

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

UTILITY CONSUMERS' ACTION NETWORK (UCAN))	
Complainant,)	
)	
vs.)	Case No. 05-11-012
)	
COX CALIFORNIA TELECOM II, LLC dba Cox)	
Communications and related entities (collectively "Cox"))	
)	
)	
Defendants.)	

MOTION TO DISMISS OF COX CALIFORNIA TELCOM, LLC DBA COX COMMUNICATIONS, TO COMPLAINT AND REQUEST FOR CEASE AND DESIST ORDER AGAINST COX COMMUNICATIONS FOR FAILURE TO COMPLY WITH PUBLIC UTILITIES CODE SECTION 2883 REGARDING 911 EMERGENCY SERVICE ACCESS FOR RESIDENTIAL UNITS

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Dated: January 27, 2006

Pursuant to the California Public Utilities Commission Rules of Practice and Procedure (“Rules”) 56 and the Scoping Memo, dated January 20, 2006, Cox California Telecom, L.L.C., dba Cox Communications, (U 5684 C) (“Cox”) respectfully moves that the Commission dismiss with prejudice (“Motion”) the Complaint and Request for Cease and Desist Order Against Cox Communications for Failure to Comply with Public Utilities Code Section 2883 Regarding 911 Emergency Service Access For Residential Units (“Complaint”) filed by the Utility Consumers’ Action Network (“UCAN”).

I. INTRODUCTION

UCAN alleges that Cox violated UCAN’s *interpretation* of Section 2883, but UCAN does not allege that Cox violated the plain meaning of the statute or any related Commission decision implementing or interpreting the statute. In effect, UCAN improperly seeks to have the Commission adopt a new policy concerning access to 911 service (i.e. warm line service) in this adjudicatory proceeding. Prior Commission decisions and the Rules dictate that the Complaint must be dismissed, as a matter of law. Additionally, because resolution of the issues raised by UCAN would have an impact industry-wide, applicable law, fairness and due process all require the Commission to open a *rulemaking proceeding* if it were to address the issues raised in the Complaint.

The Complaint is misplaced because UCAN mischaracterizes and misconstrues applicable law. Even a cursory reading of UCAN’s pleading reveals that UCAN fails to recite accurately the legal obligations encompassed in Section 2883,¹ while at the same time, ignoring Commission decisions that describe Cox’s obligations under Section 2883. Not surprisingly, the “complaint” filed against Cox is void of any specific factual allegations that suggest Cox is not complying with applicable law. Instead, UCAN alleges only “ultimate facts” – conclusory statements void of any underlying factual support – which do not establish that Cox has violated

¹ All Section references are to the California Public Utilities Codes, unless otherwise noted.

applicable law. Indeed, Cox has not violated applicable law.

UCAN's proposed interpretation of Section 2883 must be rejected because UCAN would have the Commission read into the statute obligations applicable to local telephone corporations operating in a competitive marketplace that are not required by the plain language or a reasonable interpretation of Section 2883. Section 2883 was adopted by the Legislature in 1994 prior to the Commission authorizing competition to commence in January 1996. In 1994, AT&T California (f/k/a Pacific Bell and SBC), Verizon (f/k/a GTE) and the small and mid-size incumbent local exchange carriers ("ILECs") were respectively the only "local telephone corporation" operating in a given service territory. Contrary to UCAN's suggestion that two LECs are concurrently responsible to provide 911 access at any given "residential unit," Section 2883 does not require nor did the Legislature contemplate more than one local telephone corporation being responsible for providing access to 911. Moreover, and fatal to UCAN's allegations, the plain language of Section 2883 does not include the term "residential unit."

Today, there are not only more LECs and other service providers providing voice services, but they respectively utilize various types of technology than that deployed when Section 2883 took effect. Wireline voice services may be provided over a traditional copper loop or, increasingly the fiber and coaxial cable based services of "cable companies" such as Cox. Consumers may subscribe to voice over IP ("VoIP") service which is provided via DSL or cable-modem service. Additionally, local number portability which allows a consumer to port her telephone number to an alternative provider had not been implemented when the Legislature adopted Section 2883. Both competition in the local exchange market and new technologies have and will continue to impact how residential consumers are served. The Commission's adjudicatory process is not the proper venue for considering or resolving the complex policies that the Complaint seeks to impose.

As detailed herein, the Commission must dismiss the complaint as a matter of law due to UCAN's reliance on novel statutory interpretations of Section 2883 that neither the

Legislature intended nor the Commission previously contemplated.

II. GROUNDS FOR DISMISSAL

As detailed in this Motion and the supporting Declaration of Douglas Garrett, attached hereto as Attachment 1, Cox demonstrates that UCAN's complaint should be dismissed as a matter of law on the following grounds:

- UCAN's Complaint is void of any well-pleaded facts alleging Cox violated applicable law.
- UCAN's interpretation of Section 2883 is not supported by the plain language of the statute.
- There are no material facts in dispute.
- The Complaint does not satisfy Rule 10 or Rule 5 which precludes consideration of the policy issues that UCAN seeks to have the Commission adopt in an adjudicatory proceeding.
- UCAN's interpretation of Section 2883 is not reasonable because it would render some words surplusage, defies common sense, and would lead to an absurd result.
- Cox provides warm line service to subscribers with accounts that are suspended or terminated for non payment.
- Section 2883 does not require Cox to provide warm line service to new residential units where Cox has not installed a telephone connection.
- Section 2883 does not require local telephone corporations to provide warm line service to the extent there are technological and facilities limitations or doing so would preclude service to subscribers.
- UCAN includes a reference to, but does not allege that Cox violates Sections 2895-2897.

III. LEGAL ARGUMENT

A. Standard of Review

1. Commission Standard for Granting Motion to Dismiss.

The Commission generally treats motions to dismiss submitted pursuant to Rule 56 as equivalent to a motion for summary judgment.² A summary judgment procedure is similar

² *Westcom Long Distance, Inc. v. Pacific Bell et al.* (1994) D.94-04-082, 54 CPUC2d 244, 249; 1994 Cal. PUC LEXIS 339 * 11-12 (hereafter, "*Westcom Long Distance*").

to a motion to dismiss “in that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.”³ If there are no material facts in dispute, then the Commission will consider the well-pleaded allegations in the context of existing policy and law and then, it may grant the Motion, as a matter of law.⁴

2. Ultimate Facts Are Not Accepted As Well-Pleaded Facts.

In considering the Motion, the Commission assumes that the facts alleged in the Complaint are true, provided however, the Commission only considers and relies on “well-pleaded factual allegations,” and must reject “ultimate facts” alleged by UCAN.⁵ “Ultimate facts” are conclusory statements that do not allege specific acts or practices.⁶ For example, in reviewing and rejecting a CPCN application, the Commission rejected the “ultimate fact” that the application was in the public interest.⁷ The Commission adopted this common-sense approach to prevent the Commission from “squandering their [the Commission and parties’] resources by proceeding to an evidentiary hearing when the outcome is foregone conclusion under current law and policy of the Commission.”⁸

The overwhelming majority of “facts” included in the Complaint are “ultimate facts.”⁹ UCAN includes Paragraphs 9-21 in Article III Basic Facts and Legal Violations of the Complaint which allegedly specify how Cox violated Section 2883. Paragraphs 12, 13, 14, 15, 16, 17, 18 19, 20 and 21 include ultimate facts. For example, Paragraph 14 states, in full, as

³ Id. * 12 (citing *Exchequer Acceptance Corporation v. Alexander* (1969) 271 Cal.App.2d 1, 11).

⁴ Id. * 13.

⁵ *Application of Western Gas Resources-California, Inc. for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services Through the Use of Certain Existing Facilities and to Construct Additional Interconnection Facilities* (1999) D.99-11-023, 1999 Cal. PUC LEXIS 856 * 9-10 (hereafter “*Western Gas Resources*”) (citations omitted).

⁶ Id.

⁷ Id. * 10.

⁸ Id., 10-11.

⁹ Similarly, the Commission previously acknowledged that it is bothered by the fact that complainants may easily abuse the complaint process and cause defendants to expend resources and tax the Commission’s resources. *Westcom Long Distance*, D.94-04-082, 54 CPUC2d 244, 249; 1994 Cal. PUC LEXIS 339 * 26-27.

follows:

When a customer first moves into a residential unit that has had installed in it a land line connection by COX, or if a customer cancels service or has their COX telephone service cancelled for any reason (either voluntarily or involuntarily), COX must still provide that residential unit with a “warm line” (911 service only) until such time as that residential unit selects an LEC or CLEC as their local carrier, or designates another LEC or CLEC as their local carrier.¹⁰

This paragraph does not include any factual allegations describing Cox’s practices, but instead sets forth UCAN’s interpretation of Section 2883. Paragraph 14 alleges only that Cox must provide service consistent with UCAN’s confusing and erroneous description of the statute. Specifically, UCAN refers to a “land line connection” and “residential unit,” but Section 2883 does not include either of these terms.

With the exception of paragraph 18, paragraphs 12-21 noted above are primarily comprised of “ultimate facts.” The first sentence of paragraph 18 states that to provide warm line services a telephone number must be associated with such service. Cox admits this is true and, as discussed below, limits carriers’ ability to provide warm line service.¹¹

Paragraphs 9-11 include some other factual allegations that are not “ultimate facts,” but these allegations are not material to resolving the Motion.¹² For example, Paragraphs 9 and 10 concern the Commission certificating Cox as a provider of wireline services to residential and business customers. Cox admits these statements. Similarly, with respect to Paragraph 11, UCAN alleges that Cox markets its services.¹³ In light of existing law, and the lack of well-pleaded material facts included in the Complaint, the Commission must dismiss the complaint as UCAN has not alleged a violation of existing law.

¹⁰ Complaint, ¶ 14.

¹¹ Answer, ¶ 19.

¹² Additionally, Paragraphs 12-21 addressed above may include non-material facts that are not “ultimate facts.” For example, Paragraph 21 states, in part, that “. . . as emergency affecting large geographical regions can strike at any time.” These types of facts are not neither triable or material facts with respect to determining whether Cox violated applicable law as alleged by UCAN.

¹³ Complaint, ¶ 11. Specifically, Cox admits it markets it services in California but denies that it “makes millions of dollars” as alleged by UCAN. Answer, ¶ 12.

3. Statutory Rules of Construction.

There are at least two rules of statutory construction to which the Commission must adhere in considering the Motion. First, the Commission must first look to the plain language of Section 2883. The plain meaning of the statute is clear and the Commission “should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.”¹⁴ Accordingly, as discussed below, the Commission must reject UCAN’s attempt to read into the language of § 2883 a requirement that simply is not articulated in the plain language of the statute.

Second, even if Section 2883 were theoretically capable of more than one meaning (which it is not), the Commission must reject UCAN’s proposed interpretation of Section 2883 because it is not reasonable. UCAN’s interpretation renders some words surplusage, defies common sense, and results in absurdity.¹⁵

B. The Commission Must Grant the Motion Because The Complaint Does Not Satisfy Rule 10 And UCAN Seeks to Establish Industry-Wide Policy In An Adjudicatory Proceeding.

The Commission must exercise its authority to grant the Motion on the grounds that UCAN is abusing the Commission’s process by filing a complaint against Cox instead of filing a petition for a rulemaking. The purpose of a motion to dismiss, in part, in civil practice is

¹⁴ *Cal. Apartment Assoc. v. City of Fremont*, (2002) 97 Cal. App. 4th 693; 2002 Cal. App. LEXIS 3920 (citing *Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal. 4th 748, 756). See Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.; Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, Rulemaking No. 94-04-031 (Filed April 20, 1994), Investigation No. 94-04-032 (Filed April 20, 1994), D.97-11-086, 1997 Cal. PUC LEXIS 1074 * 6-7.

¹⁵ *California Manufacturers Assn. v. Public Utilities Commission*, (1979) 24 Cal. 3d 836, 844, 1979 Cal. LEXIS 287 (Citations omitted). The California Supreme Court held, as follows: Fifth, and most fundamentally, acceptance of the premise that section 453.5 applies only when the commission chooses to call its actions "refunds" would permit the commission, by a simple *ipse dixit*, to avoid the statute in every case. That is a capricious and absurd result, and would render section 453.5 entirely superfluous. We must assume the Legislature had no such intent, but desired, instead, as fair and equitable a result as could be reached.” *Id.*, p. 847. See *Alford v. Pierno*, (1972) 27 Cal. App. 3d 682, 1972 Cal. App. LEXIS 884 (interpreting the term “business” to produce a reasonable result).

to allow the court to exercise its inherent power to prevent abuse of the judicial process.¹⁶ The Commission must be “vigilant that frivolous or needless trials are eliminated.”¹⁷ This case requires the Commission to be vigilant because UCAN’s complaint fails to allege a violation of *existing law*.

Rule 10 requires the Complaint “to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired.”¹⁸ The Commission’s dismissal of a consumer complaint brought against AT&T on the grounds that the complaint did not satisfy Rule 10 is illustrative precedent. The Commission properly concluded that:

Rule 10 requires a complainant to provide specifics as to the nature of the complaint and the relief requested. Stephan has not complied with this requirement. He states that equipment was “defectively manufactured,” *but does not provide a list of specific equipment with an explanation of exactly how the equipment malfunctions*. He references problems with “Central Office equipment and other equipment” *that could refer to virtually any equipment in AT&T’s network*. He also says that others have the same problems with equipment, *but he mentions no specifics, and does not include affidavits from other customers describing their specific service problems*.¹⁹

Similarly, the Complaint alleges that Cox violated Section 2883 but fails to include the specific factual allegations in any form, including affidavits from consumers describing any specific service problems or any violations of applicable law. For example, UCAN alleges that the Sections 2895-2897 require Cox to provide adequate customer service,²⁰

¹⁶ *Westcom Long Distance, Inc.*, D.94-04-082; 1994 Cal. PUC LEXIS 339 * 11 (citing, 5 Witkin, Cal. Procedure (3d ed. 1985) § 955, p. 389). Similarly, the Commission has acknowledged that motions to dismiss in civil practice are used to “prevent sham, frivolous, or vexatious causes of action, or to prevent filings that are not done in good faith or that are in disregard of established procedural requirements, or otherwise violative of orderly judicial administration.” Id. * 11-12 (Citations omitted).

¹⁷ Id., * 13.

¹⁸ Rule 10. Rule 10 is consistent with Section 1702 which requires UCAN in part to identify the alleged violation. Pursuant to Section 1702, UCAN must set forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.” Section 1702.

¹⁹ *David Stephan, Complainant, vs. AT&T Broadband, Defendant*, C.03-02-012, D.03-09-004, 2003 Cal. PUC LEXIS 454 *8-9. (Emphasis added).

²⁰ Complaint, ¶ 13.

but again, UCAN fails to identify a specific statutory requirement that Cox violated or any specific actions or omissions that would give rise to any such violation. The Commission must dismiss the Complaint as it plainly does not satisfy Rule 10.

As separate grounds for dismissal, the Commission must dismiss the Complaint on the grounds that an adjudicatory proceeding is not the proper venue for consideration and adoption of policies and rules that affect an entire class of carriers, which in effect, is what UCAN proposes. Specifically, Rule 5(b) limits adjudicatory proceedings as follows:

"Adjudicatory" proceedings are: (1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.²¹

Whereas, Rule 5(d) describes quasi-legislative proceedings which are appropriate when the Commission will establish policy and implement statutes:

"Quasi-legislative" proceedings are 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.

The Commission has already recognized the limits of adjudicatory proceedings and concluded that a complaint case "involving only two parties is not an appropriate forum for determining industry-wide policy."²² Specifically, when a complainant sought to preempt Commission consideration of an issue that would be best resolved through a rulemaking, the Commission granted PG&E's motion to dismiss concluding that the "consequences of granting the complaint had not been properly studied."²³ The Commission also concluded that:

To accede to Complainants' request would cause substantial cost shifting which involves complex policy choices, as to which numerous parties have divergent

²¹ Rule 5(b).

²² *CPN Pipeline Company and CPN Gas Marketing Company, Complainants, vs. Pacific Gas and Electric Company (U-39 G), Defendant*, C.00-09-021, D.01-05-086, 2001 Cal. PUC LEXIS 403 * 27.

²³ *Id.*

interests and points of view.²⁴

Similarly, consideration of UCAN's proposed interpretation of Section 2883 would require the Commission to consider complex policy issues that have not previously been considered but that would affect all local telephone corporations subject to Section 2883. For example, a consumer subscribing to VoIP service obtains voice service by connecting a telephone adapter to her underlying stand-alone DSL service. The consumer, however, at any time may take her telephone adapter with her and connect her VoIP service at a different location. Upon her doing so, there is no warm line service available at her residence because the customer has taken the dial tone with her. This may be a temporary situation but may also be permanent if the customer were to move out of the given residence. In either situation, a local telephone corporation subject to Section 2883 is not connected to such inside wire and would have no notice or knowledge of the customer's activities.

Accordingly, the Commission must find that this complaint proceeding is not an appropriate forum for determining industry-wide policy concerning warm line service.

C. Cox Complies With The Requirements in Section 2883 and Commission Rules That State Cox Must Provide Warm Line Service To Subscribers With Accounts That Cox Suspends or Terminates Due To Non-Payment.

Section 2883(a) requires local telephone corporations to provide, subject to technical and facilities limitations, every existing and newly installed residential telephone connection access to "911" emergency service. Section 2883(b) and the Commission's rules require carriers to continue providing warm line service in the event a subscriber's account is suspended or terminated for nonpayment.²⁵

Section 2883(b) provides as follows:

²⁴ Id., * 26-27.

²⁵ Section 2883(b) states in full as follows: "(b) The commission shall prohibit any corporation from terminating access to the services described in subdivision (a) for nonpayment of any delinquent account or indebtedness owed by the subscriber to the telephone corporation. A subscriber and a telephone corporation may arrange payment schedules to regain full service."

The commission shall prohibit any corporation from terminating access to the services described in subdivision (a) for nonpayment of any delinquent account or indebtedness owed by the subscriber to the telephone corporation. A subscriber and a telephone corporation may arrange payment schedules to regain full service.

When the Commission initially authorized competition in the local exchange market to commence in 1996, the Commission concluded that CLCs must continue to provide access to 911 services to customer disconnected for nonpayment. The Commission later reaffirmed this requirement in Decision 96-02-072 when it adopted permanent rules applicable to CLCs and re-sellers:

Both facilities-based and resale CLCs shall provide residential customers access to E-911 service *following disconnection due to nonpayment (i.e., "warm-line service")*.²⁶

Cox is complying with Section 2883(b) and the Commission's corresponding rule. UCAN's complaint does not include any well-pleaded or material factual allegations to the contrary. Therefore, the Commission must grant Cox's Motion on this matter.

D. Section 2883 Does Not Require Local Telephone Corporations To Provide Access to 911 Emergency Services To New Residential Units.

UCAN's proposed interpretation of Section 2883 implies that Cox would be required to provide warm line services to newly constructed residential units where no telephone service has been initiated by a consumer.²⁷ The plain language of Section 2883 does not require local telephone corporations to provide warm line service to "residential units:"

All local telephone corporations, excluding wireless and cellular telephone corporations, shall, to the extent permitted by existing technology or facilities, provide every existing and newly installed *residential telephone connection* with access to "911" emergency service regardless of whether an account has been established.

UCAN attempts to read a requirement into Section 2883(a) that simply does not exist. Accordingly, the Commission must reject UCAN's interpretation.

²⁶ D.96-02-072, Appendix E, Rule 8(B)(1). (Emphasis added).

²⁷ Complaint, ¶ 21.

If UCAN's proposed interpretation were adopted, it would result in an unreasonable interpretation of the statute. UCAN's proposed policy is unreasonable because it is not technically feasible, would require *all* carriers in a given service territory to unnecessarily incur significant expenses to install duplicative facilities that may never be utilized, and would require carriers to utilize limited numbering resources in a manner contrary to the Federal Communications Commission ("FCC") and Commission's goals. For example, under UCAN's proposed policy, Cox, SBC, Verizon and every other local telephone company offering residential voice services in a given service territory would be required to install a residential telephone connection to every newly constructed residential unit. Yet, only one of these carriers could connect to the single set of inside wiring at a given residential unit. In the absence of a customer requesting service, there are no regulations that govern which of these carriers would be permitted --or required -- to connect to the inside wire of the residential unit.

The impact of UCAN's proposal on limited numbering resources further demonstrates that it is not reasonable, defies common sense and results in absurdity. To provide warm line service, a carrier must assign a telephone number to the telephone connection. UCAN's proposed policy would require multiple carriers to each obtain separate telephone numbers and respectively assign them to their respective telephone connection at the residential unit, indefinitely. To require, on an indefinite basis, at least two LECs and probably more, to obtain and assign telephone numbers to telephone connections that may or may not be connected to a customer's inside wire, at a minimum, contradicts FCC and Commission policy promoting efficient use of telephone numbers. UCAN's proposal would increase carriers' need for telephone numbers on an indefinite basis, and thereby, require additional area code splits or overlays throughout California. Again, only one of those carriers could connect to the inside wire and actually provide the warm line service. Finally, the consumer that eventually resides in such residential unit may elect to obtain wireless service and obtain access to 911 from her wireless provider pursuant to Section 2987. Thus, multiple carriers would each be required to deploy

facilities and assign a telephone number, but none would be authorized by the consumer or required by Commission rules to connect to the inside wire.

Neither the plain language of Section 2883 nor any Commission rule requires Cox to provide warm line service to every new residential unit. UCAN's proposed policy is not consistent with the plain meaning of the statute. Indeed, UCAN's proposal defies common sense and would result in absurdity by requiring multiple carriers to needlessly deploy facilities and telephone numbers in duplicate. UCAN's proposal must be rejected outright.

E. Section 2883 Does Not Require a Local Telephone Corporation To Provide Access to 911 Emergency Services Indefinitely To Every Residential Telephone Connection That Such Corporation May Install In Its Service Territory.

UCAN suggests that under Section 2883 Cox must provide warm line service indefinitely to residential units where a former Cox customer voluntarily cancels service. For example, where Cox has installed a residential telephone connection to a residential unit, UCAN's proposed policy would require Cox and any other carriers that installed a telephone connection to concurrently provide warm line service.²⁸ This scenario is similar to UCAN interpreting Section 2883 to require all local telephone corporations to provide warm line service to every new residential units in that UCAN's proposal results in multiple carriers being concurrently responsible for providing warm line service to any given residential unit. As discussed above in Section D, UCAN's proposal is not supported by the plain language of Section 2883, is not otherwise reasonable and must be rejected outright.

Additionally, UCAN's proposed interpretation effectively renders the phrase "to the extent permitted by existing technology or facilities" in Section 2883(a) as surplusage, which in turn renders an absurd result. Additionally, UCAN's complaint ignores Section 2883(d) which further limits carriers obligations under Section 2883. As discussed below, UCAN's proposed

²⁸ Complaint, ¶ 15.

interpretation must be rejected.

1. Subject to Technical and Facilities Limitations Permitted By The Express Language of Section 2883, Cox Provides Warm Line Services In Compliance with Section 2883.

The plain language of Section 2883 requires Cox to provide warm line service subject to technological and facilities limitations. Cox complies with Section 2883 by providing warm line services, subject to both technological and facilities limitations as discussed below.

A Cox customer may voluntarily terminate service for any number of reasons, including moving to a different location within or outside of Cox's service territory or changing to another service provider. Upon doing so, a customer may elect to port her number and obtain service from another provider, including an ILEC, another CLEC, a wireless provider or a VoIP provider. Alternatively, a customer may elect to terminate service and not port her number.

When a customer terminates service and requests that Cox port her number to a different carrier, Cox must port the customer's number pursuant to the federal Telecommunications Act of 1996 ("Act") and FCC's rules implementing the Act.²⁹ The existing regulatory framework does not allow or require Cox to know whether the customer will remain in the existing residential unit or move to a different residence. Once Cox ports the telephone number to a different provider, Cox no longer has control of the telephone number associated with the telephone connection that Cox installed. Without a telephone number, UCAN and Cox agree that Cox cannot provide warm line service.³⁰

Neither Section 2883 nor any Commission rules impose an affirmative obligation on Cox to obtain and assign another telephone number to either the "residential unit" or the

²⁹ 47 U.S.C. § 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." *See* 47 C.F.R. § 52.23; *Telephone Number Portability*, CC Docket No. 95-116; RM 8535 FCC, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352; 1996 FCC LEXIS 3430; FCC 96-286 (rel. July 2, 1996).

³⁰ Complaint, ¶ 18; Answer, ¶ 19.

“telephone connection” when a customer terminates service, and consequently, any omission by Cox to do is not a violation of Section 2883.³¹ As discussed herein, numbering resources are limited and carriers must adhere to strict utilization rates. Further, it would be extraordinarily burdensome on both an administrative and operational basis for Cox to obtain a new telephone number to serve a residential unit, only to find out that the consumer obtained service from another LEC. UCAN’s proposal ignores federal regulations that carriers must comply with in a competitive environment.

When a customer voluntarily terminates her telephone service with Cox but does not port her number, Cox is constrained by technological and facilities limitations in providing warm line service indefinitely. Based on the technology that Cox utilizes as a cable-based CLEC, Cox installs a telephone connection known as a network interface unit (“NIU”). A NIU is a hardware unit with complex electronics that splits the voice service from any data and cable television services to which a customer may also subscribe. The NIU connects the customer’s inside wire to Cox’s network and provides remote monitoring of the customer’s service and test access from Cox’s central operations center. Each NIU costs approximately between \$ 150-350 depending on the number of lines the customer orders. In addition to the NIU, Cox also must deploy/activate central office equipment. This includes a host digital terminal that provides the interface between the cable network equipment and Cox’s telephone switches and the configuration of the switch itself. The technology that Cox utilizes requires Cox to re-use the NIU hardware and other facilities, and not abandon it at residential units where Cox is not providing service due to a customer voluntarily terminating service. This practice is also

³¹ See *Rick E. Thurber, Complainant, vs. Pacific Gas and Electric Company and Pacific Bell, Defendants*, C.98-09-036 (File September 30, 1998) D.99-04-001, 85 CPUC2d 524, 1999 Cal. PUC LEXIS 237. In D.99-04-001, the Commission dismissed the complaint on the following grounds: “In conclusion, we do not suggest that the utilities could not do the things that Thurber asks (e.g. remove unauthorized temporary signs; install a permanent utility notice -- which would not require our approval -- advising of GO 95, Rule 34 or other state or local law; prosecute violators). We conclude, rather, that GO 95, Rule 34 does not require them to do those things and consequently, that any omission is not a violation of GO 95, Rule 34 which we must order them to remedy.” *Id.*, 1999 Cal. PUC LEXIS 237 * 11-12.

consistent with Section 2883(d) which does not require Cox to provide warm line service if doing so precludes Cox from providing service to its subscribers. There is nothing unlawful about Cox's decision to deploy a NIU telephone connection that must be re-deployed when a customer voluntarily disconnects service with Cox.³²

Section 2883(a) does not define technology or facilities limitations. Nor has the Commission adopted any rules or guidelines implementing such terms. Cox's practice is reasonable and consistent with the requirements in Section 2883, and therefore, the Commission must find that Cox did not violate the plain language or the spirit of Section 2883.

2. FCC and Commission Rules Require Efficient Use of Telephone Numbers.

The Commission and FCC rules governing access to and assignment of telephone numbers (i.e. NPA-NXXs) governs how Cox obtains telephone numbers for assignment, and thereby, impacts the provisioning of warm line service because a telephone number is necessary to provide service. Since the introduction of competition in the local exchange market, both the FCC and the Commission have and continue to struggle to efficiently manage the on-going demand for telephone numbers. Both agencies have undertaken a number of innovative measures to ensure that carriers efficiently utilize NPA-NXXs.

For example, to thwart the drain on numbers and the need to split existing NPA-NXXs or implement overlays, the FCC's rules require carriers to satisfy a 75% fill rate criteria. That means Cox must utilize 75% of its numbers before it may obtain additional numbers. Telephone numbers allocated for warm line service are deemed "administrative" numbers and do not count

³² See *California Personnel Resources and Clarence A. Hunt, Jr., Complainants, vs. Pacific Gas and Electric Company, Defendant*, C.99-09-024, D.00-04-004, 2000 Cal. PUC LEXIS 208. In Decision 00-04-004, the Commission concluded that if assumed that "PG&E had replaced its prime contractor award program with the CORESTAFF subcontracting program, we find no inherent violation of the letter or spirit of GO 156. There is nothing unlawful about a utility's decision [to] engage a contractor to perform certain contract management functions the utility would otherwise need to perform directly. Complainants' dislike of PG&E's new program does not constitute a violation of GO 156." Id. 2000 Cal. PUC LEXIS 208 *26-27.

towards the utilization rate.³³ Accordingly, the FCC's requirement that Cox satisfy certain utilization rates, without counting administrative numbers allocated for warm line service, impacts Cox's ability to obtain and assign telephone numbers.³⁴ Requiring multiple carriers to assign multiple telephone numbers to telephone connections that will never be connected to the inside wire of a given residential unit contradicts the FCC and Commission respective rules and goals to efficiently utilize limited numbering resources.

F. UCAN Misconstrues the Notice Requirements Set Forth in Section 2883(d).

The Complaint alleges that Cox is required to inform subscribers about the availability of 911 under two different scenarios. UCAN claims that Cox must provide such notice when a subscriber cancels her Cox phone service.³⁵ Additionally, UCAN alleges that Cox is required to provide notice "if a Cox land line connection has been installed in their residential unit but has not been activated."³⁶ UCAN states that Section 2895-2897 require Cox to provide "adequate customer service" but the Complaint does not allege that Cox violated any of these statutory requirements. Without more, Cox does not know what requirements included in Section 2895-2897 it has allegedly violated. Moreover, UCAN's complaint is defective because it does not identify acts or omissions describing such "violations." The Complaint does not comply with Rule 10 because UCAN fails "to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired."³⁷ For this reason alone, the Motion must be granted on this matter.

³³ *Numbering Resource Optimization; Petition for Declaratory Ruling and Request For Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717*, CC Docket No. 99-200; CC Docket No. 96-98, FCC, 16 FCC Rcd 306, 320-21; 2000 FCC LEXIS 6878 * 35-36, FCC 00-429, ¶ 30 (rel. Dec. 29 2000).

³⁴ The Complaint includes a quote attributed to "FCC meeting" but provides not citation for the quote. Without a source for the quote, Cox is unable to respond.

³⁵ Complaint, ¶ 13.

³⁶ Id.

³⁷ Rule 10.

Additionally, UCAN completely fails to cite to Section 2883(c) which actually addresses notice requirements specific to warm line service. Section 2883(c) provides as follows:

(c) The commission shall require telephone corporations to inform subscribers of the availability of the services described in subdivision (a) in a manner determined by the commission.

Section 2883(c) clearly requires the Commission to describe the manner in which carriers must provide notice about the availability of warm line service under Section 2883(a). The Commission has not adopted any such rules, and thus, Cox has not violated applicable law. Accordingly, the Commission must grant the Motion.

IV. CONCLUSION

UCAN mischaracterizes applicable law and the Complaint fails to state a claim against Cox. For all the reasons stated herein, Cox respectfully requests that the Commission grant the Motion and dismiss the Complaint with prejudice.

Date: January 27, 2006

Respectfully submitted,
Cox California Telcom, LLC
dba Cox Communications

/s/ Margaret L. Tobias

Margaret L Tobias
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ATTACHMENT 1

**DECLARATION OF DOUGLAS GARRETT
MOTION TO DISMISS OF COX CALIFORNIA TELCOM, LLC DBA COX
COMMUNICATIONS, TO COMPLAINT AND REQUEST FOR CEASE AND DESIST ORDER
AGAINST COX COMMUNICATIONS FOR FAILURE TO COMPLY WITH PUBLIC
UTILITIES CODE SECTION 2883 REGARDING 911 EMERGENCY SERVICE ACCESS FOR
RESIDENTIAL UNITS**

I, Douglas Garrett hereby declare as follows:

1. My title is Vice President, Western Region Regulatory Affairs of Cox California Telcom, I.L.C. My business address is 2200 Powell St., Suite 1035, Emeryville, CA 94608.

2. The statements contained in this Declaration are true of my own knowledge and, if called as a witness, I could competently testify to them.

3. Cox California Telcom, LLC, dba Cox Communications ("Cox") is a competitor local carrier ("CLC" or "CLEC") serving a limited service territory in Orange County and San Diego County, California. Cox is certificated by the California Public Utilities Commission ("Commission") to provide local exchange telecommunications services pursuant to Decision No. 96-09-074.

4. As Vice President, Western Region Regulatory Affairs, I am responsible for Cox's compliance with state telecommunications laws, regulations and programs in the states of California, Nevada and Arizona. In that capacity, I am familiar with Cox's policies and practices with respect to providing access to 911 service, also referred to as "warm line service."

5. When Cox suspends or terminates a customer account due to non-payment, Cox continues to provide warm line service to such customer. By continuing to provide warm line service to such customers, Cox is complying with Section 2883(b) and the Commission's corresponding rules.

6. At any given residence, there is one set of inside wire that LECs connect to in order to provide voice service, including warm line service. If multiple carriers were to deploy facilities to provide service to a given residential unit, only one of these carriers could connect to the single set of inside wiring at such unit.

7. A Cox customer may voluntarily terminate service for any number of reasons, including moving to a different location within or outside of Cox's service territory or changing to another service

**Cox Motion to Dismiss
Attachment A**

provider. Upon such customer's request, Cox ports to another carrier, the telephone number assigned to the customer. Applicable law does not allow or require Cox to know whether the customer will remain in the existing residential unit or move to a different residence. Once Cox ports the telephone number to a different provider, Cox no longer has control of the telephone number associated with the telephone connection that Cox installed.

8. A customer may voluntarily terminate service and elect not to have the telephone number assigned to her ported to another carrier. When a customer voluntarily terminates her telephone service with Cox but does not port her number, Cox is constrained by technological and facilities limitations in providing warm line service indefinitely.

9. To provide telephone service, based on the technology that Cox utilizes as a cable-based CLEC, Cox installs a telephone connection known as a network interface unit ("NIU"). A NIU is a hardware unit with complex electronics that splits voice service from any data and cable tv services that may be provisioned at the residential unit. The NIU connects the customer's inside wire to Cox's network and provides remote monitoring of the customer's service and test access from Cox's central operations center. Each NIU costs approximately between \$ 150-350 depending on the number of lines the customer orders. The technology that Cox utilizes requires Cox to re-use the NIU hardware, and not abandon it at residential units where Cox is not providing service due to a customer voluntarily terminating service.

10. In addition to the NIU, Cox also must deploy/activate central office equipment. This includes a host digital terminal that provides the interface between the cable network equipment and Cox's telephone switches and the configuration of the switch itself.

I declare under penalty of perjury that the foregoing is true and correct except as to the matters that are therein stated on information and belief, and as to those matters I believe them to be true.

Dated: January 27, 2006



Douglas Garrett

PROOF OF SERVICE

I, Margaret L Tobias, the undersigned, hereby declare that, on January 27, 2006, I caused a copy of the foregoing:

MOTION TO DISMISS OF COX CALIFORNIA TELCOM, LLC DBA COX COMMUNICATIONS, TO COMPLAINT AND REQUEST FOR CEASE AND DESIST ORDER AGAINST COX COMMUNICATIONS FOR FAILURE TO COMPLY WITH PUBLIC UTILITIES CODE SECTION 2883 REGARDING 911 EMERGENCY SERVICE ACCESS FOR RESIDENTIAL UNITS

in the above-captioned proceeding, to be served as follows:

[X] Via hand-delivery and email to Administrative Law Judge Thorson

[X] Via hand-delivery to Commissioner Brown

[X] Via United States Mail, postage prepaid, to the following:

Michael Shames
Alan Mansfield
Utility Consumers' Action Network (UCAN)
3100 5th Ave. Suite B
San Diego, CA 92103

[X] Via Email Service to the following parties:

amansfield@ucan.org
mshames@ucan.org
esther.northrup@cox.com
marg@tobiaslo.com
douglas.garrett@cox.com
elaine.duncan@verizon.com
rcosta@turn.org
LAdocket@cpuc.ca.gov
jet@cpuc.ca.gov
pgh@cpuc.ca.gov

Dated: January 27, 2006 at San Francisco, California.

/s/ Margaret L. Tobias

Margaret L. Tobias