BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	Investigation 15-11-007 (Filed November 5, 2015)

RESPONDENT COALITION OPENING COMMENTS ON PROPOSED DECISION

Isabelle Salgado
Gregory L. Castle
David P. Discher
David J. Miller
AT&T Services, Inc.
2150 Webster Street, 8th Floor
Oakland, CA 94612
Tel: (510) 645-4581
Email: gc1831@att.com
Attorneys for AT&T California and New Cingular Wireless PCS, LLC

Christian F. Binnig
J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Attorneys for AT&T California and New Cingular Wireless PCS, LLC

Lesla Lehtonen
California Cable & Telecommunications Association
1001 K Street, 2nd Floor
Sacramento, CA 95814
Tel: (916) 446-7732
Email: lesla@calcable.org
Attorney for CCTA

James W. McTarnaghan
Anne B. Beaumont
Perkins Coie LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105
Tel: (415) 344-7000
Email: jmctarnaghan@perkinscoie.com
Attorneys for Charter Fiberlink-CCO, LLC and Time Warner Cable Information Services (California), LLC

Suzanne Toller
Peter Karanjia
Zeb Zankel
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6500
E-mail: suzannetoller@dwt.com
Attorneys for Comcast Phone of California, LLC

David P. Murray
Michael Hurwitz
Eric Schmidt
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006-1238
Tel: (202) 303-1000
Email: dmurray@willkie.com
Attorneys for Comcast Phone of California, LLC

November 7, 2016

[*additional parties on next page*]

Margaret L. Tobias
Tobias Law Office
460 Pennsylvania Avenue
San Francisco, CA 94107
Tel: (415) 641-7833
Email: marg@tobiaslo.com
Attorney for Cox California Telcom, LLC

Chuck Carrathers
Frontier Communications
Mail Code CAM21LB
2535 W. Hillcrest Drive
Newbury Park, CA 91320
805-535-5310
chuck.carrathers@ftr.com
Frontier Communications of California, Frontier Communications of the Southwest Inc., and Frontier California Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Codes

Regulations

Pursuant to Rule 14.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Pacific Bell Telephone Company d/b/a AT&T California (U1001C), and New Cingular Wireless PCS, LLC (U3060C) (collectively, "AT&T"); the California Cable & Telecommunications Association ("CCTA");[1] Charter Fiberlink CA-CCO, LLC (U6878C); Comcast Phone of California, LLC (U5698C); Cox California Telcom, LLC, d/b/a Cox Communications (U5684C); Citizens Telecommunications Company of California Inc. d/b/a Frontier Communications of California (U1024C), Frontier Communications of the Southwest Inc. (U1026C), and Frontier California Inc. (U1002C) (collectively "Frontier"); and Time Warner Cable Information Services (California), LLC (U6874C) (collectively, the "Respondent Coalition") respectfully submit these comments on the *Proposed Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market* ("PD").

I. INTRODUCTION

The Respondent Coalition generally agrees with the PD's conclusions on competitiveness of the market for voice services—the key issue in this proceeding. The PD properly focuses on the intermodal voice market and correctly finds that market to be highly competitive. Certain aspects of the PD's analysis should be modified, however, because they run counter to the record evidence and economic principles. These include the PD's findings regarding: (i) the competitive alternatives to wireline voice service; (ii) whether carriers "micro-target" customer groups (*i.e.*, charging customers different prices based on their location or demographics); and (iii) reliance on the Herfindahl–Hirschman Index ("HHI").

The PD's findings regarding the market for broadband Internet access service ("BIAS") are also problematic. First, they exceed the Commission's stated purpose in this proceeding: to examine whether prices for traditional landline voice services are just and reasonable. Second, they exceed the statutory limits on the Commission's jurisdiction under P.U. Code Section 710. Third, they conflict with well-accepted economic principles and the record evidence; even if an inquiry into the retail broadband services market were appropriate, which it is not, the PD erroneously relies on an unduly narrow definition of the market for residential "high-speed" BIAS.

With respect to wholesale services, the record confirms that there is no need or basis to adopt

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

findings related to or requirements for the wholesale market in this proceeding given the finding that the retail market for intermodal voice is highly competitive. Moreover, although the Respondent Coalition generally agrees with the PD's conclusions that competitors need access to poles and rights of way, that topic involves multiple legal and factual issues and policy objectives that are not part of this proceeding, and the PD's references to extra-record evidence on these issues should be stricken.

Finally, and most importantly, the data submission requirements in Ordering Paragraphs ("OP") 1 and 2 should be eliminated because: (i) the adoption of new reporting requirements is outside the scope of the docket, which specifically established that no rules or regulations would be adopted in this phase of the proceeding; (ii) the reporting requirements in OPs 1 and 2 constitute new regulation which is not authorized by P.U. Code section 716, and violates P.U. Code section 710, to the extent that these ordering paragraphs require production of data regarding Voice over Internet Protocol ("VoIP") and broadband services; (iii) there is no need for any ongoing data submission requirements, given that the PD finds strong competition in the retail intermodal voice market in 2016, as the Commission did in 2006; (iv) the new reporting rules require the production of extremely confidential information—certain of which raises homeland security issues; and (v) the new data submission requirements will impose significant burdens on communications providers with no corresponding benefit. If the Commission determines it can retain the data submission requirements, it should, at a minimum, sunset those requirements and make clear that the information requested will be treated as strictly confidential in keeping with federal law. OP3's reporting requirement should also be eliminated as unnecessary (in the case of the voice market) and improper (in the case of the BIAS market).

The Respondent Coalition's proposed changes to the PD are set forth in Appendix A.

II. ALTHOUGH THE PD'S CONCLUSION IS CORRECT THAT THE INTERMODAL VOICE MARKET IS COMPETITIVE, CERTAIN STATEMENTS AND CONCLUSIONS REQUIRE MODIFICATION.

The Respondent Coalition agrees with the PD's conclusion that intermodal services are the primary competitor for traditional voice services (PD at 25-27), and that the market for voice services is highly competitive (PD at 156-57 (Findings of Fact ("FOF") 4 and 7(e)). The record leaves no doubt that there is significantly more competition for traditional voice services today than at the time of D.06-08-030 ("URF Order"), as evidenced by the large growth in wireless and VoIP services. Nevertheless, the PD includes some statements regarding the voice market that should be removed or modified because they are inaccurate or misleading.

Wireless: An Economic Alternative. While the PD correctly finds that wireless voice service is a competitive alternative to wireline voice service (PD at 36-37 & 156 (FOF 7(c)), it incorrectly may suggest that wireless should not be counted as an economic alternative for some customers.[2] Any such implication is inconsistent with the central economic principle—acknowledged by the PD—that competition occurs at the margins. Because a *sufficient number* of customers could switch to wireless voice service if wireline voice rates exceeded a competitive level, wireline voice rates will be disciplined by the operation of market forces for the benefit of all customers.[3] As a result, wireless voice service need not be an attractive alternative for *all* consumers (or even available to all such consumers) in order to discipline wireline voice rates for the benefit of all customers. For these reasons, as the Commission has previously observed, there "is no compelling reason to segment the market further by user characteristics, such as income or use characteristics," and "we need not parse apart our market analysis to account for individual users' behavior." URF Order at 76-77 & FOF 15. FOF 7(c) accordingly should be modified to eliminate any implication that wireless should not be counted as a price-constraining economic alternative for some customers.[4]

Uniform Pricing. The PD's assertion that carriers "may" engage in "micro-targeting" of customers, including actually or potentially adjusting prices by "zip code" (PD at 53 (note 152) & 115), should be eliminated. No record evidence reflects such a practice—or even the ability of carriers to engage in it.[5] There also is no evidence of price differentiation by carriers to target customers who are reluctant to change service providers or may find it difficult to do so.[6]

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[2] PD at 157 (FOF 7(e)) refers to "limitations including coverage gaps, the special needs of customers with disabilities or medical devices that are not necessarily served by mobile service, and weak indoor wireless signals."

[3] *See* URF Order at 266 (FOF 58-59); Ex. 41 at 6:8-11 (Topper/Joint Respondents 6/1 Testimony); *see also* PD at 37 (note 97), citing to Ex. 28 at 7:8-14 (Gillan/Cox 6/1 Testimony) for the proposition that the test for substitutability is whether the "wireless alternative operates as a 'check on residential local wireline phone prices.'"

[4] Such modification is also required to avoid improper change to the URF decision. *See* note 13, *infra* (discussing requirements of P.U. Code § 1708).

[5] *See* Ex. 7 at 11:17-12:9 (Aron/AT&T 7/15 Testimony); Ex. 5 at 53 and Appendix 1 (Aron/AT&T 6/1 Testimony); Ex. 41 at 11:1-3 (Topper/Joint Respondents 6/1 Testimony); Ex. 28 at 10:4-18 (Gillan/Cox 6/1 Testimony); Ex. 8 at 10:25-11:1 (Katz/AT&T 7/15 Testimony).

[6] *See* Ex. 5 at 53 and Appendix 1 (Aron/AT&T 6/1 Testimony) (finding no evidence that posted prices for voice service or voice bundles vary by location within providers' service territories); Ex. 6 at 12:20-21 (Katz/AT&T 6/1 Testimony); Ex. 28 at 10:20-11:5 (Gillan/Cox 6/1 Testimony); 7/20/16 Tr. at 72:20-74:5 (Dr. Selwyn offers a hypothetical example based on Staples/Office Depot merger, rather than pointing to actual evidence of targeted pricing by voice providers); Ex. 28 at 10:4-18 (Gillan/Cox 7/15 Testimony) (Intervenors provide no analysis even

OTT & MVNOs: Competitive Alternatives. The PD also should be modified to acknowledge—contrary to its current discussion (PD at 61-63, 65-66)—that over-the-top VoIP ("OTT") service, and voice service resold by mobile virtual network operators ("MVNOs"), are competitive alternatives to traditional wireline voice service. Both options undeniably give consumers an option for replacing their traditional wireline voice service.[7] Declining to expressly include OTT voice service ignores an actual, present competitive alternative to traditional wireline voice service, and therefore understates the true extent of competition.[8] In this respect, the PD is inconsistent with D.08-09-042 ("URF Transition Order"), which described OTT VoIP as part of the competitive voice market.[9] While the PD (at 63) concludes it is "more probative" to examine facilities-based VoIP service, that is not a basis for not expressly including OTT as a competitive alternative to traditional voice service.

MVNOs that resell voice service[10] likewise give consumers an option of traditional voice service, and therefore also qualify as part of the market for voice services.[11] In fact, it is especially important to include MVNOs in a market analysis because they have developed products designed to be attractive to and serve low-income consumers and seniors.[12]

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suggesting that traditional landline prices reflect market segmentation); Ex. 42 at 14:3-14 (Topper/Joint Respondents 7/15 Testimony). On its face, the assertion in footnote 152 of the PD—that "[i]t is not beyond imagining" that carriers could use zip code-specific pricing—is pure speculation and unsupported by any probative evidence. It refers to Dr. Roycroft's testimony discussing alleged conduct in another state unrelated to voice service, yet, as Dr. Topper explained, one "should not arbitrarily assume that consumers can and will be discriminated against without any real-world evidence that this is a viable and profit-maximizing profit strategy." Ex. 42 at 7:12-14 (Topper/Joint Respondents 7/15 Testimony). This statement therefore should be stricken.

[7] *See* Ex. 42 at 4-5, 25 (Topper/Joint Respondents 7/15 Testimony).; *cf*. PD at 34 (as with wireless and traditional wireline service, OTT voice service allows a user to "make and receive phone calls based on the use of telephone numbers.").

[8] The FCC reports that "[a]s of December 2014, OTT VoIP services comprised 15% of all interconnected VoIP subscriptions in California." Ex. 42 at 22:16-17 (Topper/Joint Respondents 7/15 Testimony). And even that figure understates the true importance of OTT VoIP, for it excludes non-interconnected OTT VoIP services like Skype and WhatsApp, which continue to grow rapidly. Ex. 41 at 23:17-24:6 (Topper/Joint Respondents 6/1 Testimony).

[9] URF Transition Order at 25 ("We believe the telephone marketplace is very vibrant in California, with head-to-head competition throughout the state, including . . . over-the-top VoIP carriers, as well as traditional competitive local exchange carriers.").

[10] MVNOs, like TracFone Wireless and Virgin Mobile, buy minutes at wholesale from facilities-based carriers and then sell them at retail, often at lower rates than the national carriers. Resp. Coalition Opening Br. at 27.

[11] *See* Ex. 42 at 4-5, 25 (Topper/Joint Respondents 7/15 Testimony).

[12] *See*, *e.g.*, Ex. 28 at 31 (note 35) (Gillan/Cox 6/1 Testimony); Ex. 41 at 22:1-4 (Topper/Joint Respondents 6/1 Testimony); and Ex. 5 at 26 (Aron/AT&T 6/1 Testimony).

The PD excludes MVNOs because they do not own facilities and do not engage in "non-price rivalry" with facilities-based carriers. PD at 66. But not owning facilities does not make MVNOs any less of a competitive alternative for end-users, and it is clear from the record that they do, in fact, compete along a number of dimensions. Facilities-based competition may have additional benefits, but that goes only to weighing the competition from MVNOs; it does not justify excluding resold service from the overall intermodal voice market.

Declining HHI for Intermodal Voice. The PD correctly observes that the Commission was "very critical" of the use of HHI measurements in the URF Order, finding that they "provide no information relevant to our assessment of ILEC market power . . . ." URF Order at 128 & FOF 52. Yet, the PD relies on HHI analysis for several points, asserting that HHIs have *increased* for various markets since 2006.[13] PD at 67, 72, 76, 86. This conclusion is undermined by the Communications Division's own report which acknowledged that the HHI for the intermodal voice market has steadily *declined* since 2006 and is well below what it was at the time of the URF Order.[14] Indeed, the Communication Division's report found that the HHIs for the intermodal voice and wireline voice markets have declined since the URF Order.[15] Significantly, the Communication Division's report also concluded that the intermodal voice market is only "moderately concentrated" and "well below the threshold for a highly concentrated market."[16] At a minimum, the PD should recognize these facts and acknowledge, as reflected in Dr. Topper's and Dr. Katz's respective testimonies, that HHIs should not be rigidly applied[17]—especially since the HHI calculations relied on in the PD were not subjected to cross-examination.[18]

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[13] If the Commission reverses any of the findings of the URF Order in this proceeding, its findings will violate Public Utilities Code Sections 1708 and 1708.5(f), which exist precisely to prevent a procedural "end run" on Commission findings adopted following hearings. *See Respondents' Request for Rehearing of Scoping Memo Ruling on Evidentiary Hearings* (July 11, 2016); *see also Southern California Edison Co. v. Pub. Util. Comm'n*, 101 Cal.App.4th 982, 994-995 (2002) (confirming Commission argument that P. U. Code Sections 1708 and 1708.5(f) entitle parties to a hearing before "amend[ing] . . . a regulation" or "alter[ing] . . . a prior order" that was adopted following hearings).

[14] *See* CPUC Communications Division, "Market Share Analysis of Retail Communications in California June 2001 through June 2013" at 13-15 & Chart 4 (Jan. 5, 2015) ("CD 2015 Report").

[15] *See id.* at 30-31.

[16] *Id*. at 13-15 & Chart 4.

[17] *See* Ex. 41 at 34:13-37:17 (Topper/Joint Respondents 6/1 Testimony); Ex. 1.5 at 14:7-18 (Katz/AT&T 3/15 Testimony).

[18] Despite several parties' request to hold evidentiary hearings to cross-examine witnesses and test the various claims put forth in evidence, including those related to HHI, no evidentiary hearings or opportunity for cross-

III. THE BROADBAND-RELATED ASPECTS OF THE PD SHOULD BE MODIFIED CONSISTENT WITH THE OII'S STATED PURPOSE, THE COMMISSION'S LIMITED JURISDICTION, COMMON ECONOMIC PRINCIPLES, AND THE RELEVANT RECORD EVIDENCE.

The PD's findings concerning the BIAS market exceed both the limited purpose of this proceeding and the Commission's jurisdiction, and run counter to the evidence and commonly accepted principles of economic analysis. Therefore, they should be eliminated. [19]

A. The Final Decision Should Align With the Stated Purpose of the OII.

The Scoping Memo plainly stated that:

> …the ultimate question before us is whether intermodal competition, in the decade after URF, has offered sufficient discipline to produce just and reasonable prices for traditional landline services. But to meaningfully answer that question, we must conduct a rigorous examination of the telecommunications marketplace to analyze the competitive forces acting upon traditional landline services.

Scoping Memo at 2. Respondent Coalition agrees with this framing of the central question in this proceeding, and the PD's appropriate consideration of traditional (TDM) landline service. Respondent Coalition also agrees with the PD's consideration of intermodal alternatives, including wireless and VoIP (certain of which rely on broadband networks as the transmission medium), to the extent such consideration is based on publicly-available data, within the Commission's jurisdiction.

However, the PD goes beyond the limited purpose established in the Scoping Memo. In particular, the PD makes a number of generalized findings regarding the residential broadband market without connecting those findings to the voice market.[20] The PD should be modified to tailor its findings to the stated purpose of "analyz[ing] the competitive forces acting upon traditional landline services". That focus properly adheres not only to the Scoping Memo, but also to the express limitations on the Commission's jurisdiction under California law, as made clear in the record and further discussed

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examination were allowed. *See Assigned Commissioner and Administrative Law Judge's Ruling Regarding July 20, 2016 Evidentiary Hearings and Denying Related Party Motions* (issued July 13, 2016).

[19] Such findings should also be eliminated because parties were not afforded the opportunity to cross-examine witnesses and test the various claims regarding the BIAS market. *See* note 18, *supra*.

