

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities.	Rulemaking 05-04-005 (Filed April 7, 2005)
Order Instituting Rulemaking for the Purposes of Revising General Order 96-A Regarding Informal Filings at the Commission.	Rulemaking 98-07-038 (Filed July 23, 1998)

**ORDER MODIFYING DECISION (D.) 07-09-018 AND  
DENYING REHEARING OF DECISION, AS MODIFIED**

**I. INTRODUCTION**

We opened Rulemaking (R.) 05-04-005, the Uniform Regulatory Framework (“URF”) proceeding, to “assess and revise the rate regulation of large and mid-sized [Incumbent Local Exchange Carriers (“ILECs”)] in California.” (*Opinion (“Phase I Decision”)* [Decision (D.) 06-08-030] (2006) \_\_ CPUC.3d \_\_, p. 13 (slip op.)) The *Phase I Decision* concluded Phase I of the rulemaking and granted carriers broad pricing freedoms concerning many telecommunications services, new telecommunications products, bundles of services, promotion, and contracts. In addition, the *Phase I Decision* left certain matters, including implementation issues, to be decided in Phase II.

On September 12, 2007, we issued Decision (D.) 07-09-018, which addressed Phase II issues. Among other issues, D.07-09-018 clarified the notice and protest requirements for one-day-effective advice letters under General Order (“GO”) 96(a), the Public Utilities Code, and prior Commission decisions; determined which

subjects should fall under various tiers of the GO 96 draft 2001 Telecommunications Industry Rules; and consolidated the URF proceeding with the GO 96-B proceeding (R.98-07-038) in order to coordinate overlapping issues. (D.07-09-018, at pp. 2-3.)

On September 12, 2007, we also issued D.07-09-019, a companion decision to D.07-09-018. That decision established the Telecommunications Industry Rules as part of GO 96-B based on the consolidated URF record. D.07-09-019 also incorporated the new advice letter and detariffing requirements adopted in D.07-09-018.

The Utility Reform Network (“TURN”) timely filed an Application for Rehearing of D.07-09-018.<sup>1</sup> TURN alleges the following legal error: (1) D.07-09-018 weakens the advice letter process by unduly narrowing the right to protest; (2) GO 96-B does not support the elimination of protests based on Public Utilities Code Sections 451 and 453;<sup>2</sup> (3) the complaint procedure is not sufficient; and (4) the Commission does not have the legal authority to declare all rates as just and reasonable.

SureWest Telephone (“SureWest”), Pacific Bell Telephone Company dba AT&T California (“AT&T”), Verizon, California Inc. (“Verizon”), and Division of Ratepayer Advocates (“DRA”) filed responses to the application for rehearing.

We have reviewed each and every argument raised in the application for rehearing and are of the opinion that it does not establish a basis for granting rehearing of D.07-09-018. However, we modify D.07-09-018 to clarify our basis for limiting protests based on the grounds that a rate is unjust, unreasonable, or discriminatory under GO 96-B; the scope of a complaint proceeding; and the existence of alternatives to the complaint procedure. TURN’s application for rehearing of D.07-09-018, as modified, is denied.

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<sup>1</sup> Cox California Telcom, LLC, dba Cox Communications (“Cox”) also timely filed an Application for Rehearing of D.07-09-018. Cox’s rehearing application is addressed in a separate order. That order will also address and dispose of Cox’s Application for Rehearing of D.07-09-019, because of the similar raises in both rehearing applications filed by Cox.

<sup>2</sup> All subsequent section references are to the Public Utilities Code, unless otherwise specified.

## II. DISCUSSION

### A. Protest Rights

TURN contends that the Commission failed to proceed in a manner required by law by unduly narrowing the protest rights of interested parties pertaining to rate-related tariff filings. Specifically, TURN contends that there is no legal basis for the Commission's determination in Conclusion of Law ("COL") 5 that intervenors can no longer protest an advice letter filing on the grounds that rates are not just and reasonable as required pursuant to Public Utilities Code Sections 451 and 453.<sup>3</sup> (TURN Rehrgr. App., pp. 2-3.) As described below, this argument is without merit.

COL 5 states:

Under GO-96-B, the grounds upon which an advice letter may be protested are limited. For example, where the Commission has granted utilities full pricing flexibility, which it has done for URF Carriers with respect to many services in D.06-08-030, an advice letter increasing a rate for one of these services may not be protested as unreasonable.

(D.07-09-018, at p. 89, COL 5.)

In determining the appropriate grounds for protesting URF advice letters, D.07-09-018 relied on the existing rules set forth in GO 96-B. (D.07-09-018, at pp. 20-23, citing GO 96-B, General Rule 7.4.2.) Specifically, GO 96-B, Rule 7.4.2(6) provides that an advice letter may be protested if:

[t]he relief requested in the advice letter is unjust, unreasonable, or discriminatory, *provided that such a protest may not be made where it would require relitigating a prior order of the Commission.* (emphasis added.)

The just and reasonableness of rates for services provided by URF carriers was previously litigated in URF Phase I. In the *Phase I Decision*, we addressed the issue of whether we may rely more heavily on competitive forces to produce just and

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<sup>3</sup> Section 451 provides for just and reasonable charges and services. (Pub. Util. Code, § 451.) Section 453 prohibits the granting of preference or advantage to any corporation or person. (Pub. Util. Code, § 453.)

reasonable rates. (*Phase I Decision* [D.06-08-030], *supra*, at p. 2 (slip op.)) We found that the four ILECs lack market power in their service territories and therefore that price regulation was no longer needed to ensure that prices are just and reasonable. (*Phase I Decision* [D.06-08-030], *supra*, at p. 132 & p. 275, COL 24 (slip op.)) As a result, we determined that it was reasonable to eliminate all price regulations for business services and, except as expressly ordered otherwise in the *Phase I Decision* regarding residential basic service, all residential services. (*URF Phase I Decision* [D.06-08-030], *supra*, at p. 268, Finding of Fact 75 (slip op.))

Allowing a protest on the basis that a rate is unjust or unreasonable is contrary to Rule 7.4.2(6) because it would require relitigating a prior order of the Commission. The *Phase I Decision* is a final Commission decision that is no longer subject to appeal. (See Pub. Util. Code, § 1731.) Furthermore, the findings of the *Phase I Decision* are conclusive for the purposes of D.07-09-018. (See Pub. Util. Code, § 1709.)<sup>4</sup> Allowing such protests would constitute an impermissible collateral attack of the findings of a final Commission decision. Thus, D.07-09-018 correctly determined that allowing such protests “would effectively challenge and refute the findings and pricing flexibility granted in the *Phase I Decision*.” (D.07-09-018, at p. 81.)

TURN does not dispute that the *Phase I Decision* found that there was competition and that carriers should have pricing flexibility. However, TURN contends that the Commission misinterprets GO 96-B and that GO 96-B does not support eliminating protests based on Sections 451 and 453. In particular, TURN asserts that GO 96-B, Section 7.4.2(6) does not apply because there has not been litigation of a specific carrier’s rate for a specific service. TURN asserts that the *Phase I Decision* only made general policy pronouncements. (TURN Rehr. App., pp. 8-9.)

Contrary to TURN’s assertion, this issue has previously been addressed. In the *Phase I Decision* we determined that litigation of a specific carrier’s rate for a

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<sup>4</sup> Section 1709 provides: “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.”

specific service was not necessary. The *Phase I Decision* explicitly made a finding regarding all business services and with specified exceptions, all residential services. (*Phase I Decision* [D.06-08-030], *supra*, at p. 268, Finding of Fact 75 (slip op.)). The *Phase I Decision* also noted that:

[T]he historic practice of defining each telecommunications service as constituting a separate ‘market’ is no longer relevant in today’s technologically diverse environment. Concepts like “Basic Local Exchange Service,” “long distance service,” “call waiting service,” “call forwarding service,” and “pay phone service,” make little sense in an area dominated by telecommunications sold through bundled services.

(*URF Phase I Decision* [D.06-08-030], *supra*, at p.75 (slip op.)).

In addition, GO 96-B, Rule 7.4.2 states:

[A] protest may not rely on policy objections to an advice letter where the relief requested in the advice letter follows rules or directions established by statute or Commission order applicable to the utility.

As an illustration, Rule 7.4.2 offers Example 2, which states:

Where the Commission does not regulate the rates of a specific type of utility, an advice letter submitting a rate change by a utility of the specified type is not subject to protest on the grounds that the rates are unjust, unreasonable, or discriminatory.

In D.07-09-018, we determined that a protest could not challenge an URF carrier’s filed increased rates pursuant to Example 2. (D.07-09-018, at p. 21.)

TURN contends that Example 2 does not apply. TURN contends that the Commission has granted carriers pricing flexibility for certain services but that it is improper to suggest that the Commission does not regulate rates because the grant of pricing flexibility came with limitations and restrictions. (TURN Rehr. App., p. 9.) TURN contends that the Commission is not foreclosed or prevented from regulating the rates of URF carriers. (TURN Rehr. App., p. 9.)

We acknowledge that reference to Example 2 in D.07-09-018 may result in needless confusion regarding the nature of the Commission’s regulation of URF carriers.

Therefore, we modify D.07-09-018, as set forth in the ordering paragraphs below, to delete references to Example 2. However, this modification does not change our determination in COL 5 that grounds for protest of the advice letters of URF carriers may be limited under GO 96-B.<sup>5</sup> As explained above, GO 96-B, Rule 7.4.2(6) provides sufficient legal support for COL 5.

TURN also contends that the Commission has taken the authority delegated to it by the Legislature to set rates and to ensure those rates are just and reasonable and delegated that authority to the carriers. (TURN Rehr. App., pp. 5-6.) This contention has no merit.

By limiting the grounds for protest pursuant to GO 96-B, we did not abdicate our responsibility. There is no legal requirement that we must permit the use of the advice letter procedure to relitigate a determination of whether rates are just and reasonable made in a previous Commission decision. Further, the fact that we limited protests based on Section 451 does not signify that we are not ensuring that a rate is just and reasonable. In the *Phase I Decision*, we previously made a determination regarding the just and reasonableness of the rates of URF carriers and determined that competitive forces ensured just and reasonable rates. (See *Phase I Decision* [D.06-08-030], *supra*, at p. 132 & p. 275, COL 24 (slip op.)) Furthermore, consumers are still permitted to file complaints regarding the just and reasonableness of rates and we may institute an investigation or rulemaking regarding the just and reasonableness of rates. (D.07-09-018, at p. 82.) Parties may also file a petition for modification or petition for rulemaking as well.

Further, in conformity with GO 96-B, Rule 7.4.2(6), D.07-09-018 does not necessarily foreclose protests based on Sections 451 and 453. In D.07-09-018, we did note that “some advice letters will continue to be subject to protest as unjust,

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<sup>5</sup> Furthermore, Example 2 is merely illustrative of GO 96-B, Rule 7.4.2. Therefore, assuming arguendo that Example 2 does not apply, it would not necessarily follow that Rule 7.4.2 does not apply.

unreasonable, or discriminatory, depending on the type of carrier filing the advice letter or the service to which the advice letter relates.” (D.07-09-018, at p. 80.)

TURN acknowledges that “GO 96-B sets forth the requirements that must be adhered to when a utility files an advice letter.” (TURN Rehr. App., p. 4.) As explained above, D.07-09-018 is consistent with GO 96-B. Therefore, there is a legal basis for COL 5 and there is no basis on which to grant TURN’s request for rehearing on this issue.

### **B. Complaint Procedure**

TURN contends that it is problematic to allow interested parties to file a complaint, as opposed to a protest, on the grounds that a rate violates the just and reasonableness standard. TURN contends that complaints are a more difficult undertaking for interested parties, and a less effective regulatory tool than an advice letter protest. TURN contends that the Commission does not explain why a consumer can bring a complaint to the Commission, but cannot protest an advice letter on the same grounds.<sup>6</sup> (TURN Rehr. App., pp. 10-11.)

While TURN disagrees with the procedural options, TURN does not assert a basis for legal error. As explained above, the Commission’s advice letter protest procedure is lawful pursuant to issues previously determined in the *Phase I Decision* as well as GO 96-B. It is not unlawful to permit complaints while having a more limited protest procedure. It is within the Commission’s power and jurisdiction to determine the appropriate procedures to be followed when the Commission is making a finding regarding whether a rate is justified. (See *Wood v. Public Utilities Com.* (1971) 4 Cal.3d

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<sup>6</sup> TURN also contends that allowing parties to file such complaints demonstrates that we continue to regulate rates for the carriers. (TURN Rehr. App., p. 10.) This contention is related to whether Example 2 of GO 96-B, Rule 7.4.2, applies to the rates of URF carriers, not whether there is legal error in permitting complaints while having a more limited protest procedure. As explained above in Section II.A.1, to avoid needless confusion, we modify D.07-09-018 to delete references to Example 2.

288, 292 citing Pub. Util. Code, § 701; see also *Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4<sup>th</sup> 269, 282-283.) Accordingly, there is no legal error.

D.07-09-018 states that in a complaint proceeding, the Commission may also “determine whether conditions have changed to an extent to necessitate revisiting findings made in its prior decisions (including in Phase I).” (D.07-09-018, at p. 82.) We clarify that the scope of a complaint proceeding would be limited to whether conditions have changed for the particular carrier involved in the complaint. However, we note that there are also alternative procedures such as a petition for modification of the decision, a rulemaking, or a Commission ordered investigation in which we may determine whether conditions have changed to an extent to necessitate revisiting findings in a prior Commission decision. Therefore, we modify D.07-09-018, as set forth in the ordering paragraphs below, to clarify the scope of a complaint proceeding and to clarify that there are also alternative procedures available in which we can revisit findings made in prior Commission decisions.

**C. The Commission’s Legal Authority to Determine Rates are Just and Reasonable**

TURN contends that “[t]he Commission has not proceeded in a manner required by law when it declares that competition and the rates of other market participants will ensure that all rates subject to pricing flexibility, present and future, are a prior (sic) just and reasonable.” (TURN Rehrq App., p. 13.) TURN reasserts its position that this view results in an improper delegation of the Commission’s duty to ensure that rates are in compliance with Sections 451 and 453. (TURN Rehrq App., pp. 12-13.)

As previously discussed, the pertinent issues regarding rate regulation were already addressed in the *Phase I Decision*. In the *Phase I Decision*, we determined that: “Since Verizon, AT&T, SureWest, and Frontier lack market power in their service territories, price regulation is no longer needed to ensure that their prices are just and reasonable. Such price regulations should be removed.” (*Phase I Decision* [D.06-08-030], *supra*, at p. 275, COL 24 (slip op.)) The *Phase I Decision* is a final Commission decision and its findings are conclusive in this proceeding. (See Pub. Util.

Code, §§ 1709 & 1731.) The Commission’s legal authority to make such a determination is not subject to challenge in this proceeding because such challenge would constitute an impermissible collateral attack of a final Commission decision. Any challenge to the Commission’s authority to make this determination should have been made as a direct challenge to the *Phase I Decision*. Accordingly, there is no basis on which to grant rehearing on this issue.

### III. CONCLUSION

For the reasons stated above, we will modify D.07-09-018 as set forth below, and deny rehearing of D.07-09-018, as modified.

**THEREFORE, IT IS ORDERED** that:

1. D.07-09-018 is modified as follows:
  - a. On p. 21, the first four sentences of the first full paragraph beginning with “The grounds for protest are even more narrow ...” are deleted.
  - b. On p. 28, third line, sentence beginning “Moreover, even if there were a suspension procedure available ...” is modified to read:

“Moreover, even if there were a suspension procedure available, it could not be invoked to force the Commission to review rates that are no longer subject to protest on the grounds that the rates are unjust, unreasonable, or discriminatory pursuant to GO 96-B, General Rule 7.4.2.”
  - c. On p. 80, the second sentence is modified to read:

“However, as we noted earlier in today’s decision, there follow in General Rule 7.4.2 several important limitations on the ability to protest on these grounds.”
  - d. On p. 82, first paragraph, the third and fourth sentences are modified to read:

“This procedure affords consumers the opportunity to have the Commission consider whether rates and charges of a service are no longer just and reasonable for a particular carrier. In such a complaint proceeding, the Commission may determine whether conditions have changed for that carrier.”

e. On p. 82, a footnote is added after the fourth sentence of the first paragraph to read:

“Parties may also file a petition for modification of a Commission decision or petition for a rulemaking in which the Commission may determine whether conditions have changed to an extent to necessitate revisiting findings made in its prior decisions (including in URF Phase I).”

2. TURN’s application for rehearing of D.07-09-018, as modified, is hereby denied.

This order is effective today.

Dated April 24, 2008, San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners