BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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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 No. 06-10-005 (Filed October 5, 2006)

COMMENTS OF GOOGLE FIBER INC. ON PROPOSED DECISION DENYING GOOGLE FIBER INC.'S PETITION TO MODIFY DECISION 07-03-014

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TABLE OF CONTENTS AND SUBJECT INDEX

TABLE OF AUTHORITIES

!

California Public Utilities Commission Code

!

California Public Utilities Commission Decisions

!

California Public Utilities Commission Rules

COMMENTS OF GOOGLE FIBER INC. ON
PROPOSED DECISION OF COMMISSIONER RANDOLPH

Pursuant to Rule 14.3 of the Commission's Rules and Practice and Procedure, Google Fiber Inc. ("Google Fiber") submits these Comments on the Proposed Decision of Commissioner Randolph ("Proposed Decision"). Google Fiber appreciates the Commission's timely action on its Petition,[1] as well as the Commission's continued commitment to encouraging video and broadband competition in California. As the Proposed Decision recognizes, both the Legislature and the Commission have identified timely and predictable access to public utility infrastructure on nondiscriminatory terms—as well as equivalent treatment of video providers when they are similarly situated—as essential to further the State's goals for expanded availability of broadband.[2] Google Fiber, however, has identified errors in the Proposed Decision and hereby requests corrections or clarifications to avoid confusion or difficulties implementing the Commission's final order.

The Proposed Decision identifies two paths by which a state-franchised video service provider ("VSP") that is neither a telephone company nor a cable operator currently may obtain access to utility infrastructure: "contractual access" on a purely voluntary basis from the infrastructure owner, and access as a "cable television corporation" (as opposed to a "cable operator") under this Commission's supervision. The Proposed Decision, though, contains contradictory and incomplete discussions of these options. Regarding contractual access, the

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[1] Google Fiber Inc., *Petition of Google Fiber Inc. for Modification to Clarify Decision 07-03-014 Adopting a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Rulemaking 06-10-005 (filed July 3, 2014) ("Petition").

[2] *Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, Proposed Decision of Commissioner Randolph, at 2-5 (mailed Feb. 20, 2015), *available at* http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M146/K989/146989935.PDF ("Proposed Decision") (discussing statutory and regulatory framework).

Proposed Decision describes in detail how such access agreements protect public safety, yet elsewhere it incorrectly finds that access contracts do not ensure safe attachments. Regarding supervised access for cable television corporations, the Proposed Decision fails to say expressly which VSPs have such rights, and thus leaves an opening for infrastructure-owning utilities that seek to slow competitive broadband deployment. The Commission should revise those portions of the Proposed Decision as suggested below and shown in the accompanying Appendix.

DISCUSSION

I.! The Commission Should Conform its Discussion of Public Safety Issues to its Findings Regarding Contractual Access

Contractual access depends on the willingness of public utilities to negotiate nondiscriminatory terms, in some cases with a competitor, without a regulatory backstop. Yet the Commission explained in its 1998 ROW Decision that due to "the advantages of incumbent status of ILECs and electric utilities," these infrastructure owners "may have the potential incentive for discriminatory treatment in negotiating terms of access."[3] Google Fiber is aware from direct experience that pole owners are not always willing to negotiate an access agreement, much less an agreement providing nondiscriminatory terms.[4] Pure contractual access thus fails to solve the infrastructure challenges faced by new entrants and does not provide a meaningful solution to the problem identified in Google Fiber's Petition.

As noted, there are important differences between contractual access and Commission-supervised access under the ROW Decision. Commission oversight of attachment agreements

[3] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Decision No. 98-10-058 at 13, 82 CPUC 2d 510, at 13 (Oct. 22, 1998) ("ROW Decision"), *available at* ftp://ftp.cpuc.ca.gov/telco/Important%20Decisions/D.98-10-058.pdf.

[4] *See* Petition at 9.

helps ensure a fair price for attachments, while a "contractual access" agreement could establish higher charges through which the pole owner extracts a monopoly rent for its essential facility. That is why the Commission determined in its ROW Decision that rules are necessary to ensure nondiscriminatory pricing for all similarly situated attachers.[5] Unequal charges for similar attachments, the Commission explained, would subject some service providers "to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets."[6] Backstop regulatory supervision also might be needed to ensure timely and nondiscriminatory responses to the attacher's access requests, when the utility otherwise would not provide it.[7]

In practice, these differences can be critical to bringing greater video and broadband competition to California. As the ROW Decision says, "[t]he adoption of general guiding principles, and minimum performance standards concerning ROW access" is needed "to promote a more level competitive playing field in which individual negotiations may take place."[8]

Although pure contractual access does not protect against practices by infrastructure owners that harm competition, it does protect public safety. As the Proposed Decision itself explains, "[a]ccess 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."[9] The Proposed Decision notes that under negotiated access agreements,

> 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

[5] ROW Decision at 54.

[6] *Id.*, Finding of Fact 13.

[7] *See id.* at 20, 61-62.

[8] *Id.*, Finding of Fact 4.

[9] Proposed Decision at 24.

> 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.[10]

These facts confirm Google Fiber's showing that the Commission can protect public safety by regulating the pole attachments made by VSPs, without additionally regulating the VSPs themselves.[11] These facts also demonstrate the error of an earlier passage in the Proposed Decision that appears to credit electric utilities' safety-based arguments for denying attachment rights.[12] The truth of the matter is that whether a utility enters into a pole attachment agreement voluntarily or under regulatory supervision, the agreement invariably mandates safe attachments in accordance with regulatory rules such as General Order 95 ("GO-95"), industry standards like the National Electric Safety Code, and the utility's own safety requirements. Indeed, where Google Fiber has built networks using utility infrastructure, its arrangements with the infrastructure owners have resulted in not only safe attachments by Google Fiber itself, but also improvements to the overall safety of utility infrastructure and attachments due to replacement of overloaded poles and correction of other unsafe existing conditions. Google Fiber typically needs ubiquitous access to utility infrastructure, so it conducts a comprehensive assessment and upgrade of the infrastructure in a service area, including locations that may not have been surveyed for some time.

To correct inconsistency in the Proposed Decision and reflect the reality that access contracts invariably require safe attachments as required by GO-95, the Commission should make the following changes:

[10] *Id.*; *see id.*, Conclusion of Law 3.

[11] Google Fiber Inc., *Opening Brief of Google Fiber Inc. to the Administrative Law Judge's Ruling Requiring Google Fiber Inc., and Authorizing Other Parties, To Submit Legal Briefs Regarding Specified Matters*, Rulemaking 06-10-005, at 11-13 (filed Oct. 17, 2014) ("Google Fiber Opening Br.").

[12] *See* Proposed Decision at 20-23.

- In Section 5.1 of the Discussion, delete the passage beginning with "Another gap" on page 20 and continuing through "regulations with respect to VSPs" on page 23.

- In the Findings of Fact, delete the text of Finding 3 on page 28 and replace it with *"Pub. Util. Code §§ 761, 767.5, and 767.7 do not expressly address the issue of VSP access to utility infrastructure."*

II. The Commission Should Include an Express Finding that VSPs Providing Wireline Internet Protocol Television Service Are Cable Television Corporations

The Proposed Decision identifies a second path to infrastructure access—invocation of a cable television corporation's access rights under Section 767.5 of the Public Utilities Code.[13] If made reliably available in this proceeding, this option will address the access needs of VSPs that are wireline Internet Protocol television ("IPTV") providers. Absent the addition of clarifying language, however, the Proposed Decision may leave room for utilities to argue about the scope of the Code's definition of "cable television corporation." Such obstructionism would maintain the entry barrier that Google Fiber is seeking to remove.

Most important, the Proposed Decision fails to answer the issue framed by Administrative Law Judge Kenney's questions of September 30, 2014: Do VSPs that do not use a traditional cable television architecture qualify as cable television corporations when they transmit video programming to subscribers for a fee over a wired connection that is not a traditional one-way cable television system? It appears the Commission intends to answer this question in the affirmative by adopting the plain-language reading of the definition of "cable television corporation," which encompasses wireline VSPs that are not "cable operators" as defined in Section 5830(b).[14] Otherwise, non-traditional wireline VSPs such as Google Fiber

[13] Proposed Decision at 24-27.

[14] *See* Google Fiber Opening Br. at 4-5.

could not take advantage of the access rights in Section 767.5 of the Code. And Section 5.3 of the Proposed Decision would have no relevance to Google Fiber's Petition. The structure of the Proposed Decision thus makes plain that the Commission intends for IPTV providers like Google Fiber to be eligible for pole attachment rights under Section 767.5 and the ROW Decision.

By failing to hold this expressly, the Proposed Decision opens the door to delaying tactics by a utility that seeks to keep new video and broadband providers off its poles. Such a utility—the very incumbent the ROW Decision was adopted to constrain—conceivably could maintain in negotiations that the new entrant is not a "cable television corporation" unless it is also a "cable operator," notwithstanding the Proposed Decision's statement that "the two types of entities are not identical and may exist apart from each other."[15] The new entrant would likely have to vindicate its rights by filing a complaint that would burden the Commission and delay new competition.

To avoid this scenario and meaningfully resolve the issue framed by Google Fiber's Petition, the Commission should strike the sentence immediately following footnote 33 in Section 5.3, and add in its place the following:

> *Furthermore, the plain language of § 216.4 does not require that a cable TV corporation must meet the full definition of a "cable operator" as set out in § 5830(b). We instead find that a state-franchised VSP that transmits television programs over wired facilities to subscribers for a fee is entitled to access rights under § 767.5, § 768.5, and the ROW Rules. In that regard, we note that § 710(c) of the Code specifically provides that "[t]his section does not affect or supersede ... (7) The commission's authority relative to access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to commission General Order 95 and General Order 128."*

[15] Proposed Decision at 27.

Likewise, in Conclusion of Law 6 on page 30, the Commission should delete the word "cable" and insert in lieu thereof, "*wired facilities*".

CONCLUSION

The Proposed Decision fails to address public safety issues in a consistent manner reflecting the protections ensured by pole access agreements and GO-95, and leaves open a basic question of statutory interpretation that (absent grant of the finding sought by Google Fiber in its Petition) must be answered in order to promote video and broadband deployment in California. These deficiencies are easily remedied. With the modifications suggested above, the Proposed Decision would reasonably resolve the issues framed in Google's Petition, thereby encouraging the deployment of new video and broadband services in California.

Dated and signed: March 12, 2015 in Walnut Creek, CA.

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