BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Comply With the Mandates of Senate Bill 1563 regarding deployment of Advanced Telecommunications Technologies	)	**R.03-04-003 (Filed April 3, 2003)**

COMMENTS OF COX CALIFORNIA TELCOM, L.L.C. dba COX COMMUNICATIONS (U-5684-C) ON ORDER INSTITUTING RULEMAKING

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INTRODUCTION

Cox hereby comments on the Order Instituting Rulemaking issued April 11, 2003 (the "OIR") in the proceeding referenced above. The OIR was born of California SB 1563 and SB 1863, which amended Public Utility ("P.U.") Code § 709 and added P.U. Code § 709.3, and which ultimately require the Commission to develop a plan for encouraging the widespread availability and use of advanced telecommunications infrastructure and to report to the Legislature its findings and recommendations.

While there are a number of things the Commission and the Legislature can do to encourage the deployment of advanced telecommunications networks, one must question whether either should take any action to intervene in the marketplace at this time given that the industry is actively investing billions of dollars in broadband deployment and the marketplace seems to be working of its own momentum. Moreover, while there does seem to be a so-called "digital divide" between those who have access to and who choose to purchase broadband services and those who do not, that divide seems to be rapidly narrowing, which further suggests that the marketplace is working absent government intervention. Certainly the Commission can and should act to remove any barriers to deployment that currently exist at the Commission level. However, aggressive market intervention – whether by the Commission or the Legislature – should be avoided at this time.

In addition, while the OIR acknowledges the Commission's recent report to the Legislature on the issue of whether to expand the definition of "universal service" to include broadband services,[1] there were certain findings made in that report which are equally pertinent here. Unless the Commission finds that factual evidence suggests the state (??) of the

[1] *See* OIR at 3-4.

marketplace has changed dramatically since those findings were made in 2001, then the Commission should reaffirm those findings here.

COMMENTS

I. THE COMMISSION SHOULD REMOVE ITS OWN BARRIERS TO THE CONSTRUCTION AND DEPLOYMENT OF BROADBAND TELECOMMUNICATIONS NETWORKS

By their language, SB 1563, SB 1863 and the statutory changes they effected do not specifically refer to "broadband" networks or services as the target of the Commission's attention in this proceeding. Instead, they refer to "advanced telecommunications services," "new technologies," "state-of-the-art services," "state-of-the-art technologies," and "advanced information and communications technologies."[2] However, most parties would likely agree that the "state-of-the-art technology" at this time over which "state-of-the-art services" are currently available are broadband networks, whether they are closed-path, wireline networks or wireless networks.

With this in mind, one can confidently infer that the Commission's focus at this time should be on broadband deployment, some of which is within the scope of the Commission's jurisdiction and some of which is not. As noted in the Commission's recent report to the Legislature in compliance with P.U. Code § 316.5 on the state of telecommunications competition, the Commission rightly noted that some broadband deployment is being done by Commission-regulated telephone carriers and their affiliates in the form of DSL, and some is being done by non-Commission-regulated cable and wireless companies for the provision of

[2] *See, e.g.,* OIR at 2-3 (*citing* P.U. Code § 709).

"cable modem" and other services.[3] To the extent these broadband networks are deployed for the purpose of offering Commission-regulated services such as DSL, the deployment itself may be regulated by the Commission. However, as explained in more detail below, to the extent these broadband networks are deployed to offer video and data services, which are generally interstate, state efforts to regulate them would likely be preempted.

It may seem unnecessary to discuss the scope of the Commission's jurisdiction in this proceeding given that the caption of the proceeding clearly states that the Commission is interested in the deployment of "advanced *telecommunications* networks." Under our system of federalism, certain powers are reserved to the U.S. Government which may preempt state authority. However, it is clear that under federal law this Commission has jurisdiction to regulate intrastate telecommunications services. Where the boundaries become stretched is where the state and local authorities attempt to regulate interstate video services offered over "cable systems"[4] or interstate information services (such as high-speed cable modem service), the regulation of which is delineated, and sharply curtailed, by federal law. Given that the Commission has invited "participation from a broad cross-section of the communications industries, including those entities that the commission does not regulate," it is important to keep the boundaries of the Commission's jurisdiction in mind as it evaluates the scope of recommended action going forward. For these reasons, the Commission and the legislature may be limited in what they can do to "encourage" the deployment of some broadband networks.

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[3] *Second Report for the Year 2002,* The Status of Telecommunications Competition in California at 26 – 36 (February 28, 2003) ("*Second Telecom Report*").

[4] The term "cable system" is defined as "a facility that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ." 47 U.S.C. § 522(6) (exclusions omitted).

However, as noted above, the Commission clearly has the ability to "encourage" the expansion and deployment of common carrier, broadband telecommunications networks which are currently subject to Commission regulation. Moreover, there are in fact certain actions the Commission could take to encourage such deployment. First and foremost, the Commission can complete and resolve its current rulemaking regarding the environmental impacts of facilities-based deployment under the California Environmental Quality Act ("CEQA"). Once that is done, the Commission should lift the ban on authorizing new facilities-based construction authority for new or existing carriers that need to expand the territory subject to their CPCN authority.

For the last several years, the Commission has virtually shut down the construction of advanced telecommunications networks outside of new construction in "existing buildings" as a result of its rulemaking and investigation into compliance with CEQA.[5] In the course of that proceeding, the Commission has stayed processing of any new CPCN applications that request authority to build facilities outside of existing structures. No movement has been made on that rulemaking since the opening comments were filed in early 2000. This fact has essentially precluded certain facilities-based providers from constructing facilities outside of existing buildings.

This moratorium on new facilities-based construction authority is especially telling with respect to broadband deployment. In the *Second Telecom Report*, the Commission noted that out of 475 California cities approximately 160 (34 percent) had access to DSL only, 86 (18 percent) had access to cable modem service only, 114 (24 percent) had competitive choice of access to

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[5] *See*, *Order Instituting Rulemaking on the Commission's Own Motion into the Programs, Practices and Policies Related to Implementation of the California Environmental Quality Act (CEQA) as it Applies to Jurisdictional Telecommunications Utilities*, R.00-02-003 (issued Feb. 3, 2000).

either DSL or cable, and 115 (24 percent) had access to neither broadband service.[6] With respect to the 114 cities that have access to both DSL and cable modem service (and presumably to wireless broadband as well), the Commission need do nothing to encourage the deployment of broadband networks for the provision of state-of-the-art services: The market has already taken care of the competitive deployment.

Interestingly, the Commission's report in fact understates the availability of broadband services, because it focuses on the number of cities, not the population served by the facilities in those cities. The maps set forth at Figures 3.37 through 3.39 clearly reflect that all of California's major metropolitan areas are served by at least one broadband provider and in the larger areas by at least two. Because approximately 90 percent of California's population lives in those few metropolitan areas, a very large percentage of California's population has access to or is served by multiple broadband providers.

Furthermore, these figures comport with nationally available data, which shows that the so-called "digital divide" is narrowing rapidly as a result of a naturally expanding broadband network. Nationally, 98 percent of the population has access to at least one broadband service provider.[7] In addition, for the reporting period December 2001 through June of 2002 (the last period for which data is available), at the highest income levels 99.8 percent of the population had access to at least one broadband service provider, and at lowest income brackets 94.1 percent of the population lived in a zip code with broadband access available. By contrast, in December 1999, the highest income levels of the population was at 98 percent accessibility, while the

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6 *Second Telecom Report* at 32, Figure 3.36.

7 Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the Telecommunications Act of 1996*, CC Docket 98-146, FCC 02-33 at 103, Table 12 (February 6, 2003) ("*FCC Report*").

lowest income bracket was at 41.7 percent.[8] From this data, we can see that, even in the poorest areas of the country, the availability of broadband services more than doubled in two years and that the so-called "digital divide" with respect to the *availability* of broadband services narrowed from a 56.3 percent difference between the highest and lowest income areas to one-tenth of that or 5.7 percent, all without the benefit of government intervention. Put another way, providers have invested in broadband networks so that, as of about 12 months ago, customers in low-income areas could subscribe to broadband services almost as easily as customers in high-income areas. The issue seems now to be much more one of demand for broadband services than a limited supply. For example, some 61.6 percent of California households have a computer and 55.4 percent (or 9 out of 10) of those homes are connected to the Internet.[9] Most of those are connected via dial-up access (approximately 7.5 out of 10) rather than broadband, although the vast majority of those consumers have access to a broadband service provider.[10]

Moreover, in the 361 California cities where broadband choice is purportedly limited or non-existent, there is a significant likelihood that new broadband networks will need to be constructed in order to provide consumers with competitive choice, as it is only through competitive choice that state-of-the-art services will continue to evolve. To that end, the Commission must review and remove its own internal barriers to the construction of new, broadband telecommunications networks, including its moratorium on granting new or expanded facilities-based construction authority.

II. THE LEGISLATURE IS ALSO LIMITED IN ITS ABILITY TO REGULATE VIDEO AND DATA SERVICE DEPLOYMENT

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8 *FCC Report* at 101, Table 11.

9 *Broadband in the States 2003*, Report of the American Electronics Association, http://www.AEAnet.org/publications/idet_broadbandstates03.asp, at 79 (2003). ("*AEA Report*").

10 *AEA Report* at 26.

As noted above, our system of federalism reserves certain powers to the U.S. Government, which may preempt state authority to regulate facilities deployment and the provision of state-of-the-art telecommunications services. To the extent the federal government preserves its right to regulate cable and data services, the states may be preempted from interfering with that regulation of the facilities necessary to provision those services.

Under this system, state and local regulation of video services offered over "cable systems" is limited by federal law. For instance, the Cable Communications Policy Act of 1984 (the "CCPA") memorialized the historical distinction between a cable system and common carrier telephone service when it mandated that cable television systems would *not* be regulated as a common carrier service.[11] Moreover, the CCPA represents "national public policy concerning cable communications" which cannot be overridden by state action.[12] The CCPA went on to reserve broad regulatory authority over cable systems to the federal government (*e.g.,* ratesetting authority),[13] and to delegate certain limited authority to state or local regulatory agencies (*e.g.,* issuance of franchises and management of the public rights-of-way).[14] This bifurcated regulatory scheme applies regardless of whether cable operators use analog or digital technology to transmit cable services to their subscribers.

With that said, even if the Legislature were to attempt to remove the regulation of cable systems from the jurisdiction of the local municipalities to the Commission, it still could not

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11 *See*, 47 U.S.C. § 541(c).

12 *See*, 47 U.S.C. §§ 521(1), 556(c).

13 *See, e.g.,* 47 U.S.C. § 543.

14 *See, e.g.,* 47 U.S.C. § 541. However, even the delegated authority under the CCPA is not unlimited. For instance, the Cable Act of 1992 prohibits a local franchising agency from awarding only one exclusive franchise to a cable company. 47 U.S.C. § 541(a)(1). In addition, a franchising authority is limited in the amount of a franchise fee it can charge on cable system receipts. 47 U.S.C. § 542(a).

regulate cable systems as common carrier systems, and the Commission's authority over cable broadband deployment would be prescribed under federal law to that which is currently allowed local franchising authorities. Moreover, the Legislature would need to seriously consider whether it was prepared to do battle with local franchising authorities who have long regulated cable systems at the local level and currently impose cable franchise fees of up to five percent of revenues generated by the provision of cable services purportedly to compensate them for the use of the public rights-of-way.

Furthermore, the issue of who may regulate "data services" provided over cable systems and other non-telephone networks is in a complete state of flux in light of recent court rulings. Many jurisdictions have treated cable modem service as a cable service regulated under Title VI of the Communications Act of 1934. However, the U.S. Court of Appeals for the Ninth Circuit ruled in *AT&T Corporation v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) that cable modem service is not a cable service at all. In contrast, the Federal District Court for the Eastern District of Virginia ruled in *MediaOne Group Inc. v. County of Henrico,* 97 F. Supp.2d 712 (E.D. Virginia 2000), *aff'd on other,* 21 U.S. App. Lexis 15540, No. 00-1680 (4th Cir. July 11, 2001), that cable modem service is a cable service, not a telecommunications service (and consequently would be subject to federal preemption).[15] In order to provide greater certainty and to establish a national policy for the regulation of interstate data services such as cable modem service, the FCC initiated a Notice of Inquiry that ultimately will set the ground rules for these advanced services.[16] As of this time, nothing has been resolved with respect to whether cable modem

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15 *See also, Comcast Cablevision v. Broward County*, 124 F.Supp.2d 685 (S.D. Fla. 2000).

16 *See, Notice of Inquiry on High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000).

service can be regulated (even in a manner that might be intended to "encourage" its deployment) or by whom.

The outcome of the FCC's consideration will likely have a significant impact, and may in fact preempt completely, state regulation of high-speed Internet access services or the facilities designed to carry them. Indeed, the FCC already has on several occasions stated that Internet access is an interstate service. Such a result would be entirely consistent with the FCC's repeated refusal to apply access charges to information services (including Internet access) to ensure the unfettered development of the Internet. For these reasons, the Legislature should not attempt to assert jurisdiction over video services, interstate data services such as Internet access, or the facilities which those services traverse even for the well-intentioned purpose of "bridging the digital divide."

However, the Legislature certainly can offer broad-based tax incentives for investment into broadband deployment – especially in rural areas – in order to spur additional investment and its resulting deployment. Similar incentives could be offered for increasing employment and training in such technical fields. Either such program could be implemented with positive effects without violating the boundaries between federal and state regulation of non-common-carrier communications networks.

III. MOST ASPECTS OF BROADBAND DEPLOYMENT SHOULD BE LEFT TO THE FREE MARKET WHICH HAS BEEN SERVING THE PUBLIC WELL

The clear purpose of SB 1563 and SB 1863 appears to be to encourage the expansion of an existing services market, perhaps in anticipation that the market will not eventually reach all segments of society. This anticipation has motivated the Legislature to ask whether any regulatory intervention should be introduced into the market to ensure that the technologies that

support state-of-the-art services are ultimately delivered to all segments of California consumers. In fact, there is scant evidence to suggest that barriers exist to these services eventually being delivered to all market segments under the current regulatory regimes. Consequently, it makes no sense from a policy perspective to intercede into such markets in an effort to incent something that is already happening.

In fact, the growing broadband market in California is rapidly expanding. For instance, a recent study based on the *FCC Report* and U.S. Census data shows that California leads the nation (along with Massachusetts and New Jersey) in the number of broadband subscribers, in the growth of broadband subscribers, and is third (virtually tied with New Jersey for second) in the nation for the percentage of households that currently use broadband services.[17] California also led the nation in subscribership growth for the period December 2001 through June 2002.[18] Quite simply, there is no need to fix the expanding broadband market in California, because it is not broken.

In fact, one grievous error the legislature could make would be to attempt to bring technology companies that are not currently regulated as public utilities into a public utility regulatory regime. The result would be to send negative market signals that would discourage investment in and expansion of broadband systems, technologies and services and would hurt the California economy, which appears to be directly contrary to the stated policy goals now incorporated into P.U. Code §§ 709 and 709.3.

The laid-bare premise of SB 1536 and SB 1836 seems to be that advanced services will never be made ubiquitously available if the markets are not regulated or perhaps subsidized.

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[17] *AEA Report* at 10 .

[18] *Id.*

Remarkably, the *Second Telecom Report* suggests otherwise. Between June and December 2000, the overall broadband market increased by more than 50 percent during that six-month period.[19] While broadband growth purportedly slowed in California for the first six months of 2001, that market continues to grow both nationally and in California.[20] In light of these facts, one must question why the Legislature would consider intervening in a market that continues to grow more rapidly than virtually any other consumer market during that same period.

While there may a "digital divide" now, that divide is narrowing rapidly, partly aided by the availability of broadband technologies in our schools, libraries and through community-based organizations ("CBOs"). Moreover, such a "divide" is a natural consequence of the introduction of expensive, new technologies into the consumer marketplace, where market penetration increases over time especially as the cost of the technology falls (*e.g.,* remember the cell phone?). Just because such a "divide" exists early in the history of the market (*e.g.,* personal computers were only broadly introduced into consumer markets in 1982), that "divide" should not necessarily invite regulatory intervention unless and until the market proves it has failed, which is certainly not the case here.

Moreover, the Commission and the Legislature should decline to intervene in a market based on a mere perception of market failure. For example, although the penetration of broadband networks nationally has increased nearly five-fold since 1999, thus making broadband services widely available, *only approximately 15 percent of US households currently subscribe* to broadband services for access to the Internet.[21] This experience shows that ubiquitous availability does not translate to ubiquitous usage. It follows that 75 percent of households in

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[19] *Second Telecom Report* at 32.

[20] *Id.*

California with Internet access choose dial-up services for their access.[22] It is difficult to determine whether this difference in consumer choice results from a discretionary cost decision, service availability or the consumer's desire to learn new programs and to incorporate new services slowly.

With respect to encouraging expanded service to schools, libraries, community-based organizations ("CBOs"), etc., neither the Commission nor the Legislature need take additional actions in that area. Cox and its corporate affiliates, for instance, are providing discounted services to eligible institutions in their service areas, both under the Federal E-Rate program and the California Teleconnect Fund ("CTF"). The Commission recently revised the manner in which the CTF works to better facilitate participation by schools, libraries, CBOs and carriers.[23] In addition, Cox's affiliates have adopted expanded "Cable in the Classroom" programs to supplement the access to information ordinarily limited by public school budgets.

IV. THE COMMISSION SHOULD ACKNOWLEDGE AND AFFIRM ITS PRIOR FINDINGS REGARDING DEPLOYMENT OF ADVANCED TECHNOLOGIES AND SERVICES

As discussed above, the Commission in response to SB 1712 a couple of years ago, undertook a review of whether the definition of "universal service" should be expanded to include broadband services. At that time, the Commission concluded that there were many sound public policy reasons for recommending that the definition not be expanded. Some of those conclusions are equally relevant here. The Commission should acknowledge and affirm those conclusions here – to the extent they are applicable to the matters at issue in this

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21 *AEA Report* at 11.

22 *Id*. at 26.

23 *See* Resolution T-16742.

proceeding – unless there is substantial evidence of a change in the marketplace that would warrant deviating from those conclusions. Cox knows of no such substantial change that would support deviating from the Commission's prior conclusions.

What follows is Cox's input regarding the specific questions upon which the Commission has requested comment, including the Commission's own prior conclusions:

- **Existing barriers to the ubiquitous availability and use of advanced telecommunications technology**

To the extent a "digital divide" exists, it may be mischaracterized with negative connotations. As the Commission previously found some members of the public do not even have a computer, nor do they have an interest in using one.[24] Moreover, bringing broadband services to low-income households – such as universal Lifeline service customers who would have to pay for it whether they wanted it or not – does not address the fact that customer premises equipment may be prohibitively expensive for such customers, making network investments underutilized until this barrier is addressed.[25] Moreover, even if the equipment and services are available at affordable prices, customer training is another barrier to them using broadband and state-of-the-art services.[26]

What can be done, however, if the Commission and the Legislature so choose, is for the Commission to remove its internal barriers to granting new authority to construct advanced telecommunications networks and for the Legislature to create economic incentives for state-of-the-art service providers to do so without regard to the specific technology deployed or the existing regulatory regime governing that provider.

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[24] *Commission Report to the Legislature*, Broadband Services As A Component of Basic Telephone Service at 18 (August 2002) ("*Broadband Report*").

[25] *Id.* at 20.

- **Whether new telecommunications technologies or the cost of existing technologies have changed in ways that would make them more economical to deploy statewide**

Naturally, as would be expected, the costs of technology go down over time. The same is true of the deployment of state-of-the-art communications technologies. Consequently, through the natural evolution of the marketplace, these technologies are becoming more economic to deploy statewide, and prices for access for consumers to broadband services will continue to fall. The key issue here then is not whether there are economic barriers to entry, but rather are there regulatory barriers to entry? In this case, where there are 361 California cities that could benefit from the deployment of competitive networks, the regulatory barriers may be more inhibitive than the economic barriers.

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[26] *Id.*

- **Whether and how telecommunications technologies and their cost are expected to change in the future in ways that would make them more economical to deploy statewide**

As noted above, it would be reasonable to expect that the costs of state-of-the-art technology will continue to decline over time, thus, making them more economical to deploy statewide. As a result, if the Legislature would like to incent even more accelerated deployment, it should create additional economic incentives for that deployment.

- **Whether the Commission can or should direct changes in technologies, their deployment or related infrastructure in ways that would promote more ubiquitous availability**

The answer to this question is resoundingly "No!" First, as the Commission previously recognized it lacks jurisdiction over many of the current and potential suppliers of advanced data and video services.[27] Some parties (including Cox) believe that the Commission has no jurisdiction over broadband video and high-speed data services, or over all current or potential providers of these services.[28] In addition, to access these services, customers require certain equipment (*e.g.,* televisions, computers, modems, etc.), equipment which the Commission has no role in regulating.[29] For these reasons, and many others, Commission efforts to direct the deployment of technology would be misguided and likely ineffective.

More importantly, no regulatory agency should intervene in a market that is working. The evidence suggests that broadband technologies and services will make it virtually every California market in a reasonable time. That market evolution should not be disrupted by

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27 *Id.* at 18.

28 *Id.* at 18-19.

29 *Id.* at 23.

regulatory directive, though it may be accelerated through the reasonable and informed use of tax and investment incentives.

- **Whether and how existing programs promote the availability and use of advanced telecommunications technology for inner-city, low-income, and disabled Californians**

As discussed above, companies like Cox are engaged actively in both complying with existing regulatory programs like the CTF, as well as initiating their own community-based based outreach programs such as Cox's "Cable in the Classroom" program.

- **Whether and how open and competitive markets for advanced communications technologies can encourage greater efficiency, low prices and more consumer choice**

The current market with its expansive growth for state-of-the-art services and technologies already proves this point. To the extent the Legislature wishes to incent more accelerated deployment, it certainly has the right to do so.

- **Whether and how identified technologies may promote economic growth, job creation and social benefits**

Cox and its affiliates have invested have invested hundreds of millions of dollars in their state-of-the-art broadband networks in California since 1996. That investment has resulted in a clear benefit to Cox's customers, its employees and the California economy as a whole. It certainly has promoted economic growth, job creation and social benefits. It will continue to do so over time. However, if the Legislature wishes to expand these social and economic benefits, there are ways it can do so as discussed above.

- **The adequacy of current programs to provide educational institutions, health care institutions, community-based organizations, and governmental institutions with access to advanced telecommunications services**

The Commission has previously acknowledged that schools, libraries, health care facilities and CBOs currently receive varying discounts on services to access Internet.[30] Cox understands that it is the intent of the Commission to expand these discounts.[31] Those expanded programs can only help these organizations gain better access to state-of-the-art services at better prices. However, the Commission should be advised that service providers like Cox and its affiliates also have private programs to expand the accessibility of these entities to such state-of-the-art technologies and services, as noted above.

- **Whether existing law and policy encourage fair treatment of consumers through provision of sufficient information for making informed choices, establishment of process for equitable resolution of billing and service problems**

Cox recognizes that the Commission has at least two open proceedings in which it is addressing these issues specifically with regard to regulated telecommunications carriers. Cox takes no position with respect to these issues other than those comments its has filed in the open proceedings, of which the Commission may take official notice pursuant to Commission Rule of Practice and Procedure 73**.**

CONCLUSION

For the reasons set forth above, Cox submits that the Commission should work to remove its existing regulatory barriers to the further deployment of advanced telecommunications technologies and services. In addition, the Legislature may act to create financial tax and

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30 *Id.* at 34.

31 *Id.* at 35.

investment incentives to more accelerated deployment of such facilities and services, even though the market is evolving in a healthy and expected manner. However, neither the Commission nor the Legislature should intervene in the current marketplace for broadband services, because those markets continue to expand and offer more and better services to California consumers.

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Respectfully submitted,

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