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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules.	Rulemaking 11-12-001

REPLY COMMENTS OF PACIFIC BELL TELEPHONE COMPANY D/B/A AT&T CALIFORNIA (U 1001 C); AT&T CORP., F/K/A AT&T COMMUNICATIONS OF CALIFORNIA, INC. (U 5002 C); TELEPORT COMMUNICATIONS AMERICA, LLC, F/K/A TCG SAN FRANCISCO (U 5454 C); AND AT&T MOBILITY LLC (NEW CINGULAR WIRELESS PCS, LLC (U 3060 C); AT&T MOBILITY WIRELESS OPERATIONS HOLDINGS, INC. (U 3021 C); AND SANTA BARBARA CELLULAR SYSTEMS LTD. (U 3015 C)) ON STAFF PROPOSAL

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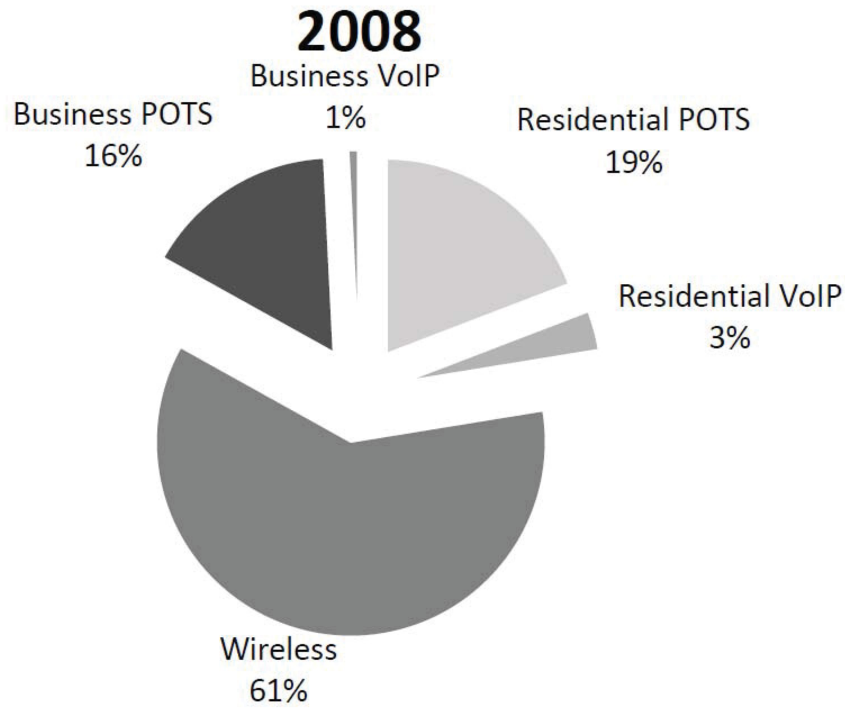
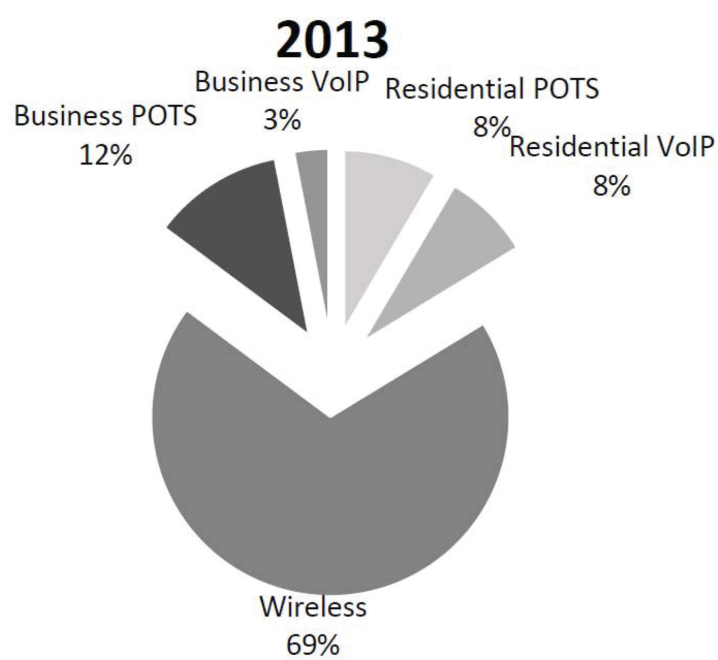
Pacific Bell Telephone Company d/b/a AT&T California ("AT&T") hereby submits its reply comments on the Report of the Commission's Communications Division on Proposed Modifications to General Order 133-C, including a service quality refund and fines proposal ("Staff Report").

