

Decision 06-03-026

March 15, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into
Competition for Local Exchange
Service

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into
Competition for Local Exchange
Service.

Investigation 95-04-044
(Filed April 26, 1995)
(FCC Triennial Review 9-Month Phase)

ORDER DENYING THE REHEARING OF DECISION (D.) 05-03-028**I. SUMMARY**

In this decision, we dispose of an application for the rehearing of D.05-03-028 (“the Decision”) filed by Blue Casa Communications, Wholesale Air-Time, Inc., and nii Communications, Ltd. (“Rehearing Applicants”). The Decision affirmed an Assigned Commissioner Ruling (ACR) that denied in part and granted in part motions for continuation of the unbundled network element platform (UNE-P).

II. FACTS

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Review Remand Order (TRRO).¹ It provides in part that incumbent local exchange carriers (ILECs) would no longer, as of March 11, 2005, be required to provide competitive local exchange carriers (CLECs) with unbundled access to mass market local switching, among other things. Existing customers would continue to have access to UNE-Ps for up to twelve months, but at higher rates. The FCC also required

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (hereinafter, “TRRO”).

CLECs to submit orders within one year to convert existing customers to alternative arrangements. During the transition period, the FCC banned new orders for unbundled access to local mass market switching, i.e., CLECs were not permitted to add new customers using unbundled access to local circuit switching. ILECs and CLECs were required to negotiate, under change-of-law provisions in their contracts, any necessary changes to the interconnection agreements.

The effective date of the TRRO was March 11, 2005. The FCC placed a nationwide bar on new switching and UNE-P arrangements and established a twelve-month transition plan to phase out UNE-P arrangements provided to preexisting customers that were served as of the March 11, 2005 bar date.

On February 11, 2005, SBC Communications (“SBC California”) announced by accessible letters to the CLECs with which it has Interconnection Agreements (ICAs) that beginning on March 11, 2005, it would reject all orders for new lines using UNE-P and would also stop processing requests for moves, adds, and changes for each CLEC’s existing UNE-P customer base.² The accessible letters were issued pursuant to SBC California’s interpretation of the legal effect of the TRRO.

On March 1, 2005, MCI, Inc., The Utility Reform Network (TURN), Blue Casa Communications, Inc., Wholesale Air-Time, Inc., Anew Communications Corp. d/b/a/ Call America, TCAST Communications, and CF Communications LLC d/b/a/ Telekenex (Joint Movants) filed a motion in response to SBC California’s announcement.³ The Joint Movants sought an order forbidding SBC from rejecting UNE-P orders pending compliance with the change of law provisions in their respective ICAs.

A second motion, entitled “Motion for an Order Requiring SBC to Comply with Its CLEC Interconnection Agreements,” was filed on March 2, 2005 by DMR

² Since the rehearing application was filed, Pacific Bell Telephone Company (aka SBC California) has become AT&T California; however, for the sake of consistency with the filed documents, we will use the former appellation of SBC California.

³ On March 15, 2005, MCI withdrew from the motion on the ground that it subsequently negotiated a commercial agreement with SBC.

Communications and Navigator Telecommunications, LLC (collectively, Small CLECs). This motion contained allegations similar to those made by MCI, Inc., *et al.* and sought similar relief.

Assigned Commissioner Ruling (ACR), issued on March 11, 2005, denied in part and granted in part the motions for the continuation of the UNE-P. The ruling was issued pursuant to the commissioner's interpretation of the TRRO. The ACR ruled that SBC California shall continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005, but that SBC California has no obligation after March 11, 2005 to process CLEC orders for UNE-Ps to serve new customers. Parties were also directed to engage in good faith negotiations to amend their ICAs in accordance with the TRRO.

On March 21, 2005, the Commission issued D.05-03-028. It confirmed the ACR in accordance with Public Utilities Code Section 310, which states in pertinent part:

“Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission.”

On April 20, 2005, Blue Casa Communications, Inc., Wholesale Air-time, Inc., and nii Communications, Ltd. (collectively, the Rehearing Applicants) timely filed an application for the rehearing of D.05-03-028. They alleged that the Decision erred as follows: (1) violated Public Utilities Code Section 1708 by “effectively” rescinding part of order in D.02-12-081 without proper notice and an opportunity to be heard; (2) does not contain adequate findings of fact and conclusions of law in violation of Public Utilities Code Section 1705; and 3) the Decision cannot be excused on grounds of federal preemption.

SBC California submitted its response to the rehearing application on May 5, 2005. It asserted that the Decision did not unlawfully reverse D.02-12-081 without a hearing, and no evidentiary hearings were required under Public Utilities Code

Section 1708. Moreover, it argued that no evidentiary hearings were required because the matter decided by the Commission involved purely a question of law. SBC California also stated that because there were no evidentiary issues or questions of fact to decide, the Rehearing Applicants were not entitled to a hearing or factual findings under Public Utilities Code Section 1705. Finally, SBC California stated that the Rehearing Applicants waived any right to a hearing by failing to request a hearing in a timely manner.

We have reviewed each and every allegation raised in the application for rehearing of D.05-03-028, and are the opinion that rehearing has not been demonstrated. Accordingly, rehearing of D.05-03-028 is hereby denied.

III. DISCUSSION

A. **The Commission Did Not Reverse, Rescind, or Alter Ordering Paragraph 2 in D.02-12-081, Thus It Did Not Violate Public Utilities Code Section 1708.**

The Rehearing Applicants assert that the Commission violated Public Utilities Code Section 1708 by “effectively” reversing Ordering Paragraph (OP) 2 in D.02-12-081 without proper notice to the parties and an opportunity for a hearing.⁴ The Rehearing Applicants’ assertion is without merit. The facts show that OP 2 was not reversed, rescinded, or altered by the Commission.

OP 2 provides that “Pacific shall advise this Commission and promptly seek leave before it ceases to provide to competitive local exchange carriers any currently required Unbundled Network Elements.”⁵ It was put in place by the Commission in D.02-12-081 as a safeguard to deter an ILEC from arbitrarily or precipitously refusing to provide required UNEs to the CLECs. In the Decision, the

⁴ Public Utilities Code Section 1708 provides as follows: “The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.” (Pub. Util. Code, §1708.)

⁵ D.02-12-081, p. 34, [OP 2] (slip op.). D.03-11-025 subsequently modified D.02-12-081, and rehearing was denied, as modified. However, OP 2 was not modified.

Commission directed SBC California “to not unilaterally impose the provisions of the accessible letter that involved the embedded customer base until the company has either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached.” (D.05-03-028, p. 3.) The safeguard put in place by OP 2 remains intact. OP 2 in D.02-12-081 was neither reversed nor written out of existence, as contended by the Rehearing Applicants. Consistent with OP 2’s purpose, the Commission acted to prevent SBC California from unilaterally refusing to provide required UNEs to the CLECs. D.05-03-028 and the ACR in fact gave leave to SBC California to cease providing certain UNEs to the CLECs, pursuant to the Commission’s interpretation of the TRRO. It was the Commission that mandated how the TRRO would be implemented, as the following discussion demonstrates.

On February 11, 2005, SBC California gave notice, by accessible letters, of its intent to cease providing UNE-P’s to new customers as of March 11, 2005, the effective date of the TRRO. The CLECs filed emergency motions, placing SBC California’s plans before the Commission. In accordance with D.02-12-081 and its OP 2, the Commission acted to ensure that ILECs would continue to provide all currently required UNEs, pursuant to its interpretation of the TRRO. The ACR, and the Decision affirming it, interpreted the TRRO and ruled that SBC had no obligation to process CLEC orders for UNE-P to serve new customers seeking new serving arrangements after March 11, 2005, but directed SBC California to continue to honor its obligations to existing CLECs already receiving UNE-P services until May 1, 2005.⁶

In order to implicate OP 2, SBC California must have unilaterally stopped providing the currently required UNEs. SBC California denies that it has ceased to provide the UNE-P elements within the meaning of D.02-12-081. (SBC California Rhg. Response, p. 4.) The Rehearing Applicants did not provide any proof to the contrary. Nothing in record shows that SBC California ceased providing required

⁶ As noted by SBC California, the Commission also subsequently ratified another ACR in D.05-04-027, which concluded that SBC California is not obligated to provide UNE-P, and certain other declassified UNEs, as of March 11, 2005. (Rhg. App. at 4.)

UNEs to the CLECs. Events may not have unfolded in the manner that the Rehearing Applicants would have preferred, but SBC California's proposed implementation of the TRRO was brought before the Commission and the Commission acted to stop the unilateral cessation of currently required UNEs, as required by OP 2.

Accordingly, D.02-12-081 was not modified, amended or changed by D.05-03-028, and thus, Public Utilities Code Section 1708 is not implicated. Therefore, Rehearing Applicants' Section 1708 argument has no merit. The Rehearing Applicants rely *on California Trucking Ass'n v. Public Utilities Commission* (1977) 19 Cal.3d 240 to support their claim that the Commission violated Public Utilities Code Section 1708. Their reliance is misplaced. *California Trucking Association* is a case involving Public Utilities Commission Code Section 1708. However, neither Public Utilities Code Section 1708 nor *California Trucking Association* applies in the instant case.

B. The Commission Did Not Violate Public Utilities Code Section 1705.

The Rehearing Applicants claim that "there is not one single finding of fact or conclusion of law addressing the issues that led the Legislature to mandate network unbundling as a prerequisite to SBC-CA's operation in the interLATA marketplace." (Rhg. App., p. 7.) This, they assert, violates Public Utilities Code Section 1705, which provides in pertinent part that "the decision shall contain, separately stated findings of fact and conclusions of law by the commission on all issues *material* to the order or decision." (Pub. Util. Code, § 1705; emphasis added.) The following analysis will demonstrate that the Commission complied with this statutory provision in all respects.

The findings and conclusions that the Rehearing Applicants would have the Commission include are beyond the scope of this Decision. This Decision is an affirmation of an ACR that gave a legal interpretation of the TRRO, and outlined immediate steps to be taken by SBC California and the CLECs. That is the sum and substance of the Decision.

The Rehearing Applicants' attempts to inject Public Utilities Code Section 709.2 issues take the Decision beyond its intended purpose. Section 709.2, enacted in 1994, requires the Commission to make four essential determinations prior to authorizing or directing competition in the intrastate interLATA market.⁷ Here, the Commission was faced with the singular issue of how the TRRO should be legally interpreted. There was no need to do findings and/or conclusions with regard to Public Utilities Code Section 709.2 in this Decision. The Commission, in establishing its own proceedings, is free to take up the matter in another forum, if necessary.

The Decision meets all the requirements of Public Utilities Code Section 1705. It contains findings and conclusions on all material issues and properly reflects the urgency of the situation. For example, the following findings and conclusions of law provide substantive support for the Order and resolve the dispute precipitated by SBC California's accessible letters. Finding No. 4 noted that the ACR gave the parties more time, until May 1, 2005, to negotiate applicable interconnection agreements to transition and continue to serve the CLECs embedded customer base, as contemplated by the TRRO. Finding No. 5 states that the ACR determined that the SBC accessible letter for the replacement of UNE-P with respect to service offerings to new CLEC customers may take effect on March 11, 2005. Conclusion of Law No. 2 determined that the March 11, 2005 ACR is consistent with the TRRO and should be confirmed in accordance with Public Utilities Code Section 310. These findings and conclusions are material to the Order and resolve the dispute caused by SBC's accessible letters.

The following findings and conclusions reflect the urgent circumstances surrounding D.05-03-028. Finding of Fact No. 6 provides as follows: "This is an unforeseen emergency situation in that the request for relief is based on extraordinary conditions in which time is of the essence." Similarly, Conclusion of Law No. 3 was

⁷ These determinations include: (1) that competitors have fair, nondiscriminatory access to exchanges; (2) that there is no anticompetitive behavior by the local exchange company; (3) that there is no improper cross-subsidization of interexchange telecommunications service; and 4) that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets. (Pub. Util. Code, §709.2, subd. (c) (1)-(4).)

included: “The 30-day period for comments on draft decisions set forth in Pub. Util. Code §311(g)(2) as well as the comment period in Rule 77.7 should be waived in view of the fact that the ACR involves an unforeseen emergency situation.” Time was of the essence. There was no time to do a study on the impacts on end users of eliminating UNE-P on competition, as called for by the Rehearing Applicants in their attempt to implicate Public Utilities Code Section 709.2.

In sum, the foregoing findings and conclusions are material to the Order and resolve the dispute between SBC California and the CLECs. Public Utilities Code Section 1705 requires no more than that.

C. The Rehearing Applicants’ Argument Regarding Preemption Has No Merit.

The Rehearing Applicants assert that the Decision cannot be excused on the basis of federal preemption, i.e., the FCC’s nationwide bar on UNE-P does not excuse the Commission from enforcing SBC California’s unbundling obligations under Public Utilities Code Section 709.2. At the same time, they concede that “California’s independent state unbundling requirements might be susceptible to federal preemption, including, perhaps, the nationwide bar on UNE-P adopted by the FCC in the TRRO.” (Rhg. App. at 8.) The Rehearing Applicants try to have it both ways and, in the process, send out vague and confusing signals. As such, the rehearing application fails to meet the requirements of Public Utilities Code Section 1732 and Rule 86.1 of the Commission Rules of Practice and Procedure.⁸ Accordingly, the Commission is justified in giving little weight to their “preemption” argument.

The Rehearing Applicants did not attempt to demonstrate that any of the

⁸ These provisions require that the grounds for rehearing be set forth with specificity. Rule 86.1 of the Commission’s Rules of Practice and Procedure cautions that vague assertions as to the record or the law may be accorded little attention. (Code of Regs., tit. 20, §86.1.)

requirements for preemption were met.⁹ Because the Rehearing Applicants neither supported nor refuted preemption, we have difficulty discerning why they interjected preemption in their rehearing application. There is currently a dual system of federal/state regulation of telecommunications. (*Louisiana Pub. Svc. Comm. v. FCC* (1986) 476 U.S. 355..) However, the Telecommunications Act of 1996 placed some limits on the authority of state commissions to regulate local telecommunications competition.¹⁰

State unbundling regulations co-exist with federal unbundling regulations. If Congress intended to occupy the field, it would not have included Section 251(d)(3) in the Telecommunications Act of 1996. Section 251(d)(3) of the Act preserves state authority to prescribe regulations relating to unbundling.¹¹ There is no conflict with federal law so long as state unbundling actions are consistent with the requirements of Section 251 and do not substantially prevent the implementation of the federal regulatory regime. Preemption does not come into play here.

The Rehearing Applicants inserted in their preemption claim the assertion that the Commission declared Public Utilities Code Section 709.2 to be dead, in

⁹ Federal preemption occurs when Congress enacts a statute that expresses a clear intent to preempt state law; state law actually conflicts with federal law; or federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. (*Louisiana Pub. Svc. Comm. v. FCC, supra* at 360; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504.)

¹⁰ *Pacific Bell v. Pac-West Telecomm, Inc.* (9th Cir. 2003).325 F.3d 1114, 1127, fn. 10, which states: “The question is ... not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to matters addressed by the 1996 Act, it unquestionably has.”

¹¹ Section 251(d)(3) provides as follows:

“(3) Preservation of State Access Regulations. – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

“(A) establishes access and interconnection obligations of local exchange carriers;

“(B) is consistent with the requirements of this section; and

“(C) does not substantially prevent implementation of the requirement of this section and the purposes of this part.”

violation of §3.5 of the California Constitution. This allegation is totally lacking in merit.

Article III, section 3.5 provides in pertinent part:

An administrative agency, including an administrative agency created by the Constitution...has no power:

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal. Const., Art., §3.5.) Section 3.5 is not implicated because the Commission did not declare a statute to be dead or unenforceable, or refuse to enforce it on the basis of federal law.

IV. CONCLUSION

For the foregoing reasons, we conclude that the Rehearing Applicants failed to demonstrate legal error.

THEREFORE, IT IS ORDERED that:

1. The rehearing of D.05-03-028 is denied.

This order is effective today.

Dated March 15, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners