BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006.	R.13-05-007 (Filed May 23, 2013)

REPLY COMMENTS OF PACIFIC BELL TELEPHONE COMPANY D/B/A AT&T CALIFORNIA (U 1001 C) ON THE FINAL OPINION AMENDING GENERAL ORDER 169 TO IMPLEMENT THE FRANCHISE RENEWAL PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

David J. Miller
AT&T Services Legal Department
525 Market Street, Room 2018
San Francisco, CA 94105
Tel: (415) 778-1393
Fax: (281) 664-9478
davidjmiller@att.com

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SUBJECT MATTER INDEX

Pacific Bell Telephone Company d/b/a AT&T California (U-1001-C) ("AT&T"), pursuant to Rule of Practice and Procedure 14.3, hereby provides reply comments regarding the "Final Opinion Amending General Order 169 to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006" proposed by President Peevey on May 27, 2014 (hereinafter, "Proposed Decision"). Specifically, these reply comments provide a response to the opening comments filed by the Office of Ratepayer Advocates ("ORA").

I. INTRODUCTION

ORA's opening comments strain, unsuccessfully, to avoid a few simple truths. Subsection 5850(b)[1] of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") provides:

> Except as provided in this section, the criteria and process described in Section 5840 [regarding initial applications] shall apply to a renewal registration, and the commission shall not impose any additional or different criteria.

Consistent with this provision, ORA has conceded that the renewal process "must mirror" the initial application process.[2] In Decision ("D.") 07-03-014[3] the Commission conclusively determined that initial applications for DIVCA franchises *cannot* be protested. As a result, renewal applications cannot be protested. Furthermore, this conclusion is consistent with the Legislature's intent, in passing DIVCA, to create an expedited franchising process. Despite the plain language of DIVCA, and the Legislature's clear intent, ORA continues to press for a renewal process that would be far more burdensome and time-consuming than the initial application process.

II. REPLY TO ORA COMMENTS

In its latest comments, ORA again argues that the Commission can and should allow protests of renewal applications on a wide array of issues. ORA's argument, however, remains

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[1] Citations are to the Public Utilities Code unless otherwise indicated.

[2] ORA Opening Comments on Staff Report Proposing Rules to Amend GO 169 (Jan. 24, 2014) ("ORA Opening Comments on Staff Report"), p. 1, fn. 1 ("Section 5850 mandates that the renewal process *must mirror* the application process in Section 5840.") (emphasis added).

[3] *Re Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Decision No. 07-03-014, *Decision Adopting a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, 2007 WL 725608 (Cal.P.U.C. Mar. 1, 2007).

logically and legally flawed for two simple reasons. First, ORA has conceded that DIVCA requires the renewal process to "mirror" the initial application process.[4] Second, the initial application process, which was established in D.07-03-014, does not allow protests. As a result, the renewal process cannot allow protests.

ORA attempts to avoid this inescapable logical and legal conclusion, primarily by attempting to circumvent the holding of D.07-03-014. Initially, ORA's comments simply ignore D.07-03-014 by arguing "there is not (and never was) a ban in DIVCA on allowing parties to comment on applications,"[5] and "neither Section 5850, nor any other part of DIVCA, state that there is a ban on protests."[6] ORA attempts to discount D.07-03-014 by claiming "[a]rguments made by the parties" in the D.07-03-014 proceeding "are no longer relevant," and the Court of Appeal decisions upholding D.07-03-014 should not be considered.[7] ORA then ignores its own advice by citing TURN's comments in D.07-03-14, and taking a swipe at the decision by claiming that "the ban on protests was never based on anything explicit in DIVCA."[8] Notwithstanding ORA's shifting arguments, D.07-03-014 clearly concluded that protests of initial applications are not allowed, and ORA's ongoing attempts to ignore or circumvent this

[4] In its opening comments on the Staff Report, ORA correctly noted that, "[i]n fact, [renewal] Section 5850 specifically requires the Commission to impose the *same requirements* as [initial application] Section 5840." ORA Opening Comments on Staff Report, p. 13 (emphasis added). Similarly, ORA conceded that "Section 5850 mandates that the renewal process *must mirror* the application process in Section 5840." *Id.* at 1, fn. 1 (emphasis added).

[5] ORA Comments on Assigned Commissioner's Proposed Decision (June 16, 2014) ("ORA Comments"), p. 3.

[6] *Id.* at 3-4.

[7] *Id.* at 3.

[8] *Id.* at 8; *see also id.* at fn. 14.

holding must fail because, as pointed out previously, they are impermissible collateral attacks on D.07-03-014.[9]

ORA next attempts to craft a novel interpretation of Section 5850 by arguing it allows more "process" on renewal, but no new "criteria."[10] In addition to contradicting ORA's prior admission that "the renewal process *must mirror* the application process," this argument fails to account for the following phrase from Subsection 5850(b): "Except as provided in this section, the criteria and process described in Section 5840 [regarding initial applications] *shall apply* to a renewal registration…." In other words, the renewal process shall be the same as the initial application process, except as provided in Section 5850. Section 5850 does not provide for any additional process.

ORA then argues the Proposed Decision errs in limiting the grounds for protest because *federal* law allegedly "contains no limitation on broader public comments."[11] This argument, however, ignores DIVCA, the very California law the Commission is tasked with implementing, which *does* impose significant restrictions on the renewal process. As explained above, DIVCA

[9]Pursuant to Public Utilities Code section 1709, "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." D.07-03-014 was decided in a prior proceeding and is now final. Four petitions for rehearing of D.07-03-014 were filed; all were denied after minor modifications to the decision. *Re Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Decision No. 07-04-034, *Opinion Modifying Decision 07-03-014*, 2007 WL 1176000 (Cal.P.U.C. Apr. 12, 2007); *Re Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Decision No. 07-11-049, *Order Modifying Decision 07-03-014 and Denying Rehearing of Decision as Modified*, 2007 WL 4934620 (Cal.P.U.C. Nov. 16, 2007). Three parties filed petitions for a writ of review in the California Court of Appeal; all were summarily denied. *See Re Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Decision No. 10-07-050, *Order Modifying Decision 07-10-013 and Denying Rehearing of Decision as Modified,* 2010 WL 3194647 (Cal.P.U.C. July 29, 2010) *mimeo*, p. 2, fn. 3. D.07-03-014 was fully litigated, is final, and cannot be attacked in another proceeding, such as this one. *See Anchor Lighting v. Southern California Edison Co.*, Decision No. 03-08-036, *Opinion*, 2003 WL 22118931 (Cal.P.U.C. Aug. 21, 2003), *mimeo*, p. 31 ("Section 1709 provides that: 'In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.' This code section is designed to prevent a party from making a collateral attack on a Commission decision. (D.92-12-023 [47 CPUC2d 51, 55].) A collateral attack is an attempt to impeach the judgment or order in a proceeding other than that in which the judgment was rendered. (*Harley v. Superior Court* (1964) 226 Cal.App.2d 432, 435; *Clark v. Deschamps* (1952) 109 Cal.App.2d 765, 769; *Rico v. Nasser Brothers Realty Company* (1943) 58 Cal.App.2d 878, 882.)").

[10] ORA Comments, p. 4.

[11] *Id.* at 6.

requires that "[e]xcept as provided in this section [5850], the criteria and process described in Section 5840 [regarding initial applications] *shall apply* to a renewal registration…."[12]

ORA specifically finds fault with the Proposed Decision's limitation of comment to the issue of whether the renewal applicant is in violation of a final non-appealable order under DIVCA. ORA claims that focusing on this one issue is "legal error" because the subsection identifying this factor does not include the words "only if."[13] Again, ORA's claim fails to consider Subsection 5850(b), which prohibits departure from the initial application process "[e]xcept as provided in this section…." The final non-appealable order issue is *the only* express criteria identified in Section 5850.[14]

Again misconstruing DIVCA, ORA next complains the Proposed Decision does not give enough weight to Section 5900(k).[15] It appears part of the basis for ORA's argument is the claim that, "under Section 5850(b) the criteria and process for renewal must be the same as the original applications 'except as provided in this section', which means that the process must take Section 5900(k) into account."[16] However, subsection (k) of Section *5900* plainly is *not* a provision of "this section"—Section *5850*. Instead, as the section number alone conclusively demonstrates, 5900(k) is a provision of Section 5900. Thus, contrary to ORA's claim, Section 5850's "except as provided in this section" clause does not require that 5900(k) be taken into account.

Finally, ORA argues "compliance" issues should be considered on renewal because the Commission's oversight purportedly has been "ineffective."[17] As the basis for this assertion, ORA relies on two examples that fail to prove its point. ORA first claims that a lawsuit involving Los Angeles and Time Warner over franchise and Public, Educational and Governmental ("PEG") fees demonstrates the Commission is not properly enforcing DIVCA. However, DIVCA provides that these issues are to be enforced by the municipalities in court, not

[12] Section 5850(b) (emphasis added).
[13] ORA Comments, p. 6.
[14] The provisions of Section 5840 that ORA claims are "legitimate criteria" (*id.* at 7) are in fact affirmations that must be included in the affidavit currently required for initial applications, and proposed to be required for renewal applications. There is no opportunity for comment on these affirmations in the initial application process, thus there can be no comment on them in the renewal process.
[15] *Id.* at 8.
[16] *Id.* at 12.
[17] *Id. at* 9-11.

by the Commission.[18] Thus, this lawsuit brought by a municipality demonstrates that the Commission is properly allowing DIVCA to be enforced as the Legislature intended.

ORA's second example involves the Commission's alleged failure to heed a recommendation that it institute an enforcement action. ORA claims that, "[a]lthough the [2013 Annual DIVCA] Report recommends that the Commission initiate a formal enforcement action, to date no action has been taken."[19] ORA's claim is overstated. The Report does not recommend that a formal enforcement action be pursued. Instead the Report acknowledges that "the Commission's staff is in the process of pursuing the matter further…" and "is reviewing procedural options and *may* recommend that the Commission initiate a formal *investigation* into cross-subsidization."[20] Of more relevance to this proceeding, is the fact that the Report does *not* express any need or desire to address the issue during renewal proceedings.

III. CONCLUSION

As explained above and in AT&T's opening comments, the renewal rules that would be established by the Proposed Decision are consistent with DIVCA, except that they would depart from the initial application process by allowing formal notice and opportunity for comment. AT&T respectfully requests that this provision be removed from the proposed rules. With this correction, the proposed rules would be consistent with the letter and spirit of DIVCA.

Respectfully submitted,

/s/

David J. Miller
AT&T Services Legal Department
525 Market Street, Room 2018
San Francisco, CA 94105
Tel: (415) 778-1393
Fax: (281) 664-9478
davidjmiller@att.com

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[18] *See, e.g.*, Sections 5860(i), 5870(p).
[19] ORA Comments, p. 10.
[20] Communications Division, "Fifth Annual DIVCA Report to the Governor and the Legislature (June 2013)," p. 16 (emphases added).