L/rbg

Date of Issuance
October 30, 2018

Decision 18-10-058 October 25, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules.	Rulemaking 11-12-001 (Filed December 1, 2011)

ORDER MODIFYING DECISION (D.) 16-08-021 ON ISSUE OF FINES FOR CLECS AND DENYING REHEARING OF DECISION AS MODIFIED

I. INTRODUCTION

In this Order, we dispose of applications for rehearing of Decision (D.) 16-08-021[1] (or "Decision"), filed by Cox California Telcom LLC ("Cox"); Office of Ratepayer Advocates ("ORA"), Center for Accessible Technology, Greenlining Institution, and The Utility Reform Network ("TURN") (collectively, "Joint Consumer Groups"); and California Association of Competitive Telecommunication Companies ("CALTEL"). In D.16-08-021, the Commission adopted General Order ("GO") 133-D, which sets forth new service quality rules for California's public utility telephone corporations. GO 133-D revised previous rules contained in GO 133-C.

The Decision was issued in Rulemaking ("R.") 11-12-001 ("Service Quality Rulemaking")[2] in response to a report by the Communications Division ("CD") issued pursuant to GO 133-C, Rule 7, regarding the quality of telephone service provided by wire line telephone corporations in 2010.[3] The report noted substandard results in the

---

[1] All Commission decision citations refer to the official Commission pdf versions of the decisions, which can be found on the Commission's website. http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx

[2] *Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules*, filed December 31, 2011.

[3] March 2011 Staff Report, Attachment A to *Order Instituting Rulemaking to Evaluate*

GO 133-C service quality reports filed by the carriers in 2010, particularly in regard to the Out of Service Repair Interval.[4] The report concluded that GO 133-C should be modified and a penalty mechanism should be included for substandard service quality performance.

GO 133-C and GO 133-D both contain the same type of standards by which service quality is measured:

> Installation Interval (the amount of time to install basic telephone service),
>
> Installation Commitments (count of total commitment for basic telephone services and commitments missed,
>
> Customer Trouble Reports (customer reports related to service quality/lack of service),
>
> Out of Service Repair Interval (average interval from the time customer trouble report received and service restoration), and
>
> Answer Time (time period for the business office to answer calls regarding billing and non-billing inquiries, and for the repair office to answer calls regarding trouble reports).

However, 133-D imposes penalties for noncompliance with service quality rules. In addition, GO 133-D revises reporting requirements and extends certain outage reporting to Voice over Internet Protocol ("VoIP") providers.

Timely applications for rehearing were filed by Cox, Joint Consumer Groups, and CALTEL. In its rehearing application, Cox raises the following claims of error: (1) the Decision does not include findings that support certain GO 133-D rule changes; (2) the record does not support the Commission adopting an industry-wide penalty mechanism and the penalties are not consistent with Public Utilities Code 2107

(footnote continued from previous page)

Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules, R.11-12-001.

[4] Additionally, the report provided information regarding the response of carriers to the outage event that affected approximately 250,000 customers in Southern California during the winter storms of December 2010 and January 2011.

and 2108,[5] nor with D.01-12-021[6] (*Pacific Bell Penalty Case*); and (3) the Decision erroneously orders VoIP service providers to comply with GO 133-D, Rule 4, which requires VoIP providers to submit copies of outage reports that are submitted to the Federal Communications Commission ("FCC").

Joint Consumers raise the following claims of error: (1) the Decision violates Public Utilities Code section 2896 (the Telecommunications Customer Service Act) and prior Commission decisions by ordering the proceeding closed without first addressing service quality standards for wireless or interconnected VoIP providers; (2) the Decision fails to comport with prior Commission decisions and fails to address multiple issues that are properly within the scope of the proceeding, in particular the Network Study[7] ordered in D.15-08-041; and (3) the adoption of GO 133-D, Rule 9.7 (which allows investments in lieu of penalties) violates the parties' due process rights and is not supported by the record or the findings. The Joint Consumer Groups also request oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure.

CALTEL asserts that the determination that Competitive Local Exchange Carriers ("CLECs") have contractual recourse against underlying facilities-based carriers that cause the CLECs to fail to meet service quality measures and be subject to fines is legally and factually incorrect, and unsupported by adequate findings of fact and conclusions of law. CALTEL also filed petition for modification on the same issue, making essentially the same arguments that are in its application for rehearing.[8]

---

[5] All subsequent section references are to the Public Utilities Code, unless otherwise noted.

[6] D.01-12-021, *Office of Ratepayer Advocates v. Pacific Bell Telephone Company* (2001), which imposed penalties on Pacific Bell for inadequate repair intervals and was used as a framework for the penalties in this case.

[7] The Network Study is a study of the facilities and practices of AT&T and Verizon (now Frontier) that was ordered in D.15-08-041 in the instant proceeding. It is discussed more fully below.

[8] See CALTEL's Petition for Modification, filed August 30, 2016.

Responses were filed by Cox, Pacific Bell Company dba AT&T California ("AT&T"), and CTIA-The Wireless Association ("CTIA") to Joint Consumer Groups' rehearing application; Joint Consumer Groups to Cox's rehearing application; and California Cable & Telecommunication Association ("CCTA") to the rehearing applications filed by Joint Consumer Groups and Cox.

We have carefully considered the arguments presented by the rehearing applicants. We will modify the D.16-08-021 and GO 133-D in response to CALTEL's rehearing application and related petition for modification. The Commission will take into account whether an underlying ILEC's action or inaction is the primary cause of any failure by the CLEC to meet service quality standards relating to Out of Service Repair Interval (GO 133-D, Rule 9.3) and Customer Trouble Reports (GO 133-D, Rule 9.4), and determine fines for any such failure accordingly. Except as set forth above, we conclude that that grounds for rehearing have not been demonstrated. Therefore, we will deny the applications for rehearing on all other issues. We will deny Joint Consumers' Request for Oral Argument. We will deny CALTEL's petition for modification as moot. Finally, we will modify GO 133-D to correct two minor errors, as set forth below.[9]

II. DISCUSSION

A. Cox's Application for Rehearing

1. The Commission did not err in adopting certain GO 133-D rule changes.

Cox argues that D.16-08-021 lacks findings to support certain GO 133-D rule changes. First, Cox challenges section 2.2.2 of the Decision, which addresses

[9] GO 133-D, Rule 9.2, Dispute Resolution refers to "GO 96-B § 7.7.1" regarding review of industry division disposition of an advice letter. That original section was later changed to GO 96-B, section 7.6.3. This order corrects GO 133-B accordingly. In addition, GO 133-D, Rule 9.1 refers to a fine "for each day" when the fine is, in fact, a monthly fine. This order corrects this by changing "day" to "month" in Rule 9.2.

changes to the out-of-service repair metric. Cox points out that under GO 133-C, adjusted data excluded Sundays and federal holidays, as well as events beyond carriers' control.[10] In the instant decision, this language was inadvertently omitted. However, this was corrected in D.16-10-019, which was issued after Cox filed its rehearing application:

> Section 3.4 (b), paragraph 3, was corrected to include Sundays, and federal holidays in the days *excluded* from measurements because the language was inadvertently omitted in the General Order. The corrected sentence reads: "The adjusted measurements exclude Sundays, federal holidays and repair tickets when maintenance is delayed due to circumstances beyond the carrier's control."[11]

Since this error has been corrected, Cox's claim is moot.

Second, Cox argues that the Decision does not otherwise discuss carriers being required to submit a monthly report detailing refunds provided under their tariffs. Yet, GO 133-D, Rule 8 requires carriers to submit such a report.[12] As Joint Consumer Groups assert, this requirement is sufficiently supported by Findings of Fact 2 and 3, which reference the CD Staff Report originally filed with the OIR. All parties had the opportunity to comment on the refund mechanism and refund reporting. Thus, this requirement is supported by the record.

2. The penalty framework in GO 133-D, Rules 9.1 through 9.6, is reasonable, supported by the record, and is consistent with the Commission's penalty statutes.

Cox challenges the Commission's decision to apply automatic industry-wide fines. (See Rule 9.1 through 9.6 of GO 133-D.) Cox also challenges the specific penalty amounts. Cox asserts that the record does not support the Commission's finding there is an industry-wide problem that an automatic penalty would resolve. Cox further contends

[10] Cox Application for Rehearing ("Rhg. App"), filed Sept. 28, 2016, at 4.
[11] D.16-10-019, at p.1, emphasis added.
[12] Cox Rhg. App. at 5.

that the adopted penalty amounts are not reasonable and do not comply with Commission decisions or the penalty statutes.

a) The record supports the Commission's finding that there is an industry-wide problem that an automatic penalty mechanism would resolve.

Cox challenges the Commission's decision to apply an automatic industry-wide penalty. (See Rule 9.1 through 9.6 of GO 133-D.) Cox asserts that the record does not support the Commission finding that there is an industry-wide problem that an automatic penalty mechanism would resolve. Cox points to the fact that much of the initial focus of the OIR was on AT&T and Verizon, the two largest incumbent LECs. Specifically, Cox contends:

> [T]he OIR, the various Staff reports and the comments in the record all demonstrate that the focus of this proceeding concerns the past performances of the two largest incumbent LECs in the state - AT&T and Verizon.[13]

Cox further claims that even Verizon's prior history is irrelevant since it has subsequently been acquired by another carrier.[14] Thus, Cox reasons, the remedy here should only apply to AT&T.

However, Cox concedes that the OIR, from its initiation, contemplated an industry-wide remedy:

> The Commission opened this rulemaking "to review telecommunications carriers' performance in meeting GO 133-C service quality performance standards in 2010, and to assess whether the existing GO 133-C service quality standards and measures meet the goals of the Commission, are relevant to the current regulatory environment and market,

[13] Cox Rhg. App. at 6.

[14] Cox Rhg. App. at 8 ("during the course of this proceeding, Verizon sold its California ILEC operation to Frontier and Frontier committed to improving service quality in the Verizon California/Frontier California service territory as part of the Commission approving that transaction. As such, the Commission cannot rely on the past alleged poor performance of Verizon as justification for an automatic penalty mechanism.").

> and whether there is a need to establish a penalty mechanism for substandard service quality performance."[15]

Staff reports addressed service quality results for the ILECs, but also for small LECs and the CLECs, including Cox. An initial Staff Report was issued on December 12, 2011. (Attachment A to OIR 11-12-001.) On September 24, 2014, a Staff Report was issued proposing modifications to GO 133-C. (Attachment A to Assigned Commissioner's Amended Scoping Memo and Ruling). On February 2, 2015, a Staff Report was issued with further proposal for amending GO 133-C (Attachment A to Assigned ALJ's Ruling). Parties commented extensively on all three of these reports. Moreover, the service quality standards under GO 133-C were industry-wide standards (with some exceptions not relevant here), and the proposed modifications to GO 133-C (which eventually became GO 133-D) were also industry-wide. For these reasons, we find that the record supports industry-wide standards.

b) The adopted fine program is consistent with the Commission's penalty statutes.

Cox contends that the adopted penalty amounts are unreasonable and are inconsistent with applicable Commission decisions and statutory authority. The penalty mechanism adopted in the Decision is based on the method for imposing penalties on Pacific Bell in D.01-12-021, which was a complaint case. Cox alleges that it is unreasonable for the Commission to rely on a single decision (D.01-12-021) adopted over fifteen years ago in a complaint case to develop a penalty framework. Cox also argues that, even if it is appropriate to rely on D.01-12-021, the penalties adopted here are not consistent with methodology adopted in that decision. In addition, Cox contends that the penalty mechanism violates Public Utilities Code section 2107 and 2108.[16]

As stated above, the framework for the penalties is based on D.01-12-021. The penalties are automatic. The fines apply to facilities-based telephone corporations

---

[15] Cox Rhg. App. at 6, citing OIR at 3-4.

[16] Cox Rhg. App. at 8-13.

that offer time division multiplexing ("TDM") based voice service (i.e. traditional telephone service); have a Certificate of Public Convenience and Necessity ("CPCN"), franchise, or section 1013 registration; and are regulated under the Uniform Regulatory Framework ("URF"). Thus, they apply to AT&T, Frontier, CLECs, such as Cox, and small LECs.

The base fines are as follows:

- Out of Service Repair Interval - $25,000 per day (daily amount does not increase over time).
- Customer Trouble Reports - $500 per day (daily amount increases over time if the problem is not corrected).[17]
- Answer Time - $500 per day (daily amount increases over time if the problem is not corrected).

A scaling factor is applied to the monthly total based on the size of the carrier determined by the carrier's number of access lines compared to the total number of California access lines. Therefore, a fine is computed as follows:

- (Carrier's Access Lines/Total Access Lines) = **Carrier's Scaling Factor**
- (Carriers Scaling Factor) x (Monthly Base Fine per Measure) x (Number of Months Measure Was Not Met) = **Fine**

The fine is only assessed after the carrier is out of compliance for three months. Thus, there is no fine for the first two months. If in the third month the carrier is out of compliance, it is deemed to be in "chronic failure status" and a fine is imposed for the third month.

The fine is imposed on a *monthly* basis, i.e., when the carrier's **statewide average for the month** fails to meet the standards. The amount of the *daily* fine, based on the allowable amount under section 2107, is used to calculate the *monthly* fine. For

[17] E.g., $500 for 3 to 5 months, $1000 for 6 to 8 months, $1500 for 9 to 11 months, and $2000 for 12 months or more.

the purposes of calculating the fine, each month is considered to be 30 days. (Rule 9.3, second paragraph.)[18]

A carrier exits "chronic failure status" when it meets the standard for two consecutive months. The carrier is not fined for any months it meets the standards. However, a carrier in chronic failure status is not given the two-month grace period for purposes of the fines. (Rule 9.1, third paragraph.)

For example, for Customer Trouble Reports, the $500 daily fine for 30 days would be a $15,000 monthly fine. If a carrier's access lines are 24% of the total access lines, the scaling factor would be .24. If that carrier goes into chronic status, the monthly base fine for the first three months would $15,000 (penalty for one month) times the scaling factor of .24 or $3,600.

The penalty framework also incorporates, to the extent possible, the factors in D.98-12-075 that are required to be considered when assessing a penalty: (1) severity of the offense, (2) conduct of the utility, (3) financial resources of the utility, (4) the totality of the circumstances in furtherance of the public interest, and (5) the role of precedent.[19] In the instant case, as with a citation program, these factors are not applied to each individual case, but they were used to come up with penalties that are reasonable. Thus, penalties for Out of Service Repair interval are higher because it is a more serious matter to leave a customer without service. And the amount of any penalty is scaled to the size of the carrier and, of course, to the amount of time the carrier is out of compliance.

Cox claims that the penalty mechanism is inconsistent with sections 2107 and 2108 because the penalties are applied on a monthly rather than a daily basis, which is contrary to section 2108. Further, Cox alleges that the penalty mechanism results in

---

[18] The carriers report on a quarterly basis, with fines only being imposed at the end of each calendar year.

[19] *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliate* [D.98-12-075] (1998) 84 Cal.P.U.C.2d 155, 182-184, 1998 Cal. PUC LEXIS 1016, at *15-*17.

fining carriers for days in which they are in compliance. Cox reasons that a carrier may be penalized daily for the whole month, even if the carrier meets the standard on some days.[20]

> The Commission does not have the authority to and cannot assess a penalty for days in which the provider *has met* the given service quality metric. Again, the Commission has no authority to impose a *monthly* penalty for daily non-compliance.[21]

Section 2107 provides:

> Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense.

Section 2108 provides:

> Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

While the fines are reasonable in terms or amount and deterrence effect,[22] we address the issue of whether the fines comply with the Commission's penalty statutes, sections 2107 and 2108.

In past decisions, the Commission has exercised its discretion to impose penalties and has not always required a mechanical interpretation of sections 2107 and

[20] Cox Rhg. App. at 10-12.

[21] Cox Rhg. App. at 12, emphasis in original.

[22] No party contends that the amount of the fine is excessive.

2108. Rather, the Commission has looked to ensure that a penalty is sufficient to deter future violations and is reasonable under the circumstances.[23]

In D.15-04-024 (*San Bruno Penalty Decision*), the Commission stated that the California Constitution, along with Public Utilities Code section 701,[24] "confer broad authority on the Commission to regulate public utilities, in particular the fashioning of remedies in addition to those specifically set forth in the Public Utilities Code."[25] The Commission further stated that, in addition to specific authority to impose fines pursuant to section 2107 and 2108, "the Commission has authority to fashion other equitable remedies."[26] This allows the Commission to craft equitable remedies, "as long as those remedies are not barred by a specific statutory limit or restriction.."[27]

Thus, we believe that the penalty mechanism here is within the Commission's discretion and is not barred by sections 2107 and 2108. As stated above, the violation occurs when the carrier's monthly average fails to meet the GO 133-D standard (after a two-month grace period). The daily fine is within the limits of section 2107. The violation is continuing under section 2108 because the violation is measured by failure to meet the standard for a month. The fact that a carrier may meet the standard on some individual days does not change the fact that the monthly average falls below the standard.

We reiterate that we believe the record in this case supports imposing penalties. We believe the amount of the fines is reasonable, and that the penalties are

---

[23] See, e.g., D.16-05-001 (*In re Application of Vodafone*) at pp 6-7, and cases cite therein.

[24] Pub. Util. Code § 701 provides "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

[25] D.15-04-024, at p. 26, citing *Southern California Edison Co. v. Peevey*, (2003) Cal. 4th 781, 792 and *Assembly v. Public Utilities Commission* (1995) 12 Cal. 4th 87, 103. .

[26] D.15-04-024, at p. 27.

[27] D.15-04-024, at pp. 90-91.

appropriately designed to encourage compliance with service quality standards. Finally, we believe that the penalty is not contrary to sections 2107 and 2108.

c) Cox's allegation that the fines have a disparate impact does not demonstrate legal error.

Cox also asserts that the penalties will have a disparate impact because carriers will receive the same penalty for different levels of service quality problems. Cox gives an example of a carrier that is 89% in compliance and one that is 40% in compliance, with the rules allowing both to receive the same penalty.[28]

The Commission has discretion to construct a penalty that holds all carriers to a certain minimum standard, and to penalize all carriers equally if they fall below the standard. Nothing in sections 2107 or 2108 require the Commission to impose different penalties on parties in relation to how much the carrier violates the standard. Under the adopted penalty program, if the carrier falls below the GO 133-D standards for three months, it is out of compliance. Further, contrary to Cox's assertion, the penalty amount is proportional. As stated above, the fines are based on the type of violation, the size of the carrier and duration of the violation. While Cox might desire further parsing of the penalty structure, the Commission is not required to do more. Thus, no legal error has been established.

3. The Commission did not err in ordering providers of VoIP services to comply with GO 133-D, Rule 4.

Cox contends that the Commission lacks jurisdiction over VoIP providers and thus erred in requiring such providers to comply with Rule 4 of GO 133-D.[29] Rule 4 deals with Major Service Interruptions and requires VoIP providers[30] to submit to this Commission the Network Outage Reporting System ("NORS") reports required by the

[28] Cox Rhg. App. at 12.

[29] Cox Rhg. App. at 13.

[30] GO 133-D specifically references any entity subject to Public Utilities Code section 285, which is the statute that requires interconnected providers of VoIP services to collect and remit surcharges for public purpose programs. (GO 133-D, Rule 4(a)(iv).)

FCC. Cox asserts that Public Utilities Code section 710(a) bars the Commission from adopting orders that impose regulatory requirements on VoIP services, including this requirement.

Section 710(a) provides:

> The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c). In the event of a requirement or a delegation referred to above, this section does not expand the commission's jurisdiction beyond the scope of that requirement or delegation.

Additional exceptions to the section 701 prohibitions are contained in sections 710(d) through 710 (g).

a) The requirement falls under the section 710(f) exception.

First, as we stated in the Decision, we believe the NORS report requirement clearly falls under the section 710(f) exception, which states:

> This section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission [FCC] and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints.

Cox challenges this interpretation and argues that the plain language of section 710 does not directly or indirectly authorize the Commission to impose GO 133-D regulations (or any other regulatory requirement) on providers of VoIP service. According to Cox, section 710(f) only allows Commission action in the context of consumer complaints and does not authorize the Commission to order VoIP providers to submit NORS reports to the Commission and ORA.[31]

Cox first points to the language in section 710(f) which allows the Commission "to continue to monitor and discuss" VoIP services, to report "the number and type of complaints received by the commission from customers," and to respond "informally to customer complaints," including providing information regarding available options for "addressing complaints." Cox asserts that section 710(f) limits Commission action to that for which it can "continue." Cox argues that, since there are no existing Commission requirements concerning VoIP service outages, there are no requirements the Commission can "continue" under Section 710(f).[32]

Cox also cites legislative history of section 710(f) which, according to Cox, indicates that section 710(f) was intended to ensure that consumers of VoIP and IP enabled services had a venue other than the FCC to raise complaints. Cox asserts that the Legislature intended for the FCC to administer "public safety and consumer protection requirements" on VoIP service, and for the Commission to have the narrower role of monitoring and responding to consumer complaints.[33]

Cox points to an Assembly Committee report recommending the "monitor and discuss" language:

> To the extent the Legislature can ensure consumers of VoIP and IP-enabled services have a venue other than the FCC to raise complaints, the author and this committee may wish to amend Section 710 (f) as follows: This section does not limit the commission's ability to continue to monitor and discuss VoIP services, to track and report to the FCC and the Legislature, within its Annual Report to the Legislature, the number and type of complaints received by the commission from customers, respond informally to customer complaints,

---

[31] Cox Rhg. App. at 15.

[32] Cox Rhg. App. at 16.

[33] Cox Rhg. App. at 18.

> including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints.[34]

The plain language of section 710(f) gives the Commission the right to "monitor and discuss VoIP service." "Monitoring" clearly encompasses review of documents. NORS data is not publicly available, so the Commission must request the data from the carrier to conduct its review. Cox does not argue otherwise; rather, it asserts that the "monitoring" may only occur with regard to consumer complaints.

Cox's interpretation of the "monitor and discuss VoIP service" language is too narrow. As Joint Consumer Groups point out, the plain, unambiguous language of section 710(f) reflects a list of "separate, independent activities" that the Commission may continue to do with respect to VoIP services: (1) monitor and discuss VoIP services, (2) track and report complaints, and (3) respond informally to customer complaints.[35]

Furthermore, a later committee report not cited by Cox suggests that the "monitor and discuss" language "includes" responding to customer complaints, suggesting that the Commission's role may go farther than just handling complaints:

> This bill… 3) Provides that the limitations per (1) on the PUC regulation of VoIP and IP enabled service do not affect:…
>
> c) The PUC's ability to monitor and discuss VoIP services, *including responding informally to customer complaints* and to inform VoIP customers who contact the PUC about options under state or federal law for addressing complaints.[36]

---

[34] Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 1161 (2011-2012 Reg. Sess.), as amended June 12, 2012, p. 9. Available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1161_cfa_20120618_110522_asm_comm.html.

[35] Joint Consumer Groups Resp. to Cox Rhg. App., filed Oct. 13, 2016, at 9.

[36] Assem. Com. on Appropriations, Rep. on Sen. Bill No. 1161 (2011-2012 Reg. Sess.), as amended June 21, 2012, p. 1, (emphasis added). Available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1161_cfa_20120807_153534_asm_comm.html.

Section 710(f) refers to the ability of the Commission to monitor and discuss VoIP services *separately* from its reference to the Commission's work on complaints. To give the statutory language its full effect, the Commission must look at all of section 710(f)'s language.[37] Moreover, the use of the term "including" suggests that the Commission has additional authority to "monitor and discuss" VoIP beyond handling customer complaints.

Cox also claims that if the Legislature wished to allow the Commission to collect data from VoIP service providers, it could have included such a provision as an exception, like the express exception contained in section 710(c)(4).[38] However, this section expressly permits the Commission to require data and information for purposes of section 716, which involves with forbearance proceedings before the FCC. Cox is correct that the Legislature could have made the Commission's authority more explicit, but this does not negate the argument that the NORS report requirement is permitted under section 710(f).

b) Other language in section 710 supports the Decision.

Cox asserts that other provisions of section 710 which are relied upon in the Decision are not applicable.[39] We disagree.

First, the Decision states that requiring VoIP carriers to submit a copy of one report (a report that is already generated for the FCC) does not constitute "regulation" of VoIP under section 710. Second, the Decision interprets section 710 to only prohibit the regulation of VoIP *services*. Pursuant to the plain language and the legislative history of the statute, Section 710 is not a blanket prohibition on the regulation of *facilities* over which VoIP services are transported.

---

[37] When interpreting statutory language, "[t]he first step in the interpretive process looks to the words of the statute themselves." (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 787; see also, 2 Witkin, Sum. Cal. Law, Insurance § 100.)

[38] Cox Rhg. App. at 15.

[39] Cox Rhg. App. at 18-20.

On this point, the Decision cites certain exceptions in section 710 relating to facilities (e.g., the Commission's authority to enforce existing requirements regarding backup power (§ 710 (c)(6)) and the Commission's authority regarding access to support structures, including pole attachments, or to the construction and maintenance of facilities pursuant to GOs 95 and 128 (§ 710 (c)(7)). Cox is correct that the provisions relating to backup power and support structures are not applicable to the NORS Report requirement. However, these provisions are included in the decision as support for our interpretation that section 710 only prohibits the regulation of VoIP services and not facilities, which may be used for both traditional and VoIP services.

c) Reliance on other sections of the California Constitution and Code are not legal error.

Cox also contends that the Decision errs in relying on Public Utilities Code sections 311 and 314, et seq., the California Constitution, and Government Code section 11180.

The Decision notes that, even where the Commission does not have regulatory jurisdiction over an entity or service, the Commission has broad authority to obtain information. Such authority is not limited to public utilities or regulated entities. The Decision cites sections 311 and 314; the California Constitution, article XII, section 6; Government Code section 11180; and Resolution ALJ-195.

Cox argues that it is inappropriate to rely on these provisions because there are no findings or legal analysis of the laws cited. Further, Cox argues that reliance on these laws, which predate section 710, fails to address how these laws may be affected by section 710. Cox claims this is an "abuse of discretion."

Cox has not demonstrated legal error. This section was inserted in the Proposed Decision ("PD") in response to comments contending that section 710 prohibited the Commission from requiring the NORS report from VoIP carriers. The Commission's authority to obtain information under these more general provisions is not inconsistent with the application of section 710 in this case, which allows the

Commission to require the NORS report from VoIP carriers. Citing these provisions was legally correct and, thus, there was not an "abuse of discretion."

d) The record supports the requirement that VoIP providers submit the NORS report.

Cox contends that the record lacks factual support for the Commission to order VoIP providers to submit the NORS report to the CPUC. Getting information on outages is a basic part of the Commission's regulatory function over telephone corporations. At different times in this proceeding, the Commission discussed extending all service quality standards to VoIP and wireless. The Commission decided not to do this at this time. However, with the migration of customers to VoIP instead of traditional phone services, having information on VoIP outages is essential for the Commission to fulfill its role of ensuring just and reasonable telecommunication services.

B. Joint Consumer Groups' Application for Rehearing

1. Public Utilities Code section 2896 does not require the extension of service quality rules to wireless and VoIP carriers.

Joint Consumer Groups contend that the Commission violated Public Utilities Code section 2896 by closing this proceeding without addressing service quality standards for wireless or interconnected VoIP providers.[40]

Section 2896 provides, in part:

> The commission shall require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all of the following: . . . (c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.

Joint Consumers point out that section 2896 applies to all telephone corporations.

> Consistent with other provisions of this code, orders, rules, and applicable tariffs . . . *the Commission shall apply these*

---

[40] Joint Consumer Groups Rhg. App., filed Sept. 28, 2016, at 18-19.

> *policies to all providers of telecommunications services on California*.[41]

Joint Consumer Groups argue that the Commission has jurisdiction to apply service quality standards to both wireless and interconnected VoIP providers, notwithstanding issues of federal preemption or Public Utilities Code section 710.

On the other hand, CTIA responds that section 2896 does not obligate the Commission to extend GO 133-D-type rules to wireless or VoIP:

> The Commission determined not to impose service quality regulation on wireless carriers, recognizing that its statutory obligation pursuant to Section 2896 does not require it to promulgate or impose service quality regulations, but rather, imposes a general duty "requir[ing] telephone corporations to provide customer service to telecommunications customers." The means by which the Commission does so is left to its discretion. Section 2896 affords the Commission the discretion to rely on competition to ensure its statutory obligation is met, and the Commission's decision to rely on competition – continuing on a path it first selected in D.09-07-019 – is a lawful exercise of the Commission's discretion.[42]

AT&T makes essentially the same argument:

> Contrary to the Joint Consumer Groups' assertion, nothing in this section obligates the Commission to impose prescriptive regulations in order to carry out the statute. Rather, the manner and means of carrying out the statute are left to the Commission's discretion.[43]

AT&T distinguishes statutes that explicitly require the adoption of regulations by stating "the Commission shall adopt regulations."[44]

[41] Pub. Util. Code, § 2896, emphasis added.

[42] CTIA Resp. to Joint Consumer Groups Rhg. App., filed Oct. 13, 2016, at 2.

[43] AT&T Resp. to Joint Consumer Groups Rhg. App., filed Oct. 13, 2016, at 2.

[44] AT&T Resp. to Joint Consumer Groups Rhg. App., filed Oct. 13, 2016, at 2-3.

Section 2896 applies to "telephone corporations," which clearly includes wireless providers and arguably includes VoIP providers (although the Commission has never explicitly declared VoIP providers to be "telephone corporations"). We also recognize that, in the initial stages of this proceeding, the Commission discussed whether the Commission should adopt service quality rules for wireless carriers.[45] Similarly, the issue of service quality rules for VoIP has been raised at various times in this proceeding.

Nonetheless, the focus of this proceeding has always been on the revisions to rules for wireline carriers, which were covered by GO 133-C. Furthermore, from a regulatory standpoint, non-traditional services such as wireless and VoIP have always been treated differently from wireline services. First, the Commission has taken a more hands-off approach for non-traditional services, with reliance on competition to ensure reasonable service and rates. This began when these non-traditional services were emerging. Second, issues of federal preemption and state prohibitions under section 710 have resulted in the Commission taking a more limited regulatory approach to these technologies. We do not think that section 2896 requires the Commission to apply the same type of regulations to wireless and VoIP that it applies to traditional wireline.

Moreover, the statute does not explicitly require the Commission to develop regulations. Rather, the section articulates "policies" which the Commission "shall apply to all telecommunications services in California." (See Pub. Util. Code, § 2897.)

Finally, some service quality rules have been applied to VoIP and wireless. (See discussion above regarding Rule 4, which requires VoIP providers to submit the FCC NORS report for major service interruptions. See also GO 133-D, Rule 5, on Wireless Coverage Maps.) For these reasons, we are not persuaded that section 2896 requires an extension of GO 133-type service quality rules to wireless and VoIP as part of this proceeding.

---

[45] See R.11-12-001, Order Instituting Rulemaking, at p. 12.

2. The Decision does not violate prior Commission decisions by refraining from extending service quality rules to wireless and VoIP carriers in this proceeding.

Joint Consumer Groups further contend that the Decision violates prior decisions of the Commission in failing to extend service quality rules to wireless and VoIP.[46] Joint Consumers first refer to D.12-12-038 (issued in R.09-06-019), which expanded the definition of basic telephone service to include services provided by wireless and VoIP. At that time, the Commission noted that it was necessary to update service quality rules for all carriers, including wireless and VoIP, and stated it would address the matter in a new OIR or in the instant proceeding.[47]

In D.14-01-036, which modernized the California Lifeline program to include non-traditional communications services, the Commission similarly stated that such services should be subject to minimum service quality standards and that the Commission would pursue these issues in other proceedings, including the instant proceeding.

AT&T contends that these decisions did not require the Commission to adopt service quality rules for wireless and VoIP in this proceeding.

> Neither of those decisions bound the Commission to adopt wireless or VoIP service quality regulations in this proceeding (and even if they did, the Commission would be entitled to change its mind).
>
> In D.12-12-038, the Commission concluded that a different proceeding – whether this one or some other proceeding – would be an appropriate forum to consider further issues related to wireless and VoIP basic telephone services, and the Commission stated it "may choose to address these issues

[46] Joint Consumer Groups Rhg. App. at 21-22.

[47] D.12-12-038, at pp. 46-47.

> within R.11-12-001." That the Commission has chosen not to does not constitute legal error.
>
> Similarly, in D.14-01-036, …[t]he Commission's stated intent to pursue "some of" these issues in "other proceedings," including this one, falls far short of a ruling that wireless and/or VoIP service quality regulations must be addressed in this proceeding.[48]

Nothing in the language of the decisions cited by Joint Consumer Groups constitutes a requirement that the Commission take future action. In most cases, the Commission has the discretion to decide when or if it will address issues that are postponed to a future time. There is a strong presumption of the correctness of the findings and conclusions of the Commission, which may choose its own criteria or method of arriving at its decisions, even if irregular, provided unreasonableness is not clearly established.[49] Moreover, the Commission cannot bind itself to act in a certain manner in the future.[50]

3. The Commission did not err in declining to keep the proceeding open for Network Study.

Joint Consumer Groups contend that the Decision violates D.15-08-041, which was issued in this proceeding and which addresses the Network Study. Joint Consumer Groups argue that it was legal error to close the proceeding without doing the Network Study.

In the initial scoping memo issued in this proceeding, the assigned Commissioner ruled that CD was to oversee an examination of AT&T's and Verizon's network infrastructure and facilities.[51] As stated in that scoping memo, the study was to

[48] AT&T Resp. to Joint Consumer Groups Rhg. App., filed Oct. 13, 2016, at 10-11. See also CCTA Resp. to Joint Consumer Groups Rhg. App., filed Oct. 13, 2016, at 10 ("Both decisions made it clear that service quality could be addressed in multiple different dockets.").

[49] See *Pacific Telephone and Telegraph Co v. Public Utilities Comm.* (1965) 62 Cal. 2d 634, 647.

[50] *In re Pacific Gas & Electric Co.* (1988) 30 C.P.U.C.2d 189, 223-225; see also *Postal Telegraph-Cable Company v. Railroad Commission* (1925) 197 Cal. 426, 436.

[51] Sept. 24, 2012 Scoping Memo and Ruling, at pp. 12-13 and pp. 18-19.

be conducted by an independent consultant under a contract managed by CD, with the costs of the study split between AT&T and Verizon. The study was described as "a foundational activity in this proceeding, providing valuable information that will assist parties and the Commission in addressing the issues" in this proceeding.[52]

In D.13-02-023,[53] the Commission re-affirmed the provisions of the September 24, 2012 scoping memo. The Commission again stated that the Network Study is a necessary foundational activity of the proceeding. The Commission also concluded that AT&T and Verizon would pay for the costs of the study.[54] The only change from the previous scoping memo was to state that the costs of the study were to be "apportioned" to those carriers "based on their share of total intrastate revenues" (rather than evenly split).[55]

The requirements for the Network Study were re-affirmed again in D.15-08-041.[56] Although D.15-08-041 states that the study was intended to be a foundational activity[57] the Commission also stated that this "in no way precludes," and "is not intended to delay," the Commission's consideration of "a penalty mechanism or other more immediate activities in this proceeding."[58] Thus, when this proceeding began we anticipated the Network Study would be performed during the pendency of the proceeding. However, this did not happen and, in D.15-08-041, we clearly stated that the delay in the Network Study should not prevent adopting the revised GO 133-D.

---

[52] Sept. 24, 2012 Scoping Memo and Ruling, at p. 12.

[53] *Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules – Decision Affirming Scoping Memo and Ruling* [D.13-02-023] (2013).

[54] D.13-02-023, at p. 7.

[55] D.13-02-023, at p. 8.

[56] D.15-08-041 discusses reassignment of the proceeding to another Commissioner in February 2014, a revised scoping memo issued by the assigned Commissioner on September 24, 2014, and a PD issued by the assigned Commissioner on April 17, 2015. That PD suggested that the Network Study may not be necessary once penalty provisions were adopted.

[57] D.15-08-041, at p.7.

[58] D.15-08-041, at p 10.

Nevertheless, the Network Study will be completed. The Commission has issued an RFP and contracted with a consultant to do the study, as ordered by the decisions discussed above. The only thing that has changed over time is that the Commission determined that the Network Study need not be completed before the adoption of GO 133-D.

As pointed out by AT&T, the Commission may re-open this proceeding or open a new proceeding to reconsider the regulations once the study is complete.[59] Thus, Joint Consumer Groups have not demonstrated legal error.[60]

4. The adoption of Rule 9.7 did not violate due process and is supported by the record.

Joint Consumer Groups contend that the adoption of Rule 9.7 violated parties' rights to due process because parties did not have sufficient notice or opportunity to be heard. Joint Consumer Groups further contend that there is no evidence in the record or findings to support the rule.[61]

Rule 9.7 allows carriers fined pursuant to the Commission's service quality rules to request and receive suspension of fines if carriers propose to voluntarily pay double the proposed fine amount to improve service quality measurably. Rule 9.7 provides:

> Alternative Proposal for Mandatory Corrective Action
>
> In support of a request to suspend the fine, carriers may propose, in their annual fine filing, to invest no less than twice the amount of their annual fine in a project(s) which improves service quality in a measurable way within 2 years. The proposal must demonstrate that 1) twice the amount of

[59] AT&T Resp. to Joint Consumer Groups Rhg. App. at 11-12.

[60] TURN also alleges that the Commission erred in closing the proceeding without addressing a pending motion filed by TURN on March 17, 2014. TURN's motion asked the Commission to address problems with the deterioration of Verizon's (now Frontier's) landline network, as well as concerns about forced customer migrations to unregulated services including VoiceLink and FIOS. This motion was never ruled upon. Since the case is closed, and it is well past the time to consider TURN's motion, the motion should be considered denied.

[61] Joint Consumer Groups Rhg. App. at 23-25.

> the fine is being spent, 2) the project (s) is an incremental expenditure with supporting financials (e.g. expenditure is in excess of the existing construction budget and/or staffing base), 3) the project (s) is designed to address a service quality deficiency and, 4) upon the project(s) completion, the carrier shall demonstrate the results for the purpose proposed.
>
> Carriers are encouraged to review their service quality results to find appropriate target projects to invest funds.

The instant OIR was issued in December of 2011. There were revisions to the scoping memo, revisions to the staff report, and modifications to the rules, with the opportunity to comment at every stage. However, the issue of the "investment alternative" was not raised until the first PD was issued on November 12, 2015. In this PD, Conclusion of Law 2 stated:

> Carriers incurring a fine under GO 133-D should have the option of requesting that the fine be suspended based on an expenditure proposal for incremental actions directed at improving compliance with the service quality standard that led to the fine in an amount that is no less than two times the incurred fine.[62]

On March 22, 2016, the Commission issued another PD which added Conclusion of Law 7:

> The public interest requires that telephone corporations subject to penalties be authorized to propose alternative means to expend twice the amount of the fine to improve service quality for customers.[63]

Parties were given the opportunity to file comments and reply comments on both the 2015 and 2016 PDs.

In their application for rehearing, Joint Consumer Groups contend that there is no record evidence to support Rule 9.7. Joint Consumers reason that because Rule 9.7 was only introduced in a PD, after the case was submitted, the rule was issued

[62] Nov. 12, 2015 PD, Conclusion of Law 2.

[63] March 22, 2016 PD, Conclusion of Law 7.

and considered outside of the evidentiary phase of the proceeding. Further, Joint Consumer Groups argue that comments on a PD do not provide an opportunity to rebut a newly proposed rule because such comments are limited to factual, legal or technical arguments. Further, parties are specifically prohibited from submitting new evidence or arguments.[64] Thus, Joint Consumers contend that the parties' due process rights were violated. Joint Consumers also point out that the Decision lacks findings to support Rule 9.7. Joint Consumers assert that this is a violation of Public Utilities Code 1757.1(a), which requires findings to support the Commission's decision.[65]

As stated above, ORA and Joint Consumers filed comments on the PDs which addressed the investment alternative. First, ORA asserted that the alternative proposal for mandatory corrective action could negate a penalty and thereby undermine new GO 133-D's penalty mechanism. Second, ORA asserted that (a) the proposed suspension option lacks metrics for success, a timeline for results, and many other details and (b) the suspension option lacks proper procedures and sufficient oversight. Third, ORA contended that the parties did not have an opportunity to adequately consider the fine suspension option details.[66]

Joint Consumers (Center for Accessible Technology, Greenlining Institute and The Utility Reform Network) contended that Rule 9.7 is completely unsupported by the record; undercuts the effectiveness of the fine mechanism; contravenes public policy; and will result in increased costs to customers. Without a requirement that shareholders bear the costs of fines or improvements, carriers would simply pass the costs on to ratepayers.[67]

Joint Consumers are correct that under Rule 14.3 of the Commission's Rules of Practice and Procedure, comments are limited to 15 pages and are required to

[64] Joint Consumers App for Rhg. at 23-25.

[65] Joint Consumers App for Rhg. at 25.

[66] ORA Opening Comments on PD, filed Dec. 2, 2015, at 3-7.

[67] Joint Consumer Opening Comments on PD, filed Dec. 2, 2015, at 5-7.

focus on factual, legal or technical errors in the proposed decision, making specific reference to the record or applicable law. Comments which fail to do so will be accorded no weight. Reply comments are limited to five pages. Furthermore, comments are filed after the evidentiary record has been closed and are not considered part of the "record." (See, e.g., Rules 13.14, 14.2, and 14.3.)

However, opening comments in this proceeding, which are part of the record, indicate the following: There is a connection between poor service quality and lack of investment,[68] ILEC's deficient service quality results from the redirection of revenue to new technologies rather than maintenance of wireline infrastructure;[69] there are limited incentives under the current system (i.e. no penalties) for ILECs to repair and maintain wireline networks;[70] the current approach to service quality (no penalties) provides no disincentive to substandard service quality;[71] and, a purpose of penalties is to stimulate infrastructure improvements.[72] These comments provide a factual record basis for implementing a policy that allows carriers to opt to make investments of twice the amount of the proposed penalty to improve service quality. Furthermore, Joint Consumers did comment on two proposed decisions containing Rule 9.7. Therefore, we do not believe they were denied due process.

C. Joint Consumer Groups' request for oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure.

The Joint Consumer Groups made a timely request for oral argument in their application for rehearing. The Commission has discretion to grant or deny oral argument under Commission Rule of Practice and Procedure 16.3(a), which provides:

[68] See, e.g., Small LECs Comments, January 31, 2012, at pp. 4-10.

[69] CALTEL Comments, January 31, 2012, at pp. 9, 16.

[70] CALTEL Comments, January 31, 2012, at pp. 9, 16.

[71] Joint Consumers Comments, December 31, 2012, at pp. 5, 8.

[72] DRA Comments, January 31, 2012, at pp. 16, 25-26.

(a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:

(1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;

(2) changes or refines existing Commission precedent;

(3) presents legal issues of exceptional controversy, complexity, or public importance; and/or

(4) raises questions of first impression that are likely to have significant precedential impact.

These criteria are not exclusive. The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. Arguments must be based only on the evidence in the record. Oral argument is not part of the evidentiary record.

Joint Consumer Groups assert that oral argument is necessary in this case because the Decision creates a new precedent for service quality rules for telephone corporations by allowing the Commission to absolve telephone corporations providing wireless or interconnected VoIP services from complying with Section 2896's service quality mandate.[73]

As stated in our discussion of section 2896 (see above), we have not created any new precedent. Rather, we have determined that the issue of additional service quality rues for wireless and VoIP providers would not be addressed in this proceeding. Thus, this does not involve a new precedent, a matter of exceptional controversy, a question of first impression, or any of the other scenarios listed in Rule 16.3(a). Further, the decision to grant oral argument is entirely within the Commission's discretion. For these reasons, Joint Consumer Groups' request for oral argument is denied.

[73] Joint Consumers App for Rhg. at 26.

D. CALTEL's Application for Rehearing

CALTEL raises one issue in its application for rehearing. CALTEL objects to fines being imposed on Competitive Local Exchange Carriers ("CLECs") for outages that are the fault of the underlying carrier. CALTEL has raised this issue repeatedly in this proceeding.

According to CALTEL, most of a CLEC's service outages involve last-mile facilities leased from large ILECs, such as AT&T and Frontier. All maintenance and repair of these facilities is provided by the ILEC. Thus, CALTEL contends that it should not be fined for outages caused by the ILEC. CALTEL specifically refers to fines for the two service quality standards that apply to maintenance and repair: Out of Service Repair Interval (GO 133-D, Rule 9.3) and the Customer Trouble Reports (GO 133-D, Rule 9.4).

In D.16-08-021, the Commission declined to exempt CLECs from penalties that relate to parts of the network CLECs do not own. The Commission concluded that if such penalties were imposed that related to outages on other carriers' networks, the CLECs could pursue those other carriers for indemnity on a contract theory.

The Decision states:

> The CLEC[s] argue that they should not be fined [based] on the underlying carrier's performance. Staff reasoned that the CLECs have a responsibility to provide safe and reliable service to their customers, and customers are indifferent to the underlying source of their service. CLECs have recourse against their underlying facilities-based providers that provide substandard service through contractual agreements.[74]

CALTEL contends that the only contractual agreements the CLECs have with underlying carriers are the interconnection agreements ("ICA"). Under those agreements, according to CALTEL, the only recourse the CLECs have for substandard performance in the ICAs is a "Performance Improvement Plan" ("PIP") adopted by this Commission. The PIP provides incentives for an incumbent local exchange carrier

---

[74] D.16-08-021, at pp. 17-18 (emphasis added).

("ILEC") to give competitors equitable access to its operations support systems ("OSS") infrastructure. The plan consists of performance measurements established in D.01-05-087, performance criteria established in D.01-01-037, and the monetary incentives adopted in D.02-03-023. The plan measures, evaluates, and imposes monetary charges on an ILEC for OSS performance that could inhibit competition by disadvantaging the CLECs.[75] Further, the plan appears to only apply to Pacific Bell, now AT&T.

The PIP Decision concludes:

> We offer this plan for Pacific's OSS performance to the parties so that they may get on with the business of providing competitive phone services to California residents. . . . We believe this plan is sufficient and appropriate to give Pacific incentives to provide non-discriminatory OSS access.[76]

Citing the PIP Decision, CALTEL points out that: (1) the PIP only applies to AT&T and does not apply to Frontier or any other URF ILECs; (2) the PIP does not necessarily constitute fair compensation to a harmed CLEC; and (3) there is no calibration between GO 133-D fines and the AT&T PIP. Finally, CALTEL contends that a "force majeure" clause in the typical ICA bars recovery by a CLEC against an ILEC for penalties caused by the ILEC's network failures.[77] Thus, CALTEL asserts, AT&T could be absolved of any incentive payments under the PIP in cases of force majeure while the CLEC may still be subject to penalties.

No party addressed these issues in Responses to CALTEL's application for rehearing or petition for modification. However, earlier in this proceeding, Center for Accessible Technology, Greenlining Institution, and TURN ("Joint Consumers")

---

[75] D.02-03-023, *Opinion on Performance Incentive Plan for Pacific Bell Telephone Company* ("*PIP Decision*"), issued March 7, 2002, at p. 2.

[76] *PIP Decision*, at p. 79.

[77] CALTEL Rhg. App. at 8-9.

supported CALTEL's position. "CLECs should not pay the price for ILECs' failures to meet service quality standards."[78]

Upon review, we believe CALTEL's argument has merit. It is not clear what contractual recourse a CLEC has for reimbursement in cases where the CLEC is fined because of actions of the underlying carrier. In addition, the fines are intended to encourage adherence to the service quality standards. Penalizing a CLEC for failing to meet a standard through no fault of its own does not advance that goal. Therefore, we will modify the Decision and GO-133-D so that the Commission may consider whether a CLEC's failure to meet service quality standards under Rules 9.3 and 9.4 is primarily due to the action or inaction of an unaffiliated underlying carrier in determining fines under those provisions**.**[79]

As stated above, CALTEL also filed a petition for modification that raises the identical issue, with the same arguments, that CALTEL raises in its application for rehearing. Because we are modifying the Decision in response to CALTEL's application for rehearing, CALTEL's petition to modify will be denied as moot.

THEREFORE, IT IS ORDERED that:

1. Decision 16-08-021 is modified as follows:

   Delete the full paragraph that starts at the bottom of page 17 and continues onto page 18, and insert the following:

   "The CLECs argue that they should not be fined on the underlying carrier's performance. Staff reasoned that the CLECs (1) have a responsibility to provide safe and reliable service to their customers, (2) customers are indifferent to the underlying source of their service, and (3) CLECs have recourse against their underlying facilities-based providers that provide substandard service through contractual agreements."

---

[78] Joint Consumers' Reply Comments on ALJ Ruling, filed April 17, 2015 at 15; see also Joint Consumers Reply Comments on PD filed April 18, 2016 at 3.

[79] As stated above, CALTEL filed a petition for modification on this same issue. Because it is recommended that the Commission modify the decision as requested in CALTEL's application for rehearing, the petition for modification will be denied as moot.

"However, it is not clear to what extent a CLEC would have recourse against the underlying carriers, and any reimbursement by the underlying carriers may not be sufficient to cover the fine. Therefore, we find it reasonable to impose fines only for the portion of outages and maintenance over which the CLEC has direct control. Accordingly, CLECs shall report when outages are caused by unaffiliated underlying carriers and the Commission shall take that into account when analyzing responsibility for the outages and determining fines payable by CLECs for failure to meet service quality standards relating to Out of Service Repair Interval (GO 133-D, Rule 9.3) and the Customer Trouble Reports (GO 133-D, Rule 9.4)."

2. GO 133-D is modified as follows:

   a. In Rule 9.1, at the end of the first full paragraph, insert the following paragraph:

      "If a CLEC fails to meet Out of Service Repair Intervals (Rule 9.3) or Customer Trouble Reports (Rule 9.4), the CLEC shall report fines as required by GO 133-D. However, where failure to meet the standards is primarily the fault of an underlying unaffiliated carrier, the Commission shall take that into account when analyzing responsibility for the outage and determining fines."

   b. In Rule 9.1, in the second line of the third paragraph, replace "day" with "month."

   c. In Rule 9.2, in the second paragraph, replace "GO 96B § 7.7.1" with "GO 96B § 7.6.3."

3. Rehearing of D.16-08-021, as modified, is denied.

4. Joint Consumer Groups' request for oral argument is denied.

5. CALTEL's petition for modification is denied as moot.

This order is effective today.

Dated October 25, 2018, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners