

Decision 14-02-044

February 27, 2014

BEFORE THE PUBLIC UTILITIES OF THE STATE OF CALIFORNIA

In the Matter of the Application of
Kerman Telephone Co. (U1012C) d/b/a
Sebastian, to Review Intrastate Rates
and Charges and Rate of Return for
Telephone Service Furnished within the
State of California, And to Modify
Selected Rates.

Application 11-12-011
(Filed December 28, 2011)

**ORDER MODIFYING DECISION 13-10-051
AND DENYING REHEARING OF MODIFIED DECISION**

Decision (D.) 13-10-051¹ denied a motion by Kerman Telephone Company, doing business as “Sebastian” (hereinafter Kerman) for an interim rate increase of \$5,412,943 from the California High Cost Fund-A (CHCF-A or Fund-A) program, and it also stays Kerman’s pending rate case application (A.11-12-011) and freezes Kerman’s Fund-A draw at 100%. Other features of the CHCF-A program remain in effect during the freeze, e.g., annual CHCF-A funding adjustments via the Advice Letter process, as well as the ability to file an emergency application for rate relief.

Kerman is one of 14 Small Incumbent Local Exchange Carriers (Small ILECs), under the Commission’s jurisdiction that, pursuant to *Re Pacific Bell* (1988) 28 Cal.P.U.C.2d 371 [D.88-07-022], and *Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1991) 40 Cal.P.U.C.2d 40 [D.91-05-016], as modified by D.91-09-042, is subject to rate of return regulation and is eligible to receive funding from the CHCF-A. Since the program’s inception, the Fund-A provides “a source of supplemental revenue to [Small ILECs] . . . whose basic exchange access line service

¹ All citations to Commission decisions and resolutions are to official pdf versions which are available on the Commission’s website at:
<http://docs.cpuc.ca.gov/cyberdocs/Libraries/WEBPUB/Common?decSearchDsp.asp>.

rates would otherwise be increased to levels that would threaten universal service.” (Resolution (Res.) T-17385 at p. 2 (issued on February 28, 2013).)²

D.91-09-042 adopted a phase-down of CHCF-A funding, known as a “waterfall.” (D.91-09-042, Appendix D.) Under the waterfall provision, funding levels are set at 100% for the first three years following the completion of a GRC, and are reduced to 80% the fourth year, 50% the fifth year and zero thereafter. In addition, Small ILECs (including Kerman) may additionally request annual CHCF-A funding adjustments through the Advice Letter (AL) process. Eligibility for annual supplemental funding is determined through a means test.³ (Res. T-17427 at pp. 6 and 13 Finding of Fact No. 2.)

One month prior to Kerman’s filing A.11-12-011, we instituted a rulemaking proceeding (R.11-11-007 or OIR). The OIR discusses at length the changed regulatory environment since institution of the CHCF-A program, and various policy reasons necessitating our thorough review of the CHCF-A program, as well as policies and practices associated with it, and sets forth the issues to be addressed in that proceeding. (R.11-11-007 at pp. 31-32.)

The background of D.13-10-051 is discussed in the challenged decision at pages 2-9. Kerman timely filed an application for rehearing of D.13-10-051. Kerman’s application for rehearing of D.13-10-051 reiterates many, if not all, of the same arguments it has previously raised. Kerman contends that D.13-10-051 errs because it violates various provisions of the Public Utilities Code⁴ by wrongfully refusing to set Kerman’s rates through rate of return regulation, and forcing it to operate under an

² A history and explanation of the CHCF-A is provided in the Background Section of Res. T-17427 at pages 2-4 (issued on December 20, 2013).

³ “Means test,” applies “seven months of [the] most-recently recorded data on rate of return as a basis for determining appropriate funding levels for the utility.” (*Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1991) 40 Cal.P.U.C.2d 40, 44-45 Conclusion of Law No. 3, and Ordering Paragraphs Nos. 1 and 2, and p. 46 Appendix A, § B [D.91-05-016].)

