Decision 07-10-013 October 4, 2007

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)

OPINION RESOLVING ISSUES IN PHASE II

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OPINION RESOLVING ISSUES IN PHASE II

1. Summary

In today's decision, we resolve issues in Phase II of this rulemaking raised by the assigned Commissioner's May 7, 2007 Scoping Memo for Phase II and Request for Comments; Ruling on Notice of Intent to Claim Intervenor Compensation (Scoping Memo), on which we received two rounds of written comments.

The Scoping Memo solicited comment on the following issues: (i) the build-out requirements for video franchise holders with less than one million telephone customers (including case-by-case application procedures); (ii) the need for additional reporting requirements to enforce the Digital Infrastructure Video Competition Act of 2006 (DIVCA);[1] (iii) amendment to the Commission's Rules of Practice and Procedure to conform requirements to DIVCA; (iv) errors or omissions in the state video franchise certificate or other attachments to the DIVCA Phase I decision; and (v) renewal of state video franchises.

Only the first two issues are contested. We adopt build-out requirements for state video franchise holders with less than one million telephone customers, largely mirroring the statutory build-out requirements for holders with more than one million telephone customers. We adopt one additional reporting requirement narrowly focused to carry out the legislative intent to ensure non-discriminatory build-out.

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[1] The Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Assembly Bill 2987 (Ch. 700, Stats. 2006).

Other issues are resolved without contention. We have amended our Rules of Practice and Procedure to reflect our expanded complaint jurisdiction under DIVCA. Lastly, we set a target date of 2011 for opening a rulemaking to adopt principles and policies regarding state video franchise renewals.

2. Build-Out Requirements

DIVCA requires that state video franchise holders actively build out their systems, and to do so in a non-discriminatory fashion. The build out requirements, set forth in Pub. Util. Code § 5890, are very specific regarding franchise holders that (together with their affiliates) have more than 1,000,000 telephone customers in California. But as to holders that (together with any affiliates) have less than 1,000,000 telephone customers in California, DIVCA provides that Section 5890 is satisfied if the holder "offer[s] video service to all customers within [its] telephone service area within a reasonable time, as determined by the Commission." Pub. Util. Code § 5890(c). The issue for Phase II is how the Commission should implement this statutory provision for the smaller state video franchise holders.

In the following discussion, we first summarize the statutory requirements for franchise build-out as they relate to the larger state video franchise holders.[2] We then summarize the debate between the commenters over the meaning of the statutory provisions specific to the state video franchise holders with less than 1,000,000 telephone customers in California. Finally, we explain that we will extend the statutory provisions for larger franchise holders as a "safe harbor" to

[2] For purposes of this decision, we refer to video franchise holders with more than 1,000,000 telephone customers in California as the "larger" franchise holders, and those with fewer than 1,000,000 telephone customers as "smaller" franchise holders.

the smaller video franchise holders, except that smaller franchise holders are not required to offer video service in areas where the cost to provide video service in that area is substantially higher than the average cost of providing video service in that telephone service area. We also explain below that GO 169 has already established a process for video franchise holders subject to Section 5890(c) to apply for case-by-case determinations of what are "reasonable" build-out requirements; we believe that this process adequately meets the needs of these video franchise holders subject to Section 5890(c).

2.1 Summary of Statutory Requirements

DIVCA requires state video franchise holders to provide non-discriminatory access to their video service. The requirements, for the larger franchise holders, are expressed 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. We 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 prescribes the conditions under which the larger state video franchise holders (over one million telephone customers) may meet the non-discrimination requirements of subdivision (a):

(1) Within three years after it begins providing video service under this division, at least 25 percent of households with access to the holder's video service are low-income households.

(2) Within five years after it begins providing video service under this division and continuing thereafter, at least 30 percent of the households with access to the holder's video service are low-income households.

Similarly, DIVCA contains specific requirements for larger state video franchise holders regarding the pace at which they offer access to *all* households within the holder's telephone service area, depending on the predominant video technology deployed. We refer to this DIVCA provision as the build-out requirements, which are set forth in Pub. Util. Code § 5890(e)(1) and (2):

(1) If the holder is predominantly deploying fiber optic facilities to the customer's premises, the holder shall provide access to its video service to a number of households at least equal to 25 percent of the customer households in the holder's telephone service area within two years after it begins providing video service under this division, and to a number at least equal to 40 percent of those households within five years.

(2) If the holder is not predominantly deploying fiber optic facilities to the customer's premises, the holder shall provide access to its video service to a number of households at least equal to 35 percent of the households in the holder's telephone service area within three years after it begins providing video service under this division, and to a number at least equal to 50 percent of these households within five years.[3]

[3] In Pub. Util. Code § 5890(e)(3) and (4), DIVCA provides relief for a larger State video franchise holder that has difficulty meeting the 40% or 50% build-out requirement, as appropriate. The holder is not required to offer access to that percent of households

Footnote continued on next page

In contrast to the specific requirements for larger state video franchise holders, the smaller holders (those with fewer than one million) telephone customers in California are not given any formula for compliance with the non-discrimination or build-out requirements of DIVCA. Instead, the smaller holders are held to a standard of reasonableness, subject to determination by the Commission, as to both the non-discrimination and build-out requirements:

> Holders or their affiliates with fewer than 1,000,000 telephone customers in California satisfy this section if they offer video service to all customers within their telephone service area within a reasonable time, as determined by the Commission. However, the Commission shall not require the holder to offer video service when the cost to provide video service is substantially above the average cost of providing video service in that telephone service area.

Pub. Util. Code § 5890(c).[4]

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until two years after at least 30% of the households with access to the holder's video service subscribe to it for six consecutive months. Pub. Util. Code § 5890(e)(3). If the 30%/six consecutive months subscription level is not achieved within three years after the holder begins providing video service, the holder may request a delay from the Commission in meeting the 40% or 50% build-out requirement, as appropriate, until the subscription level is reached. If the request is supported by sufficient documentation, the Commission must grant the delay until such time as the holder reaches the 30%/six consecutive months subscription level. Pub. Util. Code § 5890(e)(4).

[4] The Commission indicated in D.07-03-014 that it expected the franchise development requirements of DIVCA would have little or no impact on incumbent cable operators. As the Commission explained, "we interpret [the statute] to call for requirements only to the extent that a [holder] does not 'offer video service' to all of its *telephone* customers within its 'telephone service area.' If all of a [holder's] telephone customers have access to its video service (as is typically the case for incumbent cable operators), then we need not impose any further obligation on the holder." The Commission required such a holder to submit an affidavit of compliance with this condition. *See* D.07-03-014, *mimeo,* text accompanying notes 608-09 (emphasis in original).

DIVCA also provides video franchise holders with the opportunity to file an application for an extension of time to meet the franchise development requirements summarized above. Under Pub. Util. Code § 5890(f)(1), after two years of providing service, a state video franchise holder may apply to the Commission for an extension of time to meet the requirements of Pub. Util. Code § 5890(b), (c) or (e); in other words, the application for an extension is available to any state video franchise holder, regardless of the number of its telephone customers. DIVCA sets forth the following terms regarding the grant of an extension:

> The franchising authority [*i.e.*, the Commission] may grant the extension only if the holder has made substantial and continuous effort to meet the requirements of subdivision (b), (c), or (e). If an extension is granted, the franchising authority shall establish a new compliance deadline.

Pub. Util. Code § 5890(f)(4).

2.2 Positions of the Parties

In short, as the foregoing summary shows, DIVCA effectively gives smaller state video franchise holders flexibility in how they demonstrate compliance with the non-discrimination and build-out requirements of Pub. Util. Code § 5890. In D.07-03-014, the Commission reserved to Phase II of the DIVCA rulemaking the consideration of compliance mechanisms to satisfy the requirements of Section 5890(c).[5] One compliance mechanism, the "safe harbor," would consist of a development formula similar in principle to the statutory formulas for larger state video franchise holders. The other compliance

[5] D.07-03-014, Ordering Para. 22.

mechanism would be "case-by-case," literally an application in which the franchise holder would justify the reasonableness of its development efforts based on the circumstances peculiar to its service area.

The assigned Commissioner issued a Scoping Memo on May 7, 2007 seeking comment on various issues. Among other things, the Scoping Memo invited the parties to submit specific proposals for the "safe harbor" and "case-by-case basis" compliance mechanisms to satisfy the requirements of Section 5890(c).

In response to this invitation, six parties commented on compliance mechanisms. These commenters are: a group of small, mostly rural local exchange companies participating jointly (Small LECs);[6] California Cable and Telecommunications Association (CCTA); Joint Consumers,[7] the Commission's Division of Ratepayer Advocates (DRA); Greenlining Institute (Greenlining); and SureWest TeleVideo.

The commenters differ sharply and fundamentally over the inferences to be drawn from the legislative distinction between larger and smaller state video franchise holders. Commenters representing the smaller telephone companies argue that DIVCA intends relaxed requirements for smaller franchise holders;

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[6] Small LECs consist of Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Global Valley Networks, Inc., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company.

[7] Joint Consumers consist of California Community Technology Policy Group, Latino Issues Forum, and The Utility Reform Network (TURN). TURN responded separately to the Proposed Decision.

these commenters propose compliance mechanisms that reflect such a legislative intent. Commenters representing the consumer and cable interests read the legislative intent differently; these commenters' proposals reflect more or less the compliance mechanisms for larger franchise holders while also taking into account the DIVCA provisions specific to smaller franchise holders (*e.g.*, not obligated to offer video service in higher cost areas). Detailed summaries follow.

SureWest TeleVideo recommends that the Commission adopt the same safe harbor "benchmarks" as for the larger state video franchise holders but would double the timeframe within which a smaller franchise holder must meet those benchmarks:

Predominantly Fiber-Based Systems

Four Years	25% of Households
Ten Years	40% of Households

Non-Fiber-Based Systems

Six Years	35% of Households
Ten Years	50% of Households

SureWest TeleVideo, Opening Comments at p. 3. SureWest TeleVideo contends its safe harbor proposal recognizes the differences smaller franchise holders face relative to larger franchise holders, in particular, less access to capital. *Id.*

In reply to parties recommending that the statutory safe harbor apply to both larger and smaller state video franchise holders, SureWest TeleVideo argues that the small incumbent local exchange companies have far more diverse service areas and much less access to capital than an AT&T or a Verizon. From these differences, SureWest TeleVideo draws the conclusion that the Commission ought to adopt safe harbors to enable smaller franchise holders to "avoid questions about their pace of build-out [and] minimize the potential for

additional Commission proceedings investigating compliance" with DIVCA. SureWest TeleVideo, Reply Comments at p. 2. SureWest TeleVideo also argues that if the Legislature had intended all franchise holders to be subject to the same build-out requirements, it could simply have included smaller franchise holders in Pub. Util. Code §§ 5890(b) and (e) but it did not do so. *Id.* at p. 3.

For the same reason, SureWest TeleVideo disputes DRA's argument that smaller franchise holders should be subject to DIVCA's non-discrimination standards for serving low-income households. SureWest TeleVideo contends that smaller franchise holders are not subject to the non-discrimination benchmarks set forth in Section 5890(b)[8] and that the Commission may address discrimination concerns under Section 5890(a) through complaint/investigation processes. Moreover, according to SureWest TeleVideo, there are no specific build-out benchmarks for franchise holders with fewer than 1,000,000 telephone customers; there is only the requirement to build out their telephone service areas within a reasonable time, and even that requirement is qualified in that such holders need not build out areas where the cost to do so is high. *Id.*

SureWest TeleVideo further recommends that the state video franchise holder merely certify that it will comply with the non-discrimination and build-out requirements of Pub. Util. Code § 5890. *Id*. at p. 6. SureWest TeleVideo does not believe a case-by-case application should have to include a build-out plan. Instead, SureWest TeleVideo points to the monitoring provisions of GO 169 (Section VII.C.1), and asserts that if the Commission or a local government

[8] SureWest TeleVideo, Reply Comments at 3 (contending that DRA ignores the law and incorrectly applies the standards of Section 5890(b) for low-income household benchmarks to franchise holders with fewer than 1,000,000 telephone customers).

believes the applicant has not made reasonable progress in building out its service area, the Commission can open an investigation in which the burden of proof should be on the applicant to demonstrate satisfaction of the build-out requirements. Opening Comments at pp. 3-4; Reply Comments at p. 6.

Small LECs do not oppose adoption of a safe harbor for smaller state video franchise holders so long as it does not become the *de facto* standard for whether those holders have met DIVCA's build-out requirements. Small LECs, Opening Comments at p. 3. Small LECs request a case-by-case compliance mechanism that is identical to that proposed by SureWest TeleVideo; in particular, the smaller franchise holder would not have to propose a build-out plan at the application stage but would bear the burden of proof to demonstrate the reasonableness of its build-out efforts in any enforcement proceeding instituted by the Commission. *Id.* At pp. 3-4. The rebuttal arguments of Small LECs similarly mirror those of SureWest TeleVideo. See Small LECs, Reply Comments at pp. 2-5.

CCTA argues that "there is no rational basis for adopting a different or lower standard than that which the Legislature required for state franchise holders with more than 1 million telephone customers to comprise a safe harbor build-out requirement applicable to a telephone corporation with fewer than 1 million customers . . . This is particularly so when the DIVCA expressly provides a cost exemption, so that telephone companies with fewer than 1 million telephone customers are not required to offer video service in their

telephone service areas where the cost to provide video service exceeds the average cost of providing video service." CCTA, Opening Comments at pp. 2-3.[9]

All three commenters representing consumer interests support using the statutory safe harbor provisions, namely, Pub. Util. Code § 5890(b) and (e), for all state video franchise holders.[10] DRA notes that some smaller franchise holders may have a low percent of low-income households in their service, making difficult the attainment of the specific benchmarks set forth in Pub. Util. Code § 5890(b)(1) and (2). DRA proposes an alternative for satisfying DIVCA's non-discrimination requirement in this circumstance.[11]

Regarding the case-by-case compliance mechanism, DRA recommends the Commission treat this mechanism as a request for waiver of the build-out requirements, with the burden on the smaller franchise holder to demonstrate the need for the waiver. DRA, Reply Comments at p. 3. The waiver request would be a public process, with community meetings and presentation of supporting evidence on cost issues, technological options, and timelines. *Id*. at pp. 3-4. DRA would not require the franchise holder to undergo a public

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[9] CCTA tries to bolster its argument with many assertions about the experience of incumbent cable operators in building out their video franchises. The Opening and Reply Comments of CCTA, SureWest TeleVideo, and Small LECs also contain much debate over the relative advantages and disadvantages of incumbent cable operators and incumbent local exchange companies in seeking to provide video service.

[10] *See* Joint Consumers, Opening Comments at pp. 1-2; DRA, Reply Comments at pp. 1-2; Greenlining, Opening Comments at pp. 1-2.

[11] *See* DRA, Opening Comments at p. 3. DRA's proposal utilizes the percent of total low-income households provided access, rather than the percent of all households. We address the problem noted by DRA and adopt what we believe is a similar solution. *See* section 2.3 below.

process, however, if the franchise holder is merely requesting an extension of time.[12] *Id*. at p. 4.

Joint Consumers consider there is no justification for having both a safe harbor and a case-by-case compliance mechanism; in any event, Joint Consumers believe that a safe harbor should be rigorous. Joint Consumers, Opening Comments at p. 2. Any review process conducted by the Commission regarding either compliance mechanism should allow for public participation. *Id*. at pp. 3-4.

Greenlining argues that relaxed standards for smaller state video franchise holders would allow them to take advantage of the streamlined state franchising system without providing any benefit to DIVCA's target communities. Greenlining, Reply Comments at p. 2. Greenlining also argues against the case-by-case compliance mechanism, asserting that such a mechanism would take the Commission away from the ministerial role envisioned by the Commission for itself in its implementation of DIVCA. *Id.* at p. 4. Greenlining concludes that the existing DIVCA provisions allowing for requests for extension to comply and for exemptions from serving higher-cost areas are more than sufficient to cover smaller companies' concerns over excessive costs, limited resources, inability to access certain households, and other hurdles in the build-out process. *Id*. at p. 5.

2.3 Adopted Compliance Mechanisms for Smaller State Video Franchise Holders

We agree with the commenters representing the smaller telephone companies that the Legislature intended in DIVCA to allow them more flexibility

[12] Presumably, DRA is referring to an extension request under Pub. Util. Code § 5890(f).

