

**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 GREENLINING INSTITUTE
TO THE ADMINISTRATIVE LAW JUDGE'S RULING INVITING COMMENTS ON
STAFF PROPOSAL**

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I. INTRODUCTION

The Greenlining Institute (Greenlining) provides this reply to the opening comments submitted regarding the Staff Proposal on Essential Service and Affordability Metrics (“Staff Proposal”).¹ As discussed below, the Commission should retain its broadband affordability metrics because federal law does not preempt the creation of these metrics and it is within the Commission’s discretionary powers to measure the cost and affordability of broadband services. Greenlining also suggests alternative models to determine essential service minimums for broadband to reflect actual usage as opposed to subscriptions.

II. DISCUSSION

A. Broadband Affordability is Within the Scope of this Proceeding and Commission Jurisdiction.

1. The Commission Has Jurisdiction to Consider Broadband Affordability.

The Commission has jurisdiction to create broadband affordability metrics contrary to claims from the California Cable and Telecommunications Association (CCTA) and Small LECs.² Statutes implementing California’s public purpose programs delegate the Commission authority to accomplish various program goals. For example, Section 281 of the Public Utilities Code empowers the Commission to identify and prioritize “communities facing socioeconomic barriers to broadband adoption” in administering the California Advanced Services Fund (CASF).³ As part of that delegated power, the Commission has the discretionary authority to consider broadband affordability metrics in executing its duties.⁴ As discussed further below, it is

¹ R.18-07-006, Staff Proposal on Essential Service and Affordability Metrics (filed 8-20-2019) (“Staff Proposal”).

² See TURN Opening Comments at pp. 12-15. *But see* Small LECs Opening Comments at pp. 2, 6, 8; CCTA Opening Comments at p. 6.

³ Cal. Pub. Util. Code Section 281(j)(1).

⁴ See e.g. D.19-02-008, Decision Revising the California Advanced Services Fund Broadband Adoption Account Provisions, R.12-10-012 Appendix I at p. 2 (issued Mar. 1, 2019) (giving preference to communities with some other demonstrated disadvantage which affects broadband adoption). *See also*

appropriate to create consistent affordability metrics in this proceeding to avoid wasting Staff time and resources duplicating the metric creation process each and every time broadband affordability issues arise.⁵

2. Broadband Affordability is Within the Scope of this Proceeding.

The Commission should find that affordability metrics for broadband services are within the scope of this proceeding. Commenters argue that the inclusion of broadband in this proceeding is a “mistake” because broadband service is not a “telecommunications” service under federal or state law and the scope of the proceeding only covers telecommunication services.⁶ This narrow reading of the scoping memo is incorrect and focus on federal classifications is irrelevant as the scoping memo covers broadband services regardless of classification.

This proceeding is scoped to consider: “methods and processes for assessing affordability impacts across Commission proceedings and utility rate requests.”⁷ This language opens the scope of this proceeding to cover the creation of affordability metrics that would be applicable in any Commission proceedings where affordability is a concern, this includes broadband related proceedings. There are several Commission proceedings that revolve around making broadband services more accessible and affordable for residential consumers, therefore, it is appropriately within the scope of the proceeding to consider affordability metrics for broadband service.⁸ This

⁵ For example, proposed legislation would require the Commission to investigate whether a LifeLine subscriber should be allowed to obtain an additional Lifeline broadband subscription, broadband affordability could be an important part of that investigation. *See* Senate Bill 704 (2019) *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB704.

⁶ CCTA at pp. 2-3, 6.

⁷ Assigned Commissioner’s Scoping Memo And Ruling at p. 2 (“Scoping Memo”).

⁸ “Although the Commission does not regulate rates for all telecommunications services, the Commission oversees a number of low-income and universal access programs for telecommunications services and also imposes surcharges for these programs.” Scoping Memo at p. 3.

holds true regardless of whether broadband is classified as an information as opposed to telecommunication service.

CCTA also argues that broadband is outside the scope of this proceeding because broadband is not mentioned once in the scoping memo.⁹ However, the scoping memo incorporates by reference “the consideration of the questions set forth on pages 11-12 of the OIR.”¹⁰ One question from the OIR specifically asks: “[a]re there any water, energy, *broadband/internet access*, or telecommunications services for which an affordability assessment should not be made?”¹¹ As a result, arguments from CCTA that broadband service must be excluded from this proceeding because it does not mention “broadband” must fail for reading the scoping memo too narrowly.¹²

3. Broadband Affordability Metrics Have Multiple Beneficial Uses.

CCTA argues pricing and affordability data is not useful for Commission proceedings because it has no jurisdiction over rates, that there is no way to implement broadband affordability metrics in a practical way and that it is nearly impossible to envision an affordability metric in the context of telecommunication services.¹³ The Commission should reject these arguments because affordability metrics can be useful in several ongoing Commission proceedings.¹⁴ In the CASF proceeding, the Commission has attempted to figure out a way to prioritize areas to receive grant funding several times¹⁵ and the most recent CASF statute requires the Commission to prioritize adoption account funds for communities facing

⁹ CCTA at p. 6.

¹⁰ Scoping Memo at p. 2.

¹¹ Order Instituting Rulemaking to Develop Methods to Assess the Affordability Impacts of Utility Rate Requests and Commission Proceedings at p. 11 (“OIR”)(emphasis added).

¹² CCTA at p. 6

¹³ CCTA at pp. 7, 2-3, 10

¹⁴ See The Greenlining Institute’s Opening Comments at pp. 4-7.

¹⁵ See CASF Workshop on Reform Report May 25, 2017 (describing previous prioritization efforts) available at <https://www.cpuc.ca.gov/General.aspx?id=9226>.

socioeconomic barriers to adoption – a category of consumers that can be identified with affordability metrics.¹⁶ Greenlining finds that it is quite possible to envision the implementation of affordability metrics in that context.

Furthermore, CCTA notes that any discussion of affordability for telecommunication services should be confined to the Lifeline proceeding.¹⁷ These comments misunderstand the purpose of this proceeding which is to create the metrics and essential service minimums which can then be applied in a consistent manner in other proceedings such as LifeLine and CASF.

B. Collecting Broadband Data and Creating Affordability Metrics is within Commission Jurisdiction and is Not Preempted by Federal Rules

CCTA and Small LECs argue that the FCC has preempted California from measuring the affordability of broadband services.¹⁸ The Commission should reject these arguments. The creation of affordability metrics for broadband does not constitute utility-style regulation, and is not pre-empted by federal law because it is consistent with FCC requirements outlined in the FCC’s Restoring Internet Freedom Order.¹⁹

1. The Federal Rules Require ISPs to Disclosures Pricing and Performance Data, These Disclosures Do Not Place Undue Burdens on ISPs.

CCTA claims “requiring broadband data collection, as Staff proposes, would impose requirements that the RIF Order repealed” and further claims the FCC modified its transparency rules to remove reporting requirements, including disclosures regarding prices and fees and performance characteristics.²⁰ However, this reading of the RIF Order is misleading at best because the order did not repeal or prohibit the collection of the data at issue here. As shown below, the RIF Order

¹⁶ Cal. Pub. Util. Code Section 281(j)(1).

¹⁷ CCTA at pp. 7, 11

¹⁸ CCTA at p. 3-4.

¹⁹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, 33 FCC Rcd. 311 (2018) (“RIF Order”).

²⁰ CCTA at p. 5, n.12.

specifically *retained* disclosures regarding service and pricing noting that it benefited consumers and informed the Commission without placing an undue burden on ISPs.²¹

221. *Performance Characteristics.* In the Open Internet Order, the Commission required ISPs to disclose a service description as well as the impact of specialized services (non-broadband Internet access service data services) on performance. We find that the Open Internet Order's performance metric disclosures benefit consumers without placing an undue burden on ISPs.

222. We specifically require all ISPs to disclose:

- *Service Description.* A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.

223. *Commercial Terms.* In the Open Internet Order, the Commission required ISPs to disclose commercial terms of service, including price, privacy policies, and redress options. The record in this proceeding supports retaining these disclosures. These disclosures inform the Commission, consumers, entrepreneurs, and other small businesses about the parameters of the service, without imposing costly burdens on ISPs. We therefore require ISPs to make the following disclosures:

- *Price.* For example, monthly prices, usage-based fees, and fees for early termination or additional network services²²

The FCC noted that these disclosures “provides sufficient information for the Commission to meet its statutory requirements. . . while minimizing costly and unnecessary burdens on ISPs.”²³ In fact, the RIF Order repeatedly states that disclosing pricing and performance data does not constitute an undue burden for ISPs.²⁴ As a result, the Commission should reject arguments that affordability reporting requirements are too burdensome for providers.²⁵

²¹ RIF Order paras. 221-223.

²² *Id.*

²³ RIF Order at para. 224.

²⁴ RIF Order at paras. 221-24.

²⁵ See Small LECs at p. 6. See also CCTA at p. 5 (requiring broadband data collection, as Staff proposes, would impose requirements that the RIF Order repealed, and places an undue burden on broadband service providers).

2. Federal Preemption Does Not Apply Because Creating Broadband Affordability Metrics Does Not Constitute Utility-Style or Economic Regulation and Does Not Impose More Stringent Requirements than Federal Regulations.

CCTA and Small LECs argue that the Commission is preempted from collecting broadband data,²⁶ however, the Commission should find that data collection of the sort contemplated in this proceeding does not impose more stringent requirements than what the FCC imposes and is therefore permitted. The RIF Order states:

*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 or that would impose more stringent requirements for any aspect of broadband service that we address in this order.*²⁷

*This includes 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 we adopt herein.*²⁸

As discussed above, the FCC's disclosure requirements covers both pricing and performance characteristics data. As a result, the Commission can request this same type of data from ISPs operating in California because it is not imposing additional stringent rules or requirements than the FCC. In terms of the form of affordability data disclosures, the Commission should allow this data to be transmitted directly to the Commission or through a publicly available and accessible website – with the caveat that the data must be accessible or organized in a manner and format that Staff deems necessary to calculate and create the affordability metrics (i.e. machine readable, organized by PUMA, etc.).²⁹

The Commission should also reject arguments from CCTA and Small LECs stating that the Commission cannot collect broadband data or even create affordability metrics as it would constitute utility-style, or economic regulation that is preempted by the RIF order.³⁰ The creation

²⁶ Small LECs at pp. 6-7, CCTA at pp. 4-5.

²⁷ RIF Order at p. 195.

²⁸ RIF Order at 195 n. 729.

²⁹ See RIF Order at para. 229.

³⁰ CCTA at p. 4.

of metrics and data collection contemplated in this proceeding does not rise to that level and is therefore not preempted. The FCC described utility-style and economic regulation as follows:

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; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements.³¹

Data collection does not fall under any of the aforementioned categories. Merely collecting and reporting on the cost and affordability of broadband services does not impose any requirements that rates be just and reasonable nor does it impose accounting requirements which generally refers to reports regarding liabilities, salaries and expenses.³² Additionally, as described above, the RIF Order specifically requires ISPs to disclose the same data at issue in this proceeding, so it is unlikely data disclosures would constitute prohibited utility style regulation. Since the data collection and affordability analysis contemplated in this proceeding does not rise to the level of economic regulation, nor does it impose requirements more stringent than FCC regulations – the Commission should find that calculation of broadband affordability is not preempted by federal regulations.

C. The Commission Could Revise Essential Service Minimums to Reflect Usage Averages.

Several commenters noted that the essential service quantities for broadband service are not based on actual usage data.³³ Greenlining continues to support Staff’s use of essential service data minimums because they reflect the service levels that the majority of Americans believe is necessary, this method also avoids the difficulties in calculating and deciding whether each use case can be

³¹ RIF Order at para. 195 n. 730.

³² See e.g. FCC, Comprehensive Review Of The Accounting Requirements And ARMIS Reporting Requirements For Incumbent Local Exchange Carriers: Phase I, 5 FCC Rcd 8690 (2000) available at <https://www.fcc.gov/document/comprehensive-review-accounting-requirements-and-armis-reporting-1>

³³ CCTA at pp. 2-3, AT&T Opening Comments at p. 2.

deemed essential.³⁴ For example, AT&T notes that 80% of broadband usage is for video and goes on to claim that most of it is for entertainment.³⁵ However, it is difficult to tell which household is using video for entertainment as compared to the household that is using it to learn a new skill or trade. To avoid these issues, the Commission should retain the standards it developed in the proposal, or in the alternative, base the data usage standards on what the average household uses. Should the Commission consider this alternative, the OECD has collected mobile data usage for the United States over the past three years and Cisco creates a data consumption forecast every five years.³⁶ These data sources are not as consistently updated in comparison to the method outlined in the staff proposal but they may provide an alternative model to determine essential service minimums.

III. CONCLUSION

The Greenlining Institute appreciates this opportunity to reply to the issues raised on opening comments to the staff proposal and looks forward to continuing to work with the Commission and other stakeholders to develop a metric for affordability that works across industries. Greenlining respectfully requests that the Commission adopt the above recommendations.

³⁴ Opening Comments Of The Greenlining Institute to the Administrative Law Judge's Ruling Adding Workshop Presentations To The Record And Inviting Post-Workshop Comments (filed May 13, 2019) at p. 7.

³⁵ AT&T at p. 2.

³⁶ OECD data is available at <https://www.oecd.org/internet/broadband/broadband-statistics/>; for an interactive view of Cisco data please navigate to https://www.cisco.com/c/m/en_us/solutions/service-provider/vni-forecast-highlights.html alternatively a static view of data usage is available at https://www.cisco.com/c/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/United_States_2022_Forecast_Highlights.pdf;

Respectfully submitted,

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