

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**10-01-08
04:11 PM

October 1, 2008

Agenda ID # 7976
Alternate to Agenda ID #7822
Quasi-legislative
11/6/2008 Item 31a

TO PARTIES OF RECORD IN RULEMAKING 08-01-005

Enclosed is the Alternate Decision of Commissioner Simon to the Proposed Decision of Commissioner Chong previously mailed to you. This cover letter explains the comment and review period and provides a digest of the alternate decision.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a proposed decision or to a decision subject to subdivision (g) be served on all parties, and be subject to public review and comment prior to a vote of the Commission.

Parties to the proceeding may file comments on the alternate decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3 opening comments shall not exceed 15 pages.

Comments must be filed either electronically pursuant to Resolution ALJ-188 or with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Sarah R. Thomas at srt@cpuc.ca.gov and Commissioner Simon's advisor Phyllis R. White at prw@cpuc.ca.gov. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

ATTACHMENT

R.08-01-005: Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunication Services

Pursuant to Public Utilities Code § 311(e), this is the digest of the substantive differences between the proposed decision of Commissioner Rachelle Chong (mailed on August 5, 2008, as modified on October 1, 2008) and the alternate proposed decision of Commissioner Timothy Alan Simon (mailed on October 1, 2008).

The proposed decision declines to adopt rules requiring California's incumbent local exchange carriers to seek this Commission's permission before permanently retiring copper wire local loops from the telephone network, and finds that the party requesting such rules, the California Association of Competitive Telecommunications Companies (CALTEL), has not demonstrated any current harm or a current need for action by this Commission.

The proposed decision states that the record of this proceeding contains no evidence showing that the installation of facilities to replace the copper network has resulted in adverse impacts to consumers or competition. The proposed decision requires the incumbent local exchange carriers (ILECs) to file concurrently with our Communications Division any notices of network changes that the carriers file with the Federal Communications Commission (FCC) for fiber to the home (FTTH) or fiber to the curb (FTTC) deployment that results in the retirement of copper plant. The proposed decision states that filing such notices with our Communications Division staff will allow this Commission to monitor ILEC copper retirement practices and that the FCC has found that such notices will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities.

The PD encourages the carriers to coordinate in such instances to ensure that service to CLEC customers is not unduly disrupted and states that if the Commission determines that the process of copper retirement is resulting in substantial and specific harm such as disruption to consumers' service or is otherwise inconsistent with the FCC's requirements, the Commission may take action later on these issues. The proposed decision also sets forth a process to facilitate negotiations to access the loop, including a specific notice process, how to initiate such negotiations, and a process to request arbitration, either by a third party or at the Commission.

The alternate proposed decision recognizes that the record does not indicate any current harm, but recognizes the potential for marketplace harm. The alternate proposed decision therefore proposes a process to facilitate the access to copper facilities and

affords them opportunity to negotiate terms with the ILEC. The alternate proposed decision differs from the proposed decision as follows:

1. The Commission's Advice Letter Tier 2 process will apply to notice and respond to an ILEC's intention to retire copper facilities.
2. The rules apply to any copper retirement and to both business and residential customers.
3. The rules also apply whether or not the CLEC currently has a customer on the route to be retired; as long as the CLEC is willing to pay the costs that it causes to preserve and/or restore the copper.
4. The Commission asserts willingness and ability to ultimately impose a resolution if none can be negotiated or arbitrated.

Decision **ALTERNATE OF COMMISSIONER SIMON** (Mailed 10/1/2008)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services.

Rulemaking 08-01-005
(Filed January 10, 2008)

**ALTERNATE DECISION ADOPTING REGULATIONS GOVERNING
RETIREMENT BY INCUMBENT LOCAL EXCHANGE CARRIERS
OF COPPER LOOPS AND RELATED FACILITIES USED TO PROVIDE
TELECOMMUNICATIONS SERVICES**

1. Summary

In this Decision, the Commission adopts rules establishing a process, which competitive local exchange carriers (“CLECs”) may purchase or lease copper facilities proposed for retirement by incumbent local exchange carriers (“ILECs”).¹ We conclude that we must act to eliminate the marketplace

¹ Consistent with Section 251(c)(5), we define the ILECs’ obligations regarding copper retirement broadly to include any action by an ILEC that would make a copper facility, or any portion of a copper facility, unavailable for assignment and use (e.g., physical removal, removal from the database used to assign facilities). The term does not include accounting transactions that do not affect copper cable availability, or situations in which a damaged copper facility is removed and replaced with no net loss of facility

Footnote continued on next page

uncertainty that currently exists regarding the continuing availability of copper facilities in California and to prevent likely, if not inevitable, litigation to arise without such rules.

We emphasize that the rules we adopt today do not preclude ILECs from retiring copper facilities in whole or in part in all instances. Rather, the rules ensure that CLECs will receive sufficient notice and information to determine how a proposed copper retirement would affect their ability to serve existing customers or to expand to new service areas. If a CLEC is currently using an ILEC's copper facilities to serve customers, every effort must be made to find a solution so that the customer does not lose service. In instances where a CLEC is not currently serving a customer on the copper facilities to be retired, the CLEC will be provided an opportunity to preserve the copper facility for future customers. CLECs shall be responsible for all incremental maintenance costs caused by their request to maintain the copper facility, and CLECs shall be responsible for all costs (such as cross connects) of placing the copper facility back into service.

While deployment of fiber infrastructure has economic benefit to California, we are concerned that copper retirement without safeguards may be detrimental to competitive markets. We recognize there is substantial public benefit to preservation of the ILECs' copper facilities but are careful not to commit the Commission's resources unnecessarily. Ultimately, creating an environment supportive of deployment of emerging broadband technologies is

count. As used herein includes, without limitation, both physical removal of the copper facility at issue as well as network modifications or lack of maintenance which make copper facilities unable to be used to provide telecommunications services .

in the greater economic and societal benefit of California. In this context, availability to copper facilities is but another alternative in the competitive broadband market.

This Decision, therefore, establishes a process that requires ILECs and CLECs to attempt to negotiate an agreement regarding use of copper facilities proposed for retirement. If agreement cannot be reached through purely voluntary negotiations, parties are encouraged to make use of arbitration, either through a third party or the Commission's Alternative Dispute Resolution ("ADR") process. If no resolution is reached, the Commission will issue a determination to resolve the disputed copper retirement.

The rules we adopt today establish a process by which CLECs can maintain their access to copper by either purchase or lease at market rates. This process will require the incumbent local exchange carriers (ILECs) to file a Tier 2 Advice Letter with the Commission's Communication Division listing details regarding the planned retirement, as well as concurrent copy of any notices of network changes that the carriers file with the Federal Communications Commission (FCC) regarding the retirement of copper plant.

