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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 (Filed November 10, 2011)

OPPOSITION OF

CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE CO. (U 1009 C)
KERMAN TELEPHONE CO. (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE CO. (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C)

("Independent Small LECs")

TO MOTION OF DIVISION OF RATEPAYER ADVOCATES TO FREEZE THE 2012 "WATERFALL" PROVISIONS OF THE CALIFORNIA HIGH COST FUND A; STAY APPLICATION (A.) 11-12-011 OF KERMAN TELEPHONE COMPANY D/B/A/ SEBASTIAN; AND SUSPEND PROCESSING OF ALL A-FUND COMPANY APPLICATIONS FOR REVIEW OF RATES, CHARGES, AND RATES OF RETURN

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I. INTRODUCTION.

Pursuant to Rule 11.1(e) of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules") Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Company (U 1009 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C) and Volcano Telephone Company (U 1019 C) ("Independent Small LECs") hereby submit this Opposition to the Motion of The Division Of Ratepayer Advocates ("DRA") To Freeze The 2012 Waterfall Provisions Of The California High Cost Fund A; Stay Application (A.) 11-12-011 Of Kerman Telephone Company D/B/A Sebastian; And Suspend Processing All A-Fund Company Applications For Review Of Rates, Charges, And Rates Of Return ("Motion"). The aspect of the Motion seeking to stay the Kerman Telephone Co. ("Kerman") rate case has already been denied through an email Ruling of the Administrative Law Judge ("ALJ") dated January 23, 2012, so this Opposition addresses only the elements of the Motion addressing DRA's request to freeze all General Rate Cases ("GRCs") and modify the operation of the California High Cost Fund A ("CHCF-A").

DRA's Motion should be swiftly and completely denied. In a three-page Motion containing no authority, DRA seeks to fundamentally alter the regulatory structure under which the Independent Small LECs operate. DRA asks that this be done without a hearing, without a vote of the Commission, and without any due consideration of the impacts that it would have on Independent Small LECs or their ratepayers – ratepayers that DRA is supposed to protect. DRA's request blatantly ignores statutory constraints and Commission procedural rules, and would call upon the ALJ to decide critical, substantive issues in this proceeding before the parties have even fully commented on the OIR, before any evidence has been submitted, and before any hearings have been held. DRA provides no good cause for granting this motion, even if it could be lawfully granted. Literally, DRA's only stated justification for this proposed miscarriage of due process is "it would be inefficient to process individual company GRCs concurrent with the Commission's broad review of the A-Fund." *Motion*, at p. 2.

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Simply as a matter of Commission procedure, DRA's Motion cannot be granted. DRA's Motion violates Public Utilities Code Section 1708, Commission Rules 1.7, 3.2, 9.1, 11.1, and 16.4, and numerous other longstanding Commission practices and procedural conventions. Should the Commission wish to modify the GRC processes or the operation of the CHCF-A, it must do so through the normal administrative process, and only following a full and fair opportunity for parties to be heard, and a full consideration of the legal constraints, the policy impacts, and an assessment of the attendant costs and benefits. Even if the basic procedural infirmities in the Motion could be overlooked, DRA's Motion is wholly lacking in support, and would expose the Independent Small LECs to violations of their due process rights and unlawful takings of utility property without just compensation.

DRA has raised issues that are to be determined in the proceeding, and they must be determined through the normal process in the proceeding. For all of these reasons, the Motion must be denied.

II. DRA'S MOTION IS FACIALLY DEFECTIVE AND PROCEDURALLY IMPROPER.

DRA's Motion contains fatal procedural flaws. The Motion: (1) violates Public Utilities Code Section 1708 by attempting to reverse Commission rules adopted after a hearing without holding a new hearing; (2) requests substantive relief that cannot be conferred through an ALJ Ruling; (3) exceeds the scope of this proceeding by seeking a substantive outcome not contemplated by the recently-issued Order Instituting Rulemaking ("OIR"); (4) seeks relief through a motion that could only be provided through a Petition for Modification under Rule 16.4; (5) does not even attempt to meet the standard for staying Commission rules or decisions, even if it could be done through this procedure; (6) fails to state "facts and law supporting the motion or specific relief sought;" and (7) violates Rule 1.7 by seeking compound relief, in part with respect to matters in another docket. On any of these grounds alone, the Motion should be denied, but together, they represent a fundamental failure by DRA to respect the procedures under which Commission proceedings are conducted and Commission decision-making takes place.

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A. This Motion Is Foreclosed Under Public Utilities Code Section 1708.

This motion cannot statutorily be granted, as the rules that DRA seeks to "freeze" were adopted following hearings. Under Public Utilities Code Section 1708, when the Commission seeks to "rescind, alter, or amend any order or decision made by it," it must provide an "opportunity to be heard as provided in the case of complaints." Pub. Util. Code § 1708. As explained in *California Trucking Association v. Public Utilities Commission*, 19 Cal.3d 240 (1977), complaint cases require "a hearing at which parties are entitled to be heard and to introduce evidence, and the commission must issue process and enforce the attendance of witnesses." *California Trucking Association*, 19 Cal.3d at 245 (citing Pub. Util. Code § 1705). In rejecting the Commission's contention that "a trial-type hearing" is not required to satisfy Section 1708, the California Supreme Court found that "the phrase 'opportunity to be heard' implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal." *Id.* at 244. The Supreme Court also dismissed the Commission's citation to precedent in which the hearing requirement had not been followed, noting that "the statutory provisions in section 1708 are so clear as to the necessity for a hearing that the commission's consistent failure to grant hearings in prior cases cannot be deemed determinative." *Id.* at 245.

The rules that DRA now seeks to upset clearly meet the trigger for the Section 1708 hearing requirement. DRA's Motion requests termination of the rate case process and the "waterfall" mechanism reflected in the CHCF-A rules in D.91-09-042. D.91-09-042 is a decision on rehearing following legal challenges to the CHCF-A rules adopted earlier that year in D.91-05-016. In the proceeding leading up to the adoption of D.91-05-016, "two days of hearings were held in the matter," in which several parties presented witnesses and evidence was formally examined. D.91-05-016, 40 CPUC.2d 40, 41 (1991). The proceeding also involved numerous other substantive opportunities to examine the proposed rules that are now embodied in an Appendix to D.91-09-042.

The Commission's law and motion process does not provide a sufficient vehicle through which to satisfy conduct the required "hearing at which parties are entitled to be heard and to

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introduce evidence, and the commission must issue process and enforce attendance of witnesses." *California Trucking Association*, 19 Cal.3d at 245. As it did in *California Trucking Association*, there is no doubt that the Supreme Court would find the motion process that DRA has invoked inadequate to satisfy Public Utilities Code Section 1708. On this ground alone, DRA's motion must be denied.

DRA itself has invoked the requirements of Public Utilities Code Section 1708 on numerous occasions to insist that the Commission hold evidentiary hearings prior to modifying previous Commission decisions. Ironically, DRA raised the restrictions of Section 1708 and *California Trucking Association* in a recent proceeding in which the GRC rules for small water companies were being modified. *See* D.06-06-037 (*In Re Practices and Policies for Processing General Rate Cases and to Revise General Rate Case Plan for Class A Water Companies*). In D.06-02-010, the Commission had adopted an advice letter process for certain water companies to initiate GRCs, and DRA complained that the proposal had been introduced in the proposed decision, and that it reverses a prior Commission decision without the benefit of any evidence or associated hearings.

On rehearing, DRA raised the exact same procedural violation that its Motion now commits:

> DRA asserts it did not have proper notice that the advice letter issue was to be considered in this proceeding because adoption of the new procedure was first raised in the proposed decision. DRA cites to *California Trucking Association v. Public Utilities Commission* . . . for the proposition that its right to notice and opportunity to be heard is not satisfied merely by giving a party the opportunity to submit written objections to a proposed decision. . . . In its comments on the proposed decision, DRA objected to adoption of the advice letter procedure without reopening the record to take comment and/or evidence from the parties on relevant considerations. (Comments of DRA on the Draft Decision, dated February 1, 2006, pp. 4-7.) [internal citations omitted]

D.06-06-037, 2006 WL 1749635 at *2. The Commission agreed with DRA, and reversed the advice letter process because "our action in D.06-02-010 alters or modifies requirements set forth in prior Commission decisions." *Id.* at *3. The Commission further cited its own previous directive that "[w]e intend that any modification of our rules should be done in a manner that

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satisfies due process requirements . . . and that any modification of the existing rules be accomplished by traditional mechanisms providing for full stakeholder participation." *Id.* (internal citations omitted).

The procedural constraints that DRA relied upon in *In Re Practices and Policies for Processing General Rate Cases* are the same constraints that DRA now ignores. That previous proceeding involved an examination of changes to rules for water GRCs; this proceeding involves an even more fundamental set of proposed changes to Small ILEC GRC processes. DRA cannot invoke Section 1708 where it benefits DRA's agenda, and then violate Section 1708 where it preserves the due process rights of other parties. DRA correctly captured the procedural limitations imposed by the Public Utilities Code in seeking rehearing of D.06-02-010, and those same procedures must apply here.

B. Substantive Rules Adopted In Commission Decisions Cannot Be Modified Through An ALJ Ruling.

DRA's Motion seeks to modify longstanding Commission decisions reflecting major policy determinations that have direct and substantive impacts on utilities. Such relief is not available through an ALJ Ruling; it could only be accomplished through a vote of the Commission, and even then, only if all of the other procedural infirmities cited herein could be overcome.

As the Commission has often stated, "it is well settled that the Commission speaks through its written decisions." *See, e.g.,* D.00-05-047, at p. 6. Only the Commission can modify the substantive rules under which regulated utilities operate, and the Commission cannot speak without a vote of the Commission, and a written decision. This is particularly true as to rules that establish the fundamental ratemaking mechanisms for a class of utilities, such as the CHCF-A Rules in D.91-09-042.

The role of an ALJ is to "act as an assistant to the assigned commissioner in quasi-legislative cases." Pub. Util. Code. § 1701.4. ALJs have a defined set of duties under Commission Rule 9.1:

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> The Administrative Law Judge may administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. The Administrative Law Judge may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory and other authorities under which the Commission functions and with the rules and policies of the Commission.

Rule 9.1 (emphasis added). As these authorities reflect, ALJs fulfill a function in guiding Commission proceedings, but the ultimate decision-making authority resides with the Commission. ALJs can "rule upon objections or motions" but only if they "do not involve final determination of proceedings." Rule 9.1.

If DRA's Motion were granted, even as an interim measure, it would constitute a "final determination" of a substantive matter that is solely within the province of the Commission, not its professional staff. DRA's Motion would suspend the basic ratemaking process under which the Independent Small LECs operate by depriving them of the ability to file rate cases. Rate cases are the means by which rate-of-return utilities address new expense items, new required investments, and other items affecting their earnings. The CHCF-A rules are intimately linked to the rate case process, as D.91-09-042 makes CHCF-A funding contingent upon the filing of regular rate cases. If an ALJ Ruling were to curtail this process, it would undermine the effect of Commission decisions that have been in place for more than two decades. Only the Commission itself could reach such a conclusion, and even then, only after following correct procedures.

C. Commission Procedural Rules Affecting Substantive Rights Cannot Be Modified Through ALJ Ruling.

In addition to upsetting longstanding Commission decisions, DRA's Motion would freeze the effect of a major Commission rule governing the substantive rights of a class of utilities. Rule 3.2 permits utilities, including the Independent Small LECs, to file "applications for authority to increase rates, or to implement changes that would result in increased rates." Rule 3.2(a). The rights conferred by this rule are precisely the rights that DRA seeks to remove. An ALJ ruling cannot override a substantive Commission rule, and doing so as to a critical process of this sort

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would constitute a clear violation of the Independent Small LECs' due process rights.

The Commission's rules are not optional guidelines, and they must be followed absent a decision of the Commission to change them. Public Utilities Code Section 1701(a) provides in pertinent part that "[a]ll hearings, investigations, and proceedings shall be governed by this part and by the rules of practice and procedure adopted by the Commission." Pub. Util. Code § 1701(a). The Commission's Rules cannot be waived through an ALJ ruling upon a motion from a party in a docket. Only the Commission itself could modify its own rules, and that would take a properly-framed administrative vehicle backed by a valid administrative process, followed by a vote of the Commission.

D. The Relief Proposed in DRA's Motion Would Exceed the Scope of this Proceeding As Defined in the OIR.

DRA seeks relief that is directly at odds with the current scope of the proceeding, as defined in the OIR. Where the Commission adopts a decision that exceeds the defined scope of a proceeding, it will be deemed not to have "proceeded in the manner required by law," in violation of Public Utilities Code Section 1757.1(a)(2). In *Southern California Edison Co. v. Public Utilities Commission*, 140 Cal.App.4th 1085 (2006), the Commission adopted a prevailing wage requirement that exceeded the scope of the proceeding as it had been defined in the Scoping Memo. The Court of Appeal annulled the requirement, noting that "the PUC violated its own rules by considering the new issue." *Southern California Edison Co.*, 140 Cal.App.4th at 1106.

If the Commission were to grant the relief that DRA seeks, it would similarly violate the lawful bounds of this proceeding as it is presently framed. A Scoping Memo has not yet been issued in this proceeding, so the limitations of the proceeding are defined by the OIR itself. If the Commission had intended for an immediate stay of the CHCF-A rules or the rate case process to be a consideration in this proceeding, the Commission would have included these items as issues in the OIR. The Commission's judgment in framing the OIR was to examine a wide range of issues related to the CHCF-A and rate-of-return regulation, but to do so in the course of the proceeding. DRA cannot lawfully upset that judgment by immediately undoing the very rules that the Commission determined should be examined in a thoughtful manner, with a full opportunity

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for development of a record and examination of evidence. It would be particularly egregious to do through an ALJ Ruling in response to this Motion.

E. DRA's Motion Seeks Relief That Would Require a Petition for Modification.

DRA's Motion is essentially an Application or Petition for Modification[1] that DRA has recast as a motion. DRA seeks modification of numerous Commission decisions, including D.91-09-042 and D.91-05-016. Even if it could avoid the other fatal defects in its Motion, DRA's Motion would still be improper under the framework that the Commission has established for parties to seek modification of previous Commission decisions.

Rule 16.4 is the proper vehicle by which a party may "ask the Commission to make changes to an issued decision." DRA's Motion seeks modification of several previous Commission decisions, but does not invoke the correct procedure. Requesting a "freeze" of rate cases and a suspension of the "waterfall" mechanism represents a fundamental modification to D.91-09-042 the decisions underlying it. Moreover, revisions to these rules will have substantial impacts on Independent Small LECs, who could be put at grave risk of being unable to earn a reasonable rate of return without the ability to file a rate case. The substantive harms to Small LECs that could result from DRA's requested relief are precisely why the Commission requires the submission of Petitions for Modification. Once the Commission has reached a judgment on a policy issue, and enacted a rule to embody that policy judgment, the affected parties rely on that rule and conform their conduct to it. DRA's attempt to disguise a Petition for Modification as a Motion cannot avoid the requirements of Rule 16.4.

Moreover, DRA's Motion could not be treated as a Petition for Modification because it does not conform to the Commission's Rules with respect to such petitions. Rule 16.4(b) states that a petition for modification "...must propose <u>specific wording</u> to carry out all requested modifications to the decision." Rule 16.4(b) (emphasis added). DRA's Motion provides no such

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[1] Rule 16.4 governs Petitions for Modification, but the Commission often requires these Petitions to be submitted as Applications, particularly where the underlying decision seeking be modified is of an older vintage. This occurred when the Independent Small LECs sought a modification to the CHCF-A rules in D.91-09-042 through A.09-01-002.

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specific wording. This is a particularly serious omission, as it does not provide the parties with adequate guidance concerning the specific relief DRA seeks. Rule 16.4(b) goes on to provide that "[a]ny factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed." DRA provides no citations to the record in any proceeding, and offers only a bare statement concerning alleged "inefficiency" of processing Independent Small LEC rate cases during this OIR to justify the relief sought. Finally, Rule 16.4(c) requires a party filing a petition for modification to serve "[a]ll parties to the proceeding or proceedings in which the decision proposed to be modified was made." It does not appear that DRA has made any effort to complete such service. Other parties may have an interest in the outcome of DRA's proffered Motion, and, on the basis of this language, would be entitled to notice of a Petition for Modification by service of a copy in compliance with the Commission's rules.

F. DRA's Motion Fails to Meet the Standard for Staying a Commission Decision.

Even if DRA could validly submit a motion to stay a prior Commission decision to an ALJ under these circumstances, DRA has not even attempted to meet the standard for such a stay. Stays of Commission decisions are rarely granted, and when they are granted, it is almost always in the context of an application for rehearing following a full administrative process. DRA seeks to stay a set of decisions more than 20 years following their adoption in a new proceeding before the administrative process has even taken place, or a single piece of evidence has been examined.

The Commission has addressed on many occasions the requirements for staying effectiveness of a Commission decision. For example, in *Cox California Telecom v. Global NAPs California*, D.07-04-048 (April 12, 2007) the Commission emphasized two important requirements. It stated:

> In considering whether good cause exists to grant a stay of a Commission decision pending rehearing, the Commission applies a variety of factors. Two of the primary factors are: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; and (2) whether the moving party is likely to prevail on the merits.

D.07-04-048, at p. 2. The Commission has applied the same criteria in connection with other requests for a stay. *See* D.02-04-063, p. 11 (April 22, 2002).

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In its Motion, DRA does not even attempt to satisfy these requirements. DRA's only reference to any harm is an allegation of "inefficiency" if the Independent Small LECs are to continue to file rate cases on the current schedule. DRA does not even allege that this purported harm is irreparable. In addition, and even more clearly, DRA has neither attempted to make or made any showing that it is likely to prevail on the merits. As noted, there is no record in this proceeding yet that could possibly support such a conclusion. It is not even clear what "prevailing on the merits" might mean at this preliminary point in this proceeding. At this point, the proceeding consists of many questions to address, not allegations to adjudicate. On this additional ground, DRA's Motion must be denied.

In addition to the fact that DRA has not satisfied either of the two principal requirements for a stay, its Motion ignores the harmful impact on the Independent Small LECs were it to be granted. The Commission has considered the balance of potential harms between the parties in evaluating stay requests. In D.00-02-056, for example, the Commission noted that "[i]n considering whether to impose a stay, the Commission also balances harm to the applicant or the public interest if the decision is later reversed, versus harm to other parties or the public interest if the decision is affirmed." D.00-02-056, at p. 3.

In this case, the harm to the Independent Small LECs of granting the requested stay could be extraordinary. As rate of return carriers, if Independent Small LECs lack the ability to file and have the Commission determine rate cases on a timely basis, they risk being unable to earn a reasonable rate of return and recover their legitimate costs of providing service to the public. This would constitute an unlawful taking if created by Commission ratemaking action. It could also negatively impact rural consumers by preventing the Independent Small LECs from making critical infrastructure investments or recovering key expenses that will allow for maintenance of existing facilities. In addition, since the Commission adopted the CHCF-A on an evidentiary record, one must infer that the Commission has found that the CHCF-A is in the public interest, and it is evident from the Commission's prior decisions that it has considered the CHCF-A to be in the public interest. To grant a stay without any showing by DRA on these subjects would seriously jeopardize the interests of the Independent Small LECs and their customers. These

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harms cannot be outweighed by any harm that DRA could reasonably allege, let alone the scant justification offered in the Motion.

Indeed, even the "inefficiency" that DRA cites is undercut by the relevant facts. Absent unusual circumstances, the only pending rate case that DRA will be called upon to address during 2012 is the rate case filed by Kerman on December 28, 2011. No other small telephone company GRC has been filed, so the "inefficiency" that DRA proffers is minimal. Kerman has requested rate relief on a track to result in a decision during 2012. For many reasons stated in the Independent Small LECs' opening comments on the OIR, including the pending clarifications to federal universal service reforms in the FCC's *Connect America Fund Order* (FCC 11-161), the issues in this proceeding cannot be reasonably resolved in that same timeframe. Accordingly, the timeframe appropriate for the Kerman rate case will elapse before the issues in this proceeding can reasonably be addressed. DRA will not likely face any additional rate case burdens until January of 2013, when the next set of rate cases will be filed, so any perceived "inefficiency" in the ordering of the issues that DRA raises is at least a year away. Moreover, the Independent Small LECs believe that the process is operating just as it is intended – the policy choices should be made before any rules in the CHCF-A process are modified, or the rate case process affected.

Even if DRA had requested a stay through a correct procedure, it has not met the standard for such a stay. DRA's must be denied on this additional basis.

G. DRA's Filing is Defective as a Motion.

Motions before the Commission are governed by Rule 11.1. Rule 11.1(d) states that "[a] motion must concisely state the facts and law supporting the motion and the specific relief sought." As is noted above, DRA's Motion refers only to alleged inefficiency of proceeding with Small LEC rates cases now, and offers no legal or record support for the relief sought. DRA's proposed relief is also inadequately defined. Finally, DRA's Motion violates Rule 1.7, as it asks the ALJ to "address unrelated subjects" and to "take essentially different types of action." Rule 1.7(a). The Motion as originally framed sought both to modify D.91-09-042 and to stay the Kerman rate case in A.11-12-011. Based on the Independent Small LECs' experience, this flaw alone should have caused the Commission's Docket Office to reject the filing of the Motion.

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III. GRANTING DRA'S MOTION WOULD CONSTITUTE ARBITRARY AND CAPRICIOUS, PREJUDICIAL ACTION BY THIS COMMISSION.

Even if the Commission could overlook the many fatal procedural infirmities in the Motion that compel its denial, the Motion asks the Commission to take an arbitrary and capricious action based on no record evidence in a proceeding that has barely begun. The outcome that DRA seeks to effectuate through this Motion is at the core of the substantive issues in this proceeding. Although the CHCF-A cannot legally be "eliminated," as DRA suggests, the future structure of the CHCF-A and of rate-of-return regulation are issues in the proceeding. *Motion*, at p. 2. The OIR states the Commission's intent to "explore whether the current fourteen small ILECs should continue to be classified as rate-of-return carriers. *OIR*, at p. 25. Similarly, the OIR asks a variety of questions about the operation of the CHCF-A, and seeks comment about how the CHCF-A should operate in the future. These are exactly the issues that DRA seeks to prejudge through its Motion. It would turn the administrative process on its head if parties could bring motions in the initial months of a proceeding to adopt policy outcomes on the very issues that the proceeding has been scoped to evaluate.

Further, granting this Motion would constitute clear "arbitrary and capricious" decision making by the Commission when compared to a recent outcome involving the <u>same parties</u> regarding the <u>same set of rules</u>. In A.09-01-002, the Independent Small LECs brought an Application for Modification of the very same decision that DRA now seeks to modify, D.91-09-042. The Independent Small LECs sought a modification – through the correct procedure – to avoid the ambiguities and potential customer rate shock of having to keep rates at 150% of AT&T's basic, local residential rate. In denying the Application, the Commission deferred the issue to the upcoming CHCF-A proceeding, the docket in which this Opposition is now filed. D.10-02-016, at p. 16 (O.P. 3). The Commission could have granted the relief the Independent Small LECs were seeking, but chose instead to allow the administrative process to play out. If the Commission were to make the exact opposite decision as to DRA's proposed relief as to the same exact set of rules, it would endorse a quintessentially "arbitrary and capricious" outcome.

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IV. THE COMMISSION CANNOT STAY THE EFFECTIVENESS OF A PROGRAM THAT HAS BEEN MANDATED BY STATUTE.

In seeking to stay of the rate case process and CHCF-A processes under D.91-09-042, DRA asks that the Commission curtail the functioning of the CHCF-A program in its entirety. Since the operation of the CHCF-A is compelled by Public Utilities Code Sections 739.3 and 275.6, the Commission cannot grant DRA's Motion without violating direct statutory directives to continue the program. In addition, in SB 3 (Padilla 2011), the Legislature recently renewed the CHCF-A until January 1, 2015. SB 3 received no negative votes in either house of the Legislature, so "freezing" or staying the rules that are at the heart of the CHCF-A program would contradict a direct and recent Legislative mandate.

V. STAYING RATE CASES AND THE CHCF-A PROGRAM WOULD EXPOSE THE INDEPENDENT SMALL LECS TO AN UNLAWFUL TAKING.

The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." The takings clause "limits the power of the states to regulate, control, or fix prices that producers charge consumers for good or services." *20th Century Ins. Co. v. Garamendi* 8 Cal.4th 216, 292 (1994). In *Federal Power Commission (FPC) v. Hope Natural Gas Co.* 320 U.S. 591, 603 (1944) and *Duquesne Light Co. v. Barasch* 488 U.S. 299, 307 (1988), the U.S. Supreme Court held that an unlawful taking or confiscation occurs where a utility commission causes a utility to have to charge an unjust or unreasonable rate such that they cannot earn a reasonable rate of return.

The Independent Small LECs experience changes in operations on a routine basis that affect their revenue requirements, and if they are prevented from seeking ratemaking relief to adjust to those circumstances, they are deprived of an opportunity to earn their lawfully-authorized rates of return. As rate of return carriers, these companies need to have available a mechanism to adjust their rate and/or CHCF-A draws to account for those operational changes. Such operational

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changes include expense increases, requirements to invest in additional plant, changes in customer demand and access line loss or gain, state regulatory changes, and federal regulatory changes. The two most recent rate cases demonstrate the operational changes that create the need for rate cases. A.10-12-012 (Foresthill) and A.09-10-004 (Siskiyou). Although those two cases were resolved by settlement, the evidence in the records shows that the companies, without rate relief, would have earned less than their authorized rates of return. Even if there were CHCF-A companies that did not need to file a rate case in a particular year, any prohibition on their doing so regardless of the facts pertaining to a particular carrier would potential to create an unconstitutional taking of utility property without just compensation.

VI. CONCLUSION.

DRA's Motion contains deep and insurmountable procedural flaws, as described above. Granting this Motion would effectuate a manifest injustice and denial of due process to the Independent Small LECs, and potentially other parties. The Motion should be wholly and swiftly denied.

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