

Decision DRAFT DECISION OF ALJ GRAU (Mailed 4/6/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U 1001 C) and SBC
Advanced Solutions, Inc., (U 6346),

Defendants.

Case 03-05-023
(Filed May 15, 2003)

OPINION RESOLVING COMPLAINT

I. Summary

In today’s decision, we find that Pacific Bell Telephone Company (SBC California)¹ and SBC Advanced Solutions, Inc. (SBC ASI) do not unreasonably discriminate against Raw Bandwidth Communications, Inc. (Raw Bandwidth) or otherwise violate applicable law by certain of Defendants’ practices as they affect Digital Subscriber Line (DSL) services.

Specifically, this complaint concerns the situation in which the telephone subscriber receives basic service from one carrier (here, Defendant

¹ Although the complaint named SBC California, Inc. as a defendant, the correct name for the legal entity is Pacific Bell Telephone Company, which also does business as SBC California.

SBC California) and DSL service from an Internet Service Provider (ISP) that is unaffiliated with the carrier providing basic service. The Complainant and Defendants have managed to settle many of the problems underlying the original complaint. Two problems remain and are before us today.

The first problem arises when the carrier providing basic service terminates that service to the subscriber for nonpayment. Our rules require advance notice to the subscriber before termination. Raw Bandwidth argues that the carrier providing basic service must give substantially the same advance notice to the ISP (DSL service provider), which effectively will no longer be able to provide DSL service upon termination of the subscriber's basic service.² The assigned ALJ granted the Defendants' motion to dismiss the complaint insofar as it seeks to impose this additional notice requirement, and Raw Bandwidth has appealed the ALJ's ruling. We affirm the dismissal, albeit our reasoning differs slightly from that of the ruling, but we direct Defendants to negotiate this notice requirement with Raw Bandwidth.

The second problem (the alleged unreasonable discrimination) arises when the subscriber calls repair (611) for a question or difficulty with DSL service. Often, the subscriber calls the carrier providing basic service, but in this situation, responding to the question or difficulty generally will be the responsibility of the ISP, to whom, consequently, the subscriber is referred. The manner of the referral is the crux of the complaint in this regard. The Defendants

² Raw Bandwidth purchases DSL Transport from SBC ASI using a line sharing arrangement. When voice service is disconnected by SBC California, line sharing no longer is viable. SBC California initially suspends dial tone for five days for nonpayment of basic service charges and then disconnects the line.

currently enable the subscriber to be connected without redialing to the service department of the ISP when the ISP is an affiliate of Defendant SBC California. (In other words, the subscriber does not have to hang up and call the affiliated ISP directly). Raw Bandwidth, which is an unaffiliated ISP, wants SBC California to do substantially the same thing for Raw Bandwidth's subscriber, *i.e.*, to offer to automatically connect those subscribers to Raw Bandwidth's service department whenever they call dial 611 with a DSL question or difficulty. We hold that, in this situation, differential treatment of subscribers is lawful; in other words, the fact that a subscriber to Raw Bandwidth's DSL service must hang up and call Raw Bandwidth's service department directly does not violate applicable state or federal law.

II. Procedural Background

We held a prehearing conference (PHC) on August 23, 2003, to establish the scope of this proceeding and set a hearing schedule. Both prior and subsequent to the PHC the parties had settlement discussions and resolved many issues.

On June 30, 2003, Defendants filed a motion to dismiss the complaint, which Raw Bandwidth opposed. On July 8, 2003, Complainant filed a request for withdrawal of issues concerning listing ISPs on the SBC.com web page. On September 11, 2003, the Assigned Commissioner Ruling's (ACR) and scoping memo granted the unopposed request of Raw Bandwidth to withdraw two counts of the Complaint. The ACR also partially granted Defendants' motion to dismiss part of Raw Bandwidth's complaint, specifically, the allegation that Defendants unreasonably disconnected DSL Transport whenever Defendants disconnected a customer's voice line service for nonpayment. The ACR noted that the relief Raw Bandwidth requested, *i.e.*, advance notice of

disconnection, raised privacy concerns. The ACR granted Raw Bandwidth leave to amend the complaint to request relief that would obviate the privacy concerns.