To facilitate negotiations for the continued access to copper, we will require the ILEC to serve concurrently with its filing at the CPUC, notice of the planned copper retirement upon all CLECs that interconnect with the ILEC, regardless of whether the CLEC is serving customers currently on the specific facility to be retired. Once the notice has been served, a CLEC wishing to remain on that copper must request within 20 days, negotiations with the ILEC either to purchase the entire copper facility from the ILEC or to reach an agreement with the ILEC on price, terms, and conditions for continued access loop facilities. The CLEC shall include in its request for negotiations the following information:

- a. Whether the CLEC seeks to purchase the copper facility, or whether the CLEC seeks only to maintain access to a loop facility;
- b. The number of customers or potential customers on the copper UNE;
- c. The services that the CLEC may provide over the facility; and
- d. The number of UNEs or special access circuits that the CLEC currently purchases

We will require the ILEC to enter into negotiations with the CLEC for a period of 30 days to reach a fair and equitable agreement with the CLEC for the price and terms under which the copper facility will be sold or leased to the CLEC. Further, if negotiations fail, then either party may seek arbitration, either through a private party arbitrator, or at the Commission. If arbitration is sought at the Commission, the arbitrator will establish a schedule for the parties and will arbitrate the dispute between the parties within 40 days of the request for arbitration. If there is still no agreement after the arbitration proceeding, the Commission will issue a determination that resolves the disputed copper retirement.

2. Background

Copper wiring has been used in telephone networks across the country for more than 100 years to provide voice. At the time the Federal Communications Commission (“FCC”) issued the Triennial Review Order mandating unbundling of the existing telephone network, copper facilities were capable of supporting data and broadband access via technologies, such as DSL, but data speeds were limited to less than 10Mbps. Within the last two years, new technologies, such as

Ethernet over copper, have become available, which can support up to 20Mbps, a speed comparable to fiber-optic based broadband services.² Therefore, even as fiber optic cable becomes more widely used, competitive local exchange carriers (CLECs) and consumer groups have raised questions about whether this Commission should impose rules to preserve the copper facilities in order to safeguard choices by consumers and protect competition by CLECs.

We therefore opened this rulemaking on CALTEL's petition (Petition (P.) 07-07-009) to examine: (1) whether we should establish procedural rules that ILECs and others must follow when an ILEC intends to retire or permanently remove copper loop facilities, and if so, what the rules should be; (2) whether we should adopt substantive prohibitions or conditions on the removal of such facilities, and, if we require that the facilities be maintained, who shall pay for such maintenance; and (3) whether ILECs are permanently removing copper drops or other facilities, and, if so, what action we may take to ensure their replacement where a customer so requests.

In examining these issues, we specifically reviewed the extent to which ILECs that are installing fiber are removing the copper network, whether customers or ILEC competitors have been harmed, or will likely be harmed, by any such practice, and whether we should adopt rules to preserve the copper network for future generations.

² Reply Comments of the California Association of Competitive Telecommunications Companies on Proposed Decision Declining to Adopt Regulations Governing Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities at pp. 28-32 [CALTEL OIR Reply Comments].

We have compiled a substantial record examining copper retirement issues in detail. In addition to the comments and data we received in response to P.07-07-009, we took comments in connection with this Rulemaking. CALTEL, Integra Telecom of California, Inc. (Integra), the United States Department of Defense/Federal Executive Agencies (DOD/FEA), the Commission's Division of Ratepayer Advocates (DRA), and The Utility Reform Network (TURN) filed comments generally supporting CALTEL's proposed rules, while the ILECs – Pacific Bell Telephone Company dba AT&T California (AT&T), Verizon California Inc. (Verizon), SureWest Telephone (SureWest) and the small California ILECs³ (Small LECs) – each filed comments, data request responses, or both in P.07-07-009 (with comments filed on August 13, 2007, August 23, 2007, and October 16, 2007, and data request responses⁴ filed on October 4, 2007) and in this proceeding (with comments filed on March 14, 2008 and May 28, 2008).

We sought information from the ILECs as to whether they were permanently removing or retiring copper facilities in the “local loop,” located between the ILECs’ central offices and customers’ homes and businesses,

³ Calaveras Telephone Company (U1004C), Cal-Ore Telephone Co. (U1006C), Ducor Telephone Company (U1007C), Foresthill Telephone Co. (U1009C), Global Valley Networks, Inc. (U1008C), Happy Valley Telephone Company (U1010C), Hornitos Telephone Company (U1011C), Kerman Telephone Company (U1012C), Pinnacles Telephone Co. (U1013C), The Ponderosa Telephone Co. (U1014C), Sierra Telephone Company, Inc. (U1016C), The Siskiyou Telephone Company (U1017C), Volcano Telephone Company (U1019C), Winterhaven Telephone Company (U1021C) (“Small LECs”).

⁴ The Administrative Law Judge (ALJ) issued a ruling on September 14, 2007 asking the ILECs to disclose the extent of their removal of copper facilities, how they defined retirement, the impact of such retirement, and related information. The ILECs' responses are the data request responses referred to in text above.

including the “drop” line that attaches underground or overhead telephone facilities to individual customer premises.⁵ In 2004, Verizon launched FiOS, a plan in which it would deploy fiber all the way to the customer’s premise (“FTTP”) in some service areas to provide broadband and entertainment video offerings.⁶ Verizon plans to pass approximately 50% to 60% of the homes on its network nationwide with FiOS; in non-FiOS areas, Verizon will continue to provide broadband service on copper facilities.⁷ While Verizon has deployed substantial amounts of fiber, Verizon's copper retirement actions to date have been modest -- consisting of removal of approximately 40,000 copper drops (10 percent of the homes Verizon passes with fiber)⁸ Verizon retired the copper drops without providing notice to this Commission or to the FCC.⁹ Verizon physically removed the drop line, but after October 2007 Verizon changed its

⁵ *Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services*, Rulemaking (R.) 08-01-005, *Order Granting Petition for Rulemaking and Instituting Rulemaking as to Whether to Adopt, Amend or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services* (OIR), Appendix A, at 2 (R.08-01-005).

⁶ Comments of Verizon California Inc. (U-1002-C) and Verizon West Coast, Inc. (U-1020-C) On Order Instituting Rulemaking, at p. 2, March 14, 2008 [Verizon OIR Opening Comments].

⁷ Verizon OIR Opening Comments, at p.2; Response of Verizon California, Inc. (U-1002-C) to Administrative Law Judge’s Ruling Requesting Additional Information and Noticing Pre-hearing Conference, at p. A-4, Oct. 4, 2007 [cited hereinafter as Verizon Response].

⁸ Verizon OIR Opening Comments, Appendix B (Panel Declaration), at ¶34.

