

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Establish a
Framework and Processes for Assessing the
Affordability of Utility Service.

Rulemaking 18-07-006

**COMMENTS OF THE CALIFORNIA CABLE AND TELECOMMUNICATIONS
ASSOCIATION ON STAFF PROPOSAL**

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Pursuant to the Administrative Law Judge’s Ruling dated August 20, 2019 (“ALJ Ruling”) in the above-captioned proceeding, the California Cable and Telecommunications Association (“CCTA”)¹ hereby submits these comments on the “Staff Proposal on Essential Service and Affordability Metrics” (“Staff Proposal”).

CCTA and its members take seriously the importance of expanded access to broadband.² However, the Staff Proposal fundamentally misapprehends both the legal landscape and the dynamic, transparent, and competitive nature of broadband pricing. Since the stated intent of this proceeding is to establish an affordability framework for analyzing rates and rate changes for *utility* services, CCTA respectfully urges the California Public Utilities Commission (“CPUC”) to (1) exclude from the final affordability framework non-utility services, like broadband, that are beyond both the scope of this proceeding and the CPUC’s jurisdiction; (2) avoid proposals that are overly

¹ CCTA is a trade association consisting of cable providers that have collectively invested more than \$40 billion in California’s broadband infrastructure since 1996 with systems that pass approximately 96% of California’s homes.

² For example, several CCTA members offer low-priced broadband service offerings to qualifying individuals.

complex and resource-intensive and thus will lead to increased CPUC regulatory costs with no consumer benefit; and (3) adhere to the recent CPUC decision clarifying that affordability of telecommunications services should be considered within the programs the Legislature has authorized for this purpose, including the California LifeLine program.

I. Broadband Service Should Be Eliminated from the Staff Proposal and the Affordability Framework.

The ALJ Ruling states that the Staff Proposal “sets forth a proposed framework for the [CPUC] to assess the affordability of public utility rates across utility types and services.”³ CCTA does not dispute the Staff Proposal’s inclusion in the affordability framework of energy and water services, which are rate-regulated utility services that are clearly within CPUC jurisdiction. However, under the umbrella of “telecommunications” service, the Staff Proposal mistakenly includes *broadband* service, along with traditional voice services. CCTA assumes that the Staff Proposal does not pertain to VoIP, in part, because the Staff Proposal does not explicitly reference VoIP service.⁴ To be consistent with existing law, broadband service must be eliminated from the Staff Proposal because it is neither a “utility” service nor a “telecommunications” service under either federal or

³ ALJ Ruling at 1.

⁴ CCTA notes, however, that the Staff Proposal (at 13) indicates that “voice service, regardless of technology type, is an integral part of day to day life.” To the extent that statement is intended to add VoIP services to the other voice services subject to the Staff Proposal and its metrics, and the CPUC intends to adopt such a proposal, CCTA asserts that the CPUC lacks jurisdiction to take such regulatory action. *See California Cable and Telecommunications Association Comments on Order Instituting Rulemaking to Develop Methods to Assess the Affordability Impacts of Utility Rate Requests and Commission Proceedings* at 3-7 (August 13, 2018).

state law. Moreover, the proposed levels of broadband essential service are misaligned with both state law and actual usage data, and none of the proposals for implementation or use of the metrics for broadband service is practical and/or efficient.

A. Broadband is Neither a “Utility Service” Nor a “Telecommunications Service,” and, Accordingly, is Beyond Both the CPUC’s Jurisdiction and Scope of this Proceeding.

Even though the Federal Communications Commission (“FCC”) has expressly preempted states from regulating rates, terms and conditions of broadband services,⁵ the Staff Proposal errs by treating broadband as a utility service. Specifically, the Staff Proposal mistakenly identifies as an “essential” amount of “telecommunications” service the following for a single household:

- Fixed broadband: 20mbps/3mbps (actual speed minimum); 1024 GB monthly capacity
- Mobile broadband: 3G, 8.75 GB
- Mobile Voice: 1000 minutes
- Fixed Voice: unlimited local calling

The Staff Proposal also includes a “conceptual definition of utility affordability as the degree to which a household can regularly pay for essential service of each public utility type on a full and timely basis without substantial hardship,” and proposes three metrics for assessing affordability.⁶ Defining a quantity of broadband as an “essential” service

⁵ See Comments of CCTA in this proceeding (filed August 13, 2018) at 2 to 7 and (filed June 4, 2019) at 8 to 10; *see also Restoring Internet Freedom*, Declaratory Ruling, Report and Order, 33 FCC Rcd. 311, 426-28 (2018) (“RIF Order”) at 426 to 428.

⁶ Staff Proposal at 15. The three metrics are “Affordability Ratio” (the “impact of a utility bill on household budgets, that is, the percent of income (after housing) that is spent on essential utility service”); “Hours at Minimum Wage” (the worked hours required to pay essential service bills);

(and the related proposals to require regular data collection of broadband pricing) should be rejected as not being consistent with applicable law.

While the CPUC has jurisdiction over intrastate telecommunications service, *broadband is neither a telecommunications service nor an intrastate service*. Broadband is an interstate service governed by federal law,⁷ and defined as an “information service” and not a “telecommunications service.”⁸ Specifically, the *RIF Order* preempts:

(1) “any state or local measures that would effectively impose rules or requirements that [the RIF Order] repealed or . . . refrain[ed] from imposing . . . or that would impose more stringent requirements for any aspect of broadband service” addressed in the RIF Order; (2) “any so-called ‘economic’ or ‘public *utility-type*’ regulations including common-carriage requirements akin to those found in Title II of the Act and its implementing and rules”; and (3) “other rules or requirements . . . [that] could pose an obstacle to or place an undue burden on the provision of [BIAS] and conflict with the” federal policy of deregulation.”⁹

Crafting affordability metrics around broadband and implementing broadband data collection strays into the realm of public-utility regulation, which is clearly prohibited under the *RIF Order*.¹⁰ As the OIR implicitly acknowledges, this proceeding is driven by

and “Ability to Pay” (household income and the cost of housing (inclusive of utility expenses).

⁷ *RIF Order*, ¶¶ 20, 26-64, 199 (“As a preliminary matter, it is well-settled that Internet access is a jurisdictionally interstate service because ‘a substantial portion of Internet traffic involves accessing interstate or foreign websites.’”).

⁸ *RIF Order*, ¶ 2 (“We reverse this misguided and legally flawed approach and restore broadband Internet access service to its Title I information service classification.”).

⁹ *RIF Order*, ¶ 195.

¹⁰ *RIF Order* at 428 n.730 (“The terms ‘economic regulation’ and ‘public utility-type regulation,’ as used here, are terms of art that the Commission has used to include, among other things, requirements that all *rates* and practices be just and reasonable....”) (emphasis added); *see also id.* ¶ 195 (“We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order.”).

the CPUC’s ratemaking jurisdiction over public utilities to ensure that rates are “just and reasonable,”¹¹ and so applying the proposed Essential Service framework to broadband falls clearly within the realm of public utility-type regulation. Moreover, requiring broadband data collection, as Staff proposes, would impose requirements that the *RIF Order* repealed,¹² and places an undue burden on broadband service providers to direct resources to compliance with regulation, especially where broadband pricing is publicly available.

In addition, the FCC recently affirmed that states and localities are precluded from regulating “the non-cable services” provided by a cable operator,¹³ and “expressly preempt[ed] any state or local requirement . . . that would impose obligations on franchised cable operators beyond what Title VI allows.”¹⁴

¹¹ OIR at 2 (“[T]he Commission has broad responsibility to ensure utility rates are just and reasonable.”).

¹² *RIF Order*, ¶¶ 210, 214 (modifying transparency rule to remove reporting requirements, including disclosures regarding prices and fees and performance characteristics).

¹³ See *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, FCC 19-80 ¶ 76 (2019) (“Section 621 Order”) (“LFAs, therefore, may not lawfully regulate the non-cable services of such cable operators, including information services (such as broadband Internet access), private carrier services (such as certain types of business data services), and interconnected VoIP services. For example, this precludes LFAs from . . . requiring [a cable operator] to meet prescribed service quality or performance standards for broadband service carried over that cable system.”).

¹⁴ *Id.* ¶¶ 80, 100 (“[W]e conclude that any state or local law or legal requirement that . . . imposes requirements beyond those permitted by Title VI to provide cable or non-cable services, including telecommunications and information services, over its cable system conflicts with the Act and thus also is expressly preempted by section 636(c).”). Moreover, under the broad language of Section 636 of the Cable Act, the Essential Services Framework represents a state incursion into broadband services that is “inconsistent” with the Communications Act as interpreted in the *RIF Order*. 47 U.S.C. § 556(c); see also Section 621 Order ¶ 81 (describing that Section 636 “directly” indicates Congress’s intent to “broadly” preempt requirements that are inconsistent with any state law inconsistent with “any provision of the Communications Act”); see also

Additionally, consideration of the affordability of broadband service should be rejected because it is outside the scope of this proceeding. The Assigned Commissioner’s Scoping Memo and Ruling dated November 19, 2018 (“Scoping Memo”) makes clear that the CPUC is considering affordability issues with respect to “utility services.”¹⁵ As explained above, broadband is not a utility service, and the word “broadband” is not used once in the Scoping Memo.

Overall, the Staff Proposal improperly ignores CPUC jurisdictional limits, and any adoption of these proposals by the CPUC would amount to legal error. Moreover, these proposals fail to serve the public interest given that these jurisdictional limits preclude any practical way to implement the definitions of essential service in the context of broadband.

B. CPUC Staff’s Proposal to Collect Data on Broadband Pricing Falls Outside of the Scope of This Proceeding, and Is Not Necessary, Cost-Effective, or Beneficial to Consumers.

The proposals for ongoing data collection on broadband pricing are flawed and should be rejected. First, the collection of broadband pricing data is beyond the scope of the proceeding. The Scoping Memo specifies that the affordability framework is intended for use in “individual Commission proceedings and utility rate requests.”¹⁶

Section 621 Order ¶ 106 (noting that “section 636(c) makes clear that state and local authorities may not end-run the provisions of Title VI simply by asserting some other source of authority . . . to accomplish what Title VI prohibits.”).

¹⁵ Scoping Memo at 2.

¹⁶ Scoping Memo at 1 (emphasis added) (“the Commission instituted this rulemaking to develop a common understanding and methods and processes to assess, consistent with Commission jurisdiction, the impacts on affordability of *individual Commission proceedings and utility rate*

Without jurisdiction over broadband rates, it is difficult to see how broadband pricing data collection would aid the CPUC in such proceedings.

In trying to justify the collection of broadband data, the Staff Proposal suggests that the data can be used to apply an affordability metric to a California Advanced Services Fund (“CASF”) broadband infrastructure grant¹⁷ or to provide consumers charts of broadband pricing based on data requests issued to service providers.¹⁸ However, these proposed uses are not based in statute and are outside the scope of this proceeding. The statute governing the CASF program does not make affordability an eligibility criteria for award of CASF infrastructure grants.¹⁹ The Scoping Memo specifically provides that the CPUC universal service programs (like CASF) are not within scope of this proceeding.²⁰ Moreover, as explained above, the Scoping Memo clearly states that the aim of this proceeding is to develop an affordability framework to inform the *Commission* (not consumer) decision-making.²¹

requests.”)

¹⁷ Staff Proposal at 31.

¹⁸ This proposal was informally presented by Communications Division Staff at Workshop (August 26, 2019).

¹⁹ Public Utilities Code Section 281.

²⁰ Scoping Memo at 4 to 5. An affordability metric would also *not* be helpful in considering the award of CASF grants because, as former CPUC Commissioner Rachelle Chong observed at the August 26, 2019, workshop, there are no longer competitive grant applications. While restructuring or modifying the public policy programs are not within the scope of this proceeding (Scoping Memo at 5), customer surcharges that fund these programs are recognized as impacting affordability. *See* CCTA Comments (filed May 13, 2019) (citing to CPUC report that customers identified taxes and surcharges as the most relevant factor affecting affordability of telecommunications services and recommending that the CPUC consider adopting a “surcharge impact metric” that would allow the CPUC to evaluate the affordability impact of surcharges the CPUC establishes).

²¹ Scoping Memo at 2. (“[T]he Commission instituted this rulemaking to develop a common

Second, the collection of broadband pricing data is unnecessary. Broadband pricing data is already publicly available on service provider websites.²² In fact, at the January 2019 workshop, CPUC staff explained that the Communications Division already has prepared reports on communications service pricing from public data.²³

Third, to the extent the Staff Proposal seeks further data collection from service providers regarding broadband pricing, the Staff are unfairly and arbitrarily singling out broadband, among many other non-utility services, for data collection. Importantly, the CPUC is not collecting data for other non-utility services such as housing, food, healthcare, transportation, and childcare, that, while necessary to live and an important part of a household budget, are not identified in the Staff Report as “essential” or subject to data collection requirements.²⁴

C. The Proposed Broadband Essential Service Levels Are Misaligned with Statutory Guidance, Based on Flawed Analysis, and Should Be Discarded.

In addition, the Staff Proposal’s definition of an “essential” quantity of broadband service is flawed. As noted above, the Staff Proposal asserts that an essential quantity of

understanding and methods and processes to assess, consistent with Commission jurisdiction, the impacts on affordability of individual Commission proceedings and utility rate requests.”)

²² For example, Charter internet pricing is available at www.spectrum.com, Comcast internet pricing is available at www.xfinity.com, and Cox internet pricing is available at www.cox.com.

²³ Attachment C to ALJ Ruling (April 12, 2019), Wullenjohn, Robert, 2010 Study of Affordability of Basic Telephone Service: A Method of Determination and Challenge for Policy Makers (January 22, 2019) at slide 10.

