Decision 15-05-002 May 7, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005 (Filed October 5, 2006)

DECISION DENYING GOOGLE FIBER INC.'S PETITION TO MODIFY DECISION 07-03-014

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DECISION DENYING GOOGLE FIBER INC.'S PETITION TO MODIFY DECISION 07-03-014

Summary

This decision denies Google Fiber Inc.'s petition to modify Decision (D.) 07-03-014. The petition sought to provide all state-franchised video service providers (VSPs) the right to access public utility infrastructure in accordance with the rates, terms, and conditions of the right-of-way rules (ROW Rules) adopted by D.98-10-058. The petition is denied because the Commission lacks explicit statutory authority under the California Public Utilities Code to (1) grant state-franchised VSPs the right to access public utility infrastructure, and (2) promulgate and enforce safety regulations with respect to VSPs.

Although the petition is denied, today's decision does not foreclose the ability of all state-franchised VSPs to access public utility infrastructure in accordance with the ROW Rules. In particular, today's decision recognizes that some state-franchised VSPs may be classified as "cable television corporations" as defined by Public Utilities Code (Pub. Util. Code) § 216.4.[1] As explained in today's decision, a cable television corporation may access public utility infrastructure in accordance with the ROW Rules and is subject to the Commission's safety regulations pursuant to § 768.5.

1. Regulatory Background

In Decision (D.) 98-10-058, the California Public Utilities Commission (Commission) exercised its authority under federal and state law[2] to adopt regulations that provide facilities-based competitive local communications

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[1] Statutory references are to the Cal. Pub. Util. Code, unless otherwise stated.

[2] A synopsis of relevant federal and state law is provided in D.98-10-058, at Section II and the Conclusions of Law.

carriers (CLCs) and cable television (TV) corporations with nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way (together, "utility infrastructure") that are owned or controlled by (1) large and midsized incumbent local exchange carriers, and (2) major investor-owned electric utilities. These regulations (referred to hereafter as the "right-of-way rules" or "ROW Rules") address the following matters:

1. Requests to access a public utility's infrastructure by CLCs and cable TV corporations,[3] including the contents of the requests; deadlines for utility responses and the contents of responses; timeframe for the completion of make-ready work by the utility; and the use of qualified personnel to perform make-ready work, rearrangements, and installations.
2. Fees, charges, terms, conditions, and contracts for access to utility infrastructure.
3. Reservations of utility infrastructure for future use.
4. Procedures for expedited resolution of disputes.
5. Safety standards for CLC and cable TV facilities that use public utility infrastructure.

In 2006, California enacted the Digital Infrastructure and Video Competition Act (DIVCA). The purpose of DIVCA is to promote competition for broadband and video services in order to provide consumers with more choice and lower prices; accelerate the deployment of new communication and broadband technologies; and provide social and economic benefits. DIVCA is codified in Pub. Util. Code §§ 401, 440-444, and 5800 et seq., and in California Revenue and Taxation Code § 107.7.

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[3] The term "utility infrastructure" as used by today's decision refers to utility infrastructure owned or controlled by public utilities. It does not refer to infrastructure owned or controlled by publicly owned utilities.

To promote competition, DIVCA directed the Commission to establish and administer a new state franchise authorization process for video service providers that achieves the following objectives:

- Create a fair and level playing field for all market competitors that does not disadvantage one service provider or technology over another.
- Promote widespread access to the most technologically advanced cable and video services for all Californians in a nondiscriminatory manner regardless of socioeconomic status.
- Protect local government revenues and their control of public rights-of-way.
- Require market participants to comply with all applicable consumer protection laws.
- Complement efforts to increase investment in broadband infrastructure and close the digital divide.
- Maintain access to public, education, and government channels.
- Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes.

In D.07-03-014, the Commission adopted General Order (GO) 169 that sets forth the process and procedures for carrying out the Commission's responsibilities under DIVCA, including the Commission's role as the sole franchising authority for issuing state video franchises. The Commission held in D.07-03-014 that its statutory authority to regulate state video franchisees is limited because of the DIVCA provisions which specify that video service providers shall not be deemed public utilities as a result of providing video service under DIVCA (Pub. Util. Code §§ 5820(c)); that the Commission may not impose any requirements on state franchisees except as expressly provided by DIVCA (§ 5840(a)); and that the Commission's application process for a state franchise cannot exceed the provisions set forth in DIVCA (§ 5840(b)).

As a result of these statutory provisions, the Commission held in D.07-03-014 that it may promulgate rules related to state video franchises only as necessary to implement or enforce DIVCA's provisions on franchising (§ 5840); antidiscrimination (§ 5890); reporting requirements (§§ 5920 and 5960); the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services (§§ 5940 and 5950); and regulatory fees for state video franchisees (§§ 401, 440-444, 5840).

2. Procedural Background

Google Fiber Inc. (Google) provides multichannel video service and gigabit broadband connections in parts of Missouri and Utah. Google represents that it is preparing to launch service in Austin, Texas, and is exploring service opportunities in another 34 communities across the country, including Mountain View, Palo Alto, San Jose, Santa Clara, and Sunnyvale, California. Google is a franchised video service provider under DIVCA.

On July 3, 2014, Google filed a petition to modify D.07-03-014 (Petition) and served a copy of its Petition on the service list for Rulemaking (R.) 06-10-005, the proceeding in which D.07-03-014 was issued. Notice of the Petition appeared in the Commission's Daily Calendar on July 11, 2014. At the request of the assigned Administrative Law Judge (ALJ), Google served a copy of its Petition on the service lists for R.14-05-001, R.08-11-005, and the consolidated dockets of R.95-04-043 and Investigation 95-04-044.

Responses to the Petition were filed on August 19, 2014, by Interwest Management Services, Inc., d/b/a Fire2Wire[4]; the Fiber to the Home Council

[4] Fire2Wire is a facilities-based fixed wireless broadband provider.

Americas (FTTH Council)[5]; Pacific Bell Telephone Company d/b/a AT&T California (AT&T); and jointly by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (together, the "electric investor-owned utilities" or "Electric IOUs"). Google filed a reply on August 28, 2014.

On September 30, 2014, the assigned ALJ issued a ruling that directed Google to file a legal brief on specified topics. Other parties were authorized, but not required, to file legal briefs on the same topics. Opening briefs were filed on October 17, 2014, by AT&T, the California Cable & Telecommunications Association (CCTA), and Google. Reply briefs were filed on October 31, 2014, by AT&T, CCTA, SDG&E, and jointly by PG&E and SCE.

3. Summary of Google's Petition to Modify D.07-03-014

Google's petition to modify D.07-03-014 asks the Commission to grant all state-franchised video service providers (VSPs) the right to access utility infrastructure in accordance with the ROW Rules adopted by D.98-10-058.

Google filed its Petition pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure (Rules). Rule 16.4(b) provides that a petition to modify a Commission decision must justify the requested modification and provide specific wording to achieve the requested modification. Google's justification is summarized below. The specific wording to achieve the requested modification is appended to Google's Petition.[6]

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[5] The FTTH Council represents the broadband access industry. The mission of the FTTH Council is to accelerate deployment of all-fiber access networks.

[6] Briefly, the Petition requests the addition of a new discussion subsection, a Finding of Fact, a Conclusion of Law, and an Ordering Paragraph.