Raw Bandwidth filed its First Amended Complaint on September 22, 2003. On October 23, 2003, Defendants filed a joint motion to dismiss and to strike portions of the amended complaint. On October 31, 2003, the parties reported that they anticipated resolving remaining issues with the exception of the 611 transfer issue and the disconnection issue subject to the motion to dismiss. On November 7, 2003, Complainant filed a response opposing the motion to dismiss.

On October 10, 2003, Raw Bandwidth's attorney sent an email message to request that the hearings scheduled for October 15 be taken off calendar and that the matter be submitted on briefs, because the parties had settled two of the three remaining issues.³ The assigned administrative law judge (ALJ) granted the request to take the hearings off calendar and concurred with the filing of opening briefs on November 10 and reply briefs on November 25, 2003. Both parties submitted opening and reply briefs.

By December 22, 2003 ALJ Ruling, the motion to dismiss portions of the amended complaint was granted, because the relief requested (regarding disconnection of DSL Transport) would violate the settlement agreement between the California ISP Association, SBC California, and SBC ASI adopted in Decision (D.) 03-07-032.

³ Raw Bandwidth has not formally withdrawn the two issues concerning relief to which Complainant was entitled for matters settled by the parties.

In sum, the parties were able to resolve among themselves several matters from the original complaint; those matters are not discussed further. The issues before us today are (1) the request by Raw Bandwidth to reconsider the ALJ Ruling dismissing parts of the amended complaint, and (2) the discrimination issue, which was submitted on briefs. As discussed in sequence below, we affirm the dismissal and deny relief on the discrimination issue.

III. Motion for Reconsideration of December 22, 2003 ALJ Ruling

Raw Bandwidth requests reconsideration of the ALJ Ruling dismissing portions of the amended complaint. Raw Bandwidth alleges the ruling is not supported by the record, and it disagrees with the ruling's conclusion that we cannot grant the relief requested by Raw Bandwidth, *i.e.*, advance notification of disconnection. Defendants support the ruling and assert Raw Bandwidth mostly reargues its position opposing Defendants' motion to dismiss.

We affirm the ruling's conclusion that SBC ASI need not provide DSL Transport if SBC California disconnects the underlying voice service. (In practice, DSL Transport remains connected for five days after voice service has been disconnected.) DSL Transport is a detariffed service offering subject to conditions mandated by the Federal Communications Commission (FCC). (Memorandum Opinion and Order, *In the Matter of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 Fcc Rcd 27000 (2002), ¶ 1.) Under SBC ASI's general services agreement, which provides that DSL Transport is offered via a line sharing arrangement, the line cannot be shared

and DSL Transport no longer is offered once the voice line is disconnected.³ (Ruling, pp. 2-3.) Thus, disconnection of DSL Transport when the voice line is disconnected does not violate the terms under which DSL Transport is offered, nor does disconnection under these circumstances violate any law or order of this Commission.

There also is no statute or Commission order that bars disconnection of non-basic services for nonpayment of basic service charges. DSL, and by extension, DSL Transport, is not a basic service under Commission rules. Disconnecting DSL Transport for nonpayment of basic service charges does not violate a Commission order. (*See Campbell v. Pacific Bell Telephone Co.*, D.02-06-011, 2002 Cal. PUC LEXIS 391, **9-10.)⁴

There is also no statute or Commission order that requires a lengthy notice to the ISP in advance of voice service disconnection. Specifically, Defendants' practice is that five days after dial tone has been suspended for nonpayment of basic service charges, Defendants notify the ISP, either its affiliated ISP or an unaffiliated ISP, that DSL Transport is being disconnected and disconnect the line. Raw Bandwidth contends that Defendants must give 30 days' written notice before DSL Transport can be disconnected, because SBC ASI's general services agreement with the ISP provides that SBC ASI only may discontinue

³ "Company's [SBC ASI] DSL Transport is offered via a line sharing arrangement (High Frequency Portion of the Line-HFPL) over an SBC ILEC-provided (non-resold, non-UNE-Platform) retail POTS line." (SBC ASI's General Terms & Conditions, section 6.2.2.)

⁴ However, as discussed *infra*, DSL Transport is a basic service under the FCC's Computer III rules.

DSL Transport on 30 days' written notice.⁵ However, the 30-day notice referenced by Raw Bandwidth applies to the notice SBC ASI must provide if its DSL Transport customer (that is, the ISP) does not comply with the agreement. That notice does not apply to the circumstance contemplated here, the disconnection of the SBC California subscriber for nonpayment of its basic service charges and the resulting disconnection of DSL service. Thus we determine that SBC ASI's notice practice does not violate its general services agreement by notifying its DSL Transport customer only after dial tone already has been suspended and when the DSL portion of the phone line has been or is about to be disconnected.

Raw Bandwidth argues that failure to warn it in advance of disconnection of DSL Transport is unreasonable and presents problems, *e.g.*, because notice of voice disconnection sometimes is sent to the wrong address and ISPs have no opportunity to contact their subscriber to warn that subscriber of the disconnection of DSL. We reject this argument. SBC California, like any provider of basic service, must give proper notice to its subscriber before disconnecting the subscriber's basic service. The subscriber's ISP is a third party who has some interest in the disconnection of that service but who does not thereby become entitled to the same advance notice given the subscriber. Although the subscriber's ISP has no right to the disconnection notice sent to the voice service subscriber, public policy considerations favor giving the DSL

⁵ "Company [SBC ASI] may refuse additional applications for Service or discontinue the provision of Services as set forth below if a Customer fails to comply with these Terms and Conditions ("Non-complying Customer"). On thirty (30) calendar days written notice to the person designated by that customer to receive such notices of noncompliance, Company may . . ." (General Terms & Conditions, Section 2.8.1.)

Transport customer (the ISP) reasonable advance notice of the pending disconnection of DSL Transport service. DSL Transport continues five days after voice service is suspended. During that period, the issue is advance notice of DSL Transport disconnection, not voice disconnection, and the privacy protections afforded the voice subscriber for disconnection of voice service no longer apply.

Of further concern is Raw Bandwidth's contention that Defendants refuse to negotiate these terms of the general services agreement with Raw Bandwidth. In the FCC's "forbearance from tariff regulation" proceeding, SBC Communications, Inc. (SBC) committed to publishing "general rates, terms, and conditions for ISP broadband access arrangements that unaffiliated ISPs can either opt into or use as the starting point for negotiating alternative rates, terms, and conditions." (Memorandum Opinion and Order, supra, at ¶ 11.) The FCC relied on those commitments in finding that "forbearance from tariff regulation" criteria were met. (*Id.* at ¶ 13.) The failure to negotiate specific terms would violate SBC's commitment to the FCC that ISPs can negotiate alternate terms. Thus, we conclude SBC ASI must negotiate these terms with Raw Bandwidth. Among the terms that are subject to negotiation, are terms relating to notice to the ISP in the circumstances we have been discussing.

Raw Bandwidth maintains that the ALJ Ruling did not apply the appropriate standard in determining that portions of the first amended complaint should be dismissed. Raw Bandwidth is correct that the standard for dismissing complaints or portions thereof is the summary judgment standard and that the moving party must prevail based solely on undisputed facts and matters of law. The ruling determined that Raw Bandwidth's proposal to permit subscribers to waive privacy concerns to enable Raw Bandwidth to receive

advance notice of disconnection was contrary to the settlement agreement we approved in D.03-07-032. That settlement agreement precludes SBC California, when acting on behalf of its affiliated ISP, from being able to identify which unaffiliated ISP is the provider. Raw Bandwidth asserts that relaying information from SBC California to SBC ASI could be a means of providing advance notice to the ISP that would not violate the settlement agreement. If true, that procedure could resolve these legal concerns. Because we determine that the failure to give advance notice to the ISP does not violate statute or Commission order, we need not weigh the legality or merits of Raw Bandwidth's alternate advance notice proposal. However, we direct SBC ASI to negotiate with Raw Bandwidth to determine the feasibility of this or alternate proposals to satisfy the FCC's "forbearance from tariff regulation" order.