⁹ CALTEL OIR Reply Comments, at p.4, 40;

policy and generally leaves the drop line in place after it is retired.¹⁰ Verizon currently has a voluntary policy that it will replace the copper drop at no cost if a customer requests it.¹¹ Such restoral takes an average of nine days,¹² though there is no requirement that Verizon meet these deadlines for copper replacement. There is no evidence from which the Commission can determine whether the restoral policy is working because Verizon stated that it does not maintain records of the number of customers that have requested replacement of the copper drop in order to purchase service from a CLEC.¹³

AT&T stated that, except in greenfield situations, it has not, to date, deployed fiber to the home or fiber to the curb in California.¹⁴ Instead, AT&T's broadband network, U-Verse, is a hybrid network of fiber and copper that will require AT&T to leave the copper portion of the network in its system.¹⁵ Thus, AT&T stated in the record that it has not retired copper loops since at least year 2000,¹⁶ and AT&T asserted that it has no plans to remove the copper network in the next 36 months.¹⁷

¹⁰ Verizon Opening Comments, Appendix B (Panel Declaration), at ¶34.

¹¹ Verizon Opening Comments, Appendix B (Panel Declaration), at ¶34; Verizon Response, at p. A-11.

¹² Additional Comments and Information Request Responses of Verizon California, Inc. (U 1002 C), at p. A-3, October 16, 2007.

¹³ Verizon Opening Comments, Appendix B (Panel Declaration), at ¶34.

¹⁴ AT&T Response to CALTEL DR 1-22, attached to these Reply Comments, as Exhibit 2.

¹⁵ "AT&T Says Won't Need Fiber-to-the Home Network," Reuters news service, Dec. 5, 2006, attached to these Reply Comments, as Exhibit 3.

¹⁶ Response of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) to Administrative Law Judge's Ruling Requesting Additional Information and Noticing

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SureWest states that it has no current plans to retire copper facilities¹⁸ and the Small ILECs state that no CLEC operates in their service areas.¹⁹

At the time the Proposed Decision was issued, Verizon was the ILEC most likely to retire copper plant. After the Proposed Decision was prepared, however, AT&T has issued Accessible Letters to CLECs²⁰ indicating that it plans to retire copper facilities in two California cities.²¹ AT&T may retire additional copper facilities in the future.²²

Pre-hearing Conference, Oct. 4, 2007, at p. 5, (response 2b) [cited hereinafter as AT&T Response].

¹⁷ AT&T Response, at p. 5, 11 (response 2, and 3).

¹⁸ opening Comments of SureWest Telephone (U 1015 C) Regarding Rulemaking R.08-01-055 Issued January 14, 2008, at p.2 [cited hereinafter as SureWest OIR Comments].

¹⁹ Reply Comments of Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C) and Winterhaven Telephone Company (U 1021 C), at p. 3, March 28, 2008 [Small ILEC OIR Reply Comments].

²⁰ In addition, AT&T issued an Accessible Letter stating that it has begun a fiber to the home project in Georgia that will result in the complete elimination of UNEs and special access. Accessible Letters are issued by AT&T to CLECs to provide official notice of network and service changes. Although AT&T issued these Accessible Letters after the Proposed Decision was prepared, CALTEL brought them to the Commission's attention in its Opening Comments on the Proposed Decision, and asked that the Commission take official notice of them.

²¹ Opening Comments of the California Association of Competitive Telecommunications Companies On Proposed Decision Declining To Adopt Regulations Governing Retirement By Incumbent Local Exchange Carriers of Copper Loops and Related Facilities at p.11-12 [CALTEL OIR Opening Comments].

²² Reply Comments of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) to Commissioner Chong's Proposed Decision Declining to Adopt Regulations Governing Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services on Ground Dispute is Unripe, at p. 3 [AT&T PD Reply Comments] ("AT&T California did not (indeed, could not) commit that there would never be circumstances that could cause it to retire copper in the future.")

AT&T's Accessible Letters mark a departure from AT&T's statements in the record that it does not remove copper cable and replace it with fiber, and that it does not discontinue or plan to discontinue loop availability due to fiber deployments.²³ Unlike Verizon, which has a voluntary policy of restoring retired copper at the request of a customer, AT&T has stated in the record that once it retires copper facilities, it will not restore them. Because AT&T's copper retirement activities will be permanent, AT&T's likely retirement activities must also be taken into account in the Commission's evaluation of the need for rules regarding copper retirement.

While SureWest is in the process of rebuilding its network to install fiber all the way to the home, it has no CLEC in its service territory that obtains unbundled network element (UNE) loops from SureWest using copper plant. Thus, SureWest claims, removing its copper network will not deprive any CLEC of its right to lease UNEs on the SureWest network.

Finally, the Small LECs are not building fiber optic networks to replace copper facilities, and have no CLECs leasing their lines, so they too claim the facts do not support action in this proceeding.

Neither CALTEL nor other parties favoring CALTEL's proposed rules were able to identify any specific harm that has befallen them or any other CLEC in California. The Commission recognizes, however, that there is a potential for harm for CLECs and consumers that wish continued access to the copper that an ILEC intends to retire. We discuss this and the steps we take to avoid such harm below.

²³ Declaration of Joseph Gillan, at ¶13 [cited hereinafter as Gillan Declaration], attached

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3. The Commission has Jurisdiction to Act

As an initial matter, we note that in its *Triennial Review Order* (TRO) order,²⁴ the FCC declined to adopt any rules to prohibit the ILECs from retiring copper loops or subloops that they have replaced with FTTH loops.²⁵ The FCC explicitly left open for state commissions “to evaluate whether retirement of copper loops complies with state legal or regulatory requirements”:

...[W]e stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC’s retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements. We also stress that we are not establishing independent authority based on federal law for states to review incumbent LEC copper loop retirement policies. We understand that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements.²⁶

We find that in the above passage the FCC granted this Commission express authority to consider, under state law, rules or procedures, whether to govern ILEC retirement of copper facilities. Even if, as the ILECs contend, the state law had to pre-date the 2003 TRO decision by virtue of the FCC's use of the

to these Reply Comments, ; AT&T Response to CALTEL DR 1-20.

²⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Development of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003) (TRO).

²⁵ *Id.* at ¶ 281.

²⁶ *Id.* ¶ 284.

present tense in stating that "many states *have* their own requirements,"²⁷ at least one California statute qualifies.

Pub. Util. Code § 709, effective January 1, 2003, requires the Commission to facilitate the availability of broadband networks in California, as follows:

- 1) "continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians" (§ 709(a));
- 2) "encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services" (§ 709(c)); and
- 3) make efforts to "assist in bridging the `digital divide' by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income and disabled Californians" (§ 709(d)).

The record of this proceeding demonstrates that the copper network is increasingly useful to facilitate advanced services in this state. This development is relatively recent. As Integra points out in material submitted with its comments,²⁸ DSL is but one use of copper plant to facilitate broadband. While ADSL started out with up to 1.5 megabits per second (Mbps) of capacity, ADSL2 can provide 25 Mbps/pair. VDSL2 can provide up to 100 Mbps/pair on short loops of less than 1,000 feet, enough bandwidth to support services such as high

²⁷ We do not necessarily agree with the ILECs' interpretation of the FCC language as applying only to pre-existing state law, but assume that interpretation for purposes of argument.

²⁸ *Comments of Integra Telecom of California, Inc. on Order Instituting Rulemaking*, R.08-01-005, dated March 14, 2008, Exhibit 1, at 8-9.

definition television and video-on-demand. Ethernet over copper is a robust application (with speeds up to 20 Mbps) for California business, especially small business. Thus, arguably the use of copper wiring is one of many competitive ways of meeting our obligations to advance broadband deployment under § 709.

Pub. Util. Code § 851, enacted in 1951, requires utilities to apply for Commission approval to sell, lease, assign, mortgage, or otherwise dispose of or encumber facilities that are necessary or useful. CALTEL argues that the retirement of copper loops is removal of plant that is necessary or useful and that the ILECs must obtain Commission approval regarding such retirement.²⁹ AT&T argues on the other hand that Section 851 “by its own terms, does not apply to property that is no longer necessary or useful to the ILEC in the performance of the ILEC’s duties to the public.”³⁰

Verizon argues that Pub. Util. Code § 851 does not apply to the “retirement” of copper loops, as it only applies to “transactions” such as the sale, lease, encumbrance or “disposition” of public utility property that is necessary or useful to its public service obligations.³¹ We disagree and find the term “otherwise dispose of” is broad enough to encompass copper loop retirements, as

²⁹ *Comments of CALTEL on Order Instituting Rulemaking, R.08-01-005*, dated March 14, 2008 (*CALTEL Opening Comments*), at 14-15. CALTEL’s argument is that Section 851 applies to the retirement of copper facilities because the facilities are an integrated part of the network that is used by the ILECs and CLECs. CALTEL also asserts that the ILECs have a duty to serve the CLECs; and that copper facilities are used to provide wholesale services.

³⁰ *Comments of AT&T on Order Granting Petition for Rulemaking, R.08-01-005*, filed March 14, 2008 (*AT&T Opening Comments*) at 8.

³¹ *Verizon Reply Comments*, at 29-30. Verizon further asserts that absent a “transaction,” Section 851 does not apply on its face to copper loop retirement.

a disposition of assets. We also note this disposition could include the sale of copper as a raw material. *See Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 308 (1934) (holding that a hydroelectric power company could not release excess water from a river to maintain the level of a pool without the prior approval of the Railroad Commission [this Commission's precursor] because the river water had been dedicated to a public purpose). The common dictionary definition of "dispose" includes "to get rid of, or to deal with conclusively," and therefore includes retirement.³²

The Commission has previously stated that “[o]ne of the fundamental purposes of Section 851 approval of the sale or transfer of utility assets is to permit the Commission to make a determination that the assets transfer will not impair the ability of the utility to provide adequate service to its customers following the transaction.”³³ In this proceeding, we adopt a process to facilitate the continued competitive market based access to copper facilities. This process affords CLECs the opportunity to negotiate terms for either the purchase or lease the copper facility. Therefore, there is potential for “sale,” “assignment,” or “leasing” of the copper and Section 851 will apply directly.

Under both § 709 and § 851, the Commission has jurisdiction to act to preserve the copper network and we adopt the process discussed in this decision accordingly.

³² *Id.* at 3, citing Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/dispose>.

³³ *See* D.07-03-008; D. 05-09-008 (noting that “Our primary objective in reviewing the sale of utility property is to ensure that disposition or encumbrance of public utility property does not impair a utility's public service to customers”).

4. CALTEL and Parties Supporting the Adoption of Rules Have Provided Evidence to Justify Copper Retirement Rules

As discussed above, we conclude that we have jurisdiction to adopt rules regarding copper retirement (as discussed in the next section), and there is a rational reason to establish rules. This Decision represents a careful balance between policies of this Commission: encouraging the rapid deployment of high speed telecommunications services in a technology-neutral manner, consistent with Section 709 for economic development purposes, promoting fair competition and uninterrupted service for retail consumers.

CALTEL, Integra, Dodd/FEA, DRA and TURN all argue that the removal or decommissioning of the ILECs' copper facilities upon overbuilding with fiber will have an especially severe impact on critical competitive access, which will likely lead to less choice, higher prices, and a decrease in the availability of broadband services in California. CALTEL and Integra note that CLECs have invested in equipment and new technologies to "unleash the full potential" of existing copper facilities, as the FCC has encouraged, to offer new broadband services such as ADSL2 and Ethernet over Copper that support speeds of 20Mbps to 100Mbps. These speeds are capable of supporting state of the art services such as videoconferencing and video on demand. Such broadband services are especially critical to meet the needs of small and medium sized business customers because the vast majority of such businesses are located in buildings that are not served by fiber. To remove competitive and broadband services from this sector of California may result in unfair trade practices. Without CLEC offerings, these business customers will likely have no competitive alternatives because wireless offerings are impractical to meet their

needs, which frequently include high volumes of data communications, and because cable is often not available in their locations.

In addition to supporting competitive services, the ILECs' copper facilities play an important role in public safety and emergency preparedness. Due to the technical characteristics of copper, those facilities can provide power for telephones from the ILECs' central offices in the event of a commercial power outage, while fiber facilities cannot. DoD/FEA, the largest telecommunications user in California, notes that removal of copper facilities raises safety concerns because it removes a redundant network facility. During an emergency with an extended power outage, the copper facilities will be valuable in restoring communications and may provide a temporary or partial fix until other facilities can be restored. Copper facilities may also be needed to ensure the availability of "warm line" service to California customers.

The California legislature has given this Commission a broad legislative mandate to encourage competition for widespread, affordable broadband service to all California consumers. Therefore, the adoption of rules is necessary to ensure that the ILECs' copper facilities will be left in service wherever possible to support competitive services. Copper facilities are clearly useful and necessary for the provision of narrowband and broadband services to ILECs' retail customers and their CLEC wholesale customers. Therefore, we believe that adopting rules on copper retirement will ensure that we meet our obligations under state law to examine and approve the disposal of utility assets.

The ILECs have stated that they do not have plans to retire copper in fiber overbuild areas in the next 36 months. We note, however, that Verizon has a concrete business plan in place to retire copper when a critical mass of customers subscribe to FiOS services in a fiber service area and AT&T has recently

announced planned copper retirements. Therefore, copper retirements will occur in the near future. In any event, now is the time for this Commission to act to facilitate a marketplace certainty and to ensure that copper retirements are carefully planned to avoid customer service disruptions and elimination of competition. Proactive efforts are also prudent to preempt the likely complaints that will be filed at the Commission by CLECs and their customers threatened with service disruption and foreclosure of entire markets to competitors.

The ILECs have argued that the retention of copper facilities will cause them to forego cost savings that could have been realized by retiring copper. However, the ILECs have not quantified precisely what cost savings might result from copper retirement. Rather, Verizon and AT&T argue that the theoretical possibility of cost savings will give the ILECs a greater incentive to deploy fiber, though both agree that currently cost savings are not a substantial driver of fiber deployment.

Both AT&T and Verizon have already deployed substantial amount of fiber facilities in California without retiring copper, and neither Verizon nor AT&T has asserted that it is uneconomic to deploy fiber unless they retire copper facilities. Verizon stated that it “has never claimed that legacy copper facilities must be retired before FTTP is deployed, or that Verizon must immediately retire copper facilities in order to deploy FTTP.”³⁴ Similarly, AT&T's economic expert stated that the ILECs’ initially deploy fiber in “inframarginal areas” that have the greatest profit potential and that in these inframarginal areas, “the cost savings associated with copper retirement may not be an essential component in

³⁴ Verizon OIR Reply Comments, at p.2.

justifying fiber deployment” because the cost savings from retiring copper loops is small in comparison to the expected profits, “so that there is no immediate need for copper loop retirements.”³⁵

As ILECs begin to contemplate deploying fiber in less profitable areas, the “theoretical” cost savings from copper may become more important.³⁶ The ILECs’ however, have stated that they do not intend to deploy fiber facilities to the customer premises throughout their service areas. Thus, the Commission must weigh the benefits of continued copper availability for competitive service offerings and public safety against the future possibility that ILECs will have a somewhat increased incentive to deploy fiber to support entertainment services in marginally profitable areas based on theoretical savings from copper retirement. This balance weighs in favor of preserving copper facilities.

The ILECs have argued extensively that the FCC intended to create an incentive for fiber deployment by allowing copper facilities to be retired. A thorough review of the citations on which the ILECs rely, however, demonstrates that the FCC’s primary incentive for ILEC deployment of fiber was limiting unbundling of those facilities, not copper retirement. We disagree that protecting the continuing availability of copper facilities for use by competitors is tantamount to a new unbundling requirement, from which this Commission would be precluded under federal law. We further disagree that the FCC intended only to ensure CLEC access to ILEC facilities for narrowband services. The FCC expressly stated that it intended to guarantee CLEC access to ILEC

³⁵ AT&T OIR Opening Comments (Taylor Attachment at p.10-11)

³⁶ AT&T OIR Opening Comments (Taylor Attachment at p.10-11)

facilities for the provision of broadband service.³⁷ Indeed, the FCC expressly held that CLECs would continue to have access to both copper and fiber facilities for high capacity offerings such as T-1 and T-3.

5. The FCC has Rules in Place

The FCC has rules in place that require ILECs to provide notice of proposed action to remove copper loops. Those rules are found at 47C.F.R. 51.325-51.333. We do not express an opinion on whether those rules are adequate for all potential future copper retirements, but do summarize them here. We additionally emphasize that our rules regarding copper retirement are supplementary to the FCC's rules.

The FCC rules give competitors that lease lines from an ILEC proposing to remove copper facilities the right to file objections to gain time to smoothly transition service. Under these rules, ILECs planning to retire copper loops that have been replaced with a fiber loop must comply with the network disclosure requirements set forth in 47C.F.R. 51.325-51.335.³⁸ These rules provide that ILECs must provide public notice of planned changes at the "make/buy point."³⁹ The make/buy point, in this instance, is the time at which an ILEC decides to replace copper loops within its network with fiber facilities.⁴⁰ The notice requirement depends on when the planned change can be implemented after the

³⁷ See e.g., TRO ¶¶200, 244.

³⁸ 47 C.F.R. 51.325(a)(4).

³⁹ 47 C.F.R. 51.331(b).

⁴⁰ *Id.*

make/buy point. The ILEC must give notice within 12 months of the make/buy point except:

- (1) If the changes can be implemented within 12 months of the make/buy point, public notice must be given at the make/buy point but at least six months before implementation.
- (2) If the changes can be implemented within six months of the make/buy point, public notice may be given pursuant to the short-term notice procedures provided in 51.333.⁴¹

The short term notice requirements under 47C.F.R. 51.333 require public notice if the ILEC wishes to implement the planned network changes less than six months after public notice.⁴² In this case, the ILEC must serve a copy of its public notice upon each telephone exchange service provider that directly interconnects with the ILEC's network at least five business days in advance of its filing with the FCC.⁴³ Under the FCC's rules for notice of replacement of copper loops or copper subloops with FTTH or FTTC loops, the FCC requires that notices shall be given **within a minimum of 90 days** of such change.⁴⁴ Notices of replacement of copper loops or subloops with FTTH or FTTC loops shall be deemed approved on the 90th day after release of the FCC's public notice of the filing, unless an objection is filed.⁴⁵

An information service provider or telecommunications service provider that directly interconnects with the ILEC's network may file objections to an

⁴¹ 47 C.F. R. 51.331(a).

⁴² 47 C.F. R. 51.333(a).

⁴³ *Id.*

⁴⁴ 47 C.F.R. 51.333(b)(2).

ILEC's notice.⁴⁶ These objections must be filed with the FCC and served on the ILEC no later than the ninth business day following the release of the FCC's public notice.⁴⁷ The objecting party must clearly set forth reasons why it cannot accommodate the ILEC's changes by the date stated in the public notice and must indicate any specific technical information required that would enable the objector to accommodate those changes.⁴⁸ Further, the objector must list steps that it is taking to accommodate the planned retirement and state the earliest possible date (**not to exceed six months** from the original date given in the public notice) by which the objector anticipates it can accommodate the proposed retirement.⁴⁹ It must also provide an affidavit stating that the objection is reasonable and not being submitted for purposes of delay.⁵⁰

The ILEC shall have until no later than the 14th business day following the release of the public notice to file a response to the objection with the FCC and serve the response on all parties that filed objections.⁵¹ If an objection is filed, the FCC will issue an order determining a reasonable public notice period.⁵²

⁴⁵ *Id.*

⁴⁶ 47 C.F.R. 51.333(c).

⁴⁷ *Id.*

⁴⁸ *Id.* at (c)(1).

⁴⁹ *Id.* at (c)(2) and (3).

⁵⁰ *Id.* at (c)(5).

⁵¹ *Id.* at (d).

⁵² *Id.* at (e).

Under the FCC's rules, ILECs must provide a minimum of 90 days of notice to CLECs that will be directly affected by planned copper retirement.⁵³ Further, ILECs must notify affected CLECs directly if they plan to implement the retirement in fewer than six months. Thus, while the FCC rules do not allow a CLEC to prevent a proposed retirement, the rules do give affected CLECs notice and information regarding the planned retirements. Moreover, as discussed above, the FCC noted that it expected the carriers to work together to maintain access to the facilities.

CLECs contend that the FCC's current rules are not intended to take into account the effect of copper retirements under state law, and are not sufficient to prevent harm given the lack of opportunity to preserve the copper facility, even in instances where a CLEC is serving a customer using that facility..⁵⁴ However, the FCC's website lists numerous copper retirement notices that have been filed with the FCC.⁵⁵ Although the number in California is small, since January 1, 2006 there have been over 250 notifications of proposed copper retirements by ILECs throughout the country. Despite these numerous notifications, filed pursuant to the FCC's rules, no evidence was submitted in this proceeding that consumers have been harmed in any way as a result of these copper retirements.

In light of the totality of the above discussion, the Commission believes that a showing of actual harm is not necessary for us to act proactively to protect against a significant threat to competition, customers, and safety that copper

⁵³ *Id.* at (f).

⁵⁴ See *CALTEL Opening Comments* at 17,

⁵⁶ Pub. Util. Code § 5810(a)(1)(E).

retirement poses. We find that there is substantial public benefit in safeguards that may foster preservation of copper in competitive markets.

We conclude that the Commission should adopt rules for the retirement of ILECs' copper facilities. We decline to adopt the proposed CALTEL rules, however, and instead adopt a streamlined set of rules with emphasis on notice, information disclosure and party negotiations. We anticipate that these rules will enable ILEC and CLEC parties to reach agreement on the majority of disputes regarding proposed retirements of copper facilities. In those instances, however, where agreement cannot be reached, particularly in instances where CLEC customers would lose service as a result of a retirement, the Commission can and will issue a determination resolving the dispute

6. Process for ILECs and CLECs to Negotiate Access to Loop Facilities

Specifically, we will require an ILEC that plans to retire a copper loop and replace it with fiber loops to file with the Communications Division a Tier 2 Advice Letter, as well as a concurrent copy of its notice of network change that it files with the FCC pursuant to 47 C.F.R. 51.333 at least 90 days prior to the planned retirement. The ILEC shall also serve this notice concurrently on all CLECs that interconnect with the ILEC, regardless of whether a CLEC is currently serving a customer on that facility or not. If a CLEC files an objection with the FCC pursuant to 47 C.F.R. 51.333(c), the CLEC shall file a concurrent copy of that objection with the Communications Division.

Any CLEC that seeks to use that copper facility shall provide to the incumbent carrier within 20 days of receiving notice from the ILEC, a request for negotiations with the ILEC either to purchase the copper facility or to reach a fair and equitable agreement with the ILEC on price and terms and conditions to

access loop facilities. The CLEC shall include in its request for negotiations the following information:

- a) Whether the CLEC seeks to purchase the copper facility, or whether the CLEC seeks only to maintain access to a loop facility;
- b) The number of customers or potential customers on the copper UNE;
- c) The services that the CLEC may provide over the facility; and
- d) The number of UNEs or special access circuits that the CLEC currently purchases.

We will require the ILEC to enter into good faith negotiations with the CLEC for a period of 30 days either to sell the copper facility at issue; or to reach a fair and equitable agreement with the CLEC on price and terms to ensure access to loop facilities. If negotiations fail at the end of the 30 days, either party may seek arbitration, either through a private party arbitrator, or at the Commission. If arbitration is sought at the Commission, the arbitrator will establish a schedule for the parties and will arbitrate the dispute between the parties within 40 days of the request for arbitration. If no agreement can be reached after arbitration takes place, the Commission may, in its discretion, open a proceeding or defer to the established FCC Rules for copper retirement.

We reiterate that it is this Commission's policy, under Pub. Util. Code § 709, to promote the development and deployment of new technologies and the ubiquitous availability of a wide choice of state-of-the-art services. We believe that this mandate is consistent with the FCC's policies set forth in the *TRO* to encourage the deployment of broadband services. The California Legislature has also expressed its goal to "[c]omplement efforts to increase investment in broadband infrastructure and close the digital divide."⁵⁶ Given these express

state and federal goals, we adopt rules today establishing a process by which CLECs may purchase or lease copper facilities proposed for retirement by ILECs. We believe that the process we establish above promotes state and federal goals for broadband deployment; ensures competitive neutrality; is consistent with the FCC's *TRO*; and provides reasonable opportunities for the competitive carriers to negotiate access to copper facilities.

7. We are Addressing Emergency Preparedness in a Separate Proceeding

Several parties, including CALTEL, ask us to preserve the existing copper network because it is more reliable in a disaster. We are examining the issue of availability of backup power for telephone service over fiber, in R.07-04-015, our *Rulemaking on the Commission's Own Motion into Reliability Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems Pursuant to Assembly Bill 2393 (Backup Power Rulemaking)*. That proceeding is the appropriate forum to consider issues of reliability and emergency preparedness on fiber networks.

Moreover, to the extent that an ILEC has transferred a customer to its fiber-based service, the underlying copper loop cannot be easily used in the event of an emergency. Once Verizon switches a group of customers on a particular copper facility to FiOS, for example, it removes or disables the copper drop to make room for the fiber facility, subject to replacement on customer request. In the event of an emergency, therefore, the customer may not easily switch back to copper-based service for emergency purposes without a visit from a Verizon service technician. In view of these facts, it is far from clear that redundancy in copper-fiber networks is the best way to ensure emergency preparedness. Access to wireless phones provides redundancy for some

customers, though wireless service may be inadequate to replace all customers' communications needs, especially business customers' needs, during an emergency.⁵⁷

Thus, we find that the emergency preparedness issues are another factor justifying the rules we set forth herein.

8. Cost Issues

In seeking parties' input on CALTEL's proposed rules, we learned that the ILECs and CALTEL have disparate views on who should pay to maintain the network, the costs involved and how to calculate them. CALTEL argues that the ILECs already recover the cost of maintaining copper facilities when they are in use by a CLEC either for UNEs or special access.⁵⁸ If copper is not in use by a CLEC, CALTEL states that CLECs are willing to pay for any just and reasonable, direct, incremental costs to return copper facilities to usable condition (e.g. cross connects or service order charges) for which CLECs are the sole cost causer. CALTEL asserts, however, that in the large majority of situations, CLECs will not be the sole user or cost causer of copper facilities.⁵⁹ First, Verizon, AT&T and SureWest all deploy copper and fiber facilities in shared infrastructure (conduits,

⁵⁷ Since 2001, California's largest ILECs have lost 25% of their embedded wireline customer base to broadband DSL and cable, as well as substitution of VoIP and wireless for wireline voice services. Wireless subscribership was 30.2 million in June 2007, or 82.7 percent of the state's population. Further, it is estimated that there are currently between 900,000 and 1.2 million VoIP subscribers in CA. *See Residential Telephone Subscribership and Universal Telephone Service Report to the Legislature*, California Public Utilities Commission (June 2008), pp. 8-15.

⁵⁸ CALTEL OIR Opening Comments, at p.9-10, 27-28.

⁵⁹ CALTEL OIR Reply Comments, at p.13-20.

poles, vaults, manholes, etc.,⁶⁰ and retired copper will likely be abandoned in place.⁶¹ Therefore, the ILECs will necessarily have to maintain that infrastructure in good working order for the fiber, and therefore would incur most, if not all, maintenance regardless of whether copper facilities are present.⁶² Verizon identified 30 maintenance tasks associated with copper facilities and stated that 25 of them would occur whether or not copper facilities were in use.⁶³

Second, both AT&T and Verizon will continue to use copper facilities themselves for some time.⁶⁴ In addition to using copper facilities to support narrowband service, AT&T will use copper facilities as part of its U-verse platform and Verizon must leave in place sufficient copper facilities to serve non-FiOS customers until it is economic to force migrate all customers to fiber in a FiOS service area and to restore FiOS customers back to copper at their request until the forced migration occurs.⁶⁵ Because the ILECs' copper facilities have been deployed in a tree and branch architecture, CALTEL notes that the ILECs are precluded from retiring and removing a single loop or single portion of a facility.⁶⁶ This is because a single feeder facility serves multiple distribution facilities, a feeder could not be retired unless all distribution facilities connected

⁶⁰ Verizon Opening Comments, at p. 35-36, Appendix B, at ¶¶ 29, 47; AT&T Opening Comments, at p. 27; SureWest Opening Comments, p. 7.

⁶¹ See e.g., Verizon OIR Opening Comments, Appendix B, ¶34).

⁶² CALTEL OIR Reply Comments, at p. 13.

⁶³ Verizon Opening Comments, Appendix B, at ¶¶16-22.

⁶⁴ CALTEL OIR Reply Comments, at p.16-20.

⁶⁵ CALTEL OIR Reply Comments, at p.13.

⁶⁶ Verizon Opening Comments, Appendix B, at ¶41-42).

to it were out of service and disconnected from the start of the section, perhaps as far back as the Main Distribution Frame (MDF).⁶⁷ Verizon states that due to the impracticality, large cost and administrative burden that would be required to monitor, track, inventory, and control every individual cable pair in every cable section strictly for accounting purposes, a given feeder copper cable may not be retired for many years, if ever.⁶⁸ Because the ILECs will be unable to retire large portions of fiber facilities, the incremental cost of maintaining a modest additional amount of copper for use by CLECs (e.g. leaving in place a 100 pair bundle in an instance where the ILEC needed only 50 pairs to serve customer demand) will likely be minimal.⁶⁹

Because the universe of maintenance costs attributable solely to CLECs is small, there will likely not be a need for a lengthy or complex cost proceeding.⁷⁰ Costing would become an issue only in instances where a CLEC was not actively using a copper facility proposed for retirement (because ILECs already recover the cost of copper facilities used for UNEs and special access). In such instance, CALTEL reasons, the ILECs would presumably have conducted a cost benefit analysis of retiring the copper facility, including any cost of maintaining facilities for CLEC use, and would simply need to submit such analysis for review.⁷¹ As an example, AT&T was able to determine that it was more economic to retire

⁶⁷ Verizon Opening Comments, Appendix B, at ¶¶41-42).

⁶⁸ Verizon Opening Comments, Appendix B, at ¶¶41-42.

⁶⁹ CALTEL OIR Reply Comments, at p.13-20.

⁷⁰ CALTEL PD Opening Comments, at p.13.

⁷¹ CALTEL PD Opening Comments, at p.13.

copper and use fiber than to replace copper facilities that will be moved for a road widening project in Watsonville.⁷² Consideration of the precise costs associated with preservation of copper facilities for CLECs' use will necessarily be fact-specific and must be done on a case-by-case basis. ILECs will be expected to provide all supporting data for its claimed costs of maintaining copper facilities as part of its Advice Letter filing.

CLEC maintenance costs for the copper facilities prior to being placed back into service will be determined according to whether the facilities share a common infrastructure (e.g., conduit, utility pole, vault, manhole, etc.) with the ILEC's fiber facilities, and therefore pose little incremental maintenance costs.

CALTEL asserts that UNE pricing or special access rates for loops approximate the ILEC costs of maintaining a retired copper loop.⁷³ The ILECs dispute this claim and assert that many other costs should be included in any price to competitors of maintaining a network the ILECs no longer use.

We believe that the process we adopt today, subject to a requirement to negotiate in good faith, will allow parties to independently determine what price scheme is fair in order to assure continued access to copper. It is the parties' responsibility to reach a fair and equitable solution based solely on the incremental costs, if any, to the ILEC associated with maintaining the copper network in question. However, if the parties are unable to reach resolution, the Commission can and will use its authority to resolve a disputed copper retirement.

⁷² AT&T PD Reply Comments, at p. 3.

⁷³ CALTEL *Opening Comments* at p.10, 28.

9. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Verizon is installing an all fiber network.
2. AT&T's U-Verse broadband network is a hybrid of copper and fiber.
3. No CLEC in SureWest's service territory obtains UNE loops from SureWest using copper plant.
4. The Small LECs are not building fiber optic networks to replace copper facilities, and have no CLECs leasing their lines.
5. Verizon has removed 40,000 copper drops (approximately 10 percent of homes passed with fiber in California)
6. Verizon has a voluntary policy to replace copper drop(s) upon request.
7. AT&T has announced plans to replace copper feeder facilities with fiber Downieville and Watsonville, California.
8. AT&T's has announced plans to replace copper with fiber in Georgia and to discontinue all UNEs and designed circuits provided over those copper facilities.
9. AT&T's policy is not to replace copper facilities at the request of a customer.
10. ILECs recover the cost of maintaining copper facilities when they are in use by a CLEC either for UNEs or special access.
11. Verizon's FiOS network and AT&T's U-Verse network are far from ubiquitous; therefore both ILECs will continue to use copper facilities.

12. Verizon, AT&T and SureWest all deploy copper and fiber facilities in shared infrastructure (conduits, poles, vaults, manholes, etc. and retired copper will likely be abandoned in place.⁷⁴

13. The ILECs must maintain common infrastructure in good working order for fiber installed there.

14. The ILECs will incur maintenance costs maintenance regardless of whether copper facilities are present.

15. The Commission is addressing emergency preparedness issues related to fiber optic networks in a separate proceeding.

16. Customers who have switched to fiber-based service may not easily switch back to copper in an emergency.

17. Some redundancy for emergency preparedness purposes exists via wireless services such as cellular service, though such services do not necessarily meet the needs of all customers, especially business customers.

18. Cost issues related to maintenance of copper facilities for use by a CLEC must be examined on a case-by-case basis.

19. The FCC has existing rules that provide CLECs with an opportunity to object to the timing of ILEC copper retirements.

Conclusions of Law

1. We have jurisdiction to impose rules regarding copper retirement.
2. Pub. Util. Code § 709 mandates the Commission to promote ubiquitous availability of a wide choice of state-of-the-art broadband services.

⁷⁴ See e.g., Verizon OIR Opening Comments, Appendix B, ¶134).

3. Pub. Util. Code §851 requires ILECs to obtain advance approval from the Commission for the disposal of utility assets useful or necessary to their public duties.

4. Disposal of utility assets to which Section 851 is applicable includes both financial transactions and non-financial transactions.

5. The term “dispose of” in § 851 is broad enough to encompass copper loop retirements.

6. It is the Commission’s policy to implement technology-neutral rules and regulations that neither favor nor disadvantage the use of any particular technology to provide service.

7. The FCC adopted unbundling policies in the TRO to encourage swift and ubiquitous broadband deployment.

8. We will require the ILECs to file concurrently with Commission’s Communications Division a copy of their copper retirement notices that are filed with the FCC. The ILECs shall also serve these notices on CLECs that are interconnected with them, regardless of whether the CLEC is currently serving customers on the copper facility or not.

9. The rules that we adopt for the notification, disclosure, negotiation and Commission resolution of proposed copper retirements CLEC is consistent with federal and state broadband policies, and competitively neutral.

O R D E R**IT IS ORDERED** that:

1. We adopt the rules set forth in Appendix A governing the retirement of copper facilities by ILECs in California.
2. If an Incumbent Local Exchange Carrier (ILEC) seeks to retire a copper facility with fiber facilities, the following process shall apply within the 90 days that follows the ILEC's notice to the FCC of its proposal to retire a copper facility:
 - a. The ILEC shall file with Communications Division a Tier 2 Advice Letter setting forth a detailed description of the copper being retired, name and address of each CLEC(s) that interconnect with the ILEC, whether or not they are currently using the copper facility being retired, and the date the planned retirement is proposed to take place.
 - b. The ILEC shall also file with the Communications Division a copy of its notice of network change that it files with the FCC pursuant to 47 C.F.R. 51.333 when that copper facility is being used by a CLEC. The ILEC shall serve the notice on all CLECs that are interconnected with the ILEC, regardless of whether a CLEC is currently serving a customer on that facility or not.
 - c. A CLEC that is interconnected with the ILEC shall file with Communications Division a concurrent copy of any objection that it files to a proposed copper retirement with the FCC under 47 C.F.R. 51.333(c).
 - d. Any CLEC that seeks to use that copper facility shall provide to the incumbent carrier within 20 days of the ILEC notice a request for negotiations either to purchase or lease the loop facilities and file a copy of its request with the Communications Division. The CLEC shall include in its request for negotiations the following information:
 - (a) Whether the CLEC seeks to purchase the copper facility, or whether the CLEC seeks only to maintain access to a loop facility;

- (b) The number of customers or potential customers on the copper UNE;
 - (c) The services that the CLEC may provide over the facility; and
 - (d) The number of UNEs or special access circuits that the CLEC currently purchases
- e. Upon receipt of the CLEC's request for negotiations, the ILEC shall negotiate in good faith with the CLEC for a period of 30 days either to:
- i) Sell the copper facility to the CLEC; or
 - ii) Reach a fair and equitable agreement with the CLEC on price and terms to ensure access to loop facilities.
- f. If the parties are unable to reach an agreement by the end of 30 days, either party may seek arbitration either through a private third party arbitrator, or through arbitration with the CPUC, setting forth the facts surrounding the failed negotiations. If arbitration is sought at the CPUC, the arbitrator will establish a schedule for the parties and will arbitrate the dispute between the parties within 40 days of the request for arbitration.
- g. If no decision is made after arbitration, the Commission, in its discretion, may open a proceeding or defer to the established FCC rules for copper retirement, pursuant to 47 C.F.R. §51.325 - §51.333.
3. Rulemaking 08-01-005 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A**RULES GOVERNING THE RETIREMENT OF COPPER FACILITIES**

If an incumbent local exchange carrier (ILEC) plans to retire any Copper Facility that is concurrently being used by a competitive local exchange carrier (CLEC), it must adhere to the following rules:

- 1) Advice Letter Asserting Intention to Retire Copper Facility
 - (a) At least ninety days prior to retiring such Copper Facility, the ILEC shall file a Tier 2 Advice Letter with the Commission providing notice of the retirement.
 - (b) The ILEC must also concurrently serve a copy of the Advice letter on any CLEC that directly interconnects with the copper to be retired.
 - (c) The Advice Letter shall include all of the following:
 - (i) A detailed description of the wire center(s) and/or service area(s) affected by the retirement of the Copper Facility, including a route map;
 - (ii) The name and address of each CLEC(s) that interconnect with the ILEC, whether or not they are currently using the copper facility being retired;
 - (iii) The date the proposed copper retirement is planned to occur; and
 - (iv) A copy of the public notice of network changes filed with the Federal Communications Commission (FCC), pursuant to 47 C.F.R. §51.325 - §51.333. This copy must reflect the date that public notice took effect or will take effect.
- 2) CLEC Responses
 - (a) Should the interconnecting CLEC(s) wish to object to the timing for the proposed copper retirement, they may file an objection with the FCC pursuant to 47 C.F.R. §51.333 (c). The CLECs must file a concurrent copy of any objections filed under this section with the Commission.
 - (b) Should the CLEC wish to object to the proposed copper retirement, the CLEC must file a response to the advice letter pursuant to D.05-01-032, asserting the intent to either purchase or lease the copper within 20 days of receiving notice of retirement from the ILEC.
 - (c) The response must contain the following information:
 - (i) Whether the CLEC seeks to purchase the copper facility, or whether the CLEC seeks only to maintain access to a loop facility;
 - (ii) The number of customers or potential customers on the copper UNE;
 - (iii) The services that the CLEC may provide over the facility; and
 - (iv) The number of UNEs or special access circuits that the CLEC currently purchases.

- (d) If no CLEC files such a response within the requisite time period, the retirement shall be deemed granted on the proposed date as set forth in the Advice Letter.
- 3) Price negotiations
- (a) Upon receipt of the CLEC's request for negotiations, the ILEC shall negotiate in good faith with the CLEC for a period of 30 days either to:
 - i) Sell the copper facility to the CLEC; or
 - ii) Reach a fair and equitable agreement with the CLEC on price and terms to ensure access to loop facilities.
 - (b) If the parties reach an agreement, they must file a statement with the Commission stating that a fair and equitable agreement has been reached. This statement must include:
 - (i) The signatures of persons from each entity authorized to make decisions.
 - (ii) The names and contact information of the signers.
 - (c) The parties shall file the statement in the appropriate advice letter docket.
 - (d) If an agreement is not entered into by the proposed date for retirement, either party may seek arbitration, either through a private party arbitrator, or at the Commission. If arbitration is sought at the Commission, the arbitrator will establish a schedule for the parties and will arbitrate the dispute between the parties within 40 days of the request for arbitration.
 - (e) If no agreement can be reached after arbitration takes place, the Commission may, in its discretion, open a proceeding or defer to the established FCC Rules for copper retirement.

(END OF APPENDIX A)

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated October 1, 2008, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo