

Decision **PROPOSED DECISION OF COMMISSIONER RECHTSCHAFFEN**
(Mailed 11/13/2017)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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.

Rulemaking 13-05-007
(Filed May 23, 2013)

**DECISION DENYING PETITION FOR MODIFICATION OF
DECISION 14-08-057****Summary**

This decision denies the Petition for Modification of Decision 14-08-057 (Petition) submitted by the Office of Ratepayer Advocates (ORA) on July 1, 2015. ORA failed to demonstrate that the Petition satisfies the requirements for modifying a decision under Section 1708.¹ This proceeding is closed.

1. Background

The Digital Infrastructure and Video Competition Act of 2006 (DIVCA) authorizes the Commission to issue franchise licenses to video service providers. DIVCA was implemented through regulations developed by Rulemaking

¹ All code section references are to the California Public Utilities Code unless stated otherwise.

(R.) 06-10-005, and the Commission issued the rules and procedures for franchise renewals in Decision (D.) 14-08-057 (Renewal Decision).

On July 1, 2015, the Office of Ratepayer Advocates (ORA) filed the Petition for Modification of Decision 14-08-057 (Petition). In support of its Petition, ORA offers two new facts: (1) the Commission's renewed commitment to accountability; and (2) an April 2015, California State Auditor Report on the quality of the Commission's complaint data. The Petition seeks to modify the Renewal Decision to require public participation hearings during the renewal process and to allow public and ORA comment on issues besides violations of non-appealable court orders of any provision of DIVCA.²

ORA argues that D.14-08-057 should be modified because (1) the Renewal Decision contradicts the Commission's "renewed commitment to public participation, openness, and transparency;"³ (2) Section 5810(a)(3) requires that sufficient resources be devoted to "appropriately and timely process applications" and "to ensure full compliance;"⁴ (3) the federal Cable Act requires public participation; and (4) the Commission is not capturing the "true nature of complaints" because of the lack of public comment.⁵

2. Positions of the Parties

The Petition further alleges that the Commission committed legal error in D.14-08-057 by (1) restricting comments on renewal applications to the issue of violations of final non-appealable court orders despite allowing ORA to provide

² Petition at 1.

³ *Id.* at 2.

⁴ *Id. citing* Section 5810(a)(3).

⁵ *Id.* at 3-4.

substantive comments on DIVCA compliance for possible use at a future date, and (2) interpreting the other provisions of DIVCA as limiting the scope of ORA's advocacy under Public Utilities Code Section 5900(k). In particular, ORA claims that DIVCA does not prohibit public comment on renewals and argues that even though section 5850(b) requires that the criteria for evaluating applications for renewal be the same as the criteria applied to applications for initial franchises, it permits the use of different processes which allow for substantive comment on DIVCA compliance issues.⁶ Similarly, ORA alleges that the opportunity to comment on a renewal proposal required under the federal renewal process with which DIVCA's renewal process must comply, requires that ORA and the public be permitted to comment on any aspect of a renewal application.⁷

Responses to ORA's Petition were provided by Pacific Bell Telephone Company d/b/a AT&T California (AT&T), Verizon California, Inc., California Cable & Telecommunications Association, and the Writers Guild of America, West, Inc. (Writers Guild). ORA filed a reply. The positions of the parties are summarized below.

2.1. AT&T

AT&T opposes the Petition on two grounds. First, the Petition does not meet the standard for granting a petition to modify. Second, the Petition offers no other basis for granting relief.

⁶ *Id.* at 12.

⁷ *Id.* at 8-9.

AT&T states that the Petition does not meet the standard of review under Section 1708 because it offers no new facts, changed conditions, or fundamental misconceptions that would provide a basis for relief.⁸ AT&T explains that the standard of review is founded on the Commission's Section 1708 authority to "rescind, alter, or amend" its decisions. However, the Commission's decisions have consistently interpreted Section 1708 to permit modification only in exceptional circumstances which, AT&T argues, are not present here.

AT&T also contends that if the Commission's inability to observe the "true nature of complaints" about video service were a new fact, as ORA alleged, such a fact would be irrelevant. This is because DIVCA directed that complaints be resolved by local government, not this Commission.⁹

AT&T likewise opposes ORA's notion that the Commission's renewed commitment to public participation, openness, and transparency constitutes a material change in conditions that would justify either public participation hearings or the consideration of ORA comments, particularly on such issues as customer complaints and PEG access. AT&T stresses that just as DIVCA partitioned its enforcement authority among government entities, it similarly distributed the avenues for the public to comment on discrimination, cross-subsidization, consumer protection, PEG access, and other DIVCA requirements. According to AT&T, while the forum for addressing cross subsidy and discrimination issues is the Commission, this should not occur during the renewal process, but in an enforcement proceeding. Similarly, just as DIVCA

⁸ *AT&T Response to Petition* at 10-12 and fns. 36-40 (reviewing Commission precedent).