IV. Discrimination Issue

The parties stipulated to the relevant facts concerning the connection to the ISP for DSL repair services. If a caller dials 611 from an SBC California telephone line, the caller receives various Interactive Voice Response System (IVR) prompts, including entering the caller's telephone number. If the telephone number is for a line that has DSL Transport Service, the next prompt states: "Our records indicate that your voice line includes DSL service. If you are reporting trouble on the data portion of your line, press 1" If the caller presses 1, the next prompt states, " If you are calling about your DSL: Internet access service from SBC Internet Services, press 1 now. Otherwise, if you are calling about DSL Internet access service from another Internet service provider, please hang up and call your Internet service provider." If the caller presses 1, IVR will connect the caller to SBCIS' IVR.

SBC California connects over 10,000 calls each month from its 611 IVR to SBCIS. SBC California does not offer such a connection from its 611 IVR to any other ISP. The issue is whether Defendants unreasonably discriminate by providing subscribers of their affiliated ISP, SBCIS, who dial 611 for DSL repair services the option of connecting to SBCIS without having to hang up, but telling unaffiliated ISPs' subscribers they must hang up and call their ISP.

As a practical matter, both SBCIS and unaffiliated ISPs have numbers for subscribers to access DSL repair services other than 611. However, a significant number of subscribers do call 611 for repair services, and a significant number are connected to SBCIS. We hold that this differential treatment is lawful, because as we discuss below, the fact that Raw Bandwidth's DSL service subscriber must hang up and call Raw Bandwidth's service department does not violate applicable state or federal law.

A. SBC California's Differential Treatment of Customers Making 611 Calls Does Not Violate FCC Requirements

The parties stipulated that the FCC's Computer III rules govern SBC California's obligations regarding enhanced services, and agree that the rules require SBC California provide unaffiliated ISPs nondiscriminatory access to the same services and functions underlying the provision of enhanced services to its affiliated ISP. The parties also agree that there is no explicit federal requirement that SBC California automatically connect to their ISP those customers of unaffiliated ISPs who dial 611. We determine that no other federal requirement can reasonably be interpreted to require such a connection.

The connection of 611 repair calls is neither a basic service, nor a basic service function, nor a network capability that is subject to the FCC's Computer III unbundling and tariff requirements.⁶ The FCC's Computer III Order does not explicitly require SBC California to make no distinction between 611 repair calls concerning unaffiliated ISPs and those calls concerning its own ISP.⁷ The FCC's focus in the computer inquiry proceedings is on the distinction between regulated basic services and unregulated enhanced services, with telephone service a basic service and Internet access service an enhanced service. Carriers that provide enhanced services must provide access to the basic transmission facilities used to provide enhanced services under the same terms and conditions enjoyed by their own enhanced services affiliate. Those carriers are subject to nonstructural safeguards—Open Network Architecture, unbundling and equal access to basic network functions, and Comparably Efficient Interconnection (CEI), in addition to cost accounting rules. (*See generally Amendment of Sections 64.702 of the Commission Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958 (1986).)

⁶ The ACR determined that the provision of the N11 Order, which requires the transfer of local exchange customers to their own carriers when using 611, does not apply to ISPs. (First Report and Order, *In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 12 FCC Rcd 5572 (1997) ¶ 46; ACR, p. 4.) We affirm that determination. Another provision of the N11 Order precludes an incumbent local exchange carrier from using N11 codes to offer enhanced services without permitting access to competing enhanced service providers. We further determine that provision does not apply to the connection of customers to 611 repair services. (*See* First Report and Order, *supra* at ¶¶ 48, 86.)

⁷ Similarly, state law permits differential treatment, as long as it is not unreasonable. (*See Marin Telemanagement Corp. v. Pacific Bell*, (1995) 58 CPUC 2d 554, 560.)

Raw Bandwidth contends that the handling of repair calls is subject to CEI, and specifically to the unbundling of basic services requirement. That requirement provides:

As part of its CEI offering, the basic services and basic service functions that underlie the carrier's enhanced service offering must be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff. . . . Moreover, any options that are available to a carrier in the provision of such services or functions also must be included in the unbundled offerings. All basic network capabilities utilized by the carrier's enhanced service offerings, including signaling, switching, billing and network management, are subject to this unbundling requirement. (*Id.* at ¶ 158.)

Defendants contend that the FCC intended that basic service refer to the transmission that carriers use as in input into their enhanced services. By definition, a basic service underlies the carrier's enhanced service offering; therefore, DSL Transport is a basic service that underlies SBCIS' broadband Internet service offering.

