

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Address
Affordability Framework.

Rulemaking 18-07-006

**MOTION OF THE PUBLIC ADVOCATES OFFICE
TO COMPEL RESPONSES TO DATA REQUESTS
FROM AT&T INC, COMCAST PHONE OF CALIFORNIA LLC.**

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Pursuant to Rule 11.1 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure (Rules), and California Public Utilities Code (Pub. Util. Code) §§ 314(a), 314(b) and 309.5(e), the Public Advocates Office at the California Public Utilities Commission (“Public Advocates Office”) hereby moves for an order compelling Pacific Bell Telephone Company dba AT&T California(U-100-C) and AT&T Corp (U-5002-C) along with all their affiliated companies (AT&T), and Comcast Phone of California, LLC (U-5698-C. “Comcast”) to provide certain information and respond to data requests that the Public Advocates Office propounded in this proceeding.

The motion also seeks an order directing said communication companies to recognize that the Public Advocates Office’s right to discovery under the Pub. Util. Code is coextensive with the discovery rights of the Commission. AT&T and Comcast should be directed to state in their further responses to the Public Advocates Office discovery that said responses are being made pursuant to Public Utils. Code §314 and §581.

This motion is timely in light of the Assigned Commissioner’s Amended Scoping Memo and Ruling issued on November 8, 2019, confirming the Commission’s jurisdiction over the activities of the communication companies within the State. AT&T and Comcast have continually asserted a lack of jurisdiction in this proceeding, and in

objections to other discovery requests from the Public Advocates Office. Efforts to obtain information to determine whether service obligations have been met during emergencies are tied up in discovery disputes, most recently in the Emergency Disaster Relief proceeding (R.18-03-011).

The Public Advocates Office has met and conferred variously with AT&T,¹ Comcast, Charter Fiberlink CA-CCO, LLC (U-6878-C) and Cox California Telcom, LLC (U-5684-C).² However, AT&T and Comcast continue to resist providing the information requested. They have frustrated the purpose of the data request which was to comparatively evaluate current prices telecommunication companies charge. Unless the Commission addresses AT&T's and Comcast's discovery objections, the Public Advocates Office will not obtain the most current data from them to continue this evaluation.

I. BACKGROUND

The Public Advocates Office issued data requests in this proceeding to all communication companies offering broadband service to California customers, as well as services bundled with broadband,³ to better understand the true prices of their bundled services. The Public Advocates Office sought to compile representative prices of bundles in order to examine their affordability, in the affordability framework proceeding. The representative prices of communication services in widespread use (what most consumers purchase) today are a significant data set for consideration of affordability.

Thus, the Public Advocates Office asked these communications providers to provide the price of residential broadband service, by defining 35 representative home

¹ Meet and confer with AT&T on March 13, 2019, with Cox on April 19, 2019 and with Charter and Comcast on April 25, 2019.

² Meet and confer with Cox on April 19, 2019 and with Charter and Comcast on April 25, 2019.

³ The communications providers included DIVCA Statewide Franchise Holders (companies providing video, traditionally cable companies but now also phone and ISPs), CPCN holders (traditional phone companies and competitive phone companies), and also companies reporting broadband deployment and subscriptions to the Commission for purposes of determining where CASF subsidies should be given (generally companies in the first two categories, but also Internet Service Providers). The data requests that form the basis for this motion are attached as exhibits.

broadband bundles, 33 representative prepaid mobile broadband bundles, and the same 33 representative postpaid mobile broadband bundles. The request asked for one price (the lowest) in each representative bundle.

AT&T and Comcast submitted responses, objecting in large part to the data requests and arguing that the Commission has no jurisdiction over the services that form the basis for the request.

AT&T responded on January 30, 2019 asserting the following objections:

“AT&T objects to the reference to “broadband,” “mobile,” “TV,” or “VoIP,” services since the Commission lacks jurisdiction to regulate the rates or provision of said services, or to attempt to regulate said services by allowing intrusive discovery regarding such services.” p.8

“AT&T objects to the extent any request, definition, or instruction seeks documents or information about services or business activities that are not subject to the jurisdiction of the Commission, because such request is irrelevant, overly broad, unduly burdensome, and oppressive.” p.3

“AT&T objects to each request to the extent it purports to apply to any person, entity, or service that is not subject to the jurisdiction of the Commission.” p.4

Comcast objected largely on the same grounds, but further asserted that the Public Advocates Office should endeavor to compile the information requested by looking at Comcast’s website. Specifically, Comcast’s primary objection stated:

Comcast Phone objects to the extent the DR would require it to compile publicly available pricing information when the burden and expense of preparing such a compilation would be substantially the same for the Public Advocate’s Office as it would for Comcast Phone. Comcast Phone further objects to the extent the DR seeks pricing information from Comcast Phone’s non-jurisdictional affiliates. Pricing for these non-jurisdictional affiliates’ services are beyond the stated scope of this proceeding. Moreover, the Commission lacks the requisite authority over the pricing of VoIP and IP-enabled services, as set forth in Public Utilities Code Section 710, and

further lacks authority over pricing of video services under Public Utilities Code § 5820(c). The Commission further lacks requisite authority over the interstate and information services about which the DR seeks data.⁴

Charter, acting through its outside counsel Perkins Coie sent a letter objecting to the entirety of the data request.

The Public Advocates Office sent a letter to AT&T's counsel David Discher on March 6, 2019, seeking to meet and confer regarding AT&T's objections to the Public Advocates Office Data Request No. 1 ("DR-1"). On March 29, 2019, the Public Advocates Office also sent similar meet and confer letters to Comcast's counsel Zeb Zankel and Charter's counsel James W. McTarnaghan.⁵ The letters informed the respondents that Public Utilities Code §314 authorizes the Public Advocates Office to obtain information from communication companies without regards to jurisdiction.⁶ Further, both State and Federal Courts have held that a State agency may obtain information for regulatory and administrative purposes from entities whose services are not subject to the agency's jurisdiction, provided the information obtained is not used for a preempted purposes.⁷

"Courts will not presume that the information sought by state officials for which there is a legitimate purpose will be put to an unconstitutional use."⁸

⁴ Comcast Phone of California, LLC Response to Public Advocates Office Data Request No. 1, (January 30, 2019).

⁵ In addition to these three telecommunication companies, the Public Advocates Office also sent meet and confer letters to Cox Communications, Inc., T-Mobile, U.S. Cellular, and Cebridge, Comcast counsel, Zeb Zankel, also represents U.S. Cellular and largely took the same position with U.S. Cellular as he took with Comcast. Cox, U.S. Cellular, and T-Mobile provided adequate responses. Copies of these letters will be made available upon request subject to the confidentiality protocols that might attach to discussions and concessions made in them.

⁶ See *Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042*, (I.15-11-007).

⁷ See *Lewis v. Younger*, 653 F.2d 1258 (1980); *Moriconi v. AT&T Wireless PCS LLC*, 280 F.Supp.2d. 867 (2003).

⁸ *Lewis v. Younger*, 653 F.2d at 1260, citing *Natural Gas Pipeline Co. v. Slaterry*, 302 U.S. 300, 309, 58 S.Ct. 199, 203, 82 L.Ed. 276 (1937).

Regarding the objection that the Public Advocates Office can compile the information requested in DR-1 by looking at the communication companies' public websites, the meet and confer letters noted that Public Utilities Code §581 and §582 directs utilities to provide information and documents requested by the Commission in such form and manner as the Commission may require.

On March 13, 2019, the Public Advocates Office held a telephone meet and confer with AT&T, whereupon AT&T repeated the objections in its response to DR-1. The Public Advocates Office noted that there were several problems with having its staff try to obtain that information from AT&T's public websites, notwithstanding the fact that California law requires the AT&T to provide that information upon request. Further, the Public Advocates Office noted that the presentation of pricing on the AT&T website does not provide all relevant combinations of service bundles and speeds. Websites also produce selective company information that are in no way responsive to the data requests or comparable to other communication companies' information. For instance: What is the lowest price for the user-defined combination of services at the user-defined speed across all communication companies?

Second, the Public Advocates Office reminded AT&T that any information obtained by the Public Advocates Office from AT&T's publicly available website would not be helpful in any administrative or judicial proceeding seeking to use that information to establish policy, because AT&T could impeach the information as unverifiable and disavow the manner in which the information was collected.

AT&T requested further narrative explanations for the information requested in DR-1, which the Public Advocates Office provided in writing on March 15, 2019. Throughout April, the Public Advocates Office exchanged approximately ten emails and phone calls with AT&T, continuing to point out missing information. As of May 1, 2019, AT&T had still not complied with these data requests.

On April 24, 2019, the Public Advocates Office met with Comcast counsel, Zeb Zankel, and Charter counsel, James W. McTarnaghan, at the offices of the Commission on Van Ness Avenue. A member of Charter's staff, Mr. Mark Brown, participated by

telephone from Washington, D.C. However, the parties could not resolve their impasse. Comcast and Charter proposed an alternative to DR-1, which they outlined in a letter from Mr. Zankel.

I am writing to describe the proposal of Comcast/Charter outlined in our meet and confer last week. As Comcast/Charter explained in our meeting, PAO's Chart attached to the data request seeks non-jurisdictional information that is outside the scope of the Affordability docket. Moreover, the Chart does not align with how the companies price their services (e.g. mismatched speed tiers). In addition, it seeks superfluous information given the simple pricing structure for certain services (e.g. mobile). To lessen the unnecessary burden associated with compiling publicly-available pricing data and avoid complications for the PAO that may arise from the companies' attempt to fill out the chart, the companies each propose to provide the following:

- Rate card for a major California market, which contains comprehensive rack rate pricing for companies' voice, video and internet services;
- List of key pricing for new customer offers;
- Price for installation and re-activation charges;
- Price for low-income offering; and
- Prices for mobile service.

Please confirm that this data would satisfy Cal PA's concerns presented through the meet and confer process.²

At the meet and confer on April 24, 2019, counsel for Public Advocates Office referred Comcast and Charter representatives to the provisions of Public Util. Code §581 and §582, but both respondents were adamant that those provisions by their reference to the "Commission" did not apply to data requests from the Public Advocates Office.

² Letter of May 1, 2019 from Zeb Zankel to Mr. Obiora, Re: Meet and Confer.

On May 3, 2019, the Public Advocates Office informed Comcast and Charter that the parties were at an impasse and a Commission ruling on the matter would be necessary to resolve the dispute. Charter requested a further extension to discuss the matter internally and subsequently complied. Comcast has still not fully complied. Comcast supplemented its response but failed to provide certain bundles requested¹⁰.

II. ARGUMENT

The Public Advocates Office requests that the Commission direct AT&T and Comcast to provide comprehensive responses the Public Advocates Office DR-1 with the most current pricing information. The Assigned Commissioner’s Ruling and Scoping Memo of November 8, 2019 established that this Commission has jurisdiction over the activities of the telecommunication companies.¹¹ California law provides that telephone corporations and cable communication companies are subject to the jurisdiction of the Commission as “[p]rivate corporations ... that own, operate, control or manage a line, plant or system for ... the transmission of telephone and telegraph messages.”¹² Consequently, respondent’s assertion that the Commission lacks jurisdiction over the issues that form the basis of the Public Advocates Office request is not valid.

AT&T and Comcast seek to avoid Commission jurisdiction by arguing that the broadband services they provide are preempted from Commission oversight, even if the companies themselves are subject to Commission jurisdiction. This argument is untenable, especially where AT&T and Comcast have only been asked to provide information about their services, not change or otherwise affect them in anyway. Further, AT&T and Comcast have not provided any authority to support their claim that any services they provide are preempted from any and all forms of Commission regulatory oversight. However, the Public Advocates Office provided several authorities that

¹⁰ Copies of Comcast’s and AT&T’s Initial and Supplemental Responses are attached hereto.

¹¹ Assigned Commissioner Clifford Rechtschaffen’s Scoping Memo and Ruling, November 8, 2019, Rulemaking 18-07-006.

¹² Art. 12, § 3; Pub. Util. Code §216; D.01-08-062.

establish the right of the Commission to seek information from companies even if the subject of the discovery may be preempted. See *Lewis v. Younger*, 653 F.2d 1258 (1980); *Moriconi v. AT&T Wireless PCS LLC*, 280 F.Supp.2d. 867 (2003).

In *Lewis v. Younger*, the Ninth Circuit Court of Appeals stated that a State official or regulatory agencies' request for information cannot be in violation of federal preemption laws. Further, while the use of such information for a preempted purpose may be unconstitutional, "Courts will not presume that the information sought by state officials ... will be put to an unconstitutional use."¹³

Comcast and AT&T have argued that the data requests they received from the Public Advocates Office must be within the scope of a pending proceeding. This argument is frivolous. The Commission has already established that the Public Advocates Office's authority to seek discovery from utilities extends beyond the scope of one proceeding.¹⁴ As the Commission stated in D.01-08-062, the "scope of authority [Public Advocates Office] to request and obtain information from entities regulated by the Commission is as broad as that of any units of our [Commission] staff, including the offices of the Commissioners."¹⁵

Section 314 provides:

(a) The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths may examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs.

(b) Subdivision (a) also applies to inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, an electrical, gas, or telephone

¹³ 653 F.2d 1258, 1259.

¹⁴ D.01-08-062.

¹⁵ Id.

corporation, or a water corporation that has 2,000 or more service connections, with respect to any transaction between the water, electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the water, electrical, gas, or telephone corporation.

Further, section 581 of the Public Util. Code, provides:

Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission.

Every public utility receiving from the commission any blanks with directions to fill them shall answer fully and correctly each question propounded therein, and if it is unable to answer any question, it shall give a good and sufficient reason for such failure.

These provisions apply for the benefit of the Public Advocates Office whether or not there is a pending proceeding. Indeed, considerations on whether to open proceedings often require preliminary investigations or audits that are done pursuant to these provisions before any proceeding is opened.

Comcast argues that these provisions mention only the Commission and do not apply to the Public Advocates Office. However, in several decisions since 2001,¹⁶ the Commission has consistently stated that the Public Advocates Office has the same authority to discovery as the Commission under the Public Utilities Code.¹⁷

¹⁶ Decision 01-08-062, *Opinion*, In the Matter of Alternative Regulatory Frameworks of Local Exchange Carriers (Investigation 87-11-033); D.06-06-066, *Order Instituting Rulemaking to Implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) Relating to Confidentiality of Information*.

¹⁷ See Decision 06-06-066, p.64.

The word “commission” as used in any provision of the Public Util. Code is the sum of the various divisions within the Commission, and for discovery purposes includes all staff as having the authority within Sections 314 and 581.

In 2001, the Commission unequivocally clarified this issue:

“ORA’s¹⁸ scope of authority to request and obtain information from entities regulated by the Commission is as broad as that of any units of our staff, including the offices of the Commissioners. It [is] constrained solely by a statutory provision that provides a mechanism unique to ORA for addressing discovery disputes.”

ORA’s rights to seek information from entities regulated by this Commission, including Pacific Bell, principally arise from two statutes – Pub. Util. Code §§314 and 309.5.

...

This provision [§314] makes no reference to the need for a proceeding to exist, but is intended to provide access for our staff, including ORA, to undertake audits or investigations, obtain information, and ask questions at any time and for any purpose related to their scope of work on behalf of the Commission and the people of the State of California. By historical evolution, the statutory right to inspect the “accounts, books, papers, and documents” has come to include the right to propound data requests by which the holders of these accounts, books, papers and documents can be compelled to search for and provide these materials or analyze them in some fashion.¹⁹

Notwithstanding this longstanding clarification of the Public Advocates Offices discovery rights, telecommunication companies continue to frustrate the Public Advocates Office’s efforts to understand their continually evolving operational landscape and how it affects California consumers, even on safety matters. Recently, AT&T’s

¹⁸ Office of Ratepayer Advocates; Senate Bill (SB) 854 renamed the “Office of Ratepayer Advocates” to the “Public Advocates Office”. (Chapter 51, Statutes of 2018).

¹⁹ Decision 01-08-062, *Opinion*, In the Matter of Alternative Regulatory Frameworks of Local Exchange Carriers (Investigation 87-11-033).

counsel David Discher requested that the Public Advocates Office re-issue a data request under a particular proceeding number before AT&T could submit a response.²⁰

Therefore, in this motion, the Public Advocates Office requests that the Commission instruct and direct AT&T and Comcast to provide further responses to the Public Advocates Office's data request (DR1) and include language in their responses stating that their responses are being made pursuant to Public Utils. Code §314 and §581.

III. CONCLUSION

For the reasons stated herein, Public Advocates Office recommends that the Commission direct AT&T and Comcast to provide responses to the Public Advocates Office's Data Request (DR1) with information that is current as of the date of their responses, no later than January 2020.

Respectfully submitted,

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²⁰ The Public Advocates Office, represented by Charlyn Hook and Laura Roman, met and conferred with David Discher on Friday, October 25. As memorialized in email of November 6, 2019 from Charlyn Hook to AT&T representatives David Discher, Margaret Thompson and David Miller, Mr. Discher's main objection to the question was that the questions are more appropriately within the scope of a different proceeding.