(relative to larger telephone companies holding state video franchises) in demonstrating compliance with DIVCA's build-out requirements. However, we do not need to establish different "safe harbors" for these video franchise holders to afford them flexibility. The flexibility that the smaller telephone companies seek is set forth within the four corners of the statute in the provisions that allow the smaller franchise holder to demonstrate compliance "within a reasonable time" based on its own telephone service area, and that exempt the smaller franchise holder from the build-out requirements in areas where the cost of providing video service is "substantially above the average cost of providing video service in that telephone service area." Pub. Util. Code § 5890 (c).

Upon careful review of the comments, we conclude that these provisions give precisely the flexibility that the Legislature intended. It would be arbitrary for us to create a special "safe harbor" for smaller franchise holders by adopting SureWest TeleVideo's proposal (twice as long a build-out as that allowed larger franchise holders under Pub. Util. Code § 5890 (e)). Even if we were to accept SureWest TeleVideo's assertion that smaller franchise holders lack the financial resources of larger franchise holders, SureWest TeleVideo offers no concrete support or evidence for the timeframes in the safe harbor mechanism it proposes.[13]

It is in the public interest for all holders of state video franchises to build out their systems so that service is available to consumers throughout the franchise area. We find that the more reasonable approach is to use the safe

[13] Under that proposal, depending on the predominant video technology deployed, a smaller franchise holder would be in compliance by providing access to 50% or less of its customer households 10 years after it begins providing video service.

harbor provisions of Pub. Util. Code § 5890(e) for all state video franchise holders. All commenters on this issue except SureWest TeleVideo and Small LECs support this approach. Any smaller telephone company with a video franchise that considers the build-out requirements of Pub. Util. Code § 5890(e) infeasible has recourse to the case-by-case compliance mechanism established in GO 169.

Similarly, we extend the benchmarks set forth in Pub. Util. Code § 5890(b) regarding non-discriminatory service to low-income households to video franchise holders with fewer than one million telephone customers. Nothing in the record convinces us that these franchise holders subject to Section 5890(c) are not also required to comply with non-discrimination requirements in Section 5890(a), or that the benchmarks set forth in Section 5890(b) should not also be applied to these franchise holders when they are implementing a safe harbor build-out plan. However, as DRA notes, some franchise holders may have difficulty complying if the proportion of low-income households in the holder's service area is relatively low. In such cases, we will require the franchise holder to demonstrate that the percent of low-income households in its service area to which it provides access to video service correlates closely to the percent of all households provided access. For example, assume a state video franchise holder has 500,000 customer households in its service area, of which only 50,000 are low-income households. In this example, the franchise holder may not be able to meet the benchmarks in Pub. Util. Code § 5890(b) that low-income households constitute 25% or more of the households with access in a franchise holder's service area. We find that DIVCA's non-discrimination benchmarks are satisfied, under circumstances like those in the example, if the franchise holder provides access to low-income households in substantially the same proportion

as total households. Thus, when the franchise holder is providing access to half of all households, it concurrently should be providing access to half of all low-income households in its service area.

We must reject Small LECs' proposal for the case-by-case compliance mechanism. Under the proposal, the smaller franchise holder would be exempt from any up-front franchise development requirement, whether in the statute, the Commission's regulations, or the holder's application. The smaller franchise holder, under Small LECs' proposal, would bear no obligation other than the burden of proof in any enforcement proceeding, whether initiated by the Commission or brought by complaint of a local government, that the holder was meeting the reasonableness requirement of Pub. Util. Code § 5890(c).

We agree with Small LECs that Section 5890(c) shows concern for the special circumstances of smaller franchise holders. However, we do not construe Section 5890(c) as mandating or even authorizing a kind of after-the-fact reasonableness review. When we endorsed the idea in D.07-03-014 of allowing a smaller franchise holder to devise its own build-out, we clearly expected the holder to tell us *in advance* what that built-out plan would be.[14] It is equally clear from DIVCA that the Legislature expected objective milestones to be established and met for each state video franchise holder's build-out, regardless of the number of customer households in the holder's service area.

[14] "If it does not meet any of our safe harbor conditions, a State video franchise holder subject to Pub. Util. Code § 5890(c) *shall file an application with the Commission that proposes 'reasonable' build-out requirements.* The application shall be filed any time in the calendar year in which [the holder] applies for a state video franchise." D.07-03-014, *mimeo,* text accompanying note 610. (Emphasis added.)

Our GO 169 already contains a case-by-case compliance mechanism, among other compliance options for smaller state video franchise holders. In relevant part, VI.B.1 of GO 169 provides:

> With respect to build-out requirements pursuant to Pub. Util. Code § 5890(c), a State Video Franchise Holder . . . will be deemed to [comply] if it meets one of the following three conditions:
>
> . . .
>
> (3) The State Video Franchise Holder satisfies company-specific build-out requirements adopted by the Commission. To seek to satisfy this condition, a State Video Franchise Holder shall file an application with the Commission within the calendar year in which it applies for a State Video Franchise. This application shall specify how the State Video Franchise holder plans to offer Video Service to its telephone customers within a reasonable time. The application will launch a proceeding that will conclude with a vote of the full Commission.

Based on the comments, we believe these provisions give almost complete guidance. The additional guidance we set forth below follows closely from Pub. Util. Code § 5890.

First, the company-specific application should contain clearly stated build-out milestones. By definition, these milestones may differ from those set forth in DIVCA, but they must demonstrate a serious and realistic planning effort by the smaller state video franchise holder. Second, the company-specific application should clearly state the constraints affecting the holder's build-out, with

particular attention to the types of constraints noted in DIVCA itself.[15] Third, to the extent that there are areas within the smaller franchise holder's service area that are substantially higher cost than average to provide video service, those substantially higher cost areas should be clearly delineated and explained in the application. *See* Pub. Util. Code § 5890(c).

3. Additional Data Reporting

DIVCA requires that state video franchise holders report certain broadband and video data to the Commission on an annual basis. As noted in D.07-03-014, DIVCA's broadband and video reporting requirements fulfill a number of statutory purposes. The Commission determined that the Legislature intended such reporting requirements to assist the Commission with its effort under DIVCA to close the digital divide and support a variety of voluntary efforts to increase broadband adoption, in addition to our efforts to enforce video build-out and non-discrimination requirements.[16]

At issue here is whether the Commission needs additional, more detailed reporting of data in order to carry out the "express legislative intent to

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[15] *See*¸ for example, Pub. Util. Code § 5890(f)(3), regarding Commission review of a franchise holder's failure to satisfy build-out requirements. In such review, the Commission is required to consider factors that are beyond the holder's control, including:

(i) The ability of the holder to obtain access to rights-of-way under reasonable terms and conditions.

(ii) The degree to which developments or buildings are not subject to competition because of existing exclusive arrangements.

(iii) The degree to which developments or buildings are inaccessible using reasonable technical solutions under commercially reasonable terms and conditions.

[16] See generally, D.07-03-014, *mimeo*, at text accompanying notes 527-70.

(1) promote widespread access to technologically advanced cable and video services, and (ii) complement efforts to increase investment in broadband infrastructure and close the digital divide."[17]

In Phase I of this rulemaking, the Commission considered the extent to which it could impose reporting requirements on video franchise holders in addition to those specifically listed in DIVCA, and determined that it could, stating:

> …we have the authority to take actions necessary for our enforcement of specific DIVCA provisions. Despite AT&T's and SureWest's protests to the contrary, we hold that this authority extends to our ability to impose additional reporting requirements. [footnote omitted.] 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.[18]

In the following discussion, we summarize the positions of the commenters as to whether, and what, additional data should be reported. Then, we explain our decision to adopt one additional requirement, namely, the number of video customers that a state video franchise holder is serving.

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[17] Scoping Memo at p. 4. In order to carry out its monitoring responsibilities related to the build out requirements under Pub. Util. Code § 5890, Communications Division staff has proposed Resolution T-17107, adding a question to the video franchise application documents to ascertain whether an applicant (or applicant's affiliate(s)) who are providing telephone service are predominantly deploying fiber optic facilities to their customers' premises. Such information is necessary to know whether Section 5890(e)(1) or (e)(2) is applicable. This proposed change does not impact the annual reporting requirements discussed here.

[18] D.07-03-014, *mimeo,* at pp. 145-146 (note omitted).

