BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities.	FILED PUBLIC UTILITIES COMMISSION APRIL 7, 2005 SAN FRANCISCO OFFICE RULEMAKING 05-04-005

ORDER INSTITUTING RULEMAKING FOR THE PURPOSE OF ASSESSING AND REVISING THE REGULATION OF TELECOMMUNICATIONS UTILITIES

Summary of Order

This Order institutes a rulemaking to assess and revise the regulation of all telecommunications utilities in California except for small incumbent local exchange carriers (ILECs). The primary goal of this proceeding is to develop a uniform regulatory framework for all telecommunications utilities, except small ILECs, to the extent that it is feasible and in the public interest to do so. The specific issues that will be considered in this proceeding are listed and described in Appendix A of this Order. The preliminary schedule for conducting this proceeding is set forth in Appendix B. The Respondents to this rulemaking are identified in Appendix C.

Background

The Commission employs different regulatory frameworks for different providers of telecommunications services to the public. The Commission regulates the price, quality, terms, and conditions of most services provided by the large and medium sized ILECs. The Commission does not regulate the price

of services provided by completive local exchange carriers (CLECs) and interexchange carriers (IECs), and regulates only limited aspects of the quality, terms, and conditions of the services offered by CLECs and IECs. The Commission's regulation of wireless carriers is even more limited.

There have been dramatic changes to the telecommunications landscape in recent years. ILECs now compete with cellular and cable TV companies in both the local and long-distance markets. Although there is vigorous competition for long distance services, "long-distance" is disappearing as a stand-alone service as more and more consumers opt for bundled service packages or use Internet Protocol based networks. In fact, consumers are increasingly communicating in ways that bypass traditional telephone networks entirely. For example, it is now common to exchange voice and text messages through cell phones, computers, and other means without ever having to use the public switched telephone network. These changes to the telecommunications landscape have created a need for the Commission to conduct a comprehensive examination of the way it regulates telecommunications services.

Preliminary Scoping Memo

This proceeding shall be conducted in accordance with Article 2.5 of the Commission's Rules of Practice and Procedure (Rules).[1] As required by Rule 6(c)(2), this Order includes a preliminary scoping memo[2] as set forth below.

The scope of this proceeding is to review and, if appropriate, revise the Commission's regulation of telecommunications services provided to end users.

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[1] The Rules of Practice and Procedure are posted on the Commission's web site at www.cpuc.ca.gov.

[2] Rule 5(m) defines "scoping memo" as an order or ruling describing the issues to be considered in a proceeding and the timetable for resolving the proceeding.

The ultimate goal of this proceeding is to develop a uniform regulatory framework that applies to all providers of regulated telecommunications services, except small ILECs, to the extent that it is feasible and in the public interest to do so.[3] Any regulatory framework adopted by the Commission should achieve several objectives. Most importantly, the adopted framework should ensure, to the extent practical, that every person and business in California has access to modern, affordable, and high quality telecommunications services. The adopted framework should also be competitively and technologically neutral. In addition, the adopted framework should encourage technological innovation, economic development, and employment in California. The specific issues comprising the scope of this proceeding are listed in Appendix A. The final scope will be determined in one or more rulings issued by the assigned Commissioner pursuant to Rules 6(c)(2) and 6.3.

Pursuant to Rule 6(c)(2), we preliminarily determine that (1) the category of this proceeding is "quasi-legislative" as that term is defined in Rule 5(d),[4] and (2) there is no need for evidentiary hearings. If it is subsequently determined that evidentiary hearings are needed, the time, place, and scope of the evidentiary hearings will be set in one or more rulings issued by the assigned Commissioner or the assigned Administrative Law Judge (ALJ).[5]

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[3] The rates for most services offered by small ILECs are currently set on a cost-of-service basis. This Order does not propose any changes to the current regulatory structure for small ILECs.

[4] Rule 5(d) defines "quasi-legislative" proceedings as proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry.

[5] Rule 5(k)(3) provides that in a quasi-legislative proceeding, the assigned Commissioner is the presiding officer, except that the assigned ALJ, in the assigned Commissioner's absence, shall act as presiding officer at any hearing other than a formal hearing as defined in Rule 8(f)(2).

