BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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

COMMENTS OF CTIA ON PROPOSED DECISION ANALYZING THE CALIFORNIA TELECOMMUNICATIONS MARKET AND DIRECTING STAFF TO CONTINUE DATA GATHERING, MONITORING, AND REPORTING ON THE MARKET

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), CTIA[1] comments on the Proposed Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market, issued in the above-captioned proceeding on October 18, 2016 ("Proposed Decision").

I. INTRODUCTION

In the instant docket, the Commission has analyzed the state of competition in California's telecommunications markets. Although the Proposed Decision, consistent with the Scoping Memo, appropriately does not propose to impose unnecessary, market-interfering regulation, CTIA has some particular concerns with the Proposed Decision that it requests the Commission address prior to its adoption.

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

First, the Proposed Decision would impose an annual reporting requirement on "all communications providers certificated and/or registered with the California Public Utilities Commission" ("communications providers") to submit to the Commission voice and broadband subscriber and availability block-level data ("block-level data"), data regarding middle-mile facilities ("middle-mile facility data") and any other information "requested by Communications Division staff in order to monitor competition in California telecommunications markets."[2] These proposed reporting obligations would be imposed in perpetuity without any acknowledgement of the judicial limitations placed on an agency's authority to collect data, and with nebulous guidance on how the requested information will be utilized. Accordingly, the Commission should narrow these reporting obligations in order to tailor them to this proceeding's stated purpose.

Second, the Proposed Decision fails to afford a predesignated level of confidentiality to the information sought under the Proposed Decision's reporting requirements. The Commission should modify the Proposed Decision to provide that any block-level data and middle-mile facility data received from communications providers will be treated as strictly confidential and protected from disclosure to third parties.

Third, the Proposed Decision makes certain statements regarding mobile broadband speeds based on the findings of a report – *CalSPEED: California Mobile Broadband, An Assessment* ("CalSPEED Report")[3] – that uses an inadequate and flawed testing model. Moreover, those statements are premised on mobile broadband speed benchmarks that have not been adopted by the jurisdictional agency, the Federal Communications Commission ("FCC"). Given the questionable foundation upon which these statements are based, the Commission

[2] Proposed Decision, p. 163, Ordering Paragraphs 1 and 2.
[3] *See* Ex. 7, Attachment B.

should remove them from the Proposed Decision.

Finally, there are other statements contained in the Proposed Decision that are either clearly contrary to the evidence presented, predicated on extra-record information, or not based on any evidence at all. The Commission should remove these statements from the Proposed Decision.

II. THE COMMISSION SHOULD MODIFY THE REPORTING OBLIGATIONS IMPOSED BY THE PROPOSED DECISION

A. The Commission Should Modify the Proposed Decision's Carrier Reporting Obligations Consistent with the Purpose of Those Obligations

Based on the Commission's stated obligation to "monitor the markets for telecommunications services,"[4] the Proposed Decision would have communications providers annually report to the Commission's Communications Division highly-competitive, market-sensitive "voice and broadband subscriber and availability block-level data,"[5] the "location of middle-mile facilities by technology type and capacities,"[6] and "whether such facilities are available to unaffiliated providers of Broadband Internet access service"[7] "in a form designated by Communications Division Staff,"[8] as well as "any other information as requested by Communications Division staff in order to monitor competition in California telecommunications markets."[9] The Proposed Decision sets no end date for such reporting. The Proposed Decision directs these actions without considering the limitations on the Commission's authority to seek information and without providing any clear indication of how the requested information will be utilized.

In *California Restaurant Ass'n v. Henning*, 173 Cal.App.3d 1069, 1075 (1985), the court

[4] Proposed Decision, p. 154.
[5] *Id.*, p. 163.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

described a three-part test to determine whether information sought by an agency is appropriate and permissible: whether the information requested "(1) relates to an inquiry which the administrative agency is authorized to make; (2) seeks information reasonably relevant to that inquiry; and (3) is not too indefinite." As drafted, the Proposed Decision does not satisfy the test. The Commission seeks information on services, or elements of services, beyond its jurisdiction. For instance, the Commission's jurisdiction does not extend to broadband or wireless network construction or coverage,[10] and the Commission's jurisdiction over middle-mile facilities is limited to intrastate facilities, typically a small portion of the market,[11] but the Commission seeks reporting on all middle mile facilities and on wireless voice and broadband coverage and subscribership. Accordingly, it can hardly be said that the Commission seeks information reasonably relevant to an inquiry it is authorized to make.

The Proposed Decision states that the purpose of the ordered data collection to receive information necessary for the Commission to periodically "update "the analysis present[ed] in this proceeding … with the most current data available."[12] The first, and only, update to the Commission's analysis is scheduled for December 1, 2019.[13] Thus, annual filing of block-level data and middle-mile facility data is unnecessary.[14] Rather, at the time it determines to update its

[10] *Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 F.C.C. 2d 469, 504 ¶¶ 80-81, fn. 74 (1981), *modified on other grounds*, 89 F.C.C. 2d 58 (1982) (subsequent history omitted); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 988 (7th Cir. 2000); *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1040 (9th Cir. 2010). The Commission also should note that broadband has been declared an interstate service. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5803-04 ¶¶ 431-32 (2015) ("*Open Internet Order*").

[11] *See* Proposed Decision, p. 148.

[12] *Id*., p. 154.

[13] *Id.* at 163. As the Commission has indicated that only one update of its analysis is scheduled, the Commission may also consider having the communications providers' reporting obligation cease once that updated analysis is finalized.

[14] Indeed, the Commission's history with these types of annual reports confirms that they are costly but ultimately "little used" and fail to produce tangible benefits to consumers. *See, e.g.*, Decision 06-08-030,

analysis, the Commission could issue appropriately tailored data requests to the communications providers pursuant to its general authority under Sections 581–584 of the Public Utilities Code. In that manner, the Commission would have the most up-to-date information to perform its analysis without imposing on the carriers an unnecessary and onerous annual reporting obligation. The Commission should therefore modify the Proposed Decision's annual reporting obligation in favor of requiring carrier reporting only when the Commission is set to update its analysis.

B. The Commission Should Modify the Proposed Decision to Protect Communications Providers' Highly Confidential Information

The Commission should also revise the Proposed Decision to afford block-level data and middle-mile facility data a sufficient level of confidentiality. In this regard, CTIA supports the position set forth in the Respondent Coalition's Opening Comments on the Proposed Decision, arguing that the Commission must clarify that such data will be treated as strictly confidential and not disclosed to any third parties.

As illustrated by the Respondent Coalition, block-level data and middle-mile facility data clearly satisfies the requirements for confidential treatment by the Commission. First, block-level data is properly designated as confidential pursuant to Commission General Order ("G.O.") 66-C, Section 2.1, which prohibits Commission disclosure of "records or information specifically precluded from disclosure by statute." Because binding federal regulations condition state commission access to such data on a commission having "protections in place" to "preclude disclosure" beyond the commission,[15] such information is entitled to protection under G.O. 66-C, Section 2.1. Second, it is necessary to protect the confidentiality of middle-mile facility data in

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Finding of Fact 99; *see also id.* at 217-18 ("Our experience over the last several years indicates that these NRF [New Regulatory Framework]-specific detailed reports are of little use.").

[15] *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).

order to preserve network security by safeguarding critical infrastructure information.[16] Finally, G.O. 66-C, Section 2.2 precludes the Commission from releasing either the block-level data or middle-mile facility data, as the release of such data would place the communications providers at an unfair business disadvantage,[17] a finding that the Commission has already made with respect to this type of data.[18]

For those reasons, the Commission should modify the Proposed Decision to make clear that block-level data and middle-mile facility data will be treated as strictly confidential and not be disclosed to any third parties.

III. THE COMMISSION SHOULD MODIFY THE PROPOSED DECISION TO ELIMINATE UNSUPPORTED STATEMENTS REGARDING MOBILE BROADBAND

The Proposed Decision contains a finding of fact that states that "[n]o census block in California is served by a mobile carrier that consistently achieves high-speed broadband speeds."[19] The Proposed Decision also states that "advertised wireless [broadband] speeds regularly exceed the speeds actually measure in the field."[20] These claims, which are contrary to carriers' published information, are based on a CalSPEED Report that utilizes a flawed methodology to derive its results, and is therefore unreliable.[21] In addition, the Commission has

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[16] *See Attach on Fiber Networks in California Baffle FBI*, Wall Street Journal (http://www.wsj.com/articles/attacks-on-fiber-networks-in-california-baffle-fbi-1439417515) (August 12, 2015) (last visited November 7, 2016). There is also a clear federal policy of protecting infrastructure information from public disclosure, *see* 6 U.S.C.A § 133(a)(1)(e).

[17] G.O. 66 Section 2.2 provides: "Public records not open to public inspection include . . . (b) Reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage."

[18] *See* Administrative Law Judge's Ruling on Remaining Protective Order Issues, I. 15-11-007 (April 1, 2016), p. 4 (finding that the release of block-level data or middle-mile facility data to competitors would allow them to gain a significant advantage in the marketplace).

[19] Proposed Decision, Finding of Fact No. 18; *see also id.*, p. 11.

[20] *Id.*, p. 88.

[21] *See*, *e.g.*, Proposed Decision, p. 11 (citing CalSPEED Report as basis for statement that "no census block in California is served by a mobile carrier that consistently achieved high speed broadband speeds.").

not justified the adoption of a broadband speed benchmark of 25Mbps/3Mbps for mobile broadband, which has not been adopted by the FCC for mobile broadband. Accordingly, the Commission should eliminate Finding of Fact No. 18, as well as other statements in the Proposed Decision that rely on the CalSPEED Report and the use of an inappropriate benchmark.

As noted in the Proposed Decision, the Commission created and implemented the CalSPEED project "to measure mobile broadband throughput, quality and reliability for the large four national carriers."[22] The methodology used by CalSPEED to effect such measurements, however, is flawed. For example, the CalSPEED methodology relies heavily on drive tests, which were not necessarily conducted in areas where consumers live and work, and, despite the breadth of Finding of Fact 18, certainly were not conducted in all 710,145 census blocks in California. In addition, the methodology utilizes only two measurement servers to assess internet connectivity. As Internet connectivity speeds for customers depend significantly on the content provider's server infrastructure and the locations of that infrastructure, the use of only two servers does not accurately capture the customer experience. Additionally, the CalSPEED methodology uses only four transmission control protocol ("TCP") flows for measuring the consistency of the connection. Because TCP flows vary significantly depending on applications in use, and might not accurately represent the speed of modern cellular technologies like LTE, the use of only four flows is insufficient for an accurate assessment.[23]

Such methodological flaws alone call into question the accuracy and usefulness of the reported results, but other flaws are evident as well. For example, the Proposed Decision states that the CalSPEED data "allows us to conclude (among other things) that advertised wireless

[22] Proposed Decision, p. 11, footnote 21.
[23] This recitation of flaws inherent in the CalSPEED Report is merely illustrative, not exhaustive.

speeds regularly exceed the speeds actually measured in the field."[24] That statement is both misleading and demonstrably inaccurate. For example, Verizon Wireless advertises download speeds of 5 to 12 Mbps for mobile data,[25] and the FCC's most recent competition report shows that actual mean and median speeds exceed these advertised speeds.[26] Similarly, T-Mobile advertises LTE download speeds of 7 - 40 Mbps and upload speeds of 4-20 Mbps. The CalSPEED report indicates measured mean LTE download speeds of 11.84 Mbps, well within the advertised range of T-Mobile advertised speeds.[27]

Moreover, the use of flawed data on mobile broadband is compounded by the Proposed Decision's application of such data to the proposed benchmark speeds of 25 Mbps/3 Mbps, which have been established by the FCC for fixed broadband only.[28] Despite acknowledging that the FCC has not yet set a standard for mobile broadband, the Proposed Decision, for the stated purpose of "consistent treatment of fixed and mobile broadband," uses the same benchmarks speeds for mobile and fixed broadband.[29] The Proposed Decision does this without any factual analysis to indicate why 25 Mbps/3 Mbps is an appropriate benchmark for mobile

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[24] Proposed Decision, p. 11, footnote 21.
[25] *See* https://www.verizonwireless.com/archive/mobile-living/network-and-plans/4g-lte-speeds-compared-to-home-network/ (last accessed Nov. 3, 2016) ("Verizon 4G LTE wireless broadband is 10 times faster than 3G—able to handle download speeds between 5 and 12 Mbps (Megabits per second) and upload speeds between 2 and 5 Mbps, with peak download speeds approaching 50 Mbps.").
[26] Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Nineteenth Report (September 23, 2016), Table VI.B.6 at ¶ 110. Moreover, the FCC's Competition Report shows that actual speeds exceed Verizon's advertised speeds whether measured by the FCC, Ookla, Rootmetrics or CalSpeed. *See Id.* ¶¶ 107-110 and pp. 123-126 (Tables VI.B.i through VI.B.viii).
[27] Moreover, the FCC's Competition Report shows that measured speeds in either direction are within T-Mobile's advertised speeds whether tested by the FCC (mean speeds of 19.52 Mbps down/10.38 Mbps up), Ookla (mean speeds of 21.1 Mbps down/11.2 Mbps up), Rootmetrics (mean speed of 11.3 Mbps up) or CalSPEED (mean speeds of 11.84 Mbps down/7.32 Mbps up). *See Id.* ¶¶ 107-110 and pp. 123-126 (Tables VI.B.i through VI.B.viii).
[28] *See In re Deployment of Advanced Telecommunications Capability to All Americans Pursuant to Section 706 of the Telecommunications Act of 1996*, (GN Docket No. 14-126), 30 FCC Rcd 1375, released February 4, 2015, ¶ 3 ("2015 Broadband Progress Report").
[29] Proposed Decision, p. 11, footnote 20.

broadband, any explanation of why the use of identical benchmarks for fixed and mobile broadband is judicious, or any acknowledgement of the recent determination by the FCC that the use of the same speed benchmarks for fixed and wireless broadband is inappropriate.[30] Indeed, the FCC recently sought comment on "whether a mobile speed benchmark of *10 Mbps/1 Mbps* is appropriate to reflect current customer usage patterns for mobile broadband services, and whether a *10 Mbps/1 Mbps* edge speed is an accurate measure of advanced telecommunications capability."[31] There is no support in the Proposed Decision for use of a 25 Mbps/3 Mbps speed benchmark for assessing the availability of mobile broadband. Accordingly, any findings of fact and associated statements in the Proposed Decision which rely on these benchmarks, or on the inaccurate CalSPEED data, should be eliminated.

IV. THE COMMISSION SHOULD MODIFY THE PROPOSED DECISION TO ELIMINATE UNSUPPORTED FINDINGS

The Proposed Decision makes other findings which are either predicated on extra-record evidence or are clearly contrary to the evidence presented. The Commission should remove these findings from the Proposed Decision.

First, the Commission should eliminate the assertion in the Proposed Decision that carriers may engage in "micro-targeting" of customers, including actually or potentially adjusting prices on a "zip code" basis.[32] Contrary to this assertion, the record reflects that carriers do not use separate prices for different customer groups or geographic areas, but rather,

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[30] *See In re Deployment of Advanced Telecommunications Capability to All Americans Pursuant to Section 706 of the Telecommunications Act of 1996*, (GN Docket No. 160245), Twelfth Broadband Progress Notice of Inquiry (August 4, 2016), ¶ 39 (given the differences between fixed and mobile broadband, the FCC "anticipate[s] that an appropriate speed benchmark [for mobile broadband] would be lower than the 25 Mbps/3 Mbps adopted for fixed broadband services.").

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

[32] Proposed Decision, p. 158, Finding of Fact 13, and p. 53, footnote 152.

offer uniform residential prices across their areas of service.[33] There also is no evidence of carriers differentiating prices to target customers who are reluctant to change service providers or may find it difficult to do so.[34]

Second, the Proposed Decision states that only 15.3% of rural and 16% of urban households are served by wireless broadband.[35] These estimates are based on "Spring 2015 mobile field testing,"[36] but information regarding such testing was never introduced into the record, and therefore parties to this proceeding never had the opportunity to review its methodology or question its accuracy. Because this statement is supported by extra-record information only, the Commission should eliminate it as well.

V. CONCLUSION

For the reasons stated above, CTIA respectfully requests that the Commission modify the Proposed Decision prior to adoption as follows:

1. Set forth a lawful, clearly defined objective supporting the Proposed Decision's ordered data collection and require the Communications Division to narrowly tailor its data requests to achieve that objective. In addition, the Commission should remove the annual reporting obligation from the Proposed Decision, replacing it with a periodic, or single, reporting obligation;

2. Provide that all block-level data and middle-mile facility data provided to the Commission by communications providers will be treated as strictly confidential and not

[33] *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).
[34] *See* Exh. 5, p/ 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).
[35] Proposed Decision, pp. 135-136, Chart entitled "Rural and Urban Household Availability to Wireline and Mobile Broadband."
[36] *Id.*

disclosed by the Commission to any third parties; and

3. Eliminate the unsupported findings of fact and associated statements regarding wireless broadband speeds, wireless broadband availability, and carrier engagement in the "micro-targeting" of customers.

Respectfully submitted November 7, 2016, at San Francisco, California.

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