BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

COMMENTS OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON PROPOSED DECISION ALLOWING AND ADOPTING CONDITIONS FOR WIRELINE COMPETITION IN SMALL LOCAL EXCHANGE CARRIER SERVICE TERRITORIES

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the California Cable & Telecommunications Association ("CCTA")[1] hereby submits these comments on the *Proposed Decision Allowing and Adopting Conditions for Wireline Competition in Small Local Exchange Carrier Service Territories* ("Proposed Decision" or "PD"), issued on July 6, 2020, in the above-captioned docket.

I. INTRODUCTION

The PD's proposal to add competitive local exchange carriers ("CLECs") to the list of providers that can compete in California's 13 small, rural local exchange carrier ("Small LEC") territories is a positive step forward. Adding CLECs to the competitive mix will benefit consumers by expanding the range of service and pricing options available in those communities. However, the proposed imposition of new conditions on CLECs entering those areas (the "Proposed New CLEC Rules"), set forth in Appendix A of the PD, would be harmful to CLECs and ultimately to consumers. The Proposed New CLEC Rules are procedurally improper, discriminatory, overly burdensome, and – perhaps worst of all – an unnecessary deterrent to competitive entry in the

[1] CCTA is a trade association consisting of cable providers that have collectively invested more than $40 billion in California's broadband infrastructure since 1996 and whose systems pass approximately 96% of California's homes.

Small LEC territories. Accordingly, CCTA urges the Commission to modify the PD to remove the imposition of additional conditions on CLECs entering Small LEC territories beyond those already required under state and federal law.

II. DISCUSSION

A. Opening the Small LEC Territories to Competition is Consistent with State and Federal Law and Good Public Policy that Will Benefit Consumers.

As CCTA has previously explained and as the PD recognizes, federal and state law explicitly require that wireline competition be permitted in the Small LEC service territories, just as it is permitted in every other area of California and the nation.[2] CCTA applauds the Commission for recognizing this legal requirement and its potential public benefits. Consumers in these areas have already benefited from the lower prices and array of services offered by wireless and over-the-top service providers, and they will reap additional benefits when they are able to purchase competitively priced and innovative CLEC offerings.[3] CCTA therefore encourages the Commission's swift and immediate lifting of the ban on CLEC competition in the Small LEC territories and requests changes to the PD consistent with these comments so consumers can experience the benefits of competition.

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[2] *See* CCTA Comments on the Fourth Amended Scoping Memo and Ruling of Assigned Commissioner at 3-5 (filed May 21, 2019) ("May 21, 2020 CCTA Comments"); CCTA Comments on ALJ's Ruling Seeking Comment on General Guidelines for Allowing Wireline Competition in Areas Served by Small Local Exchange Carriers at 3 (filed Jan. 6, 2020) ("Jan. 6, 2020 CCTA Comments"). *See also* PD at 7-8 ("Section 253(a) is a mandate to allow competition throughout California, including the service territories of the Small LECs…. Pub. Util. Code Section 709.5(a) reflects the Legislature's intent that all telecommunications markets, including the service territories of the Small LECs, be open to competition. … Therefore, pursuant to Section 253(a) and Pub. Util. Code Section 709.5(a), we determine that wireline competition must be allowed in the service territories of the Small LECs as a matter of law.").

[3] *See, e.g.*, CCTA Comments at 14-15, 17 (filed Jan. 6, 2020); PD at 8. Indeed, in addition to its findings with respect to the PD, the Commission has confirmed on multiple previous occasions that competitive alternatives in local telecommunications markets lead to improved service quality, expanded product and service capabilities, and greater reliability, among other things. *See, e.g.*, D.94-09-065; D.95-07-054; D.96-02-072; D.96-03-020; D.96-04-052; and D.16-12-025.

B. Additional Conditions Should Not Be Imposed on CLECs Entering Small LEC Territories Beyond Those Required Under Existing Law.

The Commission should not impose any additional conditions or competition rules beyond those currently required under state and federal law.[4] Doing so would violate due process, be arbitrary, capricious, and discriminatory, and would conflict with the Commission's long-standing policies favoring technological neutrality. Further, the Proposed New CLEC Rules would impose undue burdens on those CLECs wishing to compete in Small LEC areas and would actually discourage the development of competition in these previously closed service territories.

1. Adopting the Proposed New CLEC Rules Would Violate Due Process and be Arbitrary and Capricious.

As a condition to opening the Small LEC territories to competition, the PD proposes "updating" the CLEC rules adopted in D.95-07-054 as applied to CLECs seeking to enter Small LEC markets.[5] The PD's proposal is procedurally defective, and there is no record evidence justifying the imposition of these new rules as conditions on entry into Small LEC markets.

As a matter of law, the Commission cannot adopt decisions on subjects that are outside the scope of proceedings in which they arise.[6] The imposition of the Proposed New CLEC Rules is beyond the scope of this proceeding. "Updating" the current CLEC rules "due to the passage of time" was never identified as an issue for consideration in the long history of this proceeding.[7]

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[4] While 47 U.S.C. § 253(b) does allow state imposition of conditions, as noted in the PD, Section 253(b) itself limits conditions to those that are made on a "competitively neutral basis" and consistent with 47 U.S.C. § 254. *See* PD at 40 (Conclusion of Law 4). The Proposed New CLEC Rules do neither – they have no direct relationship to preserving universal service, as envisioned in Section 254, and they are not competitively neutral.

[5] *See* PD at 19.

[6] *See S. Cal. Edison v. Pub Util. Comm'n*, 140 Cal. App. 4th 1085, 1106 (2006).

[7] Failure to provide adequate notice violates due process. *See People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 632 (1954) ("Due process as to the commission's … actions is provided by the requirement of adequate

Moreover, few, if any, of the Proposed New CLEC Rules have any basis in the underlying record, and are therefore arbitrary and capricious.[8]

For example, the PD proposes requiring all CLECs seeking to enter a Small LEC territory to file "territory maps with the Commission that detail the area in which the CLECs seek to provide voice wireline service" and that, *inter alia*, "display[] each end-user location to which the CLECs are seeking authorization."[9] Over the lengthy history of this proceeding, the Commission never sought comment on this proposal and not a single party ever proposed adopting such an unnecessary and overly burdensome mapping condition.

Nor is there any record basis for the proposed elimination of the "300 Foot Rule" (Existing Condition No. 2). There is, likewise, no record basis for the imposition of the new compliance requirements proposed in the PD, including No. 10 (required compliance with *prospective* network hardening rules), No. 11 (proposed application of General Order 168), No. 13 (compliance with affiliate transaction rules), No. 14 (duty to disclose technology plans), No. 15 (new program compliance requirements), or No. 16 (proposed compliance with LifeLine program rules).

If the Commission wanted to impose new rules on CLECs seeking entry into a Small LEC market, it should have provided adequate notice and an opportunity to present evidence and

notice to a party affected and an opportunity to be heard before a valid order can be made."). *See also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 237 Cal. App. 4th 812, 859 (2015).

[8] *See Lewin v. St. Joseph Hosp. of Orange*, 82 Cal. App. 3d 368, 387 n.13 (1978) (citing *Brock v. Superior Court*, 109 Cal. App. 2d 594, 607-608 (1952) ("[T]he determination whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support must be based on the 'evidence' considered by the administrative agency."); *see also* Pub. Util. Code § 1757.1(a)(4) (in reviewing the lawfulness of a Commission decision issued in a quasi-legislative proceeding, a court of appeals may consider whether the "decision of the [C]omission is not supported by the findings").

[9] *See* PD at 22-23; *id.* at App. A, 1-2.

comment. Doing so this late in the game and without relevant parties receiving prior notice of the proposed changes is procedurally unlawful.[10]

2. The Proposed New CLEC Rules Are Discriminatory and Not Technology Neutral.

Imposing the Proposed New CLEC Rules through this proceeding would unfairly discriminate against wireline voice technologies offered by CLECs, particularly since others providing competing services do so in these territories without such obligations.[11] Imposing additional rules exclusively on CLECs would erect a discriminatory barrier to competition. Additionally, the Proposed New CLEC Rules (i) are discriminatory because they only apply to CLECs entering Small LEC territories, thereby placing CLECs on unequal footing depending solely on where in California they choose to compete for customers, and (ii) violate California's policy favoring technology neutrality, thus depriving consumers of the benefits of competition.[12]

3. The Proposed New CLEC Rules Are Unduly Burdensome.

The Proposed New CLEC Rules are also unduly burdensome and will effectively deter competitive entry. For example, their application only to CLEC operations in Small LEC territories would require a CLEC operating throughout the state to administer two different sets of

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[10] *See People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 632 (1954) ("Due process as to the commission's … action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 237 Cal. App. 4th 812, 859 (2015).

[11] *See, e.g.*, Jan. 6, 2020 CCTA Comments at 2 ("Wireless services are not just available in urban areas, but also in the rural communities that the Small ILECs primarily serve. In 2018, a Commission staff report found that mobile voice is available from two or more service providers in 93 percent of rural households in the State. And competition is not just from wireless. Over-the-top VoIP services of one kind or another are now nearly ubiquitously available, including in Small ILEC territories, from providers like Google, Vonage, Facebook, and others.") (citations omitted).

[12] *See, e.g.*, D.14-01-036 at 165 (Conclusion of Law 9) ("The Moore Act, Public Utilities Code Section 871 *et seq.*, is technology neutral."); D.95-07-054 at 24 (rejecting proposals to apply CLEC competition rules only to wireline voice service so as to "maintain a technology-neutral policy").

compliance requirements depending on where its operations are located (*i.e.*, one set of rules for their operations in the Small LEC territories and another set of rules for their operations throughout the rest of California).

The mapping requirement is likewise unduly burdensome, discriminatory, and a potential security threat. The PD proposes that CLECs wishing to serve Small LEC territories be required to submit maps describing their existing physical facilities and detailed information regarding each end user location serviced, which must include "geo-located street addresses with latitude and longitude coordinates."[13] Such maps will require significant resources to verify and prepare without any obvious or corresponding benefit.[14] Voice telephony competition has flourished over the past 25 years without such a requirement, and there is no record evidence that supports imposing such an onerous requirement now.

Given the burdensome nature of many of the new requirements called for in the PD, and the corresponding lack of notice, opportunity for comment, or supporting record evidence justifying their imposition, the Proposed New CLEC Rules should be deleted from the PD. They should be addressed, if at all, in a separate proceeding specifically designated for that purpose.

4. The Proposed New CLEC Rules Will Harm Competition.

Rather than promoting competition consistent with its decision to open up the 13 Small LEC markets, the Proposed New CLEC Rules would deter competitive entry and run contrary to long-standing Commission efforts to promote deployment of broadband and advanced services in rural communities. Both the Legislature and the Commission have repeatedly recognized that

[13] *See* PD at 22; *id.* at App. A, 2.

[14] Moreover, this requirement would be a regulatory outlier. For example, in the context of broadband mapping, the federal Broadband DATA Act (Pub. Law. No. 116-130, enacted March 23, 2020) expressly does not require providers to submit service address-level data.

rural communities face significant challenges to accessing advanced communications services.[15] The ability to offer voice service as a bundled part of a service offering generally improves a CLEC's business case in favor of market entry. However, by imposing additional burdensome conditions on CLECs hoping to enter Small LEC markets, the PD is significantly deterring a carrier's incentive to enter. CCTA respectfully submits that the CPUC refrain from imposing such rules because they would inhibit market entry and are contrary to the Commission's broadband deployment objectives.

III. CONCLUSION

CCTA commends the PD with respect to its decision to finally open California's 13 Small LEC territories to competition from CLECs. However, CCTA opposes the PD's imposition of Proposed New CLEC Rules that go beyond those that presently exist under federal and state law. Consequently, and for the reasons discussed above, CCTA respectfully requests that the Commission modify the PD to eliminate the Proposed New CLEC Rules proposed in the PD's Section 3.4 and Appendix A, and that the PD instead retain as applicable those general conditions that currently apply to CLECs offering services throughout the state.[16]

Respectfully submitted,

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[15] *See, e.g.*, D.11-06-031; D.11-12-029; D.19-06-025.

[16] *See* Appendix 1 attached hereto for CCTA's proposed modifications to the PD's Findings of Fact and Conclusions of Law.

APPENDIX 1

Proposed Modifications to Findings of Fact and Conclusions of Law

Finding of Fact

…

5. CLECs may tend to serve only portions of Small LECs' service areas ~~that are profitable. 6. CLECs may "cream skim" profitable customers~~ rather than serve significant portions of Small LEC service territories, particularly customers
whose costs to serve are high.

~~7.~~ 6. Because CLECs generally do not receive High Cost Fund-A and other subsidies, it is unlikely that any CLECs seeking to expand into a Small LEC's service territory would ~~be willing to~~ serve all customers in that territory through robust and reliable technologies suitable to the difficult terrain, population density, weather and other characteristics of Small LEC service territories.

…

Conclusions of Law

4. The Commission has the authority under Section 253(b) of the Telecommunications Act of 1996 to impose, on a competitively neutral basis and consistent with Section 254 of the Telecommunications Act, conditions that preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

…

11. It is reasonable to apply the conditions adopted in D.95-07-054 as general conditions to CLECs that expand into the service areas of the Small LECs~~, with updates as necessary to reflect the passage of time~~.

…

~~12. A "must serve" requirement for voice wireline service in the CLEC service area as self-defined by a CLEC in its application for entry into a Small LEC service area is reasonable.~~

~~13. It is reasonable for a CLEC to make a good faith effort to serve a territory that reflects the proportional demographics of the Small LEC territory it is entering because it supports non-discriminatory behavior.~~

~~14. It is reasonable to require CLECs to comply with rules the Commission ultimately adopts in the Emergency Disaster Relief proceeding (R.18-03-011), including demonstrating in their applications for entry into the service territories~~

~~of Small LECs that they have adequate back-up power to ensure reliability during a significant power outage in any new facilities that they build.~~

~~15. It is reasonable to require CLECs to serve all customers in their self-designated areas, which may be smaller than the exchange.~~

~~16. Location-specific conditions to protect ratepayers should be developed in individual CLEC applications to offer voice wireline service in the service territories of Small LECs.~~