However, the handling of repair calls is incidental to SBC's provision of enhanced services and is outside the scope of the FCC's CEI requirements. Thus, the handling of repair calls does not constitute a basic service and is not subject to the CEI unbundling of basic service requirement. SBC notes that under the Computer III Order, it can use the same personnel to repair and install the equipment necessary to provide basic and enhanced services. (*Id.* at ¶ 100.) Therefore, the differing connection parameters for affiliated and unaffiliated ISP customers do not violate FCC requirements.

Complainant states that SBC California neither has a CEI offering for access to 611 nor tariffs for 611 Repair Transfer Service for unaffiliated ISPs.

Complainant states the CEI end-user access requirement compels SBC to provide customers of unaffiliated ISPs access to 611. That access requirement provides:

If a carrier offers end-users the ability to use abbreviated dialing or signaling to activate or access the carrier's enhanced offerings, it must provide, as part of its CEI offering the same capabilities to end-users of all enhanced services that utilize the carrier's facilities. (*Id.* at ¶ 162.)

SBC responds that it is not required to have a CEI offering because it is not providing access to 611; it merely is making a referral. SBC does not offer abbreviated dialing to activate service nor does it offer abbreviated dialing to directly access SBCIS' offerings. Instead, a subscriber who dials 611 for DSL repair must navigate a series of IVR prompts that could result in a transfer of the caller to SBCIS.

The FCC's end-user access requirement does not require a CEI offering for repair transfers. Because there is no explicit requirement and because an IVR transfer differs from direct access to SBCIS' services, we decline to find one here. In addition, as noted by Defendants, the relief requested by Raw Bandwidth, the transfer of calls to unaffiliated ISPs, could conflict with existing protocols. Competitive Local Exchange Carriers (CLECs) using unaffiliated ISPs could have calls transferred to that ISP, rather than the CLEC, as is currently required by FCC orders.

B. The Transfer of 611 Calls Does Not Raise Competitive Concerns

The inadvertent transfer of unaffiliated ISPs' subscribers' DSL repair calls to SBCIS does not raise competitive concerns. Raw Bandwidth contends the transfer of those calls amounts to "unfair competition," because SBC California's 611 IVR could transfer both SBCIS' and unaffiliated ISP's subscribers but does not, and SBCIS could use the transfer opportunity to market its own DSL service.

Defendants respond that SBC California only offers to transfer SBCIS subscribers, not unaffiliated ISP's subscribers, and that Raw Bandwidth has the means to avoid such transfers, since its CEO, Michael Durkin, sometimes instructs Raw Bandwidth's subscribers to contact SBC California when they experience both voice and data problems. We concur that Raw Bandwidth can educate its subscribers to contact it directly for repair concerns.

We also have provided parameters for marketing to customers who contact SBC California with repair issues. Specifically, in D.00-05-021, approving SBC ASI's application for a certificate of public convenience and necessity, we required Pacific Bell Telephone Company, doing business as SBC California, to address customer's inquiries prior to marketing SBC ASI's services. (*Re SBC Advanced Solutions, Inc.*, 2000 Cal. PUC LEXIS 317, Finding of Fact 3, Conclusion of Law 5.) If a customer with a DSL problem dials SBC California's 611 and inadvertently reaches an SBCIS representative after navigating SBC California's and SBCIS' IVR, SBC California has not addressed that customer's repair concern and no marketing of SBCIS' DSL services should take place.

V. Comments on Draft Decision

We initially categorized this proceeding as an adjudication that would go to hearing. We adhere to that category but find, with the agreement of the parties, that a hearing is not needed.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on April 27, 2004 and reply comments were filed on May 3, 2004. Defendants support the draft decision; Raw Bandwidth alleges the draft decision errs in its analysis and findings.

In response to the parties' comments, we made editorial changes and clarifications. However, we made no substantive change to the draft decision's disposition of the Complaint. Turning to Raw Bandwidth's allegations of legal error, we find there are basically two, allegations that we ignored legal argument by Raw Bandwidth and allegations that we denied Raw Bandwidth due process. We next discuss these allegations.

Raw Bandwidth alleges the draft decision does not address Raw Bandwidth's argument that the anti-discrimination requirements of Pub. Util. Code § 453 and 47 U.S.C. § 202 are violated whenever its subscriber is not automatically connected to its service department. We disagree. Raw Bandwidth's opening and reply briefs refer to the statutes but fail to develop the argument that there is a violation.¹⁰ Mere mention of those statutes in opening and reply briefs, without supporting legal argument based on specific facts, does not support Raw Bandwidth's assertion that those statutes are violated. The draft decision holds differential treatment of Raw Bandwidth's subscribers, the alleged discrimination, is lawful. A violation of § 453 requires more; the alleged discrimination must be unreasonable. The draft decision properly finds the differential treatment is not unreasonable discrimination.

Raw Bandwidth further alleges that the draft decision does not address the just and reasonable service standards of §§ 451 and 2896(c) in connection with SBC ASI's procedures for disconnecting DSL Transport. We disagree. Raw Bandwidth's contention was addressed in the December 22, 2003 dismissal

¹⁰ Raw Bandwidth's Opening Brief's Table of Authorities lists multiple references for each statute; in fact, most references include no mention of the statute and several references are to pages beyond the length of the brief.

ruling, affirmed in the draft decision. In the draft decision we similarly rejected Raw Bandwidth's claim that Defendants' procedure was unreasonable but supported a public policy interest in reasonable notice. Defendants contend it is not feasible to provide more than scant notice, based on existing procedures. Nonetheless, we continue to direct SBC ASI to negotiate with Raw Bandwidth to resolve this issue to satisfy SBC's commitment in the "forbearance from tariff regulation" proceeding.

Raw Bandwidth erroneously alleges dismissing the remaining counts in its First Amended Complaint violates its due process rights. In fact, the draft decision did not dismiss any issue raised in the First Amended Complaint. The ACR and scoping memo narrowed the scope of the proceeding to three issues, granted dismissal of the Third Cause of Action, Counts 3 and 4, and permitted amendment of the Complaint to request relief that would not violate privacy rights.

The scoping memo relied on Raw Bandwidth's characterization of the issues in its Prehearing Conference Statement and at the PHC in setting three issues for hearing.¹¹ Narrowing the scope of the proceeding resulted from Raw Bandwidth's request in its August 19, 2003 Prehearing Conference Statement to put two issues on hold, because Complainant had not decided how to pursue

¹¹ The PHC was held over three months after the filing of the Complaint because of scheduling conflicts with the original setting of the PHC on July 9, 2003.

them. Raw Bandwidth and Defendants had resolved two other issues and wanted to continue settlement negotiations.⁸

At that time, Raw Bandwidth characterized its Third Cause of Action, Count 3, subject to the motion to dismiss, as raising two issues: 1) the failure of SBC service representatives to warn end users that disconnecting their voice line also will disconnect their DSL; and 2) the failure to warn ISPs that the voice line has been disconnected for nonpayment. Although amendment of the Complaint was limited to requesting relief that did not raise privacy concerns, the First Amended Complaint added new counts. Although Raw Bandwidth earlier characterized Count 3 as raising two issues, Raw Bandwidth stated in the First Amended Complaint that the Complaint's Count 3 (originally four paragraphs) had been split into four counts for clarity of the relief requested (now twelve paragraphs).

Raw Bandwidth would have us set another PHC to address all remaining issues, including those for which hearings were taken off calendar based on the parties' representations that they had settled the issues.⁹ We decline to do so. Our decision resolves the only issue contained in the scoping memo that the parties have not settled. We also resolve the core allegation of the original complaint concerning disconnection.

⁸ Raw Bandwidth's attorney sent e-mail to the ALJ on September 15, 2003 requesting clarification of the scoping memo. The ALJ clarified that the issues Raw Bandwidth had not decided how to pursue were not within the scope of the proceeding.

⁹ At Raw Bandwidth's request on October 10, 2003, the scheduled hearings were taken off calendar because Raw Bandwidth represented that two issues were settled and would be dismissed with prejudice and the third issue could be submitted on stipulated facts and briefs.

