

A.01-02-024 et al.
D.05-03-026

Commissioner Geoffrey F. Brown, Dissenting:

In my opinion, the Commission has erred in its handling of the SBC UNE true-up case because it relied on a waiver which was hastily negotiated by desperate CLECs and because the 19% shared and common cost markup did not have evidentiary support and was inappropriately applied prospectively rather than retrospectively. I fear that the Commission's decision, will not withstand legal challenge.

The waiver negotiated by CalTel (a trade association of competitive local exchange carriers) on behalf of the smallest CLECs was a quick way to address the precariousness of the position of California's smallest CLECs. It was also significantly flawed by being extra-record material and as a result of the incredibly weak position of one side of the negotiating table. Despite the settlement being extra-record material, several small CLECs, apparently at the direction of SBC, hastily communicated they had reached an agreement and were now supporting what was then president Peevey's alternate decision. At least one entity, MCI, noted the nature of the last minute announcement of a settlement and the support of a particular proposed decision as a result of that settlement was troubling. The one-sided nature of the waiver negotiations ultimately proves that this Commission, rather than a CLEC industry group that cannot adequately negotiate for itself, should be ensuring we have a market that facilitates competition. The waiver as drafted was ineffective at protecting market competitiveness, opting instead to protect the weakest CLECs at the expense of those most capable of competing. This Commission then used last minute support of the waiver by the smallest CLECs, apparently orchestrated by SBC as a part of the negotiations, as justification for settling rates unsupported by record evidence.

In addition to the problems with the settlement agreement, the decision is flawed because the evidentiary basis of the 19% shared and common cost markup figure in the Commission's decision was not sufficiently addressed in the decision. Prior to the Ninth Circuit's mandate, SBC alleged it would, upon remand, demonstrate why the 19% markup rate was the lowest the supportable figure that Commission could find. However, the District Court's subsequent remand did not occur until after ALJ Duda's proposed decision had mailed. This prevented record development on the subject. The additional procedural steps which could have developed this point simply never occurred. If there were any CLECs left to challenge this ruling, the procedurally arbitrary number would be a compelling reason to do so. As a result of this one sided settlement agreement I believe few if any CLECs are in a position to challenge this Commission's decision and none will benefit even if the court were to decide this Commission's decision is unlawful.

I believe the decision also errs in setting the markup rate permanently – meaning not subject to true-up – and prospectively – meaning it does not cover the time period

with the rates the Ninth Circuit found unlawful. Handling the matter in this manner both sets the number incorrectly for the past and shuts down the opportunity to get the number right in the future, both things I am sure the Ninth circuit would appreciate this Commission handling correctly.

I acknowledge the interim markup rate of zero, which I sought in an alternate that was withdrawn because of technical errors and because it appeared to lack my colleagues' support, is flawed, but it errs on the side of protecting vulnerable CLECs while ensuring SBC is eventually made whole. Furthermore it would have done so while ensuring we are in compliance with the Ninth Circuit and the District Court and would have done so without requiring CLECs to give up rights to which they would have been entitled had this Commission handled this situation differently. The Commission's decision fails on these fronts and both CLECs and the competitive market are harmed as a result of this failure.

Geoffrey F. Brown
Commissioner

San Francisco, California
March 17, 2005