Rule 16.4(d) requires a petition for modification filed more than one year after the effective date of the decision to explain why the petition could not have been brought within the one-year timeframe. In response to this requirement, Google explains that D.07-03-014 was issued in March of 2007, and that Google Fiber Inc. was incorporated in June of 2010 and had no predecessor. Thus, Google could not have filed its Petition within one year of D.07-03-014. Google further explains that it did not obtain a California video franchise until 2011, and that it did not pursue commercial service in California until 2014. It was only then that Google realized it needed access to utility infrastructure in accordance with the ROW Rules adopted by D.98-10-058.

Google contends that it is necessary to modify D.07-03-014 in order to realize DIVCA's goals of creating a fair and level playing field that does not disadvantage one service provider or technology over another. Google claims that regulatory disparities persist: Unlike cable TV corporations, state-franchised VSPs lack access to utility infrastructure at reasonable rates, terms, and conditions. Google contends that its proposed modifications to D.07-03-014 would remove regulatory disparities by extending the ROW Rules to state-franchised VSPs.

Google states that it is a well-accepted axiom of California law that a statute must not be construed in a "manner that renders its provisions essentially nugatory or ineffective, particularly when that interpretation would frustrate the underlying legislative purpose."[7] In enacting DIVCA, the Legislature intended to encourage new competitive choices for video and broadband services through

[7] Google Reply Br., at 9, citing *People v. Carter*, 56 Cal. Rptr. 2d 309, 311 (Cal. Ct. App. 1996).

the creation of a level playing field for all competitors.[8] Google submits that if D.07-03-014 is interpreted to exclude state-franchised VSPs from accessing utility infrastructure in the same manner as CLCs and cable TV corporations, the central purpose of DIVCA will be frustrated.

Google acknowledges that DIVCA does not expressly grant state-franchised VSPs the right to access utility infrastructure. However, Google interprets DIVCA as empowering the Commission to enact policies that promote investment in broadband networks. Google represents that under the Commission's existing policy, some utilities have declined to negotiate access agreements with Google, and that one utility came to the table only after months of effort by Google. Google states that the lack of access hinders investment in broadband networks by new competitors because it can be uneconomic for VSPs to install their own poles, ducts, and conduit. Google believes the Commission can use its powers under DIVCA to remove barriers to investment by extending the access rights afforded by D.98-10-058 to all state-franchised VSPs.

Google submits that the Commission may grant its Petition pursuant to Pub. Util. Code § 761, which authorizes the Commission to regulate any service or commodity "of the character furnished or supplied by any public utility." Google believes the Commission may determine pursuant to § 761 that providing state-franchised VSPs with access to utility infrastructure is a public utility service. In support of its position, Google cites Pub. Util. Code § 767.5, which declares that access to surplus space on utility support structures is a public utility service with respect to cable TV corporations. Google reasons that the

[8] Pub. Util. Code § 5810(a)(2)(A).

Commission may likewise declare that access to utility infrastructure is a public utility service with respect to state-franchised VSPs.

Google notes that the Electric IOUs allow VSPs to access their utility infrastructure pursuant to bilateral contracts. This shows, in Google's view, that access to utility infrastructure is a public utility service. Google further notes that Pub. Util. Code § 767.7 recognizes that utility infrastructure may be used "by entities, other than cable television corporations… for the purpose of installing fiber optic cable…." The law thus recognizes that access to utility infrastructure by a variety of attachers—not just cable TV corporations—may qualify as a public utility service.

Google states that although Pub. Util. Code §§ 767.5 and 768.5 provide the Commission with explicit authority to adopt the ROW Rules with respect to cable TV corporations, the Commission held in D.98-10-058 that it has discretion to apply the ROW Rules to entities unenumerated in these statues such as CLCs.[9] Google contends that the Commission likewise has discretion to apply the ROW Rules to state-franchised VSPs.

Google posits that there are no unique safety issues associated with VSP facilities, which are essentially identical to cable TV facilities. Thus, as long as VSPs are required to comply with the Commission's regulations for the construction and operation of cable TV facilities, such as those set forth in GOs 95 and 128, all safety issues are addressed.

Google agrees that state-franchised VSPs should comply with the Commission's safety regulations as a condition for access to utility infrastructure. Google also emphasizes that D.98-10-058 allows utilities to restrict or deny access

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[9] D.98-10-058, 82 CPUC 2d 510, 543.

to a particular facility for reasons relating to safety.[10] Thus, public utilities can ensure safety by imposing conditions on access to their infrastructure in the attachment agreements that must be reached between the parties.[11] Google further argues that because the Commission can deem access to utility infrastructure to be a public utility service under § 761, the Commission has jurisdiction to regulate the conditions of access, including safety standards.

Google opines that in order to regulate VSPs' access to utility infrastructure and to protect safety, the Commission need not identify statutory provisions like those that grant the Commission detailed authority over public utilities. Rather, the Commission's authority over public utilities ensures that when a state-franchised VSP uses utility infrastructure, the VSP must do so in accordance with appropriate safety requirements.

For instance, Pub. Util. Code § 315 authorizes the Commission to investigate accidents occurring on public utility property. Accordingly, the Commission has authority to investigate accidents on utility property that involve VSP facilities. Similarly, § 451 requires public utilities to provide service in a safe manner, while § 761 gives the Commission authority to determine that such service is unsafe and order a remedy. Because these and other Code sections apply to public utility infrastructure used by VSPs, the Commission can promulgate and enforce safety regulations for VSP attachments.

Google states that GO 95 applies to all utility poles and attachments. Consequently, VSP attachments must comply with the same GO 95 safety requirements as other attachments. Google states that the Commission can

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[10] D.98-10-058 at 20.

[11] D.98-10-058 at 72.

enforce compliance with GO 95 by revoking the right of a repeat offender to access utility infrastructure. Google submits that the Commission's authority over public utilities, together with enforcement of the commercial agreements that VSPs must enter into with utilities prior to attachment, suffice to ensure that VSP attachments are compliant.

4. Summary of Responses

4.1. Supporters of the Petition

Fire2Wire and FTTH Council support Google's Petition. Fire2Wire asks the Commission to extend the relief sought by the Petition to all facilities-based broadband providers, not just state-franchised VSPs. Like Google, Fire2Wire represents that it has trouble obtaining access to utility infrastructure to serve rural customers and to meet growing broadband demand.

FTTH Council submits that granting the Petition will help to advance the DIVCA objectives of increased deployment of new all-fiber networks, expanded access to advanced video and broadband services, and social and economic benefits. Those objectives have not come to fruition, according to FTTH Council, because of restricted access to utility infrastructure.

FTTH Council agrees with Google that the Commission is empowered by DIVCA to implement policies that promote network investment and a fair and level playing field for market competitors. If Google's Petition is granted, all state-franchised VSPs would be subject to the same rules as CLCs and cable TV corporations regarding access to utility infrastructure. FTTH Council also agrees with Google's position that granting the Petition will not have an adverse effect on safety because the ROW Rules authorize public utilities to protect safety by imposing restrictions and conditions on access to utility infrastructure.

