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)

APPLICATION FOR REHEARING OF DECISION 16-08-021, ADOPTING GENERAL ORDER 133-D, OF THE OFFICE OF RATEPAYER ADVOCATES, CENTER FOR ACCESSIBLE TECHNOLOGY, THE GREENLINING INSTITUTE, AND THE UTILITY REFORM NETWORK

HIEN VO WINTER
Attorney
Office of Ratepayer Advocates
California Public Utilities Commission
320 West Fourth Street, Suite 500
Los Angeles, CA 90013
Telephone: (415) 703- 3651
Fax: (415) 703-4592
Email: hien.vo@cpuc.ca.gov

MELISSA KASNITZ
Legal Counsel
Center for Accessible Technology
3075 Adeline Street, Suite 220
Berkeley, CA 94703
Telephone: (510) 841-3224
Email: service@cforat.org

PAUL GOODMAN
Senior Legal Counsel
The Greenlining Institute
1918 University Ave, Suite 2B
Berkeley, CA 94704
Telephone: 510 898 2053
Email: paulg@greenlining.org

REGINA COSTA
Telecommunications
Policy Director
The Utility Reform Network
785 Market St., Ste 1400
San Francisco, CA 94103
Telephone: 415-929-8876, ext 312
Email: rcosta@turn.org

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATE COURT CASES

COMMISSION DECISIONS

COMMISSION RULES OF PRACTICE AND PROCEDURE

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

Pursuant to Section 1731 of the California Public Utilities Code[1] and Rule 16.1 of the Commission's Rules of Practice and Procedure,[2] the Office of Ratepayer Advocates ("ORA"), Center for Accessible Technology ("CforAT"), The Greenlining Institute ("Greenlining"), and The Utility Reform Network ("TURN") (collectively known as "Joint Consumer Groups") respectfully request the Commission grant rehearing of Decision (D.) 16-08-021, Adopting General Order 133-D ("Decision").[3] Rehearing is necessary to remedy the procedural and legal errors arising from two orders in the Decision: (a) the order closing the proceeding[4] without first addressing multiple issues that were intended to be addressed by this proceeding, including: service quality standards for wireless and interconnected Voice over Internet Protocol ("VoIP") providers as the Commission had intended, the ongoing Network Study ordered in D.13-02-023 and reaffirmed in D.15-08-041, matters referred to this proceeding from the Basic Service Decision issued in Rulemaking (R.) 09-06-019 and the LifeLine proceeding (R.11-03-013), and a pending motion filed by TURN in this proceeding on March 17, 2014[5]; and (b) the order adding Rule 9.7 (Alternative Proposal for Mandatory Corrective Action) to General Order (G.O.) 133-D,[6] which creates a loophole for chronic service quality violators to avoid paying a penalty.

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[1] All statutory citations are to the California Public Utilities Code unless otherwise identified.

[2] Rule 16.1 requires Applications for Rehearing to be filed within "30 days after the date the Commission mails the order or decision." The Commission mailed D.16-08-021 on August 29, 2016. This Application for Rehearing is thus timely filed.

[3] G.O. 133-D supersedes G.O. 133-C (adopted in 2009).

[4] Decision, Ordering Paragraph (OP) 2, at 35.

[5] *Emergency Motion of The Utility Reform Network (TURN) Urging the Commission to Take Immediate Action to Protect Verizon Customers and Prevent Further Deterioration of Verizon's Landline Network* ("TURN Motion"), filed March 17, 2014.

[6] Decision, at OP 1, at 35.

G.O. 133 sets forth service quality "Rules Governing Telecommunications Services" to implement the customer service mandate of the Telecommunications Customer Service Act of 1993 ("Act").[7] Specifically, Section 2896 of the Act states unambiguously and without exception that "[t]he commission shall require telephone corporations to provide customer service … that includes, but is not limited to, …(c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing."[8]

First, the Decision violates Section 2896 and D.15-08-041[9] by closing this proceeding without first addressing service quality standards for telephone corporations providing wireless or interconnected VoIP services. As explained below, no federal or state law absolves any type of "telephone corporation" from complying with Section 2896.

Second, the Decision improperly closes this proceeding without addressing multiple additional pending matters that are within the scope of the proceeding and have no other forum in which to be addressed. These include the pending Network Study that has been ordered and reaffirmed by the Commission, multiple matters that have been properly referred to this proceeding from other Commission proceedings, and a pending motion that is not resolved.

Finally, the Decision's addition of Rule 9.7, related to the suspension of a penalty fine if a company purports to invest twice the amount of that fine, is not supported by the

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[7] Cal. Pub. Util. Code §§ 2895-2897.

[8] Cal. Pub. Util. Code § 2896. As explained in Section III., *infra*, by its terms, § 2896 requires the Commission to do more than simply require wireless and interconnected VoIP providers to submit copies of reports they provide to the FCC. The Decision's Conclusions of Law 11-13, which directs staff to monitor the FCC's outage reporting proceeding and to analyze and review outage reports, are insufficient to comply with Section 2896's mandate for the Commission to adopt reasonable service quality standards and then to ensure that telephone corporations provide service that meets those standards.

[9] D15-08-041, *Decision Affirming Commission Direction to Conduct the Network Evaluation Study Ordered in Decision 13-02-023*.

record. This rule went beyond the scope of any penalty proposals submitted in the record.[10] No parties had notice or an opportunity to be heard regarding Rule 9.7 because it was inserted *sua sponte* in President Picker's November 12, 2015 Proposed Decision (PD).[11] As such, the Decision lacks Findings of Fact (FOF) upon which to base this rule. Though President Picker issued a subsequent PD on March 22, 2016, which the Commission ultimately adopted on August 18, 2016, the Commission did not afford parties a process by which to provide substantive comments on Rule 9.7 and therefore deprived them of due process.

Joint Consumer Groups respectfully request that the Commission grant rehearing and modify the Decision to order a second phase of the proceeding to address wireless and interconnected VoIP service quality standards as the Commission had intended and Section 2896 requires. The Commission should also address the process by which it will complete and evaluate the results of the pending Network Study, the pending motion, and other matters that have been referred to this proceeding. Finally, the Commission should eliminate Rule 9.7 from G.O. 133-D.

II. BACKGROUND AND PROCEDURAL HISTORY

Following legislative hearings regarding widespread telecommunications service outages resulting from the winter storms in 2010-2011, the Commission opened this rulemaking in December 2011 to address, among other things, the safety concerns implicated by these outages and whether the Commission's current service quality standards were sufficient to ensure telephone corporations provide safe and reliable telephone service. In March 2011, a Staff Report from Communications Division ("CD") detailed "the substandard results reported in the GO 133-C service quality reports filed by

[10] *See* Cal. Pub. Util. Code §§ 1757.1(a) subparts (4), (6).

[11] Pursuant to Commission Rule 14.3(c), comments on a proposed decision (PD) are limited to raising factual, legal or technical errors. No new evidence or arguments may be submitted in comments on a PD.

the carriers in 2010."[12] The Staff Report recommended "the Commission open an OII or OIR …to consider whether to adopt new standards, modify current standards and adopt penalty mechanisms."[13] The OIR included a preliminary scoping memo, asking, among other things: "Is it appropriate to implement a penalty mechanism when standards are not met? If so, what should it be?" and "Should the Commission adopt service quality reporting standards for Wireless carriers?"[14] These issues were reaffirmed in subsequent scoping memos (September 24, 2012 Scoping Memo and September 24, 2014 Amended Scoping Memo).[15]

The Amended Scoping Memo sought comment on CD's California Wireline Telephone Service Quality Pursuant to General Order 133-C Calendar Years 2010 through 2013 ("2014 Staff Report"). The 2014 Staff Report noted the large number of customers utilizing wireless and interconnected VoIP voice services and the need for all consumers to have safe and reliable telecommunications service, regardless of the technology used to provide their service.[16] The Staff Report recommended that the Commission consider adopting service quality rules for wireless and interconnected VoIP services.[17]

The 2014 Staff Report also contained a thorough assessment of the costs and benefits of a fine or penalty mechanism.[18] The report recommended that the Commission consider adopting a penalty mechanism to motivate carriers to improve their performance.[19] The 2014 Staff Report did not discuss any alternative in lieu of a penalty

[12] OIR, at 2.

[13] *Id*. at 8.

[14] *Id*., at 13-14 (Questions 5 and 13).

[15] *See* Scoping Memo (Sept. 24, 2012) at 5; *see also* Amended Scoping Memo (Sept. 24, 2014) at 2.

[16] *See* 2014 Staff Report at 21.

[17] *See id*., at 27.

[18] *See id*., at 17-24.

[19] *See id*., at 26.

mechanism that would have allowed carriers to use monies from penalties to repair networks that carriers are otherwise obligated to keep in good condition pursuant to existing statutes and regulations. Accordingly, many parties provided substantive proposals and comments on a penalty mechanism, but none proposed or commented on an alternative to a penalty, such as Rule 9.7 which the Decision added to G.O. 133-D.[20]

On February 2, 2015, the Assigned Administrative Law Judge sought comments on a Proposal for Modifications to G.O. 133-C developed by CD staff ("Staff Proposal"). The Staff Proposal recommended assessment of fines on telephone corporations that do not meet service quality standards for three consecutive months.[21] The Staff Proposal provided extensive analysis and support for its penalty mechanism.[22] Again, the Staff Proposal did not include Rule 9.7 or any similar proposal.

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[20] *See* CALTEL Comments (Jan. 31, 2012) at 16-18, 28, 35-37; AT&T Comments (Jan. 31, 2012) at , 7, 14, 29-30 and attached Declaration of Dr. Debra J. Aron Supporting Comments of AT&T California at 9, 56-61; ORA (formerly Division of Ratepayer Advocates) Comments (Jan. 31, 2012) at 12-14, 20; Comments of TURN, CforAT and the National Consumer Law Center (Jan. 31, 2012) at 6 and attached Declaration of Trevor R. Roycroft, Ph. D. at 25-31; ORA Reply Comments (Mar. 1, 2012) at 15-18; AT&T Reply Comments (Mar. 1, 2012) at 27-29, 51 and attached Reply Declaration of Dr. Debra J. Aron Supporting Comments of AT&T California at 45-48; Verizon Reply Comments (Mar. 1, 2012) at 24-25; Reply Comments of TURN, CforAT and the National Consumer Law Center (Mar. 1, 2012), attached Reply Declaration of Trevor R. Roycroft, Ph. D. at 13-20, 72-76; *see also* Scoping Memo (Sept. 24, 2012) at 3, 7, 11; Opening Comments of Communication Workers of America, District 9, on the Communications Division's Staff Report (Oct. 24, 2014) at 2-5; Opening Comments of Verizon (Oct. 24, 2012) at 16-17; Comments of TURN on the Amended Scoping Memo (Oct. 24, 2012) at 6; Comments of ORA on Communications Division's September 2014 Staff Report on California Wireline Telephone Service Quality (Oct. 24, 2012) at 17-18; Comments of AT&T on Staff Report (Oct. 24, 2012) at 4-7, 14; Opening Comments of Greenlining and CforAT on 2014 Staff Report on Wireline Telephone Service Quality (Oct. 24, 2012) at 3-4; Reply Comments of Cox on Amended Scoping Memo (Nov. 13, 2012) at 11-13; Reply Comments of Consumer Federation of California on Communications Division 2014 Report on Telephone Service Quality (Nov. 13, 2012) at 3-4; Reply Comments of TURN, Greenlining and CforAT on 2014 Staff Report on Wireline Telephone Service Quality (Nov. 13, 2012) at 11-12 and attached Reply Declaration of Trevor R. Roycroft, Ph.D. at 12-13, 17-19, 33-34; Reply Comments of AT&T on Staff Report (Nov. 13, 2012), attached Reply Declaration of Dr. Debra J. Aron Supporting Reply Comments of AT&T on Staff Report at 2-3, 5-6.

[21] *See* Staff Proposal at 4-5.

[22] *See* Staff Proposal, Attachment A at A-1 through A-11.

Parties addressed staff's proposed penalty mechanism in comments submitted on March 30, 2015 and reply comments submitted on April 17, 2015.[23] Many parties provided extensive and substantive discussion of the structure of the penalty mechanism.[24] Some parties analyzed the fine mechanism proposal and suggested alternatives to address sub-standard service quality.[25] No party suggested investments should be made in lieu of penalties, as provided in Rule 9.7.

On November 12, 2015, President Picker issued a Proposed Decision Adopting General Order 133-D ("November 2015 PD"). For the first time, the November 2015 PD inserted Rule 9.7 into G.O. 133-D, with the following explanation:

> We have added an option for carriers to propose that the Commission suspend an accrued fine where a carrier agrees instead to make specific, incremental expenditures to improve service quality in an amount that is equal to two times the accrued fine. In their annual filings, carriers that incur a fine may propose for the Commission's consideration an alternative set of expenditures to address the service quality standard resulting in the fine, provided that the carrier demonstrates that the expenditures are incremental, directed at the service quality deficiencies leading to the fine, and in an amount that is twice the amount of the tabulated fine. This option better aligns carriers' expenditures with improving actual customer service. [26]

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[23] *See* Comments of CALTEL on Staff Proposal (Mar. 30, 2015) at 2-3, 4-6; Comments by Frontier to Staff Proposal (Mar. 30, 2015) at 7-8; Opening Comments of CforAT, Greenlining and TURN on Staff Proposal (Mar. 30, 2015) at 3-4; Comments of ORA on Staff Proposal (Mar. 30, 2015) at 33; Comments of Small LECs on Staff Proposal (Mar. 30, 2015) at 1-2; Comments of Surewest on Staff Proposal (Mar.30, 2015) at 1-3; Reply Comments of ORA on Staff Proposal (Apr. 29, 2015) at 13-16; Reply Comments of CforAT, Greenlining and TURN on Staff Proposal (Apr. 17, 2015) at 12-15, 19.

[24] *See* Opening Comments of AT&T on Staff Proposal (Mar. 30, 2015) at 8-20); Verizon's Opening Comments on Staff Proposal (Mar. 30) at 5-9.

[25] *See* Comments of Cox on Staff Proposal (Mar. 30, 2015) at 15-26; Reply Comments of Cox on Staff Proposal (Apr. 17, 2015) at 6-9.

[26] *See* November 2015 PD at 14.

As further discussed below in section IV, *infra*, the November 2015 PD provided no citations to the record (nor could it, as this concept was not part of the record) nor did it provide any further support for this new proposal.

As to wireless service quality standards, the November 2015 PD stated:

> The Commission's jurisdiction to ensure safe and reliable telecommunications service extends to wireless telephone service. Currently, GO 133 does not apply to wireless carriers and many parties have recommended that this Commission impose service quality standards on wireless service, which is the predominant means of modern telephone communication.
>
> No later than 60 days after the effective date of this order, parties shall file and serve proposals for extending the GO adopted in today's decision to wireless carriers. Such proposals should specify any and all changes needed to this GO to make feasible extending the customer protection concepts to wireless service as well. Comments may be filed and served 20 days thereafter.[27]

On December 19, 2015, the Assigned ALJ issued a Ruling seeking comments limited to a staff-proposed modification to the November 2015's PD's version of G.O. 133-D, in which the Major Service Interruption Reporting obligations set out in G.O. 133-D, Section 4, would be extended to apply to interconnected VoIP providers subject to Pub. Util. Code section 285.[28]

On March 22, 2016, President Picker issued an updated Proposed Decision Adopting General Order 133-D ("March 2016 PD"). While the March 2016 PD carried forward the new Rule 9.7, it wholly eliminated, without explanation, the November PD's discussion related to wireless service quality rules. The Commission, in a 3-2 vote, adopted the March 2016 PD on August 18, 2016.

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[27] November 2015 PD, at 15 (citations omitted).

[28] ALJ Ruling (Dec. 29, 2015), at 1 and Attachment A.

III. THE DECISION VIOLATES THE TELECOMMUNICATIONS CUSTOMER SERVICE ACT IN ORDERING THE PROCEEDING CLOSED WITHOUT FIRST ADDRESSING SERVICE QUALITY STANDARDS FOR WIRELESS OR INTERCONNECTED VOIP PROVIDERS

The Decision orders this rulemaking closed without addressing service quality rules for wireless or interconnected VoIP providers.[29] As a result, the Commission failed to proceed in a manner required by Section 2896 and Decision 15-08-041.[30] As stated in the September 24, 2012 Scoping Memo, "a central focus of this proceeding is on service quality for voice communications services provided to customers."[31] Wireless and interconnected VoIP technologies are "used to facilitate communication by telephone," and any corporation or person that owns, controls, operates, or manages the facilities that are used in voice communications are "telephone corporations" bound by the obligation to comply with "reasonable statewide service quality standards" adopted by the Commission.[32]

As discussed in detail below, wireless providers are unambiguously categorized as "telephone corporations." While the Commission has not categorically issued a final determination as to whether interconnected VoIP providers are "telephone corporations," this Application for Rehearing demonstrates and reiterates Joint Consumer Groups' discussion of why these carriers fall within the statutory framework and thus should be governed by the same service quality obligations as other voice service providers.[33] Accordingly, the Commission has jurisdiction to adopt service quality standards for both wireless and interconnected VoIP providers.

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[29] Decision, OP 2, at 35.

[30] *See* Decision, at 30-31.

[31] Staff Proposal, at 2, citing September 24, 2012 *Assigned Commissioner's Scoping Memo and Ruling*, at 7.

[32] Cal. Pub. Util. Code § 233; § 234; § 2896; § 451; *see also* ORA March 30, 2015 Comments on Staff Proposal, at 9-12.

[33] *See e.g.*, Comments of ORA on Staff Proposal (Mar. 30, 2015) at 10-11.

The Commission must take up these issues to carry out its Section 2896 mandate, as well as to further California's stated telecommunications policy "to encourage fair treatment of consumers through provision of sufficient information for making informed choices, *establishment of reasonable service quality standards, and establishment of a process for equitable resolution of billing and service problems*."[34]

A. Violation of Cal. Pub. Util. Code Section 2896

The Commission's duty pursuant to Section 2896 is mandatory and without exception, unambiguously stating:

> The commission *shall* require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following: …(c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.[35]

The Commission has consistently cited Section 2896 as the basis for adopting service quality rules, both in this rulemaking and in previous Commission decisions regarding service quality.[36] Therefore, Section 2896 governs this proceeding. The Commission, however, committed legal error by closing the proceeding without requiring or even addressing service quality standards for wireless and interconnected VoIP carriers as required by Section 2896.

When enacting Section 2897 concurrently with Section 2896, the legislature made clear that this statutory duty must be fulfilled by *all* telephone corporations,[37] stating:

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[34] Cal. Pub. Util. Code § 709(h) (emphasis added).

[35] Cal. Pub. Util. Code § 2896(c) (emphasis added).

[36] *See* D.09-07-019, at 30; D.13-02-013, p. 5; D.15-08-041, at 7, fn.15; Order Instituting Rulemaking ("OIR") 11-12-001, at 2; Assigned Commissioner's Scoping Memo and Ruling, filed Sept. 24, 2012 ("First Scoping Memo"), at 5.

[37] *See* Stats. 1993, Ch. 1233, Sec. 2.

> Consistent with other provisions of this code, orders, rules, and applicable tariffs of telecommunications service providers, the commission *shall apply these policies to all providers of telecommunications services* in California.[38]

As seen in the plain, technology-neutral, language of Sections 2896 and 2897, no type of telephone corporation is exempt from the duty to "provide customer service to telecommunication customers that includes…reasonable statewide service quality standards."[39] As explained below, no state or federal law prohibits the Commission from establishing service quality standards that apply in a technology-neutral manner.[40]

1. Section 2896 Applies to Wireless Providers

Throughout this proceeding, wireless carriers have consistently raised jurisdictional challenges regarding the Commission's authority to adopt wireless service quality standards or rules. The Decision rejects these claims, stating "we are not persuaded by the jurisdictional arguments of the wireless carriers."[41] Thus, the Decision appears to accept that the Commission has the necessary authority to adopt wireless service quality standards. Yet, without more than a statement in the Decision stating, "we nevertheless decline to open another phase of this proceeding to address wireless service quality,"[42] the Commission erroneously exercised discretion where it had none. As explained, Section 2896 creates a mandatory obligation for both the Commission and telephone corporations.

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[38] Cal. Pub. Util. Code § 2897. (emphasis added)

[39] *See* ORA Comments on Staff Proposal (Mar. 30, 2015), at 10-11 (wireless carriers and interconnected VoIP providers are telephone corporations as defined in Pub. Util. Code § 234); *see also City of Huntington Beach v. Public Utilities Comm.*, (2013) 214 Cal.App.4th 566, 585 ("Legislature intended to define the term 'telephone corporation' broadly, without regard to the particular manner by which users of telephones are put into communication").

[40] *See* discussion, section III.

[41] Decision, at 31.

[42] *Ibid*.

Several industry parties argued that federal law preempts the Commission from adopting service quality rules applicable to wireless carriers.[43] This argument fundamentally misstates the law. Under section 332(c)(3)(A) of the Communications Act:

> … no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services*. (Emphasis added).

The 9th Circuit has made it clear that the bans on state regulation of market entry and rates for wireless services are grounded in the Federal Communications Commission's "exclusive licensing authority over wireless providers."[44] For example, licensing is "the FCC's core tool in the regulation of market entry;" accordingly, states cannot regulate spectrum licensing.[45] Similarly, state or local governments cannot enact statutes or regulations which would result in an effective ban on personal wireless services or facilities, and plaintiffs cannot pursue causes of action which would require a state court to evaluate the FCC's licensing processes or decisions.

However, state regulations are not preempted by federal law where those regulations do not "implicate the FCC's ability to regulate the number of wireless providers in a given market."[46] The industry does not demonstrate that the Commission's adoption of service quality standards would implicate the FCC's ability to regulate the number of wireless providers in California markets. The motivations for wireless providers' opposition to wireless service quality standards are clear. Although the case

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[43] *See* CTIA Comments at 8-10.

[44] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005).

[45] *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1008 (9th Cir. 2010).

[46] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005).

law regarding federal preemption of the regulation of wireless carriers has evolved over time, the FCC has clearly stated that a consumer's suit against a wireless provider for breach of contract or fraud is not per se preempted by federal law, and that "a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry into the reasonableness of the original price and therefore is permissible."[47] If wireless carriers were required to meet service quality standards and provide service quality reports to the commission, those reports could provide consumers with the evidence needed to pursue a cause of action against the carrier. Providers oppose service quality reporting standards for wireless companies not because they are unreasonable or unnecessary, but because those standards would make those companies accountable for their actions.

Adopting and enforcing service quality rules on wireless service does not constitute the regulation of either "rates" or market "entry," which are the only areas of authority preempted by §332(c)(3)(A). Moreover, service quality rules will not alter any other federal authority over tower construction or wireless tower location as the industry claimed.[48] Accordingly, there is no federal authority that stands in the way of the Commission's consideration of service quality rules for wireless carriers.

2. Section 2896 Applies to Interconnected VoIP Providers, Notwithstanding Section 710's Jurisdictional Limitations

a) Interconnected VoIP providers fall within the broad definition of a "telephone corporation," which Section 710 does not alter or amend.

The Commission has previously reached the tentative conclusion that it has jurisdiction over interconnected VoIP carriers, including making a clear statement that "interconnected VoIP service providers fall within the broad definition of 'telephone

[47] *In the Matter of Wireless Consumers Alliance, Inc*., 15 FCC Rcd 17021, 17040-17041 (2000).

[48] *See c.f.* CTIA Comments at 9-10.

corporation.'"[49] The record here supports a similar conclusion. Instead, the Decision sidesteps this threshold jurisdictional issue altogether. This was in error because, similar to wireless carriers, the Commission has a duty under Section 2896 to require interconnected VoIP providers that provide telecommunications services to comply with reasonable service quality standards.

Section 239 defines VoIP as "voice communications service that uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user's location in Internet Protocol or a successor protocol."[50] The plain language of Section 239 makes clear that the "two way voice communications" offered by VoIP service utilizes "conduits, ducts, poles, wires, cables, instruments, or appliances" to facilitate communication by telephone. Accordingly, the Commission can find that any corporation or person providing VoIP service for profit in California meets the definition of a "telephone corporation" under state law.

Moreover, neither Section 239 nor Section 710 alter or amend the relevant definitions of "public utility" (Section 216), "telephone line" (Section 233), or "telephone corporation" (Section 234) that govern the jurisdictional analysis here.

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[49] *See* Rulemaking (R.) 11-01-008, *Order Instituting Rulemaking on the Commission's Own Motion to Require Interconnected Voice Over Internet Protocol Service Providers to Contribute to the Support of California's Public Purpose* Programs (OIR), *Slip. Op.*, at 27; *see also* ORA Comments on Staff Proposal (Mar. 30, 2015), at 12-20. In 2004, in Investigation (I.) 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice Over Internet Protocol Should be Exempt from Regulatory Requirements* (OII), the Commission tentatively concluded that "those who provide VoIP service interconnected with the PSTN [public switched telephone network] are public utilities offering a telephone service subject to our regulatory authority." (I.04-02-007, OII, *Slip. Op.*, at 4.) In reaching this tentative conclusion, the Commission analyzed the functionalities of VoIP, especially from the end-user's perspective, and interpreted VoIP service providers to fall within the definition of a public utility telephone corporation pursuant to sections 216 and 234. (*Id.*, at 3-5.) In 2011, in R.11-01-008, the Commission reached the same tentative conclusion that "interconnected VoIP service providers fall within the broad definition of "telephone corporation." (R.11-01-008, OIR, *Slip Op.*, at 27.) While these tentative conclusions were never adopted in final Commission decisions, Joint Consumer Groups are unaware of any Commission decision that concludes otherwise.

[50] Cal. Pub. Util. Code § 239.

The Decision notes that Section 710(a) may limit the Commission's jurisdiction over VoIP services.[51] However, Section 710(a) is constrained to VoIP *services*, not to providers, and it also contains an express exception that permits the Commission to exercise jurisdiction or control over VoIP services, stating:

> 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 section (c)." (Emphasis added.)[52]

Federal law does indeed delegate authority for the Commission to establish service quality standards for interconnected VoIP service.

b) Federal law delegates authority for the Commission to adopt and enforce service quality standards applicable to interconnected VoIP providers.

Section 706(a) of the 1996 Federal Telecommunications Act (Section 706) states, in relevant part:

> The Commission and each State commission with Regulatory jurisdiction over telecommunications services[53] 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

[51] Decision, at 25-26.

[52] Cal. Pub. Util. Code § 710(a).

[53] The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (47 U.S.C. § 153 (50).) The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." (47 U.S.C. § 153 (53).)

> regulating methods that *remove barriers to infrastructure investment*.[54]

The language of Section 706 provides a specific grant of authority to the FCC and to each state with regulatory jurisdiction over telecommunications services to "encourage the deployment of advanced telecommunications capabilities on a reasonable and timely basis."[55] In light of the CPUC's regulatory jurisdiction over telecommunications services,[56] the "advanced telecommunications capability"[57] referenced in Section 706, which includes VoIP service, is within the Commission's subject matter jurisdiction, consistent with Section 710.

Regardless of whether the CPUC makes the finding regarding interconnected VoIP carriers being classified as telephone corporations, Section 706 by its terms confers parallel powers on state commissions and the FCC.[58] The same rationale applied by the District of Columbia Circuit Court of Appeals (D.C. Circuit) in its review of the FCC's 2010 *Open Internet Order* anti-discrimination rules also applies to this Commission's attempt to ensure safety on today's integrated network of broadband and plain old telephone service (POTS). The D.C. Circuit delivered the most definitive reading of Section 706 to date. To Verizon's objection that "Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications," the D.C. Circuit responded, "Congress

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[54] Codified at 47 U.S. C. § 1302(a) (emphasis added).

[55] *Ibid.*

[56] *See, e.g.,* Cal. Pub. Util. Code §§ 216, 233, 234, 239, 285, 709, 2871-2897.

[57] Section 706 defines "Advanced Telecommunications capability" to include VoIP. Section 706(d)(1) states: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, 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.)

[58] 47 U.S.C. § 1302(a)*; Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014); *see also Order on In the Matter of Protecting and Promoting the Open Internet (Open Internet Order)*, 25 F.C.C.R. 17905, 17968, ¶ 117 (2010).

has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here."[59] At no point in *Verizon v. FCC* does the D.C. Circuit distinguish between the grant of authority to the FCC and the grant of authority to the states.

The Senate Report on the 1996 Telecommunications Act states that Section 706 is "intended to ensure that one of the primary objectives of the [1996 Act]--to accelerate deployment of advanced telecommunications capability--is achieved," and emphasized that Section 706 is "'a necessary fail-safe' to guarantee that Congress's objective is reached."[60] This also is a primary objective of California policy, as reflected (*inter alia*) in Pub. Util. Code sections 709-709.5. As the FCC observed, and the D.C. Circuit quoted in *Verizon v. FCC*, "[i]t would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the Commission's ability to promote advanced services if it conferred no actual authority."[61]

Under Section 706, the FCC and state commissions have, as the D.C. Circuit put it, a "direct mandate" to promote broadband competition, including the adoption of service quality rules and standards for VoIP providers in order to ensure that VoIP and the broadband facilities on which it rides are being "reasonably and timely deployed" in California.[62] As explained below, service quality is inextricably linked to the deployment of advanced communications capability.

Federal law requires the FCC to ensure "adequate facilities at reasonable charges, for the purpose of national defense, for the purposes of promoting safety of life and

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[59] 740 F.3d at 638, *citing* 47 U.S.C. § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); and 47 U.SC. § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission).

[60] Committee Reports, 104th Congress (1995-1996) Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 50-51 (1995); s*ee also Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *see also Verizon v. FCC*, 740 F.3d at 639.

[61] *Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *see also Verizon v. FCC*, 740 F.3d at 639.

[62] *Comcast v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010).

property through the use of wire and radio communication…." The lack of safe and reliable facilities depresses the demand for VoIP services in the same way that the discrimination addressed in *Verizon v. FCC* would run counter to Section 706's mandate to promote deployment and competition in broadband and other advanced telecommunications services, like VoIP:

> The Commission's theory, to reiterate, is that its regulations protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.[63]

Just as the FCC may take note of the potentially adverse consequences of Internet service provider (ISP) discrimination, the Commission may take note of the potentially adverse consequences of service quality lapses – including in the wholesale market – on the deployment of VoIP in California, and may impose conditions (i.e., service quality standards) to prevent their reoccurrence. Service quality is inextricably linked to the deployment of advanced communications capability because the definition of advanced telecommunication capability includes the ability of "users to originate and receive *high-quality* voice…using any technology."[64]

VoIP, broadband competition and build-out, and public safety all stand in close relationship with one another. If California's emerging VoIP and broadband network, which interfaces with the switched telephone network, is not capable of providing reliable, high-quality service, this creates a large public safety problem. It also may slow the growth of VoIP and broadband competition that is necessary to provide service in rural areas, bring down prices, and improve adoption in urban areas. The FCC's recent

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[63] 740 F.3d at 643. Although Verizon derided this theory as a "triple cushion shot," the Circuit Court found that such a triple-cushion shot "counts the same as any other shot," and that the FCC had presented a reasonable theory of competition. *Id.*

[64] 47 U.S.C. § 1302(d)(1)(emphasis added).

Open Internet Order cites Commissioner Sandoval's concern that the lack of an open – *and reliable* – network

> … undermines public safety and universal service, and increases barriers to adopting Internet-based applications such as Internet-enabled demand response communications electric and gas utilities use to prevent power blackouts, forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources.[65]

Finally, as discussed in detail below, the Decision inappropriately requires only some non-VoIP providers to follow service quality rules in California, while refraining from establishing service quality standards for interconnected VoIP and wireless carriers; this harms consumers, creates an uneven playing field, and fails to comply with the Commission's policy goal of technological neutrality.[66]

In sum, the Commission should have kept the proceeding open in order to comply with Section 2896's service quality mandate for wireless carriers and also as a forum to exercise its federally delegated authority pursuant to Section 706 to establish the necessary service quality standards for interconnected VoIP providers in order to advance the deployment of advanced telecommunications service.[67]

B. Violation of the Decision's Finding that Customers of Telephone Corporations Should Receive the Same Standard of Service

The Decision's failure to extend G.O. 133-D standards or any service quality standards to protect customers of wireless and interconnected VoIP providers in the same

[65] *Open Internet Order* (February 27, 2015), at ¶ 126 and fn. 291.

[66] *See* D.12-12-038, at 5.

[67] The other consumer groups agree with ORA's position. *See* Reply Comments of The Utility Reform Network, The Greenlining Institute, and Center for Accessible Technology on 2014 Staff Report on Wireline Telephone Service Quality, at 2-5.

manner as wireline customers directly conflicts with its FOF 7, which states that "[c]ustomers of all telephone corporations should receive the same standard of service."[68]

The Decision offers no reasonable basis to treat wireless and VoIP customers differently than wireline customers for consumer protection purposes. While there is no doubt that the Commission views public safety as its paramount concern here, equity and fundamental fairness should also guide the Commission. Public safety requires that all voice services provided by telephone corporations must be reliable. As the Decision acknowledges, "reliable telephone service is essential for the public to access emergency services, maintain contact with family and friends, conduct business, and find employment"[69]

It is the state's express policy "to encourage fair treatment of consumers" of telecommunications services.[70] And, the legislature requires wireless and interconnected VoIP customers to pay surcharges to fund the state's public purpose programs.[71] Therefore, it is only equitable that wireless and interconnected VoIP customers receive the same benefits and protections of service quality standards as do wireline customers. The Decision discriminates against these customers because it closes the proceeding without first addressing their service quality needs.

[68] Decision, FOF 7, at 32.

[69] *Id*., FOF 1, at 31; Cal. Pub. Util. Code §§ 451 and 2896.

[70] *See* Cal. Pub. Util. Code § 709(h).

[71] *See e.g*., Cal. Pub. Util. Code § 285.

IV. THE DECISION FAILS TO COMPORT WITH PRIOR COMMISSION DECISIONS AND FAILS TO ADDRESS MULTIPLE ISSUES THAT ARE PROPERLY WITHIN ITS SCOPE AND REQUIRE RESOLUTION

A. The Decision Violates Decision 15-08-041, which Requires that the Rulemaking Remain Open Pending the Completion of the Network Study

In closing the proceeding, the Decision directly violates D.15-08-041, which ordered that "R.11-12-001 remains open pending … completion of the study ordered in Decision 13-02-023."[72] D.15-08-041 affirmed the finding of D.13-02-023 that the Network Study was a "foundational activity" within R.11-12-001.[73] In order for the Network Study to serve as a "foundation," the proceeding must remain open. As D.15-08-041 stated:

> [The Network Study] was intended to be "foundational" because it would provide empirical data on the condition of network infrastructure, as well as on carrier infrastructure policies and procedures. This would facilitate an examination of the quality of existing communications services, and potentially inform the development of new and improved metrics to measure service quality.[74]

Thus, the Network Study may be the basis of new service quality metrics, which are suggested by the results of the study. D.15-08-041 plainly stated the Commission's intent for the proceeding to remain open to complete this process.

In ordering the network study completed, D.15-08-041 found that no circumstances had changed in the time that had passed since the network study was initially ordered by D.13-02-023.[75] In the year since D.15-08-041 was issued, it remains the case that no circumstances have changed. The Decision does not provide

[72] D.15-08-041 at 19, OP 4.

[73] *Id*., at 7.

[74] *Id*., at 11.

[75] *See id*., at 17, FOF 2.

any findings regarding circumstances that would have justified changing the Commission's clear order that the proceeding remain open to complete the Network Study. The Commission cannot reverse its previous order without any justification or explanation.

B. The Decision Violates D.12-12-038, issued in R.09-06-019, which Ordered that Service Quality Standards Be Established for Wireless and Interconnected VoIP Providers

In 2012, the Commission expanded the definition of basic telephone service to include telephone service provided by wireless and interconnected VoIP technologies.[76] However, in allowing these newer technologies to be accepted as basic telephone service, the Commission noted that it was necessary to update service quality standards *generally*, and specifically in regards to wireless and interconnected VoIP technologies that were to be included as basic service, stating:

> We conclude that either opening a new OIR or addressing the issue in R.11-12-001 is an appropriate forum in which to consider further issues relating to service quality standards for wireless or other nontraditional carriers, with express consideration of service quality standards in connection with the offering of basic service, by carriers in the capacity of a [carrier of last resort]. Alternatively, the Commission may choose to address these issues within R.11-12-001 provided that the scope of the proceeding is amended accordingly. As noted above, at a minimum, this consideration should include appropriate standards relating to providing maintenance of a voice-grade connection from the customer's residence to the public switched telephone network or its successor network.[77]

Thus, the Commission made clear that service quality standards for wireless and interconnected VoIP providers should be developed in R.11-12-001 or in a new

[76] *See* D.12-12-038 at 2.

[77] *Id*., at 46-47.

proceeding – and that such service quality standards were *required* in connection with the use of wireless and interconnected VoIP service to provision basic service.

The Commission must establish service quality standards for wireless and interconnected VoIP to allow these technologies to be used for basic service. Basic service is a critical vehicle in California's efforts to provide universal service at a minimum level of service quality.[78] The Commission in D.12-12-038 noted the need for basic service to reflect changing technologies. Thus, the Decision contravenes D.12-12-038 by closing the proceeding without any indication that service quality standards for wireless and interconnected VoIP technology will be developed.

C. Violation of Lifeline Decision, D.14-01-036

In 2013, the Commission issued a decision to revise and modernize the California LifeLine program to include nontraditional communications services, including wireless and VoIP. In this Decision, D.14-01-036, the Commission indicated that standards for LifeLine service offered through such nontraditional communications services should be subject to minimum service quality standards established in this proceeding. Specifically, in addressing concerns about the level of service available in parts of the state, D.14-01-036 stated that the Commission "will pursue some of these service and quality of service issues through other proceedings, including our service quality proceeding (R.11-12-001)."[79]

Wireless LifeLine is used by many low-income Californians. Failure to provide minimum service quality standards for wireless service leaves a number of vulnerable consumers at risk of inadequate access to the telecommunications network, and the Decision contravenes D.14-01-036 by closing the proceeding while neglecting to move forward with necessary protections for these customers.

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[78] *See* D.12-12-038, at 2, citing D.96-10-066; *see also* Cal. Pub. Util. Code §§ 709(a), 871.5(a).

[79] D.14-01-036, at 81.

D. Failure to Address Pending TURN Motion

On March 17, 2014, TURN filed a motion in this proceeding, asking the Commission to address problems with the deterioration of Verizon's (now Frontier's) landline network as well as concerns about forced customer migrations to unregulated services including VoiceLink and FIOS. Numerous parties responded to the motion, and the issues underlying the motion are closely related to the questions under review in the Network Study. The Decision does not resolve the TURN Motion and therefore, the Commission's failure to act on the motion before closing the proceeding was in error.

V. THE DECISION'S RULE 9.7 IS NOT SUPPORTED BY THE RECORD, LACKS CORRESPONDING FINDINGS, AND WAS ADDED IN VIOLATION OF PARTIES DUE PROCESS RIGHTS

A. No Evidence in the Record Supports Rule 9.7 Because Parties Did Not Have Notice or an Opportunity to Address it Prior to or After Its Inclusion in the November 2015 PD

Commission Rule of Practice and Procedure 8.3(k) states that "[t]he Commission shall render its decision based on the evidence of record." However, the Commission adopted Rule 9.7 without any support whatsoever in the record.[80] As explained above,

[80] Rule 9.7 states:

> 9.7 Alternative Proposal for Mandatory Corrective Action
> In support of a request to suspend the fine, carriers may propose, in their annual fine filing, to invest no less than twice the amount of their annual fine in a project (s) which improves service quality in a measurable way within 2 years. The proposal must demonstrate that 1) twice the amount of the fine is being spent, 2) the project (s) is an incremental expenditure with supporting financials (e.g. expenditure is in excess of the existing construction budget and/or staffing base), 3) the project (s) is designed to address a service quality deficiency and, 4) upon the project (s) completion, the carrier shall demonstrate the results for the purpose proposed.
>
> Carriers are encouraged to review their service quality results to find appropriate target projects to invest funds.

Rule 9.7 was never discussed in any party's filings or in any of the Staff reports or proposals. Prior to the November 2015 PD, no party ever suggested Rule 9.7 or any similar process of promising "investments" in lieu of paying a penalty.

Rule 9.7 was first introduced in the November 2015 PD – more than four years after the issue of penalties was first introduced in this rulemaking. Rule of Practice and Procedure 13.14(a) makes clear that the "taking of evidence" is closed once a proceeding is submitted for a proposed decision.[81] As the issuance of a proposed decision necessarily happens after submission of the record, a proposed decision and any comments on it are not part of the evidence of record. Thus, Rule 9.7 was introduced and considered outside of the evidentiary phase of this proceeding.

The Commission cannot lawfully or properly develop its rules and policy in an off-the-record manner, without any notice or opportunity for the parties to rebut the proposed rule. By introducing Rule 9.7 in a PD, the Commission did not provide proper notice or opportunity to rebut the proposal. Such a rule promulgation process violates state and Commission requirements of due process, transparency and fairness.[82]

Comments on proposed decisions do not provide an opportunity to rebut a newly proposed rule, as these comments are limited to documenting factual, legal or technical errors, and parties are specifically prohibited from submitting any new evidence or arguments.[83] Thus, Rule 9.7 was promulgated without giving parties any notice or opportunity to be heard and present evidence or arguments concerning it. Accordingly, the Commission violated parties' due process rights by adopting Rule 9.7.

If the Commission wishes to consider a rule proposal, it must be introduced and vetted during the rulemaking's evidentiary phase – just as the rule proposals of CD staff

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[81] Any information presented outside of the "taking of evidence," such as information presented *ex parte,* is not a part of the evidentiary record. See Rule of Practice and Procedure 8.3(k).

[82] *See* Rules of Practice and Procedure 8.3(k), 13.14(a); *see also California Hotel and Motel Assoc. v. Industrial Welfare Comm*. (1979) 25 Cal.3d 205, 212; *California Assoc. of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 800, 812-814.

[83] *See* Rule of Practice and Procedure 14.3(c).

were introduced in two Staff Reports/Proposals and thoroughly vetted via comments by the parties. However, Rule 9.7 was first proposed in a proposed decision without any prior opportunity for parties to properly address it. As Rule 9.7 was not subject to a proper review, it contains numerous gaps and insufficiencies as noted and discussed by most Commissioners in the Commission voting meeting when the latest Proposed Decision was adopted.[84]

B. The Decision Lacks Findings to Support Rule 9.7

The Commission must support its decisions with proper findings of fact. Pub. Util. Code Section 1757.1(a) requires that Commission decisions be supported by the findings. Moreover, Section 1757.1(c) requires that Commission decisions "include ultimate facts and findings and conclusions of the commission…" Here, the Decision lacks any findings of fact that support Rule 9.7. Indeed, findings supporting Rule 9.7 could not possibly be developed, as there is no mention of Rule 9.7 in the evidentiary record. Consequently, Conclusions of Law 7 and 8 related to Rule 9.7[85] fail for lack of findings supported by the record. The Commission must eliminate Rule 9.7 from G.O. 133-D.

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[84] At the August 18, 2016 Commission Voting Meeting, President Picker and Commissioners Florio, Randolph and Sandoval noted several limitations and challenges, including the difficulty of determining if investments under Rule 9.7 simply supplant regularly planned investments, that Rule 9.7 does not actually require investment to address the root cause of service quality violations; that the two year timeline allowed for results is too long; and that there is no way to properly track the investment.

[85] COLs 7 and 8 state:

> 7. The public interest requires that telephone corporations subject to penalties be authorized to propose alternative means to expend twice the amount of the fine to improve service quality for customers.
>
> 8. Carriers incurring a fine under GO 133-D should have the option of requesting that the fine be suspended based on an expenditure proposal for incremental actions directed at improving compliance with the service quality standard that led to the fine in an amount that is no less than two times the incurred fine.

VI. REQUEST FOR ORAL ARGUMENT

Joint Consumer Groups request oral argument pursuant to Rule 16.3. Oral argument is necessary in this case because the Decision creates a new precedent for service quality rules for telephone corporations by allowing the Commission to absolve telephone corporations providing wireless or interconnected VoIP services from complying with Section 2896's service quality mandate.

VII. CONCLUSION

For the aforementioned reasons, the Commission should grant rehearing and modify the Decision as follows:

(1) Order a second phase of the proceeding to address two issues: (a) wireless and interconnected VoIP service quality standards as Section 2896 requires and (b) the process by which the Commission will complete and evaluate the results of the pending Network Study, the pending TURN motion, and other matters that have been referred to this proceeding; and

(2) Eliminate Rule 9.7 from G.O. 133-D.

Respectfully submitted,

/s/ HIEN VO WINTER
HIEN VO WINTER
Attorney for

Office of Ratepayer Advocates
California Public Utilities Commission
320 West Fourth Street, Suite 500
Los Angeles, CA 90013
Telephone: (415) 703-3651
Facsimile: (415) 703-4592
Email: hien.vo@cpuc.ca.gov

/s/ MELISSA KASNITZ
MELISSA KASNITZ
Legal Counsel

Center for Accessible Technology
3075 Adeline Street, Suite 220
Berkeley, CA 94703
Telephone: (510) 841-3224
Email: service@cforat.org

/s/ PAUL GOODMAN
PAUL GOODMAN
Senior Legal Counsel

The Greenlining Institute
1918 University Ave, Suite 2B
Berkeley, CA 94704
Telephone: (510) 898-2053
Email: paulg@greenlining.org

/s/ REGINA COSTA
REGINA COSTA
Telecommunications

Policy Director
The Utility Reform Network
785 Market St., Ste 1400
San Francisco, CA 94103
Telephone: (415) 929-8876, ext 312
Email: rcosta@turn.org

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