The preliminary schedule for this proceeding is set forth in Appendix B of this Order. As shown in Appendix B, this proceeding will be conducted in two phases. Phase 1 will focus on the selection and implementation of a uniform regulatory framework. Phase 2 will address implementation issues associated with the adopted uniform regulatory framework that require further development and/or evidentiary hearings.

Parties will have an opportunity during each Phase to submit written comments and to request an evidentiary hearing. Appendix B contains a preliminary schedule for conducting each Phase. We anticipate that because of the complexity of the issues in this proceeding, it may be necessary to revise the schedule as the proceeding progresses. Accordingly, the assigned Commissioner and the assigned ALJ may issue rulings to revise the schedule.

Parties may file and serve opening comments regarding Phase 1 issues no later than 45 days from the date this Order is mailed, and reply comments no later than 60 days from the date this Order is mailed. As required by Rule 6(c)(2), parties shall also include in their opening comments any objections they may have regarding (1) the categorization of this proceeding as "quasi-legislative," (2) the preliminary determination that evidentiary hearings are not required, and (3) the preliminary scope and timetable for this proceeding as set forth in Appendices A and B of this Order. Any party who believes that an evidentiary hearing is required regarding Phase 1 issues should file a motion requesting a hearing no later than 70 days from the date this Order is mailed. Any such motion must identify and describe (1) the material issues of fact, (2) the adjudicative evidence the party proposes to introduce at the requested hearing, and (3) a proposed schedule for the hearing. Any right that a party may otherwise have to an evidentiary hearing regarding Phase 1 issues will be waived if the party does not file a timely motion requesting an evidentiary hearing.

Because of the importance of this issue, we are also taking the unusual step of scheduling a full Commission en banc, early in the process, to hear directly comments from the parties and allow public discussion by the Commissioners. We will schedule the en banc between receipt of the opening and reply comments.

Following the receipt of Phase 1 comments and any motions requesting an evidentiary hearing, the assigned Commissioner will issue a ruling pursuant to Rules 6(c)(2) and 6.3. The ruling will address the scope of this proceeding, particularly in regard to Phase 1 issues. The ruling will also finalize the category of this proceeding, the need for evidentiary hearings regarding Phase 1 issues, and the schedule for the resolution of Phase 1 issues. If appropriate, the ruling will designate a principal hearing officer. The ruling may also provide a revised scope and schedule for Phase 2. After the ruling is issued, parties may submit an appeal to the full Commission pursuant to Rule 6.4 regarding the assigned Commissioner's ruling on category.

Respondents

The telecommunications utilities that are likely to be affected the most by this rulemaking are the large and medium sized ILECs. Accordingly, the large and medium-sized ILECs identified in Appendix C are hereby named as respondents to this rulemaking. However, non-respondent telecommunications utilities might also be affected by this rulemaking. Accordingly, non-respondent utilities should participate in this rulemaking if they wish to affect its outcome.

Service and Availability of this Order

This Order shall be served on the following: (1) all ILECs, CLECs, IECs, and wireless carriers; and (2) all categories of participants on the service lists for (i) R.95-04-043/I.95-04-044, the proceeding for matters related to local exchange competition, (ii) R.01-09-001/I.01-09-002, the proceeding for the fourth triennial review of the New Regulatory Framework for Pacific Bell Telephone Company d/b/a SBC California (SBC) and Verizon California, Inc. (Verizon), and (iii) I.04-02-007, the proceeding regarding the extent to which Voice Over Internet Protocol should be exempted from regulatory requirements.

This Order will be available to the public on the Commission's web site (www.cpuc.ca.gov). A copy of this Order may also be obtained from the Commission's Central Files Office in San Francisco [(415) 703-2045]; and from the Commission's Public Advisor Offices in Los Angeles [(213) 897-3544] and San Francisco [(415) 703-2074].

Participation and Service List

All providers of regulated intrastate telecommunications services are welcome to participate in this proceeding either individually or through their industry associations, as are cable companies and providers of Internet Protocol.

The Commission's practice is to require any party who wishes to formally participate in a proceeding to submit an appearance form at a prehearing conference (PHC) or evidentiary hearing. This practice may discourage formal participation in this proceeding, since individuals and small organizations may find it burdensome to travel to a PHC or evidentiary hearing.

To facilitate broad public participation in this proceeding, we will allow parties to formally participate by mailing a notice of participation to the Commission's Process Office. The address of the Commission's Process Office is

Room 2000, 505 Van Ness Avenue, San Francisco, CA 94102. The notice of participation must include all of the following information:

- The proceeding number shown on the first page of this Order.
- The name, address, and telephone number of each person to be placed on the service list. Parties are encouraged to provide an e-mail address as well.
- The person, entity, or organization for which the notice is being filed.
- The category of participation. There are three categories of participation: Appearance, State Service, and Information Only. Those in the Appearance category are parties with all attendant rights and obligations. Appearances receive exhibits, testimony, and all formally filed documents, including pleadings, motions, rulings, proposed decisions, and Commission decisions. Appearances must serve their pleadings on all other Appearances and those in the State Service category. Persons should not indicate that they are an Appearance unless they intend to actively participate in this proceeding by filing comments. Any Appearance that fails to actively participate may be moved to the Information Only portion of the service list. The State Service category consists of persons employed by the State of California. Those in the State Service category receive the same documents as appearances, but they are not parties to the proceeding and cannot file pleadings. Those in the Information Only category receive all Commission-generated documents at no charge, such as rulings, proposed decisions, and Commission decisions. Appearances are not required to serve their pleadings on those in the Information Only category.

Parties may also seek to formally participate in this proceeding by filing a notice of party/non-party status at a PHC or evidentiary hearing if one is held. Any person who is interested in participating in this proceeding but is unfamiliar with the Commission's procedures may contact the Commission's Public Advisor Offices in Los Angeles [(213) 897-3544] or San Francisco [(415) 703-2074].

Parties should note that it is not necessary to formally participate in this proceeding in order to monitor major developments. Significant documents in this proceeding (e.g., rulings and decisions) will be posted on the Commission's web site. There is no need to mail the previously described notice of participation to the Process Office to monitor in this fashion.

The Process Office will compile an initial service list based on the notices that it receives within 30 days from the date this Order is mailed and post the initial service list on the Commission's website no more than 37 days after this Order is mailed.[6] The service list for this proceeding may be obtained from the Commission's web site (www.cpuc.ca.gov) or the Process Office [(415) 703-2021].

The assigned Commissioner and the assigned ALJ shall have ongoing oversight regarding the procedures governing parties' participation and the service list. They may revise these procedures and the service list, as necessary.

Electronic Service Protocol

The filing and service of documents in this proceeding shall be governed on an interim basis by the revised Rules in Appendix C of D.04-12-057. The revised Rules have been sent to the Office of Administrative Law (OAL) for review and approval. Parties should use the revised Rules in Appendix C of Decision 04-12-057 until final Rules are adopted by the OAL, and then use the Rules adopted by the OAL. In addition to the requirements set forth in the Rules, all parties shall provide to the assigned ALJ via e-mail an electronic copy of their documents in Microsoft Word format.

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[6] The Process Office periodically updates service lists to correct errors and to make changes at the request of the parties on the list or the assigned ALJ.

Ex Parte Communications

This proceeding is subject to Rule 7, which specifies standards for engaging in ex parte communications and the reporting of such communications. Pursuant to Rules 7(a)(4) and 7(d), ex parte communications will be allowed in this proceeding without the restriction or reporting. These rules governing ex parte communications shall remain in effect until the assigned Commissioner makes an appealable determination of category. Following the Commissioner's determination, the applicable ex parte communication and reporting requirements shall depend on such determination unless and until the determination is modified by the Commission pursuant to Rule 6.4 or 6.5.

IT IS ORDERED that:

1. A rulemaking is instituted on the Commission's own motion to assess and revise the regulation of all telecommunications utilities in California, except for small incumbent local exchange carriers (ILECs).

2. The specific issues to be considered in this proceeding are listed and described in Appendix A of this Order. These issues constitute the general scope of this proceeding. The exact scope of this proceeding will be determined in one or more rulings issued by the assigned Commissioner.

3. The preliminary schedule for conducting this proceeding is set forth in Appendix B. The assigned Commissioner and the assigned Administrative Law Judge (ALJ) may revise the schedule of this proceeding.

4. The large and medium-sized ILECs identified in Appendix C are named as respondents to this proceeding. The respondents shall file comments on the matters set forth in Appendix A.

5. The category of this rulemaking is preliminarily determined to be "quasi-legislative" as this term is defined in Rule 5(d) of the Commission's Rules of Practice and Procedure (Rules).

6. It is preliminarily determined that there is no need for evidentiary hearings. The final determination on the need for evidentiary hearings will be made in one or more rulings issued by the assigned Commissioner. The time, place, and scope for evidentiary hearings, if any, shall be set in one or more rulings issued by the assigned Commissioner or the assigned ALJ.

7. Parties that seek to participate in this proceeding should mail a notice of participation to the Commission's Process Office. The address of the Process Office is Room 2000, 505 Van Ness Avenue, San Francisco, CA 94102. The notice must include all the information identified in the body of this Order.

8. The Process Office shall (i) create an initial service list based on notices of participation received by the Process Office within 30 days from the date this Order is mailed, and (ii) post the initial service list on the Commission's web site no more than 37 days from the date this Order is mailed. Parties may obtain the service list from the Commission's web site (www.cpuc.ca.gov) or by contacting the Process Office [(415) 703-2021].

9. The assigned Commissioner and the assigned ALJ shall have ongoing oversight regarding the procedures governing participation in this proceeding. They may revise these procedures, as necessary. The assigned Commissioner and the assigned ALJ shall also have ongoing oversight of the service list. They may revise the service list or the procedures governing the list, as necessary.

10. The filing and service of documents in this proceeding shall be governed on an interim basis by the revised Rules set forth in Appendix C of D.04-12-057. The revised Rules have been sent to the Office of Administrative Law (OAL) for review and approval. Parties should use the revised Rules in Appendix C of D.04-12-057 until final Rules are adopted by the OAL, and then use the Rules adopted by the OAL.

11. All parties shall provide to the assigned ALJ via e-mail an electronic copy of their documents in Microsoft Word format.

12. Opening comments regarding Phase 1 issues identified in Appendix A shall be filed and served no later than 45 days from the date this Order is mailed. Reply comments shall be filed and served no later than 60 days from the date this Order is mailed. As required by Rule 6(c)(2), parties shall include in their opening comments any objections they may have regarding (i) the categorization of this proceeding as "quasi-legislative," (ii) the preliminary determination that evidentiary hearings are not required, and (iii) the preliminary scope and schedule for this proceeding as set forth in Appendices A and B.

13. Any party who believes that an evidentiary hearing is required regarding Phase 1 issues shall file a motion requesting such a hearing no later than 70 days from the date this Order is mailed. Any such motion must identify and describe (i) the material issues of fact, (ii) the evidence the party proposes to introduce at the requested hearing, and (iii) the schedule for conducing the hearing. Any right that a party may otherwise have to an evidentiary hearing regarding Phase 1 issues will be waived if the party does not submit a timely motion requesting an evidentiary hearing.

14. This Order shall be served on the following: (i) the large and mediums sized ILECs; (ii) all competitive local exchange carriers and interexchange carriers; (iii) all wireless carriers; (iv) all service categories for the service lists for (a) the consolidated Rulemaking (R.) 95-04-043 and Investigation (I) 95-04-044, (b) R.01-09-001/I.01-09-002, and (c) I.04-02-007.

This Order is effective today.

Dated April 7, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

I reserve the right to file a dissent.

/s/ GEOFFREY F. BROWN
Commissioner

I reserve the right to file a concurrence.

/s/ DIAN M. GRUENEICH
Commissioner

APPENDIX A

Scope of the Proceeding

The scope of this proceeding consists of those issues identified below. The scope of this proceeding may be revised and refined by the assigned Commissioner. Any issue not identified in this Appendix or a subsequent ruling by the assigned Commissioner is outside the scope of this proceeding.

Phase 1 Issues	
1.	Is there a uniform regulatory framework that can be applied to all providers of regulated intrastate telecommunications services? If so, every element of the uniform regulatory framework should be identified and described in detail. Any party that recommends a specific framework should provide adequate information for the Commission to implement the framework.
2.	What specific steps are necessary to implement each element of the uniform framework identified in response to Question No. 1?
3.	Which elements of the uniform framework identified in response to Question No. 1 can be implemented immediately and without hearings?
4.	What specific implementation issues and details regarding the uniform regulatory framework identified in response to Question No. 1 need to be addressed in Phase 2 of this proceeding?
5.	What criteria should be used to decide if current regulations should be replaced by a uniform regulatory framework? Have these criteria been met?
6.	Why is the uniform regulatory framework identified in response to Question No. 1 superior to current regulations?
7.	How does the uniform regulatory framework identified in response to Question No. 1 achieve the following objectives: (A) Ensure, to the extent feasible, that every person and business in California has access to modern, affordable, and high quality telecommunications services; (B) treat all competitors and technologies neutrally; and (C) encourage technological innovation, economic development, and employment in California?
8.	What criteria and procedures should be used to (A) determine which services should remain subject to price regulation; (B) set and revise prices for services that remain subject to price regulation; and (C) remove a particular service from price regulation in the future?

Phase 1 Issues	
9.	What existing monitoring reports and auditing requirements should be modified or eliminated under the uniform regulatory framework? What new reports and audit requirements, if any, should be added?
10.	One possible uniform regulatory framework would include the following elements: A. No price regulation except for basic local exchange services provided by the large and medium-sized ILECs to residential and business customers B. No imputation rules except for basic local exchange services provided by the large and medium-sized ILECs. Imputation for basic local exchange services would be set at the UNE-L floor. C. Use advice letter filings to revise prices for all services provided by the large and medium-sized ILECs, except basic local exchange services. Price decreases could be implemented on one day's notice, and price increases after 30 day's written notice to customers. D. No limitations on promotions. E. Adopt FCC resale requirements. F. Allow ILECs to keep gain on sale. G. Decouple Yellow Page revenues from ILEC telephone operations. H. Refrain from price regulation of new services and new technologies. I. Conform reporting requirements to ARMIS. Parties should provide the information identified in Items 2 through 9, above, with respect to the previously described uniform regulatory framework. In addition, parties may propose other features that should be adopted as part of the previously described regulatory framework.

Phase 1 Issues	
11.	The following issues are outside the scope of this proceeding: A. The quality of service provided by Pacific and Verizon to other carriers. B. Requests for relief that are better addressed in complaint proceedings or enforcement OIIs. C. Issues regarding the Universal Lifeline Telephone Service program. D. Changes to existing prices. E. Reform of interstate access changes, which is being addressed in R.03-08-018. F. Reform of regulations associated with Sections 851 and 854. G. The following matters to be addressed in R.01-09-001/I.01-09-002: i. Rehearing of the following matters granted by D.04-07-036 and D.04-12-024: (a) The Commission's workpapers, (b) GO 133-B data for SBC and Verizon, (c) the workpapers of SBC expert Dr. Hauser; (d) TURN's time trend regression analyses; and (d) every SBC survey identified in OP 14 of D.04-12-024. ii. Whether SBC and Verizon should continue to submit the FCC Merger Compliance Oversight Team Reports to the Commission after the FCC requirement to submit these reports expires. (D.03-10-088, p. 165) iii. Whether Verizon should continue to submit the service quality monitoring reports specified in D.00-03-021 after the requirement ends in 2004. (D.02-10-020, OP 2.) iv. Issues concerning the reporting of survey data under the P.A. 02-03 and P.A. 02-04 filing categories. R.01-09-001/I.01-09-002 will focus on whether additional unreported data exists from the period under review and how SBC and Verizon should file survey data prospectively. (D.03-10-088, OP 10.) v. Whether specific changes to NRF are necessary to (a) improve the high quality of service provided under NRF, and (b) prevent future violations of service quality statutes, rules, and orders without making it necessary for parties to pursue lengthy formal complaint processes. (D.03-10-088, *mimeo.*, pp. 7, 8, 87, 178, FOF 326, COL 7, and OP 7.) vi. Proposals to revise NRF in ways that deter utilities from (a) violating the Commission's rules for affiliate transactions and the imputation of directory earnings, and (b) submitting inaccurate information. (D.02-10-020, OP 16.) vii. Proposals to revise NRF based on (a) the results of the SBC and Verizon audits; (b) D.04-02-063 re: SBC Audit/NRF Phase 2A; and (c) D.03-10-088 re: Service Quality. (OIR 01-09-001 & OII 01-09-002, Appendix A, pp. A-9 and A-10; D.04-02-063, p. 151, Col 92, and OP 16; and D.03-10-088, OP 11.)

Phase 2 Issues
Implementation Issues and Details Associated with the Adoption of a Uniform Regulatory Framework: If the Commission decides in Phase 1 to implement a uniform regulatory framework, Phase 2 will address implementation issues associated with the adopted framework that require further development and/or evidentiary hearings.

(END OF APPENDIX A)

APPENDIX B

Phase 1 Schedule	
Event	**Date**
File and serve comments re: Phase 1 Issues. Opening comments should include any objections to (1) the categorization of the proceeding, (2) the preliminary determination to that there is no need for evidentiary hearings, and (3) the preliminary scoping memo. (Rule 6(c)(2))	Opening Comments: 45 Days After the OIR Is Mailed Full Commission En Banc Reply Comments: 60 Days After the OIR Is Mailed
File and serve motions for evidentiary hearings.	70 Days After the OIR Is Mailed
File and serve replies to motions. (Rules 45(f) and 45(g))	77 Days After the OIR Is Mailed
Assigned Commissioner Ruling (ACR) regarding the scope, schedule, need for hearing, and categorization of the proceeding. (Rule 6.3) **Note**: The schedule and scope of evidentiary hearings (including written testimony, motions to strike, formal evidentiary hearings, and briefs), if any, shall be set in the ACR or in other rulings issued by the assigned Commissioner or the assigned ALJ.	As Soon as Possible After Motions and Replies Are Filed
File and serve appeals of categorization. (Rule 6.4(a))	No Later than 10 Days after the ACR.
File and serve response to appeals. (Rule 6.4(b))	No Later than 15 Days after the ACR
Draft Decision re: Phase 1 Issues.	Target: August 1, 2005
Final Decision re: Phase 1 Issues	Target: First Commission Meeting in September 2005

APPENDIX B

Phase 2 Schedule	
Event	**Date**
File and serve comments in Phase 2B.	Opening Comments: 30 Days After Final Phase 1 Decision is Mailed Reply Comments: 45 Days After Final Phase 1 Decision is Mailed
File and serve motions for evidentiary hearings.	50 Days After Final Phase 1 Decision Is Mailed
File and serve replies to motions.	57 Days After Final Phase 1 Decision Is Mailed
Ruling re: Motions for Evidentiary Hearings. **Note**: The scope and schedule of evidentiary hearings (including written testimony, motions to strike, formal evidentiary hearings, and briefs), if any, shall be set in one or more rulings issued by the assigned Commissioner or the assigned ALJ.	As Soon As Possible After Motions And Replies Are Filed
Opportunity to request and present final oral arguments to the Commission. (Rule 8(d))	To Be Determined
Proceeding Submitted. (Rule 8.1(a))	To Be Determined
Draft Phase 2 Decision, Final Decision, and any Other Matters	To Be Determined

(END OF APPENDIX B)

APPENDIX C

Respondents

The following telecommunications utilities are named as respondents to this proceeding:

1. Pacific Bell Telephone Company d/b/a SBC California.

2. Verizon California, Inc.

3. SureWest Telephone

4. Frontier Communications of California

(END OF APPENDIX C)

Dissent of Commissioner Geoffrey F. Brown
Regarding Proposed Order Instituting Rulemaking
Reassessing NRF (New Regulatory Framework) (Agenda ID#4311, item 44)

Commissioner Kennedy has proposed an order re-evaluating our 16-year old, so-called New Regulatory Framework. Such an analysis is appropriate and probably overdue. When NRF was proposed, there was a very different telephone market. Wireless was an expensive novelty used by high-end real estate agents. The internet was used almost exclusively by defense department and university researchers. For the average residential customer, competition was largely a speculative hope.

Today, for the sophisticated and the early adopters, there really are a number of different ways to obtain competitive residential service. Yet for all of the unremitting talk about competition, approximately 94% of residential customers still use an incumbent phone company (and that does not include the proposed acquisitions of MCI and AT&T by incumbents). Even when the more competitive business lines are included, approximately 77% of total market revenues go to the incumbent phone companies.

Clearly, for all of the inter-modal options available to the sophisticated consumer, the market remains dominated by the incumbent telephone companies. The future augurs for increasing elimination of independent long-distance companies, increasing concentration of the long-distance market by incumbent phone companies, and the elimination large numbers of competitive local carriers.

As telephony moves to internet protocol, the main internet backbone companies appear to be increasingly purchased by the incumbent carriers. This has the potential to cripple cable phone and broadband competition. While there is not yet market power in the internet backbone, the geographic nature of ILEC footprints and their ability to freely price connections to the backbone (or even simply to refuse to interconnect) has the potential to greatly increase costs to their cable competitors and especially to small and rural LECs. Additionally, wireless concentration by incumbent carriers seems to be increasing, with only one of the three main wireless companies not associated with an incumbent phone company.

Set against this pattern of dominance by incumbents is a vast array of new and interesting technologies that may develop in ways that are hard to predict. The inability of the average person to substitute, say, wireless for a landline today may change a decade from now. Clearly, a careful analysis of NRF's assumptions and its application to the real world is something that we should be interested in doing.

Unfortunately, as drafted, the proposed order has a number of mistakes and erroneous assumptions that make it difficult to support. More significantly, this review will be expensive and time-consuming, taking into consideration a number of factors that

Commissioner Kennedy's office overlooked. To do this matter correctly will require a greater commitment of staff and ALJ time than can be done in the hurried, incomplete manner that this draft OIR contemplates.

The proposed order contemplates only one round of comments, which is wholly unrealistic, given the scope of the changes contemplated. It also contemplates no evidentiary hearings. This is as a result of the order's failure to consider all of the decisions made through evidentiary hearings that it would reverse or upset. Public Utilities Code §1708 requires that decisions that were made through an evidentiary hearing be granted an evidentiary hearing before being reversed or modified. No less than seven of the 14 major decisions that the proposed order would modify or reverse were the result of evidentiary hearings. To assume that parties in seven full-blown evidentiary hearings can have their say without the taking of new evidence, and that this matter can be completed with a decision drafted by August 1st is wildly optimistic, particularly given the ambitious schedule Commissioner Kennedy is undertaking with the re-examination of the telephone consumer bill of rights. The ALJ division has made available to Commissioner Kennedy a list of the affected decisions and the Legal Division has confirmed our reading of §1708, yet the proposed order has not been revised.

In addition, the order assumes as true that "ILECs now compete with cellular and cable TV companies in both the local and long-distance markets." It also assumes "there is vigorous competition for long distance services." As to the former, the evidence is weak. As to the latter, the vigorous competition that exists will probably change as the incumbents buy the long distance companies. The OIR contemplates eliminating applications to raise or lower prices, no limitations on promotions, no price regulation except on local service, all gain on sale going to incumbents, directory revenues going directly to shareholders, etc. It does so because of the ostensible competition. What the proposed changes should do is ascertain the extent of inter-modal competition and substitution of one service for another. Data is now compiled by zip code, not census tract. One cannot reasonably assume that a cable company in one part of a zip code is competing with an incumbent's DSL in another part of the zip code. The cable and telephone companies know where their competitors are. It is not in their interest to disclose to the public where the competition is. How we can make effective policy without knowing the extent of competition I don't know.

Similarly, I would feel better if I were satisfied that the myriad of bundled services and calling plans that appear confusing to me were shown to be clear enough that the average consumer can make an informed decision. The options facing the consumer seem confusing enough that the Legislature has mandated that representatives "shall thoroughly inform the subscriber of the nature and extent of the service being offered." (§2889.5) An analysis of competition is an obligation that we are required to make under a 1971California Supreme Court case, *Northern California Power Agency v.*

PUC, 5 Cal. 3d 370. The proposed order does not consider these factors, factors that are crucial if we are to properly do our job.

As written, I am fearful that this OIR will be bad for California consumers and terrible for California businesses, both of whom will likely lose the marginal benefits they received from a competitive telecommunications market. In particular I am concerned that the smallest of the competitors, the California based employers who believed this Commission was here to ensure a level playing field, will be rendered unable to provide alternatives to the incumbents this OIR proposes to deregulate. These small carriers are least equipped to legally address and financially survive potential abuses of monopoly bottlenecks. There is nothing in this OIR that speaks to the protection of traditional voice customers. They, at best, may be forced to elect to opt out of advanced services and, at worst, may be forced to subsidize them. Finally, and most worrisome, the competitors, which markets rely on to innovate, will be unable to do so. If innovation dies, California's telecommunications market will be left with this decade's version of ISDN, which in the 1990s the incumbents pushed as their stale, overpriced preference over DSL broadband technology.

In sum, I think NRF needs a re-look, but this order assumes too much, and concedes too much. It does so at a time when regulators can least afford to do so: in the midst of what is widely seen as the most aggressive consolidation of power this industry has seen in 90 years. As such, this OIR fails to ensure that the policies which are critical to consumer protection remain in force.

Dated April 7, 2005, at San Francisco, California.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Commissioner

Concurrence of Commissioner Grueneich:

I strongly support a major re-look at the telecommunications policy in California. I believe that regulatory agencies such as the PUC should undertake that exercise on a regular basis, and a major re-look of NERF is particularly warranted given the many innovations and changes in the telecommunications industry and the length of time since the adoption of NERF. For that reason I join in support of the issuance of the OIR.

I have previously stated my concern that the PUC does not have adequate resources to undertake a simultaneous review of telecommunications policy, ensure adoption of a revised Consumer Bill of Rights by the end of this year, and undertake its legally required review of the proposed mergers. However, given the assurance from Commissioner Kennedy that we will not sacrifice our commitment to move ahead with the Consumer Bill of Rights, I am supporting issuance of this OIR.

I believe this Commission has a real opportunity to re-shape the telecommunications regulatory structure to develop policies that are robust and do not rely upon simplistic assumptions with regard to competition. I strongly believe that a new regulatory framework must be based on a thorough understanding of the state of competition in the telecommunications market and must take into account different levels of competition over time and in different geographical and demographic markets. It is critical for this Commission and the public to understand the facts with regard to competition.

I share Commissioner Brown's concern regarding the extraordinarily short schedule for completion of the proceeding and the lack of hearings. I am relying on Commissioner Kennedy's assurance that she will take into

account the parties' comments and if necessary, adjust the timeline and process accordingly. I strongly believe that this important and complex issue must be based on a thorough review of the best evidence available, including information from our own NRF proceedings and audits, if the final decision in this proceeding is to withstand scrutiny.

Additionally, I am very concerned about this Commission's obligation to protect California's low-income and rural customers. While I support competitive markets in utility industries, it is essential that we ensure that all residents of California, regardless of income level or geographical location, have reliable and affordable service and derive benefits from the industry structure that we implement. We can have both technological innovation and economic development in the telecommunications industry and we do not need to sacrifice one for the other. Universal service and consumer protection are key elements of any regulatory framework and I will take a hard look at how these issues are addressed in this proceeding.

Finally, at my request the OIR includes an en banc with the full Commission at the beginning of this proceeding. This decision will have major policy implications for the state and it is essential that this Commission as a whole be involved in this policy discussion from the outset.

Dated April 7, 2005, at San Francisco, California.

/s/ DIAN M. GRUENEICH by EPG
Dian M. Grueneich
Commissioner