

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

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

A.19-01-003

**RESPONSE OF COMCAST PHONE OF CALIFORNIA, LLC (U-5698-C) TO
ASSIGNED COMMISSIONER’S SCOPING MEMO AND RULING**

Comcast Phone of California, LLC (U-5698-C) (“Comcast Phone”) hereby responds to the issues presented and questions posed to the Parties in the April 4, 2019 *Assigned Commissioner’s Scoping Memo and Ruling* (“Scoping Memo”).

I. INTRODUCTION

Existing law and Commission policy make clear that Comcast Phone’s request to expand its certificate of public convenience and necessity (“CPCN”) to provide service in Ponderosa Telephone Company’s (“Ponderosa”) territory should be considered in the present proceeding:

- State Law and Commission Policy Favor Immediate Review of Comcast Phone’s Application: In California Public Utilities Code Section 709, the Legislature expressly declared that California should seek to “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.” Further, California Public Utilities Code Section 709.5 and Commission Decision 95-07-054 make clear that the Legislature intended all telecommunications markets subject to Commission jurisdiction, including Ponderosa’s, be open to competition not later than 1997 (more than 20 years ago). Although the Commission deferred consideration of amended CPCN applications to provide service in certain rural service territories in a decision from 2014, the assumptions underlying that decision have not borne out or are not applicable to Comcast Phone’s CPCN application (“Application”).
- Federal Law Prohibits Further Delay: Federal law (47 U.S.C. § 253(a)) provides states cannot “prohibit or have the effect of prohibiting the ability of any entity to

provide any interstate or intrastate telecommunications service.” The only legal bases for denying an application of a competitive local exchange carrier (“CLEC”), including the present application of Comcast Phone, are inapplicable here. By denying Comcast Phone’s ability to enter Ponderosa’s territory and interconnect, the Commission would be, without a lawful basis, effectively prohibiting Comcast Phone’s ability to provide service, thereby conflicting with federal law. Thus, there is no lawful basis for delaying or denying Comcast Phone’s Application.

- Public Policy Favors Immediate Review: The Tesoro Viejo community wants another competitive alternative to Ponderosa. In fact, Comcast Phone’s Application was prompted by a request from the developer of that community to build a state-of-art broadband and voice network and market its services. Moreover, it would be poor public policy to deny Comcast Phone’s Application—and thereby prevent its VoIP affiliate from providing voice services to Tesoro Viejo—while wireless, over-the-top VoIP providers, and messaging apps offer their services in Ponderosa territory without restriction.

Comcast Phone meets the Commission requirements to expand its existing CPCN as requested in its Application and subsequent pleadings, including Comcast Phone’s showing of public convenience and necessity, financial ability, and managerial and technical competence.

II. PROCEDURAL HISTORY AND BACKGROUND

On January 4, 2019, Comcast Phone filed its Application to expand its existing CPCN to provide limited facilities-based telecommunication service in Ponderosa’s service territory. As Comcast Phone previously explained, its Application is prompted by a request from the developer of the Tesoro Viejo community in Madera County, who asked Comcast Phone’s cable and broadband affiliate to build a state-of-art network and to market services, including voice offerings, in the community. Coincident with the Application, Comcast Phone requested negotiations with Ponderosa, pursuant to Sections 251-252 of the Communications Act of 1934, as amended (the “Act”), seeking interconnection and related rights under Sections 251(a)-(b).

On February 8, 2019, Ponderosa filed two pleadings which, taken together, ask the Commission to hold Comcast Phone’s Application in abeyance pending resolution of the Commission’s High Cost Fund A (“A-Fund”) Rulemaking (R.11-11-007). Ponderosa claims that the Decision (D.) 14-12-084 (“2014 Decision”) issued in that proceeding precludes consideration of Comcast Phone’s Application at this time.¹ On February 19, 2019, Comcast Phone filed a reply and opposition to the Motion.

The Scoping Memo now seeks additional information on whether the Commission should proceed with consideration of the Application and asks the Parties to answer the five questions set forth below.

III. SCOPING MEMO QUESTIONS AND COMCAST PHONE’S RESPONSES

Question 1: How does Comcast’s assertion that it seeks interconnection in Ponderosa’s territory based on 47 U.S.C § 251(a) and § 251(b), and not § 251(c), change the applicability of Commission policy and decisions?

Response 1: Because Comcast Phone seeks interconnection under Sections 251(a) and (b), as opposed to Section 251(c), there is no legal basis to further delay consideration of Comcast Phone’s CPCN Application.

While federal law recognizes “that in some cases, it might be inappropriate to apply all of the requirements [of Section 251] to smaller or rural telephone companies,”² those limited exceptions are not applicable here. Section 251(f)(1) grants rural telephone companies (referred to herein as rural local exchange carriers or “RLECs”) a standing exemption from the unbundling, collocation, and resale discount obligations of Section

¹ See 2014 Decision.

² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499, ¶ 1262 (1996).

251(c).³ This so-called “Rural Exemption” remains in place unless and until it is terminated by a State commission but, as noted, it applies only to requests for elements under Section 251(c).

The Section 251(f)(1) exemption is not applicable here because Comcast Phone did not request network elements from Ponderosa, nor avail itself of the other incumbent local exchange carrier (“ILEC”) duties under Section 251(c). Rather, Comcast Phone seeks rights only under Sections 251(a) and (b), which Ponderosa must provide. The Commission itself has recognized that the “[r]ural exemption under 47 U.S.C. 251(f) does not remove 47 U.S.C. Sections 251(a) and (b) obligations.”⁴ Comcast Phone’s rights to offer its services in Ponderosa’s service territory and to obtain interconnection with Ponderosa under 47 U.S.C. §§ 251(a) and (b) are fully consistent with Commission policy and decisions.

Beyond Section 251 requirements, 47 U.S.C. § 253(a) bans any state prohibition on “the ability of any entity to provide any interstate or intrastate telecommunications service” and subjects such acts of prohibition to preemption. The Federal Communications Commission (“FCC”) has on multiple occasions preempted a state’s restrictions that prohibited competitors from interconnecting and obtaining certificates to operate in an RLEC territory in violation of Section 253.⁵ Thus, any attempt to interfere with Comcast

³ 47 U.S.C. § 251(f)(1).

⁴ D.14-12-084, mimeo at 97, COL 27.

⁵ See, e.g., *In the Matter of Connect Am. Fund Sandwich Isles Commc'ns, Inc.*, 32 FCC Rcd. 5878 (2017) (preempting exclusive license that effectively bars competition on the Hawaiian home lands); *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd. 11064 (1999) (preempting the enforcement of the Tennessee Authority’s denial of a CLEC’s CPCN application to operate in rural market). While Section 253 preserves certain state authority,

Phone's rights under Section 251, by deferring consideration of the Application, would also violate federal law requirements under Section 253. Of course, the Application and Comcast Phone's ability to compete are inextricably tied with Comcast Phone's interconnection request. Because of the current territorial limitations of its CPCN, Comcast Phone cannot make effective use of its interconnection request unless the Commission considers and grants the Application. As a result, there is no lawful basis for denying Comcast Phone's Application.

Question 2: What are the circumstances particular to Comcast and Ponderosa that requires a decision on the expansion of the Comcast CPCN separately from phase 2 of the R.11-11-007?

Response 2: The Commission should evaluate Comcast Phone's CPCN Application separately from A-Fund Proceeding because that Application is unique to Ponderosa's territory and will not impact the A-Fund.

Rulemaking 11-11-007 focuses on the A-Fund statewide. Comcast Phone's CPCN Application is not a statewide application. It seeks to expand Comcast's Phone's CPCN to serve Ponderosa's territory only, not the territories of the other RLECs.

Moreover, Comcast Phone's entry into Ponderosa's service territory will have limited, if any, effect on Ponderosa and its draw on the A-Fund, obviating any need to address the Application in the A-Fund proceeding. This is demonstrated by the fact that, while there already has been increased competition in Ponderosa's service territory for

that authority can only be exercised on a "competitively neutral basis" which would necessarily bar any deferral of Comcast Phone's request to compete. *See* 47 U.S.C. 253(b); *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999) (denying petition for declaratory ruling that exclusive right-of-way agreement to provide fiber transport capacity is consistent with Section 253).

many years from wireless carriers, over-the-top VoIP service providers, messaging apps, and others,⁶ there has been no corresponding increase in Ponderosa's A-Fund draw. To the contrary, over time, Ponderosa's A-Fund draw has *decreased*.⁷ This is consistent with the experience of the California High Cost Fund-B, which shows that opening ILEC markets to competition actually decreases pressure on such subsidy funds, without sacrificing access to basic telephone service.⁸

Additionally, while Comcast Phone seeks authority to operate throughout the Ponderosa service territory, Comcast Phone initially plans to offer its services only in the Tesoro Viejo area. This minimizes the effect that Comcast Phone's entry will have on Ponderosa.

⁶ For example, the coverage maps on the websites of all four major wireless carriers each show mobile wireless coverage in the Tesoro Viejo area. Moreover, the FCC reports from December 2015 to June 2017 for fixed voice residential subscriptions from Fresno and Madera Counties (where Ponderosa is located) decreased by approximately 11,000 in only two years. *See* Federal Communications Commission, *Voice Telephone Services: Status as of June 30, 2017* (Nov. 2018) (county level subscriptions data) (available at <https://www.fcc.gov/voice-telephone-services-report>.) The decline is presumably related to increased consumer use of the above-mentioned alternatives.

⁷ *Compare* Resolution T-17132 (2009) at 1 (“This resolution also authorizes CHCF-A support for Ponderosa for test year 2009 of \$3,680,994....”) against *In re Ponderosa*, D.17-11-013, mimeo at 2 (“This decision adopts...for Test Year 2018 (TY 2018) including a subsidy draw of \$3,616,969 from the California High Cost Fund-A”).

⁸ California High Cost Fund-B provides subsidies to carriers of last resort for providing basic local telephone 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. Since opening those service territories to competition, 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 February 18, 2019). *See also* D.17-11-013.

Question 3: *Given the Fourth Amended Assigned Commissioner’s Scoping Memo and Ruling in R.11-11-007, can the Commission evaluate Comcast’s CPCN separately from R.11-11-007?*

Response 3: **The Commission can, and should, evaluate Comcast Phone’s Application separately from Phase 2 of the A-Fund proceeding.**

The issuance of the *Fourth Amended Assigned Commissioner’s Scoping Memo* (“A-Fund Scoping Memo”) does not necessitate combining, or deferring, Comcast Phone’s Application with the much more complex, multi-party A-Fund proceeding. The A-Fund Scoping Memo asks over 40 separate questions, only two of which address whether RLEC territories should be opened to competition. Nothing in the A-Fund Scoping Memo refers to limits on review of CPCN applications or territorial expansion requests. Indeed, there is no mention, let alone discussion, in that document regarding the deferral of any CPCN application or interconnection requests in RLEC territories pending completion of the A-Fund proceeding.

In addition, reviewing and approving the Application in the present proceeding will not disrupt the Commission’s review of competition generally in the A-Fund proceeding. The record developed in this proceeding will be helpful to the analysis of competition conducted in the A-Fund proceeding; the Commission will be able to benefit from analysis of real market conditions rather than rely on just a theoretical understanding of competition.

Finally, the A-Fund Scoping Memo sets no timeframe for completion of Phase 2. By contrast, federal law requires that Comcast Phone’s interconnection request be resolved by September 18, 2019.⁹ Addressing the Application now, in this proceeding, as opposed to consolidating it with the A-Fund proceeding, ensures that the Application does not continue

⁹ See 47 U.S.C. § 252(b)(4)(C).

to languish, in conflict with state and federal law and public policy, depriving customers in Tesoro Viejo of choice in facilities-based voice services and negating Comcast Phone's right to enter the service territory.

Question 4: Given the Fourth Amended Assigned Commissioner's Scoping Memo and Ruling in R.11-11-007, what are the policy reasons for and against evaluating Comcast's CPCN separately from R.11-11-007?

Response 4: Sound policy considerations support evaluating Comcast Phone's Application separately from the A-Fund proceeding.

The policy reasons for granting Comcast Phone's Application are compelling. Denial of the Application would prevent consumers in Ponderosa's territory from receiving Comcast Phone's VoIP affiliate's facilities-based voice services while other options (wireless, over-the-top, messaging apps, and others) are freely available. This does not make policy sense and arbitrarily deprives consumers of the benefits of additional choices. Denying or deferring Comcast Phone's Application would, however, send the message to rural Californians and those seeking to invest in rural telecommunications service that the Commission does not prioritize advanced telecommunications in rural areas.

Question 5: Does D.14-12-084 apply to Comcast's application?

Response 5: The 2014 Decision does not preclude review of Comcast Phone's Application in this proceeding.

The 2014 Decision found that the question of whether competitors should be allowed to enter the service territories of the RLECs was not yet "ripe for review."¹⁰ However, that decision was based on (1) the absence, to that point, of any CLEC actually seeking entry; (2) the expectation that one or more of the RLECs would seek relief from

¹⁰ 2014 Decision, mimeo at 47.

competition via one of the legally prescribed methods for doing so (i.e., the procedures set forth in Section 251(f) and Section 253(f) of the Communications Act); and (3) the assumption that CLECs would pursue interconnection via the procedures of Section 251(c) (i.e., unbundled network elements and collocation).¹¹

The situation is very different today. Comcast Phone has applied for authority to provide telecommunication services in Ponderosa's service territory. None of the RLECs has ever petitioned the Commission for relief from competition. Finally, as previously explained, Comcast Phone does not seek interconnection with Ponderosa under Section 251(c). As a result, the procedure laid out in the 2014 Decision, which called for evaluating CLEC entry into the RLEC service territories as part of Phase II of the A-Fund proceeding, is simply no longer controlling.¹²

Moreover, Comcast Phone's Application in this proceeding is consistent with the two-step analysis procedures called for in the 2014 Decision. Such requests were to be deferred until (1) "the Broadband Networks and Universal Service study is completed" and (2) the Commission could evaluate the impact that competition would have on specific RLECs' territories.¹³

¹¹ *Id.* at 39-44.

¹² Even if the deferral policy in the 2014 Decision were controlling here, which it is not, the Commission is not bound precedent. Indeed, the Commission notes this fact in the 2014 Decision. *See, e.g., Util. Reform Network*, D.04-05-024, mimeo at 6 ("Commission is not bound by its own precedent. (*In re Pacific Gas & Electric Co.* (1988) 30 CPUC2d 189, 223-225). It is not legal error for the Commission to deviate from prior Commission decisions. The California Supreme Court explained this long-held principle as follows....Circumstances peculiar to a given situation may justify such a departure.").

¹³ 2014 Decision, mimeo at 46.

The first prong, issuance of the Competition Study,¹⁴ is complete and it squarely favors granting Comcast Phone’s Application. Indeed, the Competition Study concludes that “[o]pening Small ILEC territories to wireline voice competition is not expected to have a significant direct impact on small ILECs”¹⁵ Any additional analysis the Commission believes is necessary can—and should—be done in this proceeding as it would relate squarely to Comcast Phone and Ponderosa, specifically, and not require consideration of numerous unrelated issues.

III. ADDITIONAL ISSUE

The Scoping Memo indicates that part of the impetus for seeking answers to the questions presented in the Scoping Memo is based on Ponderosa’s Motion to Hold in Abeyance. Following up on a point raised by counsel at the February 28, 2019 prehearing conference, Comcast Phone reiterates here the controlling legal standard by which motions for stay are reviewed. In deliberating motions to stay the Commission considers: (1) whether the moving party will suffer imminent irreparable harm if the stay is denied; and (2) whether the moving party is likely to prevail on the merits.¹⁶ This standard applies both to requests to stay final Commission orders and to requests to stay or hold in abeyance an

¹⁴ CPUC Communications Division, *Broadband Internet and Wireline Voice Competition Study in Service Territories of Small Incumbent Local Exchange Carriers* (September 2018) (“Competition Study”).

¹⁵ Competition Study at 47. That is especially likely to be the case here considering the nature of Comcast’s entry into Ponderosa’s service territory—namely, that it is prompted by the Tesoro Viejo community’s request to provide services there. This is a largely greenfield community that is not a significant part of Ponderosa’s current customer base. Thus, Ponderosa will not experience significant customer losses from Comcast’s entry.

¹⁶ See, e.g., *In re Bay Area Rapid Transit District*, D.19-01-022; *Pacific Bell Telephone Co.*, D.08-09-044; *In re Southern California Edison*, D.05-04-040; *Utility Consumers’ Action Network*, D.01-11-069.

active proceeding, as is the case here.¹⁷ As is clear from its Motion, Ponderosa has provided no showing of imminent irreparable harm or likelihood to prevail on the merits. Accordingly, it would be inappropriate for the Commission to grant Ponderosa’s motion here.

IV. CONCLUSION

For the reasons explained above, Comcast Phone requests that the Commission continue its review of the Application in the present proceeding and grant its Application.

Respectfully submitted,

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¹⁷ See *In re Sound Energy Solutions* D.04-07-024 (moving party sought stay an investigation proceeding while the Commission resolved certain legal and jurisdictional issues—the Commission denied the motion because the moving party failed to meet the threshold of the two-part test. In denying the motion, the Commission noted that in addition to failing to show irreparable harm, the moving party also fails to acknowledge the public interest aspects of moving forward with the proceeding); *In re Neighbors for Smart Rail*, D.13-08-005 (party filed a motion for stay of the proceeding based on the Supreme Court’s concurrent review of issues that would allegedly impact the legal basis of the case. The presiding administrative law judge denied the motion for failure to meet the “irreparable harm” test).