

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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

Rulemaking 11-11-007
(Filed November 10, 2011)

**REPLY COMMENTS OF THE OFFICE OF RATEPAYER
ADVOCATES ON THE PROPOSED DECISION OF
COMMISSIONER SANDOVAL**

TRAVIS T. FOSS
Staff Counsel

Office of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-1998
travis.foss@cpuc.ca.gov

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these Reply Comments¹ to the Opening Comments of the Small LECs on the November 17, 2014 Proposed Decision of Commissioner Sandoval (PD).

**II. THE PD DOES NOT MISSTATE THE APPLICABLE LAW ON
BROADBAND IMPUTATION**

The PD does not incorrectly state the law with regards to broadband imputation, as argued by the Small LECs.² The PD correctly states that Public Utilities (PU) Code Section 275.6 is silent on the broadband revenue imputation issue, and that it is a normal ratemaking mechanism within the Commission’s jurisdiction.³ The PD needs no changes to its discussion of applicable law.

The Small LECs cite to various policy concerns in an attempt to manufacture legal issues where there are none. For example, there is simply no basis to conclude that broadband imputation requires “a rate design that cannot reasonably fulfill intrastate revenue requirement.”⁴ Section 275.6 requires the Commission to authorize A-Fund subsidies in “amounts sufficient to meet the revenue requirements established by the commission.” Nothing in the PD suggests the

¹ This Reply Brief does not address every issue in the Small LECs’ Opening Comments on the PD. ORA’s silence on any issue is not intended to indicate agreement.

² Small LECs’ Opening Comments, at 2.

³ PD, at 21 and Conclusion of Law #2.

⁴ Small LECs’ Opening Comments, at 3.

Commission would do otherwise. Broadband imputation would be part of the legitimate rate design used by the Commission to calculate the Small LECs' revenues need to meet their revenue requirements; it would not prevent them from "fulfilling their intrastate revenue requirement."

The Small LECs also argue that broadband imputation violates "federal statutory and regulatory standards" for unregulated Internet service.⁵ The sole support for this policy argument is a citation to an FCC order that holds that DSL services are not subject to federal Title II regulation.⁶ However, the PD correctly points out the inherent contradiction in the Small LECs' position; namely, that the Small LECs are willing to accept regulation of Internet service where it benefits them, but cry foul where it does not. Neither A-Fund subsidies for broadband infrastructure nor imputation of broadband revenues are illegal, because the FCC has not preempted state regulation of rural carriers.⁷ By advocating for SB 379, the Small LECs' agreed to continue to accept classic rate regulation as a trade-off for receiving state subsidies for broadband investments.

Finally, the Small LECs argue that broadband imputation would be an unconstitutional "taking" because it would deny the Small LECs a reasonable rate of return.⁸ However, the PD correctly concludes that broadband imputation would not be an illegal "taking."⁹ Under well-established Constitutional doctrine, "a state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public'."¹⁰ Under the Fifth Amendment, a ratemaking order only "protects utilities from being restricted to rates that are so 'unjust' as to be confiscatory."¹¹ Here, the Small LECs have made no showing that imputation would be confiscatory.

⁵ *Ibid.*

⁶ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC No. 05-150, FCC Rcd 14853 (2005) (DSL modem not common carrier telecommunications service). It is simply not true that the entire Internet is unregulated. Look no further than Section 275.6, which permits investments in broadband infrastructure to be included in the rate base for regulated telephone companies, in return for accepting rate-of-return regulation.

⁷ PD, at 18.

⁸ Small LECs' Opening Comment, at 3.

⁹ PD, at 22 and Conclusion of Law #2.

¹⁰ *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 301-302.

¹¹ *P.R. Tel. Co. v. Telecomm. Regulatory Board of P.R.* (2001) 665 F.3d 309, 323 (internal citations and quotations omitted).

III. RAISING THE PRICE CAP ON BASIC RESIDENTIAL SERVICE RATES IS NOT THE SAME AS RAISING RATES

The Small LECs justifiably argue that the PD imposes rate increases which, if imposed as rate increases *per se*, would be excessive.¹² The PD appears to raise basic residential rates from \$20.25 to \$30, partially adopting the parties' recommendations but doing so in a way that undercuts the parties' positions. In its Reply Comments filed after the hearing, ORA recommended adopting the FCC's \$30 cap as a strict ceiling, so that basic residential local rates can go no higher than \$30 total (inclusive of taxes and fees). ORA further recommended that the actual rate increase be considered in each Small LECs' GRC.¹³ While the PD acknowledges that the FCC's cap functions as a ceiling, the Ordering Paragraphs do not accurately reflect that the \$30 is a cap, not a rate increase. Not only that, but the PD adopts the \$30 rate increase exclusive of fees and taxes, which would bring the typical customer bill to approximately \$37 total.

The Small LECs' Opening Comments recognize and agree with ORA, that the \$30 should rightfully represent a cap or a benchmark, and that if the PD in fact raised rates to \$30 exclusive of fees and taxes, there has been no notice to customers and no discussion during the hearings or in briefs about the reasonableness of a 48% rate increase.¹⁴

On this issue, ORA agrees with the Small LECs that an increase from \$20.25 to \$30 is excessive, and that this proceeding is not the proper proceeding to consider actual rate increases. The Small LECs' customers have received no notice of the increase, and a 48% increase will likely come as quite a shock to most customers. The PD must be changed to reflect that the \$30 ceiling is not a rate increase *per se*, but a rule that allows the carriers to implement rate increases in the future, only after proper notice and hearings.

IV. ALLOWING THE SMALL LECS TO APPEAL THE CORPORATE PRICE CAPS SUBVERTS AND NEGATES THE PURPOSE OF HAVING PRICE CAPS

The Small LECs argue that the corporate expense caps are "inconsistent with the weight of the record evidence", but they fail to point out what evidence they are referring to.¹⁵ Again, imposing expense caps is a policy decision that does not require additional "evidence" here,

¹² Small LECs' Opening Comments, at 5.

¹³ ORA Reply Comments, filed October 10, 2014, at 44.

¹⁴ *Ibid.*

¹⁵ Small LECs' Opening Comments, at 8.

because the FCC has already expended much time and effort in developing a record upon which to base these averages. Moreover, this record contains no evidence showing that the Small LECs' service territories are "higher costs" area compared to the rest of the nation. ORA acknowledged in its Reply Comments that it is evident that San Francisco and Los Angeles are more expensive, but not necessarily Oakhurst or Eureka.¹⁶

At every step in this proceeding, ORA has made recommendations intended to streamline the process and incant efficiency. The Small LECs, however, have opposed all such steps, on the grounds that more process and more paperwork is necessary. Here, the Small LECs have again advocated for a slower more inefficient process, by advocating that the corporate expenses caps are merely a rebuttable presumption that can be rebutted in every GRC.¹⁷ However, this merely serves to frustrate and negate federal policy, as well as the stated intent of the Commission here to manage the A-Fund more efficiently. ORA's recommendation to eliminate from the PD the Small LECs' ability to challenge corporate expense caps should be adopted.

The Small LECs' make a proposal that if any corporate expenses that exceed the caps are deemed unreasonable, then any corporate expenses below the cap are also automatically deemed reasonable.¹⁸ While ORA cannot support such a tradeoff, in the interests of efficiency, ORA can support a compromise where any corporate expenses below the cap are automatically deemed reasonable, so long as the Small LECs' corporate expenses above the cap are automatically deemed unrecoverable without appeal.

V. ORA AGREES THAT THE TWO-PRONG TEST FOR A-FUND SUBSIDIES ADJUSTMENTS FOR FEDERAL SUBSIDIES DECREASES SHOULD BE CLARIFIED

The Small LECs request "further clarification" with regards to A-Fund subsidy adjustments for federal subsidy decreases.¹⁹ ORA agrees that the PD needs to be clarified. It is apparent that other parties also find the two-prong test confusing at best. However, ORA

¹⁶ ORA Reply Comments, filed October 10, 2014, at 42. Small LECs' witness Mr. Douglas alleges in his Reply Testimony that California's "labor costs, health care costs, [and] regulatory costs" are higher, but he does not state whether this is also true for California's rural areas, and provides no data or studies whatsoever.

¹⁷ Small LECs' Opening Comments, at 8.

¹⁸ *Id.*, at 9.

¹⁹ *Id.*, at 9.

recommends that the PD be modified to simply state that, pursuant to Section 275.6(c)(4), the A-Fund should provide support “in an amount sufficient” to make up “the portion of the revenue requirement” not provided by federal subsidies, so long as doing so does not frustrate federal policy. ORA’s Opening Comments provide two recent examples where the FCC specifically articulated efficiency goals in its programs, and if the A-Fund is used to make up the difference, those goals are negated. Thus, ORA’s test would be simple: Did the FCC decrease its subsidies in order to incentivize efficiency? If so, the A-Fund subsidies should not be increased.

VI. CONCLUSION

ORA submits these Reply Comments in response to Comments by the Small LECs to the proposed decision of Commissioner Sandoval. ORA hopes that these Reply Comments will assist the Assigned Commissioner and the ALJ to advance the proceeding effectively.

Respectfully submitted,

/s/ TRAVIS T. FOSS

Travis T. Foss

Attorney for the Office of Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-1998
Email: travis.foss@cpuc.ca.gov

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