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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.	R. 11-12-001 Filed December 1, 2011

REPLY COMMENTS OF COX CALIFORNIA TELCOM, LLC, DBA COX COMMUNICATIONS, (U-5684-C) ON ASSIGNED ADMINISTRATIVE LAW JUDGE'S RULING SETTING DATES FOR COMMENTS AND REPLY COMMENTS ON STAFF PROPOSAL (WITH CORRECTION TO PAGES B-1 AND B-2), DATED FEBRUARY 2, 2015

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I. Introduction

The majority of other parties' comments demonstrate that there is not sufficient data or other information in the record which allows the Commission to adopt the proposed rules in the February Staff Report ("Proposed Rules"). Notably, comments reflect that the recently issued Staff Report ("February Staff Report") does not take into account the extensive comments previously submitted by carriers which establish why the Commission cannot consider or adopt the Proposed Rules.

Even considering Joint Consumers' and ORA's respective comments, there is an overwhelming, recurring theme that there is not an industry-wide problem, but instead the problems rest solely with the two largest ILECs's compliance under the existing measures. Neither the Joint Consumers nor ORA offer substantive or reasonable basis (i.e. data showing a significant increase in complaints or some other meaningful data) for any of their proposed changes. Additionally, ORA's legal arguments lack completeness and ignore relevant requirements, as well as Commission precedent, further minimizing support in the record for the Staff Report.

Finally, recent FCC action also weighs in favor of the Commission not adopting the Staff Report or other submitted proposals. The FCC has taken the lead in adopting and continuing to consider new rules on outage reporting. Specifically, on March 30, 2015, the FCC issued a notice of proposed rulemaking in which it solicits comments on updating its NORS reporting requirements.[1] In light of the FCC's efforts, Commission action on outage reporting is neither necessary, reasonable nor sound public policy.

II. Comments Demonstrate That The Commission Cannot Adopt the Staff Report and Proposed Rules.

Carriers' comments are striking as they clearly and plainly establish that record evidence does not support the Commission adopting the Proposed Rules or other proposals submitted by the consumer advocates. ORA and Joint Consumers, on the other hand, erroneously support the Proposed Rules or advance expanded, burdensome rules for the sake of more data being reported. They fail to explain how the existing rules – including the Commission's underlying reasoning for adopting them – are still necessary and/or that proposed modifications can be lawfully adopted. For example, they do not show how any additional data would or could

[1] FCC 15-39.

improve service quality or assist Staff in administering GO 133-C. Simply put, without data reflecting an industry-wide problem and requires a narrowly-tailored regulatory response, the Commission cannot adopt more industry-wide rules.

As discussed below, parties' comments demonstrate the February Staff Report ignores completely record evidence demonstrating (a) that existing rules should be examined for purposes of eliminating them; and (b) there is not sufficient evidence to expand existing rules or adopt any new rules. After reviewing and considering all relevant factors identified in the record, the Commission will be required to reject the Proposed Rules.[2]

A. The Commission Must Consider Comments in the Record That Respond to Issues Identified in the Scoping Memo.

Consistent with the Scoping Memo, the record reflects that existing service quality measures should be re-considered in terms of minimizing or eliminating them. Specifically, Cox agrees with comments highlighting the fact that the initial Scoping Memo solicited comments on whether existing measures are appropriate in consideration of the existing competitive marketplace and the Uniform Regulatory Framework ("URF").[3] In light of this inquiry, the record now establishes that: (1) URF carriers should not be subject to GO 133-C as it exists today;[4] (2) the existing measures are not reasonable or appropriate;[5] (3) numerous states have limited or eliminated metrics/reporting;[6] (4) automatic penalties would impose greater regulation, instead of less, and therefore, are not consistent with URF;[7] (5) service quality rules were initially adopted when ILECs operated without any competition such that customers could not choose the provider that best meets their needs as they can do today;[8] (6) the Commission rules should recognize competition and remove regulatory imbalances between certificated

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2 AT&T OC, p. 2.

3 AT&T OC, pp. 4-6; Verizon OC pp. 2-4; Frontier OC, p. 2.

4 See, Id. For example, record evidence establishes that in the competitive environment, URF carriers' respective performances will not suffer as a result of service quality measures being eliminated. Verizon OC, p. 1.

5 AT&T OC, pp. 1-8; Verizon OC, pp. 1-4.

6 Frontier OC, p. 2; Verizon OC, p. 3.

7 Verizon OC, p. 1.

8 Frontier OC, p. 4.. For example, Frontier points out that as of 2012, only 6% of households rely *solely* on traditional wireline service. In other words, competition in the marketplace has allowed 94% of consumers to have either selected another type of service completely or selected both another service and traditional wireline. Frontier OC, p. 5.

carriers and non-certificated carriers;[9] and (7) the record contains no evidence of any complaints or incidents (excessive or not) that indicate a problem that existing or additional industry-wide regulations need to or could address.[10] Because the Staff Report is silent on all of this relevant evidence, the Commission cannot adopt the Proposed Rules.

While Joint Consumers suggest that there is a "pattern of recurring conduct," the record data actually refutes this statement with respect to competitive local exchange carriers ("CLECs").[11] Joint Consumers cite to the tables in the September 2014 Staff Report reflecting data reported for the OSS measure. In that report, there is one table reflecting ILEC data and a second table reflecting CLEC data. The data for CLECs can be distinguished from that of the ILECs, but Joint Consumers did not evaluate the data on that basis. Whereas data for the ILECs show that Verizon and AT&T did not exceed 76% for the OOS metric in any given year, the data for many CLECs shows percentages generally at or well-above 84% in any given year.[12] In fact, many CLECs have routinely exceeded the 90% threshold or were within a few percentage points of it.[13] Additionally, neither the September 2014 or the February 2015 Staff Reports nor the comments of consumer advocates take into account that certain CLECs may not achieve the existing OOS standard due to their reliance on the AT&T and Verizon networks.[14] Ignoring data and facts specific to the CLECs is unfair and unreasonable. Taking this data into account, the Commission cannot adopt the Proposed Rules.

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9 Frontier OC, pp. 3-5.

10 See AT&T OC, pp. 4-8; Frontier OC, p. 1.

11 Joint Consumers OC, p. 7.

12 See September Staff Report, Appendix B (Advanced, Astound, Charter, Cox, Electric Lightwave, PAETEC and Telscape. Note that Charter reported in at 80% and in 2011 Electric Lightwave reported in at 81%. For purposes of this analysis, Cox did not include ACN since there is only data for one year or AT&T Communications since it is an affiliate of AT&T California (although AT&T Communication's data reflects 89% and 99% in the two most recent years).

13 See, Id. As just two examples, Advanced exceeded the 90% threshold for two reporting periods and was in 5% for two reporting periods. Astound exceeded the 90% threshold for one reporting period and reported 87% for two periods and 88% for one period.

14 Further, Joint Consumers do not appear to rely on the corrected version of Appendix B attached to the February Staff Report which indicates that most CLECs have overall performances equivalent to the Small LECs –entities the February Staff Report exempts from the proposed refund and penalty measures. See CALTEL OC, p. 1. See Staff Report, Appendix B (e.g. Sonic Telecom and TelePacific).

B. There Is Not Sufficient Evidence To Either Expand Existing Rules Or Adopt New Rules.

Comments also demonstrate that the record lacks sufficient evidence to support the Commission adopting proposals that would expand existing measures and reporting requirements or add new ones. For example, parties' comments demonstrate that there is no basis or justification for additional outage reporting in areas with sparse populations and that the Staff Report includes a flawed understanding of FCC requirements.[15] Similarly, there is not a sufficient record or basis for modifying existing rules to include customer counts by size and service since that proposed rule is not lawful, nor would it otherwise result in the collection of any meaningful data that the Commission could utilize.[16] Further, there is no need for Staff to develop a secure, web-based means for submitting reports, since the FCC is currently considering the Commission's request for granting state commissions access to highly confidential state-specific information included in carriers' respective NORS reports.[17]

ORA nonetheless argues for expanded reporting but without any substantive, factual basis, such as evidence linking an actual, identified industry-wide problem with the proposed rule change. For example, ORA proposes a new major service outage rule that is intended to capture more outages [18] on the grounds that the Staff's proposed rules do not go far enough.[19] ORA believes that any outage – even those not reported by a customer – should be reported, but it does not ever provide a substantive, relevant reason why. ORA's proposal is based on a reporting for the sake of reporting model; but reporting for the sake of reporting is not a reasonable or otherwise a lawful exercise of Commission authority.

While ORA describes a car accident in Mendocino County in 2014 which caused AT&T's network to be out of service for an extended period of time due to events beyond its control ("Mendocino Incident"), this type of commentary is not sufficient evidence on which the

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[15] See AT&T OC, p. 22; Verizon OC, pp. 14-15; Consolidated OC, p. 9. 3-4; Small LECs OC, pp. 2-3.

[16] See AT&T OC, pp. 27-28; Verizon OC, p. 12; Consolidated OC, p. 3; Frontier OC, p. 6; Small LECs OC, p. 2; CALTEL, OC, p. 7;

[17] See Staff Report, p. 8. See FCC 15-39, ¶¶ 48-53.

[18] ORA, p. 26.

[19] However, comments indicates that Staff have not reviewed NORS reports that carriers have previously filed. AT&T OC, p. 29.

Commission may rely for adopting new rules.[20] Specifically, a single or any small number of examples is not sufficient to justify the adoption of industry-wide rules. Just as important, ORA's analysis of the Mendocino Incident is erroneous and flawed.

ORA incorrectly suggests that this outage "would not be reported to the FCC and the Commission, and 9-1-1 special facilities would not be notified" because service was estimated, affected for only 783,000 user minutes below the FCC reporting threshold of 900,000 user minutes.[21] It appears that ORA miscalculated the user minutes by multiplying the number of estimated, affected end users (17,400) by the number of *hours* service may have been down (45 hours) (17,400 x 45 = 783,000).[22] However, the criteria is user minutes and not user hours. Based on the numbers included in its comments, ORA should have converted the 45 hours into minutes by multiplying it by 60 for a total of 2,700 user minutes. Multiplying the total number of user minutes by the number of estimated affected users in ORA's example is over 4.8 million minutes which clearly exceeds the FCC threshold for NORS reporting. As such, nothing in ORA's comments demonstrates that FCC NORS rules are inadequate.

Moreover, the FCC just issued a NPRM with the intent of updating its NORS reporting rules. Since the Commission already relies on the NORS reports, it is appropriate and reasonable for the Commission to allow the FCC to continue to take the lead on this complex and technical issue. The FCC's recent action conclusively moots ORA's unfounded, proposed new rule.

Finally, like the Staff Report, ORA and Joint Consumers remain silent as to costs carriers will incur to implement modified and/or new rules. Carriers' comments and other record evidence, on the other hand, plainly show that carriers will incur significant costs as carriers do not currently collect the data that would be required under the Proposed Rules.[23] For example, AT&T states that the proposed outage reporting for sparse areas will require carriers to implement an extensive reporting system which will have significant costs[24] and making the necessary changes for reporting for outages, customer type and reporting by billing/ and non-

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[20] To the extent ORA cites to an FCC report on 911 outages, the FCC has and will continue to adopt and enforce appropriate rules. The FCC's report is not a reasonable or sufficient basis for the Commission to duplicate FCC efforts. See ORA OC, p. 23.

[21] ORA OC, p. 24.

[22] See ORA OC, p. 24.

[23] See AT&T OC, pp. 22; Verizon OC , pp. 12, 15.

[24] AT&T OC, p. 28.

billing and automatic refunds will also be extremely costly to implement.[25] Increased costs could likely lead to increase rates to consumers.[26] And again, while increased costs and rates are likely, the Staff Report fails to document any real, measureable benefit to service quality or that any meaningful data would be collected.[27]

Carriers' comments continue to reasonably demonstrate that record evidence does not support expansion of service quality rules. Nothing in ORA or Joint Consumers' comments challenge or undermine carriers' comments or otherwise provide substantive and reasonable support for the adoption of the Proposed Rules or any other proposals.

III. Comments Demonstrate That Refunds and Penalty Mechanisms Should Not be Adopted.

A. Not Satisfying the Service Quality Metrics Is Not A Violation of Section 451.

Cox agrees with Frontier's correctly highlighting that the intent of G.O. 133-C was to provide meaningful thresholds for service quality and achieving those threshold can be affected by many conditions beyond the company's control. Stated differently, a carrier failing to satisfy the measures included in GO 133-C does not equate to a violation of Section 451. Indeed, in D.09-07-019 – the decision in which the Commission adopted GO 133-C - does not include an analysis establishing that carriers not meeting the service quality measures could be a violation of Section 451.[28] This is not surprising since the eight issues identified for resolution in D.09-07-019 do not concern service quality data being used as proof that a carrier violated Section 451 and/or should be subject to a penalty.[29] Importantly, the record here does not support the Commission concluding that any number of missed service quality measures equates to a violation of Section 451.[30]

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[25] Frontier OC, pp. 6-7. See, Small LECs OC, p. 2.

[26] AT&T OC, pp. 7-8. For example, changing the reporting frequency for the Answer Time measure would increase carriers' costs but would not impact answer times or the data submitted.

[27] See Verizon OC, pp. 10-12; Frontier OC, p. 6.

[28] D.09-07-019 does include references to Section 451 in discussing the Commission resolution of a complaint case concerning service quality issues, D.01-02-021.

[29] See D.09-07-019, pp. 10-11.

[30] Even Joint Consumers' comments reflect, in advocating for additional measures that failure to comply with any given measure does not equate to a violation of Section 451. Joint Consumers state additional requirements "will better ensure that carriers provide the level of service required by Public

B. Carriers' Comments Identify Numerous and Significant Legal Problems with the Proposed Refund and Penalty Mechanisms.

Parties' critiques of the proposed refund and penalty mechanisms are detailed and comprehensive and show that those mechanisms cannot be adopted. For example, comments demonstrate that (1) there is not sufficient support in the record for the Commission to adopt the proposed mechanisms; (2) Staff's proposal is not consistent with the decisions it relies on; and (3) the proposed penalty formulas are otherwise erroneous.

First, there is not an underlying factual basis for the proposed penalty and refund mechanisms, in part because since they are based generally on the AT&T and Verizon missing certain metrics.[31] Also, there is no basis for the Staff Report proposing a three-month period as the trigger for a chronic state or how that three-month period could be measured or applied.[32] Further, the record reflects that URF carriers that operate in a competitive market are already subject to a penalty mechanism – which is customers switching providers when service quality is not adequate.[33] Similarly, the record also reflects that the adopting rules requiring refunds is duplicative and not necessary as carriers already have refund policies in place.[34] Additionally, record evidence provides that penalty mechanisms have little to no impact on service quality.[35] Looking at all of the comments in the records, it is neither reasonable or necessary for the Commission to consider adopting the proposed penalty and refunds in the Staff Report.

Utilities Code section 451." In other words, carriers achieving the service quality metrics in GO 133-C indicate a certain level of service and failure to do so is an indicator that Staff inquiry and Commission action may be necessary. This is consistent with Frontier correctly assessing that GO 133-C data may indicate areas for service quality improvement or resolution of certain problems, but the data, standing alone, does not indicate a carrier has violated Section 451.

[31] See AT&T OC, pp. 12, 17, 21; Consolidated OC, p. 4. To the extent the Commission could rely on the performance of two carriers for purposes of adopting industry-wide penalties (which it cannot), it still would need to review and adjust it accordingly, for things like the 2010-2011 winter storms.

[32] Frontier OC, p. 8.

[33] See Verizon OC, pp. 5-7. The proposed refund and penalty mechanisms would harm competition by subjecting regulated providers subject to penalties when non-regulated competitors are not.

[34] See Verizon OC, p. 9; Frontier OC, p. 7; AT&T OC, p. 17.

[35] See Verizon OC, p. 8; Consolidated OC, p. 2. Joint Consumers appear to disagree and claim that the penalty mechanisms in Illinois had an impact on AT&T. Joint Consumers OC, p. 4. While there may be disagreement over this issue, the Staff Report makes no reference or analysis of the relevant factors. Without some analysis of the relevant factors concerning this issue, there are not sufficient findings in the record that could support the Commission adopting a penalty mechanism.

Second, comments also show that it is improper to utilize the decisions that the Staff relies on in developing its proposal.[36] However, even to the extent Staff could rely on them, the proposed refund and penalty mechanisms is not consistent with those decisions. For example, the proposed penalties are more punitive than the decisions identified in the Staff Report and Staff did not actually or accurately take into account the five factors of D.98-12-075.[37]

Finally, there are numerous other errors with the proposed refund and penalty formulas, including but not limited to: the imposition of a daily fine for a monthly measure,[38] the refunds/penalties not accounting for CLEC reliance on ILECs,[39] the formula for calculating penalties is not correct and/or unclear;[40] the arbitrary nature of the penalty mechanism.[41]

In light of both the volume and the substance of these critiques, the Commission cannot proceed with considering or adopting the proposed penalty and refund mechanisms in the February Staff Report.

C. Comments Show That Staff and the Commission Can Make Better Use of Existing Tools And Doing So Is Reasonable and Appropriate.

Comments reflect that the Commission has numerous tools at its disposable in terms of addressing carriers that routinely report service quality measure data that is not close to the thresholds set forth in GO 133-C. The Commission and Staff should make better use of those tools on a case-by-case basis.

ORA, however, without any justification, suggests that the Commission should require voice service providers to submit their best practices.[42] The proposal must be dismissed since ORA offers no basis for this type of *industry-wide* rule. For example, when working with an individual carrier, the FCC has required such carriers to submit best practices to ensure

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[36] See AT&T OC, pp. 9-10.

[37] AT&T OC, pp. 10-17.

[38] See AT&T OC, p. 8.

[39] CALTEL OC, pp. 2-3.

[40] See Consolidated OC, pp. 2-3; AT&T OC, p. 20.

[41] AT&T OC, pp. 16-21. As just one example, the proposed penalty for missed customer trouble reports is 30 times as much as the other two measures. Id., p. 21.

[42] ORA OC, pp. 34-35.

resolution of an issue.[43] Identifying and requiring best practices may be appropriate in a given situation, but there is no basis for a general rule of this type. Further, to the extent the FCC *already* requires carriers to report information about best practices in certain situations with respect to outages, then there is no reason (and certainly not one documented in the record) for the Commission to duplicate the FCC's efforts.

The Commission must also reject the suggestion that the networks of all carriers should be inspected. The Commission already limited the network examinations to AT&T and Verizon – and this was due in part to their performances during a particularly difficult weather-period in 2010-2011. The record in this proceeding does not suggest that the Commission can, should or needs to consider inspecting other carriers' networks.

Further, the Commission already has rules that provide for the inspection of a carrier's records it is required to keep and Staff may wish to utilize this tool when working on future carrier action plans, if any. Notably, ORA recommends inspections of carriers' networks on the grounds of safety, however the Commission already has a separate regulations and in fact an open proceeding addressing outside plant safety issues. Additionally, the Commission's Safety and Enforcement Division already conducts regular audits of companies' outside plant and compliance programs. Thus, there does not appear to be a need to also address these issues in the Commission's service quality rules.

Finally, CWA suggests the Commission consider requirements related to staffing. The overall record does not support the Commission adopting this type of proposal as it does not concern an industry-wide issue. Cox submits that Staff and the Commission may wish to consider additional staffing as a requirement for future carrier action reports with respect to a given carrier, if any.

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[43] Cox OC, p. 25.

IV. ORA's Proposals To Regulate VoIP Services Are Not Lawful And Otherwise Reflect Poor Public Policy.

A. As A Threshold Matter, ORA's Suggestion To Extend GO 133-C Requirements To All "Telephone Corporations" That Provide "Voice Services" is Unlawful.

ORA argues that interconnected VoIP providers are telephone corporations, as well as public utilities because they provide some form of "voice communication service."[44] ORA's position is belied by federal law, FCC rules, the California Public Utilities Code, Commission precedent, as well as the Staff Report, and thereby, is wholly without merit and must be rejected.[45]

While the Commission has jurisdiction over public utilities, all telephone corporations are *not* public utilities, just as all gas corporations, electric corporations and water corporations are not public utilities. Moreover, with respect to telephone corporations that offer service for which the Commission generally has jurisdiction, such jurisdiction extends only to *intrastate* telecommunications services (and not to interstate telecommunications services or information services). Moreover, to date, there have been no findings by the Federal Communications Commission ("FCC") or the Commission granting jurisdiction over the undefined, generic and overbroad category of "voice communications services." Nor has the FCC or the Commission categorized all "voice services" as telecommunications or found that all "voice services" are "intrastate" services. Those types of issues have not been addressed and/or decided, contrary to ORA's suggestion. It necessarily follows, the Commission cannot rely on ORA's comments which omit critical information about the overarching legal framework concerning applicable and relevant limits on the Commission's jurisdiction.

ORA also relies on California Public Utilities Code ("PU Code"), section 2896[46] which refers to "telephone corporations" as grounds for the Commission extending its jurisdiction over

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44 ORA states, "The provision of voice communications services in California by these entities [interconnected VoIP providers] for profit subjects them to the Commission's jurisdiction as 'public utility' 'telephone corporations.'" ORA OC, p. 9 (Footnotes omitted).

45 Surely if the Commission's jurisdiction over interconnected VoIP providers was as obvious as ORA suggests, the volume of pleadings filed in this docket and others certainly would have not been necessary. Further, notwithstanding Section 710, one would anticipate that ORA is quite aware of the on-going uncertainty of the regulatory classification of VoIP providers in light of the FCC not categorizing interconnected VoIP service as telecommunications. For example, in its recent order, the FCC addressed Internet access services but it did not classify any VoIP services. See, FCC 15-24.

46 All reference herein are to the California Public Utilities Codes, unless stated otherwise.

non-public utility telephone corporations, but in doing so, ORA omits relevant text limiting the Commission's jurisdiction. Specifically, section 2896 concerns "telephone corporations" that serve "telecommunications customers," which limits the grant of authority to the Commission.[47] Neither the FCC nor the Commission have categorized any type of VoIP service as "telecommunications," and thereby, it would be erroneous for the Commission to find that interconnected VoIP providers are serving "telecommunications customers," and thereby, subject to section 2896.

The laws that ORA cites to and relies on do not in fact grant the Commission authority to impose service quality related rules ore reporting requirements on interconnected VoIP providers.

B. ORA Misinterprets the Law In Arguing That Providers of Interconnected VoIP Are Telephone Corporations.

ORA's multiple attempts to categorize interconnected VoIP providers as telephone corporations ultimately fail for numerous and obvious reasons. One of the most obvious reasons is because the Staff Report itself states that the Commission has *not* categorized providers of interconnected VoIP as telephone corporations.[48] To the extent that the Commission had previously made any such finding, Staff would have necessarily relied on such in preparing its reports and determining the scope and applicability of the Proposed Rules.

ORA posits that the "plain language of section 239 makes clear that VoIP service utilizes" a telephone line (which is defined in Section 233) such that a provider of VoIP service is a telephone corporation.[49] However, ORA also misinterprets these code sections. It does so by stating that Section 239, which describes VoIP as a voice communications service that utilizes a Internet Protocol or a successor protocol – makes clear that VoIP uses a "telephone line." A communications protocol – such as IP – however, is a system of rules for data exchange by devices,[50] and as such, is in no way equivalent to a "telephone line" which is defined in Section 233 in terms of physical property. The partial definition of VoIP services in Section

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[47] Section 2896 is included in Article 4 of the PU Code which is titled "Telecommunications Services." Section 2896(a) in relevant part states "The commission shall require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following:…"

[48] February Staff Report, p. 6.

[49] ORA OC, p. 12.

[50] See Newton's Telecom Dictionary (definition of "protocol").

239(a)(1)(A) does not name or even refer to any of the types of physical items identified in Section 233. And Section 233 which defines "telephone line" as including conduit, . . . other real estate, fixtures or personal property,"[51] does not mention any type of communications protocol. Accordingly, ORA is wrong in stating that Section 239 "makes clear" that VoIP services utilizes a telephone line.[52]

ORA also relies on prior "tentative" assessments included in a 2004 OII and a 2011 OIR[53] as support for interconnected VoIP providers being deemed "telephone corporations." Quite to the contrary, these Commission documents establish that the Commission has effectively rejected ORA's current proposal. Specifically, the Commission making such tentative findings and *never* adopting them can only be interpreted as the Commission not approving those findings. In fact, in closing the 2004 OII, the Commission correctly concluded that the FCC is the agency that will determine the appropriate regulatory framework for VoIP.[54] It is telling that the Commission has opened two proceedings to look at VoIP and has not adopted ORA's position.

Finally, nothing in the OIR or scoping memos issued in this proceeding identifies categorization of any type of provider of VoIP services as an issue for consideration.[55] As such,

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[51] Section 233 defines a "Telephone line" as "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

[52] ORA OC, p. 12.

[53] It is worth noting that the OIR proposed identifying interconnected VOIP providers as "telephone corporations, *solely for purposes* of the Commission having authority to require such providers to collect and remit public policy surcharges. Importantly, the OIR did not state or even suggest that if such providers were deemed telephone corporations that they would automatically also be deemed a public utility. While the rulemaking was pending, the Legislature passed AB 841 which requires customers of interconnected VoIP service to pay Commission's public policy surcharges and thereafter, the Commission closed the docket. In doing so, D.13-02-022 Finding of Fact states that CPSD sought to expand the scope of the proceeding to require VoIP providers to comply with various consumer protection statutes and the Commission denied that request, as well as all others. D.13-02-022, FOF NO. 3 and Ordering Paragraph No. 1.

[54] D.06-10-006, p. 3.

[55] OIR, pp. 12-16. It its worth noting that the OIR indicates the Commission may consider whether service quality requirements for wireless carriers but no mention of VoIP service providers.

ORA's comments not only omit relevant Commission precedent, they are outside the scope of the proceeding and must be rejected.[56]

C. ORA's Other Proposals To Expand Commission Jurisdiction Over Providers of Interconnected VoIP services Are Not Lawful.

ORA's single sentence statement that Section 710(f) allows the Commission to monitor and discuss VoIP services also authorizes the Commission to adopt service quality reporting for VoIP services lacks any merit. Adopting ORA's overly expansive reading of Section 710(f) would make Section 710(a) meaningless. Specifically, the Commission could ignore the prohibition against regulating VoIP in Section 710(a) and adopt *any* type of regulatory requirement under Section 710(f) on the grounds that the Commission needs data. ORA's proposed interpretation of Section 710(f) is not consistent with and violates the intent and plain language of Section 710.

ORA also surprisingly argues that the Commission can adopt service quality requirements for VoIP services based on the Commission's subpoena authority. This is surprising in that subpoena authority is generally the process used to require the appearance of a witness or the production of written materials.[57] Indeed, ORA cites to Government Code section 11180 et. seq which concerns agencies *conducting an investigation.* Similarly, ORA relies on a California case concerning an agency undertaking *an investigation to determine if any laws had been violated.* Here, there are no laws being broken and there are no investigations. Quite to the contrary, the Commission is considering the *adoption* of rules, and is not conducting an *investigation or enforcing* its rules. While ORA's proposal is not entirely clear, the Commission

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[56] Moreover, as discussed at recent Commission meetings, the FCC's recent Net Neutrality order did not change the status of interconnected VoIP service or how providers of such services may be regulated.

[57] California Civil Code of Procedure, section 1985(a) and (b) state, in part, "(a) The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, electronically stored information, or other things under the witness's control which the witness is bound by law to produce in evidence. When a county recorder is using the microfilm system for recording, and a witness is subpoenaed to present a record, the witness shall be deemed to have complied with the subpoena if the witness produces a certified copy thereof."; and (b) A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control."

using its subpoena authority to adopt rules in a rulemaking would be improper and not consistent with the Commission's rulemaking authority or procedures.

D. Section 706 of The Federal Telecom Act Is Not A Source of Regulatory Authority As ORA Suggests.

Based on its reading of *Verizon v. FCC,* ORA argues that 47 U.S.C. § 1302(a) (hereafter "Section 706(a)") grants the Commission authority to take note of the potentially adverse consequences of service quality lapses on the deployment of VoIP in California.[58] As discussed below, ORA's proposal ignores certain defined terms in the statute and confuses the types of actions the Commission may undertake. ORA's argument lacks merit on both factual and a legal grounds, and must be rejected.

Section 706(a) states:

> The Commission 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*. (Emphasis added).

First, Summarily, Section 706(a) allows the Commission to encourage the deployment of advanced telecommunications capability by either promoting competition in the local telecommunications market or by removing barriers to broadband infrastructure deployment. By definition, "advanced telecommunications *capability"*[59] does not include VoIP, and as such, Section 706(a) does not grant the Commission any authority to "encourage" the deployment of

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[58] ORA OC, p. 17.

[59] 47 USC 1302(d)(1) (Emphasis added). This statutes states, "Advanced telecommunications capability is defined as high-speed, switched, *broadband telecommunications capability that enables* users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." (Emphasis added). It should go without further clarification that "capability" is not the same as "service." For clarity nonetheless, the FCC has routinely defined advanced telecommunication capability as Internet access or broadband. For example, the FCC stated that it "has historically used the term "broadband" to refer to 'advanced telecommunications capability' and we do so herein. *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, *and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10344, para. 1 n.2 (2012) (*2012 Eighth Broadband Progress Report*)." FCC 14-113, n. 1.

VoIP. As such, Section 706(a) does not expressly apply to VoIP services. It follows that Section 706(a) is not an express or implied delegation of authority on which the Commission could rely on to adopt service quality requirements for VoIP under Section 710(a).

Additionally, ORA's proposal is not consistent with Section 706(a) which allows Commission action specific to broadband providers – and not to parties that may offer a service available via the public Internet. ORA's attempted reliance on *Verizon v. FCC* necessarily fails because the court there was addressing FCC rules imposed on broadband providers – and not rules applicable to providers of services which are available via a broadband connection.[60] By no means does Section 706 authorize the FCC *and* every state commission authority to regulate every type of application and service that consumers may obtain via a broadband connection.

Second, the Commission's authority to act is limited to its subject matter jurisdiction. For example, in *Verizon v. FCC,* the court concluded:

> First, the section [Section 706(a)] must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission's [FCC] subject matter jurisdiction to "interstate and foreign communication by wire and radio." 47 U.S.C. § 152(a). Any regulatory action authorized by section 706(a) would thus have to fall within the Commission's [FCC] subject matter jurisdiction over such communications--a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction.[61]

Applying this reasoning to the Commission, it follows that under Section 706(a) Commission action must be limited within its subject matter jurisdiction under the PU Code. ORA does not explain how its proposal is consistent with this Section 706(a) requirement.

Third and closely related, under Section 706(a), the Commission may adopt only those regulations "designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' *47 U.S.C. § 1302(a)*."[62] For the sake of argument, to the extent Section 706 could theoretically be applied here, the Commission's actions would need to be narrowly tailed to fulfill that statutory

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[60] Similarly, ORA's reliance on a proposed decision in A.14-03-013 is misplaced for the same reasons and also because the Commission has yet to consider adoption of the proposed decision and alternate proposed decision in that proceeding. Specifically, the Proposed Decision and the Alternate Proposed Decision both limit the Commission's jurisdiction to "evaluate the broadband aspects" of the merger. As discussed above, VoIP is not the same as "broadband."

[61] *Verizon v. FCC,* 740 F.3d 623, 640 (D.C. Cir. 2014); 2014 U.S. App. LEXIS 680, *38-39.

[62] Id. at 640; 2014 U.S. App. LEXIS 680, * 39.

goal. And Commission action would need to be limited to actions that either promote competition in the local telecommunications market or remove barriers to infrastructure investment. Nothing in ORA's comments remotely relate to fulfilling any of the express statutory requirements in Section 706(a). For example, stating that VoIP, broadband competition and build-out, and public safety are closely related[63] is not only vague but insufficient for purposes of satisfying Section 706(a) requirements. Similarly, ORA suggests regulating VoIP is necessary to remove barriers to deployment of safe and reliable broadband networks. This argument also fails to satisfy the requirements of Section 706(a), and otherwise lacks merit. Here, there is *no* evidence in the record that there is a lack of safe and reliable facilities (of any kind) but especially not broadband facilities.

In light of ORA not accurately or fully addressing Section 706 requirements, the Commission can and must reject ORA's proposal.

V. Additional Service Quality Proposal Issues.

Cox agrees with AT&T's proposed modifications concerning duration of a catastrophic event. Specifically, Cox agrees that the proposal in the Staff Report should be modified to include: OOS tickets for residential and small business customers and that tickets resulting from catastrophic events should be excluded.[64]

VI. Conclusion.

For all the reasons described in these reply comments, as well as other comments that Cox has filed in this docket, all of which are hereby incorporated by reference, Cox recommends the Commission not adopt the Staff Report.

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[63] ORA OC, p. 17.

[64] AT&T OC, pp. 25-26.

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Respectfully submitted,

/s/ Margaret L. Tobias

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