3.1 Positions of the Parties

Eight parties responded to the Scoping Memo's invitation to comment on whether the broadband and video data currently being collected by the Commission is sufficient for the Commission to carry out its responsibilities under DIVCA.[19] The five parties who provide telephone and/or video programming services, and who are either holders of state video franchises now or may be in the future (Verizon California Inc., AT&T California, SureWest TeleVideo, Small LECs, and CCTA) all take the position that the data currently being provided is sufficient.[20] Parties representing consumer interests all argue that the current data requirements are not sufficient, and that additional information either regarding the technology being used to provide video or broadband services, pricing, and/or video subscribership should, among other things, be required.

AT&T California asserts that additional data requirements "would be burdensome and go beyond the intent and scope"of DIVCA; that increased competition, not close regulation of video franchise holders, is what will accomplish DIVCA's goals; that additional data requirements would be tantamount to utility regulation; and that Section 5840(a) prohibits any

[19] Scoping Memo at p. 5.

[20] *See, e.g.*, Small LECs, Opening Comments at p. 4 ("Imposing additional reporting requirements on participants in a competitive marketplace adds compliance costs for carriers, thereby reducing resources that should more appropriately be directed at the investment intended by the Legislature"); Verizon Reply Comments, at p. 2 ("Moreover, as pointed out by several parties, DIVCA recognizes that the path to greater availability of advanced services is through competition, not reporting").

additional data requirements.[21] As AT&T California indicates, these are arguments it has made previously in this rulemaking.[22] Indeed, it was precisely these arguments that the Commission already considered and rejected in the Phase I Decision, when it determined that "Despite AT&T's and SureWest's protests to the contrary, we hold that this authority extends to our ability to impose additional reporting requirements," as quoted more fully above. We need not relitigate the issue here.

SureWest TeleVideo also again argues that any additional reporting requirements would be improper, stating "[i]f anything, this legislative intent is an argument against additional reporting requirements,"[23] and that "[l]ooking to broad statements of legislative intent as a basis for authority to invoke reporting requirements beyond those explicitly created in DIVCA would violate Section 5820(c)."[24] SureWest TeleVideo's position on this, like that of AT&T California, was rejected by the Commission in D.07-03-014.

3.2 Adopted Addition to Data Reporting Requirements

We disagree that the imposition of further reporting requirements violates DIVCA. However, we agree generally with the comments of current or potential

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[21] AT&T California, Opening Comments at pp. 1-3.

[22] AT&T California, Opening Comments at pp. 2-3 ("As AT&T California has previously noted, these requirements are both broader, and more granular than authorized by DIVCA") and n.16 (citing four filings in which AT&T California has previously made this argument).

[23] SureWest Televideo, Opening Comments at p. 5.

[24] *Id.* at p. 6.

providers of video programming and broadband services that DIVCA intends video programming and broadband services to be offered in a competitive environment, and that the Commission should avoid imposing additional data requirements that impose a heavy burden on service providers yet do not assist the Commission in carrying out its role.

DRA has proposed that "…data collection should be expanded to include…service pricing by market and/or census tract." [25] However, DIVCA makes clear that we have no jurisdiction over pricing issues.[26] Thus, we decline at this time to require any pricing information for video or data services.

Although Greenlining and Joint Consumers request that the Commission require additional data regarding specific broadband and video technologies being used and the data speeds being offered for broadband services, we also decline to require such additional reporting. We expect that technologies being used and data speeds will rapidly change as competitive forces drive providers to invest constantly in new technology and increase data speeds in response to consumer demand.

On the other hand, we are persuaded that we should require state video franchise holders to report the number of video customers by census tract in addition to the number of households that are offered video service, as was urged by DRA. DIVCA prohibits both discrimination and the denial of access to any group of potential customers because of income in the area in which they reside. Pub. Util. Code § 5890(a). We believe that subscribership data will be

[25] DRA, Opening Comments at p. 3.

[26] Pub. Util. Code § 5820(c).

useful for ensuring enforcement of the non-discrimination and build-out provisions of Section 5890.

AT&T California, SureWest Televideo, and Small LECs argue that the requirement for a state video franchise holder to make a substantial and continuous effort to meet build-out requirements, which was mentioned in the Scoping Memo, does not authorize additional data reporting on a regular basis, as the state video franchise holder has the burden of demonstrating such effort only when seeking an extension, pursuant to Section 5890(f), of time to comply with those requirements. AT&T California states that "If and when a franchise holder seeks such an extension, the franchise holder will bear the burden of showing a 'substantial and continuous' effort, but DIVCA provides no authority to require all holders to make this showing at all times."[27] SureWest TeleVideo claims that it "would be an abuse of discretion, therefore, to rely on this standard to create a reporting requirement that applies regardless of whether a provider seeks such an extension."[28]

We do not rely on the need for the Commission to monitor whether a "substantial or continuous effort" is taking place in deciding to require state video franchise holders to report the number of video customers they serve. While Section 5890(f) allows the holder, under certain circumstances, to be granted an extension of time to comply with Sections 5890(b), (c), or (e), as appropriate, it does not provide for an extension of time to comply with the non-discrimination requirements of Section 5890(a). Should a holder fail to meet

[27] AT&T California, Opening Comments at p. 3.

[28] SureWest TeleVideo, Opening Comments at p. 4.

the requirements of Section 5890(b) or (c), seek an extension of these DIVCA provisions, or indeed be granted an extension under Section 5890(f), the Commission, upon complaint or upon its own motion, needs to evaluate a holder's compliance with Section 5890(a). We believe that video subscriber data will be necessary information for the Commission so that it can determine whether to initiate action on its own motion to enforce Section 5890(a). To the extent that franchise holders assert that this is competitively sensitive information, we reiterate that under Section 5960(d), we may provide for confidential treatment of this information.

4. Revision to General Order 169

In the Scoping Memo, the assigned Commissioner invited the parties to draw our attention to possible errors or omissions in the state video franchise certificate or other attachments to D.07-03-014.[29] The sole response to this invitation is by AT&T California, which notes that GO 169 fails to reflect the Commission's discussion in D.07-03-014 indicating it would require a state video franchise holder to give notice to incumbent cable operators of the holder's imminent market entry. SureWest TeleVideo and Small LECs support adding this notice requirement to GO 169.[30] There is no opposition to AT&T California's recommendation that GO 169 expressly set forth this notice requirement.

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[29] Through inadvertence, the form of certificate attached to D.07-03-014 did not include certain language specifically required by DIVCA. On our own motion, we modified D.07-03-014 to revise the form of certificate. We also authorized the Director of the Communications Division to prepare a proposed resolution for our consideration to make future changes to forms, as may be needed. *See* D.07-04-034.

[30] *See* AT&T California, Opening Comments at pp. 3-4; Small LECs, Reply Comments at p. 5; SureWest TeleVideo, Reply Comments at p. 7.

The relevant discussion in D.07-03-014 clearly shows both that we wanted the notice requirement included in GO 169 and that the requirement has a statutory basis:

> We … conclude that we should require State Video Franchise Holders to provide concurrent notice to affected incumbent cable operators. The basis for this conclusion is Pub. Util. Code § 5840(o)(3) [which] specifies that an incumbent cable operator's right to abrogate a local franchise is triggered when "a video service provider that holds a state franchise provides … notice … to a local jurisdiction that it intends to initiate providing video service in all or part of that jurisdiction." Implicit in this abrogation right is the assumption that an incumbent cable operator will know when a State Video Franchise Holder provides notice of imminent market entry. To ensure this assumption is fulfilled, we modify the General Order to require State Video Franchise Holders to provide affected incumbent cable operators concurrent notice of imminent market entry.[31]

Through oversight, GO 169 failed to include the notice requirement. We should correct that oversight in today's decision.

Section VI.B of GO 169 pertains to "State Video Franchise Obligations." We now add the following notice of imminent market entry "obligation" to that section:

> A State Video Franchise Holder must concurrently notify each affected local jurisdiction and each affected incumbent cable operator of the holder's imminent market entry. The State Video Franchise Holder must provide the concurrent notice to the incumbent cable operator before initiating Video Service pursuant to a State Video Franchise, and any local jurisdiction within which, or

[31] D.07-03-014, *mimeo*. text accompanying notes 376-78 (notes omitted, emphasis added).

within any part of which, the holder intends to provide Video Service.

5. Amendment to Commission Procedural Rules

Before enactment of DIVCA, the Commission's complaint jurisdiction derived from Pub. Util. Code § 1702. That statute authorizes the Commission only to hear a complaint against a public utility, and Rule 4.1 of the Commission's Rules of Practice and Procedure mirrors the statute. DIVCA, however, enlarges the Commission's complaint jurisdiction by directing the Commission to hear a complaint brought by a local government against a state video franchise holder, even though the latter, by express provision of DIVCA, is not a public utility.[32]

In response, the Commission followed the procedure of the Office of Administrative Law (OAL) for regulatory changes necessitated by a changed statute.[33] Under the procedure, the Commission submitted a proposed amendment to Rule 4.1, allowing local governments to file complaints pursuant to DIVCA. OAL approved the proposed amendment on June 11, 2007. The amendment is set forth in the Appendix to today's decision; new words are underlined.

In the Scoping Memo, the assigned Commissioner indicates that aside from Rule 4.1, staff has not found any other incompatibilities between DIVCA and our current rules. Parties were invited to comment on incompatibilities they might have noted.

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[32] *See* Pub. Util. Code §§ 5890(g), 5820(c).

[33] *See* Calif. Code of Regulations, Title 1, § 100(a)(6).

We received comments from four parties. None of the commenters identifies any direct conflicts between DIVCA and the Rules of Practice and Procedure.[34] AT&T California notes, however, that some rules (citing the intervenor compensation rules as an example) may not apply to DIVCA proceedings. Accordingly, AT&T California requests the Commission clarify that its determination to use the existing Rules of Practice and Procedure does not constitute a determination that they are wholly applicable to DIVCA proceedings.

AT&T California's understanding is correct. Because the Rules of Practice and Procedure are used in *all* formal proceedings at the Commission, there will always be rules that are inapplicable in any given type of proceeding. Regarding the specific example cited by AT&T California, the Commission has already determined that intervenor compensation is not available in a proceeding arising under DIVCA, so there is no reason in a DIVCA rulemaking, for example, to file a notice of intent (NOI) to claim compensation.[35]

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[34] AT&T California, Opening Comments at p. 4; Small LECs, Opening Comments at p. 5; SureWest TeleVideo, Opening Comments at p. 6; Verizon California Inc., Opening Comments at p. 7.

[35] The Scoping Memo rejected Greenlining's NOI filed on April 2, 2007, in Phase II. The Commission has not yet addressed NOIs filed by Latino Issues Forum (November 1, 2006) and Consumer Federation of California (November 22, 2006) in Phase I of this rulemaking. Finally, TURN has requested an award of compensation for substantial contributions to D.07-03-014 (request filed May 4, 2007). However, Ordering Paragraph 25 of D.07-03-014 states: "No party shall be awarded intervenor compensation in a proceeding arising under DIVCA." This DIVCA rulemaking itself falls within the broad ambit of the holding in Ordering Paragraph 25. Therefore, the pending NOIs and TURN's request for compensation should also be rejected.

6. Renewal of Video Franchises

In the Scoping Memo, the assigned Commissioner notes several factors tending to show that it would be premature at this time for the Commission to adopt principles or policies regarding video franchise renewal. These factors include: (1) a state video franchise would not be renewed any earlier than 2017; (2) between now and 2017 the federal and state law applicable to state video franchise holders likely would evolve significantly; and (3) the Commission has had little practical experience with DIVCA on which to base renewal principles or policies. Parties were invited to comment on whether any issue regarding franchise renewal was ripe for determination at this time.

All parties commenting on franchise renewal agree that the Commission should not try to adopt comprehensive policies and principles at this time.[36] Two parties, however, suggest the Commission consider specific timing for its adoption of renewal policies and principles. These parties' concern is that "Video providers should have sufficient time to evaluate renewal requirements and the opportunity to ensure compliance with whatever renewal rules are adopted." SureWest TeleVideo, Opening Comments at p. 6, recommends renewal rules be in place at least a year before the expiration of the initial grants of franchises (in other words, by 2016). *Id.* Small LECs recommend the rules be in place still earlier, at least three years before expiration of the first state franchises (*i.e.*, by 2014); they further recommend that the Commission automatically extend a franchise on a day-for-day-basis if the holder does not

[36] AT&T California, Opening Comments at p. 4 and Reply Comments at p. 5; Small LECs, Opening Comments at pp. 5-6; CCTA, Opening Comments at p. 8; SureWest TeleVideo, Opening Comments at p. 6; Verizon California Inc., Opening Comments at p. 7.

have the benefit of a full three years' operation with knowledge of the adopted renewal requirements prior to renewal. Small LECs, Opening Comments at pp. 5-6. AT&T California believes the Commission should adopt renewal rules "a reasonable time" before current franchises expire. AT&T California, Reply Comments at p. 5.

We agree that we should adopt renewal rules a reasonable time before current state franchises begin to expire in 2017. Unfortunately, we cannot be certain about when this Commission will be in a position to adopt a comprehensive set of renewal policies and principles. We depend, in large part, on the actions of state and federal legislators. Those actions are beyond our control.

There are two actions we can take now to ensure timely policymaking by the Commission regarding state video franchise renewals. First, we will endorse the Commission's opening a rulemaking no later than April 2011, or such earlier time as the matter may be deemed ripe, to adopt principles and policies regarding state video franchise renewals. Second, we remind the parties that any interested person, under Pub. Util. Code § 1708.5(f), may petition the Commission at any time to adopt a regulation pertaining state video franchise renewals. We will direct that the petition cite this decision and discuss with specificity the developments, such as changes of law or other occurrences, that cause the renewal issues to be ripe for determination by the Commission.

7. Consideration of Other Issues

The preceding sections discuss and resolve, to the extent possible at this time, the issues identified for Phase II of this rulemaking. Although no party had asked for additions to the scope of issues in Phase II, some comments posed questions or suggested issues regarding procedural matters that might arise as

the Commission carries out its responsibilities under DIVCA. Following today's decision, the assigned Commissioner will scope the extent of these procedural questions in consultation with the parties. The assigned Commissioner also has discretion to add other issues as warranted. We expect that Phase III will conclude this rulemaking.

8. Comments on Proposed Decision

The proposed decision of Commissioner Chong in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on September 13, 2007, and reply comments were filed on September 18, 2007.

The parties that filed comments are AT&T California, CCTA, DRA, Joint Consumers, Greenlining, Small LECs, SureWest TeleVideo, TURN, and Verizon California Inc. Except for CCTA, Joint Consumers, and TURN, the same parties filed reply comments. However, Greenlining's reply comments were twice the length authorized by Commission rules.[37] Assigned Administrative Law Judge (ALJ) Kotz allowed Greenlining to file revised reply comments no later than September 27, 2007. ALJ Kotz also directed that the revised reply comments may not exceed five pages, and that the Greenlining reply comments filed on September 18 may not be referred to for any purpose in this proceeding.[38]

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[37] Rule 14.3(d) of the Commission's Rules of Practice and Procedure provides in relevant part, "Replies shall not exceed five pages in length."

[38] Greenlining filed "amended" reply comments on September 24. The amended reply comments also exceeded the five-page limit, using most of a sixth page. ALJ Kotz directed that the additional substantive material on the sixth page not be referred to for any purpose in this proceeding.

Commenters continue the debate over build-out requirements and additional reporting requirements. Other DIVCA issues resolved in today's decision remain uncontested.[39]

We clarify our build-out requirements in response to comments, but we make no substantive modifications to our original proposals. We retain the requirement that all franchise holders report the number of their video customers, but upon consideration of the comments, we will not require reports regarding the means by which wireless broadband data customers are gaining access to the broadband network.

In Section 8.1 below, we discuss and respond to comments relating to build-out requirements; in Section 8.2 below, we discuss and respond to comments relating to additional reporting requirements.

8.1 Response to Comments on Build-Out Requirements

Six parties comment on this issue, which concerns the build-out requirements governing smaller state video franchise holders. CCTA, DRA, Greenlining, and Joint Consumers support the build-out requirements essentially as set forth in the Proposed Decision (PD); Small LECs and SureWest TeleVideo

[39] In Conclusion of Law 10 and Ordering Paragraph 3 of today's decision, where we rely on Ordering Paragraph 25 of D.07-03-014 (the Phase I decision of this rulemaking), we deny TURN's request for intervenor compensation for its participation in Phase I; we also deny two notices of intent filed in Phase I. In its comments, TURN incorporated by reference the legal objections TURN raised in its application for rehearing of D.07-03-014 regarding the Commission's denial of intervenor compensation in DIVCA proceedings. Similarly, AT&T California incorporated by reference in its reply comments its response to TURN's application for rehearing. We note that the application for rehearing is still pending and will be addressed by separate order.

oppose these requirements, although these two commenters substantially modify their own original proposals.