4.2. Opponents of the Petition

4.2.1. AT&T

AT&T argues that Google's Petition should be denied for two reasons. First, Google does not request modification of D.98-10-058, which adopted the ROW Rules governing access to utility infrastructure by CLCs and cable TV corporations. Instead, Google seeks to modify D.07-03-014, which adopted processes and procedures for implement DIVCA. AT&T asserts that nothing in the DIVCA Decision addresses access to utility infrastructure. AT&T contends that Google's attempt to expand the scope of the ROW Rules adopted by D.98-10-058 by filing a petition to modify D.07-03-014 constitutes an improper collateral attack on the D.98-10-058.

Second, AT&T claims that the Commission cannot compel public utilities to allow their infrastructure to be used by state-franchised VSPs. While the Commission has authority under Pub. Util. Code §§ 767 and 767.5 to order a public utility to allow its infrastructure to be used by other public utilities (including CLCs) and cable TV corporations at regulated rates, terms, and conditions, these statutes do not apply to VSPs.

AT&T also observes that DIVCA does not give VSPs access rights to utility infrastructure. AT&T states that when the Legislature enacted DIVCA, it could have added a provision to the Public Utilities Code that gives VSPs access to utility infrastructure, but the Legislature did not do so. The Commission must assume the Legislature's choice was deliberate and abide by it.

4.2.2. CCTA

CCTA states that federal law provides "cable operators" the right to access utility infrastructure at reasonable rates, terms, and conditions, and that the

Commission in D.98-10-058 exercised its authority under federal law to establish reasonable rates, terms, and conditions.[12] Similarly, Pub. Util. Code § 767.5(b) provides "cable television corporations" with a statutory right to access utility infrastructure. CCTA asserts that a "cable operator" under federal law is also a "cable television corporation" as defined by Pub. Util. Code § 216.4 and thus has a right to access utility infrastructure pursuant to Pub. Util. Code § 767.5(b).

CCTA represents that all of its members are "cable operators" under federal law, are "cable TV corporations" under state law, and have obtained state video franchises under DIVCA as "incumbent cable operators" as defined in DIVCA's § 5830(i).[13] CCTA asserts that nothing in DIVCA or other statutes allows the Commission to usurp the statutory rights afforded to state-franchised VSPs that are "cable operators" under federal law or "cable television corporations" under California law to access utility infrastructure.[14] In contrast, non-cable VSPs do not have a statutory right to access utility infrastructure.

CCTA disagrees with Google's position that the Commission can determine the scope of its authority to regulate access rights for VSPs that are not cable TV corporations or CLCs. CCTA responds that Google ignores the laws the Commission relied upon in D.98-10-058, such as Pub. Util. Code §§ 767 and 767.5, that provide the Commission with authority to regulate access to utility infrastructure by cable TV corporations and telecommunications utilities (such as

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[12] Title 47 of the United States Code, Sections 224(c) and (f). (47 U.S.C. §§ 224(c) and (f)).

[13] Pub. Util. Code § 5830(i) defines an "incumbent cable operator" as a "cable operator… serving subscribers under a franchise in a particular city, county, or city and county franchise area on January 1, 2007."

[14] CCTA states that if Google is "cable operator" under federal law or a "cable television corporation" under state law, then Google has access rights to utility infrastructure, thereby making its Petition moot.

CLCs). Google also ignores 47 U.S.C. § 224, which authorizes the states to regulate access to utility infrastructure by cable operators and telecommunications carriers. Thus, the Commission did not unilaterally determine its own authority, but relied on authority expressly delegated by Congress and the California Legislature.

CCTA also disagrees with Google's position that DIVCA empowers the Commission to provide VSPs with access to utility infrastructure. CCTA replies that DIVCA precludes the Commission from imposing any requirement on a holder of a state franchise except as specifically provided in DIVCA.[15] Thus, while the Legislature declared that it intended to create a fair and level playing field for all market competitors, it also withheld authority from the Commission to create new rules governing state video franchises.

4.2.3. The Electric IOUs

The Electric IOUs argue that Google's Petition should be denied for several reasons. First, they claim the Petition is premised on the erroneous assertion that Google has been denied access to utility infrastructure in California. The Electric IOUs respond that PG&E has reached agreements with several broadband network providers for access to PG&E's infrastructure.

Second, the Electric IOUs argue that Google is impermissibly seeking to expand the scope of the ROW Rules adopted by D.98-10-058 by filing a petition to modify D.07-03-014, which adopted GO 169 setting forth the process and procedures for obtaining a state video franchise under DIVCA. As such, Google's Petition is procedurally defective and should be rejected.

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[15] Pub. Util. Code § 5840(a).

Finally, the Electric IOUs posit that the right to access utility infrastructure under the ROW Rules is limited to CLCs and cable TV corporations. These entities are statutorily subject to the Commission's safety regulations, including GOs 95 and 128, the ROW Rules, and Safety and Enforcement Division audits and enforcement actions. VSPs, on the other hand, do not have a right to access utility infrastructure or a statutory obligation to comply with the Commission's safety regulations. The Electric IOUs state that VSPs may negotiate bilateral agreements with infrastructure owners, which will guarantee by contract that the VSP follows applicable safety standards. Such contracts may come at a higher cost than the ROW Rules, but that cost reflects the shift of oversight and enforcement from the Commission to the public utility.

The Electric IOUs disagree with Google's position that the Commission need not exercise safety jurisdiction over VSPs because the Commission regulates public utilities and can look to them to remedy any safety issues that arise. The Electric IOUs state that Google's plan to privatize oversight and enforcement of the Commission's safety regulations raises the following unanswered questions:

- To what extent would the Commission require a public utility to monitor VSP facilities: Just with respect to equipment directly attached to utility facilities or more broadly to include VSP operations and practices?
- If the Commission requires public utilities to enforce VSPs' compliance with safety standards, are public utilities liable to third parties for injuries/damages caused by VSP violations?
- If VSP facilities are determined to be noncompliant by the public utility or the Commission, what happens if the VSP declines to promptly remove or repair the attachment?
    - Would the Commission hold the public utility responsible for removing or repairing the attachment?

- Would the public utility be responsible for seeking an injunction or other order in civil court to enforce the requirements against the VSP?
- How would the Commission enforce its safety regulations with respect to VSP facilities if its authority is limited to regulation of the public utility?
  - Would the Commission's enforcement action be with respect to the VSP's violation, or would the enforcement action be with respect to the public utility's failure to adequately monitor and enforce the Commission's safety requirements against the VSP?
  - Would the public utility be responsible for responding to a Commission citation and paying any fines that arise out of the VSP's noncompliance?
  - If the public utility is responsible for paying Commission-imposed fines, would the public utility have to sue the VSP in state court for reimbursement?
  - In a suit for reimbursement, would the Commission's findings as to the VSP's noncompliance be res judicata in the court proceedings or could the VSP argue that it was not party to the Commission's enforcement proceeding and therefore entitled to a trial de novo?
- Google suggests that the Commission could revoke the right of a repeat offender to access utility infrastructure. If the Commission only has regulatory authority over the public utility, how would this sanction be initiated and enforced?
  - Would the public utility have to seek a Commission ruling that the VSP is a repeat offender and that the VSP's facilities should be removed from utility infrastructure?
  - Does the Commission have authority to order a public utility to terminate the attachment agreement and remove all attachments of a repeat offender, or would the public utility's remedy lie exclusively in state court under the terms of the attachment agreement?
  - If the Commission orders the removal of VSP facilities, would the Commission's order preempt a civil action by

> the VSP in state court, such as an injunction against removal of facilities?

The Electric IOUs contend that because Google leaves too many important jurisdictional and safety questions unanswered, its Petition should be denied.

5. Discussion

Google's Petition asks the Commission to modify D.07-03-014 to give all state-franchised VSPs the right to access utility infrastructure in accordance with the ROW Rules adopted by D.98-10-058. In deciding this matter, a threshold issue is whether the Commission has authority to grant Google's request.

5.1. Commission Authority Under DIVCA Regarding Video Service Providers

The following statutory provisions in DIVCA provide the Commission with limited authority to regulate the facilities, operations, and practices of state-franchised VSPs:

> **§ 5820(c)**: The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division. This division shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in this division.
>
> **§ 5840(a)**: Neither the commission nor any local franchising entity or other local entity of the state may… impose any requirement on any holder of a state franchise except as expressly provided in this division.
>
> **§ 5840(b)**: The application process described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section.

The above statutes provide that state-franchised VSPs are not public utilities by virtue of DIVCA and that DIVCA does not provide the Commission with authority to regulate VSPs except as explicitly set forth in DIVCA. As the Commission held in D.07-03-014, DIVCA provides authority to regulate VSPs

only as necessary to implement and enforce statutory provisions on franchising (§ 5840); antidiscrimination and build-out (§ 5890); reporting (§§ 5920 and 5960); the prohibition against financing video deployment with rate increases for residential basic telephone service (§§ 5940 and 5950); and regulatory fees (§§ 401, 440-444, 5840).[16]

We recognize that DIVCA authorizes state-franchised VSPs to use "public rights-of-way,"[17] which § 5830(o) defines as "the area along and upon any public road or highway, or along or across any of the waters or lands within the state." It is important to distinguish, however, between the "public rights-of-way" as used in DIVCA and the utility poles, ducts, conduits, and rights-of-way that are owned or controlled by public utilities (which today's decision refers to as "utility infrastructure"). There are no provisions in DIVCA that (1) provide state-franchised VSPs with the right to access utility infrastructure,[18] (2) obligate public utilities to provide such access, or (3) authorize the Commission to regulate access to utility infrastructure by state-franchised VSPs.[19]

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[16] D.07-03-014 at 3 and 12-13.

[17] See, for example, §§ 5830(f), 5830(l), 5830(s), 5840(e)(9), 5840(i)(2), and 5885(a).

[18] Google agrees that "DIVCA did not expressly grant [VSPs] automatic attachment rights to utility infrastructure."(Petition at 8.)

[19] While DIVCA does not provide the Commission with authority to grant VSPs nondiscriminatory access to utility infrastructure, we note that Section 706(a) of the 1996 Telecommunications Act (47 U.S.C. 1302(a)) grants this Commission authority to "encourage the deployment… of advanced telecommunications" (which includes broadband capability) by "utilizing… measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." However, neither Google nor any of the parties provided a legal analysis of Section 706(a) as a possible statutory basis for granting the Petition. Therefore, we do not evaluate Google's Petition in light of this statutory authority. Moreover, even if Section 706(a) gives us authority to grant nondiscriminatory access to utility infrastructure, we still have concerns about a VSP's statutory obligation to comply with the Commission's safety regulations, as discussed further below.

Google argues unpersuasively that the Commission may grant VSPs access to utility infrastructure pursuant to Pub. Util. Code § 761, which states as follows:

> **§ 761**: Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility… are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

Section 761 does not explicitly addresses the issue before us, namely, whether the Commission may grant state-franchised VSPs the right to access utility infrastructure, and Google did not cite any precedent where § 761 was used in this manner.

We disagree with Google's position that Pub. Util. Code §§ 767.5(b) and 767.7 together authorize the Commission to determine that access to utility infrastructure is a public utility service that must be made available to state-franchised VSPs. Sections 767.5(b) and 767.7 state, in relevant part, as follows:

> **§ 767.5(b)**: The Legislature finds and declares that public utilities have dedicated a portion of… [the] surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.

> **§ 767.7(a)(3)** : Public utility… support structures are also used by entities, other than cable television corporations, with the acquiescence of the public utility… for the purpose of installing fiber optic cable in order to provide various telecommunications services.

We find that Google has an overly broad interpretation of the Commission's authority under § 767.5(b) and § 767.7. Section 767.5(b) declares that access to public utility support structures is a public utility service with respect to "cable television corporations." There is no mention of VSPs or other entities. And § 767.7 does not grant access rights to any entities. To the contrary, the statute states that access to utility support structures by entities "other than cable television corporations" may occur "with the acquiescence of the public utility." Moreover, nothing in DIVCA – which was enacted after § 767.5 and § 767.7 – provides access to utility infrastructure. Had the Legislature intended to grant access rights to state-franchised VSPs, the Legislature could have done so in DIVCA, but did not. We decline to read into § 767.5(b) and § 767.7 what the Legislature chose not to enact.[20]

Another gap in our jurisdiction over state-franchised VSPs is the absence of any provisions in the Public Utilities Code that authorize the Commission to promulgate and enforce safety regulations with respect to VSPs. This is a significant concern because granting Google's Petition may foreseeably result in VSPs installing thousands of miles of new cable facilities on utility infrastructure.

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[20] Google's Brief at page 10 claims incorrectly that the Commission held in D.98-10-058 that the Commission may apply § 767.5 to entities unnamed by the statute. At the page cited by Google (82 CPUC 2d 510, 543) the decision discusses the Commission's lack of authority over publicly-owned utilities, but says nothing about access to utility infrastructure by entities not named in § 767.5.

Our concern is magnified by the DIVCA provision that states that a holder of a state franchise shall not be deemed a public utility as a result of providing video service under DIVCA.[21] This provision could be interpreted as exempting state-franchised VSPs from safety-related statutes in the Public Utilities Code that pertain explicitly to "public utilities." Among the statutes that authorize the Commission to promulgate and enforce safety regulations with respect to "public utilities," but are silent with respect to VSPs, are the following:

- **§ 315**: The commission shall investigate the cause of all accidents occurring…upon the property of any **public utility** or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it...Every **public utility** shall file with the commission, under such rules as the commission prescribes, a report of each accident so occurring of such kinds or classes as the commission from time to time designates. (Emphasis added.)
- **§ 451**: [E]very **public utility** shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities…as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. (Emphasis added.)
- **§ 701**: The commission may supervise and regulate every **public utility** in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Emphasis added.)
- **§ 702**: Every **public utility** shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission…in any way relating to or affecting its business as a **public utility**, and shall do everything necessary or proper to

[21] Pub. Util. Code § 5820(c).

secure compliance therewith by all of its officers, agents, and employees. (Emphasis added.)

- **§ 761**: Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any **public utility**… are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. (Emphasis added.)
- **§ 768**: The commission may, after a hearing, require every **public utility** to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. (Emphasis added.)