⁴ All statutory references are to the Public Utilities Code unless otherwise indicated.

unreasonable rate structure. Kerman also alleges D.13-10-051 violates its constitutional right of due process and constitutes an unconstitutional taking of Kerman's property. Further, Kerman argues that granting a stay is arbitrary and capricious and an abuse of discretion, alleging an insufficient record and findings to support the stay. It also contends the challenged decision is inconsistent with Commission precedent, contrary to the Commission's procedural rules, unfairly singles out Kerman, and also misapplies the standards for staying a Commission decision. And Kerman argues that the imposition of a stay constitutes a modification of established rules without a hearing in violation of section 1708. In addition, Kerman contends the decision unlawfully delegates to the ALJ discretion to extend the stay, alleging the challenged decision violates provisions of the Code by permitting the ALJ to grant an extension of the stay, and also by imposing a stay on Kerman's GRC application. Finally, Kerman asserts that denial of its request for interim rate relief is arbitrary and capricious and an abuse of discretion because it contradicts precedent, and is not supported by a sufficient record; also it alleges it is unconstitutional because it permanently deprives Kerman of rate relief for 2013, which Kerman contends constitutes an unlawful taking and a violation of its procedural due process rights. The Office of Ratepayer Advocates (ORA, formerly the Division of Ratepayer Advocates or DRA) filed an opposition to Kerman's application for rehearing of D.13-10-051.

On November 18, 2013, pursuant to Ordering Paragraph Number 3 of D.13-10-051, ORA filed a motion to extend the stay imposed on A.11-12-011 by D.13-10-051.

In reviewing Kerman's allegations of error, we have determined that the findings of fact and conclusions of law should be modified, as set forth in the Ordering Paragraphs below, pursuant to the rationale discussed in the challenged decision.

We have carefully considered the arguments in the application for rehearing and are of the opinion that good cause for rehearing of D.13-10-051, as modified herein, has not been demonstrated. Accordingly, rehearing of D.13-10-051, as modified herein, is denied.

THEREFORE, IT IS ORDERED that:

1. Decision 13-10-051 is modified as follows:
 - a) Finding of Fact No. 1.a is added as follows:

1.a The California High Cost Fund-A (CHCF-A) is a statutorily established public purpose program, the purpose of which is to assist small independent telephone corporations serving rural and small metropolitan areas.
 - b) Finding of Fact No. 1.b is added as follows:

1.b On November 10, 2011, the Commission initiated R.11-11-007 (CHCF-A Rulemaking) with the express purpose of undertaking a comprehensive review of the purposes, operations and benefits of the CHCF-A.
 - c) Finding of Fact No. 1.c is added as follows:

1.c Kerman and the other Small ILECs are parties in R.11-11-007.
 - d) Finding of Fact. No. 2.a is added as follows:

2.a On January 18, 2012, DRA filed a motion in R.11-11-007 to freeze the “waterfall” provisions of the CHCF-A; stay A.11-12-011, and suspend processing of all Fund-A company GRC applications.
 - e) Finding of Fact No. 2.b is added as follows:

2.b The ALJ assigned to R.11-11-007 denied the request to stay A.11-12-011, finding, with respect to Kerman, that the request to stay should be dealt with in A.11-12-011.
 - f) Finding of Fact No. 2.c is added as follows:

2.c On January 26, 2012, as part of its protest to A.11-12-011, DRA requested a stay of Kerman’s rate application and recommended the Commission continue to compensate Kerman at its current Fund-A draw pursuant to the waterfall provision.

g) Finding of Fact No. 2.d is added as follows:

2.d At the first pre-hearing conference on March 20, 2012, DRA renewed its motion for a stay of Kerman's GRC proceeding pending the outcome of R.11-11-007.

h) Finding of Fact No. 2.e is added as follows:

2.e The June 15, 2015 Assigned Commissioner's and Administrative Law Judge's Scoping Memo and Ruling in this proceeding provides that the Commission will first address the threshold issue of whether to freeze Kerman's revenue requirement and CHCF-A draw at current levels until the Commission concludes or reaches a decision on draws from the CHCF-A in R.11-11-007; and that a related threshold issue within the scope of this case is when would Kerman make a future GRC filing if its CHCF-A draw is frozen at this time.

i) Finding of Fact No 2.f is added as follows:

2.f On January 9, 2013, Kerman filed a motion for an interim rate increase for calendar year 2013; specifically an increase that would provide Kerman a total of \$5,412,943, in its CHCF-A draw.

j) Finding of Fact No. 2.g is added as follows:

2.g D.13-02-005 in R.11-110-007, which issued on February 20, 2013, granted the Small ILECs' request for a one year stay on GRC applications (excepting Kerman's already filed A.11-12-001) and freeze in the waterfall provisions, retroactive to January 1, 2013, with the possibility of a six month extension.

k) Finding of Fact No. 2.h is added as follows:

2.h The Assigned Commissioner's Amended Ruling and Scoping Memo of February 26, 2013 expanded the scope of the issues in A.11-12-011 to include whether: (1) There should be an interim rate increase; (2) Whether Kerman's

rate case application should be stayed until Rulemaking 11-11-007 is completed; and (3) If Kerman's rate case application is stayed, should the Fund-A be frozen at its current level? The Ruling also set a schedule for a decision resolving those issues.

l) Finding of Fact No. 2.i is added as follows:

2.i On March 7, Kerman and DRA filed opening briefs, and on March 21, 2013, both parties filed reply briefs.

m) Finding of Fact No. 3.a is added as follows:

3.a Kerman's request for an interim increase of \$5,412,943, subject to true up, in its Fund-A draw in calendar year 2013 is not based on financial emergency or the reasonableness of its investment costs, but is based on allegations of delay in the GRC and its claim that it has a right to an interim increase in the CHCF-A draw in order to have an opportunity to earn its authorized rate of return.

n) Finding of Fact No. 3.b is added as follows:

3.b Although any changes to the CHCF-A program will affect Kerman and the other Small ILECs and their customers on a prospective basis only, for reasons of efficiency, the Commission has already determined that it is not reasonable to attempt to adjudicate a potential increase in the CHCF-A draw for one recipient while the Rulemaking is pending.

o) Finding of Fact No. 3.c is added as follows:

3.c The Commission has also determined that it was necessary to freeze the Small ILECs' GRCs and the associated "waterfall provisions" while the Rulemaking was pending.

p) Finding of Fact No. 3.d is added as follows:

3.d Kerman's requested interim relief in 2013 would result in an even greater increase in its CHCF-A

draw than the request denied in D.12-12-003, albeit subject to refund.

q) Finding of Fact No. 5.a is added as follows:

5.a This proceeding will be adjudicated as soon as possible following the conclusion of R.11-11-007.

r) Conclusion of Law No 2.a is added as follows:

2.a The Commission will continue to process the case, and intends to set rates to be charged by the small independent telephone corporations in accordance with Sections 451, 454, 455, and 726; however, we must do so in an administratively efficient manner.

s) Conclusion of Law No. 2.b is added as follows:

2.b This Commission has already found that to increase Kerman's CHCF-A draw now, absent closer scrutiny and without further review, is unreasonable in light of the current Rulemaking. We have also already determined that the other Small ILECs' rate cases should be stayed and their CHCF-A draws frozen pending a final determination in the Rulemaking.

t) Conclusion of Law No. 2.c is added as follows:

2.c Our decision in this case is consistent with D.12-12-003, Conclusion of Law 4. That decision did not stay the GRC, but it did acknowledge that adopting a nearly 25% increase in Kerman's CHCF-A in view of the concurrent Rulemaking and absent the closer scrutiny of a GRC proceeding, would be unreasonable.

u) Conclusion of Law No. 2.d is added as follows:

2.d D.13-02-005 specifically excluded Kerman from the GRC freeze, however, our exclusion of Kerman in that proceeding was not intended to position Kerman differently than the other Small ILECs

during the Rulemaking, but instead was due to the procedural fact that Kerman had already filed its GRC and therefore, any stay or freeze should be decided in this case.

v) Conclusion of Law No. 8.a is added as follows:

8.a Freezing the Kerman GRC generally places Kerman on the same footing as the other Small ILECs.

w) Conclusion of Law No. 8.b is added as follows:

8.b Contrary to Kerman's arguments, it will not be "locked in" to any particular return; it retains discretion to adjust operations and expenditures as it sees fit pending the conclusion of its GRC.

2. Rehearing of Decision 13-10-051 as modified herein is denied.

3. Application 11-12-011 remains open.

This order is effective today.

Dated February 27, 2014, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
MICHAEL PICKER
Commissioners