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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Into the Review of the California High Cost Fund-A Program	R. 11-11-007

REPLY COMMENTS OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON ALJ'S RULING SEEKING COMMENT ON GENERAL GUIDELINES FOR ALLOWING WIRELINE COMPETITION IN AREAS SERVED BY SMALL LOCAL EXCHANGE CARRIERS

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The California Cable & Telecommunications Association ("CCTA") submits these reply comments in response to the Administrative Law Judge's ruling dated November 8, 2019, in the above-captioned proceeding ("ALJ Ruling").[1]

I. Introduction

For more than 20 years, the California Public Utilities Commission ("CPUC") and the California Legislature have recognized that competition benefits consumers by keeping prices low and ensuring a robust choice of products and services.[2] Yet not all Californians are able to enjoy the full benefits of innovative, alternative communications services because competitive local exchange carriers ("CLECs") are being excluded from providing voice service in the territories of the 13 incumbent rural local exchange carriers ("RLECs"),

[1] These reply comments are timely filed pursuant to the ALJ's email message dated November 18, 2019.

[2] D.95-07-054 at 16 ("We reaffirm our previous commitment to achieve implementation of competition in all telecommunications markets by January 1, 1997 consistent with our legislative mandate and our policies. We fully intend to open all markets, *including the mid-size and small LECs*, to local exchange competition…") (emphasis added); Pub. Util. Code § 709.5.

including the small incumbent local exchange carriers ("Small ILECs").[3] As a result, many rural California consumers have access to only *some* voice service options despite consumer demand for alternatives and the ready availability of facilities to provide those alternative voice services. Cable operators that provide residential customers video and broadband internet access services—and are also capable of enabling voice service—have to tell consumers that they are not allowed to provide voice service with these same facilities. This denial of consumer choice is not based on any technological constraint. Rather, it is an outdated regulatory barrier in direct conflict with federal law – law that provides for rural incumbents to obtain limited relief from the effects of CLEC operations *only after* they follow a specific process and demonstrate that such relief is warranted.[4]

In an effort to shield themselves from certain forms of competition, the Small ILECs argue that competition from CLECs will undermine their financial ability to meet their carrier-of-last-resort ("COLR") obligations. This argument is wrong. As TURN notes, allowing competition will not remove the "regulatory compact" that guarantees the RLECs a return on investment and guarantees their customers access to service at "just and reasonable" rates.[5] Moreover, the RLECs will continue to have access to California High-Cost Fund A ("A Fund") and federal universal service support. The Small ILECs' argument also contradicts the facts: existing competition from wireless and over-the-top

[3] *See* D.14-12-084 at 2, footnote 1, describing the universe of RLECs as including (1) the 10 Small ILECs that draw support from the A Fund, and (2) the three other incumbent RLECs that filed comments as the TDS Companies and are eligible but do not draw from the A Fund. For clarity, CCTA emphasizes that it is requesting the CPUC to lift the ban on competition in all the RLEC territories.

[4] *See* CCTA Comments at 4 to 8.

[5] TURN Comments at 6.

providers has not prevented Small ILECs from meeting their COLR obligations or increased their draws on universal service funds.

The incumbents also seek to tilt the competitive playing field in their favor by urging the CPUC to impose COLR obligations and rate-of-return-style regulations on CLECs. These proposals should be rejected for several independent reasons. First, the COLR obligations and regulatory obligations undertaken by the Small ILECs run with their guaranteed return on investment, and thus it would be wrong to impose these obligations on CLECs with no guaranteed return on investment. Second, the Small ILECs have virtually ubiquitous facilities inside their territories, whereas CLECs are new entrants with much smaller footprints in the Small ILECs' territories. Imposing COLR obligations on CLECs would thus effectively preclude CLEC market entry. Third, the proposed COLR requirement for CLECs is premised on the erroneous notion that all CLECs offer retail services to end users. In fact, some CLECs offer only wholesale voice services to affiliates and third parties, which in turn provide retail voice services to end users, and so COLR obligations simply do not fit with those CLECs business models. Moreover, regulatory requirements that hamper, if not altogether prevent, CLEC operations in RLEC territories contradict federal law.

It would similarly be problematic to address in this proceeding the CLEC regulations generally applicable to all CLECs operating statewide ("CLEC Rules"). As almost all commenters agree, addressing CLEC rule changes here would violate due process and would far exceed the scope of this proceeding.

Finally, CCTA opposes the Small ILECs' attempt to unnecessarily delay this nearly decade-long proceeding with more evidentiary hearings on CLEC competition. Not only

are evidentiary hearings not required by law, it would be consistent with past CPUC practice to decline evidentiary hearings when opening ILEC territories to CLEC competition.

II. Speculative claims that competition from CLECs will erode the Small ILECs' financial ability to meet their COLR obligations are baseless and ignore the actual impact of competition.

The Small ILECs claim that if CLECs were allowed to offer customers voice service in their territories, it would reduce their revenues and hamper their ability to meet their COLR obligations.[6] This speculative claim, however, is not based on any facts or data. To the contrary, it is undermined by real world experiences in which rural incumbents have maintained revenues and met COLR obligations even though they have been exposed to competition from wireless and over-the-top voice providers.

There is no evidence to support the Small ILECs' claim, and the record contradicts it.[7] The CPUC's "2014 Decision" (D. 14-12-084), which temporarily prohibited CLECs from offering voice service in RLEC territories, did *not* find that competition would harm consumers, Small ILECs, or the A Fund.[8] Similarly, the study of impacts of competition on Small ILEC territories, resulting from the 2014 Decision, found that competition would have no significant direct impact on Small ILECs.[9]

Moreover, the introduction of competition in rural ILEC territories has not unleashed the parade of horribles asserted by the Small ILECs. As CCTA demonstrated in

[6] Small ILEC Comments at 9.

[7] CCTA Comments (filed August 9, 2019) at 7.

[8] D.14-12-084; and *id*. at 3 to 4.

[9] CCTA Comments (filed May 21, 2019) at 5 to 9.

its opening comments, there is no evidence of harm to the Small ILECs or their customers in the wake of significant competition from wireless and over-the-top voice services in Small ILEC territories over the past 10 years.[10] To the contrary, while the Small ILECs have experienced line losses correlated with competition from wireless and over-the-top voice, their revenues have largely held steady and the Small ILECs' draw on the A Fund has generally *decreased* or remained flat.[11] This is consistent with the experience of the California High Cost Fund-B, which shows that opening larger ILEC markets to competition actually decreases pressure on such subsidy funds, without sacrificing access to basic telephone service.[12] Finally, as TURN's comments explain, the A Fund and regulatory framework codified in Public Utilities Code Section 275.6 will continue to provide universal service support to the Small ILECs and ensure that their high-cost customers have access to voice service at "just and reasonable" rates.[13]

III. Imposing additional conditions on CLECs would be contrary to state and federal law, create unnecessary barriers to entry, contradict technology neutral principles, and in some cases, duplicate current rules.

a. Requiring CLECs to be COLRs is contrary to law and policy and would undermine universal service.

[10] CCTA Comments at 17.

[11] CCTA Comments at 16 to17.

[12] California High Cost Fund-B provides subsidies to COLRs for providing "basic service" to residential customers in high-cost areas that are currently served by ILECs whose service territories were opened to competition in the mid-1990s. The budget for the fund has decreased from $350 million in 1996 to $22.3 million in fiscal year 2017-2018. *See* "California High Cost Fund-B," http://www.cpuc.ca.gov/General.aspx?id=989 (last visited October 11, 2019). *See also* D.17-11-013.

[13] TURN Comments at 5 to 6.

The Small ILECs propose that CLECs be subject to COLR obligations as a condition to competitive entry in RLEC areas.[14] TURN, although claiming to *not* support a COLR requirement for CLECs, nonetheless proposes "must serve" requirements[15] and notice requirements for network deployment.[16] The CPUC should reject these proposals.

First, imposing COLR requirements on CLECs would violate 47 U.S.C. § 253 and be contrary to long-standing universal service policies. In the 1990s, California first opened long-standing monopoly telephone markets to competition, finding that competitive alternatives in local telecommunications markets lead to improved service quality, expanded product and service capabilities, and greater reliability, among other things.[17] At that time, the CPUC explicitly designated each incumbent LEC, including each Small ILEC, as a COLR. The CPUC required COLRs to retain the obligation they had as monopolists to provide basic voice service to any and all customers in the service area.[18] The CPUC was aligned with federal policy-makers in designating ILECs – not competing providers – as COLRs because "the landline carriers already providing those essential services were in the best position easily and efficiently to prevent coverage gaps" that might

[14] Small ILEC Comments at 6. The TDS Companies state that it is not critical for CLECs to have COLR responsibilities "provided they are required to serve all customers upon request in their designate service territories" (TDS Comments at 2). This statement is internally inconsistent given that the proposed obligation to service effectively imposes COLR responsibilities on CLECs.

[15] TURN Comments at 6 to 7.

[16] TURN Comments at 7.

[17] CCTA Comments at 17.

[18] D.96-10-066 at 199 to 203.

occur when opening markets to competition.[19] In exchange for this COLR obligation, all COLRs – and only COLRs – were authorized to draw from universal service funds – which, for the Small LECS, is the A Fund.[20] COLR obligations could not be imposed on CLECs without providing the same universal service support. Failure to do so would violate Section 253(a) because it would be discriminatory and prevent CLECs from actually entering the market.

Second, requiring multiple COLRs in a single service territory would actually undermine universal service by creating the result that the Small ILECs and others repeatedly claim they most want to avoid – an increased draw on the A Fund and increased surcharges that California customers must pay to support that fund. As TURN states, it "does not support placing COLR obligations on CLECs, especially if the fulfillment of COLR obligations requires subsidization of the CLEC."[21]

Third, proposals to impose COLR obligations on CLECs are based on the mistaken notion that all CLECs are retail providers that serve end users. Of course, that is not the case. CLECs, such as Comcast Phone of California, and others, generally do *not* provide retail voice telecommunications services to end-user consumers. They are primarily

[19] *AT&T v. FCC* (D.C. Cir. April 6, 2018) 886 F.3d 1236, at 1240 (affirming Federal Communications Commission designation of ILECs as COLRs).

[20] D.96-10-066 at 199. Although the CPUC established a mechanism for a CLEC to become a second COLR and therefore eligible for designated subsidies if the CLEC accepted an obligation to serve all customers in a designated subsidy area, there has been little history of second COLRs and never a time when a CLEC replaced an ILEC as the COLR in the ILEC's service area. *Id*. at 199-203.

[21] TURN Comments at 6.

wholesale providers that *enable* retail services to be delivered by others,[22] and so COLR obligations are simply inapplicable to those CLECs.

Finally, cable-provided VoIP services are typically "fixed" VoIP services (not "over-the-top"), meaning that end-users are served over the cable providers' network plant, which is rarely, if ever, coextensive with Small ILEC service territories. For example, Comcast Phone's cable affiliate is simply not present in most of Ponderosa Telephone Company's service territory. Thus, it would effectively prevent CLEC entry in Small ILEC territories to impose a ubiquitous service obligation on them.

In sum, calls to impose COLR obligations on CLECs should be rejected because customer access to basic service is already guaranteed by the Small ILECs remaining COLRs and because multiple COLRs drawing on the A Fund would increase customer surcharges for universal service.

b. So-called "regulatory parity" conditions proposed for CLECs would create unnecessary barriers to entry, not be technology neutral, and in some case duplicate current CLEC obligations.

The Small ILECs propose as "minimum requirements" for any CLEC authorized to offer service in a Small ILEC area a litany of regulatory requirements that currently apply to Small ILECs as part of the rate-of-return A Fund regulatory framework.[23] The Small ILECs cite "regulatory parity" as rationale for making CLECs subject to the same – or even more restrictive – requirements than those that apply to the Small ILECs.[24]

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[22] *See* A.19-01-003, Response of Comcast Phone of California, LLC (U-5698-C) to Administrative Law Judge's Ruling Requesting Information, at 5.

[23] Small ILEC Comments at 5 to 8.

[24] Small ILEC Comments at 10. ("[T]he Commission should avoid institutionalizing competitive advantages in favor of CLECs by permitting them to operate in Independent Small LEC territories under a far less restrictive set of rules.").

The CPUC should reject these proposals and recognize them for what they are – an attempt to erect conditions so onerous as to effectively prohibit CLEC entry, and deny consumers' the right to certain competitive offerings. The Small ILECs ignore that these mandates apply to them as part of the regulatory compact that includes a guaranteed rate of return and access to tens of millions of dollars in state and federal universal service funding every year to meet their revenue requirements. As TURN notes, it would be highly problematic to force CLECs to accept support from these funds[25] and equally problematic to impose on CLECs the restrictions/requirements that come with those funds. There is also no showing as to why CLECs operating in Small ILEC areas should be subject to different rules than those applied to CLECs operating in other areas of the state or to competitive voice service providers using other technologies – wireless and over-the-top VoIP – that are already offering service in Small ILEC areas.

Finally, the policy objectives underlying many of the obligations that the Small ILECs and TURN would impose on CLECs operating in Small ILEC territories are already addressed in rules that apply to CLECs, regardless of where they operate. These rules are tailored to CLECs that operate in a competitive market without universal service support. There is no evidence supporting the imposition of another layer of likely duplicative, inconsistent or conflicting requirements on top of the existing regulatory regime.

c. The additional proposed conditions are misaligned with state and federal law, based on flawed assumptions and would effectively continue the ban on CLEC entry.

The Small ILECs and TURN also propose a host of other requirements that should be rejected. These additional proposals fail for many of the same reasons already addressed

[25] TURN Comments at 8.

in these reply comments. They are in conflict with existing legal requirements, based on assumptions about CLEC business models that are odds with the facts, beyond the CPUC's jurisdiction, and discriminatory barriers that would effectively prohibit customers from gaining access to new and innovative CLEC products and services in violation of both state and federal mandates.

Anti-Competitive Pricing Restrictions. The Small ILECs seek to impede CLECs from competing in Small ILEC territories by requiring CLECs to provide at least 60-days advance notice of any price changes for service offerings,[26] and requiring that "basic local service rates" not exceed the applicable Small ILEC's rates.[27] These proposals restrict flexibility in rates, terms, and conditions of service and run counter to the pro-competitive policies and lighter-touch regulations that have long been the hallmark of the CPUC's regulatory approach.[28] In fact, the 60-days notice proposal the Small LECs seek would create an unfair advantage for incumbents over CLECs.

Duplicative Restrictions on Customer Contracts. TURN suggests that CLECs should be barred from entering into "exclusive contracts" in the Small ILEC territories or that CLECs with such arrangements be required to pay a fee to offset A Fund draws that may result from such contracts.[29] Demands to ban exclusive contracts ignore the economic realities of the critical role that such contracts play in business decisions to deploy

[26] Small LEC Comments at 10 to 11.

[27] TDS Companies Comments at 4.

[28] *See, e.g.*, D.06-08-030 and D.08-09-042; and Pub. Util. Code § 709(g) (stating California's policy "[t]o remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice").

[29] TURN Comments at 10 to 11.

infrastructure for advanced communications services. Moreover, the universal service fee payment proposed in the event that such contracts are entered into would be unworkable and legally unsupportable.[30] Finally, as TURN acknowledges, state and federal rules already address exclusive service arrangements.[31]

Restrictions on Non-Jurisdictional Services. The Small ILECs argue that CLECs must be required to fulfill all reasonable broadband service requests,[32] and, similarly, TURN asks that CLECs be required to provide information on the "maturity" of broadband deployment.[33] As noted above, CLECs already report to the CPUC on broadband deployment. Additionally, requiring CLECs to provide ubiquitous broadband at guaranteed service levels overlooks that many CLECs do not currently provide retail broadband and further ignores the CPUC's lack of jurisdiction over broadband.[34] Moreover, even at the federal level, where jurisdiction is clear, broadband deployment requirements are only associated with acceptance of universal support.[35]

[30] TURN Comments (at 10 to 11) reveal the difficulty, complexity, subjectivity and speculation of "value" required to even make such a fee calculation.

[31] TURN Comments at 10, footnote 24.

[32] Small LEC Comments at 6.

[33] TURN Comments at 12.

[34] *See, e.g.*, Small LEC Comments (filed May 21, 2019) ("The Commission does not regulate broadband *service*, so it has no authority to adopt such measures."); *see also Mozilla Corp. v. FCC*, Case No. 18-1051 at 51-61 (D.C. Cir., Oct. 1, 2019) (confirming the FCC's and courts' ability to preempt state laws and regulations pertaining to broadband that conflict with federal regime).

[35] *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking (released November 18, 2011) at para. 86 (offering broadband service is "condition of receiving federal high-cost universal service support").

Duplicative and Unnecessary CPCN Application Requirements. The Small ILECs and TURN seek to bury CLECs in CPCN application requirements that are essentially duplicative of existing requirements and/or unnecessary. TURN's proposal to direct CLECs to include specific demonstrations of the benefits that would be conferred by granting the CPCN would largely duplicate existing mandates. Moreover, as CCTA explained in its opening comments, the benefits of competition are presumed in existing law.[36] If a RLEC believes that competitive entry would impose "a significant adverse economic impact *on users*" or be "unduly economically burdensome," then the obligation falls on the RLEC to seek the limited relief available to it under Section 251(f)(2).[37]

The Small ILECs also ask the CPUC to consider whether a CPCN applicant will install any new facilities and whether the CLEC intends to serve customers over a platform that is subject to CPUC jurisdiction.[38] These proposed requirements are unnecessary because facilities information is already required in CPCN applications.[39] Similarly, given that the CPUC already considers service territory in CPCN application proceeding, forcing CLECs to include demographic disclosure information in their applications, as TURN suggests, is also unnecessary.[40]

IV. Modification of CLEC Rules is unnecessary, would exceed the scope of this proceeding, violate due process, and create even more delay in this 8-year proceeding.

[36] CCTA Comments at 4 to 8.

[37] 47 U.S.C. § 251(f)(2) (emphasis supplied).

[38] Small ILEC Comments at 12.

[39] *See, e.g.,* CLEC Rule 4(f)(2) (requiring a CLEC to file a service area map and provide *its* services (not all services) within that area).

[40] *See* CPUC Rule 3.1(a) and, e.g., D.17-05-023; D.19-10-005, respectively.

While TURN appears to propose certain changes to the CLEC Rules, it is unclear whether it is asking the CPUC to modify those rules in this proceeding.[41] The Small ILECs concur with CCTA's comments that it would be inappropriate for the CPUC to address those changes here as doing so would both violate due process and far exceed the scope of this proceeding.[42]

V. Evidentiary Hearings are not required for the CPUC to lift its ban on CLEC competition in RLEC areas.

The Small ILECs are outliers in their claim that Public Utilities Code Section 1708 requires new evidentiary hearings before the CPUC can lift its temporary ban on CLEC competition[43] No other party seeks evidentiary hearings. The Small ILECs raised this same argument in a motion asking for evidentiary hearings filed July 25, 2019 in this proceeding, and the ALJ ruled that issues set for evidentiary hearings did not include the competition issue.[44] The ALJ Ruling that began this round of comments definitively stated: "We do not intend to hold evidentiary hearings on the question of allowing wireline competition within individual Small LEC service territories in this Rulemaking."[45] The ALJ Ruling did not ask for comment on the question of whether evidentiary hearings are required to lift the CLEC

[41] TURN Comments at 13.

[42] Small ILEC Comments s at 14, and CCTA Comments at 21 to 23.

[43] Small ILEC Comments at 3 to 4.

[44] "Administrative Law Judges' Ruling Setting Hearing Dates and Issues for Hearing," Sept. 12, 2019. *See also*, email message dated November 1, 2019, copied to the service list from ALJ McKenzie stating: "A ruling will issue shortly clarifying that the Commission does not intend to hold evidentiary hearings to address the competition issue. The ruling will explain the process that will be used to consider the competition issue and outline next steps and dates. The issue of competition will **not** be considered in the upcoming evidentiary hearings scheduled for late January, 2020."

[45] ALJ Ruling at 2.

competition ban. The Small ILECs' comments on this issue, therefore, are improper and simply another attempt to manufacture more delay in this 8-year proceeding, delay that effectively continues to prevent competition and more service options for rural consumers.

Importantly, Section 1708 does not require evidentiary hearings as the Small ILECs assert. First, the CLECs' right to compete is a matter of law on which the parties have had adequate opportunity to present their positions.[46] Second, contrary to the Small ILECs' allegations, due process provisions do not require a hearing in quasi-legislative proceedings.[47] As the CPUC previously noted: "if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing."[48] Third, the 2014 Decision included a "preliminary conclusion" subject to review of the Competition Study; it was not a final policy to which Section 1708 would apply. The 2014 Decision simply stated that the CPUC would evaluate the Competition Study and made no reference to further evidentiary hearings regarding the Competition Study.[49] Fourth, as demonstrated by this comment

[46] See, e.g. In Re Alternative Regulatory Frameworks of Local Exch. Carriers, D.01-08-062 ("No hearing should be required pursuant to § 1708 since the matters determined are all matters of law on which the parties have had an adequate opportunity to present their positions.").

[47] *See* D.06-04-070 ("The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court, if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing.") (citing *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292.)

[48] *Id.*

[49] COL 40 ("We preliminarily conclude that it is not in the public interest to open the Small LECs territories to wireline competition at this time, subject to our review of the Broadband Networks and Universal Service studies to be conducted in Phase 2 of this proceeding.")

round, the Small ILECs have no evidentiary facts to offer and merely repeat the same tired policy arguments and speculation about the "likely" effects of competition in RLEC areas. These are not facts warranting more evidentiary hearings. Fifth, in the past the CPUC has declined evidentiary hearings when opening up the territories of other incumbents that drew from Public Purpose Program funds, even when such policy efforts were opposed by ILECs.[50] Simply put, there is no valid reason why evidentiary hearings would be necessary here.

VI. Conclusion

CCTA respectfully urges the CPUC to expeditiously issue a Proposed Decision removing the ban on CLEC operation in the RLEC service areas. This will ensure that CLECs can enter the competitive playing field already occupied by the RLECs, wireless carriers and over-the-top voice providers, and provide alternative, innovative communications services to rural Californians.

Respectfully submitted,

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[50] *See, e.g.,* D.97-09-115 (opening to competition the service territory of Roseville and Citizens); D.95-07-054 (opening Pacific Bell and GTEC territories to competition).