[20] *See, e.g.*, PD Sections 5.3.2, 6.1.5, 6.3, FOFs 3, 7(g)-(h), 11, 14, 16-20, 28-29; Conclusion of Law ("COL") 12; and the portions of OPs 1-4 pertaining to BIAS data and reports. In fact, the PD goes so far as to suggest that the real focus now is the market for broadband services, not voice. PD at 69 (". . . most voice service today is purchased in bundles with broadband connectivity, so the analysis of a voice-only market as conceived by URF is today something of an artificial construct.").

below.[21]

In seeking to justify its broader focus, the PD asserts that "[t]he voice market is tied to the broadband market in a number of ways"—for instance, noting that the broadband network is used to transmit VoIP and that carriers often bundle together voice and broadband services. PD at 158-9 (FOF 14). These facts, however, do not justify separate analysis and findings regarding the residential market for BIAS.[22] Indeed, the record shows that, from an economic perspective, the market for residential BIAS is distinct from the market for retail voice service—as several testifying economists explained,[23] and the PD itself confirms.[24] Moreover, to the extent that the PD continues to exclude OTT VoIP from its definition of the intermodal voice market (PD at 61-63), that fact further supports the exclusion of findings and conclusions about the market for residential BIAS.

The PD also justifies its examination of the BIAS market by stating that "the market we envisioned in 2006 is very different from the market that exists in 2016" (PD at 26), and "URF [did not] anticipate broadband's status as the dominant telecommunications service" (PD at 125). However, the landscape today is not that different from the one envisioned by the URF Order. That decision correctly anticipated a world in which mobile and broadband services were becoming more prevalent and customers were increasingly purchasing services in bundles.[25] Even if BIAS is more widely adopted now than at the time of the URF Order, the Commission properly focused at that time—as it should focus today—on the service (*i.e.*, voice service) that falls within its jurisdiction.[26]

Finally, the PD correctly acknowledges (at 110) that "digital divide issues" are not part of its

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[21] *See* Section III.B, *infra*.

[22] Cable providers generally offer broadband as a managed service using the broadband network as the transmission medium, but customers do not have to subscribe to BIAS to obtain VoIP services offered by cable providers. *See* Resp. Coalition Opening Br. at 19 (note 25).

[23] *See, e.g.,* Ex. 54 at 28:4-10 (Roycroft/TURN 6/1 Testimony); Ex. 42 at 16:4-9 (Topper/Joint Respondents 7/15 Testimony); Ex. 6 at 25:21–26:8-10 (Katz/AT&T 6/1 Testimony); Ex. 28 at 3:10-16 (Gillan/Cox 6/1 Testimony).

[24] Although Respondent Coalition takes issue with how the PD defines the broadband market and evaluates broadband market competition, it is clear from the PD that the Commission views it as a separate market from the voice market. *See* PD at 27 ("We will examine those markets below, focusing on an intermodal retail voice market, and then on … broadband markets….").

[25] *See, e.g.*, URF Order at 75 (the "era [is] dominated by telecommunications sold through bundled services"); *id.* at 265 (FOF 43) ("Broadband is available to most Californians.").

[26] *See* III.B, *infra*.

analysis.[27] This is consistent with the OII's express exclusion of affordability and LifeLine issues from the scope of the docket. *See* OII at OP 2; *see also* PD at 158 (FOF 13). Nevertheless, the PD goes on to both discuss digital divide issues (at 133-38) and draw conclusions about them, even stating in FOF 10 (at 157) that the digital divide "has widened." All such observations in the PD—and especially related findings of fact—should be removed. Removal is justified because these findings are outside the established scope of the docket.[28] Moreover, because observations, findings, or conclusions about the alleged digital divide likely would be quoted in future proceedings as if such issues had been fully analyzed and tested through cross-examination (when that is not the case), allowing them to remain in the PD would be unduly prejudicial to the service providers.

B. The Final Decision Should Respect Limits on the Commission's Jurisdiction.

The statutory limits on the Commission's jurisdiction also require the removal of the PD's findings and orders on BIAS and the alleged digital divide.

The PD appropriately recognizes several important limitations on the Commission's jurisdiction based on P.U. Code Section 710 and the Federal Communication Commission's ("FCC's") treatment of BIAS—a jurisdictionally interstate service.[29] As the Respondent Coalition members have urged throughout this proceeding—and as the PD acknowledges—any role the Commission may have in promoting competition in communications markets must be limited to actions "for which [the Commission] presently [has] clear and unambiguous legal authority."[30] Therefore, to the extent the PD can be read to assert more expansive regulatory authority or control over broadband—as it does in particular in OPs 1 and 2[31]—it should be revised to conform to California and federal law.

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[27] None of the Commission's Information Requests purported to seek information related to digital divide issues, nor are such issues mentioned or within the range of topics in the mandatory briefing outline attached to the Scoping Memo.

[28] *See* note 66, *infra* (discussing the requirement that decision must be within the scope of the proceeding).

[29] *See* PD at 161-62 (COL 4) ("Public Utilities Code § 710 limits for a time the Commission's authority over Voice over Internet Protocol and Internet Protocol enabled services, with some exceptions."); *id*. at COL 8 (the FCC's classification of BIAS as jurisdictionally interstate "does not foreclose or preempt Commission action related to broadband, but does require that such Commission action be consistent with the forbearance determinations and related rulings of the FCC").

[30] PD at 149. *See also* Resp. Coalition Opening Br. at 9 (Aug. 12, 2016) (noting that "[s]ome Intervenors have urged the Commission to expand [the scope of the OII] significantly to include services that squarely fall outside its regulatory jurisdiction"); Coalition Motion for Reconsideration of Assigned ALJ's February 4, 2016 Ruling at 14 (March 8, 2016) (asserting that "the Commission has no jurisdiction to demand information about Coalition Movants' VoIP and wireline or wireless broadband services").

[31] *See* Section V, *infra*.

1. Section 706 of the 1996 Act Does Not Provide Authority to Regulate Broadband, Especially Where State Law Limits Such Authority.

Although the PD accurately states that Section 710 "largely removes the Commission's regulatory authority over VoIP and IP-enabled telecommunication services, subject to an exception in favor of express delegations of federal authority," the PD also appears to suggest that Section 706(a) of the federal Telecommunications Act of 1996 provides just such an express delegation.[32] That is incorrect. Contrary to the PD's suggestion, the D.C. Circuit in *Verizon v. FCC* did *not* hold that Section 706(a) confers "an express delegation of regulatory authority to promote broadband competition" that applies equally to the FCC and to state commissions.[33] In fact, the *Verizon* court stated that "Congress has *not* 'directly spoken' to the question of whether section 706(a) is a grant of regulatory authority simply by mentioning state commissions in that grant."[34] Absent such a "direct[]" statement concerning the purported authority of state commissions, nothing in *Verizon* supports the theory that Section 706(a) contains the sort of "express delegation[]" that—as the PD acknowledges—would be necessary to overcome the broad prohibition in P.U. Code Section 710 on any efforts by this Commission to exercise regulatory jurisdiction or control over broadband and VoIP services. In addition, the PD reads too much into *Verizon* by suggesting that Section 706(a) provides the Commission with a sweeping mandate to "promote competition" or "remove barriers to facilities investment" through regulation of broadband.[35] The *Verizon* court's analysis confirms that any authority granted by Section 706(a) must be limited by "other provisions" of law, "including, most importantly, those *limiting the [Commission's] subject matter jurisdiction.*"[36]

Section 710 is precisely such a limitation on this Commission's subject matter jurisdiction.

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[32] PD at 147-48. Notably, California adopted Section 710 some *16 years after* Congress enacted Section 706(a), underscoring that the Legislature could not have intended this Commission to have the independent regulatory authority that the PD now attempts to read into the federal statute.

[33] PD at 147-48 (citing *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014)).

[34] *Verizon*, 740 F.3d at 638 (emphasis added; citation omitted). Although the court noted in passing that "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here," those observations were *dicta*, and the question of state commission authority was not squarely at issue in the case. *See id.*

[35] PD at 147-48 (internal quotation marks omitted). The D.C. Circuit's recent decision upholding the FCC's *2015 Open Internet Order* did not speak further to any purported state commission authority pursuant to Section 706. *See U.S. Telecom Assn. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

[36] *See Verizon*, 740 F.3d at 640 (identifying "at least two limiting principles inherent in section 706(a)," including the principle that "the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those *limiting the [FCC's] subject matter jurisdiction*") (emphasis added).

Thus, Section 706(a)'s general direction to encourage broadband deployment would not override the California Legislature's more specific command in Section 710(a) that this Commission "shall not exercise regulatory jurisdiction or control" over broadband services. By contrast, reading Section 706(a) to confer jurisdiction notwithstanding express state jurisdictional limits would ignore basic principles of statutory interpretation and render superfluous the Legislature's carefully enumerated exceptions to Section 710.[37]

The PD's apparent reliance on P.U. Code Sections 709, 709.5, 871, and 882 fails for similar reasons. These aspirational policy statements confer no regulatory authority of their own,[38] and even if they did, their general intent to promote competition, universal service, and "advanced telecommunications" would still be constrained by express jurisdictional limitations under Section 710(a).[39]

2. P.U. Code Section 716 Cannot Overcome Section 710's Prohibition of Broadband Regulation.

The PD appears to rely on P.U. Code Section 716 as an exception to Section 710(a)'s jurisdictional limitations, suggesting that Section 716 authorizes an ongoing data collection in anticipation of *potential* forbearance petitions that may be filed with the FCC.[40] While Commission

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[37] If, for example, Section 706(a) were as expansive as the PD suggests, there would be no need for Section 710(c), which contains eight specific exceptions preserving the Commission's jurisdiction in limited circumstances not relevant here. Nor would there be any need for Section 710(f), on which the PD relies for authority to "monitor and discuss VoIP services." *See* PD at 147 (note 401); *Riverside Cty. Sheriff's Dep't v. Stiglitz*, 60 Cal. 4th 624, 630 (2014) ("[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.").

[38] *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) ("[S]tatements of policy, by themselves, do not create 'statutorily mandated responsibilities'").

[39] Section 709, for example, sets forth "policies for telecommunications in California," while Section 709.5 expresses the Legislature's intent "that all telecommunications markets *subject to commission jurisdiction* be opened to competition" (emphasis added). Section 871 declares California's "longstanding goal of . . . achieving universal service by making basic telephone service affordable to low-income households," and Section 882 directs the Commission to "consider ways to ensure that advanced telecommunications services are made available as ubiquitously and economically as possible, in a timely fashion." None of these general statements of policy overrides Section 710(a)'s specific prohibition of "jurisdiction or control" over broadband services.

[40] *See* PD at 161 (COL 5) ("The period after a forbearance petition is filed may not be sufficient time to gather and analyze that information, and thus we direct Communications Division to collect that data on an ongoing basis."); *see also* PD at 153.

action that properly falls within the scope of Section 716 is exempted from Section 710(a),[41] Section 716 has no application here. By its terms, Section 716 applies only "*[i]f* an incumbent local exchange carrier files a forbearance petition with the [FCC]" regarding access to unbundled network elements.[42] This statutory language therefore is limited to specific parties and circumstances. It cannot serve as a basis for establishing an *ex ante*, industry-wide, and continuing mandatory data collection.

Nor could the Commission properly rely on Section 716 in order to overcome Section 710(a)'s jurisdictional limitation under the circumstances here. The Commission's "authority to require data and other information pursuant to Section 716"[43] extends only to "providers of voice communications services."[44] Moreover, Section 716 directs such voice providers to "provide all data and other information *relevant to the forbearance petition*," underscoring that it cannot authorize an open-ended data collection, on a statewide and industry-wide basis, just in case it becomes relevant to a future forbearance request. Indeed, any such expansive theory of Section 716 would lack a limiting principle, and impermissibly allow the narrow exceptions of Section 710(c)(4) to swallow the general rule that "[t]he commission *shall not exercise regulatory jurisdiction or control over … Internet Protocol enabled services*."[45] The Commission therefore should modify the PD to eliminate any reliance on Section 716—including in COL 5—as a basis for evading the limitations on the Commission's jurisdiction under Section 710(a).

C. Findings About the Residential Broadband Market Should Be Eliminated or Modified Consistent with Well-Accepted Economic Principles and Substantial Record Evidence.

If, notwithstanding the express limits of the Scoping Memo and the Commission's jurisdiction,

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[41] *See* P. U. Code § 710(a) (prohibiting the exercise of regulatory jurisdiction or control over IP-enabled services "except as … expressly directed to do so by statute or as set forth in subdivision (c)"); *id.* § 710(c)(4) (referencing "[t]he commission's authority to require data and other information pursuant to Section 716").

[42] P. U. Code § 716(a) (emphasis added). Although Section 716(b)(1) directs the Commission "to be prepared to timely comply" with an FCC request for comments on a forbearance petition by "develop[ing] a sample data request for collecting data on competition in any California metropolitan statistical area," it provides no basis for the ongoing, statewide collection of highly confidential network and subscription data without a connection to any particular forbearance request.

[43] *Id.* § 710(c)(4).

[44] *Id.* § 716(b)(2). To the extent that definition includes interconnected VoIP providers, any data requested under Section 716 must still be tied to a particular forbearance petition, as discussed above. Also, Section 716 cannot be used to impose the ongoing obligation in Ordering Paragraph 1 for the production of data regarding voice services, either, as discussed below in part V.

[45] *Id.* § 710(a) (emphasis added).

the Commission nonetheless decides to include findings concerning the residential BIAS market, those findings must be grounded in core principles of economic theory and supported by the record evidence. Because a number of the PD's broadband-related findings fail to conform to these criteria, they should be eliminated or modified. In particular, the PD adopts an overly narrow definition of the "high speed" residential broadband services market according to "the FCC's current benchmark for 'Advanced Services'"[46] currently set at 25 Mbps download and 3 Mbps upload ("25/3"). PD at 162 (COL 12). The PD then incorrectly excludes lower-speed fixed and mobile broadband services from the market, along with fixed wireless and satellite.[47] Based on this overly narrow market definition, the PD erroneously concludes, first, that "[t]he residential, high-speed broadband market in all of California's geographic markets is highly concentrated" (PD at 159 (FOF 17)), and, second, that "[t]he increasing and high level of concentration in the residential broadband market poses risks of an insufficiently competitive marketplace." PD at 160 (FOF 28). As explained below, these findings and the related text should be eliminated from the PD. *See* Appendix A.

1. The PD Improperly Segments the Residential Broadband Market by Speed.

As an initial matter, the FCC did not adopt the 25/3 definition as part of a market definition or competition analysis. Rather, the FCC adopted this definition for the specific purpose of fulfilling its obligations under Section 706(b) of the federal Telecommunications Act of 1996.[48] The PD points to no plausible basis for using the 25/3 definition as a reasonable baseline for a competitive analysis of the market for BIAS or the telecommunications market in general.

Moreover, analyzing the California BIAS market based on the 25/3 definition ignores well-established economic principles that the PD elsewhere embraces in the context of voice communications—and even generically in the broadband context. Specifically, the PD seems to accept that, in defining a market, it is critical to assess whether products are economic alternatives.[49] It is not plausible to assume that speeds of 10, 15, or 20 Mbps are not economic alternatives for speeds of 25

[46] We assume the PD is referring to "advanced telecommunications capability" and recommend consistency with FCC terminology.

[47] *See* PD at 157, (FOF 7(g)); *see also* id. at 82 & 86.

[48] Specifically, under Section 706(b), the FCC is required to collect data for purposes of annually reporting to the U.S. Congress on the status of broadband deployment nationally. *See* 47 U.S.C. § 1302.

[49] PD at 40 ("In defining whether residential and mobile broadband are separate and complementary markets, or substitutable for one another and therefore part of the same market, we apply a similar analysis as that described above with regard to the substitutability of voice services.").

Mbps or more.[50] The PD also appears to acknowledge that, under well-established principles of economic analysis, one must look at the marginal customer and how he or she would respond to a hypothetical price increase to make the substitution assessment.[51] Yet, the PD largely ignores the substantial record evidence demonstrating the wide availability of broadband services at lower speeds that meet various consumer needs,[52] focusing instead the purported advantages of higher download speeds, especially for video streaming.[53] The PD also neglects to consider the undisputed record evidence showing that millions of people who have access to 25/3 service elect to purchase lower broadband speeds.[54] These record facts demonstrate that the 25/3 definition is an arbitrary and insupportable basis for conducting any *competitive* analysis of broadband. The Commission should eliminate FOF 12 and the related text in the PD.

2. The PD Improperly Segments the Residential Broadband Market by Technology.

The PD also draws an overly narrow view of the broadband market by improperly excluding mobile broadband from the residential broadband market without the requisite analysis. The PD bases this conclusion on a finding that those mobile and fixed wireline broadband services are *complements* rather than substitutes—in large measure because mobile broadband differs from fixed broadband in

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[50] It is simply incorrect to segment different broadband speeds into tiers as though they define individual markets. Different broadband speeds comprise a common market (i.e., they are substitutable). *See* Resp. Coalition Opening Br. at 22.

[51] *See* PD at 114 ("Several economists in this proceeding have asserted that competition occurs at the margins, or that appropriate product market definitions depend on sensitive evaluation of product equivalency—including equivalency of pricing."); PD at 37 (stating agreement that "the wireless alternative operates as a 'check on residential local wireline phone prices,'" and citing to Exhibit 28, Cox/Gillan [sic] at 8 ("So long as wireless service is a substitute at the margin—i.e., it will be the relevant price to consumers making a decision—then wireline phone providers must consider the prevailing wireless price when pricing their own services").

[52] *See* Ex. 42 at 32-33 (Topper/Joint Respondents 7/15 Testimony) establishing that 10 to 15 Mbps is sufficient for multiple users, using a combination of basic and high-bandwidth broadband uses (citing the FCC Household Broadband Guide).

[53] PD at 44 (noting that "higher speeds improve the performance of video streaming services from companies like Netflix and Amazon, and live-video feeds from companies like Facebook and Twitter." And that while " Netflix recommends a five Mbps connection for high definition video streaming, households that include multiple end-users using multiple devices to access multiple services at the same time may find that download speed inadequate.") (citations omitted). Moreover the citations provided in the PD to Facebook and periscope websites in support of these propositions do not support the need for higher speeds. To the contrary, both websites expressly state that the services work on mobile devices *See, e.g.,* https://live.fb.com/about ("…you'll want a 4G connection…."); *see also* http://help.periscope.tv ("Periscope is the easiest way to live stream from your phone ….").

[54] Resp. Coalition Reply Br. at 30 citing to various FCC reports.

terms of speeds,[55] pricing, and other factors. *See* PD at 157 (FOF 7(g)) & 42-3.

There are a number of problems with this finding. To begin with, the PD misuses the economic term "complement." As the Commission explained in the URF Order, "[w]hen services are complements, then the increased use of one service leads to the increased use of the other."[56] URF Order at 128. Nothing in the record indicates that an increased use of wireline broadband has led or would lead to an increase in the use of wireless broadband service.

Moreover, the fact that fixed and mobile broadband have some different characteristics does not mean that mobile broadband should be ignored. As the PD notes, "residential and mobile broadband data services are in many respects functional substitutes—both services allow users to access email, browse the web, stream audio and video content …." PD at 41. And even if there are differences, "products need not be identical to assert competitive pressure on one another." Ex. 6 at 8:9-10 (Katz/AT&T 6/1 Testimony). Rather, from an economic standpoint, the key question is whether the products or services offered are an acceptable alternative to a significant portion of the market in the event of a hypothetical price increase. *See* Resp. Coalition Br. at 32-33. However, the PD fails to undertake the requisite economic-alternative analysis and ignores the evidence (cited in the PD itself) that significant numbers of California customers already subscribe to mobile broadband (PD at 47) and many consumers *exclusively* obtain mobile broadband service.[57] Moreover, the PD readily admits that it does not have adequate data on data caps and latency or how WiFi offloading and zero rating streaming options may impact substitutability. PD at 44-45 & note 126. As a result, it is improper for the PD to determine that mobile broadband is not a competitive alternative to wireline BIAS services, and the PD's finding in this regard (FOF 7(g)) and the related text in the PD should be eliminated.[58]

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[55] It is also worth noting that the conclusions regarding mobile broadband speeds (*see, e.g.*, FOF 18), are wholly reliant on a "structured sampling program", CalSPEED, (PD at 5) the methodology and efficacy of which were never verified or tested on the record.

[56] In economic terms when services are considered complements it is generally understood to mean that if the price of one good goes down, the demand for the other, complementary good goes up. *See* Resp. Coalition Opening Br. at 32.

[57] *See* Greenlining Opening Br. at 5 (citing to Ex. 71 at 2:19-21); Ex. 54 at vi (Roycroft/TURN 6/1 Testimony).

[58] The PD's exclusion of satellite (PD 61) and fixed wireless (PD at 81) from the BIAS market similarly lacks the requisite economic analysis and fails to recognize both the ubiquitous availability of satellite service. *See* Ex. 5 at 33-34 (Aron/AT&T 6/1 Testimony); Ex. 42 at 26:1-3 (Topper 7/15 Reply Testimony) (noting that fixed wireless service offers an important option for customers in rural locations); Ex. 18 at I-1:4-6 (Tully/ORA 6/1 Testimony).

IV. WHOLESALE ISSUES AND ACCESS TO POLES

The PD addresses, at a high level, five aspects of the "wholesale" market: (1) residential last mile loops (UNEs); (2) special access/business data services ("BDS") and cell site backhaul; (3) access to poles and conduit; (4) access to spectrum; and (5) interconnection. PD at 93-109 & FOFs 24-27. The Commission did not substantively consider wholesale inputs (other than local loops) in the URF proceeding.[59] And the record in this docket confirms that there is generally no need or basis for the Commission to make findings or adopt requirements related to the wholesale market in this proceeding—including a requirement for carriers to submit data related to middle-mile facilities. That is so for several reasons.

First, the PD properly concludes that competition in the retail intermodal voice market appears strong (PD at 157 (FOF 7(f)), with the vast majority of California consumers having access to six facilities-based voice providers.[60] This supports the conclusion that there are many retail providers with sufficient access to wholesale inputs. *See* Resp. Coalition Reply Br. at 21. Second, rules regarding access to and pricing of UNEs and special access are defined by the FCC. *See* Resp. Coalition Reply Br. at 21-22. And as the PD itself notes, "[t]here are…limits on the Commission's ability to affect the special access and spectrum markets, as the former is largely federalized, and the latter completely so." PD at 148 (citations omitted). Third, the FCC is in the midst of a detailed evaluation of BDS, and Intervenors and the competitive carrier association agree that the Commission should not duplicate the FCC's efforts.[61] Taken together these facts strongly militate against the inclusion of any finding with respect to BDS, UNEs, backhaul, or spectrum, or the adoption of any reporting requirements regarding the wholesale market.[62]

That said, the Respondent Coalition agrees with the PD's finding that competition is facilitated by ensuring nondiscriminatory access to utility poles and rights of way in a timely manner, while

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[59] *See* URF Order at 132 ("We note that wholesale services are not part of this proceeding.").

[60] PD at 69 ("Eighty-seven percent of California households live in census blocks with six or more voice providers.").

[61] *See* TURN Opening Br. at 76-77 ("The CPUC should not seek to replicate [the FCC's] federal efforts[.]"); CALTEL Opening Br. at 19-20 ("there is also no reason for the Commission to try to replicate the FCC's efforts").

[62] Because the Respondent Coalition members have varying positions on the scope of the Commission's jurisdiction over IP interconnection, the Respondent Coalition is not submitting comments on that issue, and each member reserves the right to address this jurisdictional issue at the appropriate time in the appropriate forum.

adhering to reasonable safety requirements that serve both new and existing pole attachers and accounting for other relevant concerns. Indeed, the Commission is currently considering two petitions concerning cable companies' and competitive local exchange carrier ("CLEC") access rights with respect to their wireless attachments.[63] Additionally, with respect to safety, the PD correctly reflects that the Commission is addressing safety issues in a number of pending dockets.[64] However, in discussing access to poles, the PD relies in part on unsubstantiated newspaper reports and other information outside of the record,[65] which should be stricken as unnecessary and improper.

V. THE PD SHOULD ELIMINATE THE REPORTING REQUIREMENTS IN ORDERING PARAGRAPHS 1-3.

OPs 1 and 2 of the PD require all certificated and/or registered communications providers to submit to the Communications Division the following information: (i) voice and broadband subscriber and availability block-level data reflective of the prior calendar year's end in a form designated by Communications Division staff; (ii) location of "middle-mile facilities" by technology type and capacities and whether such facilities are available to unaffiliated providers of broadband, in shapefile form designated by Communications Division staff; and (iii) "other information as requested by Commission staff." As explained below, adopting these new requirements would be unlawful, unnecessary, and unduly burdensome and is not supported by the record in this docket or the text of the PD. Accordingly, the PD should be modified to eliminate these proposed data submission requirements. To the extent that the requirements are retained, they should be (i) time-limited and (ii) subject to heightened confidentiality protections.

OP 3 requires Communication Division staff to prepare a report analyzing the broadband and voice markets by December 2019. Because the PD determined that the voice market is competitive and it is improper for the Commission to make findings about the separate market for BIAS, OP 3 should also be eliminated.

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[63] *See* P.16-07-009, *Petition of the California Cable and Telecommunications Association (CCTA) for a Rulemaking to Extend the Right of Way Rules to CMRS Facilities to wireless facilities Installed by Cable Corporations*; and P.16-08-016, *Petition of the Wireless Infrastructure Association for a rulemaking to Extend the Rights of Way Rules for CMRS Facilities to Wireless Facilities Installed by CLECs*.

[64] *See* PD at 102-103 (note 292) (citing to the Safety Enforcement Division's pending petition to revise G.O. 95, Rule 18. Additionally, the Commission is currently is in the midst of a proceeding to update G.O. 95 rules in connection with the development of a comprehensive statewide fire map (R.15-05-006)).

[65] PD at 103 (note 295) and associated text; PD 105 (note 303) and associated text; PD at 105-6 (note 304) and associated text; and PD at 130 (note 156) and associated text.

A. The Proposed New Reporting Regulations Are Unlawful

The proposed data submission requirements should be eliminated because they exceed the proper scope of this proceeding, exceed the Commission's authority, are not supported by the PD's analysis or findings, and include an improper delegation of authority to staff.

While it is well-established that any regulatory requirements adopted in a Commission decision must be within the scope of the proceeding,[66] the proposed new reporting requirements clearly exceed the scope of this proceeding. That is evident from the Scoping Memo, which expressly states that "no rules or regulations will be adopted" in this phase of the proceeding (Scoping Memo at 7)—a view reiterated by both the assigned Commissioner and the assigned Administrative Law Judge ("ALJ") on numerous occasions throughout the proceeding. *See, e.g.*, 1/25/16 Tr. at 12:22-24.

Although the PD asserts that "[t]he new reporting that we direct Communications Division to implement does not … constitute a new regulation [because] it is based on existing statutory authority" (PD at 154 (note 417)), that is incorrect. To be sure, the Commission must have the existing authority to adopt a regulation. The PD errs by proposing the Commission exercise its authority in response to the record developed in this proceeding—such action would result in a new regulation. Forcing regulated entities to turn over voluminous, nonpublic, and highly confidential data against their wishes and presumably subject to sanctions if they fail to do so[67] is a classic example of regulation.[68] And, the existing statutory authority on which the proposed regulation is based, Section 716, cannot, for the reasons discussed above, authorize such an open-ended and industry-wide mandatory data collection.[69] Moreover, to the extent that the new reporting requirements mandate the submission of data regarding

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[66] *See Southern California Edison Co. v. Pub. Util. Comm'n.,* 140 Cal. App. 4th 1085, 1106 (2006) ("The PUC's failure to comply with its own rules concerning the scope of issues to be addressed in the proceeding therefore was prejudicial.").

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

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

[69] The PD also purports to rely on its authority under P.U. Code sections 311 and 314. However, those sections do not establish ongoing reporting requirements. They merely authorize the Commission to issue subpoenas and inspect the books and papers of public utilities.

VoIP and other IP-enabled services (including broadband), they violate P.U. Code Section 710(a).[70]

OPs 1 and 2 are also unlawful because they are not supported by the findings (or even the analysis in the text of the decision).[71] As discussed in detail below, the PD offers no compelling reason why communications providers must annually submit block-level voice and broadband subscriber and availability data and sensitive information regarding middle-mile facilities.

Finally, the second part of OP 2 constitutes an improper delegation of authority to staff. OP 2(2) directs providers to submit annually "other information as requested by Communications Division staff in order to monitor competition in California telecommunications markets." This appears to give the Communications Division "carte blanche" to request any data they wish on an annual basis.[72] Such an open-ended delegation of a discretionary action is prohibited under state law.[73]

B. The Proposed Reporting Regulations Lack an Adequate Factual Foundation and are Vague, Unnecessary, and Unduly Burdensome.

OPs 1 and 2 also should be eliminated because they are ultimately unnecessary, impose extremely burdensome and vague reporting requirements for the submission of highly confidential data, and risk the release of highly-sensitive competitive data without any proper factual predicate.

First, it is apparent that there is no need for any ongoing data submission requirements, given that the PD appropriately acknowledges that "competition in the retail intermodal voice market, as measured above, appears strong." PD at 157 (FOF 7(f)) & 23). That being so, as the Respondent Coalition demonstrated, prices are disciplined by competition and will remain "just and reasonable." Resp. Coalition Opening Br. at 41. Thus, neither the record nor the PD demonstrate that the new reporting requirements would result in the Commission collecting data that would be useful or otherwise meaningful to the Commission monitoring the intrastate telecommunications market (*see id*. at 28-29)—especially given its limited jurisdiction over certain of the services subject to the proposed data

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[70] *See* Section III.B.1, *supra.*

[71] *See* P.U. Code § 1757(a)(3) (A reviewing court will determine whether "The decision of the commission is not supported by the findings.").

[72] Such a policy fails to provide adequate notice and sufficient specificity necessary to avoid arbitrary, subjective, or discriminatory application, and therefore fails the constitutional prohibition on vagueness. *See People v. Superior Court of Santa Clara County*, 46 Cal.3d 381 (1988).

[73] While the Commission may delegate the performance of ministerial tasks, it cannot delegate duties that involve final policy judgment or discretionary decisions, like how to monitor the broadband market or what data to collect. *See Bagley vs. City of Manhattan Beach*, 18 Cal. 3d 22, 24 (1976); *see also Schecter v. County of Los Angeles*, 258 Cal. App. 2d 391 (1968).

collection requirements.[74] As a result, there is no need or basis for the Commission to look at voice and broadband subscription and availability block level data or wholesale inputs in this proceeding.

The PD notes that the data will be helpful in monitoring the markets for telecommunications service and proposes that Staff prepare a report by 2019 analyzing certain competitive data. However, given the fact that the Commission determined in the 2006 URF Order that the voice market was competitive and the PD proposes to determine that the competition in the intermodal voice market is more robust in 2016, Respondent Coalition respectfully suggests that there is no need for such a report in 2019 as to the voice market. Moreover for the reasons state above, the Commission should not issue a report about the separate market for BIAS. Accordingly OP 3's requirement for a 2019 Communication Division's staff report should be eliminated. To the extent that the Commission decides to move forward with such a report, it could be prepared by using publicly available data, such as the FCC's urban rate studies[75] and FCC reports reflecting aggregated Form 477 data. Reliance on publicly-available data also avoids the jurisdictional concerns discussed above.

The PD also suggests that such data will be useful in assisting the Commission in preparing to respond to a potential forbearance petition filed at some point in the future. *See* PD at 161 (COL 5). The Coalition has already explained that the PD's reliance on P.U. Code Section 716 as a basis for the Commission's jurisdiction conflicts with the plain text and purpose of the Code.[76] Still, any attempt to rely on Section 716 to impose ongoing reporting obligations not related to a forbearance petition would yield data from prior years that would likely be either unnecessary or unusable. Any forbearance request is likely to be targeted at particular Section 251 or 271 requirements and is likely to be focused on specific geographic areas rather than the entire state. The scope of the forbearance request would determine—and thus delimit—the nature of and time period of the data the Commission could reasonably request.

Second, the new reporting rules require the production of extremely confidential information—certain of which raises homeland security issues. As the Respondent Coalition has previously explained, block level subscriber data (required by OP 1) is proprietary and extremely sensitive information, the

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[74] *See* Section III.B, *supra*.

[75] *See* "Wireline Competition Bureau Announces Results of 2016 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey and Explanatory Notes, and Required Minimum Usage Allowance for ETCs Subject to Broadband Public Interest Obligations," WC Docket No. 10-90, Public Notice DA 16-362 (rel. Apr. 5, 2016).

[76] *See* Section III.B.2, *supra*.

release of which could cause significant competitive harm to the submitting communications provider. OP 2 requires the production of a map of a communications providers' "middle mile facilities"; this data is also highly competitively sensitive, but also raises national security concerns. Communications networks are considered to be part of critical network infrastructure by the federal government.[77] Information about critical network infrastructure network is protected from disclosure. *See* 6 U.S.C § 133.[78] The FCC has also ruled that certain information about communications networks should not be disclosed for national security reasons.[79] Even if the Commission requires that this information be kept confidential, the fact that the Commission has the information increases the risk of inadvertent disclosure and raises national security concerns. Thus, the extreme sensitivity of this data is yet another reason why the Commission should not require its production.

Third, the data submission requirement in OP 2 is vague in that the PD does not define "middle-mile facilities"—a term that parties have utilized in different ways in this proceeding. For example, the Respondent Coalition generally refers to those facilities as various forms of the dedicated transport that the FCC requires ILECs to provide as UNEs at TELRIC-based or negotiated prices, so that competing carriers could compete in the voice market. Resp. Coalition Opening Br. at 36. CALTEL, by contrast, refers to middle-mile facilities as facilities used to provide transport and traditionally purchased as BDS from the ILEC. CALTEL Opening Br. at 18-19. The PD fails to delineate what should be reported and

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[77] *See* Department of Homeland Security, Critical Infrastructure Sectors, available at https://www.dhs.gov/communications-sector ("The Communications Sector is an integral component of the U.S. economy, underlying the operations of all businesses, public safety organizations, and government. Presidential Policy Directive 21 identifies the Communications Sector as critical because it provides an "enabling function" across all critical infrastructure sectors.").

[78] *See* 6 U.S.C. § 133(a)(1) ("Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)—(A) shall be exempt from disclosure under section 552 of title 5 (/uscode/text/5/552) (commonly referred to as the Freedom of Information Act).").

[79] For example, the FCC has found that "outage reports are presumed to be confidential" with concerns about, among others, the release of "potentially harmful details about particular network vulnerabilities." See *In the Matter of the Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, FCC 12-22 (Feb. 21, 2012) at ¶¶ 13, 113. The FCC further asserts that the disclosure of outage reporting information to the public could present an unacceptable risk of more effective terrorist activity, and therefore treats the information that will be provided as confidential, withholding from disclosure to the public in accordance with the Freedom of Information Act. *New Part 4 of the Commission's Rules Concerning Disruptions to Commc'ns*, 19 F.C.C. Rcd. 16830, 16834 (2004) at ¶ 3.

the basis for such a requirement.

Fourth, the new data submission requirements will impose significant burdens on communications providers. As has been detailed in previous pleadings submitted in this proceeding, communications providers do not generally maintain both voice and broadband subscription and availability data on a census block-level basis and the creation of that data on an annual basis would be time consuming and costly—and may require the assistance of a consultant who can prepare the data in that format and/or reallocating resources away from existing projects.[80] Further, carriers do not generally maintain maps of "middle-mile" facilities, and providing such data to the Commission would be time-consuming, costly, and burdensome.

For these reasons OPs 1, 2 and 3 should be eliminated.

C. If the Reporting Requirements are Retained, They Should be Time-Limited, and Confidentiality Must Be Fully Protected

While the Respondent Coalition respectfully objects to the reporting requirements in OPs 1 and 2 for the reasons stated above, to the extent they remain in the PD, the Commission—at a minimum—should limit the number of years which carriers are required to submit this data. As currently drafted, the requirements are imposed on certificated and registered communications providers indefinitely. Such an open-ended requirement is not justified. At the most, the reporting requirement should stay in place for two years and sunset in 2018.[81]

Critically as well, the Commission must make clear that this information will be treated as strictly confidential in accordance with federal requirements. Consistent with COL 14, the requested Form 477 subscriber data and critical infrastructure data contains highly confidential detailed and granular customer information. Its confidentiality therefore must be fully protected as required by federal regulations.

The information identified in OPs 1 and 2 clearly meets Commission confidentiality standards. In particular, block level subscriber data (required in OP 1) are properly designated as confidential pursuant to General Order ("G.O.") 66-C, Section 2.1, because binding federal regulations condition

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[80] *See, e.g., Coalition Motion for a Partial Stay*, Choroser Decl. ¶ 15 (filed March 11, 2016) ("The process of pulling together the information requested is time-consuming and costly. Particularly, in order to develop and report on the census block data…Comcast must hire a third party information technology vendor to run programs to parse customer address information into the granular census block divisions."); Wood Decl. ¶ 17 ("[T]he company would not expend these resources for any other purposes….").

[81] For OP 2, the Commission should clarify that the reports due January 31st would include data for the prior calendar year, if that is in fact what the Commission intends.

state commission access to that data on the commission having "protections in place" to "preclude disclosure" of the data.[82] Moreover, the Commission has previously recognized that broadband availability and subscribership data is confidential, including in G.O. 169, the General Order that governs annual reporting requirements under DIVCA.[83]

As explained above, the disclosure of the location of middle-mile facilities by technology type and capacities (required in OP 2) should also be deemed confidential to preserve network security regarding critical infrastructure information. *See* 6 U.S.C.A § 133(a)(1)(e); G.O. 66-C § 2.1.[84] Moreover, the Public Records Act precludes disclosure to the public of those records prohibited from disclosure under federal law (*see* Gov't Code § 6254(k)). The Commission also protects information of a confidential nature under G.O. 66-C including: "(2.1) Records or information specifically precluded from disclosure by statute. (E.g.: accident reports, P.U. Code §315)…(2.2) Records or information of a confidential nature furnished to, or obtained by the Commission," and information that would subject affected providers to "unfair business disadvantages." G.O. 66-C (2.2(b)); *see also* P.U. Code § 583. Moreover, in D.16-08-024 the Commission acknowledged that information about the location of communications networks would likely be the type of confidential information that would be protected from disclosure under G.O. 66-C.[85]

If, despite the federal and state confidentiality requirements, the Commission nonetheless

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[82] *See, e.g.*, 47 C.F.R. §§ 1.7001(d)(4)(i), 43.11(c)(4)(i); *Local Competition and Broadband Reporting*, 15 FCC Rcd. 7717, 7761 ¶ 95 (2000).

[83] G.O. 169 § VIII(C)(1); *see also* CPUC Comments on the Development of Broadband Data, WC Docket No. 07-38, at 10-11 (June 15, 2007) ("The FCC already provides this [Form 477] data to states in its original format, under agreements of nondisclosure, simultaneous reporting should not impose significant cost or burden to providers, and the same confidentiality requirements should be required."), available at http://apps.fcc.gov/ecfs/document/view?id=6519529526.

[84] *See* 6 U.S.C. § 133(a)(1)(E) which provides that critical infrastructure information

> "(E) shall not, if provided to a State or local government or government agency—
>
> (i) be made available pursuant to any State or local law requiring disclosure of information or records;
>
> (ii) otherwise be disclosed or distributed to any party by said State or local government or government agency without the written consent of the person or entity submitting such information; or
>
> (iii) be used other than for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act;"

[85] D.16-08-024 at 25 (noting that "information regarding the location, function, and relationship between network facilities, including the identity of critical infrastructure protected by 6 U.S.C. Section 133(a)(1)(E)," cited by CALTEL in its comments on Proposed Decision at 2-3, would be an appropriate basis for designating documents as confidential "assuming that the information submitted meets the requirements of those statutes.").

contemplates releasing the type of competitively sensitive data discussed above to any third parties, it must afford the impacted carrier confidentiality protections at least as strong as those afforded by the FCC with respect to comparable information.[86] Thus, at a minimum, the Commission must require that any recipients of such information (including other participants in Commission proceedings, and experts and consultants) be required to abide by the provisions of protective orders that contain confidentiality safeguards at least as strong as those imposed by the FCC in its *Special Access* proceeding.[87] Under those procedures, among other things, the impacted carrier must have the right to object to the release of the information and an opportunity to obtain the full Commission's review of a determination to release—and, where appropriate, judicial review—*before* any such disclosure occurs.[88]

Moreover, in light of the extreme sensitivity of the required reporting information under the PD, the authority for reviewing any requests for confidential treatment of documents should not be delegated solely to the Commission's Legal Division pursuant to D.16-08-024. Rather, as contemplated by Ordering Paragraph 1(b) of D.16-08-024, the Commission should establish a different process in this case to ensure that the subscriber data and critical infrastructure information produced by the carriers remains confidential, and is not inadvertently or erroneously disclosed upon delegated authority by the Legal Division in response to a Public Records Act Request. The PD should therefore be modified to specify that this information is explicitly confidential and shall not be publicly disclosed by the Commission. *See* Appendix A. If this additional guidance is not provided, it will put providers in the perilous situation where they would have to provide highly-sensitive data to the Commission that could be disclosed without any notice by the Legal Division. The Commission should avoid this situation by clarifying the matter up front.

IV. CONCLUSION

For these reasons, stated above, the PD's findings regarding voice competitive alternatives,

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[86] A state commission must "formally declare to [the FCC] that [it is] willing and able to treat submitted information subject to restrictions on data release that are at least as stringent as federal requirements." *See also Local Telephone Competition and Broadband Reporting, 19 FCC Rcd 22340, ¶ 26*. Additionally, the Form 477 Data Sharing Agreement continues to require state commissions to commit that, "[t]o the extent that Federal confidentiality statutes and rules impose a higher standard of confidentiality than state law," they are "able to, and will adhere to the higher Federal standard." Public Notice at 1*, available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1013/DA-16-1177A1.pdf.

[87] *See In re Special Access*, 29 FCC Rcd. 11657 (Wireline Comp. Bur. 2014); *see also Investigation of Certain Tariff Pricing Plans*, 30 FCC Rcd. 13680 (Wireline Comp. Bur. 2015).

[88] *See In re Special Access*, 29 FCC Rcd. 11657, Appx. A ¶ 5.

micro-targeting, and HHI should be modified or eliminated from the PD. Findings and orders concerning the BIAS and wholesale markets should also be excluded. Extra-record evidence regarding pole access should be stricken. And, the PD should be modified to eliminate the proposed data submission and reporting requirements in OPS 1-3. To the extent that the data submission requirements in OPS 1 and 2 are retained, (i) they should be time-limited and (ii) subject to heightened confidentiality protections.

Respectfully submitted,

/s/

Suzanne Toller
Peter Karanjia
Zeb Zankel
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6500
Fax: (415) 276-6599
Email: suzannetoller@dwt.com

For Respondent Coalition[89]

Dated: November 7, 2016

[89] Pursuant to Rule 1.8(d), counsel for Respondent Coalition authorizes Davis Wright Tremaine LLP to sign and file these comments on behalf of Respondent Coalition.

APPENDIX A

Proposed Changes to Findings of Fact, Conclusions of Law, and Ordering Paragraphs

Findings of Fact

1. Wireless and cable-based Voice over Internet Protocol (VoIP) services have rapidly displaced traditional landline phones as the primary modes of voice communication in California.

2. Voice communication itself is a diminishing segment of the broader telecommunications market.

3. ~~Approximately 92 percent of Californians obtain their voice service in a bundle with broadband~~.

4. The Commission's Communications Division has prepared Market Share Analyses that show concentration throughout various communications markets in California, but that none of these markets is a monopoly. Further, it finds that competition in intermodal voice services (traditional voice, wireless and VoIP telephony taken together) has increased since 2001, predominantly due to competition of mobile and cable VoIP.

5. The additional data submitted by Respondents in this proceeding provides information, including in particular additional census block data, which allows a more granular assessment of individual markets defined by technology and/or geography and other demographic factors.

6. In addition, the Federal Communications Commission (FCC) has posted data online, which we have attempted to integrate with data from Respondents and from the Communications Division.

7. Taken together, this data tells us:

   a. Most residential wireline customers with voice service obtain that service from either the legacy incumbent telephone provider or cable VoIP providers;

   b. Concentration in the wireless market has increased since 2001;

   c. ~~For most consumers, w~~Wireline and wireless voice services are <u>competitive alternatives to one another in the intermodal voice market.</u> ~~substitutes.~~ Stated differently, mobile voice service is a substitute for fixed landline voice service <u>and imposes competitive discipline on the price for fixed landline voice service</u>;

   d. Evidence suggests that this is one-way substitutability. Landline voice service is typically not a substitute for mobile voice service due to its lack of mobility;

   e. Competition in this retail intermodal voice market, as measured above, appears strong; <u>and</u>

   f. Whether landline and mobile services are substitutes for business customers is less clear<u>.</u>

g. ~~For most consumers, residential and mobile broadband services are not substitutes for each other. Mobile data service, at present, is typically not a substitute for residential broadband service because of higher data usage prices for mobile and lower data caps for mobile compared with residential broadband; and~~

h. ~~Our analysis of the substitutability of broadband services could change if either 5G wireless becomes a closer substitute for residential broadband, or if residential broadband services improve their mobility through new functionality or other innovation.~~

8. With the rapid convergence of voice communications, and Internet access, ~~and video streaming into applications that are~~ all accessible from a single device, the economic and social importance of the telecommunications network has multiplied, making the network an "essential infrastructure for [the] 21st century."

9. To examine telecommunications competition in California, we must also examine the services available in different parts of the State, and the service subscriptions in different parts of the State.

10. ~~The so-called "digital divide" between geographic and economic sub-groups of the State's population has widened. Those Californians who lack reliable and affordable access to that network are unable to participate fully in the economy and society of the 21st century. For rural and tribal Californians, the "digital divide" stems largely from the lack of sufficient deployment of telecommunications services. For low-income Californians, the "digital divide" stems largely from the unaffordability of telecommunications services.~~

11. ~~In addition to the Market Share Analyses, the Commission's Communication Division also prepares reports in conjunction with the Digital Infrastructure and Video Competition Act (DIVCA) (Pub. Utils. Code §§ 914.3, 5800-5970), and with the Communication Division's administration of the California Advanced Services Fund (CASF). In particular the most recent DIVCA Report shows that competition in video and broadband availability has increased, but not in all areas of the state, and CASF Reports results show differences in service availability and quality between urban and rural areas.~~

12. It is unclear whether the growth of wireless, VoIP, and other alternative means of voice communication has kept prices and services for traditional landline service just and reasonable, or even whether that is the right question to ask when most consumers obtain voice service in a bundle with broadband and other services.

13. Reliable price and cost data both are difficult to obtain in a market where bundles predominate, and where the lowest available prices of various communications services vary over time, ~~sometimes daily, and often depend on zip code or other micro-targeting by communications carriers.~~

14. The voice market is tied to the broadband market in a number of ways, including: (1) broadband is the network means of transmitting VoIP, one of the intermodal competitors foreseen by URF I; (2) with the high incidence of service bundling, and the increased importance of broadband Internet access, consumer choices in the voice market may be affected by their choices in the broadband market; and (3) traditional phone calls and broadband data services utilize the same physical network.

15. This decision focuses on describing the telecommunications market as it exists today and on what this Commission can do or recommend to promote competition and facilitate entry in the voice ~~and broadband~~ market~~s~~.

~~16. The September 10, 2015 DIVCA Report, based on 2013 year-end data, confirms other testimony and information in the record of this proceeding that:~~

~~a. In the fixed broadband market, cable companies generally provide the fastest broadband speed;~~

~~b. Cable companies have a larger share of the fixed broadband market;~~

~~c. In general, customers are gravitating toward faster speed broadband; and~~

~~d. DIVCA franchise holders (most of the large broadband and video providers in the state) now provide more broadband service than they do video service.~~

~~17. The residential, high-speed broadband market in all of California's geographic markets is highly concentrated.~~

~~18. No census block in California is served by a mobile carrier that consistently achieves high-speed broadband speeds.~~

~~19. Although there are varying estimates, roughly half (or more) of California households have access to only one (or no) wireline broadband provider at speeds of 25 Mbps down and 3 Mbps up.~~

~~20. Broadband speeds are increasing for both fixed wireline and mobile broadband, both in California and around the world.~~

21. Competitors' access to the built network infrastructure is a critical aspect of the competitive landscape for telecommunications services.

22. Telephone Incumbents provide legally required access to competitors through "unbundled network elements" at cost-based prices, and to other necessary inputs at market rates. Thus, there are distinct markets for wholesale inputs that affect retail telecommunications markets and retail prices.

23. The price of stand-alone voice service - while central at the time of the URF decisions - is not centrally relevant to today's market. An attempt to rate regulate telephone service would likely have

unintended consequences that would render rates less just and reasonable than they are in the absence of rate regulation.

24. Competitive bottlenecks and barriers to entry in the telecommunications network could limit new entrants and may raise prices for some telecommunications services above efficiently competitive levels.

25. ~~One particular~~ Access to utility poles~~,~~ is an issue where the Commission's goals of safety and of facilitating ~~mandate meets, and must be reconciled with, its goal of~~ a competitive market meet and must be reconciled.

26. Efficient interconnection promotes competition.

27. There is a ~~considerable~~ potential risk of inefficiency in the market for cell site backhaul, which may impact the rates for retail mobile service.

28. ~~The increasing and high level of concentration in the residential broadband market poses risks of an insufficiently competitive marketplace.~~

29. ~~In measuring this rapidly evolving market, actual broadband speeds supply more useful information than advertised broadband speeds.~~

30. The business telecommunications market, ~~both as~~ to voice ~~and broadband~~, differs from the residential market, but remains critically important to the California economy.

Conclusions of Law

1. Public Utilities Code §§ 216, 233-34, and 451 vest the Commission with the duty to ensure "just and reasonable" charges, terms and conditions for the conduits, ducts, poles, wires, cables, instruments, appliances and other property used in connection with or to facilitate communication by telephone, whether such communications is had with or without the use of transmission wires.

2. Public Utilities Code § 709 contains "policies for telecommunications in California," which include encouraging "the development and deployment of new technologies," "promot[ing] lower prices, broader consumer choice, and avoidance of anticompetitive conduct," and "remov[ing] the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."

3. Public Utilities Code § 709.5 endorses a reliance on competitive markets to achieve California's goals for telecommunications policy.

4. Public Utilities Code § 710 limits for a time the Commission's authority over Voice over Internet Protocol and Internet Protocol enabled services, with some exceptions.

5. ~~Data collected for forbearance petitions under Public Utilities Code § 716 can provide useful guidance to the Commission in its oversight of the California communications marketplace. The period after a forbearance petition is filed may not be sufficient time to gather and analyze that information, and thus we direct Communications Division to collect that data on an ongoing basis.~~

6. Public Utilities Code § 882 establishes that regulatory policies should encourage access to a wide choice of advanced telecommunication services.

7. In Public Utilities Code § 871, the Legislature reiterates its intent that our policies encourage development of a wide variety of advanced telecommunication facilities and services.

~~8. In reclassifying broadband as a telecommunications service, the FCC determined that it is jurisdictionally interstate. This determination does not foreclose or preempt Commission action related to broadband, but does require that such Commission action be consistent with the forbearance determinations and related rulings of the FCC.~~

9. While legacy telephone companies are required to provide access to certain parts of their infrastructure at cost-based rates under current law, they are not required to provide access to their entire infrastructure at cost-based rates.

10. Under current law, cable companies are not required to provide competitive carriers with access to their infrastructure ~~at cost-based rates~~.

11. The telecommunications markets in California extend to all types of telecommunications transport services, including both retail and wholesale, middle mile and last mile connections, whether those services are delivered via copper wire, coaxial cable, fiber or radio waves or some combination of those media.

~~12. The FCC's speed benchmark for "Advanced Services," currently set at 25 Mbps download and 3 Mbps upload, is a useful, reasonable, and forward-looking division to separate the broadband market into "low-speed" and "high-speed" tiers.~~

13. Telecommunications affordability will be addressed in the Lifeline proceeding, as well as by our other public purpose programs.

14. Clearly confidential carrier information, such as granular, census block level data, and the identity of certain wholesale providers are not, being publicly disclosed in this Decision.

15. Statewide subscriber totals or market shares are not likely to cause competitive harm to the providers and are not confidential.

16. The data disclosed in this decision is authorized for disclosure under Public Utilities Code § 583.

17. While it is unclear whether the growth of wireless, VoIP, and other alternative means of voice communication has kept prices and services for traditional landline service just and reasonable, improving the efficiency of the telecommunications markets should result in rates for traditional landline service that are more just and reasonable.

18. The Commission should consider the role of pole access in facilitating telecommunications competition in any proceeding regarding proposed attachments to existing utility poles.

O R D E R

IT IS ORDERED that:

~~1. Pursuant to P. U. Code §§ 311, 314, and 716, all communications providers certificated and/or registered with the California Public Utilities Commission shall submit annually to the Communication's Division by April 1st, voice and broadband subscriber and availability block level data reflective of the prior calendar year's end in a form designated by Communications Division Staff.~~

~~2. Pursuant to P. U. Code §§ 311, 314, and 716, all communications providers certificated and/or registered with the California Public Utilities Commission shall submit annually to the Communication's Division by January 31st: (1) location of middle-mile facilities by technology type and capacities and whether such facilities are available to unaffiliated providers of Broadband Internet access service in shapefile form designated by Communications Division staff; and (2) other information as requested by Communications Division staff in order to monitor competition in California telecommunications markets.~~

3. ~~The Communications Division staff shall prepare and deliver by December 1, 2019 a report to the Commission analyzing voice and broadband in the following manner: broadband availability by speed and geography; the number of broadband service providers by geographic area; broadband penetration rates by geographic area; areas of the state having a single and no broadband provider, and voice and broadband market share by various geographic areas in California.~~

~~4. The Communications Division staff shall budget and seek state funding for a third party survey of consumer broadband speed experience measured by the CalSPEED fixed location test. Staff shall report to the Commission its findings and recommendations.~~

[To the extent OPs 1-2 are retained, Respondent Coalition proposes the addition of the following new OPs 3-4]

[3. The reporting requirements in Ordering Paragraphs 1-2 shall cease to apply and automatically terminate two years after the effective date of this decision.]

[4. The submission of information specified in Ordering Paragraphs 1 and 2 (1) shall be treated as strictly confidential pursuant to General Order 66-C, §§ 2.1-2.2(b) and 2.8, Public Utilities Code § 583, and applicable federal regulations. *See, e.g.*, 47 C.F.R. §§ 1.7001(d)(4)(i), 43.11(c)(4)(i); Local Competition and Broadband Reporting, 15 FCC Rcd. 7717, 7761 ¶ 95 (2000); 6 U.S.C. § 133(a)(1)(E).]

5. Investigation 15-11-007 is closed.