BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation to Address Intrastate Rural Call Completion Issues.	Investigation 14-05-012 (Filed May 15, 2014)

COALITION APPLICATION FOR REHEARING OF DECISION 16-12-066 ON RURAL CALL COMPLETION ISSUES, OTHER CALL COMPLETION ISSUES AND CALL INITIATION ISSUES INCLUDING LACK OF 911 ACCESS AND DIAL TONE

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SPECIFICATIONS OF ERROR

- The Commission failed to proceed lawfully when it contradicted its own rules by failing to publish substantive revisions to the Proposed Decision on the "Escutia Table" at least one hour prior to a vote on the proposed decision. Based on this procedural error, the Decision must be annulled in its entirety. At a minimum, the Decision must be modified to eliminate modifications made after the business meeting started.

- The Commission failed to proceed lawfully by materially changing the Proposed Decision, without sufficient notice and opportunity for comment, directing the Communications Division to issue a standing data request requiring outage reporting from *all* respondents, not just COLRs as had been previously stated. Therefore, OP 20 must be eliminated.

- The Commission abused its discretion and failed to proceed lawfully by addressing issues that are outside the scope of the OII, including outages, MLTS programming, Frontier service issues, and the placement of telecommunications facilities on trees. Therefore, Findings of Fact 5-38, Conclusions of Law 7, 10-13, 18-19, and 23-26, and Ordering Paragraphs 5-8, 11-13, 15-16,19-20, 23, and 25 present legal error and must be eliminated.

- The Commission abused its discretion and failed to proceed lawfully by addressing issues that are beyond the scope of the Scoping Memo, including adopting requirements that pertain to tree attachment, Frontier service issues, and MLTS services. Therefore, Findings of Fact 5-16, and 18-19, Conclusions of Law 13, 19, and 22, and Ordering Paragraphs 5-8, and 11-13 present legal error and must be eliminated.

- Ordering Paragraph 20's extension of statewide outage reporting requirements to all respondents is not supported by the findings. Therefore, Ordering Paragraph 20 must be eliminated.

- The Commission abused its discretion by adopting OP 20 because: (i) the findings and text of the decision conflict with the outage reporting requirement and prior Commission decisions; and (ii) the Commission failed to consider all relevant factors and ultimately drew conclusions without substantial reason. Therefore, Findings of Fact 25-30, 32-35, 37-38 and Ordering Paragraphs 15-16, 20, 23, and 25 must be eliminated.

- The Commission failed to proceed lawfully and violated the constitution by denying respondent parties due process. It did so by materially expanding the requirements of the Decision to "carriers," including non-respondent entities. Therefore, Ordering Paragraphs 2, 5-7, and 15 must be eliminated.

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Pursuant to Rules 16.1 and 16.2 of the Rules of Practice and Procedure ("Rules') of the California Public Utilities Commission ("Commission"), the California Cable and Telecommunications Association, Charter Fiberlink CA-CCO, LLC (U6878C), Comcast Phone of California, LLC (U5698C), Consolidated Communications of California Company (U1015C), Cox California Telcom, LLC, dba Cox Communications (U5684C), CTIA,[1] MCImetro Access Transmission Services, Corp. (U5253C), and Time Warner Cable Information Services (California) LLC (U6874C), and the Small LECs[2] (collectively, "Coalition") respectfully submit this Application for Rehearing of Decision 16-12-066 ("Decision") issued on January 4, 2017.

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] The Small LECs are the following companies: Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), and Winterhaven Telephone Company (U 1021 C).

As detailed above in the "Specifications of Error," and described below, the Decision presents a number of procedural and substantive legal errors that merit rehearing. Accordingly, the Commission should grant this application for rehearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The OII

The Commission issued the Order Instituting Investigation ("OII") on May 21, 2014, for a limited purpose: to understand and evaluate rural call completion failures that arise from alleged problems of toll carriers and other intermediaries to complete calls to the rural telephone companies. This proceeding followed the Federal Communications Commission ("FCC") *Rural Call Completion Order*, which took steps to "create incentives for providers to improve their rural call completion performance."[3] In the OII, the Commission established the scope of the proceeding as "the review of intrastate call completion failures in California, particularly in rural areas of the state." OII at 33-34. The OII was explicitly framed as an investigation, not a rulemaking, which specifically stated that it would not involve the enactment of new regulations. *See* OII at 2.

B. The Scoping Memo and Public Participation Events

In May 2015, the assigned Commissioner issued the Scoping Memo and Ruling ("Scoping Memo"), which unexpectedly expanded the scope of the proceeding to include a "review of 911 call completion and access issues, including, but not limited to, those due to [a] loss of dial-tone for reasons other than service cancellation." Scoping Memo at 1. This statement sought to expand the scope of the proceeding beyond the bounds of the OII by including all "loss[es] of dial tone," whereas the OII was focused only on "call completion

[3] *Rural Call Completion*, WC Docket 13-39, *Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd. 16154, FCC 13-135 (released November 8, 2013), at ¶¶ 85.

failures." *Compare* Scoping Memo at 1 to OII at 33-34. The Assigned Commissioner originally published on the Commission's website a proposed decision for the purpose of amending the scope of the OII, but this proposed decision was not served on parties and was withdrawn after appearing on two Commission meeting agendas.[4]

Over a year after the issuance of the Scoping Memo, the Commission held a number of public participation hearings ("PPHs"). On September 8, 2016, the Assigned Commissioner issued a ruling ("ACR") directing the public and parties to file written comments on certain matters raised during the PPHs.[5] These matters included issues relating to 211 dialing, collect calls, pole and line safety, tree mortality, and 911 emergency response. Significantly, however, the Commission took no steps to add these issues to the scope of the OII. The parties' comments submitted in response to the ACR highlighted that the Commission would err by further considering any of these issues in that they: (i) fall outside the scope of this proceeding and/or the Commission's jurisdiction; (ii) have already been addressed by the Commission in a separate docket or are subject to existing rules; and/or (iii) are specific to a given carrier or area and do not give rise to industry-wide issue.[6]

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[4] This proposed decision to amend the scope was to be considered at the April 9, 2015 Commission meeting (Agenda ID #13829) and after a hold, at the May 7, 2015 meeting. However, the proposed decision was withdrawn before the Commission could vote on it. *See* Public Agendas 3355 and 3356 and results at https://ia.cpuc.ca/gov/agendadocs/.

[5] *Assigned Commissioner's Ruling Inviting Party and Public Comments Regarding Issues Raised at Public Participation Hearings and Workshops* at 1 (dated September 8, 2016).

[6] *See, e.g.,* Cox October 2016 Comments at 3 ("The Commission would err in further considering any of these issues in that they: . . . fall outside the scope of this proceeding and/or the Commission's jurisdiction"), and CTIA October 2016 Comments at 2 ("Consideration of rural outage reporting requirements, in addition to being outside the scope of the proceeding, would be ill-timed at best and unlawful at worst."), MCImetro October 2016 Comments at 5 ("Adopting any rules as a result of this OII would contravene the OII, go beyond its scope and subject the decision to annulment.").

C. The Proposed Decision and Decision

The proposed decision in this proceeding ("Proposed Decision") was issued for comment on November 15, 2016. The first revised Proposed Decision was issued on December 5, 2016. The second revised proposed decision was issued just before the close of business on December 14, 2016, the day before the voting meeting. The Decision was adopted at the Commission's December 15, 2016 meeting by a 3 to 2 vote and formally issued on January 4, 2017, with the Dissent of Commissioners Randolph and Peterman.

The Decision addresses rural call completion issues, and correctly finds that those issues have abated. However, in a departure from even the broadest interpretation of the scope of the OII, the Decision also includes 26 different mandates, referrals, and directives on a host of issues, including outage reporting, Multi-Line Telephone System ("MLTS") issues, network maintenance, the attachment of facilities to trees under General Order 95, 211 and 811 services, and Frontier service issues.[7]

II. THE COMMISSION FAILED TO PROCEED LAWFULLY BY ENACTING SUBSTANTIAL CHANGES TO THE DECISION WITHOUT SUFFICIENT NOTICE OR OPPORTUNITY FOR COMMENT.

A. Modifications to the Proposed Decision that Were Made During the Commission Meeting Are Invalid Under Public Utilities Code Section 311.5.

Modifications to the Proposed Decision that were made during the Commission meeting are invalid. The Commission failed to make public substantive these revisions with enough time prior to voting to discharge the obligations of Public Utilities Code § 311.5 ("Section 311.5"), Rule 15.3(a), and the Commission's own processes. This is a failure to proceed in the manner required by law, in violation of Public Utilities Code § 1757.1(a)(2).

[7] *See* Ordering Paragraphs 5-8, 11, 12, 13, 15, 16, 19, 20, 23, 25 and 26.

Under the plain language of Section 311.5, the Commission is required to make its revisions to the Proposed Decision public before voting on those revisions. Section 311.5(a)(1) states that:

> [p]rior to commencement of any meeting at which commissioners vote on items on the public agenda, the commission shall make available to the public copies of the agenda, and upon request, any agenda item documents that are proposed to be considered by the commission for action or decision at a commission meeting.

Pub. Util. Code § 311.5(a)(1). The statute further provides that the Commission:

> shall publish the agenda, agenda item documents, and adopted decisions in a manner that makes copies of them easily available to the public, including publishing those documents on the Internet. Publication of the agenda and agenda item documents shall occur on the Internet at the same time as the written agenda and agenda item documents are made available to the public.

Pub. Util. Code § 311.5(a)(2). Section 311.5(b)(1) further states that the Commission "shall publish and maintain" on an appropriate website "[e]ach of the commission's proposed and alternate proposed decisions and resolutions, until the decision or resolution is adopted and published." Put together, these provisions require that the Commission publish "proposed and alternate proposed decisions and resolutions" online "[p]rior to [the] commencement of any meeting" that involves a vote on the public agenda, regardless of any request. Pub. Util. Code § 311.5(a)(1). *See also* Rule 15.3(a) and D.07-11-051.

In addition, the Commission's stated practice for complying with Section 311.5(a)(2) is to make copies of proposed decisions available to the public on the "Escutia Table" for at least one hour prior to the vote. As noted in the Commission Meeting Guide:

> The Commission is required to have copies of all the documents and changes that are to be discussed and voted on at the meeting.

> They must be available at a location near the meeting and for at least one hour before they are voted on.[8]

Commissioners Peterman and Randolph offered multiple changes to the Proposed Decision and these changes were properly placed on the Escutia Table prior to the Commission meeting. However, Commissioner Sandoval advocated for substantive revisions that were not placed on the Escutia Table either prior to the Commission meeting or even 1 hour prior to the Commission voting on them. Instead, Commissioner Sandoval asked that the Proposed Decision be edited from the dais while projecting the edits on the auditorium wall. As part of this process, the Commission made a substantive change to Ordering Paragraph 20 ("OP 20") by adding the following language: "We delegate the authority to Communications Division to adjust the data request threshold between 90,000 - 900,000 user minutes." The language was then voted on. By voting on a decision with changes first proposed at the Commission's business meeting, the Commission violated both the Commission's "one-hour rule" and Section 311.5. By failing to comply with its own procedural rules, the Commission failed to proceed in a "manner required by law." Pub. Util. Code § 1757(a)(2). The modifications to the Decision are therefore procedurally invalid and the Decision must be annulled in its entirety.[9] At a minimum, the Decision must be modified to eliminate modifications made after the business meeting started.[10]

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[8] *See* Commission Meeting Guide, available on the Commission's website at http://docs.cpuc.ca.gov/published/report/117551.htm, last accessed on February 3, 2017 (emphasis added). The "Escutia table" is a table in a room adjacent to the Commission's main hearing room upon which the Commission places the most recent drafts of agenda items to be considered at each Commission meeting.