Among the commenters supporting the build-out requirements set forth in the PD, DRA and Joint Consumers offer certain suggestions. DRA (Opening Comments on PD at p. 3) believes the Commission should require "public/community meetings" as part of its review of a request for an extension of time to meet one of the DIVCA milestones (*see* Pub. Util. Code § 5890(f)) or for an exemption from serving a high-cost area. Joint Consumers argue that the Commission should not allow a state video franchise holder that has applied for and received company-specific build-out requirements, as provided by Section VI.B.1(3) of GO 169, to request an extension of those build-out requirements under Pub. Util. Code § 5890(f). At the least, such a request should be viewed by the Commission with "disfavor," according to Joint Consumers. (*See* Joint Consumers, Opening Comments on PD at pp. 1-2.)[40]

We do not adopt either of these suggestions. Regarding community meetings, DRA provides no persuasive argument for requiring them. Franchise holders may consider community meetings useful for various reasons, but we find no basis in this record for us to require such meetings.[41] In addition, as we note below, DIVCA provides for a public hearing where a franchiseholder seeks an extension under Pub. Util. Code § 5890(f).

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[40] Greenlining, in its Amended Reply Comments on PD at p. 3, supports Joint Consumers' suggestion.

[41] We note that SureWest Televideo and Small LECs oppose DRA's proposal in their respective Reply Comments on the PD.

Regarding extensions, we believe that any state video franchise holder may encounter circumstances reasonably causing the franchise holder to miss a build-out milestone, even a milestone proposed by the franchise holder itself. We need not and should not presumptively consider such a request either with favor or disfavor. If the franchise holder is able to show that it has been hindered by factors beyond its control, *see* Pub. Util. Code § 5890(f)(3), and if it has otherwise made a "substantial and continuous effort" to meet the requirements of its build-out plan, *see* Pub. Util. Code § 5890(f)(4), we may find that an extension is appropriate and establish a new compliance deadline. Notice of the application is provided to telephone customers of the franchise holder, and public hearings in the telephone service area are required. *See* Pub. Util. Code § 5890(f)(1), (2). Thus, we expect the Commission will have a full record on which to base its findings on whether to grant an extension.

Joint Consumers also suggest that the Commission allow public participation in any application for company-specific build-out requirements under Section VI.B.1(3) of GO 169. We find merit in this suggestion.

We did not allow public participation (such as protests) in our review of state video franchise applications because, among other things, we concluded that DIVCA afforded us no discretion in performing such review. D.07-03-014, *mimeo,* text accompanying note 330. In contrast, the review and approval of company-specific build-out requirements is inherently discretionary.

Nevertheless, we believe that consistent with DIVCA policy, company-specific applications should be processed quickly and not turned into utility-type proceedings. We envision that these applications would be subject to protest

under our Rules of Practice and Procedure but likely would not go to hearing, *i.e.,* they would be handled under notice-and-comment procedure.[42]

SureWest TeleVideo and Small LECs oppose the safe harbor and case-by-case compliance mechanisms adopted in the PD for smaller state video franchise holders. They also oppose the PD's extension to these franchise holders of non-discrimination requirements set forth in Pub. Util. Code § 5890(b), which establishes benchmarks for providing video access to low-income households.

The fundamental premise of SureWest TeleVideo and Small LECs has not changed from their earlier comments. The premise is that DIVCA intends smaller state video franchise holders to have greater flexibility than larger holders in demonstrating compliance with build-out requirements. We agree with the premise, but flexibility cannot be so loose as to defer compliance unreasonably.

SureWest TeleVideo and Small LECs recognize that their original safe harbor proposal, which would have doubled the build-out timeframes allowed by DIVCA for larger franchise holders, may have seemed excessive. They now propose for smaller franchise holders that the Commission add "one to two years to the build-out requirements identified in Section 5890(e) and [use] those

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[42] The applicant for a company-specific build-out plan is likely to be a Small LEC; as discussed later, we think that most or all of the factors relevant to the application may be matters of public record and not reasonably subject to dispute. Furthermore, under GO 169, the company-specific application would be a planning proceeding and thus quasi-legislative in character, which would lend itself to notice-and-comment procedure. In contrast, under the proposal for company-specific build-out plans that SureWest TeleVideo and Small LECs had sponsored, the Commission would only have reviewed the plans in a complaint or investigation. Either of those proceedings would be an adjudication involving evidentiary hearings.

extended build-out standards as the safe harbors contemplated in Section VI.B.1.(2) of General Order 169." SureWest TeleVideo, Opening Comments on PD at p. 5. SureWest TeleVideo now also recommends that the Commission simply abandon the case-by-case compliance mechanism altogether (deleting Section VI.B.1.(3) of GO 169), and allow any smaller franchise holder that has trouble meeting a safe harbor benchmark to apply for an extension of time under Pub. Util. Code § 5890(f). *Id.*[43]

We reject SureWest TeleVideo's "one to two years" proposal, which – like the five extra years that SureWest TeleVideo originally proposed – is vague and unsupported. We are also not inclined to eliminate the company-specific compliance mechanism; that mechanism is clearly contemplated by DIVCA in Pub. Util. Code § 5890(c). We regard the opportunity to develop a company-specific build-out plan as a key part of the flexibility intended by the Legislature for smaller state video franchise holders.[44]

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[43] Small LECs support these proposals by SureWest TeleVideo. *See* Small LECs, Opening Comments on PD at pp. 9-10; Reply Comments on PD at p. 1.

[44] We are surprised that SureWest TeleVideo and Small LECs seem to consider extension applications in the safe harbor context preferable to company-specific build-out plans. We note that the former applications are subject to stringent statutory requirements, including the requirement to hold a public hearing if requested. *See* Pub. Util. Code § 5890(f)(1), (2). Moreover, the applicant for an extension would apparently have to make all of the factual showings necessary for a company-specific build-out plan, and in addition would have to demonstrate to our satisfaction that the applicant made "substantial and continuous effort" to meet the relevant build-out requirements. Pub. Util. Code § 5890(f)(4). Notwithstanding these difficulties, if a smaller state video franchise holder wishes to apply for an extension under Pub. Util. Code § 5890(f), we have clarified below that it may do so.

Regarding non-discrimination requirements, a smaller state video franchise holder implementing an approved, company-specific build-out plan under Pub. Util. Code § 5890(c) will be in compliance with these requirements by "offer[ing] video service to all customers within [its] telephone service area within a reasonable time, as determined by the commission."[45] *Id.*, emphasis added. However, when a smaller state video franchise holder is implementing a build-out plan pursuant to one of the safe harbors, the franchise holder cannot claim the presumption of compliance with DIVCA's non-discrimination requirements under Pub. Util. Code § 5890(c) for company-specific build-out plans. Rather, as we concluded in the PD, that franchise holder must be subject to the non-discrimination benchmarks set forth in Pub. Util. Code § 5890(b).

In arguing against these benchmarks, SureWest TeleVideo and Small LECs essentially attempt to rewrite Pub. Util. Code § 5890. The safe harbor they prefer for smaller state video franchise holders would include the extension provisions in Pub. Util. Code §§ 5890(e) and (f) but would omit the non-discrimination benchmarks in Pub. Util. Code § 5890(b). We find that non-discrimination is a pervasive legislative concern in DIVCA, and we see no basis for ignoring that

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[45] However, the smaller state video franchise holder need not offer video service in an area where the cost to provide video service is substantially above the average cost of providing video service in that telephone service area. Pub. Util. Code § 5890(c).

When a franchise holder provides video service outside of its telephone service area, DIVCA authorizes the Commission to review the franchise holder's proposed video service area to ensure that the area is not drawn in a discriminatory manner. *See* Pub. Util. Code § 5890(d). Taken as a whole, the various subdivisions of Pub. Util. Code § 5890 contain a comprehensive set of non-discrimination requirements under all compliance scenarios.

concern in designing a safe harbor for build-out by smaller state video franchise holders.

Small LECs pose a hypothetical that they claim illustrates a problem with our non-discrimination standard (discussed in Section 2.3 above) for any franchise holder whose service area includes a relatively low proportion of low-income households:

> Under the Proposed Decision's approach, a Small LEC whose customer base includes only 10% low-income households would have to make a specific showing that its build-out includes at least 10% low-income individuals. With small, sparse, rural populations, implementing such a requirement can lead to perverse results. For example, consider a Small LEC with 1,000 households, 100 of which qualify as "low-income." If this Small LEC builds out to 80% of its households, it must show that its footprint includes at least 80 low-income households. Unlike in an urban area, these 80 low-income households may bear no geographic relation to each other. That is, there may be no particular area where the provider could build to sweep in all of these 80 households. There may be no systematic way for the Small LEC to ensure that it meets the low-income requirement. Companies facing these circumstances may be wary of applying for a state franchise. Alternatively, they may be forced to undertake the significant cost of specifically targeting a very small number of geographically-dispersed low-income households in manner that deviates from a rational build-out.

Small LECs, Opening Comments on PD at p. 6.

We have carefully considered this hypothetical but fail to perceive it as a problem. If the "significant cost" in offering service to areas including 80 low-income households would include areas that are "substantially above the average cost of providing video service in [the smaller franchise holder's] telephone service area," then the franchise holder in the hypothetical is excused from offering video service to those areas under Pub. Util. Code § 5890(c); and if

the "significant cost" does not rise to a level substantially above the average, we see no reason in law or logic why the franchise holder should not be required to offer service in those areas.

SureWest TeleVideo asks a series of questions regarding the procedure for applying for company-specific build-out plans under GO 169. *See* SureWest TeleVideo, Opening Comments on PD at p. 4. For example, "Is a smaller provider prohibited from serving customers until such application is granted?" *Id.* The answer is no; as clearly stated in GO 169, the smaller state video franchise holder need only file its company-specific build-out plan in the same calendar year in which it applies for its state video franchise. If the applicant prefers, it may obtain its state video franchise before filing its company-specific build-out plan, and having received its franchise from the Commission, may therefore commence any lawful activity under its franchise, including construction and service.[46]

SureWest TeleVideo objects that a smaller franchise holder must file its company-specific build-out plan application within the same calendar year that it receives its franchise while a larger franchise holder has "two full years to evaluate its build-out progress before returning to the Commission if it needs additional time." SureWest TeleVideo, Opening Comments on PD at p. 4. The

[46] Although the franchise holder would not concurrently have a Commission-approved build-out plan, the same thing would be true under SureWest TeleVideo's proposal for company-specific plans. In fact, SureWest TeleVideo's proposal poses much higher risks for the franchise holder than the company-specific build-out plan procedure we adopt today. Under the SureWest TeleVideo proposal, the franchise holder would be at risk for rejection by the Commission of its build-out plan in a complaint or an investigation that might occur many years after receiving its franchise.

objection misleadingly compares two fundamentally different types of proceeding. The franchise holder in the company-specific build-out plan application is creating a build-out plan; the franchise holder seeking an extension already has a build-out plan that is failing to meet the statutory deadlines. Contrary to the impression given by SureWest TeleVideo, the latter franchise holder is under far greater time pressure.[47]

SureWest TeleVideo and Small LECs assume that the company-specific build-out plan application would be slow and expensive. We question that assumption. At least the Small LECs are still subject to cost-of-service regulation. Many factors relevant to the cost of providing video service to their telephone service area are already a matter of public record.

We do not expect of Small LECs the kind of cost showing that a Verizon or an AT&T would be able to sponsor. A qualitative showing should be adequate to the purpose. Such a showing should address the relevant build-out factors, and should explain how the circumstances in the franchise holder's specific service area affect the timing of the build-out. The showing should indicate both circumstances that might tend to slow the pace of build-out (for example, a widely-dispersed customer base) and circumstances that might accelerate build-out (for example, fiber in place for much of the system).

Small LECs ask that we incorporate into GO 169 the various extension provisions of DIVCA. These provisions are Pub. Util. Code §§ 5890(e)(3), (4), and 5890(f). *See* Small LECs, Opening Comments on PD at p. 10. In response, we clarify that the build-out compliance mechanisms we approve today for smaller

[47] In fact, the company-specific build-out plan application could be filed before receipt of the franchise if the applicant prefers.

state video franchise holders include these extension provisions. With this clarification, we see no need to repeat or expressly incorporate these provisions in GO 169.

8.2 Response to Comments on Additional Data Reporting

The Commission proposed two additional reporting requirements, one dealing with the number of video subscribers by census tract, and the other dealing with the type of device customers are using to access broadband wireless services.

Seven parties comment on the issue of requiring additional data to be reported. Verizon California Inc., AT&T California, SureWest TeleVideo, Small LECs, and CCTA oppose either or both of these requirements. Greenlining, Joint Consumers, and TURN support these requirements, but argue that additional reporting on speed and technology should be required; DRA supports the additional requirement for reports on video subscribership.

We adopt the requirement for reporting the number of video subscribers by census tract, but do not adopt the proposed requirement for reporting on the type of device used to access broadband wireless services.

Both AT&T California and Verizon California Inc. oppose the requirement for subscribership data, arguing that DIVCA's non-discrimination and build-out requirements are defined solely in terms of "access" to video service, not subscribership. They quote Pub. Util. Code § 5890(a):

> 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.

In arguing that this language deals only with "access" to service, *i.e.*, availability, however, both commenters neglect the prohibition that a holder "may not discriminate against" any group because of the income of the residents in the local area in which the group resides.

The statute 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. Reporting of subscribership data will help us ensure compliance with the non-discrimination provision of Section 5890(a), to which all state video franchise holders are subject.

AT&T California and Verizon California Inc. argue that compliance with the non-discrimination and build-out requirements of Section 5890 should be measured over of the provider's entire service area. We agree with their interpretation in the case of Section 5890(b)(3), which states:

> (3) Holders provide service to community centers in underserved areas, as determined by the holder, without charge, at a ratio of one community center for every 10,000 video customers.

Section 5890(a), by contrast, explicitly refers to discrimination, not in the context of the entire franchise area, but with regard to the "income of the residents in the local area in which the group resides." In short, while subdivision (b)(3) looks at franchise-wide subscription numbers, subdivision (a) looks at discrimination in terms of "local areas."

In arguing generally against additional reporting requirements, AT&T California also points to DIVCA's declaration that "video service providers *are not public utilities* or common carriers," and may not be regulated as such. (Opening Comments on PD at p. 4.) However, our requirement that holders provide data annually on the number of video

subscribers by census tract derives from our enforcement duties under DIVCA; the requirement does not constitute common carrier or utility regulation.

AT&T California[48] and Verizon California Inc. both claim that the Commission may not require franchise holders to report the number of their video subscribers because this kind of reporting was considered during DIVCA negotiations in the Legislature but not enacted. While this history may be of some use in determining legislative intent where the language of a statute is unclear, we must first look to the language that is included in the statute itself. As DIVCA prohibits discrimination in addition to denial of access, we find it appropriate to require reports that allow us to determine whether a holder has violated the rule that it "may not discriminate against … any group of potential residential subscribers because of the income of the residents in the local area in which the group resides."[49]

Finally, both AT&T California and Verizon California Inc. express concern about reporting competitively sensitive subscribership information. As we had already noted in the PD, upon a proper showing

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[48] AT&T California also reiterates its argument that we cannot impose additional reporting requirements. That argument, rejected in the Phase I Decision, is discussed and rejected earlier in today's decision as well.

[49] *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. *See also* Greenlining's ReplybComments on PD, discussing the usefulness of subscribership information by census tract as a measure of actual progress in closing the "digital divide."

by the franchise holder submitting the information, competitively sensitive data will receive confidential treatment.

We also reject CCTA's suggestion that this additional reporting requirement regarding video subscribership should not apply to franchise holders that are cable companies, which evidence compliance with build-out requirements by submitting an affidavit to the Commission that all of the holder's telephone customers are offered video service. CCTA's suggestion, like the arguments of Verizon California Inc. and AT&T California discussed above, takes into account only the access requirement of Section 5890(a), and not the prohibition on discrimination.

While we decide here to adopt the reporting requirement regarding video subscribers, we will not adopt our proposal to require reporting on the type of device customers are using to access broadband wireless services. While such a requirement was supported by some commenters, we are persuaded by those parties with affiliates who provide wireless service that our broadband proposal should not be adopted. We find that the functionality of handheld devices is rapidly changing, and any distinction with wireless data cards is likely to be meaningless.

Finally, we decline to expand our reporting requirements further at this time, as urged by TURN, Joint Consumers, and Greenlining, to include additional information on pricing, technology, and data speed. We find that unlike subscribership data, information on pricing, technology, and data speed does not appear necessary for our enforcement of specific DIVCA provisions.

9. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Steven Kotz and Timothy J. Sullivan are the assigned Administrative Law Judges.

Findings of Fact

1. The case-by-case compliance mechanism is an application including a plan in which the franchise holder would justify the reasonableness of its development efforts based on the circumstances peculiar to its service area.

2. GO 169 contains a suitable case-by-case compliance mechanism. The additional guidance set forth below follows closely from Pub. Util. Code § 5890. First, the company-specific application shall contain clearly stated build-out milestones that demonstrate a serious and realistic planning effort by the state video franchise holder. Second, the company-specific application shall clearly state the constraints affecting the applicant's build-out, with particular attention to the types of constraints noted in DIVCA itself. Third, to the extent that there are areas within the smaller franchise holder's service area that are substantially higher cost than average to provide video service, those substantially higher cost areas shall be clearly delineated and explained in the application.

3. Periodic reporting by state video franchise holders provides important information to the Commission that it uses in fulfilling its roles under DIVCA regarding broadband deployment in California and enforcing DIVCA's non-discrimination and build-out requirements.

4. 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).

5. Through oversight, GO 169 failed to include the requirement that a state video franchise holder give notice to incumbent cable operators of the holder's imminent market entry.

6. The Commission should adopt renewal rules a reasonable time before current state video franchises begin to expire in 2017.

7. The Commission should institute a rulemaking no later than April 2011, or such earlier time as the matter may be deemed ripe, to adopt principles and policies regarding state video franchise renewals. Any interested person, under Pub. Util. Code § 1708.5(f), may petition the Commission at any time to adopt a regulation pertaining state video franchise renewals. The petition should cite this decision and discuss with specificity the developments, such as changes of law or other occurrences, that cause the renewal issue to be ripe for determination by the Commission.

Conclusions of Law

1. DIVCA requires that state video franchise holders actively develop their franchise.

2. DIVCA requires state video franchise holders to provide non-discriminatory access to their video service.

3. DIVCA gives smaller state video franchise holders flexibility in how they demonstrate compliance with the non-discrimination and build-out requirements of Pub. Util. Code § 5890.

4. The flexibility that the Legislature intended in DIVCA for the smaller telephone companies in demonstrating compliance with DIVCA's non-discrimination and build-out requirements is set forth within the four corners of the statute.

5. Pub. Util. Code § 5890(c) does not mandate or authorize after-the-fact reasonableness review.

6. Pub. Util. Code § 5890(b), regarding non-discriminatory service to low-income households, should apply to smaller state video franchise holders. Some franchise holders may find difficulty complying if the proportion of low-income households in the holder's service area is relatively low. In such cases, the franchise holder should demonstrate that the percent of low-income households in its service area to which it provides access to video service correlates closely to the percent of all households provided access.

7. The Commission has authority to take actions necessary to carry out its duties under DIVCA, and to that end the Commission may impose additional reporting requirements beyond those set forth in DIVCA.

8. To the extent that information contained in a report submitted to the Commission pursuant to its video franchise program contains competitively sensitive information, the state video franchise holder submitting the report may request confidential treatment, as provided by Pub. Util. Code § 5960(d).

9. DIVCA enlarges the Commission's complaint jurisdiction by directing the Commission to hear a complaint brought by a local government against a state video franchise holder, even though the latter, by express provision of DIVCA, is not a public utility.

10. Ordering Paragraph 25 of D.07-03-014 states: "No party shall be awarded intervenor compensation in a proceeding arising under DIVCA." This DIVCA rulemaking itself falls within the broad ambit of the holding in Ordering Paragraph 25. Therefore, the pending NOIs and TURN's request for compensation should also be rejected.

11. Today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. State video franchise holders may satisfy the non-discrimination and deployment (build-out) requirements of Pub. Util. Code § 5890 by doing either of the following:

    a. Complying with Pub. Util. Code § 5890(b) and with either Pub. Util. Code § 5890(e)(1) or Pub. Util. Code § 5890(e)(2), depending on whether fiber optic facilities are predominantly deployed; or

    b. Obtaining Commission approval of a company-specific build-out plan submitted to the Commission by application under Section VI.B.1(3) of General Order (GO) 169.

2. GO 169 shall be amended as follows:

    a. Amend Section VI.B.1.(3) as shown:

    The State Video Franchise Holder satisfies company-specific build-out requirements adopted by the Commission. To seek to satisfy this condition, a State Video Franchise Holder shall file an application with the Commission within the calendar year in which it applies for a State Video Franchise. This application shall specify how the State Video Franchise Holder plans to offer Video Service to its telephone customers within a reasonable time. <u>The application must contain clearly stated build-out milestones and must demonstrate a serious and realistic planning effort by the State Video Franchise Holder. The application must clearly state the constraints affecting the build-out, with particular attention to the constraints noted in DIVCA itself. To the extent that there are areas within the State Video Franchise Holder's Telephone Service Area that are substantially higher cost than average to provide Video</u>

Service, those substantially higher cost areas should be clearly delineated and explained in the application.

b. New subsection "3. Notice of Imminent Market Entry" is added to Section VI.B as shown:

A State Video Franchise Holder must concurrently notify each affected local jurisdiction and each affected incumbent cable operator of the holder's imminent market entry. The State Video Franchise Holder must provide the concurrent notice to the incumbent cable operator before initiating Video Service pursuant to a State Video Franchise, and to any local jurisdiction within which, or within any part of which, the holder intends to provide Video Service.

c. Amend the following paragraphs in Section VII.C.1.(3) as shown:

(a) If the State Video Franchise Holder and/or any of its Affiliates is a Telephone Corporation:

(i) The number of Households in each Census Tract of the State Video Franchise Holder's and/or any of its Affiliates' Telephone Service Area; and

(ii) The number of Households in each Census Tract of the State Video Franchise Holder's and/or any of its Affiliates' Telephone Service Area that are offered Access pursuant to a State Video Franchise by the State Video Franchise Holder and/or any of its Affiliates.

(iii) The number of Households in each Census Tract of the State Video Franchise Holder's and/or any of its Affiliates' Telephone 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.

(b) If neither the State Video Franchise Holder nor any of its Affiliates is a Telephone Corporation:

(i) The number of Households in each Census Tract of the State Video Franchise Holder's and/or any of its Affiliates' Video Service Area; and

(ii) The number of Households in each Census Tract of the State Video Franchise Holder's and/or any of its Affiliates' Video Service Area that are offered Access pursuant to a State Video Franchise by the State Video Franchise Holder and/or any of its Affiliates.

(iii) The number 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.

3. The notices of intent filed in Phase I of this Rulemaking 06-10-005 by Latino Issues Forum and Consumer Federation of California, and the request of The Utility Reform Network for an award of compensation for substantial contribution to Decision 07-03-014 are denied.

4. This Rulemaking 06-10-005 remains open for a possible Phase III, as discussed in Section 7 of the foregoing Opinion.

5. After concluding this Rulemaking 06-10-005, but no later than April 2011, the Commission will institute a new rulemaking to consider principles and policies regarding state video franchise renewals.

This order is effective today.

Dated October 4, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

APPENDIX A

Rule 4.1 of the Commission's Rules of Practice and Procedure, as Amended to Implement Pub. Util. Code § 5890(g)

4.1 (Rule 4.1) Who May Complain

(a) A complaint may be filed by:

(1) any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission; or

(2) any local government, alleging that a holder of a state franchise to construct and operate video service pursuant to Pub. Util. Code § 5800 et seq. is in violation of Section 5890.

(b) No complaint shall be entertained by the Commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 256 actual or prospective consumers or purchasers of such gas, electric, water or telephone service.

Note: Authority cited: Section 1702, Public Utilities Code. Reference: Section 1702 and Section 5890(g), Public Utilities Code.

(END OF APPENDIX A)