FILED
7-12-16
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules.	R.11-12-001 (Issued December 1, 2011)

OPENING COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE TELECOMMUNICATIONS COMPANIES REGARDING ALTERNATE PROPOSED DECISION OF COMMISSIONER CATHERINE J.K. SANDOVAL ADOPTING GENERAL ORDER 133-D

July 12, 2016

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 500
San Francisco, CA 94111
Telephone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

Richard H. Levin, Attorney at Law
309 South Main St.
P.O. Box 240
Sebastopol, CA 95473-0240
Tel.: (707) 824-0440
rl@comrl.com

Counsel for CALTEL

Pursuant to Commission Rule 14.3, the California Association of Competitive Telecommunications Companies ("CALTEL") submits these opening comments on the Alternate Proposed Decision of Commissioner Sandoval (APD).

I. INTRODUCTION

As CALTEL noted in its opening comments on President Picker's proposed decision (PD), CALTEL has been an active participant in this proceeding since its inception and was one of the original advocates for the opening of this proceeding. The Order Instituting Rulemaking (OIR) specifically recognized the substance of CALTEL's advocacy, noting in particular the nexus between retail and wholesale service quality, and the impact of poor performance by AT&T and Verizon (now Frontier) on competitive carriers, and on competition:

> …since CLECs rely on copper facilities owned by URF ILECs, deteriorating facilities and extended out-of-service repair times negatively impact customer choice by increasing costs of CLECs through compensating customers to restore confidence in their service. If this confidence cannot be restored, it creates an anti-competitive environment by removing CLECs as a viable alternative to the URF ILECs.[1]

For that reason, CALTEL continues to support the Commission moving forward with adoption of service quality refunds and carrier penalties, even though such measures will impose new regulations on CLECs as well as ILECs. CALTEL's member companies continue to believe that meaningful penalties are essential as part of an effort to deter *de facto* retirement of the last-mile copper facilities on which the major ILECs' retail and wholesale customers rely.

The Digest of Differences between the PD and APD summarizes four primary differences between the two proposed decisions. CALTEL does not object to any of those proposed changes, and in fact wishes to clarify that it has *never opposed* the extension of Major Service Interruption reporting obligations on VoIP providers, contrary to the references in footnote 18 of

[1] Order Instituting Rulemaking at p. 11.

the APD. CALTEL briefly outlines its position below, and requests that footnote 18 be modified accordingly.

However, there is one determination that is unchanged from the PD that CALTEL believes is factually and legally incorrect, and which should be modified: i.e., the PD's finding that CLECs should not be permitted to request mitigation of fines for missing maintenance measures due to substandard performance of an underlying facilities provider.

II. DISCUSSION

A. Footnote 18 Incorrectly Concludes that CALTEL Opposes the Extension of Major Service Interruption Reporting Obligations to VoIP Providers

The "Digest of Differences Between Commissioner Michael Picker's Proposed Decision and the Alternate Proposed Decision of Commissioner J.K. Sandoval" notes that one of the four substantive differences between the two proposed decisions is that "Major Service Interruption reporting obligations are extended to entities subject to Public Utilities Code Section 285."[2]

CALTEL was surprised to see its October, 2014 comments referenced in footnote 18 of the APD indicating that it opposed such a determination. Nothing could be further from the truth, and CALTEL regrets that its comments could be misinterpreted to lead to such a conclusion. Many of CALTEL's member companies offer interconnected VoIP services as well as legacy TDM-based services, and in most cases they would be hard pressed to try to separate out major service interruptions that implicated one type of service over the other. For that reason, CALTEL agrees that providing copies to the PUC of any major service interruption reports that are filed with the FCC is not only not burdensome, but that having to redact or modify reports to limit the reporting to TDM services would add unnecessary complication and

[2] However, it appears to CALTEL that the PD currently makes this same determination, and that there is no substantive difference between the two proposed decisions with regard to this issue.

burden. CALTEL therefore respectfully requests that Footnote 18 of the APD be modified to remove the reference to CALTEL's October, 2014 comments as shown in Attachment A.

B. Fines Imposed on CLECs for the Maintenance Measures Should Be Mitigated to Only Include Conditions over Which the CLEC Has Direct Control

1. CALTEL's Mitigation Proposal is Both Fair and Reasonable

As background, CALTEL explained in its opening comments on the OIR in this proceeding, and in the proceeding that preceded it, that any fines imposed on CLECs for missing the Out of Service or Trouble Report maintenance measures must take into consideration the CLECs' dependence on the quality of ILEC wholesale performance which is indisputably beyond the CLECs' control. This is because the overwhelming majority of CLEC service outages involve "last-mile" facilities leased from a large ILEC like AT&T or Verizon (now Frontier), for which the large ILEC provides all maintenance and repair. As a result, the duration of CLEC customer outages arising from issues with ILEC last mile facilities will never be less than the time it takes for the ILEC to dispatch a technician and restore service.

CALTEL previously included data in the record of this proceeding that explained and quantified this problem,[3] and recommended that any fines imposed on CLECs for the maintenance measures only include trouble reports or outage intervals that are directly attributable to the CLEC. As CALTEL previously explained, such an adjustment would be both fair and reasonable,[4] since CLECs will be required to issue refunds subject to Section 8 of the draft General Order, and will no doubt be forced to continue to engage in other remediation

---

[3] *See, e.g.,* CALTEL Comments on CD Staff Report, dated March 30, 2015, at p. 3.

[4] Such an adjustment is also practicable, as CALTEL has previously demonstrated that CLECs possess the detailed trouble ticket data needed to objectively and reliably calculate such an adjustment. *Id.*

efforts to restore customer confidence in the future reliability of their networks while receiving no offsetting remediation from their ILEC suppliers.

Therefore, in its comments on an earlier version of the PD, CALTEL proposed that the fines process outlined in Section 9 of the draft General Order be modified to add the following:

> An URF CLEC will be permitted to request a reduction or suspension of a fine for either the Customer Trouble Reports or Out-of-Service measures based on detailed root cause analysis data that shows that the measure was missed (or the degree to which it was missed) due to problems or delays caused by the ILEC from which the CLEC leases the line to the end-user's location. The CLEC will support its request by providing detailed root cause analysis data that segregates trouble reports or portions of outages over which it had control from those that were ILEC-caused, and will recalculate penalty amounts to include only those trouble reports or portions of outages that were CLEC-caused. Data that is deemed confidential may be filed under seal.[5]

CALTEL notes that under its proposal, a CLEC's request for a reduction or suspension of any calculated fine amount is just that—a request. The CLEC would be required to provide root cause analysis details that support its request, including relevant wholesale performance measurement results that it received from the ILEC (in particular PM 19, Customer Trouble Report Rate, and PM 22, POTS Out of Service Less Than 24 Hours).[6] Such a request would be subject to the Dispute Resolution procedures outlined in Section 9.2 of the draft General Order.

2. In Rejecting CALTEL's Mitigation Proposal, the APD Incorrectly Concludes that Section 252 Interconnection Agreements Provide Sufficient Recourse From Underlying Facilities Providers

Like the PD, the APD rejects CALTEL's proposed mitigation proposal, reasoning that:

> The CLEC's (sic) request to be exempted from the fine mechanism is also not persuasive. Like other telephone carriers, the CLECs have a responsibility to provide safe and reliable service to their customers, and customers are indifferent to the underlying source of their service. If a CLEC outage is due to substandard service by an underlying

[5] CALTEL Opening Comments on the Proposed Decision of Commissioner Picker Adopting General Order 133-D, dated December 2, 2015, at p. 7.

[6] *See* D.07-09-009, Appendix I, for the list of and business rules for the wholesale performance measurements that currently apply to AT&T California and Verizon California. Confidential underlying data should be permitted to be filed under seal.

> facilities-based carrier or a failure of facilities over which the CLEC has not (sic) direct control, CLECs have recourse against their underlying facilities-based providers through contractual agreements that track outages and other performance failures.[7]

CALTEL wholeheartedly agrees with the second sentence. CALTEL member companies strive to manage the relationships with all of their external suppliers in such way that is transparent to their end user customers. But the last sentence is unfortunately not accurate for a number of reasons, as described below, the most important being that the Commission itself has unequivocally found otherwise.

First, it is important to understand that the only last-mile circuits used by facilities-based CLECs to serve residential and small business customers (i.e. the types of CLECs and customers that fall within the parameters of the maintenance measures), are unbundled copper loops. And these facilities are only provided by ILECs to CLECs because Section 251(c) of the Act requires that they be, making the only applicable "contractual agreements" Interconnection Agreements (ICAs) mandated by Section 252.

Furthermore, the only "recourse" for substandard performance in these ICAs is the Performance Improvement Plan (PIP) adopted by the Commission in 2002, *and it is only applicable to one of the four large URF ILECs (AT&T).* While the Commission expressed its hopes that the AT&T PIP would incentivize good wholesale performance, the Commission also clearly recognized that it would not provide full protection against potential anti-competitive behavior by AT&T:

> Given the level at which we set the payments or billing credits today, we consider them to be an inducement of appropriate market behavior rather than penalties. This record does not support the determination that the incentive payments will be "fair compensation" to a harmed CLEC. What constitutes fair compensation to the CLECs would be extremely difficult to calculate. Moreover, the goal of the proceeding is not to

---

[7] APD at p. 31.

provide "insurance" payments to a CLEC (that it will receive fair compensation while it is being discriminated against), but to ensure that there is a competitive market.[8]

The APD's conclusion that CLECs have sufficient recourse in contractual agreements with ILECs is inconsistent with the Commission clear understanding in setting up the compensation mechanism that it would not be sufficient to make CLECs whole in the face of ILEC transgressions. Certainly, there is no calibration of the potential penalties CLECs may face under the PD and the APD and the compensation available for violations of the PIP.

Second, the ability of ILECs to declare a *force majeure* condition under the wholesale performance measurement plan and obtain broad exemptions from making incentive payments further reduces a CLEC's hope for any type of meaningful recourse.

3. If the Commission Does Not Adopt CALTEL's Mitigation Proposal, ILECs May Be Economically Motivated to Provide Poor Performance to Individual CLECs to Increase Their Costs and Potentially Force Them Out of Business

It is no secret that the requirements imposed on ILECs pursuant to the federal Telecom Act (Act), and in particular the requirement to provide access to unbundled last-mile facilities, render them unwilling suppliers of those inputs to CLECs. Absent Commission oversight and the adoption of appropriate regulatory backstops, an ILEC is economically motivated to harm competitors by providing sub-standard wholesale inputs.

If a CLEC's exposure to service quality fines is not mitigated as proposed by CALTEL, an ILEC will be free to choose to target individual CLECs by providing substandard performance that will result in fines. Over a relatively short period of time, this strategy will significantly drive up the CLEC's costs, impair its reputation with customers, and ultimately lead to a market exit. The Commission must not encourage such an anti-competitive outcome.

[8] D.02-03-023, Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company, Issued March 7, 2002.

III. CONCLUSION

For all of the reasons described above, the process for assessing fines on URF CLECs contained in draft General Order 133-D should be modified to adopt CALTEL's mitigation proposal as documented in Attachment A.

Respectfully submitted,

July 12, 2016

/s/ Richard H. Levin

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 500
San Francisco, CA 94111
Telephone: (925) 465-4396
Email: deyoung@caltel.org

Richard H. Levin, Attorney at Law
309 South Main St.
P.O. Box 240
Sebastopol, CA 95473-0240
Tel.: (707) 824-0440
rl@comrl.com

Counsel for CALTEL

Attachment A

Recommended Change to Footnote 18:

[18] AT&T Opening Comments to the October 2014 Staff Report at pp. 14-20, Verizon Opening Comments to the October 2014 Staff Report at pp. 3, CTIA Opening Comments to the October 2014 Staff Report at pp. 1-2, ~~CALTEL Opening Comments to the October 2014 Staff Report at p. 7~~, CCTA Opening Comments to the October 2014 Staff Report at p.1-4 and Cox Opening at p. 11.

Recommended Additions to Findings of Facts:

The overwhelming majority of CLEC service outages involve "last-mile" facilities leased from a large ILEC like AT&T or Verizon (now Frontier), and therefore the duration of CLEC customer outages arising from issues with ILEC last mile facilities will never be less than the time it takes for the ILEC to dispatch a technician and restore service.

CLECs' only "recourse" for substandard performance by underlying facilities-based providers is the Performance Improvement Plan (PIP) adopted by the Commission in 2002, and it is only applicable to one of the four large URF ILECs.

The ability of ILECs to declare a *force majeure* condition in order to obtain broad exemptions from making incentive payments under the PIP further reduces a CLEC's hope for any type of meaningful recourse.

Recommended Additions to Conclusions of Law:

It is fair and reasonable to permit CLECs to request the adjustment of any fines for the maintenance measures to only include trouble reports or outage intervals that are directly attributable to the CLEC.

In D.02-03-023, the Commission recognized that the payments required by AT&T to CLECs under the Performance Improvement Plan (PIP) were meant to be an inducement of appropriate market behavior rather than penalties, and would not provide full protection against potential anti-competitive behavior.

If a CLEC's exposure to service quality fines is not mitigated as proposed by CALTEL, an ILEC is free to choose to target individual CLECs by providing substandard performance that will result in fines that over a relatively short period of time, have to potential to significantly drive up the CLEC's costs, impair its reputation with customers, and ultimately lead to a market exit.

Recommended Changes to Draft General Order 133-D

9.6 Advice Letter Tabulating Fine

The performance of any telephone corporation that does not meet the minimum standards shall submit annually, by February 15 of the following year, a Tier II Advice Letter that shows by month each Service Quality measurement that it did not meet the minimum standards and the applicable fine.

The advice letter shall contain detailed calculations using MS Excel spreadsheets (or a format specified by the Communications Division) with explanations of how each fine was calculated and assumptions used in the calculation. If the advice letter is accepted, then fines shall be payable to the California Public Utilities Commission for deposit to the California General Fund.

The minimum annual fine shall be no lower than the registration fee for a CPCN.

An URF CLEC will be permitted to request a reduction or suspension of a fine for either the Customer Trouble Reports or Out-of-Service measures based on detailed root cause analysis data that shows that the measure was missed (or the degree to which it was missed) due to problems or delays caused by the ILEC from which the CLEC leases the line to the end-user's location. The CLEC will support its request by providing detailed root cause analysis data that segregates trouble reports or portions of outages over which it had control from those that were ILEC-caused, and will recalculate penalty amounts to include only those trouble reports or portions of outages that were CLEC-caused. Data that is deemed confidential may be filed under seal.