidiscrimination Provisions

The rehearing applications filed by Verizon and AT&T also dispute the Phase II Decision's finding that subscribership data is necessary to enforce DIVCA's non-discrimination requirement. The non-discrimination requirement is set forth in

section 5890, subdivision (a) ("section 5890(a)"). We held that subscribership data was necessary to enforce this requirement in Finding of Fact 4, which states:

> Reporting by a state video franchise holder of the number of its video customers by census tract, in addition to the number of households that are offered video service, will provide necessary information to the Commission in enforcing the non-discrimination requirements of Pub. Util. Code § 5890(a).

AT&T and Verizon claim that this finding of fact is incorrect because they contend that DIVCA should be interpreted to provide that the only permissible measure of discrimination under the act is whether or not a franchise holder has complied with the statute's open access provisions. (Cf., Pub. Util. Code, § 1732.) Verizon asserts "*discrimination is in fact the same as denial of access*." (Verizon's rehearing at p. 7 (original emphasis).) AT&T claims that what DIVCA prohibits is only "discrimination in offering *access* to potential subscribers." (AT&T's Rehearing Application at p. 4 (original emphasis).) These arguments have both a legal and a policy component. The discussion below separates the legal and policy arguments and discusses them individually.

a) Section 5890 Contains Separate Discrimination and Open Access Requirements

Section 5890(a) contains the following requirements for video franchise holders:

> A cable operator or video service provider that has been granted a state franchise under this division may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

The Phase II Decision considered the claim that this language should be interpreted to prohibit only the denial of access, with no separate prohibition against discrimination, and determined that it was incorrect. We pointed out that the parties advocating this interpretation of the statutory language gave no meaning to the words in

section 5890(a) that prohibit discrimination. The Phase II Decision found, instead, that section 5890(a), "clearly prohibits two things: discrimination and denial of access. The rules of statutory construction require that we give meaning to all provisions of a statute, in this case, both discrimination and denial of access." (Phase II Decision at p. 41.) This approach correctly applies rules of statutory construction. "Interpretative constructions which render some words surplussage ... are to be avoided." (*California Manufacturers' Assn. v. Public Utilities Com.*, *supra*, 24 Cal.2d at p. 844.)

The rehearing applications, however, assert that the Legislature did not intend to separately address both discrimination and denial of access, despite the language of section 5890(a). AT&T and Verizon assert that the Legislature's intent should be determined not by looking to section 5890(a)'s terms, but, instead, by reading the other subdivisions contained within section 5890. Before we consider those claims in detail, we must again point out that the rehearing applications do not explain why the law requires us to engage in an exercise of statutory construction to interpret DIVCA in a way that diverges from the statute's plain language. Neither rehearing application identifies any ambiguity or lack of clarity that requires application of the second-order principles of statutory construction relied upon by AT&T and Verizon. At best, these two parties identify some language in other subdivisions of section 5890 that addresses questions of denial of access. This is not surprising, since section 5890(a) prohibits both denial of access and discrimination. Neither Verizon nor AT&T explain why the existence of this language establishes legal grounds to requires us to read the words "discriminate against or" out of the statute. Section 5890(a) refers separately to both discrimination and the denial of access and other subdivisions in section 5890 further contain language that both addresses the provision of service and use the number of subscribers as a benchmark. (See Pub. Util. Code, § 5890, subds. (b)(3), (e)(3).) Because these provisions are "clear and unambiguous there is no need for … construction" and we, legally, "may not indulge in it." (*Pacific Gas & Electric Co. v. Dept. of Water Resources* (2003) 11 Cal.App.4th 477, 495 (internal quotation punctuation omitted).)

b) DIVCA's Requirements Separately Address Both Open Access and "Discrimination in Providing Service"

The rehearing applications' claims are based on a concurrent reading of section 5890(a) and the subdivisions that follow. Subdivisions (b), (c), and (d) state a wide variety of criteria for determining if a franchise holder has complied with DIVCA's requirements, including the requirements of subdivision (a). Both Verizon and AT&T claim that analysis of these criteria shows that the Legislature intended that section 5890(a)'s non-discrimination language to be read to impose no requirements on franchise holders that are not imposed by the separate open access requirements.

Subdivisions (b), (c), and (d), are not straightforward. Each of these three subdivisions applies—exclusively—to a particular type of franchise holder. Each subdivision further states unique criteria that only apply to the type of franchise holder covered by that subdivision. In addition, the effect of meeting these different statutory criteria varies from subdivision to subdivision. Franchise holders that meet subdivision (b)'s criteria are deemed to have satisfied section 5890(a)'s requirements. On the other hand, franchise holders that satisfy subdivision (c)'s criteria are deemed to satisfy all of section 5890's requirements.

A correct reading of subdivisions (b), (c) and (d) needs to take into account all of these differences in order to properly describe DIVCA's approach to open access and discrimination issues. For the purposes of this analysis, section 5890, subdivision (b), (c), and (d) are all described in detail below. Subdivision (e), which requires some franchise holders to construct a specific amount of facilities during the first 5 years in which they hold a franchise, is also discussed.

Subdivision (b) applies only to franchise holders with more than one million telephone customers, called "larger franchise holders" in the Phase II Decision. These larger franchise holders have the ability to "satisfy" subdivision (a)'s requirements, including the antidiscrimination requirement, by meeting three specific conditions. In order to meet the first two conditions, a larger franchise holder must *offer* service to

increasing percentages of "low-income households" during the first five years in which it provides service. (Pub. Util. Code, § 5890, subds. (b)(1), (b)(2).) To meet the third condition, larger franchise holders holder must *provide* free service at "community centers in underserved areas ...." (Pub. Util. Code, § 5890, subd. (b)(3).) A larger franchise holder does not satisfy subdivision (a)'s requirements unless it meets "all of the … conditions" listed in subdivision (b).

Although the rehearing applications do not discuss this aspect of DIVCA, larger franchise holders are also subject to section 5890, subdivision (e), which states a number of mandatory "build-out" requirements. Ultimately, these franchise holders must deploy enough facilities to reach 40% or 50% of the number of their telephone customers after five years, depending on the type of technology deployed.[15] However, the statute's requirements only apply if a franchise holder has attracted sufficient subscribers. Subdivision (e)(3) states that franchise holders are nor required to meet this benchmark "until two years after at least 30 per cent of the households with access to the holder's video service subscribe to it for six consecutive months."

The statutory requirements that apply to other franchise holders are quite different. These "smaller franchise holders" cannot satisfy subdivision (a) by meeting the benchmarks set forth in subdivision (b), nor are they subject to the build-out requirements in subdivision (e). Instead, smaller franchise holders are governed by the provisions of subdivision (c). Under this subdivision, smaller franchise holders can satisfy all of section 5890's requirements by meeting a subjective "standard of reasonableness, subject

[15] More precisely, subdivision (e)(1) contains requirements that apply to larger franchise holders that use fiber optic technology (such as Verizon). Franchise holders using any other technology (such as AT&T) fall under subdivision (e)(2). All of subdivision (e)'s requirements apply at two different time thresholds: the two or three year mark (depending on the technology used), and the five year mark. After two years of providing service, a larger franchise holder that is subject to subdivision (e)(1) must have built out its network to reach a number of households equal to at least 25% of the number of households where that franchise holder provides telephone service. A larger franchise holder that is subject to subdivision (e)(2) must meet a similar but larger (35%) requirement within three years. After five years, a franchise holder subject to subdivision (e)(1) must reach a number of households equal to 40% of the number of its telephone customers, while subdivision (e)(2) sets a 50% target.

to determination by the Commission." (Phase II Decision at p. 6.) Subdivision (c) states that a smaller franchise holder must "offer video service to all customers within their telephone service area within a reasonable time as determined by the [C]ommission." (Pub. Util. Code, § 5890, subd. (c).)

We exercised our authority to determine what is reasonable under subdivision (c) by adopting a "safe harbor" for smaller franchise holders that was based on subdivisions (b) and (e) with minor modifications. (Phase II Decision at pp. 14-15.) Those smaller franchise holders that are not able to comply with the Phase II Decision's safe harbor provisions can have their compliance with section 5890's antidiscrimination and open access requirements evaluated on a case-by-case basis.[16] (*Phase II Decision* at p. 15.)

Subdivision (d) applies to franchise holders who begin to offer video service in an area that is only served by satellite television, or who offer video service in an area where they do not also offer telephone service. This subdivision also applies to franchise holders who are not telephone corporations. Rather than giving these franchise holders an opportunity to satisfy DIVCA's requirements by meeting specific standards, subdivision (d) creates a presumption that DIVCA's antidiscrimination requirements have been met. For those franchise holders to which subdivisions (d) applies, "there is a rebuttable presumption that discrimination in providing service has not occurred ...." Unlike the provisions considered above, this presumption only affects the antidiscrimination requirements, not section 5890's requirements as a whole, or all of subdivision (a)'s requirements.

[16] We note that the "Summary of Statutory Requirements" on pages 4-5 of the Phase II Decision is not as detailed as the discussion in the main text accompanying this footnote, and will modify that summary to make it more complete and to make it clear that we were only addressing those features that were salient to our creation of a safe harbor provision for smaller franchise holders.

c) The Rehearing Applications do not Properly Describe Subdivision (b), (c), and (d)'s Requirements

The review of section 5890 set forth above shows that the arguments presented in the rehearing applications do not demonstrate error for two reasons. First, contrary to the relearning applications' claims, subdivisions (b), (c), (d) and (e) do not merely require franchise holders to meet an open access requirement. Section 5890 states requirements that are based on the provision of service (section 5890, subdivision (b)(3)) or tied to benchmarks measuring the number of subscribers (section 5890, subdivision (e)(3).) This indicates that the Legislature specifically contemplated that DIVCA would address the provision of video services, not just the construction of facilities to make those services available. Further, in subdivision (c), section 5890 states an entirely subjective standard that cannot be construed as limiting the effect of subdivision (a). (Pub. Util. Code, § 5890, subd. (c).) As a result, the language of section 5890 provides no support for the claim that the only yardstick DIVCA uses to measure discrimination is the extent to which a franchise holder meets DIVCA's open access requirements. (Cf., Verizon's Rehearing Application at p. 8.) Having considered these statutory provisions in detail, however, we realize that the summary of DIVCA's requirements contained in section 2.1 of the Phase II Decision should be made more precise, and we will modify the decision accordingly.

Second, the rehearing application's specific arguments do not properly describe the statute. AT&T's claims rely only on the conditions stated in section 5890, subdivisions (b)(1) and (b)(2) and fail to acknowledge the provisions of subdivision (b)(3). (AT&T's Rehearing Application at p. 4.) Because a franchise holder does not "satisfy" section 5890(a)'s requirements unless it meets all three conditions, the language of subdivision (b)(3) shows that providing service in low income areas is a necessary part of meeting section 5890(a)'s requirements. While it is true that the two conditions addressed by AT&T speak in terms of access, this fact is not as significant as A&T claims. Because a franchise holder can satisfy all of subdivision (a)'s requirements—

including both antidiscrimination and open access—by meeting subdivision (b)'s conditions, the fact that some conditions relate to access is unsurprising.

Verizon's rehearing application makes an argument based on section 5890 subdivisions (b), (c) and (d), considered as a group. According to Verizon, these subdivisions, taken together, show that compliance with subdivision (a)'s requirements is measured solely in terms of access. (Verizon's Rehearing Application at pp. 7-8.) Verizon supports its claim by pointing out that the term "access" is defined in section 5890, subdivision (j), and includes only the capability of providing video service, not the actual provision of service. However, as discussed above, subdivisions (b), (c) and (d) do not speak exclusively in terms of offering access. In addition to subdivision (b)(3)'s requirement that some franchise holders "provide service" at community centers, subdivision (d) creates a rebuttable presumption that certain franchise holders have not discriminated "in providing service ...." The fact that section 5890 defines, and in some places uses, the term "access" and, elsewhere, refers to "provid[ing]" service—which is excluded from the statute's definition of "access"—shows that, contrary to Verizon's claims, DIVCA looks to more that just whether or not franchise holders offer "access" to their services. Because Verizon's claim that subdivisions (b), (c), and (d) show that section 5890(a) speaks only in terms of access is not based on the statute's actual language, the rehearing application does not demonstrate error.

d) The Commission Is Not Legally Required to Adopt Verizon and AT&T's Policy Views

In addition to claiming that section 5890 legally requires us to disregard subscribership data, Verizon and AT&T both assert that, for policy reasons, we should not consider this information. According to Verizon, once the facilities for providing advanced video services have been built out, the only thing that will cause a household not to subscribe to those services is the customer's decision not to subscribe. (Verizon's Rehearing Application at p. 7.) AT&T makes a similar policy claim. According to AT&T, economic incentives are sufficient to prevent franchise holders from

discriminating in any way other than by denying access to low-income communities. (AT&T's Rehearing at p. 5.)

These claims represent one side of a policy dispute that took place in this proceeding. The record shows that DRA and Greenlining disagreed with Verizon and AT&T on this issue. DRA's Response to the rehearing applications points out that the mere fact that households have been offered service is not sufficient to demonstrate that discrimination has not occurred as a result of other practices. DRA notes that installation issues and maintenance concerns could interfere with the non-discriminatory provision of service. (DRA's Response to Applications for Rehearing, at p. 5.) DRA's comments in the underlying proceeding also make this point. There, DRA points out that subscribership data will allow the Commission to identify when problems arise in both a franchise holder's ability to offer video services and in providing those services. (DRA's Comments on Scoping Memo at p. 4.)

Greenlining's comments present similar policy arguments. Greenlining pointed out that determining whether advanced video services are "truly accessible" involves "economic and technical" considerations. (Greenlining's Amended Reply Comments at p. 5.) That is, even if a franchise holder builds its network into a low-income neighborhood, its pricing structure, lack of customer support, lack of maintenance, or inability to easily connect households to its network could all result in discrimination, even if "access," as it is defined in DIVCA, was provided.[17] Greenlining asserted that reviewing subscribership data to see if low-income households are actually using advanced video services provides a method of determining if any economic or technical factors are impeding customers from using those services that are available.

Based on these comments, we rejected the claim that no extraneous factors could interfere with the ability of a franchise holder to provide service once its facilities

[17] AT&T claims that section 5890(a) only addresses access issues because it only seeks to protect "potential residential subscribers [.]" (AT&T's Rehearing Application at p. 4.) The discussion in main text shows how issues unrelated to access could result in discrimination against potential subscribers.

were deployed in a low income neighborhood. (Phase II Decision at p. 42.) The fact that AT&T and Verizon believe that the Commission should have relied on different facts (e.g., a belief that franchise holders are economically motivated to serve low income customers) to reach a different conclusion does not demonstrate that the findings we did make are in error. (Cf., AT&T's Rehearing Application at p. 5.) However, our discussion of these policy considerations, and the parties' positions is abbreviated. We will modify the Phase II Decision to expand on this point.

Verizon further asserts that Greenlining's comments should be disregarded because DIVCA only seeks to close the "digital divide" in terms of broadband services, not video services. (Verizon's Rehearing Application at p. 9.) However, DIVCA clearly states the Legislature's intent ensure that all Californians receive the benefits of advanced video services, specifically noting the wide variety of programming that can be provided using advanced video services, the need for diverse communities to have access to appealing programming, and the overall economic benefits of providing advanced services. (Pub. Util. Code, § 5810, subds. (a)(1)(A), (a)(1)(B), (a)(1)(D).) DRA's comments directly address this point. (DRA's Comments on Scoping Memo at p. 4.) Verizon also asserts that these requirements place an "additional burden" on new entrants (Verizon's Rehearing Application at p. 2.) However all franchise holders must provide subscribership data. (Compare GO 169 section VII. C.1. (3)(a) (iii) with section VII. C.1.(3) (b) (iii).)

AT&T concludes its discussion of section 5890's requirements with two further policy arguments. First, the rehearing application asserts that subscribership data should not be reported because it is proprietary. The rehearing application speculates that competitors will obtain this data, even if it is aggregated, and then analyze the data to "identify a new entrant [i.e. a competitor's] rollout plans." (AT&T's Rehearing Application at p. 5.) This claim states a vague concern about the sensitivity of subscribership data but does not explain how that concern could be realized. We have held that "upon a proper showing by the franchise holder submitting the information, competitively sensitive data will receive confidential treatment." (Phase II Decision at

pp. 42-43, See also GO 169, § VII.C.2.) Subscribership data is collected pursuant to our enforcement authority and there is no statutory obligation to disclose this information outside the context of an enforcement proceeding. Consistent with our discussion of GO 169, above, we will modify the Phase II Decision to make the distinction between data collected for enforcement purposes and for reporting purposes clear. AT&T provides no explanation of how our approach to providing confidential treatment for subscribership data would result in sensitive data being disclosed or how aggregated data could provide a competitive advantage. As a result, AT&T's rehearing application states policy concerns without providing us with any ability to evaluate those concerns. (C.f., Pub. Util. Code, § 1732.)

AT&T also claims that subscribership data should not be collected at the census tract level. According to AT&T, DIVCA's antidiscrimination requirement "is measured at the level of the provider's entire service area." As the Phase II Decision explains at page 41, this assertion is not correct. DIVCA prohibits discrimination at a "local" level, specifically discrimination based on "the income of the residents in the local area in which the group resides." (Pub. Util. Code, § 5890, subd. (a).) The only authority cited by AT&T is a reference to GO 169 at page 19, section D(2). This appears to be a reference to section VII.D, which requires franchise holders to report their total number of subscribers so that the number of community centers that must be served pursuant to section 5890, subdivision (b)(3) can be calculated. Nothing in this requirement supports the conclusion that DIVCA's non-discrimination does not apply at a local level, as required by section 5890(a).

III. CONCLUSION

In the Phase I Decision we determined that DIVCA gives us the authority to obtain information necessary for the enforcement of specific DIVCA provisions. That decision also determined that we do not have authority to award intervenors compensation for their participation in proceedings regarding DIVCA. Both these holdings are now final and conclusive.

The Phase II Decision applied these holdings. We determined that TURN was not entitled to intervenor compensation, and that video subscribership data met the criteria for information that should be reported to us for enforcement purposes. The rehearing applications assert that these conclusions are in error, but as we have explained in this order, these arguments, do not demonstrate error. We will modify the Phase II Decision to make the nature of its underlying statutory authority clear. Because the rehearing applications do not demonstrate error, we will deny rehearing of D.07-10-013, as modified.

Therefore **IT IS ORDERED** that:

1. D.07-10-013 is modified as follows:

   a. The first two paragraphs of Section 2.1, entitled "Summary of Statutory Requirements," on page 4 are restated to read:

   > For the purposes of this discussion regarding safe harbor provisions, we will note some of the salient features of DIVCA's antidiscrimination, build-out, and open access requirements. DIVCA contains a general requirement that state video franchise holders provide open access to their video service and avoid discrimination. More specific requirements, for the larger franchise holders, are expressed, in part, in terms of (1) minimum percent of low-income households out of total households with access to the franchise holder's video service within specified periods, and (2) minimum percent of total households with access to the franchise holder's video service within specified periods, depending on the predominant video technology that the franchise holder is deploying. A complete discussion of these requirements is found in our Phase I Decision and we also describe these requirements in greater detail below.
   >
   > Pub. Util. Code § 5890(a) sets forth the fundamental principle that a "cable operator or video service provider that has been granted a state franchise … may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides." Pub. Util. Code § 5890(b)(1) and (2) then prescribe two of the conditions that would allow larger state video franchise holders (over one

million telephone customers) to meet DIVCA's open access and non-discrimination requirements:

b. The second sentence of the paragraph spanning pages 21 and 22, which sentence begins, "However, we agree generally…" is modified to read as follows:

However, we agree generally with the comments of current or potential providers of video programming and broadband services that DIVCA intends video programming and broadband services to be offered in a competitive environment. As we concluded in the Phase I Decision, for policy reasons this Commission should avoid imposing additional requirements that impose a heavy burden on service providers yet do not assist this Commission in carrying our its role.

c. A new sentence is added at the end of the first full paragraph on page 42, immediately prior to the reference to footnote 49, which sentence reads:

The comments of the parties further indicate that economic, technical, or logistical factors could create discriminatory conditions interfering with potential customers' ability to obtain video services even if a franchise holder provides open access.

d. Footnote 49 on page 42 is restated to read:

See DRA's Reply Comments on PD, discussing the usefulness of such reports for the Commission to determine whether holders are complying with anti-discrimination requirements and factors that could interfere with a customers ability to obtain service. *See also* Greenlining's Reply Comments on PD, stating that knowing whether customers are actually utilizing services that have been made available is an indicator of whether economic or technical factors have impeded with the ability of those customers to obtain service.

e. Ordering Paragraph 2.c. on pages 48-49 is restated to read:

c. Restate Paragraph G. of Section VII, "Reporting Requirements" as follows:

G. Video Subscribership Data Reports

A State Video Franchise Holder shall report the number, as of January 1 of each year, of Households in each Census Tract of

the State Video Franchise Holder's and/or any of its Affiliates' Video Service Area that subscribe to the Video Service offered pursuant to a State Video Franchise by the State Video Franchise Holder and/or any of its Affiliates.

The subscribership data reports required by this section shall be filed with the Commission on a date no later than April 1 after the conclusion of each annual reporting period. All information submitted to the Commission pursuant to this section shall be disclosed to the public only as provided pursuant to Public Utilities Code § 583. No individually identifiable information shall be subject to public disclosure.

f. A new Ordering Paragraph 2.d is added at page 49, which Ordering Paragraph shall state:

d. Add a new Section VII.H as shown:

H. Additional Information

The Commission reserves the authority to require additional reports that are necessary to the enforcement of specific DIVCA provisions.

2. Rehearing of D.07-10-013, as modified, is denied.

This order is effective today.

Dated July 29, 2010 at San Francisco, California.

MICHAEL R. PEEVEY
President
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

Commissioner Dian M. Grueneich, being necessarily absent, did not participate.