BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish a Framework and Processes for Assessing the Affordability of Utility Service.	Rulemaking 18-07-006

REPLY 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 reply comments in response to opening comments filed September 10, 2019, on the "Staff Proposal on Essential Service and Affordability Metrics" ("Staff Proposal").

CCTA agrees with other comments that federal law and regulations constrain the CPUC's authority with respect to creating and implementing an affordability framework for communications services. These restrictions underscore the limited value of including broadband within the CPUC's affordability framework. Moreover, the August 26 workshop discussion and opening comments confirm the complexity, unworkability and unreliability of the proposed affordability framework, especially in the context of communications services. To the extent the CPUC wishes to adopt an affordability framework for telecommunications services, it should do so in the LifeLine proceeding.

[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.

I. OPENING COMMENTS REINFORCE THAT THE BROADBAND ASPECTS OF THE STAFF PROPOSAL EXCEED THE CPUC'S JURISDICTION.

A. CCTA Agrees with the Small LECs that Federal Law and FCC Precedent Constrain the CPUC's Authority.

The Small LECs correctly note that "Commission lacks jurisdiction to implement affordability metrics for unregulated broadband services."[2] CCTA agrees. The California Public Utilities Commission's ("CPUC" or "the Commission") regulatory authority over broadband internet access services remains subject to key federal limitations. First, broadband internet access services are *interstate information services,* and are not intrastate services or telecommunications services. By definition, the Commission cannot include broadband services as part of "Telecommunications essential service." The scope of this proceeding is limited to utility services, and broadband service is not a utility service.

Second, while the Staff Proposal would not immediately impose any regulatory obligations on broadband providers and services, its proposed treatment of broadband services as "utility" services—and its incorporation of such services within the Commission's affordability framework— is not only unlawful, it also creates a high risk that the proposal could lead the Commission into conflict with these federal-law limitations in specific future applications of the framework. Indeed, the Staff Proposal envisions use of broadband affordability framework for the California Advanced Services

[2] Small LECs Opening Comments at 6

Fund program,[3] Staff discussed ongoing data collection of broadband pricing at the recent workshop, and the ALJ Ruling seeks comment on how the CPUC will "monitor and track" affordability and how the "affordability metrics be utilized"[4]—all of which indicate that the Commission is contemplating future applications of the broadband affordability framework, which would inevitably conflict with federal law.

Precisely because of the limits on the CPUC's jurisdiction over broadband, CCTA and others have urged the Commission to focus this proceeding on services within its jurisdiction, as the usefulness of expanding the scope of the affordability framework to non-jurisdictional services, such as broadband internet access, is severely limited, and risks embroiling the Commission in legal disputes that will detract from the Commission's stated goal and effectiveness of any framework that the Commission may adopt.[5]

B. Contrary to TURN's Allegations, the Federal Telecommunications Act of 1996 Does Not Give the Commission Affirmative Authority over Broadband Internet Access Services.

The Utility Reform Network ("TURN"), in particular, asserts that concerns about federal preemption of the Commission's jurisdiction over broadband are "irrelevant"[6]

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[3] Staff Proposal at 31.

[4] ALJ Ruling at 2.

[5] *See* Post-Workshop Comments of the California Cable and Telecommunications Association ("CCTA Comments") at 1-3, 13-14; *see also* Post-Workshop Reply Comments of the California Cable and Telecommunications Association ("CCTA Reply Comments") at 1-2, 8-10; *cf.* Reply Comments of the Small LECs on Selected Proposals and Questions in Attachment J to Administrative Law Judge's Ruling Adding Workshop Presentations into the Record and Inviting Post-Workshop Comments ("Small LECs Reply Comments") at 4.

[6] Opening Comments of The Utility Reform Network on Staff Proposal on Essential Service and Affordability Metrics ("TURN Comments") at 12 n.17.

because, in TURN's view, Section 706 of the Federal Telecommunications Act of 1996 ("Section 706") endows state commissions with affirmative authority over broadband on which the CPUC can rely.[7] TURN also suggests that the Commission relying on Section 706 to encourage deployment advanced telecommunications capabilities is within the scope of this proceeding. TURN's proposals are not consistent with *current* law and they otherwise ignore what the Commission has stated it intends to do in this proceeding.

TURN bases its assertion about Commission authority under Section 706 on the D.C. Circuit's 2014 decision in *Verizon v. FCC*, which it claims recognized this interpretation of Section 706.[8] Adopting TURN's theory as a predicate for any Commission action in this proceeding would be legal error. *Verizon v. FCC*, which relied on the FCC's then-effective interpretation of Section 706, is no longer good law, as the FCC's subsequent decision in *In the Matter of Restoring Internet Freedom*[9] ("*RIF Order*") disavowed and superseded the underlying legal reasoning to which the D.C. Circuit had deferred in *Verizon*.

Specifically, the *RIF Order* concluded that Section 706 is *not* an affirmative source of authority for itself or state commissions:

> [W]e conclude that *section 706 does not constitute an affirmative grant of regulatory authority*, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law. . . . Finally, insofar as we conclude that section 706's goals of encouraging

[7] TURN Comments at 14-15.

[8] 740 F.3d 623, 636 (D.C. Cir. 2014).

[9] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018).

> broadband deployment and removing barriers to infrastructure investment are best served by preempting state regulation, *we find that section 706 supports (rather than prohibits) the use of preemption here*.[10]

The *RIF Order*'s interpretation of Section 706 binds the CPUC even while under review.[11] Because the CPUC has no affirmative federal-law source of authority under Section 706 of the Communications Act (or elsewhere), the Staff Proposal's inclusion of broadband services as a "Telecommunications essential service" within its framework for evaluating "utility" services cannot be grounded in any authority delegated to the Commission by federal law.

C. The Commission Should Remain Mindful of Federal-Law Limitations on Any Future Actions under the Staff Proposal.

TURN's proposal ignores comments identifying current limitations resulting from the *RIF Order.*[12] Specifically relevant here is the fact that the *RIF Order* expressly preempts "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*; these include "any so-called 'economic' or 'public utility-type' regulations including common-carriage requirements akin to those found in Title II

[10] *RIF Order* at 311 ¶ 195 n.731 (emphasis added).

[11] *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) ("The Hobbs Act provides a framework for determining the validity of final FCC orders, a framework that grants exclusive jurisdiction to the circuit courts. *See* 28 U.S.C. § 2341 et seq."); *see also* 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

[12] CCTA Reply Comments at 8-10; Small LECs Reply Comments at 4.

of the Act and its implementing and rules" as well as "other rules or requirements . . . [that] could pose an obstacle to or place an undue burden on the provision of [broadband Internet access services] and conflict with the" the federal policy of deregulation.[13] These provisions of the *RIF Order* substantially limit the authority of state commissions to impose regulatory obligations on broadband providers and services, and are binding upon the CPUC.[14] Including broadband service as a "telecommunications essential service" is problematic as it seems to subject broadband service to the Commission's regulatory framework - in that it implies it is a "telecommunications service," as well as an "essential service."

Further, the *RIF Order* preempts "any state laws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule" adopted by the FCC.[15] Accordingly, any requirement by a state commission that broadband providers submit or report data different from the disclosures required by the FCC would be impermissible under the FCC's current framework.[16]

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[13] *RIF Order* at 311 ¶ 195.

[14] 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

[15] Id.

[16] *New Cingular Wireless PCS, LLC v. Picker*, 216 F. Supp. 3d 1060 (N.D. Cal. 2016), is not to the contrary. In *New Cingular Wireless*, the court determined that a CPUC reporting requirement did not conflict with any then-current federal policies. Since then, the FCC has adopted the *RIF Order*, which expressly adopts a federal policy of preempting state disclosure requirements beyond those set forth in the *RIF Order* itself, superseding any federal policies previously in effect on which the *New Cingular Wireless* court had relied.

These restrictions underscore the limited value of including broadband within the CPUC's affordability framework. The range of actions the Commission can take with respect to the pricing, data collection, and terms of service for broadband internet access services is significantly constrained, and irrespective of whether the Commission has the authority to consider such services for limited purposes within the narrow confines of specific programs or authorizations, the inclusion of broadband within the Commission's affordability framework heightens the risk that future applications of the framework will lead to legal challenges.

The inclusion of broadband internet access services within the affordability framework also raises concerns about how the Staff Proposal, if adopted, would be administered going forward. The data request that preceded the Staff Proposal, paired with statements by Staff at the workshop regarding ongoing data collection, raises the possibility that the inclusion of such services within the affordability framework could ultimately lead to the unlawful imposition of mandatory data submission and reporting requirements for broadband providers.

In light of the limits on the CPUC's authority over the pricing, terms, and conditions of broadband internet access services (an interstate information service), CCTA encourages the CPUC to reject Staff's proposal to include broadband service as a "telecommunications essential service," and in any event, decline to create any new reporting or data submission requirements for broadband providers, and to proceed cautiously with any application of the framework to generate any new regulatory or

reporting requirements.[17] Any such requirements would invite legal disputes and create litigation risk and delay that could frustrate future Commission policy objectives.[18]

II. OPENING COMMENTS DEMONSTRATE THAT THE PROPOSED AFFORDABILITY FRAMEWORK IS SUBJECTIVE AND DUPLICATIVE, ESPECIALLY AS APPLIED TO TELECOMMUNICATIONS

As the Commission recognized in the Scoping Memo, telecommunications services are not like other services at issue in this proceeding, and as such, the Commission will need to be cautious in considering how its affordability metric

[17] For example, the Staff Proposal contemplates using Public Use Microdata Samples ("PUMS") associated with a single Public Use Microdata Area (PUMA) for household samples, because "[w]hile PUMAs are larger than census tracts or block groups, PUMS data provide census responses from individual households." Staff Report at 16. Although the Commission is of course free to consult publicly-available data or conduct consumer surveys, any mandatory data-collection from broadband providers risks conflicting with federal law and exceeding the scope of the Commission's jurisdiction.

[18] The Commission should also be mindful of federal constraints on its authority with respect to interconnected VoIP services. The FCC has consistently rejected attempts to subject VoIP to the same regulatory regime as traditional telephone service and preempted state commissions from regulating over-the-top nomadic VoIP as a public utility. *See, e.g., Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 ¶ 1 & n. 78 (2004) ("*Vonage Order*"), *aff'd, Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Pulver Ruling*, 19 FCC Rcd 3307 (2004).

Moreover, a federal court of appeals recently held, "[i]n the absence of direct guidance from the FCC," that a fixed, interconnected VoIP service is an "information service" under the federal Communications Act. *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (application for rehearing en banc denied; petition for certiorari pending sub nom. *Dan M. Lipschultz et al.* Accordingly, the Eighth Circuit determined that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law." *Id.* at 718 (*quoting Minnesota Pub. Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)

/framework could be applicable in terms of telecommunications services. The August 26 workshop discussion and opening comments confirm the complexity, unworkability and unreliability of the proposed affordability framework, especially in the telecommunications context. Parties point out a wide range of flaws with the proposed metrics – no objective definition of "substantial hardship,"[19] inconsistent and subjective values in defining "essential,"[20] failure to include non-utility essential costs,[21] unreliable or inadequate data sources,[22] significant geographic variables,[23] and differing views of a household,[24] to name just a few.

Comments also reveal the significant barrier to setting forth a level of essential service for broadband with any degree of objectivity. For example, the Public Advocates Office ("Cal PA") proposes a broadband essential use standard of 70/5 Mbps without any discussion of why this level of service is essential.[25] Similarly, TURN's misguided suggestion to remove data caps for fixed broadband[26] lacks factual grounding and

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[19] Comments of Small LECs at 4.

[20] Comments of Center for Accessible Technology at 2 ("Customers must have access to this essential quantity of utility service at an affordable rate, but this does not mean that customers should be able to consumer unlimited services without incurring substantial costs." Comments of AT&T at 2 (entertainment video such as Netflix is not essential; water metric requires consumers to conserve water).

[21] Comments of TURN at 4 to 8.

[22] Comments of TURN at 1 and 10 (developing metrics could become "futile exercise"). Comments of Small LECs at 5.

[23] Comments of Small LECs at 1.

[24] Comments of CalPA at 5. Comments of TURN at 15 to 17.

[25] See Cal PA Opening Comments at 19-20.

[26] TURN Opening Comments at 15.

presents no explanation of how this unlimited data proposal relates to an "essential" level of service.

Moreover, Cal PA's, TURN's, and Greenlining's suggestions for defining essential service conveniently ignore that the Commission has already defined an essential level of service for the type of communications services within its jurisdiction. In 2012, the CPUC defined basic telephone service—those services essential to meet universal service needs—in Decision 12-12-038. Given that the parameters of basic service, which is service "essential to meet universal service needs," has already been defined by the Commission in D.12-12-038, there is no need or basis to expand the "essential service" definition here.

III. COMMENTS PROPOSING VAGUE AND EXTRA-JURISDICTIONAL IMPLEMENTATION OF THE AFFORDABILITY FRAMEWORK, HIGHLIGHT THE FLAWS IN STAFF PROPOSAL

The OIR states that the Commission's intent is to develop tools to allow it to assess affordability issues.[27] Further, the Scoping Memo recognizes that telecommunications services are not regulated in the same way as other utility services.[28] Despite all of this, certain parties put forth proposals for developing and/or implementation of an affordability framework in the context of telecommunications services without recognizing the unique nature of telecommunications law, policy, and business environment in which telecommunications companies operate.

[27] OIR (R.) 18-07-006 at 2 and 11.

[28] Scoping Memo at 3.

As an illustration, Greenlining presents a series of proposals that are vague, nebulous, and misplaced. Greenlining asserts that "affordability metrics could help policymakers ensure policy interventions designed to ease utility and communication costs."[29] Similarly, Greenlining proposes that communications providers would or could somehow "use affordability data to direct advertising and outreach to areas that would benefit the most from their services."[30] Again, the purpose of the OIR is to determine if the Commission can determine a metric that *it* could use to evaluate the "cumulative bill impacts since a customer often pays for electricity, gas, water, and telecommunications services under a single household budget,"[31] and not to help service providers market their services. Greenlining also proposes that the Commission could use an affordability metric when reviewing CASF applications to analyze nuances and impact of different pricing structures on consumers' decision-making process.[32] However, such analysis is neither within the scope of the Commission's jurisdiction or of this proceeding.[33] These proposals highlight that the affordability framework set forth in the Staff Proposal is ill-suited for the telecommunications industry, and should be rejected.

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[29] Greenlining Opening Comments at 4. Greenlining also based it's proposal for yearly updates to affordability data/metric on the grounds that it would assist those drafting legislation and give consumers, academia and other stakeholders of the costs of living in different areas of California. Id. 2. Needless to say, that proposal is not consistent with the goal of the OIR which is to develop a tool that the *Commission* can utilize. Moreover, the Commission is not charged with creating and publishing data that others may utilize in advancing legislation and their policy positions.

[30] Greenlining Opening Comments at 4.

[31] Scoping Memo at 3.

[32] Greenlining Opening Comments at 5.

[33] Scoping Memo at 2. Similarly, an affordability metric as contemplated by the OIR and Scoping Memo could not be used to determine if a broadband adoption project "is in a community with socioeconomic barriers to adoption."Greenling Opening Comments, at 5.

IV. AFFORDABILITY FOR INTRASTATE TELECOMMUNICATIONS SERVICE SHOULD BE ADDRESSED IN PUBLIC PURPOSE PROGRAM DOCKETS.

To the extent the CPUC wishes to adopt an affordability framework for telecommunications services, it should do so in the LifeLine proceeding. Pursuing this approach is not only consistent with CPUC precedent, and the approach of other government agencies,[34] it is also a better vehicle to addressing commenters' recommendations. In this regard, Greenlining suggests that data from pilot projects being considered in the LifeLine proceeding – such as how varying the size of the discount could impact overall affordability – could be used.[35] While the Scoping Memo excludes from this proceeding the "[e]valuation of the effectiveness of existing affordability programs,"[36] CCTA agrees that affordability issues related to telecommunications services should be addressed in a LifeLine proceeding – as the Commission has already committed to doing in Decision 16-12-025.[37]

[34] Notably, the "essential service" level for telecommunications service adopted in the Staff Proposal, is taken directly from an order issued by the Federal Communications Commission in its Lifeline proceeding — the proceeding in which affordability is appropriately analyzed.

[35] Greenlining Opening Comments at 6.

[36] Scoping Memo at 4-5.

[37] OIR (R.) 18-07-006 at 2 and 11.

V. CONCLUSION

CCTA appreciates the opportunity to submit reply comments concerning the Staff Proposal and urges the Commission to only take action in this proceeding consistent with the positions set forth in CCTA's Opening and Reply Comments.

Respectfully submitted,

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