[9] *See, e.g., Nissan Motor Corp. v. New Motor Vehicle Bd.,* 153 Cal.App.3d 109, 113 (1984) ("due to the constitutional infirmity…the decision of the Board must be held void and null in its entirety.").

[10] In addition, to the change to OP 20, there were other more minimal changes made to the Decision during the Commission's business meeting.

B. The Commission Materially Expanded the Outage Reporting Requirement Without Publishing the Revised Decision for Notice and Comment.

In the initial version of the Proposed Decision which was mailed to all parties, the outage reporting requirement was limited to only the Carriers of Last Resort ("COLRs").[11] *See* Proposed Decision at 150 (OP 20). As a result, non-COLRs declined to comment on the proposed outage requirement because they would not be subject to it. Minutes before the close of business on the day before the Commission's meeting, revised proposed changes were issued that significantly altered the outage reporting requirement. Instead of a voluntary reporting requirement applicable only to COLRs, the Proposed Decision was revised to direct the Communications Division to issue a standing data request—applicable to all respondents, including non-COLRs—requiring the reporting of outages.[12] As the Dissent notes, "[s]uch a tremendous change in the scope of carriers affected should not have been rushed through without further discussion."[13] By failing to issue an alternate decision reflecting these changes—or to otherwise re-issue the proposed decision to provide an opportunity to comment on substantive revisions—and hastily adopting such an expansion of Ordering Paragraph 20, the Commission has failed to proceed in a manner required by law. Pub. Util. Code § 1757.1(a)(1).[14]

Under the Public Utilities Code and the Commission's own rules, a proposed decision must be issued at least 30 days prior to its adoption.[15] During this time period, affected parties

[11] A COLR is a carrier that is required by D. 96-10-066 to provide telephone service, upon request, to all residential and business customers within a designated geographic area.

[12] Decision at 182-283 (OP 20).

[13] Dissent at 2.

[14] The Decision suggests these changes were responsive to parties' comments, but it fails to identify to which comments it refers to. Decision at 165. The Coalition respectfully disagrees. There is no discussion in any party's opening comments to suggest that the scope should be expanded or otherwise justify the expansion of the class of carriers affected by this order.

[15] Pub. Util. Code § 311(d); *see also* Commission Rule of Practice and Procedure 14.3.

have an opportunity to comment on the proposed decision. An alternate decision is subject to the same 30-day notice and comment requirements.[16] In this case, respondents affected by the last-minute changes had no notice that the Proposed Decision would be changing, and they had no opportunity to comment on the changed requirement the Commission ultimately adopted. Under the Public Utilities Code, the Commission's procedural rules, and general principles of due process, the affected parties should have been afforded an opportunity to comment on the changes. However, no such opportunity was provided, and no alternate was circulated for review and comment.[17] Through its actions, the Commission violated its own rules and procedures regarding proposed decisions, notice, and opportunity for comment, and it thus failed to proceed in the manner required by law. Pub. Util. Code § 1757.1(a)(2).[18] Therefore, OP 20 must be eliminated.

III. THE COMMISSION ABUSED ITS DISCRETION AND FAILED TO PROCEED LAWFULLY BY ADOPTING A DECISION THAT EXCEEDS THE SCOPE OF THE OII AND THE SCOPING MEMO.

A. The Decision Unlawfully Addresses Matters that Are Beyond the Scope of the OII.

The Decision exceeds the scope of the OII, constituting legal error, by adopting any rules in this proceeding. In addition, the Decision exceeds the scope of the OII by adopting rules on topics beyond the established scope of the proceeding, including outage reporting requirements, rules governing MLTS, requirements relating to the Frontier service issues, requirements

[16] Pub. Util. Code § 311(g). Similarly, changes made by the Assigned Commissioner that go beyond changes suggested in prior comments on the proposed decision are treated as an alternate decision under Commission Rule of Practice and Procedure 14.1(d) and require an opportunity to comment.

[17] Moreover, as discussed in below in Section V, the Decision adopted by the Commission does not include findings that support imposing an outage reporting requirement on all respondents.

[18] *See also* Pub. Util. Code § 1757.1(a)(6) (courts may overturn orders or decisions where "The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.").

addressing the affixing of telecommunications facilities to trees, and directives to Staff to develop and recommended guidelines for future transfers and mergers. The Commission's adoption of these requirements are procedurally improper and thereby constitute an "abuse of discretion" and a failure to "proceed[] in the manner required by law." Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2).

As a matter of law, the Commission cannot adopt decisions on subjects that are outside the scope of proceedings in which they arise.[19] The OII clearly provided that any rules would be considered in a separate docket, stating: "we will then consider opening an Order Instituting Rulemaking (OIR) proceeding to propose remedies to address problems identified in this Investigation."[20] OII at 2. In this case, the OII also made clear that a specific, narrow set of issues would be addressed—far narrower than the wide-ranging set of issues actually addressed in the Decision. Specifically, the OII was initiated to address a specific call completion phenomenon unique to call termination in rural areas served by rural telephone companies. *See* OII at 30-33 (explaining potential problems relating to "least cost routers" and their role in call termination to rural telephone companies). This scope did not encompass outages,[21] programming of MLTS systems, Frontier service issues, requirements concerning future

[19] *See Southern California Edison v. Pub. Utili.Comm'n*, 140 Cal.App.4th 1085, 1106 (2006).

[20] Notably, the Scoping Memo maintained the focus of the proceeding as a "review" (Scoping Memo at 4) and not a rulemaking.

[21] "Call completion" is a specific issue and refers to long-distance/toll calls being dialed and not ultimately delivered to the called party, who generally lives in a rural area. *See In the Matter of Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (rel. November 8, 2013). This is in contrast to an "outage" where the customer does not have dial tone nor can attempt a call. *See* 47 CFR § 4.5(a) ("'outages' refer to a "significant degradation in the ability of an end user to establish and maintain a channel of communication as a result of failure or degradation in the performance of a communication provider's network."). The fact that rural call completion does not encompass general outages is recognized in the Scoping Memo's attempt to expand the scope to include all "loss[es] of dial tone," whereas the OII was only focused on "call completion failures." *See* Scoping Memo at 3.

transfers and mergers, or the location of telecommunications facilities on trees.[22] By adopting requirements relating to these issues, the Commission committed legal error, both because such issues were outside the scope, and the OII made clear that if any rules were to be considered, those would be addressed in a subsequent rulemaking, not in the investigation. *See* OII at 2.

The Decision attempts to avoid the OII's narrow scope by relying on the Scoping Memo, but this reliance is misplaced. Only the Commission can amend or expand the scope of a proceeding beyond the scope initially determined in the OII. As the Commission has acknowledged, "the Commission speaks only through its decisions, and not through the statements of any individual Commissioner or staff person."[23] The Scoping Memo is not a Commission decision—it was issued by the Assigned Commissioner alone without a vote of the full Commission. Therefore, the scope of the OII remains unaltered and the parts of the Scoping Memo and Decision that address subjects beyond the OII's scope are unlawful.

The Court of Appeal has confirmed that where the Commission has "violated its own rules by considering [a] new issue," it "fail[s] to proceed in the manner required by law."[24] In relying on an expansion of an OII absent a vote of the Commission, the Decision commits precisely this legal error. The rules governing the powers of an Assigned Commissioner further underscore that an OII cannot be altered by an action of one Commissioner.[25] Under Rule 7.3, the Assigned Commissioner can issue a scoping memo to "determine the schedule … and issues

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[22] Commissioners Randolph and Peterman submitted a dissent articulating this point, noting as follows: "the Decision addressed issues far beyond the scope of the proceeding. The scope was ***improperly expanded*** beyond what this Commission approved in issuing I.14-05-012. For example, the connection between rural call completion issues and pole attachments, or the Verizon/Frontier transaction, or outage reporting, or Multi-Line Telephone Systems is tenuous at best." Decision, Dissent of Commissioners Liane Randolph and Carla Peterman ("Dissent") at 1 (emphasis added).

[23] D.15-07-010 at 10; *see also* D.00-09-042 at 6 and Rule 15.1(a).

[24] *Southern California Edison*, 140 Cal.App.4th at 1106.

[25] *See, e.g.,* Rule 7.1, Rule 7.3, Rule 7.5 (describing the Power of the Assigned Commissioner).

to be addressed," but those issues must be consistent with the scope of the decision opening the Commission proceeding over which the Assigned Commissioner presides. No rule gives the Assigned Commissioner the power to modify a Commission decision.

Where the Assigned Commissioner wishes to expand the issues beyond the original scope of the proceeding—the Assigned Commissioner must present the matter for consideration by the full Commission. *See. e.g.*, D.00-10-028. This is the process that should have been followed here if the Commission intended to consider additional issues in this proceeding, but no such process occurred.[26]

The Commission cannot adopt directives or rules related to matters that are beyond the scope of the OII[27]—nor can the Decision rely on the improper expansion of the proceeding—such actions constitutes a failure to "proceed[] in the manner required by law." Pub. Util. Code § 1757.1(a)(2). It is also an "arbitrary and capricious" administrative action that constitutes an "abuse of discretion" under the law[28] and thereby, a violation of Public Utilities Code § 1757.1(a)(5). The parts of the Decision that address outages, outage reporting, MLTS programming and notice issues, Frontier service issues, requirements concerning future transfers and mergers, and the placement of facilities on trees are beyond the scope of the OII and were not lawfully adopted in the Decision. Additionally, as noted above, the Scoping Memo

[26] Indeed, as discussed *supra*, it appears that the Assigned Commissioner was aware of the problems posed by her proposed expansion of the proceeding in the Scoping Memo because a proposed decision to expand the scope for the OII was released on March 17, 2015, but that proposed decision was never adopted by the full Commission.

[27] The scope of the proceeding remains defined by the OII even where respondents did not otherwise file a contemporaneous appeal of the unlawful scoping ruling and regardless of whether respondents answered data requests relating to matters that were not within the scope of the OII. Regardless of whether the scoping ruling was appealed or whether respondents answered data requests on issues beyond the scope, the fact remains that the Decision is at odds with the defined scope of the proceeding.

[28] *Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421 (2003) (if agency interpretation of a law or regulation is "arbitrary and capricious," that action constitutes an abuse of discretion).

purported to maintain the focus of the proceeding as a "review" (Scoping Memo at 4) and not a rulemaking. Accordingly, Findings of Fact 5-38, Conclusions of Law 7, 10-13, 18-19, and 23-26, and Ordering Paragraphs 5-8, 11-13, 15-16,19-20, 23 and 25 present legal error and must be eliminated from the Decision to proceed "in the manner required by law" and avoid the "abuse of discretion."

B. The Decision Unlawfully Addresses Matters that Exceed the Boundaries of the Scoping Memo.

The Decision's requirements pertaining to "tree attachments," Frontier service issues, requirements concerning future transfers and mergers, and MLTS services not only exceed the scope of the OII, they also extend beyond any reasonable boundaries imposed by the Scoping Memo. The adoption of these requirements is an "arbitrary and capricious" administrative action that constitutes an "abuse of discretion" under the law[29] and thereby, a violation of Public Utilities Code § 1757.1(a)(5). Further, adoption of the requirements, constitutes a failure to "proceed[] in the manner required by law," in violation of Public Utilities Code § 1757.1.

The Court of Appeal has expressly forbidden the Commission from adopting requirements on subjects that lie outside the scope of the scoping memo.[30] In *Southern California Edison*, the Commission adopted a requirement for utilities to charge "prevailing wages" in connection with utility construction projects, but the requirement was annulled because the scoping memo only extended to examine the practices of "reverse auctions" and "bid shopping," not prevailing wages. *Southern California Edison,* 140 Cal.App. 4th at 1105. The Court of Appeal found that this was a violation of the Commission's own procedural rules and a violation of Public Utilities Code § 1757.1(a).

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[29] *Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421 (2003) (if agency interpretation of a law or regulation is "arbitrary and capricious," that action constitutes an abuse of discretion").

[30] *Southern California Edison v. Pub.Util. Comm'n*, 140 Cal.App.4th 1085, 1104-1106 (2006).

The Decision commits the exact same legal error. Here, the Scoping Memo, which in itself unlawfully deviates from the OII, purports to address only "intrastate call completion failures . . . particularly in rural areas of the state" and "911 call completion issues in California." Scoping Memo at 1-2. This scope—even if accepted as valid despite being inconsistent with the OII—bears no relation to the Decision's requirements regarding the Frontier service issues and the potential attachment of telecommunications facilities to trees, nor does it relate to the manner in which MLTS systems are programmed or the mechanisms whereby MLTS system operators communicate with their customers. *See* Decision at 179-180 (OPs 6, 11). Therefore, Findings of Fact 5-16, and 18-19, Conclusions of Law 13, 19, and 22, and Ordering Paragraphs 5-8, and 11-13 present legal error and must be eliminated to proceed "in the manner required by law" and avoid the "abuse of discretion."

IV. THE OUTAGE REPORTING REQUIREMENT LACKS SUPPORT IN THE FINDINGS, AND THE COMMISSION ABUSED ITS DISCRETION BY ISSUING AN ARBITRARY AND CAPRICIOUS OUTAGE REPORTING REQUIREMENT.

In the Commission's recent service quality proceeding (R.11-12-001), the Commission extended the reach of its General Order ("G.O.") 133 outage reporting requirement—which is based on the FCC's outage reporting requirement of 900,000 user minutes over 30 minutes—to additional service providers. *See* D.16-08-021 at 24-26. In that proceeding, the Commission also considered, but declined to reduce the reporting threshold to address concerns about the reporting of outages in rural areas. *See* D.16-08-021 at 13.

The Proposed Decision issued in the present proceeding required reporting of outages of 300,000 user minutes or more, lasting 30 minutes by COLRs. *See* Proposed Decision at 150-151 (OPs 20, 21). The outage reporting requirement that was finally adopted by the Commission lowered the reporting threshold and expanded the universe of carriers subject to it. Specifically, the outage reporting requirement set forth in OP 20 provides that:

> We direct Communications Division to issue standing data requests to all respondents to report to the Commission outages of 90,000 user minutes that last 30 minutes or more, and the number of user minutes affected by an Optical Carrier 3 (OC3) or transport outage. We delegate the authority to Communications Division to adjust the data request threshold between 90,000- 900,000 user minutes. We further direct respondents to provide concurrent notice of such outages to the California State Warning Center of the California Office of Emergency Services, and require such reports or notice to be made as soon as possible, but no later than 60 minutes after their discovery of such outages.

Decision at 182-183 (OP 20).

As explained in Section II and III above, OP 20 is outside the lawful scope of the docket and the last minute modifications of OP 20 were procedurally improper on numerous grounds and violated due process. For these reasons, OP 20 must be eliminated. OP 20 must also be eliminated because: (i) OP 20 is not supported by the findings; and (ii) the Commission abused its discretion by adopting OP 20 in an arbitrary and capricious manner.

A. OP 20's Extension of Statewide Outage Reporting to All Respondents is Not Supported by the Findings.

Another factor that a court may consider in reviewing the lawfulness of a Commission decision issued in a quasi-legislative proceeding is whether the "decision of the [C]ommission is not supported by the findings." Pub. Util. Code § 1757.1(a)(4). Courts will vacate a Commission decision where findings are inadequate.[31] There are three aspects of the OP 20 outage reporting requirement that are not supported by the findings: (i) the extension of the requirement to all respondents (as opposed to only COLRs); (ii) the extension of the reporting requirements on a statewide basis (as opposed to limiting the requirement to rural areas); and (iii) the delegation of authority to the Communications Division to adjust the reporting threshold.

[31] *See United States Steel Corporation v. Pub. Util. Comm'n*, 29 Cal.3d 603 (1981).

First, the Decision fails to make any Findings of Fact to support its conclusion that OP 20 should apply to all respondents. To the contrary, as noted above, the text of the Decision and the Findings of Fact make clear that the outage reporting requirement should only apply to COLRs. The Decision states; "We impose this outage report duty on *COLRs only* at this time in light of their responsibility to provide service to any customer who requests it within their service territory."[32] The propriety of limiting the outage reporting requirement only to COLRs runs throughout the Decision (*see, e.g.*, Decision at 19-20, 150, 169), with the exception of OP 20 itself. There is no finding or even discussion in the text of the Decision about why respondent carriers are the right target group for OP 20.

Second, the record shows that the key driver for adopting a lower threshold outage reporting requirement in this proceeding was that the existing G.O. 133-D outage reporting threshold might not result in the reporting of significant outages in *rural* communities.[33] This is the same concern that was raised in the service quality proceeding.[34] However, instead of limiting the outage reporting to rural areas, as suggested by parties like County of Mendocino,[35] the Decision adopts a reporting requirement statewide. The Decision does this without including any finding that would justify the need for statewide outage reports, much less the need for outage reports in rural areas using the 90,000 minutes threshold, in particular.

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[32] Decision at 152 (emphasis added); *see also* Finding of Fact ("FOF") 27.

[33] Decision at 128 ("long distances between many *rural* communities…merit outage reporting responsive to the needs of this state."); s*ee also* Decision at 146 ("County of Mendocino calculated that the "threshold of 90,000 user minutes is appropriate for *rural* counties….") (emphasis added).

[34] *See* R.11-12-001, *Alternate Proposed Decision of Commissioner Sandoval Adopting General Order 133-D* at 17-18 (June 22, 2016) ("These additional reporting requirements were intended to assist the Commission in identifying localized service quality problems, especially those affecting small communities and rural areas of the state.").

[35] County of Mendocino Reply Comments at 4 (December 12, 2016) ("We need reporting standards that work for rural counties….").

Third, the Decision similarly fails to make any findings to support OP 20's delegation of authority to Communications Division to modify the outage reporting threshold or on what basis such a modification would be made. In fact, there is not even discussion of the delegation authority anywhere in the text of the Decision. The law is clear that the Commission must have findings to support its orders, and in this case there are no such findings. *See* Pub. Util. Code § 1757.1(a)(4). Accordingly, Ordering Paragraph 20 must be eliminated.

B. OP 20 Was Adopted in an Arbitrary and Capricious Manner.

In reviewing the lawfulness of a Commission decision issued in a quasi-legislative proceeding, a court can consider whether the "decision of the Commission was an abuse of discretion." Pub. Util. Code § 1757.1(a)(1). Courts have found that "[a]n administrative agency may abuse its discretion if it acts arbitrarily or capriciously."[36] Here, the Commission acted in an arbitrary and capricious manner and abused its discretion because: (i) the outage reporting requirement conflicts with the findings and text of the Decision and the recent service quality decision; and (ii) the Commission failed to consider all relevant factors and drew conclusions without substantial reason. *Id*.

First, the outage reporting requirement conflicts with the findings and text of the Decision and the recent service quality decision. The adopted outage reporting threshold of 90,000 user

[36] *Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421, 438 (2003). Where an agency has failed to "adequately consider[] all relevant factors" or has failed to supply a "rational connection between those factors" in connection with a decision, the agency has acted in an arbitrary and capricious manner. Actions that are "not supported by a fair or substantial reason" are also arbitrary and capricious. Similarly, courts will vacate a Commission Order where the Commission's analysis of the evidence was marginal. *See Carrancho v. California Air Res. Bd*., 111 Cal.App.4th 1255, 1265 (2003); *see also McBail v. Solano County Local Agency Formation Comm'n*, 62 Cal.App.4th 1223, 1230-1231 (1998). *Zuehlsdorf v. Simi Valley Unified Sch. Dist*., 148 Cal.App.4th 249, 256 (2007). *The Utility Reform Network v. Pub. Util. Comm'n*, 166 Cal. App. 4th 522 (2008) (remanding an intervenor compensation matter back to the Commission to make a compensation determination based on the record evidence).

minutes lasting at least 30 minutes, applicable to respondents, conflicts with other findings and the text of the Decision. Finding of Fact 27 specifically determines:

> [d]ata from *Carriers of Last Resort* to the Commission about outages of *300,000 user minutes or more, lasting at least 30 minutes* will provide the Commission with information to ensure that carriers provide safe and reliable service and comply with California law, and the Commission's rules, orders, and Decisions.

See Decision at 170 (FOF 27) (emphasis added). Similarly, the text of the Decision finds that "*300,000 user minutes is a prudent level* to start *COLR* reporting of outages" (Decision at 152) (emphasis added), and only encourages "respondent carriers to *voluntarily report* outages of 300,000 user minutes…." (Decision at 153) (emphasis added).

OP 20's 90,000 user minute threshold, applicable to all respondents, cannot be reconciled with these other aspects of the Decision. Even if, as the Decision suggests, reporting by respondent COLRs at a 300,000 user minute threshold were a "prudent level" for outage reporting purposes,[37] the Decision does not and cannot justify a 90,000 user minute threshold for *all* respondents—both COLRs and non-COLRs.[38] The internal conflict between the appropriate threshold in the decision itself shows that OP 20's outage threshold and its application to all respondents is arbitrary and capricious and thus an abuse of discretion.[39]

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[37] As noted in earlier comments filed in this proceeding, the Coalition does not agree that outage reporting at thresholds below those included in G.O. 133-D should have been adopted. *See, e.g.,* AT&T Opening Comments at 9-11; Comcast Opening Comments at 3; Frontier Opening Comments at 4.

[38] The Decision also fails to consider all relevant factors and draws conclusions without substantial reason by providing only marginal analysis of the 90,000 user minute threshold. Fundamentally, there is no indication of whether this threshold would serve its stated purpose of addressing rural outages, or whether there were better alternatives. In this regard, the Dissent points out that there were other alternatives for addressing the purported data gap: "[a] ruling could have been issued to ask carriers to 'backcast' the number of outages that would have been reported under various thresholds. While the past is not a perfect indicator of the future, the relative scale of various thresholds could have been determined." *See* Dissent at 2.

[39] Moreover, the fact that the Commission modified the Proposed Decision to provide Commission staff with the ability to further modify the outage reporting threshold within a range (*see* OP 20) only further highlights the arbitrary nature of the selected threshold.

Similarly, OP 20's directive, mandating compliance with the Communications Division's standing data request, conflicts with text in the Decision that states: "We *encourage* all respondents, *on a voluntary basis*, to report outages of 300,000 user minutes that last 30 minutes or more…We *encourage* such reports to be made as soon as possible after the outage has begun, and such reports should be communicated no later than 120 minutes after their discovery of such outages." Decision at 20 (emphasis added).

Additionally, the findings that support OP 20's requirement to inform the California Office of Emergency Services ("OES") of outages are contradicted by other portions of the Decision. For example, the Decision acknowledges the lack of a sufficient record with respect to the notification of government entities and questions "*whether* the Commission should require respondents to report outages to public safety officials at the local, county, *and state* level." Decision at 152 (emphasis added). In fact, the Decision orders the establishment of a stakeholder working group to address this exact issue. *Id*. Because the Decision concedes that the notification issue requires further study, the Commission has not "adequately considered all relevant factors" and has abused its discretion by adopting such a requirement absent that further study. As the Dissent astutely points out, "[w]e would have preferred for the record to be further developed to determine if alternatives exist that would meet the needs of emergency responders while minimizing unnecessary work by the telephone companies." *See* Dissent at 1.

OP 20 also conflicts with the recent Service Quality proceeding (R.11-12-001). As stated above, the Commission chose not to pursue lower reporting thresholds for rural outage reporting in that proceeding,[40] and there is no justification to deviate from that decision now. At its core, OP 20 is an improper last-ditch effort to relitigate an issue that was already decided in the service

[40] *See* D.16-08-021 at 13.

quality docket, where it was rejected in a well-reasoned decision based on a full and robust record and appropriate Commission procedure. Here, by contrast, OP 20 lacks support in the record, and the last-minute nature of its addition failed to provide parties with proper notice or opportunity for comment. This inconsistency reveals the arbitrary and capricious nature of OP 20.

Second, the Commission failed to consider all relevant factors and drew conclusions without substantial reason. The Decision's adoption of outage reporting is also an abuse of discretion because of its "arbitrary and capricious" reliance on untested hearsay statements from PPHs as the principal basis for these requirements.[41] Pub. Util. Code § 1757.1(a)(4). As the Dissent observes, "the Decision gives great weight to the anecdotal comments made at those [Public Participation] hearings." Dissent at 1. The dissent also notes, "it is not appropriate to make policy simply based on individual experiences without a better sense whether they are widespread or possible to be addressed on a statewide basis." *Id*. Heavy reliance on the PPH statements without giving parties "a specific opportunity to comment on the representations" or present evidence of their own to counter the representations renders the Decision arbitrary and capricious, and, thus, an abuse of discretion.[42]

Finally, the Commission has committed legal error by requiring outage reports without addressing the critical need to protect the confidentiality of the reports.[43] Under federal law,

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[41] *See, e.g.,* Decision at 97, n.133 (speculations from Sean McLaughlin regarding the nature and extent of alleged outages in connection with finding that there are "facilities-driven outages" demonstrated on the record); the Decision also contains hundreds of citations to comments made at PPHs. None of these comments was presented under oath, and none was tested under cross-examination. Some of the comments also reflect speculations about technical network matters for which no foundation or proper expertise was established.

[42] Dissent at 1*; Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421 (2003).

[43] Decision at OP 20.

outage reports are presumed to be confidential and given significant protection.[44] Of particular concern, the Decision orders that respondents not only provide outage reports to the Commission, but also concurrent notice to OES.[45] Yet the Decision fails to address how OES will protect the confidential nature of the outage reports, or even whether Cal OES has mechanisms to ensure confidentiality and protection of such reports if requested via a Public Records Act requests. By forcing respondents to provide this highly sensitive information with no guarantee of protection, the Commission has abused its discretion.

Accordingly, OP 20 is also arbitrary and capricious, and thus an abuse of discretion, because: (i) the outage reporting requirement conflicts with the findings and text of the Decision, and the recent service quality decision; (ii) the Commission improperly relied on PPH statements in consideration of outage issues; and (iii) the Decision fails to address the confidentiality of

[44] The FCC's confidentiality regime for NORS data is extremely sensitive, given its relation to critical infrastructure and potential for competitive advantage. In its 2012 Order, the FCC ruled that individual outage reports will be treated on a presumptively confidential basis and will not be routinely available for public inspection under the federal Freedom of Information Act, consistent with Section 4.2 of the Rules, which permits release only under the procedures set forth in 47 C.F.R. Section 0.461. *See In the Matter of the Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, FCC 12-22 (Feb. 21, 2012) at ¶ 112. These reports also implicate national security, and the FCC has considered providing states access pursuant to certain protections against public disclosure: "we reaffirm our view that NORS data should be presumed confidential and shielded from public inspection. We thus propose that, in order to receive direct access to NORS, a state must certify that it will keep the data confidential and that it has in place confidentiality protections at least equivalent to those set forth in the federal Freedom of Information Act (FOIA)." *In re Amendments to Part 4 of the Comm'n's Rules*, 30 FCC Rcd 3206, ¶ 51 (2015). In addition, the FCC's submission process for NORS reports requires verification via username and password in order to be able to even access the NORS reporting system, and submission of reports occurs via a secure server. *See* Network Outage Reporting System, https://www.fcc.gov/nors/outage/StartUp.cfm (last accessed Jan. 19, 2017). No such confidential protections are afforded here.

[45] Decision at OP 20.

outage information, thereby justifying the elimination of OP 20, in addition to Ordering Paragraphs 15-16, 23 and 25,[46] and Findings of Fact 25-30, 32-35, 37-38.

V. THE COMMISSION FAILED TO PROCEED LAWFULLY AND VIOLATED THE CONSTITUTION BY EXTENDING CERTAIN DIRECTIVES TO THE UNDEFINED CATEGORY OF "CARRIERS."

In using the undefined term "carriers" to define the applicability of certain Ordering Paragraphs, the Decision is unconstitutionally vague, and violates the non-respondent entities' due process rights. *See* Pub. Util. Code § 1757.1(a)(6). For the same reasons, the Decision is an arbitrary and capricious outcome that constitutes an unlawful abuse of discretion. *See* Pub. Util. Code §§ 1757.1(a)(2), 1757.1(a)(1), 1757.1(a)(6).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions and requirements are not clearly defined.[47] The vagueness doctrine bars enforcement of a rule "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[48] Several of the Decision's directives are void for vagueness because they purport to apply to the undefined category of "carriers." *See* OPs 2, 5, 6, 7, and 15. Although the OII clearly identifies "respondents" by a listing in its Ordering Paragraph 4,[49] the term "carrier" is

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[46] Because the Decision also heavily relied on untested PPH statements regarding adoption of tree attachment and MLTS requirements, Findings of Facts 13, 15, and 16 and OPs 5-8, 11-13 must also be eliminated to avoid legal error (*see, e.g.,* Decision at 15 (reference to comments and photographs addressing tree attachments) and Decision at 60, 62 (anecdotal statements regarding lack of access to 2-1-1 in connection with MLTS systems)).

[47] *Mason v. Office of Admin. Hearings*, 89 Cal.App.4th 1119, 1126 (2001).

[48] *In re Sheena K.*, 40 Cal.4th 875, 890 (2007).

[49] OII, OP 4 provides:

> "The respondents to this investigation are: [¶] All Carriers eligible to draw support from the California High Cost Fund A and B, namely: Calaveras Telephone Company, California-Oregon Telephone Company, Ducor Telephone Company, Foresthill Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles

not defined in the Decision or Commission's rules, nor is there a general definition of "carrier" in the Public Utilities Code. This lack of definition as to who is subject to these requirements violates a constitutional right, rendering these requirements void for vagueness.

Moreover, to the extent that these requirements are intended to apply to non-respondent entities, it violates those entities' due process rights.[50] Although non-respondent, certificated, and registered providers were apparently given notice of the proceeding,[51] they were not added to the service list of the proceeding and it is unclear if the term "carriers" is even meant to be co-extensive with the list of companies that were provided notice of the OII.[52] Even if that were the case, those entities that were notified of the OII were not provided notice that there would be any directives applicable to them or kept apprised of the developments in the proceeding through service of process. Indeed, the OII made clear that if any rules were to be considered those would be addressed in a subsequent rulemaking, not in the investigation. *See* OII at 2.

> Telephone Company, Ponderosa Telephone Company, Sierra Telephone Company, Siskiyou Telephone Company, the Volcano Telephone Company, and Winterhaven Telephone Company, AT&T California, Verizon of California (includes three (3) companies: Contel, GTE and MCI Metro Access), Frontier Communications of California (includes Citizens and Frontier SouthWest), Cox California Telecom (Cox Communications), and SureWest Communications."

The list of respondents was improperly expanded in the Scoping Memo to also include "Intrado Communications, Comcast Phone of California, Time Warner Information Services Inc., and Charter Fiberlink." Scoping Memo at 1.

[50] *See Goldberg v. Kelly,* 397 U.S. 254, 269 (1970).

[51] OII at 40 ("Due to the potentially far-reaching effects of this proceeding, we also provide for service of this Order on the following entities in order to ensure that it is distributed to a wide range of potentially interested parties, including: 1) all certificated California telephone carriers and wholesalers with either a CPCN or a WIR; and 2) individuals and entities on the service lists for Rulemaking (R.) 01 08-002, R.11-11-007, and R.11-12-001.").

[52] In fact, logically it would seem that certain of the requirements should not, for example, apply to all certificated telephone corporations (e.g. those that provide wholesale service) since they relate only to retail services. *See, e.g.,* OPs 7 and 15. Moreover, the extension of these requirements to VoIP or other IP-enabled services would violate Pub. Util. Code § 710, the Commission would have again failed to proceed in a manner required by law.

The United States Supreme Court set forth the requirements for notice, and those have not been followed here as to non-respondent entities:

> An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. . . .

Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314 (citations omitted). Here, no notice reasonably calculated to convey that the proceeding could lead to rules or directives was provided to non-respondent entities. Finally, to the extent that these requirements in Ordering Paragraphs 2, 5, 6, 7, and 15 are extended to "carriers," such determination is arbitrary and capricious and therefore an abuse of discretion.[53] There is no rationale provided in the Decision, nor any discussion, about why the Decision applies certain requirements to "carriers" while others apply to "respondents." Accordingly, the broad extension of requirements to "carriers" constitutes an abuse of discretion. *See* Pub. Util. Code § 1757.1(a)(1). Therefore, Ordering Paragraphs 2, 5-7, 15 must be eliminated.

[53] Pub. Util. Code §§ 1757.1(a)(1); *Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421 (2003) (arbitrary and capricious actions are an "abuse of discretion").

VI. CONCLUSION

For these reasons, stated above, the Decision is unlawful, and the Commission must grant rehearing to remedy the legal errors identified herein.

Respectfully submitted,

/s/

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Dated: February 3, 2017

[54] Pursuant to Rule 1.8(d), counsel for Coalition authorizes Davis Wright Tremaine LLP to sign and file these comments on behalf of Coalition.