

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

Application of Comcast Phone of California,
LLC (U-5698-C) to expand its existing
Certificate of Public Convenience and
Necessity to provide limited facilities-based
telecommunication service in the service
territory of Ponderosa Telephone Co.

A.19-01-003

**COMMENTS OF THE PONDEROSA TELEPHONE CO. TO COMCAST PHONE
OF CALIFORNIA, LLC'S RESPONSE TO ADMINISTRATIVE LAW JUDGE'S
RULING REQUESTING INFORMATION**

Henry Weissmann
Jordan D. Segall
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 683-5153
henry.weissmann@mto.com
jordan.segall@mto.com

Attorneys for The Ponderosa Telephone Co.

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Pursuant to the Assigned Commissioner’s Scoping Memo and Ruling dated April 4, 2019, The Ponderosa Telephone Co. (“Ponderosa”) respectfully submits these comments to Comcast Phone of California, LLC’s (“Comcast”) responses to the six questions posed in the Administrative Law Judge’s Ruling Requesting Information from Comcast and Ponderosa dated September 26, 2019.

I. COMMENTS

1. **Comcast proposes to offer wireline telephone service to residents in Ponderosa’s service territory, directly implicating the Commission’s longstanding policy against wireline competition in the rural areas served by the Independent Small LECs.**

Comcast’s responses attempt to disguise the nature of the service it intends to offer in Ponderosa’s service territory as “*wholesale* telecommunications services.” (Response at 2.) In fact, however, Comcast concedes that the *only* buyer of its “wholesale” services will be its own affiliate, Comcast IP. This affiliate will “use those wholesale telecommunications services to provide *retail* interconnected VoIP services” to Tesoro Viejo, a 5,200-home housing development in Ponderosa’s service territory. (*Id.* at 3 (emphasis added); *see also id.* at 5 (noting that, other than its own affiliate, “Comcast is not aware of any other third-party providers that may purchase its [wholesale] services in Ponderosa’s service territory”).)

Comcast suggests that its new service offering will have little impact on the retail wireline service that Ponderosa offers because its interconnected VoIP service is simply an “additional high-quality option[] for voice services beyond the current wireless and over-the-top VoIP options” offered in Ponderosa’s service territory. (*Id.* at 2–3.) But the

interconnected VoIP retail service that Comcast intends to offer is fundamentally unlike either wireless or OTT VoIP service. Unlike wireless service, interconnected VoIP is a wireline service, offering all of the advantages of landline telephones—superior sound quality and clarity, reliable emergency communications, and enhanced resiliency and security. And, unlike OTT VoIP services like Skype, interconnected VoIP services like Comcast’s retail service offer customers a dedicated phone number on ordinary phone hardware rather than a computer or mobile device.

In short, Comcast intends to compete directly with Ponderosa’s retail landlines in Ponderosa’s service territory by offering its own wireline telephone service. Comcast’s own marketing materials concede this fact, describing its interconnected VoIP service a “landline phone service.”¹ Similarly, the Federal Communications Commission distinguishes “wireline technologies,” which include both switched access lines and interconnected VoIP subscriptions, from mobile wireless subscriptions.² Indeed, the fact that Comcast is seeking a CPCN to provide competitive wireline telephone services in Ponderosa’s territory demonstrates that the proposed service is not a service “alternative,” such as wireless or OTT VoIP, but rather a directly competing wireline service offering. If Comcast did not intend to offer competing wireline service in a territory where it is currently barred from competition, it would not have to apply to expand its CPCN at all.

¹ See <https://www.xfinity.com/learn/home-phone-services>.

² See Federal Communications Commission, Office of Economics and Analytics, Industry Analysis Division, *Voice Telephone Services: Status as of December 31, 2017* (Aug. 2019) at 2, available at <https://docs.fcc.gov/public/attachments/DOC-359343A1.pdf>.

From the perspective of retail customers, Comcast’s proposed service offering will represent the only direct landline competitor to Ponderosa’s wireline telephone service within Ponderosa’s service territory. That is not surprising, because the rural territories in which the Independent Small ILECs operate have *always* been closed to wireline competition. Since the passage of the Telecommunications Act of 1996, *none* of the CPCNs issued to CLECs such as Comcast have included authority to offer local exchange service in the territories of California’s small, rural telephone companies.³ In 2014, the Commission made a preliminary finding that it was not in the public interest to open the Small ILECs’ territories to wireline competition, and it has not deviated from that finding since.⁴ Far from “not directly impact[ing] retail services in Ponderosa’s territory” (Response at 2), Comcast’s Application, if granted, will reverse that 2014 determination and fundamentally alter the competitive landscape.

2. Comcast’s proposed service offering will substantially impact both Ponderosa and rural telephone service in California as a whole.

Ponderosa’s prior filings in this proceeding have established that opening Ponderosa’s service areas to competition from Comcast would have a significant detrimental impact on Ponderosa specifically, rural telephone service in California more generally, and the public interest.⁵ As the Commission found in Phase 1 of the CHCF-A

³ See D.14-12-084 at 39.

⁴ *Id.* at 45, 53.

⁵ See, e.g., A.19-01-003, Protest of the Ponderosa Telephone Co. to the Application of Comcast Phone of California, LLC to Expand the Territorial Scope of its Certificate of Public Convenience and Necessity (Feb. 8, 2019), at 10–12.

proceeding, wireline competition will undermine universal service principles by increasing the cost to Ponderosa of fulfilling its COLR obligation within its service territory. The COLR obligation requires Ponderosa to provide reliable voice service to all current and prospective customers in its predominately rural, high-cost service territory. Comcast, unshackled from any COLR requirements, will offer competing service only to customers in the new, high-end Tesoro Viejo master planned community in Madera, California. That is, Comcast seeks to raid the most profitable consumers in Ponderosa's service territory. This "cherry-picking" concern by non-COLR CLECs operating in COLR ILEC territories was a factor that led the Commission to conclude that wireline competition would "leave behind residential, small business, and community anchor institution customers in more scattered and harder to serve areas of the rural carrier's territory"; "adversely affect the bulk of the hard-to-serve and high cost customers"; and "result in the Small ILECs losing revenue and needing to seek a larger draw from the CHCF-A program."⁶

Comcast maintains that its proposed service offerings "will not directly impact retail services in Ponderosa's territory" (Response at 2), but none of its arguments is persuasive.

First, Comcast argues that the proposed service will not adversely impact Ponderosa "because it will be offering largely *wholesale* telecommunications services."

⁶ D.14-12-084 at 53.

(*Id.*) As explained above, however, this is disingenuously misleading.⁷ To the extent Comcast Phone proposes to offer wholesale services in Ponderosa’s service territory, it is only to permit Comcast Phone’s interconnected VoIP affiliate, Comcast IP, to provide *retail* interconnected VoIP services to end-users in the territory. Comcast’s focus on the provision of wholesale services is a red herring.

Second, Comcast argues that the retail wireline competition that it concededly intends to introduce into Ponderosa’s service territory will not “significantly impact Ponderosa or its customers” because the “Competition Study” commissioned in the CHCF-A proceeding found that “voice competition is not expected to have a significant direct impact on Small ILECs and their customers.” (*Id.* at 3.) As a preliminary matter, Comcast’s reliance on the Competition Study is misplaced because the Commission declined to incorporate the Competition Study into the record of the CHCF-A proceeding after the parties criticized its methods, factual findings, and legal conclusions. On July 15, 2019, the Independent Small ILECs moved to strike the study from the evidentiary record on the grounds that the study was neither reliable nor independent.⁸ At a prehearing conference in the CHCF-A proceeding held on July 31, 2019, ALJ Mary McKenzie held that the study “is not currently part of the evidentiary record,” and the

⁷ See *supra* Part I.1.

⁸ See R.11-11-007, Motion of Independent Small LECs to Strike the Broadband Internet and Wireline Voice Competition Study from the Evidentiary Record (July 15, 2019).

Commission subsequently denied the motion to strike as moot.⁹ Comcast's position is not well supported by a study whose validity is in serious question and which has not been incorporated into the evidentiary record of the proceeding for which it was commissioned.

In any event, Comcast is also wrong on the substance of the study's findings. As it did in its Application, Comcast quotes selectively from those findings. The Competition Study in fact concluded that competition for wireline voice services *would* "result in some customers transferring from Small ILECs to CLECs, resulting in a decrease in Small ILEC customer revenues," and that those losses would be compounded by the "cherry picking [of] the most profitable customers in each territory" that will occur if Comcast's Application is granted and it is given license to compete for residents of the Tesoro Viejo project.¹⁰ To the extent the study found that opening the Small ILECs' territory to wireline voice competition "is not expected to have a significant direct impact on Small ILECs and their customers," as Comcast argues (Response at 3), it so concluded only because it assumed the Small ILECs would be "largely insulated by the CHCF-A Program."¹¹ This proposition mischaracterizes the operation of the CHCF-A program, which does not include any automatic "makeup" mechanism when a company

⁹ See R.11-11-007, Administrative Law Judges' Ruling Denying the Independent Small ILECs' Motion to Strike the Broadband Internet and Wireline Voice Competition Study from the Evidentiary Record (Sept. 19, 2019).

¹⁰ Mission Consulting, LLC, *Broadband Internet and Wireline Voice Competition Study in Service Territories of Small Incumbent Local Exchange Carriers* (commissioned by D.14-12-084) at 47.

¹¹ *Id.*

experiences competitive losses. Moreover, whether the CHCF-A program will continue in its current form—and how the effects of competition might impact the state’s decision to continue those subsidies—are among the questions that will be addressed in the ongoing CHCF-A proceeding. And Comcast’s responses fail to disclose that the Competition Study found that competition *would* increase demand for CHCF-A funds “to offset the revenue shortfall experienced by Small ILECs whose customers transfer to CLECs.”¹² In other words, by relying on the Competition Study, Comcast implicitly concedes that its competitive wireline service offering in Ponderosa’s territory *will* have negative effects on Ponderosa—effects that will only be ameliorated if CHCF-A subsidies rise to “keep basic service rates reasonable.” (Response at 4.)

Thus, Comcast’s request to serve only certain carefully selected wireline retail consumers in Ponderosa’s service territory in effect compels the CHCF-A program to *subsidize* its business plan to cherry-pick the most profitable customers. As long as the CHCF-A program exists in its current form, the tab for this “targeted competition” will be paid ultimately by ratepayers through the universal service surcharge. We respectfully submit that the ineluctable impact of Comcast’s Application *subverts* the Legislature’s expressly stated universal service commitment, through the vehicle of the CHCF-A

¹² *Id.* at 48. Notably, concerns that the Small ILECs might need to “seek a larger draw from the CHCF-A program” to make up for losses in revenue caused by CLEC cherry picking was one of the factors that led the Commission to find *against* opening Small ILEC areas to competition following Phase 1 of the CHCF-A proceeding. *See* D.14-12-084 at 53.

program, for the provision of affordable and widely available high-quality communications services in California’s rural areas.¹³

Third, Comcast argues that, even if there is an impact on Ponderosa’s wireline service offerings, “the impact is likely to be positive for consumers.” (*Id.*) Comcast cites a handful of Commission decisions from the mid-1990s finding that competition in local telecommunications markets generally increases consumer welfare. (*Id.* at 4 & n.8.) But the Commission has expressly found that the *rural* territories the Independent Small ILECs serve constitute an exception to this general rule.¹⁴ If the Commission wishes to revisit the finding that wireline competition in rural areas is against the public interest, it should do so in the context of the CHCF-A Phase 2 proceeding following a full evidentiary hearing—not on the basis of Comcast’s self-interested *ipse dixit*.

Finally, Comcast argues that the impact on Ponderosa of its proposed service offering will be limited because it “plans to, at least initially, serve only Tesoro Viejo.” (Response at 4.) Without discovery and expert analysis, it is impossible to determine the extent to which Comcast’s plan to service the (exceptionally large) Tesoro Viejo housing development would impact Ponderosa’s service provision throughout the territory. Two things are clear, however. First, Comcast’s plan to offer service selectively to one high-

¹³ See Pub. Util. Code § 275.6.

¹⁴ See, e.g., D.14-12-084 at 45 (finding that “it is not in the public interest to open the Small ILECs territories to wireline competition” because of “our findings about the rural territories the RLECs serve” and “customer concerns about the potential for service degradation in a competitive market that would primarily favor large business customers”).

end master-planned community near the most densely populated portion of Ponderosa’s service territory represents precisely the sort of cherry-picking by non-COLR CLECs that has led the Commission to maintain wireline service restrictions in rural territories. And second, Comcast’s ambitions could grow: if Comcast succeeds in expanding the scope of its CPCN and opening Ponderosa’s territories to competition it will be free to compete anywhere in the territory in the future, and it will likely continue to cherry-pick the most profitable customers as new residential developments are built in the service territory. Comcast acknowledges as much in its responses, which state that Comcast plans only to serve Tesoro Viejo but adds the caveat, “*at least initially.*” (Response at 5 (emphasis added).)

3. As the Commission has held, the question whether to open the Independent Small LECs’ rural territories to wireline competition should be decided collectively as part of Phase 2 of the CHCF-A proceeding.

Comcast does not deny that, in Phase 1 of the CHCF-A proceeding, the Commission made a preliminary finding that it would not open the Small ILECs’ territories to wireline competition and held that it would review that preliminary conclusion in Phase 2 of the proceeding.¹⁵ Nor does Comcast dispute that the governing scoping memo in Phase 2 of the CHCF-A proceeding—the Fourth Amended Scoping Memo—includes within the scope of the proceeding the question whether the

¹⁵ D.14-12-084 at 45, 53.

Commission should open the Independent Small LECs' service areas to wireline voice competition.¹⁶

For all of the reasons Ponderosa has previously outlined,¹⁷ the collective CHCF-A Phase 2 proceeding remains a superior vehicle for addressing the competition issue than this one-off CPCN application proceeding:

- *Efficiency.* It is more efficient for the Commission to address its public policy toward competition in rural service territories in a single comprehensive proceeding—as contemplated by the Phase 1 decision, D.14-12-084—rather than piecemeal.
- *Danger of Inconsistent Rulings.* Determining whether to grant Comcast's Application to compete in Ponderosa's service territory while wireline service competition in rural areas remains a live issue in the CHCF-A Phase 2 proceeding risks inconsistent rulings that could cause uncertainty and wasted resources.
- *Public Policy Informed By All Stakeholders.* The question whether to open Small ILEC territories to wireline competition raises public policy questions with a collective impact on stakeholders throughout California—in particular, with respect to the impacts of competition on the CHCF-A fund as a whole—that are better addressed in the comprehensive CHCF-A Phase 2 process, in which all affected parties are participating.
- *Fairness and Undue Burden.* Forcing a small rural carrier like Ponderosa to litigate on two fronts against larger and better-resourced CLECs like Comcast is fundamentally unfair. If the Commission permits simultaneous adjudication of the competition issue in this application proceeding and in the CHCF-A Phase 2 proceeding, Ponderosa will incur burdensome and duplicative fees for attorneys and experts and will bear disproportionate burdens compared to other Independent Small ILECs that do not currently face CPCN applications by CLECs.

¹⁶ R.11-11-007, Fourth Amended Scoping Memo and Ruling of Assigned Commissioner (March 22, 2019), at 4.

¹⁷ See A.19-01-003, Response of the Ponderosa Telephone Co. to Assigned Commissioner's Scoping Memo and Ruling (Apr. 19, 2019), at 8–11.

Comcast musters only two arguments for why the Commission should decide the competition issue in this application proceeding instead of the ongoing CHCF-A Phase 2 proceeding. First, Comcast seizes on a remark by Commissioner Guzman-Aceves at a prehearing conference in the CHCF-A Phase 2 proceeding, stating that there is a “consensus” that the Commission should examine requests by CLECs to “examine requests to operate in Small ILEC territories on a case-by-case basis.” (Response at 6.)

No such consensus exists, and Comcast’s reliance on this remark is misplaced. Indeed, the Independent Small LECs advocated in opening comments on the Fourth Amended Scoping Memo that the competition issue be addressed through hearings in Phase 2 of the CHCF-A proceeding.¹⁸ There is no consensus in favor of a case-by-case determination of the competition question—and certainly no consensus in favor of the Commission considering the competition question in collateral application proceedings instead of the ongoing CHCF-A Phase 2 proceeding. The governing scoping memo in the Phase 2 proceeding continues to treat the competition question as a global issue that will be resolved in the course of the proceeding. After the issuance of the Fourth Amended Scoping Memo, the Independent Small ILECs moved for evidentiary hearings

¹⁸ See R.11-11-007, Independent Small LECs’ Opening Comments on Fourth Amended Scoping Memo (Mar. 21, 2019), at 10–11. The Independent Small LECs noted that if the Commission were to reverse its categorical prohibition on wireline competition in rural telephone company areas, it would *then* be appropriate to evaluate the merits of specific CPCN proposals impacting specific areas. *Id.* at 11. This did not constitute a concession that the issue should be addressed to carrier-specific proceedings in the first instance, as the comments confirm.

on the competition hearings on the ground that Public Utilities Code section 1708 requires the Commission to hold hearings before considering reversing its policy on CLEC competition in the Independent Small LECs' territories.¹⁹ The Commission has not expressly ruled on that motion, nor has it issued a further amended scoping memo clarifying how and when the competition issue is to be resolved.²⁰

Second, Comcast's argues that "past Commission practice" supports deciding the competition question in this application proceeding, because the Commission began accepting CLEC CPCN applications for major ILEC markets in July 1995, before rules for the CHCF-B fund were finalized. (Response at 7.) In fact, this past practice supports *Ponderosa's* position. At the time the Commission began accepting CLEC CPCN applications to compete in Pacific Bell's and GTE California's territories in July 1995, it had *already decided as a policy matter* to open those markets to competition.²¹ In fact,

¹⁹ See R.11-11-007, Motion of Independent Small LECs for Evidentiary Hearings (July 25, 2019).

²⁰ Comcast notes that in a September 9, 2019 email ruling regarding the scheduling of hearings, the assigned ALJs in the CHCF-A proceeding stated that "[a]t this time, we do not intend to take up the issue of allowing competition in the small ILECs' service territories in these evidentiary hearings." (Response at 7 (quoting R.11-11-007, ALJ Email Ruling (Sept. 9, 2019), at 3).) But this clarification does not mean that the competition issue has been removed from the proceeding; the Fourth Amended Scoping Memo confirms that it remains part of the proceeding. Neither the Commission nor the assigned ALJs have ever ruled that the Commission will not eventually resolve the competition issue in the course of the CHCF-A Phase 2 proceeding, as the scoping memo contemplates.

²¹ See D.95-07-054 at 2 ("By this order, we take an important step toward our *previously stated goal* of opening all telecommunications markets to competition.") (emphasis added).

the Commission did not begin accepting requests for CPCNs from CLECs until *four years* after it resolved as a policy matter to open non-rural markets to competition.²²

Here, the Commission has not resolved to open rural wireline markets to competition; to the contrary, it remains the Commission's policy that the Independent Small ILECs' rural territories should remain closed to wireline competition. Comcast thus has it exactly backward: it is more consistent with the Commission's historical practice to invite CPCN applications from CLECs—like Comcast's here—only after deciding in the first instance whether to permit competition in the relevant territories. Comcast is putting the cart before the horse.

4. If Comcast's Application is not stayed, Ponderosa is entitled to discovery and a hearing.

Finally, Comcast's responses appear to urge the Commission to resolve its Application on the existing record. (*See* Response at 8 ("To the extent the Commission has any concerns about how the competition enabled by Comcast Phone's service offerings may impact Ponderosa and its draw on the CHCF-A, the record demonstrates that such concerns are misplaced.")) But there is no "record" yet in this proceeding. Comcast's "previous filings" consist only of advocacy by counsel, and it would be improper to resolve Comcast's Application on that basis alone. (Response at 8.)

Comcast's Application necessarily raises the question whether to open Ponderosa's service territory to competition. Ponderosa's position remains that

²² *See id.* at 3 (noting that the Commission first stated its intention to open telecommunications markets to competition in November 1993, four years before it began inviting CPCN applications from CLECs).

Comcast's Application should be held in abeyance so that question may be considered in the course of the CHCF-A Phase 2 proceeding, as the Commission's prior decisions and scoping memos contemplate.²³ If, however, the Commission concludes that this application proceeding is an appropriate vehicle for evaluating statewide policy toward wireline competition in rural territories, Ponderosa submits that it is entitled to discovery and an evidentiary hearing on the various factual and legal questions raised by the Application.

These questions include, but are not limited to, the scope of Comcast's wireline service offering in Ponderosa's territory and future plans for expansion; the likely impacts of Comcast's service offering on Ponderosa's revenues, future growth, CHCF-A draws, and ability to satisfy its COLR obligations; and the impact of alternative services like wireless and OTT VoIP. Further, Ponderosa has been informed that Comcast may *already* be providing high-bandwidth services to businesses and/or schools in Ponderosa's service territory, raising the possibility that Comcast is improperly jumping the gun on its CPCN application.²⁴ Discovery and a hearing is necessary to provide a full account of these and all other facts germane to the competition issue posed by the Application.

²³ See generally A.19-01-003, Motion of the Ponderosa Telephone Co. to Stay or Hold in Abeyance the Application of Comcast Phone of California, LLC to Expand the Territorial Scope of its Certificate of Public Convenience and Necessity (Feb. 8, 2019).

²⁴ Ponderosa has received requests regarding the porting of telephone numbers to Comcast, including in connection with a five-year contract between a school district in Ponderosa's service territory and Comcast for a SIP trunk through which Comcast appears to be providing voice services.

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Respectfully submitted,

Henry Weissmann
Jordan D. Segall
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 683-5153

By: /s/ Jordan D. Segall
 JORDAN D. SEGALL
Attorneys for The Ponderosa Telephone Co.