I. INTRODUCTION

This comment cycle is to respond to Staff's Report proposing penalties for failing to meet the Commission's service quality metrics. Making wireline telephone providers subject to penalties in a competitive market where customers are abandoning wireline service for alternative means of communications would be anticompetitive, disruptive, and a major step backwards. Such a backward looking policy would be discriminatory to wireline service: The answer to this dilemma is not including other competing technologies such as wireless and VoIP as ORA urges in its Opening Comments, but eliminating service quality regulation for wireline services and allowing market forces to work freely. The communications landscape as shown in the testimony of AT&T's witness, Dr. Debra Aron, and now corroborated by the ORA's analysis of the FCC's competition data, has radically shifted and transformed into a robustly competitive and fast-changing market. Wireline service, far from being a dominant form of communication, is a rapidly shrinking sector as the charts below show. The number of residential consumers on the wireline network has plummeted, from near 100% to 8% at the end of 2013.



Source: Federal Communications Commission, Industry Analysis and Technology Division—Wireline Competition Bureau, "Local Telephone Competition: Status as of December 31, 2008," Tables 10-11, 18 (rel. June 2010), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf.



Source: Federal Communications Commission, Industry Analysis and Technology Division—Wireline Competition Bureau, "Local Telephone Competition: Status as of December 31, 2013," Tables 9-10, 17 (rel. October 2014), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf.

Applying service quality metrics to a dwindling wireline service market sector under these rapidly changing circumstances and without any clear policy or evidentiary foundation is wrong. The Commission's forward looking policy goals and efforts during the last three decades, and its continued reliance on competition in lieu of regulatory fiat for the communications market has been a model for other state commissions in the nation. Imposing penalties on this small subset of providers is both irrational and anticompetitive, raising costs and prices for consumers of wireline service.

ORA's recommendations are misguided and backwards. The Commission should reject these legally flawed backward looking ideas that have no coherent policy basis. The policy and evidentiary justification sorely missing in the Staff's Report is also absent from ORA's Opening Comments, notwithstanding its implicit recognition of the competitive market in its rendition of the FCC's competitive data. There is no reason why any measures or penalties are needed in this intensely competitive market; neither ORA nor the Staff's Report provides any.

Similarly, CALTEL's support for service penalties is equally unreasonable, particularly when CALTEL paradoxically claims, after being in place for over a dozen years, service penalties for wholesale service were never an effective method of ensuring satisfactory service levels. Moreover, CALTEL's claim that service penalties should be used to ensure URF ILECs maintain their legacy copper networks for use by CLECs, long after the ILECs have moved to more advanced networks, has no basis in logic or in the law.

A reasoned analysis of the facts and law lead to the conclusion that the service quality metrics should be abandoned for URF ILECs and penalties are anticompetitive and consumer-harming.

II. THE COMMISSION SHOULD NOT ADOPT SERVICE QUALITY REQUIREMENTS FOR VOIP OR WIRELESS SERVICES.

A. ORA Provides No Policy Reasons Why the Commission Should Establish Service Quality Standards for Wireless and VoIP Services.

ORA's advocacy for the establishment of service quality standards for wireless and VoIP services is devoid of any policy reason or purpose for regulation of the quality of service for these two services, which even by ORA's own admission are rapidly being adopted by consumers. The proposals ORA offers for service quality regulation of VoIP and wireless services are entirely and wrongly premised on the uncontroverted fact that wireless and VoIP services have become ubiquitous in California. For reasons not explained in ORA's pleading, it is ORA's belief that if more and more consumers use these services, then the Commission should regulate the service quality of the services "to protect consumers."

To support this contention, ORA cites a well-known and researched study by the National Regulatory Research Institute and includes a quotation from the executive summary that, "Protective regulation, the *raison d'être* for many well-established government agencies, has lived in the shadow of traditional economic regulation. As we move towards an era of a network of networks in telecommunications, a new emphasis on protective regulation is needed to assure Americans of the quality they want.

However, a complete reading of this study – and its conclusions – reveals that the authors of the study recommend not more regulation when competition grows and consumers adopt new technologies in large numbers – as ORA illustrates through its charts and data – but to do precisely the opposite: government agencies should rely on such demonstrable competition to discipline service quality instead of using directive regulation such as ORA proposes.

The NRRI Report finds that, "Quality standards and incentive systems in a regulatory environment necessarily result in a 'second-best' solution. Absent robust competition, regulatory policy makers need to continue to be aware of the imperfections of any method of overseeing quality."[1] In fact, the NRRI Report notes that out of the three general regulatory control mechanisms – direct regulation, incentive regulation, and competition – "that govern quality of service, market solutions are, naturally, the preferred choice for goals that have to do with economic efficiency. In the absence of a market, however, regulatory controls are still necessary for consumer service standards and to mediate intra-industry conflict when interconnectors have difficulty meeting network quality needs."[2] It is when there is no competitive market that regulatory intervention is needed. ORA heeds no attention to the central recommendation of this report but selectively picks a paragraph to back up its logic-defying proposals for "protective regulation" of service quality in a competitive market.

