

**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 THE PONDEROSA TELEPHONE CO. TO ASSIGNED  
COMMISSIONER'S SCOPING MEMO AND RULING**

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April 19, 2019

Pursuant to the Assigned Commissioner’s Scoping Memo and Ruling dated April 4, 2019, The Ponderosa Telephone Co. (“Ponderosa”) respectfully submits this Response addressing the five questions posed in the Scoping Memo and Ruling regarding the threshold issue of whether Comcast’s request to be a service provider in Ponderosa’s territory should be considered at this time.

## I. ARGUMENT

### A. **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?**

Comcast’s assertion that it seeks interconnection from Ponderosa based on 47 U.S.C. § 251(a) and (b) does not change the applicability of the Commission’s policy and decisions in any respect. This application proceeding does not present the question whether Comcast is entitled to interconnection under Section 251 of the federal Telecommunications Act. Rather, Comcast’s Application to expand its Certificate of Public Convenience and Necessity (“CPCN”) presents the same question that the Commission is currently considering in R.11.11.007: “whether as a matter of federal or state law, and CPUC analysis of the best policy, areas served by [rural telephone companies] should be open to competition from wireline telecommunications carriers.”<sup>1</sup>

To be sure, *separately from this proceeding*, Comcast has requested interconnection from Ponderosa under Section 251(a) and access to certain Section 251(b) elements. As the Commission observed in D.14-12-084, the FCC has concluded

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<sup>1</sup> D.14-12-084, at 32.

that all telecommunications carriers, including incumbent rural LECs, “have a basic duty to interconnect their networks under section 251(a) … [and] to comply with the requirements set forth in section 251(b).”<sup>2</sup> But the FCC “distinguishes between the interconnection requirement for local competition under Section 251(c), from which RLECs are exempt, and the exchange of traffic required of the RLECs and other telecommunications carriers under Section 251(a) and (b).”<sup>3</sup> In other words, interconnection and competition are distinct concepts. The Commission explained the difference this way:

While both interconnection and competition play an important role in telecommunications markets, their purposes are separate and distinct. The purpose of wireline local competition is to allow other wireline carriers to offer competing telecommunications services to end-users. The purpose of rules requiring interconnection, on the other hand, is to allow carriers to link their networks and equipment to facilitate mutual exchange of traffic.<sup>4</sup>

Comcast is proceeding on two distinct tracks. In this application proceeding, it has petitioned the Commission to expand its CPCN, which would have the effect of opening Ponderosa’s service territory to local competition by permitting Comcast to offer wireline local service within the territory. Separately, by letter dated January 18, 2019, Comcast asked that Ponderosa enter into negotiations for an interconnection agreement regarding rights under Sections 251(a) and (b) of the federal Communications Act. Comcast later prepared and sent Ponderosa a draft interconnection agreement.

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<sup>2</sup> *Id.* at 33.

<sup>3</sup> *Id.* at 34.

<sup>4</sup> *Id.* at 40.

Consistent with its duties under federal law, Ponderosa intends to negotiate with Comcast in good faith regarding interconnection. But nothing about that process affects the question at issue in this application proceeding, which is whether to permit wireline local competition in Ponderosa’s service territory. Indeed, Comcast has conceded that these two issues are distinct. In a February 28, 2019 email to Ponderosa, Comcast’s Director of Regulatory Affairs wrote that that “FCC and California regulations permit CLECs to request interconnection *before* receiving state commission authority to operate in a service territory,” so that an interconnection agreement can be in place if and when the Commission “grants [] Comcast’s expansion request” to compete in Ponderosa’s territory.<sup>5</sup> Regardless of what happens between Ponderosa and Comcast regarding the interconnection request, the Commission must separately decide, as a matter of Commission policy and state and federal law, whether to permit wireline local competition in the Small ILECs’ territories—a question that it intends to confront squarely in Phase 2 of the CHCF-A proceeding.<sup>6</sup>

In Comcast’s reply to Ponderosa’s protest to Comcast’s application, Comcast argues that the fact that it had requested interconnection under Sections 251(a) and (b) means that “the issues the Commission deferred addressing” in the CHCF-A Phase 1

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<sup>5</sup> See Exhibit 1 (emphasis added).

<sup>6</sup> See Fourth Amended Assigned Commissioner’s Scoping Memo and Ruling, R.11-11-007 (Mar. 22, 2019), at 4 (determining that one of the issues in Phase 2 shall be “should the Commission open the RLECs’ service areas to wireline voice competition”).

decision “are now ripe for review.”<sup>7</sup> Comcast’s argument reflects a misreading of the Phase 1 decision. The issue that Comcast’s CPCN application raises is whether Ponderosa’s territory should be opened to local competition. In the Phase 1 decision, the Commission did not conclude that the competition question was unripe. To the contrary, it considered that question and reached a provisional determination that it was not in the public interest to open the Small ILECs’ territories to wireline competition.<sup>8</sup> It then went on to hold that any application or petition seeking to contravene the Commission’s provisional determination would not be “ripe for review” until after Phase 2 of the proceeding, in which the Commission would conduct the Broadband Networks and Universal Service studies and evaluate them to reach a definitive determination of the competition issue.<sup>9</sup>

The fact that Comcast has filed a CPCN application and requested interconnection does not make the specific competition issue it raises any more “ripe” than it was at the end of Phase 1. With the Commission not yet having reached a final determination regarding rural competition, it remains the case that Comcast’s CPCN application is subject to the Commission’s order in Phase 1 that it “will defer consideration of any request filed and received subsequent to this Phase I decision to amend CPCNs to include

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<sup>7</sup> Reply of Comcast Phone of California, LLC (U-5698-C) to the Protest of Ponderosa Telephone Co., A.19-01-003 (Feb. 19, 2019), at 4.

<sup>8</sup> D.14-12-084, at 45.

<sup>9</sup> *Id.* at 47 (holding that petitions “to amend the service area of CPCNs to include Small ILEC-served areas” would not be “ripe for review” until after Phase 2 of the proceeding).

Small ILEC areas” until the end of Phase 2.<sup>10</sup> To the extent the competition issue the application raises is ripe, it will be addressed in Phase 2.

**B. 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?**

In Phase 2 of the CHCF-A proceeding, the Commission will consider whether some or all of the Small ILECs’ territories should be opened to local competition. The Commission should make that determination before it considers this Application. If the Commission concludes that the Small ILECs’ territories should not be opened to local competition, this Application should be dismissed. If, however, the Commission concludes that Small ILECs’ territories could be opened to local competition, it can then evaluate whether there are circumstances particular to Comcast’s proposed selective entry into Ponderosa’s service territory that would lead the Commission to deny this Application.

As it did in Phase 1, the Commission must determine whether to open rural territories to competition at all by investigating questions that affect all the Small ILECs equally, including whether the burdens on the CHCF-A fund are outweighed by the purported benefits of cherry-picking by CLECs and whether competition will undermine universal service principles. Every Small ILEC, including Ponderosa, is similarly situated with respect to these fundamental questions of public policy. As the R.11.11.007 Phase 2 Scoping Memo and Ruling notes, Ponderosa is one of 13 Small ILECs whose

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<sup>10</sup> *Id.* at 46.

territories are “subject to evaluation in the [CHCF-A] Rulemaking.”<sup>11</sup> Each of those 13 Small ILECs are subject to identical regulatory requirements, including, most notably, Carrier of Last Resort obligations and the rate-setting process pertaining to wireline voice services.<sup>12</sup> Of the California ILECs, Ponderosa is one of ten that apply for and receive CHCF-A funds.<sup>13</sup> And like the other Small ILECs that draw CHCF-A funds, Ponderosa is almost completely built out: the Mission Consulting Study reports that more than 97% of the households in its service area have access to Ponderosa’s wireline voice service offering.<sup>14</sup>

As the Phase 1 decision recognized, “location-specific fact-finding” regarding the various Small ILECs’ territories may be necessary to decide whether to open *all* Small ILECs’ territory to competition or just some of them.<sup>15</sup> The specific characteristics of Ponderosa’s service territory may make competition inappropriate even if the Commission concludes in Phase 2 that there is no overriding public-interest obstacle to wireline competition in rural territories. But that location-specific analysis can be deferred until the Commission has had an opportunity to reconsider the public-policy determination it provisionally reached in Phase 1 of the CHCF-A proceeding.

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<sup>11</sup> Scoping Memo and Ruling at 3.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 39.

<sup>15</sup> See *id.* at 46–47.

**C. 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?**

The Commission cannot evaluate Comcast’s CPCN separately from R.11-11-007.

In all collateral actions or proceedings, the orders and decisions of the Commission which have become final are conclusive.<sup>16</sup> In Phase 1 of R.11-11-007, the Commission held that (1) applications to expand CPCNs into the Small ILECs’ territories would be held in abeyance until after the Commission finally resolves in Phase 2 whether to open those territories to competition; and (2) that Phase 2 of the CHCF-A proceeding would be the exclusive forum in which the Commission will consider whether to open the Small ILECs’ territories to wireline competition. Unless and until the Commission alters, amends, or rescinds its orders in D.14-12-084, it cannot evaluate Comcast’s CPCN application separately from R.11-11-007.

Although the Commission has continuing jurisdiction to alter or amend its prior orders,<sup>17</sup> it may not do so without giving notice to the affected parties and holding a hearing at which parties are entitled to be heard and introduce evidence.<sup>18</sup> Modifying an existing decision is an “extraordinary remedy that must be exercised with care to keep

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<sup>16</sup> Pub. Util. Code § 1709.

<sup>17</sup> *Id.* § 1708; *see also, e.g., Sale v. Railroad Commission*, 15 Cal. 2d 612, 616 (1940).

<sup>18</sup> *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244–45 (1977).

with the principles of res judicata,” because modification represents a “departure from the standard that settled expectations should be allowed to stand undisturbed.”<sup>19</sup>

The Commission has not held a Section 1708 hearing or reconsidered its orders in D.14-12-084. To the contrary, the Fourth Amended Scoping Memo and Ruling in R.11-11-007, which Commissioner Martha Guzman Aceves issued on March 22, 2019, ratifies and implements the orders set forth in D.14-12-084. The Scoping Memo invites comments on the Broadband Internet and Wireline Voice Competition Study commissioned following Phase 1, and calls for comment on whether, in light of the study, the Commission should open the Small ILECs’ service areas to competition.<sup>20</sup> Nothing in the Scoping Memo casts any doubt on the continued efficacy of D.14-12-084, nor specifically on the order in D.14-12-084 that petitions to expand CPCNs into rural service territories, like Comcast’s here, be deferred until the competition issue is resolved in Phase 2.

**D. 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?**

At least four policy reasons favor evaluating Comcast’s request to compete to provide wireline service in Ponderosa’s service territory in Phase 2 of the CHCF-A proceeding, rather than in this separate CPCN application proceeding.

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<sup>19</sup> D.18-10-033, 2018 WL 5847288, at \*2 (Oct. 25, 2018).

<sup>20</sup> Fourth Amended Assigned Commissioner’s Scoping Memo and Ruling, R.11-11-007 (Mar. 22, 2019), at 4.

First, efficiency militates in favor of deference to the procedure established in D.14-12-084. Rather than consider the question of wireline local competition in rural service territories piecemeal, by deciding CPCN applications and Section 251(c) interconnection requests as they arose, the Commission decided in D.14-12-084 that it would hold all such requests in abeyance and instead re-consider the policy question whether to open all or some of the Small ILECs' territories to local competition in a single comprehensive proceeding—namely, Phase 2 of the CHCF-A proceeding. Comcast has offered no plausible reason why the Commission should abandon its efficient comprehensive rulemaking process in favor of multiple overlapping proceedings presenting identical or nearly identical questions.<sup>21</sup>

Second, considering Comcast's Application in parallel with Phase 2 of the CHCF-A proceeding risks inconsistent rulings. In determining whether to grant Comcast's application to expand its CPCN into Ponderosa's service territory, the Commission will necessarily have to decide whether permitting wireline local competition in Ponderosa's service territory serves the public interest. In the Phase 2 proceeding, the Commission will have to make the same determination, either with respect to particular rural territories or with respect to all of them. Ponderosa's service territory could be opened to local

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<sup>21</sup> See, e.g., *Pacific Bell v. AT&T Commc'ns of Cal., Inc.*, CPUC No. 97-03-016, D.97-09-105, 75 CPUC2d 678 (Sept. 24, 2997) (“efficient deployment of this Commission's resources requires that we decline to exercise our jurisdiction where a fully competent agency is also addressing the same issues”); *Pacific Bell Tel. Co. v. MAP Mobile Commc'ns, Inc.*, CPUC No. 05-11-016, D.06-04-010, 2006 WL 1059026, at \*2 (Apr. 13, 2006) (same).

competition from Comcast in the course of this application proceeding, then closed again at the conclusion of the Phase 2 proceeding.

Third, the basic question whether to open Small ILEC territories to local competition is better made in a comprehensive process like the CHCF-A proceeding rather than in a particularized application, because competition raises public policy questions with a collective impact on stakeholders throughout the state. Opening any particular Small ILEC territory to competition has the potential to impact the CHCF-A fund as a whole. The Mission Consulting study observed that, because Small ILECs will retain their COLR and rate-setting obligations even if exposed to competition, “the financial burden of offsetting decreased revenues is likely to fall on the CHCF-A and its ratepayers,” with the effects being “more pronounced if CLECs engage in cherry picking the most profitable customers in each territory.”<sup>22</sup> These are public policy questions that ought to be addressed collectively by all of the affected stakeholders. Indeed, all of the relevant stakeholders participated in Phase 1 of the CHCF-A proceeding: CLECs and CLEC organizations like Comcast and CALTEL, each of the 13 Small ILECs, and consumer representatives all submitted briefs or comments on rural competition. The same will be true of Phase 2. With this broad input, the Commission will be able to make a more informed decision about the advantages and disadvantages of rural wireline competition than it would be able to make in Comcast’s application proceeding, which presents only one small piece of the broader competition question.

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<sup>22</sup> Mission Consulting Study at 47.

Finally, simple fairness to Ponderosa favors deferring Comcast’s Application. Together with the other Small ILECs, Ponderosa intends to be an active participant in Phase 2 of the CHCF-A proceeding. In connection with that proceeding, it will incur burdensome fees and costs for attorneys and experts, and Ponderosa employees may be required to give testimony. Requiring Ponderosa to participate in a second parallel proceeding raising an identical issue is unduly burdensome, particularly in light of the significant disparity in resources between Ponderosa and Comcast.

Comcast’s Application identifies only a single public policy benefit of evaluating its CPCN application separately from Phase 2 of R.11-11-007: speed. Comcast’s Application argues that it is “unclear” when Phase 2 will be resolved, and “consumers should not have to wait indefinitely to reap the benefits of additional service choices.”<sup>23</sup> That concern has been resolved by the Commission’s issuing the Fourth Amended Scoping Memo and Ruling for Phase 2 of R.11-11-007, which confirms that the competition issue will be considered and decided in Phase 2 and directs interested parties to file opening comments within 60 days. In other words, the Phase 2 proceeding is underway, and there is no reason to think that the Commission’s decision on rural wireline competition will be unduly delayed. Comcast has offered no reason why its Application should supersede the Commission’s established deliberative process.

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<sup>23</sup> Application at 5–6.

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

D.14-12-084 plainly applies to Comcast’s Application—and requires that it be stayed.

First, ordering paragraph 5 of D.14-12-084 states, “We make a preliminary determination that Small Incumbent Local Exchange Carrier’s territories will not be opened to wireline competition at this time.”<sup>24</sup> Comcast’s Application seeks to reverse that preliminary determination with respect to Ponderosa’s territory specifically. In the Application, Comcast observes that the Commission currently “insulate[s] rural local exchange carriers … such as Ponderosa[] from wireline competition,” but urges the Commission to “grant Comcast Phone’s request to enter Ponderosa’s service territory” anyway.<sup>25</sup>

Second, ordering paragraph 5 also states that the question “whether wireline competition should be permitted in some or all” of the Small ILECs’ territories “*will be determined* in Phase 2 of this proceeding.”<sup>26</sup> Contrary to this ordering paragraph, Comcast’s Application asks that the Commission consider the competition question in a parallel Application proceeding instead of Phase 2 of the CHCF-A proceeding.

Third, ordering paragraph 7 of D.14-12-084 states that “[a]ny request filed and received subsequent to this Phase 1 decision to amend certificates of public convenience

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<sup>24</sup> D.14-12-084, at 101.

<sup>25</sup> Application at 4.

<sup>26</sup> D.14-12-084, at 101 (emphasis added).

and necessity to include Small Incumbent Local Exchange Carrier areas” “will be deferred” until the Commission has “determine[d] in Phase 2 whether or not some or all of the Small ILEC areas should be opened to CLEC competition.”<sup>27</sup> Comcast’s Application is a request received after the Phase 1 decision to amend a CPCN to include Ponderosa’s service territory. The unambiguous language of ordering paragraph 7 requires that Comcast’s Application be deferred until the Commission has resolved the wireline local competition issue in Phase 2 of the CHCF-A proceeding.

During oral argument on Ponderosa’s motion to stay at the prehearing conference, Comcast offered a variety of arguments in support of the proposition that D.14-12-084 is “inapplicable” to Comcast’s Application. None of those arguments has merit.

Comcast first argued that D.14-12-084 is inapplicable to its Application because Comcast is not seeking “to draw from the A fund,” “to change the rules of the A funds,” “to open up all small ILEC territories,” or “even … to open up Ponderosa’s territory other than Comcast’s own operation in that market.”<sup>28</sup> The fact that Comcast does not seek to draw from or change the rules of the CHCF-A fund is of no moment, as the Commission has elected to consider the issue of rural wireline competition in the context of the CHCF-A proceeding. Nor does it matter that Comcast’s Application would only permit competition by a single CLEC in a single Small ILEC territory. The Commission’s preliminary determination in D.14-12-084 was that *none* of the Small ILECs’ territories

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<sup>27</sup> *Id.* at 101–02 (emphasis added).

<sup>28</sup> See Feb. 28, 2019 Hearing Transcript, at 10:22–11:9.

would be opened to wireline competition. That determination bars *any* application to introduce competition into the Small ILECs' territories, regardless of how many ILECs or CLECs the application affects.

Comcast next argued that D.14-12-084 is inapplicable to its Application because the competition study contemplated by the Phase 1 decision has been completed.<sup>29</sup> But the completion of the study alone is not enough, because D.14-12-084 ordered that any application to extend a CPCN into a rural service territory would be deferred not merely until the competition study was completed, but until the "Commission has evaluated the study to determine in Phase 2 whether or not some or all of the Small ILEC areas should be opened to CLEC competition."<sup>30</sup> That has not yet occurred.

Third, Comcast argued that D.14-12-084 is now inapplicable because the Commission "based its order to defer review of CPCN applications saying essentially that it was not ripe for review," but now review is ripe because Comcast has submitted a CPCN application and requested interconnection with Ponderosa.<sup>31</sup> Comcast mischaracterizes the Commission's decision. As noted above, D.14-12-084 held that action on a CPCN application was unripe because neither the competition study nor Phase 2 was complete.<sup>32</sup> Nowhere in D.14-12-084 did the Commission suggest that it would consider the competition issue—or a CPCN application posing that issue—upon a

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<sup>29</sup> *Id.* at 11:10–23.

<sup>30</sup> D.14-12-084, at 101–02 (ordering paragraph 7).

<sup>31</sup> Feb. 28, 2019 Hearing Transcript, at 11:24–12:6.

<sup>32</sup> See *supra* at 3–4.

CLEC requesting interconnection, let alone that it would do so in the context of a single Small LEC while an industry-wide evaluation was pending. In fact, it said that it would not.

Finally, Comcast pointed to a variety of facts that, in its view, justify opening Ponderosa's territory to wireline competition from Comcast, including the fact that "Comcast wishes to serve those businesses" and the fact that the developers of the Tesoro Viejo project "reached out to Comcast and asked them" to compete.<sup>33</sup> Comcast's "wishes" are not controlling. Any entrant "wishes" to provide service, but that does not displace the Commission's role in evaluating whether such entry is in the public interest. More fundamentally, these arguments do not justify interrupting the process contemplated by D.14-12-084, which is now in progress. If Comcast believes that facts or Commission policies relevant to the competition issue have changed since the Phase 1 decision was published, the proper venue for raising those issues is the Phase 2 proceeding. But that belief is no basis for contending that D.14-12-084 does not apply. It does, and it requires deferral of Comcast's Application.

## **II. CONCLUSION**

As discussed more fully in Ponderosa's pending motion to stay, the Commission should stay or hold in abeyance Comcast's Application to include Ponderosa's territory in its CPCN until the Commission issues a decision in Phase 2 of the CHCF-A Rulemaking Proceeding.

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<sup>33</sup> Feb. 28, 2019 Hearing Transcript, at 12:7–22.

DATED: April 19, 2019

Respectfully submitted,

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By: /s/ Jordan D. Segall  
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# **Exhibit A**

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**From:** O'Donnell, Beth <Beth\_ODonnell@Comcast.com>  
**Sent:** Thursday, February 28, 2019 12:11 PM  
**To:** Dan Douglas <[dand@ponderosatel.com](mailto:dand@ponderosatel.com)>  
**Subject:** RE: request for interconnection negotiations

Dan,

As you might have noted from my letter requesting negotiations with Ponderosa, FCC and California regulations permit CLECs to request interconnection before receiving state commission authority to operate in a service territory. Interconnection agreement negotiations can take up to nine months to complete. Comcast Phone expects the CPUC to grant its request to expand the territorial scope of its CPCN within or close to that timeframe. Regardless of the length of time taken by the CPUC to address Comcast's application, we are seeking interconnection now in order to have the agreement between our companies in place and in effect as soon as the CPUC grants the Comcast's expansion request.

Per your request, we will provide you with a proposed agreement to begin discussions in late next week or early the following week. I look forward to working with you and your team.

Thanks,  
Beth O'Donnell