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 PUBLIC ADVOCATES OFFICE ON THE ADMINISTRATIVE LAW JUDGE'S RULING INVITING POST-WORKSHOP COMMENTS

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I. INTRODUCTION AND SUMMARY

Pursuant to Administrative Law Judge (ALJ) Park's August 20, 2019, Ruling Releasing the Staff Proposal and Inviting Comments (Ruling), the Public Advocates Office at the California Public Utilities Commission (Public Advocates Office) submits these Reply Comments.

The Public Advocates Office corrects several misleading and incorrect statements in the Opening Comments submitted by California Cable and Television Association (CCTA), AT&T.[1] Further, the Public Advocates Office agrees with the California Community Choice Association (CalCCA) that the affordability indicators should be assessed cumulatively across proceedings and over time, though with specific industry focus, to provide a more meaningful indication of changes to affordability than considering any one rate change in isolation.

[1] Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) and its affiliates AT&T Corpo. (U 5002 C); Teleport Communications America, LLC (U 5454 C); and AT&T Mobility LLC (New Cingular Wireless PCS, LLC (U 3060 C); AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C); and Santa Barbara Cellular Systems, Ltd. (U 3015 C) are collectively referred to as "AT&T."

II. DISCUSSION

A. The California Public Utilities Commission's Authority to Track Broadband Affordability is not Preempted by Federal Law

CCTA incorrectly claims that the California Public Utilities Commission (Commission) lacks oversight authority to collect and track broadband pricing and affordability[2].

CCTA asserts that "[c]rafting affordability metrics around broadband and implementing broadband data collection strays into the realm of public-utility regulation, which is clearly prohibited under the RIF [Restoring Internet Freedom] Order."[3] Further, they claim that Staff's Proposal "fundamentally misapprehends both the legal landscape and the dynamic, transparent, and competitive nature of broadband pricing."[4] The Commission should direct CCTA to refrain from obstructing this proceeding with its false and misleading assertions that the Commission has no authority to examine the impact of its activities as broadband providers in California.

California's authority to obtain information in aid of the State's administrative and regulatory objectives is not an assertion of jurisdiction. Therefore, it is not preempted by federal law. This authority was settled in the case of *Lewis v. Younger*,[5] wherein the State's Attorney General initiated an investigation into possible State antitrust violations that the Atlantic Richfield Company (ARCO) may have committed in connection with its marketing of Alaskan natural gas in California. ARCO sought an injunction against the State from pursing said investigation, arguing that Alaska Natural Gas Transportation Act[6] preempted the State from bringing antitrust action against the company. The federal district court enjoined California's Attorney General from conducting the investigation,

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[2] CCTA Opening Comments, p. 1

[3] Id., p. 4.

[4] Id., p. 1.

[5] 653 F.2d 1258 (1980)

[6] 15 U.S.C. ss 719-719o

but the Ninth Circuit Court of Appeals lifted the injunction.[7] The Ninth Circuit held that the district court's premise that the State would use the results of its investigation to bring antitrust action is not a proper basis for enjoining the State's administrative and regulatory inquiry.

> The district court's ruling on preemption of the California antitrust laws was premature. By enjoining the Attorney General's investigation at its inception, the district court prevented the Attorney General from conducting an investigation for which there were several proper objectives. Courts will not presume that information sought by state officials for which there is a legitimate purpose will be put to an unconstitutional use. Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 309, 58 S.Ct. 199, 203, 82 L.Ed. 276 (1937).[8]

In arguing that the Commission has no jurisdiction to regulate the prices or provision of "broadband," "Cable" and "VoIP," like the district court in *Lewis v. Younger*, CCTA has "confused the … power to obtain information with the power to regulate" the price terms of these services.

In *Moriconi v. AT&T Wireless PCS, LLC,*[9] the United State District Court specifically addressed congressional intent in preserving a State's authority to regulate significant aspects of the services CCTA claims the Commission is preempted from considering.

> That Congress intended for States to retain some authority to regulate and hear claims concerning commercial mobile service providers is clear from § 332's statutory language and legislative history. The statutory preemption portion of § 332 prohibits states from regulating "the entry of or the rate charged" by commercial mobile service providers, but limits the restriction to the topics noted, pointing out that the paragraph "shall not prohibit a State from regulating the other terms and conditions of mobile service." § 332(c)(3)(A). The

[7] 653 F.2d at 1260, citing *Natural Gas Pipeline Co. v. Slaterry*, 302 U.S. 300, 58 S.Ct. 199, 203, 82 L.Ed. 276 (1937).

[8] Id.

[9] 280 F.Supp.2d. 867 (2003)

> statute even contemplates that states may be granted permission to regulate rates. And the legislative history supports the finding that Congress specifically intended to reserve for states the right to regulate and resolve such matters as customer billing information and practices and billing disputes and other consumer protection matters.[10]

In light of these clear lines of authority, there is no basis for CCTA to assert preemption under the Federal Communications Act as a basis for suggesting the Commission exclude broadband from tracking affordability of essential services. The Commission should establish in this proceeding that CCTA and its member companies have no basis for such assertions. Failing to do so undermines the integrity of the process rather than fosters the objectives and goals the Commission is trying to achieve.

B. The Proposed Broadband Essential Service Levels Are Based on Verifiable Data

The CCTA has no basis to assume that 70 megabits per second (Mbps) overstates the broadband download speeds of a substantial majority of Californians.[11] Comcast incorrectly states that speeds are inflated because "subscribership data only includes the highest subscribed speed per census block or census tract," citing to the Commission's Guidelines for Broadband Data Submission on the Commission website.[12] CCTA's cited source gives no such instruction to report subscribership data at the highest subscribed speed, nor does it instruct companies to report a the census tract level. Instead, the instructions from the Commission's Communications Division Geographic Information System team are:

> "[A]ll communications providers certificated and/or registered with the California Public Utilities Commission (CPUC), that also file Form 477 with the Federal Communications Commission, shall submit annually to the Communications Division by April 1st, broadband subscriber

[10] *Moriconi v. AT&T Wireless PCS, LLC,* 280 F.Supp.2d at 874.

[11] CCTA Opening Comments, p.9.

[12] Id.

> and deployment data at a *Census Block level* as of the prior calendar year's end in a form as designated by Communications Division Staff."[13] (emphasis added)

It is evident that the Commission requires reporting at the Census Block level, not at the tract level, which is less useful because it covers a larger area. In accordance with the instructions and reporting template, companies report broadband speeds at a more granular level than the block; they report speeds for customers by technology type within the block.[14] These instructions do not ask for the highest download speed, but the actual downstream speed the customer subscribes to. Furthermore, it is left to the discretion of the company whether to report the maximum, minimum, or average speed per group of customers per technology per speed. In fact, many companies provide the same census block multiple times with different speeds and subscriber numbers which allows for more accuracy by capturing speeds for smaller groups of customers.

C. The Staff Proposal Correctly Finds That Broadband Speeds Capable of Streaming Video Are Essential Services

AT&T is correct that the Commission should consider broadband uses that are "essential."[15] In fact, the Staff Proposal correctly identifies essential services as including broadband access with download speeds capable of streaming video on at least one device.[16] The ability to stream a video service is a critical component of broadband

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[13] These instructions are originally found in Commission Decision (D.) 16-12-025, Ordering Paragraph 1, and are reprinted on the Commission's website, available here: ftp://ftp.cpuc.ca.gov/Telco/BB%20Mapping/2019/Data%20Request/CPUC%20Broadband%20Data%20Request%202019.pdf

[14] To understand the requirements for reporting speeds, one must refer to the additional instructions, called "Data Format," and reporting template provided by the Commission. The "Data Format" defines the subscriber speeds as, "The downstream speed in Mbps to which the customer in census block subscribes (i.e. 12). You may enter up to 3 decimal places (768 kbps would be entered as .768). instructions and reporting template available here: ftp://ftp.cpuc.ca.gov/Telco/BB%20Mapping/2019/Data%20Request/Data%20Format%20for%20Broadband%20Subscribers%20by%20Census%20Block%202019.pdf

[15] Comments of AT&T on Staff Affordability Proposal, R.18-07-006, July 12, 2019, page 2.

[16] Staff Proposal, page 13.

service which is necessary to take full advantage of the Internet. Video streaming has the same magnitude of importance for broadband service as local calling does for voice service; without it, the service is neutered.

However, AT&T contends that "entertainment video such as Netflix and ESPN+ should not be considered 'essential'"[17] and that "…essential broadband service must be sized by appropriate essential functions rather than being an entertainment service."[18] The word entertainment is not mentioned a single time in the Staff Proposal. Tellingly, the Staff Proposal discusses education, telehealth, safety, and participation in society[19] but AT&T makes no distinctions among streaming video for education, telehealth, safety and participation in society, appearing to conveniently classify all video streaming as entertainment.

The Staff Proposal correctly defines essential service as "service that meets a household's basic needs and is reasonably necessary for that household's health, safety, and full participation in society,"[20] and, further, that telecommunications essential service includes "voice and broadband services required for education; telehealth; safety; and participation in society, such as completing job applications an accessing government assistance programs."[21] Video service is a critical component to every aspect of the telecommunications essential service. The Commission should disregard AT&T's erroneous argument that video over broadband is purely for entertainment purposes. Broadband capable of streaming video service is *the* critical component of broadband service and is, as the Staff Proposal finds, an essential service.

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[17] Comments of AT&T on Staff Affordability Proposal, R.18-07-006, July 12, 2019, page 2.

[18] Comments of AT&T on Staff Affordability Proposal, R.18-07-006, July 12, 2019, page 2.

[19] Staff Proposal, page 5.

[20] Id.

[21] Id.

D. The Commission Should Test Cumulative Bill Impacts in Southern California Edison Company's General Rate Case

In opening comments, the Public Advocates Office recommends using the recently filed Southern California Edison Company (SCE) General Rate Case (GRC) Phase 1 to pilot an affordability framework.[22] In addition to the affordability metrics, the framework should include tracking of indicators such as residential average rate, Tier 1 baseline rate, and average customer bills over time. To the extent that these indicators are used to develop the affordability metrics, they should be disaggregated and available for analysis. The Public Advocates Office further recommends that the Commission simplify the Affordability Ratio (AR) and Hours at Minimum Wage (HM) metric by only reflecting the bill of the specific industry being measured in the numerator and accounting for the combined bills of the remaining utilities in the denominator. In other words, if the energy industry is being evaluated, the metric should be AR = E_{ES}/(IAHC- W_{ES} -T_{ES}).[23] The California Community Choice Association (CalCCA) is correct in noting that assessing these indicators cumulatively across proceedings and over time provides a more meaningful indication of changes to affordability than considering any one rate change in isolation.[24]

Pacific Gas and Electric Company (PG&E) and SCE have recommended including the affordability framework in the Commission's annual reports[25] San Diego Gas & Electric Company (SDG&E) recommends considering affordability metrics as a part of an annual workshop or summit at the Commission.[26] However, in order to be an effective decision-making tool, the affordability framework must be reflective of both the individual rate impacts of a proposal, and the cumulative rate impact of other proposals

[22] Cal Advocates Opening Comments pp. 25-26.

[23] E_{ES}: Annual energy bill; W_{ES}: Annual water bill; T_{ES}: Annual communication bill; Energy bill IAHC = Annual household income subtracting annual housing cost. See Cal Advocates Opening Comments p.6.

[24] CalCCa, pp. 5-6.

[25] PG&E Opening Comments, p. 10; SCE Opening Comments, p. 4.

[26] Joint Comments of SDG&E and SoCalGas, p. 10.

before the Commission. The affordability framework and individual metrics should illuminate the trade-offs across proceedings and do so in a context that can be cited as record evidence by decision-makers. For this reason, the Public Advocates Office supports piloting affordability framework that can demonstrate and reflect updated utility service affordability trends cumulatively as a part of an upcoming or current GRC Phase 1 filing. As stated above and in opening comments, the Commission should test the affordability framework and metrics in the current SCE GRC Phase 1 filing.[27]

III. CONCLUSION

The Commission should approve the recommendation of CalCCA that the affordability indicators should be assessed cumulatively across proceedings and over time, though with specific industry focus but disregard the comments of CCTA and AT&T.

Respectfully submitted,

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[27] Cal Advocates Opening Comments pp. 25-6.