Although the scoping memo did not include the discrete disconnection sub-issue concerning the failure of service representatives to warn subscribers that disconnection of the voice line would disconnect DSL, we do not find that omission, which Raw Bandwidth did not challenge, violates Raw Bandwidth's due process rights. Raw Bandwidth states the issue may be settled shortly. If not, we have directed SBC ASI to negotiate terms of service with Raw Bandwidth to satisfy the FCC's "forbearance from tariff regulation" order.

We clarify the procedural status of the remaining counts of the First Amended Complaint to ensure Raw Bandwidth can continue to negotiate with Defendants in order to resolve those issues. We dismiss without prejudice all remaining counts of the First Amended Complaint. Raw Bandwidth also brought to our attention during this proceeding Defendants' failure to negotiate other issues not raised in the Complaint. We encourage Defendants to negotiate those issues as well. Should Raw Bandwidth need to file another complaint on issues raised in this Complaint or brought to our attention in this proceeding, we request that Raw Bandwidth provide us with a status report on the results of informal negotiations.

VI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SBC ASI's General Terms & Conditions for DSL Transport require that DSL Transport be offered via a line sharing arrangement. DSL Transport no longer is offered once the voice line is disconnected. Defendants' practice is that five days after dial tone has been suspended for nonpayment of basic service

charges, Defendants notify the ISP, either its affiliated ISP or an unaffiliated ISP, that DSL Transport is being disconnected and disconnect the line.

2. SBC Communications, Inc. committed to negotiate alternative rates, terms, and conditions with unaffiliated ISPs for broadband access arrangements.

3. SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.

4. SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.

5. If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

6. SBC California does not have a CEI offering or tariff for access to or transfer from 611.

7. Raw Bandwidth mentions Pub. Util. Code § 453 and 47 U.S.C. § 202 in opening and reply briefs in support of its argument that SBC California's 611 connection procedure violates the statutes' anti-discrimination requirements.

8. The December 22, 2003 ruling addressed Raw Bandwidth's contention that SBC ASI's disconnection procedure is not just and reasonable under Pub. Util. Code §§ 451 and 2896(c).

9. The scoping memo set three issues for hearing. Raw Bandwidth requested other issues be put on hold, because Raw Bandwidth had not decided how to pursue them. Raw Bandwidth requested two issues set for hearing be removed from the calendar because they had been settled.

10. The September 11, 2003 ACR partially granted Defendants' motion to dismiss and granted Raw Bandwidth leave to amend the complaint to request relief that would obviate privacy concerns.

11. Raw Bandwidth's First Amended Complaint added new counts to its Third Cause of Action.

Conclusions of Law

1. Defendants are required to negotiate certain terms and conditions with ISPs; these terms may include advance notice to Raw Bandwidth of DSL Transport disconnection incidental to termination for nonpayment of basic service to an SBC California subscriber.

2. The FCC's Computer III rules govern SBC California's obligations regarding enhanced services.

3. The FCC's Computer III rules do not prohibit the differential treatment of subscribers described in Findings of Fact 3 and 4.

4. Pub. Util. Code § 453 does not prohibit the differential treatment described in Findings of Fact 3 and 4.

5. DSL Transport is not a basic service under Commission rules and can be disconnected if a subscriber fails to pay basic service charges. DSL Transport is a basic service under the FCC's Computer III rules.

6. The inadvertent transfer of unaffiliated ISPs' subscribers with DSL repair concerns to SBCIS does not raise competitive concerns. Defendants must address subscribers' inquiries before marketing SBCIS DSL service.

7. Mere mention of statutes without supporting legal argument based on specific facts does not prove those statutes are violated.

8. All counts not within the scope of the proceeding as set forth in the scoping memo are dismissed. All counts set forth hearing and then settled also are dismissed.

9. It is reasonable to make this order effective today in order to provide conduct guidance.

O R D E R

IT IS ORDERED that:

1. The complaint of Raw Bandwidth Communications, Inc. is denied.
2. Defendants shall negotiate terms and conditions of service to Raw Bandwidth, as required by order of the Federal Communications Commission and discussed in the foregoing opinion.
3. The hearing determination is changed. Hearings are not necessary.

4. Case 03-05-023 is closed.

This order is effective today.

Dated _____, at San Francisco, California.