BEFORE THE PUBLIC UTILITIES COMMISSION

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OPPOSITION OF THE UTILITY REFORM NETWORK AND THE CENTER FOR ACCESSIBLE TECHNOLOGY TO THE COALITION'S MOTION FOR STAY OF DECISION 16-12-066

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") and the Center for Accessible Technology ("CforAT"), submit this opposition to the *Coalition Motion for Stay 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 ("*Motion*")*. As described below, the Coalition's Motion is unnecessary, overbroad, and overstated, and it should be denied.

II. DISCUSSION

A. Legal Standard

The Public Utilities Code and the Commission's Rules of Practice and Procedure clearly and explicitly state that a party may not avoid compliance with a Commission order by filing an application for rehearing.[1] The affected party must comply, or else that party has the burden to request a stay and justify that request. This is for good reason. If a party had the ability to instantly suspend the implementation of a Commission final decision merely by filing an Application for Rehearing, only 30 days after the Commission voted to approve the decision, it would weaken the Commission's decision-making authority, create significant regulatory uncertainty, and result in inefficiencies in the administrative process.

Because legislative intent favors timely implementation of Commission decisions, the Commission's authority to grant a stay is discretionary, and is not to be given lightly. In particular, the Commission can and has denied authorizing a stay when it finds that a delay in

[1] Public Utilities Code §1735; Rules of Practice and Procedure 16.1; *see also*, *In the Matter of the Application of SCE for a CPCN Concerning Tehachapi Renewable Transmission Projec*t (A.07-06-031), D.15-05-004, at FOF 13, COL 2 ("Tehachapi Rehearing").

implementation of a decision would be "inefficient and prejudicial."[2] While the Coalition's Motion suggests that the Commission uses a "flexible standard,"[3] in reality, the Commission has a strict test to determine whether a stay is warranted. Specifically, the Commission must find that: (1) the moving party is likely to prevail on the merits of the subject application for rehearing; (2) the moving party will suffer serious or irreparable harm without the stay; (3) a balancing of the harms finds that the harm to the moving party is greater if the stay is denied than the harm to the public interest caused by the suspension or delay in implementation of the decision; and (4) there are other relevant factors to support a stay.[4] The carriers fail to meet their burden here and the Commission should deny the request for a stay.

B. Likelihood to Prevail

The carrier Coalition does not successfully demonstrate a likelihood that it will prevail on the merits of its Application for Rehearing. Even under the lesser standard cited to by the Coalition, the Motion does not demonstrate a "reasonable probability" that the Decision will be overturned or modified,[5] and, thus, the stay request must fail. To support its Motion, the Coalition provides a laundry list of its arguments from the related Application for Rehearing and asserts that its Application successfully "addresses" each argument.[6] TURN and CforAT will address each of the Coalition's assertions of legal error in their response to the Application for Rehearing and will demonstrate that the Coalition misstates the intent of the Commission as incorporated into the Final Decision, mischaracterizes several of the orders in the Final Decision, and misapplies the Commission's rules and procedures. As discussed below, while the carriers

[2] *Application of Neighbors for Smart Rail for Rehearing of Resolution SX-100* (A.11-12-010), D.13-08-005 at p. 21-22 ("NFSR Rehearing and Stay").
[3] Motion at p. 6.
[4] *See*, *NFSR Rehearing and Stay*, p. 22-23; *OIR re: Application of CEQA* (R.06-10-006), D.11-05-050 ("CEQA Stay") at p. 2; Tehachapi Rehearing at p. 13.
[5] Motion at p. 6.
[6] Motion at p. 7-8.

correctly identify isolated issues where the Final Decision should be clarified, these issues are more appropriately the subject of a Petition for Modification or further discussion in Phase 2. The Motion, however, overreaches in an attempt to stay, indefinitely, almost every aspect of the Final Decision. As a result, the Coalition is not likely to prevail on the merits of its Application and the Motion should be denied.

Further, the Coalition's citation to the Commission's grant of a stay in the CEQA Rulemaking is not applicable.[7] In that rulemaking, the challenged final decision closed the proceeding and directed staff to implement a new General Order without the benefit of further party input or additional opportunities to clarify the Commission's intent.[8] Here, the Final Decision clearly anticipates that all stakeholders will have an opportunity to request clarifications and contribute to further proceedings related to several of the issues raised by the Coalition. For this reason too, a sweeping stay is unnecessary.

C. Irreparable Harm

The carrier Coalition fails to demonstrate irreparable harm if this Motion for a Stay is denied. Many of the carriers' arguments alleging "irreparable harm" present an over-wrought interpretation of the Final Decision and its impacts on carriers. It is particularly disingenuous for the carrier Coalition to allege irreparable harm based on the implementation of certain ordering paragraphs that were the subject of the same carriers' recent requests for extension of time, which were granted, or of those ordering paragraphs that are clearly slated for further clarification and comment in Phase 2.[9] These extensions mitigate any potential for harm to the carriers if the Commission denies this Motion. In the balance, and contrary to the Coalition's

[7] Motion at p. 8.
[8] CEQA Stay at p. 2-3.
[9] See, for example, February 6, 2017 letter from Executive Director Tim Sullivan to Comcast counsel Suzanne Toller granting Comcast's Request for Extension of Time to Comply with Decision 16-12-066, Ordering Paragraphs 1, 2, 5, 6, 7, 11, and 16. TURN and CforAT are aware of similar letters sent to AT&T, MCI, Charter, Frontier and a narrower grant of an extension provided to Cox.

repeated and unsupported assertions that no harm would befall consumers if a stay is granted,[10] is the urgency that work move forward on the vital issues of public safety addressed in the decision. A sweeping and indefinite stay as requested in this Motion would directly interfere with progress toward Phase 2 and the work to implement key ordering paragraphs.

For example, the Coalition alleges that carriers will be harmed by potential release of confidential data if several ordering paragraphs that direct carriers and staff to develop outage reporting requirements are not stayed.[11] However, the Final Decision does not require respondents to report outage data to any third party until several conditions are met, including: (1) Communications Division provides a format for reporting outages (OP 19); (2) Communications Division issues a standing data request (OP 20); (3) Stakeholders "explore" reporting thresholds and procedures for reporting to third parties in Phase 2 (OP 21); and, (4) the Commission forms a Working Group as part of Phase 2 to discuss outage reporting. Under the Final Decision, only Carriers of Last Resort are required to report outages prior to Phase 2 and that reporting will only go to Commission staff.[12] TURN and CforAT urge the Commission to dismiss the carriers' claims of harm and find that it is unnecessary to stay these ordering paragraphs while the Commission staff moves forward with their tasks and while stakeholders prepare for the discussions in Phase 2.

While the carriers' concerns about reporting requirements fail to note relevant content from the Decision, other items are appropriately identified for limited review and clarification, including the need to harmonize terminology across the text and various ordering paragraphs

[10] Motion at p. 2, 13, 14, 15.
[11] Motion at pp. 8-10.
[12] The COLR's obligation to report to the Commission outages using a 300,000 minute threshold within 120 days of adoption of the Final Decision is set forth at pages 6, 20, 150-153, and FOF 27, 38 of the Final Decision, but is not separately stated in an Ordering Paragraph. While the intent of the Commission to adopt a lower threshold reporting requirement of 90,000 minutes for all carriers is clear, as it is stated in OP 20 and 21, this requirement will be further developed in Phase 2.

throughout the Final Decision. These revisions can be made through a Petition for Modification, in Phase 2 or on the Commission's own motion. Any of these procedural mechanisms can provide the Commission with the opportunity to clarify its intent to apply these ordering paragraphs broadly across carriers.

However, these appropriate clarifications do not support the carriers' challenge of even the simplest elements of the Final Decision and, the expansive attempt to halt all work to implement the Decision should be rejected. For example, the carriers bemoan the harm that will come from the requirement to meet[13] with the "2-1-1 coalition and the 8-1-1 coalition" by the end of the first quarter of 2017 to discuss short code access and education (OP 7).[14] Not only have most of the carriers in the Coalition been given an extension of time to conduct these meetings, but carriers can easily begin to identify these "coalitions" by contacting the personnel at 2-1-1 California (www.211california.org) and Underground Service Alert North and Underground Service Alert of Southern California.[15]

Perhaps the least convincing (and, simultaneously disturbing) claim of harm by the carriers is their objections to providing emergency contact information to city, county and tribal emergency personnel (OP 16).[16] The carriers opposed this requirement during the litigation in the docket and reargue their objections in their Application for Rehearing. It strains credulity to

[13] Without the least bit of irony, the carriers actually take issue with the Final Decision's use of the term "meet and confer." They argue that because the Commission's Rules use the term "meet and confer" to describe a discovery dispute, it, therefore, "is not clear what the 'carriers' and the given 'coalitions' would meet and confer about as there are no pending disputes." Motion at p. 14. This is just one example of word play engaged in by the carriers to justify their Motion and indicate a lack of cooperation and a lack of good faith effort to work with the Commission on these matters.
[14] Motion at p. 13.
[15] A five-minute web-search found these organizations that appear to be obvious starting points for a dialogue between carriers and 2-1-1 and 8-1-1 providers. TURN and CforAT are not suggesting that these are the only groups that should be involved, but each of these groups appear to serve as an umbrella organization for various smaller 2-1-1 and 8-1-1 organizations operating in California.
[16] Motion at p. 14.

suggest that carriers will be "irreparably harmed" by the effort to identify at least one or two key emergency services personnel within a municipal or county agency, perhaps the county sheriff or municipal police department, and provide those departments with a single phone number to be used only in cases of emergency or in the event of a failure of the carriers' facilities that threatens public safety. At the same time, the record contains substantial evidence of harm that communities have experienced in the past when they have been unable to communicate with carriers during local emergencies. This requirement is clearly an important yet straightforward, *first step* in the Commission's work to facilitate discussion among stakeholders to "improve communications between carriers and first responders" that will carry over into Phase 2. (OP 22)

The carrier Coalition has not met its burden to demonstrate irreparable harm.

D. Balance of Harms

When considering a stay of its final decisions, the Commission must balance the potential harms to the moving party from denying the stay and the harms to the public interest in granting the stay. The public interest weighs heavily in this Final Decision. This Final Decision makes critical findings and develops a path forward for the Commission to address problems with call completion and call initiation that can weaken the reliability of the communications network and threaten public safety, especially for those living in isolated rural areas. When these interests are balanced against the vague and overstated claims of irreparable harm made by the Coalition absent a stay, there can be no doubt that the appropriate conclusion is to deny the stay.

For example, as discussed above, elements of the Final Decision that mandate outage reporting are critical to the public safety and reliability of the state's telecommunications network. The Final Decision notes that this outage reporting is designed to "close the data gap and provide safe, reliable, high-quality service throughout California."[17] Yet, the Commission

[17] Final Decision at p. 150.

also provided additional time to properly implement these reporting requirements in order to avoid risk that the carriers could incur unnecessary expenses or dedicate resources to implement unclear mandates. At this stage, the requirements of the ordering paragraphs identify and order the preliminary work needed to develop an outage reporting structure, and a stay of these preliminary requirements would jeopardize the efficacy of the reporting and the public safety of rural communities in California.

Another example of the balance of harms favoring the public interest in this case is the importance of the report described in Ordering Paragraphs 11-12, which requires companies to evaluate their network operations regarding facilities attached to trees. This report covers operational practices that should be investigated by carriers as a matter of course to ensure that they are meeting their obligations to provide safe and reliable service and are complying with the existing "robust rules" that the Coalition acknowledges are currently in place to address safety violations.[18] The justification for this requirement stems directly from public input and observations during the public participation meetings, which revealed clear and troubling instances of improper facilities maintenance; this information indicates that the Commission's "robust rules" are not always sufficient. Because of the risks associated with failure to follow existing rules or to repair maintenance problems in a timely manner, there is a sense of urgency as previously discussed by TURN, CforAT, the County of Mendocino and the Final Decision.[19] The need to address these ongoing threats to public safety must outweigh the claims of harm by the carriers. Indeed, this Commission has previously rejected claims that carriers are irreparably

[18] Motion at p. 15.

[19] *See, for example*, TURN Reply Comments on Proposed Decision at p.4 ("The CPUC is obligated to ensure reliable service. As the PD described, it is clear that the Commission lacks adequate data regarding the extent of rural outages"); County of Mendocino Comments on the Proposed Decision at p. 3 ("In summary, the evidence supports that Public Safety official's legal responsibilities to the public to fulfill their duties are being compromised by issues over which the CPUC has duties and authorities.")

harmed by expending resources to participate in administrative processes, such as administrative hearings.[20] Here too, the Commission should reject the carriers' attempt to improperly balance harms and tip the scale against the public interest.

The carriers also point to potential violations of due process, including an alleged lack of notice to impacted carriers, which they claim would risk putting unsuspecting carriers in a state of non-compliance.[21] Yet, the Coalition makes no attempt to discuss why this proceeding is different than most Commission proceedings where only a handful of California's market participants are active parties to a docket. The OII was properly served, and the broad scope articulated in that docket provided sufficient notice to protect the due process rights of carriers operating in California. The subsequent comments, motions, hearings and orders, including the Amended Scoping Memo, were all public, transparent, and posted on the Commission's website. When balancing harms to grant or deny a stay, the Commission must acknowledge that a communications provider ignores the Commission's administrative processes at its own risk and it would grind the Commission to a halt if it was required to affirmatively ensure that every certificated and registered communications provider was alerted to each filing in every potentially relevant docket.

E. Other Factors

At times, the Commission has relied on other relevant factors, beyond those discussed above, in considering a request for a stay. Many of those factors are not present here.[22] The

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[20] *OII Into Sound Energy Solutions Proposal for LNG Terminal* (I.04-04-024), D. 04-07-040 at p. 7-8 "It is true that the OII will require SES to respond to discovery **[*8]** requests and participate in a hearing. However, under federal and state common law, it has long been established that the mere time and expense of participating in an administrative hearing does not constitute irreparable harm." [*citations omitted*]

[21] Motion at p. 12.

[22] For example, the due process violations considered as "other factors" in the *PacWest case* cited to by the Coalition at p. 16, are demonstrably different than the due process violations alleged here. There, the Commission was concerned about a specific, single entity receiving sufficient notice of a complaint

Commission should reject as irrelevant the additional factors cited to by the Coalition, including the scope and number of issues in the Coalition's Application for Rehearing and the fact that two Commissioners dissented from the Final Decision. The Coalition's "kitchen sink" approach to its Application for Rehearing cannot justify a stay of almost the entire Final Decision.[23] As discussed above, the efficacy of the Commission's processes cannot be threatened by the mere filing of a voluminous Application for Rehearing that prevents the Commission from moving forward to implementing its decisions. Perhaps more of a threat to the Commission's processes is the Coalition's suggestion that dissenting votes on a Commission decision are somehow relevant to whether the Commission has the ability to move forward. It would create a troubling precedent if the Commission were to rely on the fact that certain Commissioners dissented from a vote issuing a final decision as a basis to stay the decision.[24] Dissents are an important part of the Commission's decision-making processes, but the mere fact that there were dissenting votes does not undermine the efficacy of a final decision, and should not be used as the basis for a challenge to that decision.

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alleged directly against that entity. Here, concerns about whether the entire California carrier community received notice of an amended scoping memo, after receiving notice of the docket itself, is not analogous. See, *Pac-West Telecomm v. Pacific Centrex* (C.07-08-026), D.08-04-044.

[23]The Coalition, at p. 12-13, cites to D.10-05-018 as support for its Motion because there the Commission purportedly granted a stay under similar circumstances where the Commission found multiple problems with an underlying decision. However, in that case, the Commission noted that the filed Petitions for Modifications called for "extensive changes to a long and detailed decision" making consideration of the Petitions "complex." As discussed above, the carriers attempt to portray the Final Decision here as long and detailed and onerous must fail, as a high-level review of the Decision demonstrates that much of the Decision sets the stage for further discussions in Phase 2, additional investigations by staff, and data reporting by the carriers, thus a stay is not justified here. The barrier to compliance is low, carriers are not being directed to build a power plant, construct a railroad crossing, or implement smart meters based on this Final Decision.

[24] The Commission appears to reject attempts by a Petitioner to point to a "Commission's 3-2 vote" on the underlying decision to justify, in part, modification to the decision. *Application of SoCal Gas for Approval of AMI* (A.08-09-023), D. 14-06-034, p. 4.

III. CONCLUSION

For the reasons set forth above, TURN and the Center for Accessible Technology urge the Commission to reject the Coalition's Motion for Stay.

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Respectfully Submitted,

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