²⁴ See Comments of UCAN (filed May 13, 2019) at 2 to 3 (describing other services impacting affordability but not within CPUC jurisdiction such as solid waste disposal or municipal water and sewer services, which are not subject to the data collection proposal).

service is 20 Mbps downstream and 3 Mbps downstream. This proposal disregards the levels set by the Legislature in 2017, which defined broadband as 6 Mbps downstream and 1 Mbps upstream.²⁵

The Staff Proposal also problematically states: “it may be reasonable to, going forward, raise essential service standards to 70 Mbps down and 5 Mbps up.”²⁶ This assertion is based on “subscriber data from CPUC’s Geographic Information System (GIS) team,” which the Staff claims shows that a substantial majority of Californians subscribe to a minimum of 70 Mbps downstream and a minimum of 5 Mbps upstream. This 70 Mbps figure appears to be overstated. While it is unclear, it appears that the Staff is relying on subscriber data submitted under Decision 16-12-025, and/or received through annual reports filed by video service providers. In either case, such subscriber data only *includes the highest subscribed speed per census block or census tract*,²⁷ not the average minimum speed that the majority of Californians subscribe to, as the Staff Proposal incorrectly suggests.

II. Affordability of “Telecommunications” Service Is Properly Addressed in Ongoing Proceedings Examining Universal Service.

To ensure a reasonable, just and otherwise lawful outcome in this proceeding, CCTA recommends the CPUC adopt an approach that is consistent with existing

²⁵ Public Utilities Code Section 281(b)(1)(B).

²⁶ Staff Proposal at 14.

²⁷ See Guidelines for Broadband Data Submission, available at <https://www.cpuc.ca.gov/General.aspx?id=2541>.

requirements applicable to telecommunications carriers. With respect to intrastate “telecommunications” services, the CPUC does not rate-regulate such services, except for the rates of the small incumbent local exchange carriers (“Small ILECs”).²⁸ Carriers (other than the Small LECs), which operate in a competitive environment, determine the rates for their respective services under the Uniform Regulatory Framework adopted by the CPUC in 2008 for ILECs and since the 1990s for non-dominant competitive carriers like CCTA’s members.²⁹ In other words, competitive telecommunications carriers are different from public utilities that provide water, energy and gas services.

Unlike public utilities, competitive telecommunications carriers do not operate as monopoly providers, and significantly, they lack market dominance. The existing and successful regulatory framework that telecommunications carriers operate in makes it neither necessary nor reasonable for the CPUC to regulate rates of competitive providers. Importantly then, it appears impossible, or otherwise extremely difficult, to envision an affordability metric in the context of competitive telecommunications services. An affordability metric to help the CPUC evaluate rates has no practical application for telecommunications services offered by competitive carriers.

Moreover, in a proceeding in which the CPUC considered the telecommunications service marketplace, the CPUC issued D.16-12-025 and elected not to modify the existing regulatory framework under which competitive providers operate.

²⁸ Specifically, only the Small LECs submit applications pursuant to which the CPUC adopts rates that the Small LECs may charge. No other telecommunications carrier is rate-regulated.

²⁹ See Decision 94-06-065; Decision 95-07-054.

Consistent with that outcome, the CPUC stated that it would address affordability issues for telecommunications services through its universal service program proceedings:

“Telecommunications affordability will be addressed in the Lifeline proceeding, as well as by our other public purpose programs.”³⁰

Accordingly, consistent with the existing regulatory framework governing competitive carriers operating in California, and the conclusions adopted in D. 16-12-025, to the extent that there are any such issues properly considered, the CPUC should address affordability issues for telecommunications service in the LifeLine proceeding.

III. Conclusion

CCTA urges the CPUC to limit the development of an affordability framework to utility services within its jurisdiction where it might have some use in CPUC evaluation of rates. It is counter to the very purpose of this proceeding to incur excessive costs – that consumers pay through the fee that funds CPUC operations – to develop an overly complex and resource-intensive framework or database for non-utility services that will provide no consumer benefit. For telecommunications services, where the CPUC has some limited jurisdiction, CCTA respectfully suggests that resources would be better

³⁰ D.16-12-025 at 191, COL 13; and at 161 (“This decision recognizes several gaps in the market, particularly deployment of telecommunications services to rural and tribal communities, affordability of telecommunications services to low-income communities, and the particular communications needs of customers with disabilities. The Commission’s public purpose programs target those gaps.”).

spent addressing the many pending issues in the program that provides a tangible benefit to low-income consumers – the LifeLine program.

Respectfully submitted,

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