While the report's conclusions are contrary to and disprove ORA's advocacy for more service quality regulation, the recommendations of the authors on the role of service quality regulation by state commissions in a competitive market cogently lay out actions the Commission should consider in its deliberations in this rulemaking. The report advises that "regulators will want to: (1) carefully distinguish between competitive and noncompetitive markets and services and tailor their oversight of quality of service to market conditions; (2) explore participation in the industry standard-setting process; (3) where markets and services remain monopolies, strengthen protective regulation, particularly enforcement of quality of service standards; (4) where markets and services remain monopolies, examine a minimum

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[1] Vivian Witkind Davis, Larry Blank, David Lensbergen, Nancy Zearfoss, Raymond W. Lawton, and John Hoag, The National Regulatory Research Institute, *Telecommunications Service Quality* (Mar. 1996) ("NRRI Report"), available at : http://www.ipu.msu.edu/library/pdfs/nrri/Davis-Telecom-Service-Quality-96-11-Mar-96.pdf, p. 161.
[2] *Id.* at *iv*, 220.

subscribership form of regulation, and (5) develop new means of informing the public about the degree and type of telecommunications quality available."[3]

These are sound principles to follow in a service quality regulation review such as this one. In particular, the first key principle advanced by the NRRI report that commissions "tailor their oversight of quality of service to market conditions", a principle that is also articulated by this Commission in this Rulemaking when it sought to determine the relevance of service quality regulation to market conditions,[4] is ignored by both ORA and the Staff Report. The Commission must fully address and must comprehensively resolve this policy question of the need for regulation of service quality in a competitive market before adopting any service quality regulations in this proceeding.

ORA correctly describes in detail that while VoIP and wireless subscriptions have risen in significant numbers between 2008 and 2013, wireline subscription has steadily declined. Clearly this is uncontroverted evidence of competition in the telecommunications market, consistent with the testimonies of Dr. Debra Aaron and others in this rulemaking demonstrating that the communications market is subject to intense and continuing competition. Whereas this empirical trend should lead towards reliance upon competition for service quality regulation according to the recommendations of the authors of the NRRI report and lightening the existing "protective regulation" on these services, ORA, defying the recommendations of the report it relies upon, reaches the opposite and unprincipled conclusion that the sheer number of consumers using these alternate services is a sufficient basis for more regulation of the service quality of wireless and VoIP services. What ORA fails to observe in this trend is that more and more consumers are *choosing* wireless and VoIP in lieu of their wireline services. The

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[3] *Id.* at *iv*.
[4] *See* OIR, p. 12.

downtrend in wireline subscription demonstrates the value and reliability consumers receive with these services. This historical shift in consumer behavior is proof of full competition in the market. Additionally, as the total number of subscriptions for all modes of communication continues to exceed the total number of households, it is also proof that households have multiple means of communications in the same household. Where there is competition, regulation should be relaxed or removed, tailored to the particular market. The Commission should not go back to the future as ORA suggests.

ORA's claim that its recommendations for more service quality regulation of VoIP and wireless would encourage further deployment of advanced communications services is false. ORA own words admits that, "VoIP phone service is rapidly replacing traditional land-line phone service. . . ."[5] Consumers are already making choices and adopting their preferred technology for communications without ORA's mandated service quality regulation. The fact that this adoption is taking place in the absence of regulatory oversight of service quality is proof that the market is working to discipline carriers to provide acceptable and reliable service in competition with each other.

B. Federal Law Restricts the Commission in Adopting Service Quality Requirements for Wireless Services.

ORA argues that the Commission should extend service quality and penalty regulations to wireless carriers, asserting they are "telephone corporations" under California law, and that federal law permits the Commission to regulate "other terms and conditions" of wireless services.[6] However, ORA fails to acknowledge the limits federal law places on the Commission's authority over wireless services.

[5] ORA Comments, p. 25.
[6] ORA Comments, pp. 9-11.

The Commission's authority to regulate wireless service is expressly limited by 47 U.S.C. § 332(c)(3)(A) ("State preemption"), which states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ., except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Service quality and penalty regulations effectively requiring a wireless carrier to build a network capable of providing a particular level of coverage or capacity to handle wireless traffic would run afoul of this limitation. That is because impermissible "entry" regulation includes regulations that effectively require wireless carriers to build an infrastructure capable of providing service at particular levels.

For example, in *Bastien v. AT&T Wireless Services, Inc.*,[7] the Seventh Circuit held that section 332 preempted a customer's complaint that AT&T Wireless violated state law by signing up subscribers without first building an appropriate infrastructure to provide reliable wireless service. The court concluded that "[t]hese claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market," and "[s]hould the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates."[8]

Similarly, in *In re Apple iPhone 3G Products Liability Litigation*, a California federal district court found a state law claim alleging that Apple and AT&T Mobility ("ATTM") had falsely advertised their iPhone 3G service as significantly faster than previous service was preempted by section 332.[9] The plaintiffs premised their claims on state consumer protection

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[7] 205 F.3d 983 (7th Cir. 2000).
[8] *Id.* at 989.
[9] 728 F.Supp.2d 1065, 1075-76 (N.D. Cal. 2010).

and unfair competition laws, but the court found the claims were "based on the core allegation that Defendants knew that ATTM's 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver."[10] Relying on *Bastien*, the court held that this claim "targeted[ed] the sufficiency of ATTM's network infrastructure and the ability of Apple's iPhone 3G to operate within the network to deliver the promised 'twice as fast' performance."[11] The court noted that the plaintiffs alleged "they have not received the level of cell phone service that they paid for, and that Defendants do not have the infrastructure to provide that level of service."[12] Because the court found that the claims attacked AT&T Mobility's rates and 3G market entry, it held those claims to be preempted.[13]

In addition, the FCC has established technical standards for antenna structures and construction requirements for wireless licensees.[14] The FCC's exclusive authority to establish such standards means state commissions may not enact service quality regulations that would require wireless carriers to deploy or operate their networks in a particular manner. For example, in *New York SMSA Limited Partnership v. Town of Clarkstown*,[15] the Second Circuit held that federal law preempted local regulations regarding radio frequency interference and the technology used by wireless carriers, because those regulations "interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law."[16] The court reiterated that "Congress

[10] *Id.* at 1072.
[11] *Id.*
[12] *Id.* at 1074.
[13] *Id.* at 1072.
[14] *See, e.g.*, 47 C.F.R. §§ 24.55, 24.103, 24.203.
[15] 612 F.3d 97, 105 (2nd Cir. 2010).
[16] *Id.* (citing *Bastien*, 205 F.3d at 989).

intended the FCC to possess exclusive authority over technical matters related to radio broadcasting," and "Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation."[17] The FCC also has emphasized its exclusive authority of such matters, noting "federal primacy over the areas of technical standards and competitive market structure for cellular service."[18] The FCC affirmed its "preemption over the technical standards for cellular systems," because it is "imperative that no additional requirements be imposed by the states which could conflict with [the FCC's] standards and frustrate the federal scheme for the provision of nationwide cellular service."[19]

In short, federal law does not permit the Commission to engage in market entry regulation of wireless carriers, which the courts have confirmed includes regulation of the sufficiency of a carrier's wireless network. Rather, under federal law, the regulation of wireless networks – including technical and operational aspects such as signal strength, capacity, and coverage – is committed to the FCC's exclusive jurisdiction. As *Bastien* explained, "[t]he [Communications] Act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure" and "Congress has expressed its decision that these areas be reserved exclusively for federal adjudication."[20]

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[17] *Id.* (quoting *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320-21 (2nd Cir. 2000)).
[18] *In the Matter of an Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79–318, *Report and Order*, 49 Rad. Reg. 2d (P & F) 809, 86 F.C.C.2d 469, FCC 81-161 (rel. Apr. 9, 1981), ¶ 82.
[19] *In the Matter of an Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHZ for Cellular Communications Systems*, CC Docket No. 79–318, *Memorandum and Order on Reconsideration*, 50 Rad. Reg. 2d (P & F) 1673, 89 F.C.C.2d 58, FCC 82-99 (rel. Feb. 25, 1982), ¶ 81.
[20] 205 F.3d at 988.

C. The Commission Lacks Authority to Adopt Service Quality Requirements for VoIP Services.

ORA concedes, as it must, that Section 710(a) of the Public Utilities Code generally prohibits the Commission from regulating VoIP services. That provision states: "The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c)."

ORA does not, and cannot, contend that any of the exceptions set forth in subdivision (c) of Section 710 applies here. Instead, it argues that section 706(a) of the federal Telecommunications Act of 1996 authorizes the Commission to impose service quality regulations upon VoIP providers.[21] ORA's analysis is deeply flawed.

Section 706(a) states:

> The [FCC] and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[22]

Nothing in this provision requires the Commission to, or *expressly* delegates to the Commission the authority to, impose service quality regulations upon VoIP providers. As a result, this provision does not exempt the Commission from the general command in Section 710(a) that it "shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services."

[21] ORA Comments, pp. 15-20.
[22] 47 U.S.C. § 1302(a).

ORA points to the D.C. Circuit's conclusion in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), that Section 706(a) is a grant of regulatory authority to the FCC, and by extension, according to ORA, to State commissions. But even if that is correct (and the FCC had long disclaimed that Section 706(a) provided any affirmative regulatory authority), the D.C. Circuit was careful to explain just how limited this authority is: "any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"[23] The Commission's service quality regulations are not designed to achieve this purpose, and ORA fails to put forth any evidence that they would in fact achieve this purpose.

In addition, Section 706(a) limits the *methods* that may be used to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability," in particular to "utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Service quality regulations and penalty plans are none of these things. Indeed, imposing new service quality regulations upon VoIP providers is the precise opposite of "regulatory forbearance," and does not remove any "barriers to infrastructure investment" but would simply create new barriers.

Moreover, the FCC has made clear that it, and not any state commission, will determine whether VoIP providers should be burdened by the type of traditional telephone company regulation at issue here. In particular, in the *Vonage Order*, the FCC held that the Minnesota commission was preempted from applying its "traditional 'telephone company' regulations" to

[23] 740 F.3d at 640.

Vonage's "DigitalVoice" VoIP service.[24] It squarely held that "we add to the regulatory certainty" regarding VoIP services "by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities," and "[f]or such services, comparable regulations of other states must likewise yield to important federal objectives."[25]

The FCC noted that while the Communications Act preserves state authority over intrastate communications, where a service is "jurisdictionally mixed," state regulation of the intrastate component of the service is impermissible if it is impossible or impractical to separate the interstate and intrastate components, and state regulation would interfere with federal rules or policies.[26] The FCC concluded that Vonage's VoIP service was jurisdictionally mixed, because it enabled both interstate and intrastate communications, and that application of Minnesota's traditional telephone company regulations to Vonage's VoIP service would impede federal jurisdiction over interstate service and conflict with the FCC's pro-competitive, de-regulatory framework for that service.[27] Among other things, the FCC relied upon Section 706(a), and found that permitting 50 states to impose traditional telephone company regulations "could severely inhibit the development of this and similar VoIP services."[28] "We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and

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[24] *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 FCC Rcd. 22404, FCC 04-267, ¶ 1 (2004) ("*Vonage Order*"), *petitions for review denied*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).
[25] *Id*.
[26] *Id*. at ¶ 17.
[27] *Id*. at ¶¶ 18, 20-22.
[28] *Id*. at ¶ 37.

promotes continued development and use of the Internet."[29] Thus, while ORA urges the Commission to regulate VoIP providers like any other "telephone corporation,"[30] the FCC has made clear both that such regulations are preempted, and that such regulations find no harbor in Section 706(a).

Finally, ORA's reliance[31] on the Commission's subpoena power and Section 710(f) of the Public Utilities Code misses the mark. Section 710(f) merely states that Section 710 "does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints." It says nothing about imposing affirmative obligations upon VoIP providers to meet service quality standards, or to track and report service quality data, and Section 710(f) cannot plausibly be read to authorize the Commission to impose any new requirements upon VoIP providers.

Similarly, even assuming *arguendo* that the Commission could subpoena VoIP providers to obtain information about their services, that would not permit the Commission to impose service quality standards, or require that the VoIP providers create new methods and procedures to track and periodically submit (wholly apart from any new subpoena) new data regarding service quality that the VoIP provider might not otherwise maintain. The subpoena power is not a license to enact substantive regulations, much less substantive regulations that are expressly barred by Section 710 of the Public Utilities Code.

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[29] *Id*.
[30] ORA Comments, pp. 12-13.
[31] *Id.* at 13-14.

III. ORA'S PROPOSAL FOR NEW OUTAGE REPORTING SHOULD BE REJECTED.

ORA's proposals for new and modified outage reporting do not accurately reflect the current G.O. 133-C metrics, resulting in a confusing mishmash of unrelated metrics. ORA is wrong when it indicates that the current G.O. 133-C guidelines for Customer Trouble Reports exclude outages due to circumstances beyond the carrier's control. The G.O. 133-C Customer Trouble Report metric reflects all customer trouble reports in the month, both service-affecting and out-of-service. This includes trouble reports due to circumstances beyond the carrier's control. ORA compounds its error by recommending that its modified Customer Trouble Report metrics would exclude trouble reports associated with major service interruptions.

The existing Customer Trouble Report metric includes all customer trouble reports, including trouble reports associated with outages reported to the Commission based on the FCC NORS reporting threshold. The existing Customer Trouble Report metric, is the best indicator of the health of a carrier's network under all conditions. Unwittingly, ORA's proposal for new outage reporting would destroy the integrity of this metric by excluding tickets associated with major events. Without explanation, ORA's modified Customer Trouble Reports[32] would exclude any trouble reports related to events which meet ORA's new Major Service Outage metric. The existing Customer Trouble Reports metric provides insight into the overall reliability of the carrier's service throughout the entire month. Major service interruption reporting, such as outages meeting the FCC NORS thresholds, are intended to provide awareness and insights into specific large outage events. The two reports serve very different purposes, and ORA's recommended combining of the two is wrongly conceived and would dilute the effectiveness of the metric in understanding the reliability of carrier's network.

[32] *Id.* at 31.

ORA's proposed "lower triggering threshold"[33] outage reporting requirements as explained below, far from being objective, are proposed without due consideration to practical implications including benefits to consumers, cost reality, and practical or operational consideration. These proposals are driven by no justification other than the unjustified belief that the public safety interest is served by requiring carriers to produce more information on outages and performance regardless of the effect of these requirements on the carriers.

First, ORA argues against the exclusion of outages beyond the control of the utility because, "the impact to the customers is of equal significance whether an outage resulted from circumstances within or outside" of its control and that such an impact is a "reflection of a voice service provider's responsiveness to customer complaints but also to the state of the voice service provider's network and/or facility design and operation."[34] ORA's analysis essentially assumes an omniscient and omnipotent utility that has not only the foreknowledge of all things imminent but has all the capacity necessary to prevent any disaster whether due to nature or man. ORA's proposal for repair intervals would include, for example, situations where the customer requested a later appointment time. Including these reports in the interval calculation would distort the assessment of the carrier's responsiveness to customer needs. As AT&T explained in more detail in its opening comments, the Commission did not agree with such sentiments in its 2001 order when it clearly articulated the rationale for exclusion of events beyond the control of the utility.[35]

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[33] *Id.* at 28.
[34] *Id*.
[35] *See*, *e.g.*, *Office of Ratepayer Advocates v. Pacific Bell Telephone Co.*, Decision No. 01-12-021, *Opinion Granting Complaint, in Part*, 2001 WL 1713875 (Cal.P.U.C. Dec. 11, 2001), *mimeo*, pp. 40, 52 (Conclusion of Law 20), 54-55 (Ordering Paragraphs 9-10).

ORA's "Major Service Outage Reports" proposal requires "all" service outages of at least 30-minute duration discovered by a customer or a voice service provider on any facilities the customer or the provider owns, operates, leases, or utilizes and that affects a mobile switching center is reportable. This proposed requirement lowers the trigger level creating two different standards between the NORS reporting standard and California's reporting requirement. The proposal would require major changes to isolate California's data for reporting purposes without any clear benefit. In section (b) of the same requirement, ORA reduces the FCC's reporting threshold requirement from 900,000 user minutes to 90,000, based on 3,000 customers and a 30-minute outage duration in a desire to capture outages in rural areas. This proposal ignores the FCC's fully considered finding that the user-minutes need not be reduced to anything below 900,000 to capture rural areas. In rejecting a proposal for adopting a 150,000 user-minute threshold that was offered by the Staff of Kansas Corporation Commission, the FCC stated that its "proposed 900,000 user-minute threshold could result in the reporting of more outages in rural areas (*e.g.*, if telecommunications in those areas were less reliable); however, the availability of essential telecommunications services are particularly vital in rural areas, given the remote nature and lack of quick access to emergency services and other forms of communications that are more frequently available in urban environments." The FCC noted "use of the common metric will result in a more accurate and realistic assessment of outages on a national basis" and serve "as a common metric for determining the general outage-reporting threshold for each communications technological platform addressed . . ." in that proceeding.[36]

[36] *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd. 16830, 33 Communications Reg. (P&F) 739, FCC 04-188 (rel. Aug. 19, 2004) ("*Communications Disruptions Order*"), ¶ 56.

There is a reason the FCC chose to rely on a "user-minute" yardstick as opposed to an emphasis on an absolute number of customers to be inclusive of rural areas. The reporting threshold used in the FCC's requirement is intended to measure the number of "potentially-affected" customers. Use of 30,000 customers for the purpose of the reporting threshold is the number of *potential* customers. The FCC took this conservative view and selected the 900,000 user-minute metric focusing on the number of people who would have been affected by the outage if, for example, they had attempted to make or receive telephone calls during the outage, regardless of whether they, in fact, had actually attempted to do so. The FCC's well considered threshold for reporting recognizes the inherent differences in the potential for the expected use of communications between an urban area and rural area by virtue of the differences in the size of the potential users that may be affected. But this approach also balances the material benefits resulting from reporting requirements with the cost and operational complexity such requirements naturally cause service providers and their customers. The Commission should reject ORA's proposal.

In section (c) of its Major Service Outage Report, ORA proposes to establish 150 DS3 minutes for reporting purposes. ORA provides no rhyme or reason why the FCC's current threshold of 1,350 DS3 minutes, which is equivalent to 30,000 "potentially affected customers" should be dramatically reduced to 150 DS3 minutes, which amounts to an equivalent of 3,300 "potential affected customers," roughly $1/10^{th}$ of the FCC's threshold.[37] What is disturbing is that ORA makes no effort to explain to the Commission why the existing FCC thresholds for

[37] In footnote 354 of the *Communications Disruptions Order*, the FCC explains its approach in selecting 1,350 DS3 minutes on the basis that each DS3 has a capacity of 672 DS0 circuits (basically 672 customers). Therefore, the equivalent of 30,000 customers in DS3s would be 44.6 DS3 or about 45 DS3. The 900,000 user minute would then be equivalent to 1,350 DS3 minutes (45 x 30 minutes). ORA's 150 DS3 would proportionally be equivalent to about 3,300 customers.

reporting have failed to serve the public purpose or how its proposed lower 'triggers' would improve public safety. An unsubstantiated assertion that the public good is served by stricter regulation does not pass as a sound policy rationale for imposing drastically stringent reporting requirements.

In section (e), ORA seeks to lower the trigger for 911 reporting from the current 900,000 user-minutes to 90,000. As explained above, ORA's proposal to lower this threshold should be rejected as unreasonable and unnecessary.

IV. INSTALLATION MEASURES ARE UNNECESSARY.

ORA's proposal that URF Carriers be required to report on Installation Intervals and Installation Commitments should also be rejected. As the Commission correctly noted in D.09-07-019, "minimum service quality measures for URF ILECs and CLECs should reflect the competitive landscape in which they operate. Competitive carriers have a strong incentive to install service promptly."[38] "Mid-sized and large ILECs exceed the installation average of small ILECs. Thus, there is no need to require installation interval reporting for URF ILECs and CLECs. URF ILECs and CLECs are exempt from reporting installation intervals."[39]

V. ORA'S PROPOSAL TO ESTABLISHING NETWORK TECHNICAL STANDARDS IS LACKING REASON.

Ignoring the unabated evolution of the communications industry and the abolishment of rate-of-return regulation, ORA recommend that the Commission set technical standards applicable to all voice service providers. At a time when Moore's Law continues to predict a doubling of computing power in microelectronics on which ride everything, including voice,

[38] *Re Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B*, Decision No. 09-07-019, *Decision Adopting General Order 133-C and Addressing Other Telecommunications Service Quality Reporting Requirements*, 275 P.U.R.4th 70, 2009 WL 2205760 (Cal.P.U.C. July 9, 2009), *mimeo*, p. 40.
[39] *Id.*

data, and video – every two years, and voice service is an application rather than a main feature of what communications devices do, asking the Commission to establish network technical standards for voice service is nonsensical. Even during the command-and-control era of monopoly regulation, which ended nearly 30 years ago, the Commission did not find a reason to establish network standards, apparently knowing that technology and consumers drive the evolution of the network not the other way around. Today, voice communication can be had through a Facebook application or an Apple watch or the many other means that ride on VoIP, wireless or wireline networks. Traditional communications service providers regulated by the Commission and unregulated service providers such as Google or Facebook, and others, compete at many levels to offer services to consumers that invariably include among many options voice services. These voice applications are generally transmitted as digital bits (1's and 0's) through the various networks including wireless and IP that will continue to undergo technological changes – too rapid for any government regulation to catch up with let alone set standards for prospectively. Consumers and technology ultimately decide where the industry should invest and what services should be prioritized. ORA's proposal is not cognizant of the reality of the communications market and should be rejected.

VI. ORA'S APPLICATION OF BEST PRACTICES RECOMMENDATION SHOULD BE REJECTED.

ORA recommends that the Commission require "voice service providers to report on Best Practices that they are implementing to prevent or reduce the effects of outages."[40] No mention is made of what the purpose is or what, if anything, the Commission will do with such information. AT&T has been an active participant in government and industry efforts to develop best practices for emergency preparedness and response. AT&T employs the best-available

[40] ORA Comments, p. 35.

engineering and design standards for preventing or mitigating the effects of outages whether due to storms or other disruptions. The standards AT&T and the communications industry follow today contain guidelines aimed at preventing and mitigating effects of outages. Also, the standards that AT&T has relied on for building and maintaining its network include the applicable industry standards created by the National Electric Safety Code, American National Standards Institute, and those created by Telcordia. ORA's proposal to require voice providers to report on "Best Practices" and provide yet another reporting scheme to the Commission would be burdensome and is unnecessary. Service providers are already involved at various levels in numerous external committees and forums for the purpose of local planning and emergencies. These Best Practices to prevent or reduce outages are also already included in the "final outage reports" that are provided to the FCC and Commission. ORA's proposal should be rejected as this would be redundant reporting and would require additional resources to provide an additional quarterly report.

VII. AN AUDIT IS UNNECESSARY.

Network audits in a competitive market in which the wireline network is but one among several competing infrastructures is a pointless exercise in a deregulated market.[41] Under rate-of-return regulation, audits could serve the purposes of checking if the utility properly used authorized capital expenditures – for which the Commission guaranteed a return – and authorized expenses as forecasted and determined by the Commission to meet desired service quality levels. In contrast, in a deregulated market environment such as what California has today, the Commission long ago stopped guaranteeing a rate of return or set operating expenses.

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[41] The audits proposed in this proceeding should be distinguished from the ongoing safety audits of carrier outside plant facilities conducted with physical walk-out inspections by the Safety and Enforcement Division and designed to ensure of compliance with the Commission's G.O. 95 and G.O. 128 standards for outside aerial and underground plant.

Instead, it relies on competition and consumer demand to reach the efficient allocation of resources. Demanding a network audit under these circumstances would be a waste of resources.

Notwithstanding the futility of a network audit, it is noteworthy to mention that there is also no evidence that systemic network issues exist with the ILECs' networks warranting an expensive and drawn out audit. CALTEL claims a network audit would provide the basis for additional rule changes with respect to network operations; but, there is no telling from its pleading what sort of network management changes would be needed, how those changes would be paid for, or why wireline networks would be singled out for network audit. AT&T submits to the Commission monthly data on the service levels provided by its network. AT&T meets the metric for trouble reports, showing there is no underlying problem needing to be investigated through an audit. CALTEL's request for a network audit should be disregarded.

VIII. PARITY WITH ILEC RESIDENTIAL CUSTOMERS IS THE MANDATED STANDARD.

CALTEL is not only misguided in its claims, but is disingenuous about the context of the negotiations that occurred between AT&T California and the CLECs during the development of the AT&T wholesale performance measurements and incentive plans. CALTEL states that, "CLECs negotiated wholesale performance measures to rely on receiving parity with retail performance because they never imagined that ILECs would ever provide such consistently poor performance to their own customers." Setting aside CALTEL's specious claims about California ILECs' current service levels to their retail customers, the CLECs did not *accept* the parity standard for wholesale performance measures, the parity standard was *required* for wholesale performance measures by federal law and FCC rules. The ILECs and the CLECs had no choice but to use the parity standard for the wholesale measurement plans because the Telecommunications Act of 1996 and the associated Implementing Rules required ILECs to provide CLECs non-discriminatory access to the ILECs' OSS.[42] Specifically, the ILECs had to demonstrate that CLECs are able to perform OSS sub-functions of pre-ordering, ordering, provisioning, billing repair, and maintenance in "substantially the same time and manner" as the ILECs could for their own retail customers. The FCC's and state commission convention for making this assessment was through the use of performance metrics based on the standard of parity. In no way, as CALTEL seems to allege, did the ILECs hoodwink the CLECs into using the parity standard – it was required by law.

Moreover, there was no basis previously, or is there now, for the Commission to require ILECs to provide wholesale service at a level better than parity with the ILEC's retail service. That would be equivalent to mandating service quality discrimination against an ILEC's retail customers in favor of CLECs' customers.

IX. AT&T DOES NOT AVOID PAYING PENALTIES FOR POOR WHOLESALE SERVICE LEVELS BY ROUTINELY INVOKING UNJUSTIFIABLY BROAD AND LENGTHY "FORCE MAJEURE" EXEMPTIONS.

Despite AT&T citing specifically in prior filings in this proceeding to the wholesale performance plan's requirements to report all data and pay remedies unless specific relief is granted by the affected CLECs or an arbitration panel, CALTEL restates the fiction that the wholesale performance plan allows for and AT&T takes advantage of, "unjustifiably broad and lengthy 'Force Majeure' exemptions." As AT&T has previously explained:

> CALTEL's suggestion (at 14) that AT&T invokes the Force Majeure Event Notification process to "avoid reporting poor performance" and "avoid payment of CLEC performance remedies" also exhibits a deep misunderstanding of the process (which perhaps explains why no CLEC itself has made such a claim). AT&T's performance incentive plan does not include an automatic exclusion for reported results or for incentive payments for force majeure events. Rather, it provides a process for AT&T to present a case for relief from incentive payments due to unusual circumstances, which process begins with negotiations with the

[42] *See* 47 U.S.C. § 251(c).

affected CLECs, followed by Commission arbitration if necessary. This arbitration process has never been invoked – meaning that despite CALTEL's hype, there has never been a dispute with a CLEC over this issue that could not be resolved on a carrier-to-carrier basis. This includes during the winter storms of 2010-2011, where, contrary to CALTEL's suggestion, AT&T did not invoke the process for relief from incentive payments, but instead made those payments in full.[43]

X. AT&T DOES NOT VIEW WHOLESALE PENALTIES IT PAYS AS THE COST OF DOING BUSINESS.

CALTEL makes the baseless claim that the remedy payments AT&T has made for wholesale performance shortfalls have been ineffective in incenting good performance and are considered, by AT&T, just the "cost of doing business."[44] This is completely incorrect. While AT&T does not agree that remedy payments are necessary to incent AT&T to provide good service to its customers, retail or wholesale, AT&T hardly views the remedies it pays for wholesale performance as the "cost of doing business." The potential financial exposure of the wholesale incentive plan is tens of millions of dollars annually if AT&T does not maintain satisfactory service levels. Twenty three measures, with hundreds of submeasures, are subject to remedy payments. Remedies must be paid on these hundreds of submeasures to individual CLECs, making the metrics subject to possible failure in the thousands of dollars monthly. Yet AT&T pays only about $150,000 a month in wholesale remedy payments. Moreover, for the last two years, and for many years previous, AT&T's "pass" rate for its wholesale metrics has been nearly 90%. Contrary to CALTEL's claim, AT&T has always worked very diligently to maintain satisfactory service levels for its wholesale customers, as evidenced by its consistently high "pass rate" for the wholesale performance plan.

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[43] Reply Comments of AT&T California and Certain of Its Affiliates, pp. 25-26 (Mar. 1, 2012).
[44] Comments of CALTEL to ALJ Ruling and Communications Division Staff Report, p. 5 (Mar. 30, 2015).

XI. CONCLUSION

The facts and the law lead to one principled result. Namely, the Commission should eliminate service quality metrics for URF ILECs who now serve a small and shrinking subset of the communications market.

Dated this 17th day of April 2015 at San Francisco, California.

Respectfully submitted,

/s/

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