¹⁰ *Id.* at 14-15.

requires that local governments resolve customer complaints, AT&T maintains that DIVCA identifies the California Courts as the exclusive forum for the resolution of PEG disputes.¹⁰

AT&T also asserts that the Petition fails to identify a “basic misconception” of law or fact and that all of the claimed errors were extant at the time the Renewal Decision was issued and, therefore, should have been raised in an application for rehearing.¹¹

Lastly, AT&T states that ORA’s justifications for modification were unpersuasive. First, the Renewal Decision is consistent with public participation, openness, and transparency because those values will still be recognized in proceedings before the Commission and other government entities.¹² Second, Section 5810(a)(3) relates to fee collection, not the resources devoted to the public interest or public comments.¹³ Third, the informal renewal process under the federal Cable Act, 47 U.S.C. Section 546(h), requires public comment only on the issues presented by the renewal request itself which is limited to whether the applicant is in violation of a non-appealable court order.¹⁴ Finally, AT&T states that ORA’s argument which distinguishes between processes and criteria, relies upon a misreading of Section 5850(b). While the second clause of Section 5850(b) states that no additional criteria shall be imposed on the renewal process, ORA ignores the first clause which states that the processes and criteria shall be the

¹⁰ *Id.* at 14-15.

¹¹ *Id.* at 15-17.

¹² *Id.*

¹³ *Id.* at 18.

¹⁴ *Id.* at 19.

same as those used for the initial application. Additionally, AT&T claims that if the Commission cannot apply additional criteria in evaluating an application for renewal, there is no point in receiving comments on DIVCA compliance because taking DIVCA compliance into account in reviewing renewal applications would amount to applying new criteria.¹⁵

2.2. Verizon

Verizon California, Inc. (Verizon) objects to the Petition and argues that ORA is just recycling arguments that have been previously rejected as unpersuasive by Commission decisions D.07-03-014, D.07-11-049, D.14-08-057, and the California Court of Appeals.¹⁶ Verizon also explains that the Petition fails to meet the requirements of Rules of Practice and Procedure 16.4(b)¹⁷ because it neither proposes specific wording to effectuate the requested modifications nor supplies an affidavit or declaration.¹⁸ Verizon contends that the Commission's renewed commitment to public participation, openness, and transparency is "opinion, not fact."¹⁹

¹⁵ *Id.* at 18.

¹⁶ Verizon Reply at 1-2.

¹⁷ "A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit." Cal. Pub. Util. Comm'n Rules of Prac. & Proc. 16.4(b).

¹⁸ *Id.*

¹⁹ *Id.*

2.3. California Cable & Telecommunications Association

The California Cable & Telecommunications Association (CCTA) echoes the arguments of Verizon and AT&T, and complains that ORA is rehashing arguments previously rejected by the Commission and attempting to use its Petition as a procedurally improper substitute for an application for rehearing.²⁰ According to CCTA, the Commission has consistently stated that it will not consider issues in petitions for modifications which merely seek to rehash issues which were raised during a proceeding and considered in a prior Commission decision.²¹ Furthermore, CCTA argues that because neither ORA nor any other party filed an application for rehearing of the Renewal Decision, CCTA's members have relied on that decision and the renewal process it adopted. Thus, in response to the decision's own admonitions, these parties made the determination to forgo preserving their federal due process rights under 47 U.S.C. §§ 546(a)-(g).²² Finally, CCTA argues that ORA conflates the federal formal process set forth in Sections 546(a)-(g) with the informal process in 546(h) and, in so doing so, ignores the prohibition in Section 546(h) that none of the elements of the formal renewal process shall be included in the informal process.²³

²⁰ CCTA response to Petition at 9.

²¹ *Id.* at 7-10

²² *Id.* at 8.

²³ *Id.* at 10-11.

2.4. Writer's Guild

Writer's Guild supports ORA's Petition for two broad reasons. First, the proposed modifications are consistent with state and federal law. Regarding state law, the Writer's Guild asserts that DIVCA was enacted to ensure that video and cable services providers comply with consumer protection law, protect local government revenue and authority over public rights of way, and promote access to services in an equitable and nondiscriminatory manner.²⁴ To pursue these objectives, the Commission must receive more expansive feedback from the public and local governments than is authorized by the Renewal Decision.

Regarding federal law, Writers Guild notes that Section 5850(c) requires compliance with the Cable Act, where renewal applications are evaluated through either a formal or an informal process. Although the Commission adopted the informal process in D.14-08-057, Writer's Guild argues that the criteria applied by the formal process suggests that the same criteria should also apply to the informal process, because if the informal process does not produce agreement on a renewal application, then the formal process will apply. Therefore, Writer's Guild concludes criteria contained in the formal process are "relevant regardless of which process is followed, and so there must be an opportunity for the Commission to evaluate the franchise holder according to those standards."²⁵

²⁴ WGAW at 3 *citing* D.14-08-057 at A-4.

²⁵ WGAW at 4 *citing* 47 U.S.C. § 546.

2.5. ORA Reply

ORA replies that the Petition complies with Rule 16.4 and is procedurally regular. ORA states that the “opposing parties’ responses contain no citation to any provision of Rule 16.4 nor any citation to any Commission decision that require Petitions for Modification to allege new facts or new laws.”²⁶

ORA nevertheless characterizes the California State Auditor Report and the Commission’s rediscovered commitment to accountability as new facts, and adds that the Commission has violated both federal law and the Legislature’s directive that ORA advocate on behalf of subscribers under Section 5900(k).²⁷

3. Discussion

As set forth in § 1708 of the Pub. Util. Code, this Commission may “rescind, alter, or amend any order or decision made by it,” after notice to all the parties and with an opportunity to be heard. The Commission has long recognized that this broad authority should be exercised with great care and justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues. Rule 16.4 requires a party submitting a Petition for Modification to “concisely state the justification for the requested relief.” As analyzed below, we find that ORA has failed to justify its requested relief in that its purportedly new facts, even if accepted as accurate, are not material to the legal premise of our 2014 Renewal Decision and that ORA’s legal arguments have been previously litigated. Accordingly, we conclude that ORA’s Petition for Modification of D.14-08-057 should be denied.

²⁶ ORA Reply *id.* at 2.

²⁷ *Id.* at 2-5.

3.1. Procedural Analysis

A petition for modification must comply with Rule 16.4 of the Commission's Rules of Practice and Procedure. Under the rule, a petition must:

...concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.²⁸

Although the Petition addresses Rule 16.4(b), it does not satisfy the substantive requirements that originate in Section 1708. To justify modifying a Commission decision, a party must show a significant change in material facts that undermines the factual premise of the decision. We particularly disfavor re-litigating issues due to the waste of Commission and parties' resources.

Section 1708, which authorizes Rule 16.4(b), provides:

The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

The Commission has long interpreted Section 1708 in light of our discretion to reopen proceedings.²⁹ We have expressly clarified that:

only a persuasive indication of significant new facts or a major change in material circumstances, which would create a strong

²⁸ Cal. Pub. Util. Comm'n Rules of Prac. & Proc. Rule 16.4.

²⁹ Compare *City of Los Angeles v. Pub. Util. Comm'n*, 15 Cal. 3d 680, 707-08 & fn.45 (1975) (Section 1708 relates to reopening final decisions) with *N. Cal. Ass'n to Preserve Bodega Head & Harbor, Inc. v. Pub. Util. Comm'n*, 61 Cal. 2d 126, 135-136 & fn.5 (1964) (discretion to reopen proceeding under Section 1708).

expectation that we would make a different decision based on these facts or circumstances, would cause us to reopen the proceedings.³⁰

Accordingly, our decisions establish that we may only modify a decision if:

(1) new facts are brought to the attention of the Commission, (2) conditions have undergone a material change, or (3) the Commission proceeded on a basic misconception of law or fact.³¹

Some of our decisions have also limited the application of Section 1708 to petitions that aver “extrinsic fraud or other extraordinary circumstances.”³² Either way, Rule 16.4(b) sets forth the filing requirements and explicitly required ORA to justify its request.

Pursuant to Rule of Practice and Procedure 16.4(b) and Section 1708, the Petition must be denied because it has failed to demonstrate a new fact, material change in conditions, or misconception that would create a “strong expectation” that the Commission would have reached a different result based on the new information.³³

The Petition does not raise any new factual issues that warrant modification of the decision under Section 1708. ORA proffers only two new facts: the Commission’s renewed commitment to accountability and an April, 2015, California State Auditor Report on the quality of the Commission’s complaint data.³⁴ These facts are insufficient to justify modification of D.14-08-057. There must be a major change that would “create a strong

³⁰ D.92058, 1980 Cal. PUC LEXIS 785, *26.

³¹ D.97-04-049, 1997 Cal. PUC LEXIS 427, *17.

³² D.99-05-013, 1999 Cal. PUC LEXIS 346, *15 (quoting D.74141).

³³ D.03-10-057, slip op. at 17.

³⁴ Reply at 3; Petition at 11 & fn.12.

expectation that we would make a different decision based on these facts or circumstances.”

We would not reach a different conclusion on those facts. The scope of the Commission’s discretion under DIVCA has already been litigated, and that discretion is very limited.³⁵ During the renewal process, the Commission can only assess whether the renewal application, as specified by Section 5840, is complete and whether the applicant has violated a non-appealable final court order. These inquiries are unrelated to the Commission’s endorsement of certain principles of governance or the quality of complaint data. Additionally, the Commission can always reconsider its guiding principles.

3.2. ORA’s Proposed Modifications are Based on Previously Rejected Legal Arguments

As noted above, we have previously rejected ORA’s legal arguments and we decline to re-litigate these arguments. ORA presented no persuasive justification to revisit or modify our previous legal conclusions. If ORA believed that the Commission committed legal error in adopting the renewal decision, it could and should have raised these issues in an application for rehearing; it did not do so. It is not appropriate to raise these issues now in the context of a petition to modify.³⁶

³⁵ Cf. D. 95-10-020, 1995 Cal. PUC LEXIS 759, *5 (“To grant petitioners’ application to reconsider denial of their petition for modification of the Decision would undermine the concept of finality of Commission decisions by permitting petitions for modification to circumvent the proper appeal procedure, and to reopen and litigate a major aspect of a decision after that decision has become final.”); D.78981, 1971 Cal. PUC LEXIS 45, *8-10 *quoting* D.76133 (“strong justification is required before the Commission contemplates reversing its decisions.”).

³⁶ See, *Application of San Diego Gas & Electric Company (U902-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3*, D.01-06-044 , 2001 Cal. PUC LEXIS 360, * 2.

Therefore, we find that ORA has failed to justify its proposed modifications to D.14-08-057 and we deny ORA's petition.

4. Comments on Proposed Decision

The proposed decision of Commissioner Clifford Rechtschaffen in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. ORA filed comments on the proposed decision on December 4, 2017 and reply comments were filed on December 11, 2017 by CCTA and AT&T. ORA's comments largely reiterate its previous arguments. No changes have been made in response to comments and reply comments.

5. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Katherine MacDonald is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On May 13, 2013, the Commission initiated this proceeding, R.13-05-007, through an Order Instituting Ratemaking.
2. On August 28, 2014, we closed this proceeding with D.14-08-057.
3. On July 1, 2015, ORA filed the Petition for Modification of D.14-08-057.
4. The Petition seeks to modify D.14-08-057 to require public participation hearings during the franchise renewal process and to allow comment on issues beside violations of non-appealable court orders.
5. The Petition alleges the Commission commits legal error in D.14-08-057 by (1) restricting comments on renewal applications to the issue of violations of final non-appealable court orders, and (2) interpreting the other provisions of DIVCA as limiting the scope of ORA's advocacy under Pub. Util. Code § 5900(k).

6. ORA offers two new facts: the Commission's renewed commitment to accountability, and an April, 2015, California State Auditor Report on the quality of the Commission's complaint data.

7. ORA's substantive arguments have already been litigated.

8. ORA has not justified the relief requested in its Petition.

9. The Petition does not meet the requirements under Section 1708.

Conclusions of Law

1. A Petition for Modification must comply with Rule 16.4 and Section 1708.

2. Rule 16.4 sets out formal procedural requirements for a Petition.

3. Under Section 1708, a Petition must persuasively demonstrate that a material change in fact or condition "create[s] a strong expectation that we would make a different decision based on these facts or circumstances" or demonstrate "extrinsic fraud or other extraordinary circumstances."

4. The Petition does not set forth new facts that justify reopening the proceeding; factual conditions have not undergone a material change from when the Commission issued D.14-08-057.

5. D.14-08-057 does not rest on a basic misconception of law or fact.

6. ORA's petition for modification should be denied.

7. This decision should be effective today.

O R D E R

IT IS ORDERED that:

1. The Petition of the Office of Ratepayer Advocates for Modification of Commission Decision 14-08-57 is denied.

2. Rulemaking 13-05-007 is closed.

This order is effective today.

Dated _____, at San Francisco, California.