



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Evaluate
Telecommunications Corporations Service
Quality Performance and Consider
Modification to Service Quality Rules.

Rulemaking 11-12-001
(Filed December 1, 2011)

**OPENING COMMENTS OF CENTER FOR ACCESSIBLE TECHNOLOGY,
COMMUNICATIONS WORKERS OF AMERICA, CONSUMER FEDERATION OF
CALIFORNIA, THE GREENLINING INSTITUTE AND THE UTILITY REFORM
NETWORK ON THE APRIL 17, 2015 PROPOSED DECISION DEFERRING
NETWORK STUDY REQUIREMENT ADOPTED IN DECISION 13-02-023**

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, Center for Accessible Technology (CforAT), Communications Workers of America, District 9 (CWA), Consumer Federation of California (CFC), The Greenlining Institute (Greenlining) and The Utility Reform Network (TURN) (collectively, Joint Consumer and Labor Groups) file these comments on the Proposed Decision (PD) of President Picker issued April 17, 2015. The PD contains several factual errors, erroneously assuming that a penalty mechanism is a substitute for an infrastructure study, and assuming that the Commission will actually adopt staff's recommended penalty mechanism. Additionally, the PD commits legal error by misstating the scope of D.13-02-023 and reversing the Commission's decision in D.13-02-023 without citing substantial evidence to support that reversal. Accordingly, Joint Consumer and Labor Groups urge the Commission to reject the Proposed Decision.

II. ANALYSIS

The Proposed Decision contains multiple factual and legal errors. The Proposed Decision also erroneously concludes that the infrastructure study is unnecessary. Finally, the Proposed Decision ignores the Commission's obligation to protect public safety.

A. The Proposed Decision Contains Factual Errors

The Proposed Decision contains factual errors in that it first assumes that a penalty mechanism is a substitute for the infrastructure study that was previously ordered by the Commission, and then it further assumes that the Commission will adopt the penalty mechanism proposed by staff.

1. The Penalty Mechanism Is Not A Substitute For The Infrastructure Study.

The PD is based on an error of fact regarding the purpose of the previously-ordered infrastructure study. In D.13-02-23, the Commission found that “[a] study of carrier network infrastructure, facilities, policies, and practices as described in the scoping memo and ruling issued on September 24, 2012, is a necessary foundational activity within this proceeding to help gauge the condition of carrier infrastructure and facilities and ensure the facilities support a level of service consistent with public safety and customer needs.”¹ The PD now finds that an infrastructure study is unnecessary because “[t]he penalty and fine mechanism currently under consideration in this proceeding is based on operational outcomes, not detailed examination of network facilities.”²

While D.13-02-23 found that the purpose of the infrastructure study was to determine the state of carriers' infrastructure and ensure service quality, public safety, and customer needs, the PD appears to assume that the Commission ordered the infrastructure study for the purposes of

¹ D.13-02-023 at 7, Finding of Fact (FOF) 1.

² PD, FOF 3.

imposing a penalty and fine mechanism. The penalty mechanism is no substitute for the infrastructure study. A penalty mechanism, if adopted, would be applied after harm had occurred, as an incentive for carriers to improve service quality. The purpose of the study is quite different. The study would provide the Commission with information about the condition of AT&T and Verizon's wireline networks. There is evidence in the record dating back to at least 2010 showing that AT&T's and Verizon's networks have already deteriorated.³ The study was ordered to provide the Commission with accurate information about the current state of the respective networks so that the Commission is better positioned to fulfill its obligation to ensure reliable communication. Accordingly, the PD is based on an incorrect analysis of the factual basis for the infrastructure study.

2. The Penalty Mechanism Is Not Guaranteed

While a penalty proposal was recommended by Communications Division staff, and comments on the proposal have been submitted, the PD recognizes that the penalty and fine mechanism is only “under consideration,”⁴ notes that the study may still be necessary,⁵ and in fact, acknowledges that the Commission could potentially make no changes whatsoever to the current service quality rules.⁶ The PD assumes the existence of a penalty mechanism that has not yet been adopted and which is strongly opposed by the ILECs and some of those ILEC's competitors, and then uses this assumption as a justification to abandon the infrastructure study required by D.13-02-023. Additionally, the PD was issued before the parties submitted reply comments on the staff report that recommended the penalty mechanism. Accordingly, it appears

³ See, for example, TURN and CALTEL, Post Workshop Comments, pp. 2-3, 16-17.

⁴ PD, FOF 3.

⁵ *Id.*, FOF 4.

⁶ *Id.*

that the PD assumes that the Commission will adopt that penalty mechanism. This assumption constitutes factual error.

B. The Proposed Decision Contains Legal Errors

The PD commits a number of legal errors. The PD does not acknowledge that the Commission has the Legislatively-confirmed authority to study infrastructure carriers use to provide VoIP service. The PD ignores the fact that the Commission has a Constitutional and statutory duty to ensure safe and reliable telephone service. Finally, the PD reverses the Commission's decision in D.13-02-023 without substantial evidence.

1. The Commission has a Statutory Duty to Ensure Safe and Reliable Telephone Service.

The PD states that “[e]nsuring that adequate facilities are available and properly maintained to provide safe and reliable telephone service is the responsibility of the management of the telephone companies.”⁷ This statement could be interpreted to mean that facilities maintenance is solely the responsibility of the telephone companies. That interpretation misstates the law in two ways: first, it does not acknowledge the Commission's jurisdiction over facilities used to provide VoIP service; second, it ignores the Commission's Constitutional and Statutory duty to ensure the adequacy of infrastructure.

a. The Commission has the Authority to Study Infrastructure used to Provide VoIP service.

While D.13-02-023 held that it was necessary for the Commission to review “carrier network infrastructure,”⁸ the PD refers only to telephone company infrastructure.⁹ Joint Consumer and Labor Groups are concerned by the PD's implication that an infrastructure study could not include a review of carrier facilities used to provide VoIP service. However, as

⁷ PD at 4.

⁸ D.13-02-023 at 3.

⁹ *See, e.g.*, PD at 4.

recently as 2013, the California Legislature confirmed the Commission’s authority to review carrier facilities used to provide VoIP service. In enacting Public Utilities Code section 710, the Legislature restricted the Commission’s authority over, among other subjects, VoIP services. However, section 710 explicitly preserved “[t]he commission's authority relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128.”¹⁰ Accordingly, the Commission has the authority to perform an infrastructure study which includes carrier facilities used to provide VoIP service.

b. The Proposed Decision Commits Legal Error by Ignoring the Commission’s Constitutional and Statutory Duty to Ensure the Adequacy of Infrastructure.

The Commission has a Constitutional and statutory duty to ensure the adequacy of infrastructure. The California Constitution provides that the Commission “may fix rates, **establish rules**, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.”¹¹ Not only does the Commission have the power to establish rules, but it also has a statutorily-imposed duty to ensure that telephone corporations provide customer service including “standards regarding network technical quality”¹² Additionally, the Commission is charged with ensuring that public utilities “furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to **promote the safety, health, comfort, and convenience of its patrons, employees, and the public.**”¹³

¹⁰ Public Utilities Code section 710, subd. (c)(7).

¹¹ Cal. Const. Art. XII, § 6 (emphasis added).

¹² Cal. Pub. Util. Code § 2896,

¹³ Cal. Pub. Util. Code § 451 (emphasis added).

While the PD is correct that the management of telephone companies is responsible for ensuring that adequate facilities are available and properly maintained to provide safe and reliable telephone service, the PD errs in implying that only telephone companies bear that responsibility. Article XII, Section 6 of the California Constitution and Sections 451 and 2896 of the Public Utilities Code impose that same duty on the Commission. Accordingly, the PD's assumption that only telephone companies are responsible for ensuring that infrastructure is properly maintained constitutes legal error. Particularly in light of the Commission's recent public statements in support of the importance of its role in ensuring the safety of energy networks, it would be highly problematic for the Commission to abdicate its responsibility for the safety of telecommunications networks in the manner implied by the PD.

2. The Proposed Decision Commits Legal Error by Reversing D.13-02-023 without Substantial Evidence.

The PD also errs by reversing D.13-02-023 without citing to any changed facts or circumstances justifying that reversal. The Commission's findings must be supported by substantial evidence in the record.¹⁴ Substantial evidence is evidence that is credible, reasonable in nature, and of solid value.¹⁵ If a Commission decision is not supported by substantial evidence, that decision is arbitrary and capricious.¹⁶

In D.13-02-23, the Commission found that “[a] study of carrier network infrastructure, facilities, policies, and practices as described in the scoping memo and ruling issued on September 24, 2012, is *a necessary foundational activity* within this proceeding to help gauge the condition of carrier infrastructure and facilities and ensure the facilities support a level of

¹⁴ *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.

¹⁵ *Sasco Elec. v. FEHC* (2009) 176 Cal.App.4th 532, 535.

¹⁶ *Verizon Cal. v. Peevey*, (9th Cir. 2006) 462 F.3d 1142, 1150.

service consistent with public safety and customer needs.”¹⁷ The pending PD reaches the conclusion that the study is no longer necessary, but does not cite any facts in support of this new finding and only states that “[d]epending on what, if any, of the service quality rule changes are adopted in this proceeding, the study ordered in 2013 may no longer be necessary.”¹⁸

Similarly, there is nothing in the record of this proceeding to contravene the finding in D.13-02-023 that the examination of networks is a foundational activity in this proceeding. In fact, the record evidence shows that AT&T and Verizon have continued to let their networks deteriorate since the OIR was issued. Additionally, there is evidence that since the Commission issued D.13-020-023, AT&T and Verizon have continued to let their networks deteriorate even further. The PD’s unsubstantiated conclusions that the study is no longer necessary and that the study is no longer a foundational activity constitutes legal error.

C. THE PROPOSED DECISION IMPROPERLY CONCLUDES THAT THE STUDY IS UNNECESSARY.

Contrary to the PD’s assumptions, the infrastructure study is necessary. As previously noted by the parties, Verizon has a history of providing insufficient or inaccurate information on various service quality metrics:

A report commissioned by the Delaware Public Service Commission investigating the adequacy of Verizon’s service noted that Verizon was unable to provide detailed address information of customers’ reporting troubles and repeat troubles, making analysis impossible. Additionally, Verizon failed to accurately collect statistics about customer line loss and noise because of changes to its maintenance platform and failure to implement proper testing procedures.¹⁹

¹⁷ D.13-02-023 at 7, FOF 1.

¹⁸ PD at 5, FOF 4.

¹⁹ Greenlining Comments on Workshop at 3, citing Fox, Smolen & Associates et al., Report of Consultants to the Delaware Public Service Commission Staff on the Adequacy of Verizon’s Service, (November 3, 2009) , at 3, available at http://dep.sc.delaware.gov/dockets/08194report_public.pdf (hereafter, Delaware Report).

Since the Delaware Public Service Commission issued that report, Consumer and Labor Groups have received additional evidence that AT&T and Verizon “fudge” their reporting to the Commission.²⁰ The study continues to be necessary in order to obtain accurate information regarding the adequacy of AT&T and Verizon’s networks.

Additionally, the study is necessary to properly determine the adequacy of current and potential future service quality rules. For example, if the Commission does not know the condition of AT&T and Verizon’s infrastructure, the Commission cannot determine how much it would cost the carriers to repair and maintain that infrastructure at a level sufficient to ensure that customers receive adequate service quality. Accordingly, in the absence of the study, there is a risk that the Commission could institute a fine and penalty mechanism with fines that are significantly lower than the carriers’ cost to repair the network, therefore creating a perverse incentive for the carriers to **not** maintain their networks.

Finally, the study is necessary to provide information to the Federal Communications Commission. The FCC recently opened a proceeding that, among other issues, requested comment on "de facto" copper retirement, i.e., "failure to maintain copper that is the functional equivalent of removal or disabling."²¹ The FCC asked parties to provide specific examples and facts regarding the deterioration of copper plant.²² The study ordered in D.13-02-023 would provide the FCC with important, empirical information that would enhance the effort to refine federal copper retirement rules and improve the FCC's understanding of the condition of the networks operated by California's largest wireline carriers.

²⁰ TURN and CALTEL, Post Workshop Comments, pp. 6-7, February 28, 2012.

²¹ Before the Federal Communications Commission, In the Matter of Technology Transitions, et. al., Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 (rel. November 25, 2014) at para. 44.

²² *Id.*

D. THE PROPOSED DECISION IS INCONSISTENT WITH THE COMMISSION'S COMMITMENT TO PUBLIC SAFETY.

In energy proceedings, the Commission has been clear that its duty to protect public safety means that it must know what is in the ground.²³ The telecommunications network is equally important for public safety. While a failure in the telecommunications network may not create an immediate or apparent harm as with gas pipeline failures, lives are nonetheless at risk when there are network failures. Many seniors and those with disabilities rely on the fact that they can call for help in an emergency. If their service goes down, their risk of harm increases.

On the other end of the line, some hospitals in California use automated dialing systems to contact nurses, doctors, and other hospital employees during staffing shortages. In the event of a large natural disaster, hazardous material spill, or other wide-spread public safety emergency, this automated dialing system contacts every one of the health care workers and instructs them to come to the hospital to help. An outage that causes the hospital's communications system to fail – because the phone company's lines to the hospital are not properly maintained – would be detrimental. The hospital would not be able to make the necessary “all hands on deck” call, creating the risk that large numbers of injured would arrive at the emergency room with inadequate medical staff to treat them.

It is thus vital that the Commission know the condition of the network by conducting the Network Infrastructure Study. This would provide the Commission with the information necessary to determine the right service quality standards and reporting requirements needed to ensure that telecommunications facilities are built and maintained in a manner consistent with public safety and public convenience.²⁴

²³ See D.15-04-021, COL 25, 28, at 296.

²⁴ See Pub. Util. Code §§ 451, 2896.

E. The Proposed Decision Could Prejudice Other Proceedings

The PD states, “engaging in a costly and time consuming examination of AT&T California’s and Verizon California’s networks at this time may not be necessary to achieve the overall goal of telephone companies providing service at a level that meets public safety and consumer needs.”²⁵

This broad language has the potential to prejudice other proceedings before the Commission. For example, Verizon and Frontier recently filed a Joint Application for Approval of Transfer of Control Over Verizon California seeking approval of the sale and transfer to Frontier of Verizon California, certain assets held by Verizon California, and Verizon LD’s customer accounts in Verizon California’s service territory.²⁶ The operations that would be transferred include approximately 2 million lines used to provide voice services.²⁷

Before the Commission can authorize transferring those lines, it must know their physical condition so it can determine whether Verizon bears responsibility for any neglect of the network before the transfer is approved. If the study ordered in this proceeding is not performed in this proceeding, then the Commission must not preclude an investigation into the state of Verizon’s networks in the transfer proceeding. The language contained in the PD, if approved, could allow the carriers in that application and other future applications to argue that an investigation into network is “not...necessary to achieve the overall goal of...providing service at a level that meets public safety and consumer needs.” This is a dangerous precedent that could have far-reaching effects on future Commission actions.

²⁵ PD, p. 4.

²⁶ A.15-03-005; Joint Application for Approval of Transfer of Control Over Verizon California Inc. and Related Approval of Transfer of Assets and Certifications.

²⁷ *Id.*, at pp. 1-2.

III. CONCLUSION

It has been over two years since the Commission adopted the requirement developed by former Commission Ferron finding it necessary for the Commission to examine AT&T and Verizon's facilities. D.13-02-023 found that the study was necessary because of substantial evidence that those companies were allowing their facilities to degenerate to such an extent that customers were losing service, creating serious potential harms to public safety. There is evidence that since the Commission issued D.13-02-023, both AT&T and Verizon have allowed their infrastructure to degenerate even further. Joint Consumer and Labor Groups can discern no justifiable reason that the Commission has not yet undertaken the infrastructure study ordered in 2013, and now the PD, without citing any facts or changed circumstances, asserts that the study is unnecessary. The PD's assumptions—that after-the-fact fines and penalties are somehow the equivalent of a facilities inspection, that the Commission will actually institute a penalty mechanism, and that the Commission has no independent duty to ensure that carriers maintain their infrastructure—are incorrect and constitute factual and legal error.

Accordingly, Joint Consumer and Labor Groups respectfully request that the Commission reject the Proposed Decision and move forward promptly with the infrastructure study it already ordered in 2013.

[Signatures on next page]

Respectfully submitted,

May 7, 2015

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