

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation into the State of  
Competition Among Telecommunications  
Providers in California, and to Consider and  
Resolve Questions Raised in the Limited  
Rehearing of Decision 08-09-042

Investigation 15-11-007  
(Filed Nov. 5, 2015)

**OPENING BRIEF OF THE WRITERS GUILD OF AMERICA, WEST, INC.**

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August 12, 2016

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**I. SUMMARY AND INTRODUCTION**

Writers Guild of America, West, Inc. (“WGAW”) submits this Brief in the above-referenced proceeding in accordance with the Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (July 1, 2016) (“Scoping Memo”) and the Order Instituting Investigation to Assess the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Limited Rehearing of Decision (D.) 08-09-042 (Nov. 5, 2015) (“OII”).

In the course of this Investigation, the California Public Utilities Commission (“CPUC” or “Commission”) has issued numerous questions and requests for information in order to compile a picture of competition in California’s telecommunications ecosystem. This Brief focuses on a subset of those questions in an effort to contribute to the Commission’s understanding of competition and choice in broadband, an essential aspect of telecommunications connectivity for California consumers. Broadband technology has evolved to represent, not a luxury, but an essential platform for participation in society. Californians apply for jobs, communicate with health care providers, do schoolwork, engage in distance

learning and consume vast amounts of media via their Internet connections. The most data-intensive uses such as streaming video have promoted adoption of and investment in high-speed broadband, becoming inextricably linked with its development. Evaluations of broadband in numerous regulatory settings have found that the demands these applications place on broadband infrastructure should guide assessments of broadband availability and competition. With appropriate product market definitions, a clear picture emerges of a broadband market in California that is severely lacking in the competition necessary to protect consumers and promote innovation.

This Brief will address several items from the Scoping Memo's Appendix A Issue and Briefing Outline. Specifically, it will address topics identified in the outline as 1, 1(a)(i), 1(b)(ii)(1) and 3(b)(i).

## **II. WRITERS GUILD OF AMERICA, WEST, INC.**

WGAW is a labor organization headquartered in Los Angeles that represents more than 8,000 professional writers of film, television, online video programming, local news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in theaters are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). More than 7,000 Guild members live in California and make significant contributions to the state and local tax base. In 2015, WGAW members reported over \$1 billion in earnings and \$400 million in residual compensation from reuse of written material.<sup>1</sup> In recent years, WGA members have benefitted from the advent and growth of the online video market, which has been enabled by the

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<sup>1</sup> Writers Guild of America West, Annual Financial Report at 2-3 (June 29, 2016), *available at* [http://www.wga.org/uploadedFiles/who\\_we\\_are/annual\\_reports/annualreport16.pdf](http://www.wga.org/uploadedFiles/who_we_are/annual_reports/annualreport16.pdf).

increased availability of high-speed Internet. WGA members now create original video programs offered by online video distributors (“OVDs”) such as Netflix, Amazon, Hulu and Crackle.

### **III. ISSUE AND BRIEFING OUTLINE ITEMS**

#### **1. Defining the Market(s)**

As this proceeding is an effort to assess the state of competition in telecommunications market(s) in California, it is reasonable to begin by identifying the relevant markets. The boundaries of product markets should be guided by identification of relevant consumer behaviors that influence the substitutability of various products. As WGAW’s testimony notes, this is consistent with the Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines, and with transaction analysis utilized by the Federal Communications Commission (“FCC”), which establishes that products are within the same product market if consumers consider them “reasonably interchangeable for the same purpose.”<sup>2</sup> In the context of broadband, behaviors related to demand for online video services provide key insight. Online video has become one of the most significant uses for broadband, driving adoption and investment and influencing marketplace dynamics.

Since the advent of streaming video, most notably the debut of YouTube in 2005 and Netflix’s streaming business in 2007, use of this technology has become a defining feature of broadband utilization.<sup>3</sup> Streaming video and audio now comprise 70% of peak downstream

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<sup>2</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 3:16-20 and 5:17-19, citing U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (Aug. 19, 2010) at 7, available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> and Applicants of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 15-149, ¶ 53 (2016) (“*Charter-TWC Order*”).

<sup>3</sup> *Id.* at 4:6-10, citing 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 Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Improvement Act, *2016 Broadband Progress Report*, GN Docket No. 15-191, 31 FCC Rcd. 699, 706, ¶ 14 (2016) (“*2016 Broadband Progress Report*”).

traffic.<sup>4</sup> Streaming video has evolved from primarily user-generated, short-form content to a robust and diverse menu of syndicated and original professional television-length content. On-demand streaming services such as Netflix, Amazon and Crackle are now being joined by packages of linear video channels delivered online, such as Dish's SlingTV and Hulu's just-announced live service.<sup>5</sup> This type of usage is a well-recognized piece of broadband's virtuous cycle, enhancing demand for high-speed, reliable connections and supporting investments in broadband infrastructure.<sup>6</sup>

The FCC has included online video usage as a relevant feature in its evaluations of broadband progress and competition in numerous settings.<sup>7</sup> And as ORA's witness Dr. Selwyn has noted, the demand for high-speed broadband and growth in popularity of online video have influenced market dynamics for and among telecommunications providers. These factors have resulted in a dominant market position for the telecommunications companies most able to meet the increased demand for higher speeds, causing cable MSOs to replace telephone companies as the leading providers of last-mile broadband.<sup>8</sup> For providers that offer traditional pay-tv video service as well as broadband, the consumer trend of substituting a broadband connection and online video subscriptions for pay-tv service may provide incentive to raise broadband prices, including through usage-based pricing mechanisms, in order to recover lost revenue.<sup>9</sup> Online video has had a tremendous impact on the development and use of broadband, and the technical

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<sup>4</sup> *Id.* at 4:13-15.

<sup>5</sup> Lance Whitney, *Hulu takes on cable, confirms plan to offer live TV service*, CNET (May 4, 2016), <http://www.cnet.com/news/hulu-confirms-plan-to-offer-live-tv-service/>.

<sup>6</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 4:10-11, citing Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, 30 FCC Rcd. 5601, 5663 ¶ 142 (2015), ("*Open Internet Order*").

<sup>7</sup> See, for instance, the FCC's *Open Internet Order* and *Broadband Progress Reports*.

<sup>8</sup> Exhibit 15, ORA, Selwyn Direct Testimony at 44:10-17. Also Exhibit 16, ORA, Selwyn Testimony at 3:15-19. Cable modem now accounts for 59% of all fixed broadband subscriptions. Exhibit 16, ORA, Selwyn Testimony at 71 n.44, citing *2016 Broadband Progress Report*, 31 FCC Rcd. at 710, ¶ 26.

<sup>9</sup> Exhibit 15, ORA, Selwyn Direct Testimony at 48:14-17.

requirements to support it should be incorporated into an assessment of product market definition and competition.

**1(a)(i): In defining the market or markets, are mobile services a substitute for wireline services?**

As noted above, it would be consistent with FCC evaluations of broadband competition to incorporate relevant consumer behaviors in the Commission's evaluation of product markets and substitutability, and as one of the most prominent uses of the Internet, streaming video is a relevant behavior that differentiates broadband technologies. Wireless or mobile broadband services are widely used, but do not provide a functional substitute for wired broadband products due to quality limitations and the significantly higher cost of data for wireless plans. In addition, the two types of services are generally used for differing purposes when consumers have both.<sup>10</sup>

An analysis of the cost to use a major carrier's wireless data plan to stream an average month of television viewing brings relevant limitations into focus. As noted above, wired broadband has begun to provide a potential substitute for pay-tv service; however, wireless broadband is far too expensive to provide the same. Using Verizon or AT&T's wireless plans to replace an average month of television viewing would cost at least \$300 a month and potentially hundreds of dollars more.<sup>11</sup> This is because wireless plans generally include data caps or usage-based pricing; wired plans generally offer unlimited data or include much higher data allowances. ORA's witness Adam Clark illustrates this comparison as well with an analysis of

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<sup>10</sup> Exhibit 71, Greenlining, Goodman Supplemental Testimony at 3:7-14; Exhibit 17, ORA, Clark Direct Testimony at II-13:1-9.

<sup>11</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 6:15-7:13. Using a mobile device and data plan to replace an average month of TV viewing, currently over 147 hours, could cost \$710 per month using a tablet or \$300 per month using a smartphone.

the cost per GB of data offered by various technologies, finding that the median per-GB cost for mobile data is 26 times greater than for cable broadband and DSL.<sup>12</sup>

The FCC has similarly and consistently found wireless and wired broadband services to be non-substitutable. Prior to the most recent (2016) Broadband Progress Report, the FCC excluded mobile services from its assessment of advanced telecommunications services due to concerns over quality, reliability, latency and usage allowances.<sup>13</sup> The 2016 Broadband Progress Report does include mobile services, but the FCC specifically concluded that “advanced telecommunications capability” is only present where consumers have access to both fixed and mobile broadband. The FCC noted that consumers use the two types of services in different ways and generally purchase both if they can afford to do so, reiterating that “[a]s they currently exist, fixed and mobile broadband services are not functional substitutes for one another...”<sup>14</sup> In its evaluation of the recent Charter-Time Warner Cable-Bright House merger, the FCC’s identification of relevant markets reached the same conclusion, finding that the cost-based limitations of wireless plans for heavy data consumption and consumers differentiated use of the two types of services indicated that wireless and wired broadband are separate product markets.<sup>15</sup> Reiterating the relevance of streaming video in coming to this finding, the FCC noted that “it would cost an average Netflix subscriber using the Applicants’ cable BIAS [Broadband Internet Access Services] many hundreds of dollars each month to view that same Netflix programming over a wireless provider.”<sup>16</sup> As a high-capacity use of broadband technology, streaming video highlights the limitations of wireless broadband service as compared to wired and reinforces that the two technologies are separate product markets.

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<sup>12</sup> Exhibit 17, ORA, Clark Direct Testimony at II-15:Table 2.

<sup>13</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 8:17-9:2.

<sup>14</sup> *Id.* at 9:2-8, citing *2016 Broadband Progress Report* at 31 FCC Rcd. at 706, ¶ 17.

<sup>15</sup> *Id.* at 9:9-14 citing Charter-TWC Order, ¶ 50, 56.

<sup>16</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 8:12-15, citing *Charter-TWC Order*, ¶ 56.

**1(b)(ii)(1): In defining the market or markets among broadband providers, should fixed wireline broadband be differentiated by speed?**

The original OII in this proceeding noted the FCC's update of its benchmark speed for broadband to 25 Mbps down and 3 Mbps up as a significant regulatory change.<sup>17</sup> The FCC's adoption of this threshold relied on analysis which considered relevant consumer behaviors. Specifically, the FCC noted that it "relied in particular on the expanding demand for online video services, increasing simultaneous usage of multiple devices in a single household, and growing adoption of 25 Mbps/3 Mbps service by consumers in areas where such services were available among other trends" in order to reach its finding that only 25 Mbps/3 Mbps or faster broadband qualifies as "advanced telecommunications capability."<sup>18</sup>

Testimony in this proceeding reinforces the relevance of this threshold for the Commission's assessment of competition in telecommunications markets. Consumers in California overwhelmingly purchase higher-speed service where it is available; Mr. Clark's testimony notes that over 84% of the residential CA broadband customers served by AT&T, Charter, Comcast, Cox, Surewest, Frontier or TWC purchase service at 25 Mbps or higher.<sup>19</sup> As the FCC notes, the demand for higher speed broadband is related to consumer adoption of online video services, as lower speed technologies may be inadequate for such high-capacity usage especially when multiple users in a single household are considered, and as the quality of streaming increases. The 25 Mbps/3 Mbps speed threshold allows for a picture of competition in California that takes key consumer behaviors – ones which guide purchasing decisions as well as broadband development as a whole – into account.

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<sup>17</sup> Order Instituting Investigation to Assess the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Limited Rehearing of Decision 08-09-042 (Nov. 5, 2015) at 8.

<sup>18</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 4:4-10, citing *2016 Broadband Progress Report* at 31 FCC Rcd. at 705-6, ¶ 14.

<sup>19</sup> Exhibit 20, ORA, Clark Rebuttal Testimony at II-3:8-12.



### **3(b)(i): Analyzing the Market for Deployment/Availability of Fixed Broadband**

As the Issue and Briefing Outline establishes, deployment or availability of broadband is one of several views into competition and market dynamics. Various testimony has noted the limitations of the FCC's publically available broadband deployment data, such as its tendency to overstate both availability and competition as providers offering service to a given census block may not serve all households in the block.<sup>20</sup> However, the availability of high-speed broadband service is a helpful component of evaluating competition, as it contributes to a picture of consumer choice. To this end, WGAW's testimony provides an analysis of the FCC's most recent broadband deployment dataset for California, revealing very little competition for wired 25 Mbps/3 Mbps broadband.

Though 76.4% of the broadband-served population of California resides in census blocks served by two providers of any speed or technology, just over one-quarter of the state has more than one option of provider of 25 Mbps/3 Mbps or faster broadband. 69.4% of the population have just one option, and 3.3% cannot access those speeds.<sup>21</sup> The main competitor to cable broadband's dominance of the high-speed market is fiber; as the FCC confirmed in the recent Charter-TWC proceeding, "Evidence in the record confirms that fiber, FTTP, and FTTN are reasonable substitutes for cable BIAS, while other technologies are not. The evidence shows that the Applicants alter their pricing and product offerings materially in response to FTTP and FTTN offerings from companies like Google (Google Fiber), Verizon (FiOS), and AT&T (U-verse) but not in response to other technologies."<sup>22</sup>

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<sup>20</sup> Exhibit 71, Greenlining, Goodman Supplemental Testimony at 4:7-13; Exhibit 61, WGAW, Blum-Smith Testimony at 10:19-11:2.

<sup>21</sup> Exhibit 61, WGAW, Blum-Smith Testimony at 11:14-12:3.

<sup>22</sup> *Id.* at 14:6-11 citing *Comcast-TWC Order*, ¶ 57.

Fiber's competitive pressure for cable broadband is related primarily to its consistent ability to offer comparable or higher speeds, while other technologies (DSL, copper, etc.) are rarely able to do so. In California, the most common DSL or copper speed is 18 Mbps, the maximum DSL/copper speed available to 48.3% of the population served by the technology.<sup>23</sup> AT&T, the single largest provider by number of census blocks served, offers 18 Mbps as the maximum available speed to 62.6% of its served population.<sup>24</sup> The most common situation for a California resident is to be served by two providers, one of which offers cable or fiber and the other of which offers DSL or copper. This is the competitive environment for 62.9% of the served population.<sup>25</sup> Just 15.3% of the broadband-served California population have access to fiber.<sup>26</sup> Dr. Roycroft and Dr. Selwyn's analyses of broadband availability data came to substantially similar conclusions regarding the dearth of competitive options for high-speed broadband in California.<sup>27</sup> These findings are also similar to analyses performed using earlier datasets and examining competition in the footprints of the large cable companies. For instance, analysis of the combined California footprints of Charter, Comcast and Time Warner Cable based on deployment data from December, 2013 revealed that just 17% of the population in the footprint was served by fiber and that for 69% of the population, the only alternative to cable was a DSL or copper provider.<sup>28</sup> Analysis of the Charter, Comcast, Time Warner Cable and Bright House Networks footprints based on data from June, 2014 showed 69.7% of the population had

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<sup>23</sup> *Id.* at 15:1-3.

<sup>24</sup> *Id.* at 16:11-13.

<sup>25</sup> *Id.* at 15:7-9.

<sup>26</sup> *Id.* at 15:17-18.

<sup>27</sup> See Exhibit 16, ORA, Selwyn Testimony at 46:9-53:14 and Exhibit 54, TURN, Roycroft Testimony at 58:1-59:9. Thought the methodologies used across these two analyses and WGAW's differ somewhat, producing slightly different results, the conclusions were the same. For instance, Dr. Roycroft included 24 Mbps/3 Mbps in his analysis while the other two did not, and Ms. Blum-Smith used 2010 population census data while Dr. Selwyn used 2015 household census data.

<sup>28</sup> Exhibit 60, WGAW, Blum-Smith Direct Testimony, Appendix A.

only one choice for 25 Mbps or faster broadband.<sup>29</sup> Though this is a short period of time for comparison, it is clear that the competitive environment in which California consumers are purchasing broadband has not significantly improved in the recent past, and it is not likely to do so in the foreseeable future.

#### **IV. CONCLUSION**

This proceeding encompasses a number of issues and seeks to examine a number of markets, many of which are not commented on in this brief. However, as the original OII, the Scoping Memo's Issue and Briefing Outline and a plethora of ruling in between have established, an examination of telecommunications markets in California must include broadband, and such examination must incorporate understanding of key broadband uses. Streaming video, one of the most prominent, high-capacity applications for broadband, has pushed adoption and demand for high-speed connections, becoming responsible for the majority of peak traffic. It is appropriate for the Commission to consider the demands placed on broadband by such high-capacity usage, indicating the relevance of both high speed thresholds and the differentiation of wireless and wired broadband markets. Within the market for high-speed, 25 Mbps or greater wired broadband, it is clear that most California consumers are without competitive choice. The Commission should recognize this fact and take action to address it.

Respectfully submitted,

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/s/

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Dated: August 12, 2016

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<sup>29</sup> *Id.*, Exhibit B.