We disagree with Google's suggestion that our safety concerns may be resolved by allowing only those state-franchised VSPs that agree to comply with the Commission's safety regulations to have the right to access utility infrastructure. The flaw in Google's reasoning is that the Commission lacks explicit statutory authority to enforce safety regulations with respect to VSPs. It is conceivable that if a major safety violation were to occur, the offending VSP—which originally pledged to comply with the Commission's safety regulations in order to obtain access to utility infrastructure—may argue that it is not a public utility and thus exempt from the Commission's authority to investigate the incident and to impose fines, sanctions, and other remedies for violations of the Commission's safety regulations. Until we possess clear statutory authority to enforce safety regulations with respect to VSPs, we

conclude that it is not in the public interest to grant VSPs the right to use utility infrastructure.[22]

Google suggests that our safety concerns may be addressed by requiring public utilities to enforce our safety regulations. We find this suggestion to be problematic because it would conscript public utilities to achieve indirectly what the Legislature has not authorized the Commission to do directly, i.e., enforce safety regulations with respect to VSPs.

For the previous reasons, Google's petition to modify D.07-03-014 is denied. However, Google and other state-franchised VSPs may still access utility infrastructure through voluntary agreements with public utilities or as cable TV corporations under the ROW Rules. Each of these options is summarized below.

5.2. Contractual Access to Utility Infrastructure

Public utilities have authority under Pub. Util. Code § 767.7(a)(3) to enter into voluntary contracts regarding access to their infrastructure.[23] The record of this proceeding indicates that public utilities have entered into such contracts with broadband providers. According to the Electric IOUs, "[i]n the past couple of years, PG&E has reached agreements with several fiber service providers for access to PG&E structures, including Time Warner, Integra (formerly Electric Lightwave), Zayo (formerly AboveNet and MFN), WILTEL (formerly Williams

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[22] Google also cites GO 95 and to D.98-10-058. However, those Commission orders do not and cannot expand the Commission's authority over VSPs beyond the limited authority the Legislature specifically delegated to the Commission.

[23] Pub. Util. Code § 767.7(a)(3) states, in relevant part, that "[p]ublic utility… support structures are also used by entities, other than cable television corporations, with the acquiescence of the public utility… for the purpose of installing fiber optic cable in order to provide various telecommunications services."

Communication), Level3 Communications (formerly IP Networks and Broadwing), Optic Access (formerly Navigata) and San Louis Obispo County.[24]"

Access to utility infrastructure must comply with the Commission's safety regulations, even in situations where the Commission does not have jurisdiction over the accessing entity. In these situations, the public utility assumes (1) responsibility for compliance with the Commission's regulations by the accessing entity, and (2) regulatory liability for violations of the Commission's safety regulations by the accessing entity. In turn, the public utility's contract with a non-regulated entity may include rates, terms, and conditions that compensate and indemnify the public utility for its assumption of responsibility for compliance with Commission regulations and liability for violations.

5.3. Cable TV Corporations' Access to Utility Infrastructure

Section 767.5 provides cable TV corporations with the right to access "surplus space" and "excess capacity" on public utility "support structures" pursuant to rates, terms, and conditions established by the Commission in accordance with the statute. The Commission may also promulgate and enforce safety regulations with respect to cable TV corporations' facilities, operations, and practices pursuant to § 768.5. The ROW Rules adopted by D.98-10-058 establish the rates, terms, and conditions for cable TV corporations' access to utility support structures and associated safety regulations.[25]

Section 216.4 defines a "cable television corporation" to "mean any corporation or firm which transmits television programs by cable to subscribers

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[24] Electric IOUs Response filed on August 18, 2014, at 3.

[25] D.98-10-058 at Section III.E.1 and Appendix A, Parts I and II. D.98-10-058 uses the term "cable TV corporation" interchangeably with the terms "cable corporations," "cable companies," "cable TV companies," and "cable operators."

for a fee.[26]" This definition overlaps with DIVCA's definitions of "cable operator," "cable service," "cable system," "video programming," "video service," and "video service provider" contained in § 5830:

> **§ 5830(b)**: "Cable operator" means any person or group of persons that either provides cable service over a cable system and directly, or through one or more affiliates, owns a significant interest in a cable system; or that otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system, as set forth in Section 522(5) of Title 47 of the United States Code.[27]
>
> **§ 5830(c)**: "Cable service" is defined as the one-way transmission to subscribers of either video programming, or other programming service, and subscriber interaction, if any, that is required for the selection or use of video programming or other programming service, as set forth in Section 522(6) of Title 47 of the United States Code.[28]
>
> **§ 5830(d)**: "Cable system" is defined as set forth in Section 522(7) of Title 47 of the United States Code.[29]

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[26] The statutory definition of "cable television corporation" was previously contained in Pub. Util. Code § 215.5, which was then renumbered to § 216.4 by Stats. 2006, Ch. 198, Sec. 6, effective January 1, 2007.

[27] 47 U.S.C. 533(5) provides a definition of "cable operator" that is essentially identical to the definition provided in Pub. Util. Code § 5830(b).

[28] 47 U.S.C. 522(6) defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."

[29] 47 U.S.C. 522(7) defines "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier… except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide

Footnote continued on next page

§ 5830(r): "Video programming" means programming provided by, or generally considered comparable to programming provided by, a broadcast station, as set forth in Section 522(20) of Title 47 of the United States Code.[30]

§ 5830(s): "Video service" means video programming services, cable service, or [open-video system] provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology.

§ 5830(t): "Video service provider" means any entity providing video service.

With the enactment of DIVCA, cable TV corporations as defined by § 216.4 can now obtain a state franchise to "transmit television programs by cable to subscribers for a fee." As CCTA notes, all of its members are cable TV corporations and have obtained state video franchises under DIVCA as "incumbent cable operators."[31] Once a cable TV corporation obtains a state video franchise under DIVCA, there is nothing in DIVCA that affects the access rights

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interactive on-demand services; (D) an open video system that complies with section 573 of this title…"

[30] 47 U.S.C. 522(20) defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."

[31] CCTA Brief at 1 and 4. Several provisions in DIVCA indicate there is nothing mutually exclusive about being a state-franchised VSP and a cable TV corporation. Besides the overlapping statutory definitions, § 5810(a)(2)(B) declares that DIVCA is intended to "[p]romote the widespread access to the most technologically advanced cable and video services...." In addition, DIVCA requires state franchise applicants to certify that they will (i) file all forms required by the Federal Communications Commission before offering cable or video service, and (ii) not discriminate in the provision of cable or video service. (§§ 5840(e)(1)(A) and (B).) DIVCA further provides that no additional local fees can be imposed on a VSP based on its provision of cable or video service. (§ 5860(c).)

and safety obligations the cable TV corporation has under § 767.5, § 768.5, and the ROW Rules.[32]

Although state-franchised VSPs may possess dual status as cable TV corporations, with all the concurrent rights and obligations of a cable TV corporation, the dual status may not always apply. The Public Utilities Code has separate definitions for video service providers and cable TV corporations, which indicates the two types of entities are not identical and may exist apart from each other.[33] Today's decision does not reach the issue of how to distinguish state-franchised VSPs that are cable TV corporations from those that are not cable TV corporations.[34]

6. New Federal Regulations

On February 26, 2015, the Federal Communications Commission (FCC) adopted *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order On Remand, Declaratory Ruling, and Order, FCC Order 15-24 (rel. March 12, 2015) (commonly referred to as the "Net Neutrality Order")[35] in which the FCC reclassified broadband Internet access service under Title II of the

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[32] Google acknowledges that "cable corporations that hold state video franchises under DIVCA" may access utility infrastructure in accordance with the ROW Rules. (Google Petition at 1.)

[33] In 2011, the Legislature passed Assembly Bill (AB) 1027, which granted access to poles owned by municipal utilities. (Stats. 2011, ch. 580, § 2.) AB 1027 refers separately to "cable television corporations" and "video service providers." (*See*, e.g., Pub. Util. Code §§ 9510(a) and 9510(c).) AB 1027 demonstrates that after DIVCA's enactment, there are "video service providers" and "cable television corporations," and the two are not identical.

[34] To be clear, a state-franchised VSP that transmits television programs by cable to subscribers for a fee is also a "cable television corporation" as defined by § 216.4. Further, as Google notes in its comments on the PD, there is no requirement that a state-franchised VSP which is also a cable TV corporation must be a "cable operator" as defined by DIVCA's § 5830(b).

[35] Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

Communications Act. Among other things, the Net Neutrality Order allows broadband network providers to access poles, ducts, conduits, and rights-of-way owned or controlled by utilities in the same manner as cable operators and telecommunications carriers under 47 U.S.C. § 224.[36] Today's decision evaluates Google's Petition largely in the context of California law (i.e., DIVCA and other parts of the Public Utilities Code), and does not take into consideration what effects, if any, the FCC's Net Neutrality Order may have on Google's Petition.

7. Comments on the Proposed Decision

The proposed decision (PD) of the assigned Commissioner was mailed to the parties in accordance with § 311, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on March 12, 2015, by Google. Reply comments were filed on March 17, 2015, by AT&T and the Electric IOUs. The reply comments oppose Google's recommended changes to the PD.

Google argues that Section 5.1 and Finding of Fact 3 of the PD (and today's decision) mistakenly find that the safety of workers and the public would be compromised if state-franchised VSPs were granted the right to access public utility infrastructure without an enforceable obligation to comply with the Commission's safety regulations. Google contends that compliance with the Commission's safety regulations may be enforced through contractual arrangements, as noted in Section 5.2 of today's decision.

Google has not identified an error in the PD, in our opinion. The PD (and today's decision) finds that the Commission lacks explicit statutory authority to promulgate and enforce safety regulations with respect to state-franchised

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[36] Net Neutrality Order at Paras. 56, 413, and 478-485.

VSPs – a finding that Google does not dispute. We are not persuaded that enforcement of our safety regulations with respect to VSPs (in the situation where VSPs have a Commission-conferred right to access utility infrastructure) can be delegated to utilities and then enforced by utilities through contractual arrangements for the reasons stated previously in today's decision.

Google next contends that the PD is not sufficiently clear regarding the right of those state-franchised VSPs that possess dual status as cable TV corporations to access utility infrastructure as cable TV corporations pursuant to § 767.5 and the ROW Rules. Google is concerned that utilities might block access to their infrastructure by claiming that VSPs which do not use a traditional cable architecture are not cable TV corporations within the meaning of § 216.4. To avoid this scenario, Google asks the Commission to revise the PD to say that a state-franchised VSP which transmits television programs over "wired facilities" to subscribers for a fee has access rights under § 767.5 and the ROW Rules. Google's proposed revision would have the effect of defining the term "cable" in § 216.4 as including "wired facilities."

We agree with Google that the PD contains an ambiguity that, if not clarified, could lead to disputes regarding the right of cable TV corporations to access utility infrastructure based on the type of technology used to transmit television programs to subscribers. Accordingly, we conclude that Google's comments on this matter are properly within the scope of Rule 14.3(c).[37]

We concur with Google that the term "cable" in § 216.4 includes "wired facilities." While the term "cable" is not defined in § 216.4, the Commission has

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[37] Rule 14.3(c) states that comments on a proposed decision "shall focus on factual, legal or technical errors" in the PD.

long recognized that a cable TV corporation's facilities may include any type of cable (e.g., coaxial cable and fiber optic cable) or wire that is used to transmit television programs to subscribers for a fee, regardless of whether the facilities are also used to provide other services (in addition to transmitting television programs) such as broadband internet service.[38] In light of the Commission's long-standing practice, and because "wired facilities" serve the same function as a "cable" in transmitting television programs to subscribers, we conclude that "wired facilities" are a "cable" within the meaning of § 216.4.[39]

So that today's decision is clear, we have revised the decision to include a footnote, finding of fact, conclusion of law, and an ordering paragraph regarding our conclusions that (1) the term "cable" in § 216.4 includes "wired facilities"; and (2) state-franchised VSPs that possess dual status as cable TV corporations have the right to access utility infrastructure in accordance with § 767.5 and the ROW Rules, regardless of whether they use coaxial cable, fiber optic cable, or wired facilities to transmit television programs to subscribers for a fee.

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[38] *See*, for example, D.03-10-017 at 1 and 21; D.03-05-055 at 3; D.02-03-048 at 3, 4, 6, 11, 22, 24, 26, Finding of Fact (FOF) 2, and Conclusion of Law 7; D.98-10-058 at FOFs 10-12; D.92-12-016, 1992 Cal. PUC LEXIS 846 at *35; D.88-12-085, 1988 Cal. PUC LEXIS 888 at *99; D.90832, 1979 Cal. PUC LEXIS 1015 at *21-22; D.77185, 1970 Cal. PUC LEXIS 544 at *13-14; and Resolution E-3397, dated November 22, 1994, at Paragraph 12.C. The Legislature has likewise recognized in Pub. Util. Code §§ 767.5(a)(3) and 767(a)(2) that a cable TV corporation's facilities may include wires and fiber optic cable.

[39] Analogously, the term "telephone line" is broadly defined by § 233 to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." Also, DIVCA allows state-franchised VSPs to use any technology to provide video service (including cable service). (§ 5810(a)(2)(A) and 5830(s).) Therefore, to harmonize DIVCA and § 216.4, the term "cable" in § 216.4 should be broadly construed with respect to state-franchised VSPs that are cable TV corporations under § 216.4.

8. Comments on the Revised Proposed Decision

The parties' comments on the PD were addressed in the Revised Proposed Decision (RPD) that was posted on the Commission's website on March 23, 2014. On March 24, 2015, AT&T filed a motion to allow comments on the RPD. The assigned ALJ granted AT&T's motion in an informal ruling that was e-mailed to the service list on March 26, 2015, and in a formal ruling issued on April 1, 2015.

Comments regarding the RPD were filed on April 15, 2015, by AT&T. Reply comments were filed on April 20, 2015, by Google.

8.1. The RPD Addresses Issues Raised by Google

AT&T contends that the RPD improperly finds that state-franchised VSPs which use "wired facilities" to transmit television programs to subscribers for a fee are cable TV corporations under § 216.4. The problem, according to AT&T, is that Google never requested this finding. AT&T argues that the Commission should not rule on issues that are not before it.

We disagree that Google never requested this finding. Google's Petition requested that all state-franchised VSPs be granted the right to access utility infrastructure in accordance with the ROW Rules.[40] The PD addressed Google's Petition, in part, by concluding that those state-franchised VSPs which transmit television programs by cable to subscribers for a fee are "cable television corporations" as defined by § 216.4 and, as cable TV corporations, may access public utility infrastructure in accordance with the ROW Rules.[41]

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[40] Google Petition at 1 and 14.

[41] The assigned ALJ's ruling issued on September 30, 2014, invited parties to brief the issue of whether state-franchised VSPs may be classified as cable TV corporations under § 216.4. AT&T addressed this matter in its brief and reply brief filed in response to the ruling, without suggesting that it exceeded the scope of this proceeding. It is undisputed that VSPs classified as cable TV corporations under

Footnote continued on next page

In its comments on the PD, Google asked that the PD be clarified to state, in effect, that the term "cable" in § 216.4 incudes "wired facilities." The RPD granted Google's request for the reasons explained in Section 7 of the RPD and today's decision. In sum, there is no merit to AT&T's argument that the RPD improperly addressed an issue that was not before the Commission.[42]

8.2. The RPD's Interpretation of § 216.4 Is Consistent with California Statutes

AT&T argues that the RPD should not interpret the term "cable" in § 216.4 as including "wired facilities" because:

- Section 216.4 uses the word "cable." It does not say, "wired facilities." The Commission cannot add words to a statute.
- There is no definition of "cable" in the Public Utilities Code. AT&T posits that the Commission must interpret the term "cable" in § 216.4 consistent with the everyday meaning of "cable television" when § 216.4 was enacted in 1968. AT&T contends that in 1968, people considered cable television service to be a service provided by a locally-franchised entity using an antenna to gather signals and coaxial cables to distribute the signals. Even today, people do not associate "cable television" with "wires," according to AT&T.[43]

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§ 216.4 may access utility infrastructure – as cable TV corporations - in accordance with the ROW Rules.

[42] Google likewise disagrees with AT&T, stating: "The RPD provides substantive relief that is within the scope of what Google Fiber sought." (Google Reply Comments on the RPD at 1.)

[43] The terms "cable" and "wire" are not defined in the Public Utilities Code. In the common vernacular, a wire is a single strand and a cable is two or more wire strands bundled together. Newton's Telecom Dictionary (15th ed. 1999) states at 124 that a "[c]able may refer to a number of different types of wires or groups of wires capable of carrying voice or data transmission." A coaxial cable is "a cable composed of an insulated central conducting wire wrapped in another cylindrical conducting wire. The whole thing is usually wrapped in another insulating later and an outer protective layer." (Id., at 179.) We take official notice of these definitions pursuant to

Footnote continued on next page

- If the Legislature had intended the term "cable" in § 216.4 to encompass "wired facilities," the Legislature would have done so expressly. The fact that § 216.4 refers only to "cable" is significant, according to AT&T, because of three other laws enacted in the same era as § 216.4 (i.e., Revenue and Taxation Code § 225.5 and § 35001(c), and a ballot initiative called the "Free Television Act") that explicitly use the terms "wires" and "coaxial cable" in connection with television service. These laws demonstrate that the Legislature (1) viewed "wires" and "cables" separately, and (2) knew how to include both "wires" and "cables" in a statute when the Legislature intended the statute to cover both.
- Pub. Util. Code § 233 and § 235 further demonstrate that when the Legislature intends a statute to cover both "wires" and "cables," the statute expressly refers to both:

> **Pub. Util. Code § 233**: "Telephone line" includes all conduits, ducts, poles, **wires**, **cables**, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. (Emphasis added.)
>
> **Pub. Util. Code § 235**: "Telegraph line" includes all conduits, ducts, poles, **wires**, **cables**, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. (Emphasis added.)

We find that AT&T's argument lacks merit because the Legislature has enacted statutes which explicitly recognize that cable TV corporations may install and operate wired facilities. Specifically, in Pub. Util. Code § 767.5 the

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(i) Rule 13.9 of the Commission's Rules, and (ii) California Evidence Code Section 451(e).

Legislature established a statutory framework governing the attachment of cable TV corporation facilities to public utility poles and other support structures. Section 767.5(a)(3) defines a cable TV "pole attachment" to mean:

> **[A]ny attachment** to surplus space, or use of excess capacity, by a **cable television corporation** for a **wire communication system** on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility. (Emphasis added.)

It makes no sense to interpret the term "cable" in § 216.4 as excluding wired facilities, as AT&T argues, when § 767.5(a)(3) explicitly states that a cable TV corporation's facilities may include "any attachment" for a "a wire communication system."

In Pub. Util. Code § 9510 *et seq*., the Legislature established a statutory framework governing access to support structures that belong to publicly owned utilities. Of relevance here, the Legislature declared in § 9510(a) that:

> The Legislature finds and declares that in order to promote **wireline** and wireless broadband access and adoption, it is in the interest of the state to ensure that local publicly owned electric utilities, including irrigation districts, that own or control utility poles and support structures, including ducts and conduits, make available appropriate space and capacity on and in those structures to **cable television corporations**, video service providers, and telephone corporations under reasonable rates, terms, and conditions.

Section § 9510(a) demonstrates that the Legislature considers cable TV corporations to be providers of "wireline" broadband. For this view to make sense, the term "cable" in § 216.4 must encompass wired facilities.

In Government Code § 53066 *et seq*., the Legislature enacted a statutory framework for cities and counties to authorize and regulate "community antenna television systems," commonly known as cable TV franchises.[44] The following provisions in Government Code § 53066 *et seq*., demonstrate that the Legislature views cable TV franchises as including "wires":

> **Gov. Code § 53066(d)**: Any cable television franchise or license awarded by a city or county… may authorize the grantee thereof to place **wires**, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county[.] (Emphasis added.)
>
> **Gov. Code § 53066.2(b)**: Nothing… authorizes a [city or county] to require a cable operator to build a line extension to a home which may be too remote and where the cost to **wire** is substantially above the average cost of providing cable television service in that community. (Emphasis added.)
>
> **Gov. Code § 53066.3(d)**: Any additional franchise granted to provide cable television service in an area in which a franchise has already been granted and where an existing cable operator is providing service… shall require the franchisee to **wire** and serve the same geographical area[.] (Emphasis added.)

Revenue and Taxation Code § 107.7(a), which provides guidance for assessing property taxes on cable TV franchises, further demonstrates that the Legislature views cable TV franchises as including "wires":

> When valuing possessory interests in real property created by the right to place **wires**, conduits, and appurtenances along or across public streets, rights-of-way, or public easements contained in either a **cable franchise** or license granted

[44] Government Code § 53066.3(a)(3) indicates that a cable TV corporation as defined by Pub. Util. Code § 216.4 may own and operate a cable TV franchise.

pursuant to Section 53066 of the Government Code (a "cable possessory interest") or a state franchise to provide video service pursuant to Section 5840 of the Public Utilities Code (a "video possessory interest"), the assessor shall value these possessory interests consistent with the requirements of Section 401. (Emphasis added.)

For the preceding reasons, we conclude there is a sound statutory basis for the RPD's finding that the term "cable" in § 216.4 encompasses wired facilities.

8.3. The RPD Is Consistent with DIVCA

AT&T argues the RPD is inconsistent with the Legislature's intent in DIVCA that not every company which provides television over wires should be treated as a cable TV corporation. AT&T states that in DIVCA, the Legislature chose to deal with new types of television providers, and with their varying platforms and technologies, by creating a new classification – the VSP – rather than trying to fit such providers into the old category of "cable television corporation." AT&T further claims that if the Legislature had intended in DIVCA to give all VSPs the same rights and obligations as cable TV corporations, the Legislature would have done so explicitly.

We find no merit in AT&T's argument that the RPD is inconsistent with DIVCA. As explained in Section 5.3 of today's decision, the DIVCA statutes governing state-franchised VSPs overlap with the statutes governing cable TV corporations. As a result, an entity that is a state-franchised VSP under DIVCA may possess dual status as a cable TV corporation under § 216.4.[45] There is nothing in DIVCA that affects the rights and obligations that a cable TV corporation has under § 767.5, § 768.5, and the ROW Rules.

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[45] AT&T acknowledges that an entity may possess dual status as a state-franchised VSP and a cable TV corporation. (AT&T Comments on the RPD at 12.)

We disagree with AT&T's portrayal of the RPD as somehow classifying all state-franchised VSPs –with their varying platforms and technologies – as cable TV corporations. As Google recognizes, not all state-franchised VSPs are cable TV corporations.[46] However, today's decision does not reach the issue of how to distinguish state-franchised VSPs that are cable TV corporations from those that are not cable TV corporations.

8.4. The Definition of "Cable Television Corporation" Is Limited to Licensed and Franchised Entities

AT&T contends that the RPD interprets § 216.4 in a way that could apply the definition of "cable television corporation" to any entity that uses wires to transmit television programs, including potentially Netflix, Hulu, and Amazon. We disagree. It is well established that the definition of "cable television corporation" in § 216.4 is limited to entities that have authority to construct and operate cable TV facilities in public rights-of-way pursuant to a franchise granted by a governmental body of competent jurisdiction.[47]

8.5. Clarifications and Corrections

After reviewing AT&T's Comments on the RPD, we conclude that it is appropriate to revise, correct, and clarify the RPD in three respects. First, we revise Footnote 39 of the RPD (which is Footnote 38 in today's decision) to remove an erroneous citation to a Commission decision, modify another citation, expand other citations in the footnote, and add new citations to the footnote. We also correct the dicta associated with the footnote to more accurately describe the

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[46] AT&T Comments on the RPD at 12 (citing Google's brief filed on October 17, 2014), and Google Reply Comments on the RPD at 4.

[47] *See*, for example, California Business and Professions Code § 7042.5, Government Code § 53066 *et seq.*, Penal Code § 637.5, Public Resources Code § 6224.3(b), and Public Utilities Code §§ 767.5, 5800 *et seq.*, and 7000 *et seq.*

Commission's historical practice of interpreting the term "cable" as it applies to cable TV corporation facilities.

Second, we clarify that we do not interpret the term "cable" in § 216.4 as including satellites or other types of wireless transmission.[48]

Finally, with one narrow exception, we clarify that today's decision does not interpret the terms "cable operator," "cable service," and "cable system" as those terms are defined in DIVCA and other state and federal laws. The one exception is in Section 5.3 of today's decision where we conclude that (1) the definition of "cable television corporation" in § 216.4 overlaps with DIVCA's definitions of "cable operator," "cable service," and "cable system" in § 5830; and (2) a state-franchised VSP as defined by DIVCA may have dual status as a cable TV corporation as defined by § 216.4.

We have revised the conclusions of law of today's decision to reflect the above clarifications.

9. Assignment of the Proceeding

Liane M. Randolph is the assigned Commissioner for R.06-10-005 and Timothy Kenney is the assigned ALJ.

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[48] The Legislature has recognized that cable TV corporations are distinct from satellite providers of TV service. (Pub. Util. Code § 8283(f)(2) and Penal Code § 637.5.)

Findings of Fact

1. Google's petition to modify D.07-03-014 seeks to provide all state-franchised VSPs with the same right to access public utility infrastructure that CLCs and cable TV corporations have under the ROW Rules adopted by D.98-10-058.

2. Granting Google's Petition could foreseeably result in state-franchised VSPs installing thousands of miles of cable facilities using public utilities' poles, ducts, conduits, and rights-of-way.

3. The safety of workers and the public would be compromised if VSPs were granted a right to access public utility infrastructure without an enforceable obligation to comply with the Commission's safety regulations.

4. State-franchised VSPs may transmit television programs by cable to subscribers for a fee.

5. Google Fiber Inc. is a state-franchised VSP.

6. Wired facilities may serve the same function as cable facilities in transmitting television programs to subscribers for a fee.

Conclusions of Law

1. The Commission does not have explicit authority under the California Public Utilities Code to (i) compel public utilities to provide state-franchised VSPs with access to public utility infrastructure in accordance with the ROW Rules; (ii) grant state-franchised VSPs the right to access public utility infrastructure in accordance with the ROW Rules; or (iii) promulgate and enforce safety regulations with respect to VSPs.

2. Google's petition to modify D.07-03-014 should be denied for the reasons set forth in Conclusion of Law 1 and Findings of Fact 2 and 3.

3. Public utilities have authority under Pub. Util. Code § 767.7(a)(3) to enter into voluntary contracts with state-franchised VSPs for access to utility infrastructure. Contractual access to public utility infrastructure must comply with the Commission's safety regulations. In situations where the Commission does not have jurisdiction over the accessing entity on safety matters, the public utility assumes responsibility for compliance with the Commission's safety regulations by the accessing entity and regulatory liability for violations of the Commission's safety regulations by the accessing entity.

4. A state-franchised VSP that transmits television programs by cable to subscribers for a fee is a "cable television corporation" as defined by Pub. Util. Code § 216.4.

5. The term "cable" in Pub. Util. Code § 216.4 applies to any type of cable facility (e.g., coaxial cable, fiber optic cable, or wired facility) that is used to transmit television programs to subscribers for a fee, regardless of whether the "cable" is also used to provide other services (in addition to transmitting television programs) such as broadband internet service. The term "cable" in § 216.4 does not include satellites and other forms of wireless transmission.

6. An entity that has dual status as a state-franchised VSP under Pub. Util. Code § 5800 et seq., and a cable TV corporation under § 216.4, may access public utility infrastructure as a cable TV corporation in accordance with § 767.5 and the ROW Rules. The same entity must also comply with the Commission's safety regulations that pertain to cable TV corporations pursuant to § 768.5.

7. Conclusions of Law 4 - 6 would apply to Google Fiber Inc. if Google were to transmit television programs by cable to subscribers for a fee.

8. The Public Utilities Code has separate definitions for cable TV corporations and VSP's, which indicates the two types of entities are not identical and may exist apart from each other.

9. With one narrow exception in Section 5.3 of this decision, this decision does not interpret the terms "cable operator," "cable service," and "cable system" as those terms are defined in DIVCA and other state and federal laws.

10. The following Order should be effective immediately so that this proceeding may be closed forthwith.

O R D E R

IT IS ORDERED that:

1. Google Fiber Inc.'s petition to modify Decision 07-03-014 is denied.

2. An entity that has dual status as a state-franchised video service provider under Public Utilities Code Section 5800 et seq., and a cable television corporation under Section 216.4, may access public utility infrastructure as a cable television corporation in accordance with Section 767.5 and the right-of-way rules adopted by Decision 98-10-058, regardless of whether the entity uses coaxial cable, fiber optic cable, wired facilities, or other cable facilities to transmit television programs to subscribers for a fee. The same entity must also comply with the Commission's safety regulations that pertain to cable television corporations pursuant to Section 768.5.

3. Rulemaking 06-10-005 is closed.

This Order is effective today.

Dated May 7, 2015, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners