

Decision 07-03-024 March 15, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company,
d/b/a SBC California for Generic Proceeding to
Implement Changes in Federal Unbundling Rules
Under Sections 251 and 252 of the
Telecommunications Act of 1996.

Application 05-07-024
(Filed July 28, 2005)

**DECISION GRANTING, IN PART, CALIFORNIA ASSOCIATION OF
COMPETITIVE TELEPHONE COMPANIES' REQUEST FOR AN ORDER
REQUIRING AT&T CALIFORNIA TO COMPLY WITH
DECISION (D.) 06-01-043 and D.06-05-040**

I. Summary

In this decision, we grant, in part, the California Association of Competitive Telephone Companies' (CALTEL) request for an order requiring Pacific Bell Telephone Company (dba AT&T California (AT&T)) to comply with certain terms of D.06-01-043 and D.06-05-040. Specifically, these decisions apply to all Competitive Local Exchange Carriers (CLECs) that had a dispute with AT&T regarding implementation of the Federal Communications Commission's (FCC) network unbundling orders. The only exception is that carriers that negotiated their own amendments are entitled to the terms of the arbitrated amendment, except for those instances where they have negotiated different terms for a particular element. In that case, the earlier negotiated amendment governs the treatment of that element.

We confirm that our prohibition on the assessment of nonrecurring charges (NRCs) for conversions that do not involve physical work, applies to

transitions made both before and after March 11, 2006. CALTEL's request for an award of attorneys' fees is denied.

II. Background

On November 2, 2006, CALTEL¹ filed a motion on behalf of its members seeking an order from the Commission requiring AT&T² to comply with D.06-01-043 and D.06-05-040. Both of these decisions involve the so-called "TRRO Amendment" to AT&T's interconnection agreements (ICAs) with CLECs.

CALTEL's motion raises two issues:

- a) Do the findings of the Commission with respect to the terms of the TRRO Amendment, including the determination of a resale proxy rate and the prohibition on the imposition of nonrecurring charges (NRCs) for simple conversions, apply to all CLECs, including CALTEL's members?
- b) Does the Commission's prohibition on the imposition of NRCs for simple conversions apply to all simple

¹ The following companies are members of CALTEL and join in this motion: A+ Wireless/ Advantage Wireless; Access One, Inc.; BullsEye Telecom; Call America; Cbeyond Communications; CCT Telecommunications, Inc; CommPartners; Covad Communications; Creative Interconnect; Edison Carrier Solutions; Fones4All Corp.; ITS, Inc.; Level 3 Communications; McGraw Communications, Inc.; Mpower Communications Corp.; New Edge Networks; nii communications, Ltd.; North County Communications Corp.; O1 Telephone Communications; Pac-West Telecomm, Inc.; PAETEC Communications, Inc.; Sage Telecom; TCAST Communications, Inc.; Telekenex; U.S. TelePacific Corp.; Telscape Communications; The Telephone Connection; TMC Communications; Trinsic Communications; Utility Telephone; and XO Communications Services.

² Application 05-07-024 was filed by Pacific Bell Telephone Company (dba SBC California) on July 28, 2005. Since then, SBC California changed its name to AT&T California. References to "AT&T" and "SBC" in this order pertain to the same company.

conversions under the TRRO Amendment, regardless of when they occurred (so long as it was after the Amendment became effective)?

CALTEL also requests that the Commission require AT&T to reimburse CALTEL for the attorneys' fees incurred in bringing the motion.

AT&T filed in opposition to CALTEL's motion on November 17, 2006, and CALTEL filed a reply to AT&T's opposition on November 30, 2006.

III. Discussion

We discuss each issue in turn.

A. Does the TRRO Amendment apply to all CLECs?

The issue at hand relates to amendments to ICAs arising from actions taken by the FCC. In orders issued in 2003 and 2005 known, respectively as the *Triennial Review Order (TRO)*³ and the *Triennial Review Remand Order (TRRO)*,⁴ the FCC eliminated or restricted the unbundling obligations for numerous Unbundled Network Elements (UNEs).

By means of a multi-party arbitration initiated by AT&T, the Commission issued a decision in January 2006 addressing numerous issues for multiple AT&T ICAs.⁵

³ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, FCC 03-36 (2003)(TRO).

⁴ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 , FCC 04-290 (rel. Feb. 4, 2005) (TRRO).

⁵ D.06-01-043.

CALTEL points out that when the Commission undertook the arbitration of the ICA amendments on a multi-party basis, it made it clear that the results were to apply to all CLECS who had interconnection agreements with AT&T. In an Administrative Law Judge (ALJ) Ruling dated September 23, 2005, the assigned ALJ stated this quite emphatically:

I want to make it clear to any carrier with an interconnection agreement with SBC, that has a dispute over the change-of-law provisions related to the FCC's Triennial Review Order (TRO) and TRRO orders, will be subject to the outcome of this proceeding. The Commission does not intend to conduct individual arbitrations to implement change-of-law provisions relating to the two FCC orders. Carriers are not required to be parties to this proceeding, but they need to understand that they will be bound by the outcome of the proceeding. I will require SBC to send a copy of this Ruling to each carrier with whom it has an interconnection agreement so that any carrier that wants to take an active role in the proceeding, can do so.⁶

The Commission reiterated this statement in D.06-01-043:

We reiterate the September 23, 2005 Ruling by the Administrative Law Judge (ALJ) that any carrier with an interconnection agreement with SBC that has a dispute over the change-of-law provisions related to the FCC's *TRO* and *TRRO* orders will be subject to the outcome of this proceeding.⁷

According to CALTEL, the two rulings that are at issue here are directly applicable to all CLECs. First, when the Commission established the resale

⁶ ALJ Ruling, September, 23, 2005 at 2 (footnote omitted).

⁷ D.06-01-043 at 3.

proxy rate of \$23.16 for Unbundled Network Element Platform (UNE-P) lines not converted by March 11, 2006, it stated that this rate would apply to all CLECs:

SBC California shall charge all Competitive Local Exchange Carriers, except Fones4All, a rate of \$23.16 per month for each UNE-P line not converted by March 11, 2006.⁸

CALTEL points out that nothing in the order excluded any CLECs (except Fones4All) from this rate.

Moreover, in D.06-01-032, the Commission stated that AT&T could not charge NRCs for simple conversions that did not involve physical work, but instead only required a record change. This finding was applicable to all CLECs and was determined based on an analysis of the relevant law. As the Commission stated:

It is inappropriate to charge a nonrecurring charge for record changes. Therefore, we conclude that no charges are warranted for conversions and transitions that do not involve physical work...⁹

CALTEL contends that, despite the clear applicability of these two rate issues to all CLECs, AT&T has specifically refused to apply them to certain of CALTEL's members. AT&T asserts that these specific CALTEL members signed "change of law" amendments to their ICAs prior to the TRRO arbitration. It thus asserts that these CLECs are not entitled to the provisions found in the two Commission decisions.

⁸ D.06-05-040 at 7.

⁹ D.06-01-043 at 43.

AT&T responds that the arbitrated amendment is not available to CLECs that voluntarily negotiated an amendment with AT&T. According to AT&T, the Commission made it clear that its consolidated arbitration proceeding would apply, not to CLECs that had already executed TRO/TRRO amendments, but rather to carriers with “a dispute over the change-of-law provisions related to the FCC’s TRO and TRRO orders.”¹⁰

According to AT&T, by negotiating their own amendments, carriers such as McGraw Communications, Inc. (McGraw) and O1 Telephone Communications (O1) resolved *any* such disputes. Indeed, AT&T’s application excluded carriers that had voluntarily negotiated a TRO/TRRO amendment.

AT&T states that CALTEL’s logic runs headlong into the FCC’s all-or-nothing rule. Under CALTEL’s proposed approach, a CLEC can voluntarily negotiate a TRO/TRRO amendment, thus indicating it had no further dispute with AT&T, wait until the Commission issues an arbitration ruling, and then seek to replace its own amendment with other terms. But the FCC has expressly prohibited carriers from arbitrating or negotiating one agreement and then seeking to pick and choose components of a different agreement. AT&T points out that as the Ninth Circuit recently explained in upholding the FCC’s rule, “[u]nder all-or-nothing, if a requesting CLEC is interested in a service or network element provided by an ILEC, it may adopt *in its entirety* any approved agreement that includes that service or element to which the ILEC is already a party.”¹¹ The FCC had initially adopted a pick-and-choose rule in 1996 but found

¹⁰ D.06-01-043 at 3; *see also* September 23, 2005 ALJ Ruling at 2.

¹¹ *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1109 (9th Cir. 2006).

that experience under the rule showed it to be counter-productive because it deterred real negotiations. The FCC determined that “an all-or-nothing rule would better serve the goals of *sections 251 and 252*...because it would encourage [I]LECs to make trade-offs in negotiations that they [we]re reluctant to accept under the [pick-and-choose] rule.¹²

AT&T asserts that CALTEL’s request that the terms of the arbitrated amendment be inserted to replace or augment the amendments voluntarily negotiated by certain CLECs is precluded by the all-or-nothing rule. Even assuming that any of the CLECs at issue could seek to adopt another entire agreement, it is certain they could not adopt only the arbitrated amendment (whether in full or in part), because the FCC’s rule only permits a CLEC to adopt an agreement “in its entirety.”¹³ Accordingly, CALTEL’s request that the terms of the arbitrated amendment be inserted to replace or augment the amendments voluntarily negotiated by certain CLECs is precluded by the all-or-nothing rule. According to AT&T, it is the underlying agreements, as amended, that control those CLECs’ contractual relationships with AT&T.

CALTEL rebuts AT&T’s claims, saying that its members have no objection to being subject to every term of the TRRO amendment, as determined by D.06-01-043 and D.06-05-040. Moreover, to the extent that any terms of the earlier ICA amendments are inconsistent with the TRRO amendment ordered by the Commission, CALTEL’s members will comply with all of the terms of the

¹² *Id.* at 1110 (quoting *All-or-Nothing Order* ¶ 12).

¹³ 47 C.F.R. § 51.809(a).

TRRO amendment. CALTEL believes that this should put to rest any claim that CALTEL's members are attempting to disregard the "pick and choose" rule.

CALTEL disputes AT&T's position saying that the ICA amendments that were signed on earlier dates explicitly reserved disputed issues under the TRO and TRRO. Those issues were reserved in writing as part of the amendments.

The following specific language is found in each of the relevant ICA amendments:

In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v FCC, et. al*, 535 U.S. 467 (2002); *USTA, et.al v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*) and the following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*); the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C.Cir. 2002).

According to CALTEL, it is clear that these carriers explicitly reserved, and expressly disclaimed the waiver of, their disputes with AT&T regarding changes of law under the TRO and the TRRO.

AT&T seems to want to wish away these reservations of rights. It states in opposition to the motion:

From the start, the Commission made clear that its consolidated arbitration proceeding would apply, not to CLECs that had *already* executed TRO/TRRO amendments, but rather to carriers with “a dispute over the change-of-law provisions related to the FCC’s TRO and TRRO orders. By negotiating their own amendments, carriers such as McGraw and O1 *resolved* any such disputes.¹⁴

CALTEL states that this claim is absurd on its face. As explained above, their carriers did not “resolve any such disputes.” Rather they expressly reserved these disputes for the future, in clear and unassailable language.

CALTEL states that a second problem with AT&T’s argument is that the earlier ICA amendments did not touch on the two issues under consideration here. Those amendments anticipated that UNE-P conversions would be completed by March 11, 2006, but nowhere did they address what rate would be charged if such conversions were not completed by that date. Nor did they address the issue of disallowing NRCs for conversions that did not involve physical work. These two issues were the subject of D.06-01-043 and D.06-05-040. Since they were not addressed in the earlier ICA amendments, AT&T is wrong to assert that CALTEL’s members are trying to renegotiate completed amendments.

CALTEL contends that the third problem with AT&T’s “waiver” argument is that the Commission expressly determined that the results of the arbitration would apply to all CLECs, regardless of whether or not they participated in the proceeding. Thus, the Commission rejected AT&T’s explicit attempt to limit the results of the arbitration only to those CLECs that AT&T chose to identify.

¹⁴ AT&T Opposition to Motion at 6 (emphasis added).

AT&T was not able to exclude CALTEL's members by *fiat*. CALTEL's members were entitled to be covered by the outcome of the TRRO amendment arbitration.

We find AT&T's reliance on the FCC's all-or-nothing rule to bar OI and McGraw from assuming the terms of the arbitrated amendment to be misplaced. We agree that the ICA amendments the two companies negotiated with AT&T were in accordance with the TRO/TRRO, but it is clear from the language inserted in those amendments that they were not expected to be the *only* amendments arising from the TRO and the TRRO. The language that both parties agreed to (since both parties signed the ICA amendments) left the door open for further amendments relating to the TRO and TRRO. This makes sense in light of the fact that the amendments resolved only a few of the issues relating to implementation of the TRO and TRRO.

The carriers explicitly reserved, and expressly disclaimed the waiver of, their disputes with AT&T regarding changes of law under the TRO and TRRO. The CLECs specifically reserved their claims "with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, *which the parties have not yet fully incorporated into this Agreement* (emphasis added)." Both the TRO and TRRO are among the items listed as ripe for further action.

In other words, the CLECs made it clear that by negotiating and signing the amendments, they were not giving up their rights to resolve additional disputes with AT&T under the TRO/TRRO. Therefore, under the terms of the ICA amendments they executed, McGraw and OI would be considered carriers that had a dispute with AT&T and therefore are entitled to the terms of the arbitrated amendment, with one caveat that we will discuss further below.

Also, CALTEL included two advice letters with its filing. Those advice letters, Nos. 26536 and 26537, filed on April 6, 2006, involved amendments to the ICA between McGraw Communications, Inc. and AT&T. In reviewing the two advice letters included with CALTEL's filing, we find that the issues covered are few in number; the amendments do not address the many issues included in the arbitrated amendment. Advice Letter No. 26536 adds post-TRO Remand loop-transport rate increase and embedded base transition language to the ICA, while Advice Letter 26537 adds post-TRO Remand unbundled local switching (ULS) rate increases and embedded base transition language to the agreement. The fact that two Advice Letters were filed is further evidence that McGraw and AT&T were implementing the TRO and TRRO in segments.

We find that CALTEL's members are entitled to the terms of the arbitrated amendment in D.06-01-043 and D.06-05-040, with a caveat described below. We rule that where any specific terms of the earlier ICA amendments are inconsistent with terms in the arbitrated amendment, CALTEL's members are bound by the terms of the earlier amendment, as described in detail in the following section. For example, if a CLEC voluntarily negotiates a rate for a particular element, and the arbitrated amendment adopts a different rate, the CLEC is bound by the rate it negotiated in its ICA amendments.

As AT&T points out, we would be at odds with the Ninth Circuit decision in *Pacific Bell v. Pac-West* if we were to change the terms of the earlier negotiated amendments. The court found that the Commission's revision of agreements, without the consent of the parties, "effectively changes the terms of 'applicable interconnection agreements' in California and therefore contravenes the [1996] Act's mandate that interconnection agreements have the binding force of law" by

engaging in “[r]etrospective [r]ule-making.”¹⁵ Therefore, we take care to leave the terms of the earlier negotiated amendments in place.

B. Resale Proxy Rate

In D.06-01-043, the Commission determined that it would be appropriate to apply a resale proxy rate to all UNE-P lines that were not converted by March 11, 2006, the deadline set by the FCC. The Commission rejected AT&T’s attempt to impose “market-based” rates:

We find that adopting SBC’s [now known as AT&T] market based rates would be unduly punitive for failure to make the deadline to transition services from ULS [unbundled local switching]/UNE-P [unbundled network element platform] arrangements. We will instead adopt the CLECs’ TSR [total service resale] rates that we previously approved.¹⁶

When AT&T purported to comply with this requirement by establishing a rate of \$37.24, a group of CLECs filed a motion seeking enforcement of D.06-01-043. In a subsequent ALJ Ruling, which was adopted by the Commission in D.06-05-040, the Commission granted the motion and determined that the appropriate resale proxy rate for UNE-P lines not converted by March 11, 2006 was \$23.16.¹⁷

AT&T points out that O1’s negotiated amendment provides that, “[t]o the extent that there are CLEC embedded base Mass Market ULS and UNE-P...in place on March 11, 2006, [AT&T] California, without further notice or liability,

¹⁵ *Pacific Bell v. Pac-West*, 325 F.3d at 1119 (9th Cir. 2003).

¹⁶ *Id.*, at 46.

¹⁷ D.06-05-040 at 4.

will re-price such arrangements to a *market-based rate*.”¹⁸ Accordingly, O1’s agreement expressly precludes application of a resale rate to non-transitioned lines after the FCC’s deadline.

We have concluded that the arbitrated amendment should not supplant earlier amendments. We will not change the terms of the earlier amendments. Therefore, since O1 signed an ICA amendment that allowed its ULS and UNE-P lines to be re-priced to a market-based rate, that rate will apply. O1 is not entitled to the resale rates established in the arbitrated amendment because it had earlier agreed to a different rate. However, McGraw is entitled to that provision because its earlier amendments did not set a transition plan for ULS and UNE-P lines.

C. Applicability of Nonrecurring Charges (NRCs) to Conversions after March 11, 2006

Also in D.06-01-043, the Commission addressed the issue of the applicability of NRCs charged by AT&T for UNE-P lines converted on or after January 26, 2006, the effective date of the TRRO Amendment. The Commission found that such NRCs were not to be allowed for such conversions:

We concur with the FCC’s finding in ¶ 587 of the *TRO* cited above that because ILECs are never required to perform conversions in order to continue serving their own customers, such charges are inconsistent with Section 202 of the Act, which prohibits carriers from subjecting any person or class of persons to any undue or unreasonable prejudice or disadvantage. In the following paragraph, the FCC also reiterates that the conversions between wholesale services and UNEs are “largely

¹⁸ O1 TRO/TRRO Amendment § 2.3.1 (emphasis added).

a billing function.” Given the FCC’s finding cited above, it is inappropriate to charge a nonrecurring charge for record changes. Therefore, we conclude that no charges are warranted for conversions and transitions that do not involve physical work, and the CLECs’ language on this issue in Sections 1.3.3, 2.1.3.3, 3.2.2.2, 10.1.2 and 10.1.3.1 is adopted.¹⁹

CALTEL asserts that this conclusion is not time-constrained on a going forward basis. It applied to “all conversions and transitions that do not involve physical work” that occurred after the *TRRO* Amendment became effective on January 26, 2006. There was no suggestion, in any form, that the decision that NRCs should not apply to these types of conversions was only applicable to conversions that occurred on or before March 11, 2006.

CALTEL reiterates that this provision applies to all CLECs covered by the arbitrated amendment, not just to McGraw and O1.

AT&T disagrees, stating that the arbitrated amendment makes clear that the NRCs specified in D.06-01-043 do not apply to UNE-P transition orders completed after March 11, 2006. According to AT&T, the relevant section of the Consolidated Amendment is § 2.1.3, which provides that, “[i]n accordance with Rule 51.319(d)(2)(ii), CLECs shall migrate the Embedded Base of end-user customers off of the unbundled local circuit switching element to an alternative arrangement by March 11, 2006.” Four subsections of § 2.1.3 set out the specifics of the transition required to be completed by March 11, 2006. Subsection 2.1.3.3 contains language precluding certain NRCs. AT&T asserts that the subsection’s scope is limited by the section in which it is found, and § 2.1.3 expressly requires that the UNE-P conversions be completed by March 11, 2006. In context,

¹⁹ D.06-01-043 at 34.

therefore, subsection 2.1.3.3 can only be read to apply to orders placed in time to be completed by that deadline.

AT&T states that Subsection 2.1.3.4 is the only subsection that addresses what happens if a line is not timely transitioned; it provides that a "Total Service Resale" recurring rate applies to such non-transitioned lines. According to AT&T, the failure similarly to specify a post-March 11, 2006 rate for NRCs shows that the waiver of NRCs in subsection 2.1.3.3 does not apply to late UNE-P transition orders. Indeed, subsection 2.1.3.4 provides that the resale re-pricing shall be done by "AT&T, without further notice or liability;" thus confirming that AT&T is under no obligation to waive NRCs in the situation where a CLEC has breached the agreement by failing to complete the transition by March 11, 2006.

AT&T alleges that failure to transition ULS/UNE-P lines by the March 11, 2006 deadline constituted a breach of the ICA. We do not agree. Section 2.1.3.4 of the arbitrated amendment included a provision on how those lines should be handled. In other words, the arbitrated amendment recognized that not all lines would be transitioned by the due date and set up a process for dealing with that situation. In no way can failure to transition lines by March 11, 2006 be construed as a breach of the ICA terms.

CALTEL states that AT&T's effort to place a time constraint on the NRC determination makes no sense. The Commission's determination was a legal one. It found that where there is no physical work involved in the conversion, AT&T is not permitted to charge an NRC. There is nothing about the "conversion date" of March 11, 2006 that changes this determination.

Indeed, under AT&T's argument, it would be entitled to charge NRCs for conversions that occurred on or after March 11, 2006, even though no physical work was involved in the conversion. This would be a windfall to AT&T and a

direct violation of the finding in D.06-01-043 that such NRCs are not properly charged.

We concur with CALTEL that AT&T may not charge NRCs for conversions that do not involve physical work, and the timing of those conversions is irrelevant to that determination. Our conclusion was not time-constrained on a going-forward basis. We reject AT&T's attempt to impose a time limit on this rule. Section 2.1.3.4 in the arbitrated amendment provides that any ULS/UNE-P arrangements that have not been transitioned by March 11, 2006, will be converted to market based rates. In other words, that section acknowledges that not all ULS/UNE-P lines would be transitioned by the March 11, 2006 deadline. We set up a process for how those would be treated, and allowed AT&T to charge TSR rates for those lines that were not converted. At no point did we state that our prohibition on NRCs for transitions that do not involve physical work would not apply to lines transitioned after March 11, 2006.

We need to look at the McGraw and O1 amendments to analyze how the prohibition on NRCs affects them. AT&T's reliance on the fact that McGraw's and O1's underlying agreements address pricing for the disconnection of UNEs is misplaced. The purpose of the combined arbitration proceeding was to implement the terms of TRO and TRRO. In some cases, those amendments will be in opposition to language in the underlying ICA, but in this case, the ICA amendment governs, since it is intended to implement change-of-law provisions.

AT&T does not allege that McGraw's and O1's amendments address pricing for the disconnection of UNEs, only that their underlying agreements address the issue. Therefore, McGraw and O1 are entitled to the adopted provisions in the arbitrated amendment for the pricing for the disconnection of UNEs.

IV. Should the Commission Require AT&T to Reimburse CALTEL for its Attorneys Fees?

CALTEL requests that the Commission order AT&T to reimburse CALTEL for the attorneys' fees it has incurred in bringing the instant motion. CALTEL asserts that the motion should not have been necessary. AT&T's refusal to apply the proper terms of the two Commission decisions and the terms of the TRRO Amendment to all of CALTEL's members is a direct flaunting of the Commission's orders. By forcing CALTEL to bring this motion on behalf of its members, AT&T has caused direct harm to CALTEL in the form of the costs incurred to bring the motion.

AT&T objects, saying that CALTEL is not entitled to attorney's fees. According to AT&T, the Commission has repeatedly recognized that it can award attorneys' fees only in very limited circumstances, such as where the right is established by statute²⁰ or where a private party wins a case that establishes an important public policy and a monetary fund that will provide a "substantial benefit" to the public."²¹

AT&T states that CALTEL does not even attempt to show that it satisfies the conditions for an award of attorneys' fees under either of those standards,

²⁰ Sections 1801-1812 of the Public Utilities Code allow attorneys' fees to be awarded to intervenors that would otherwise suffer "significant financial hardship," *id.* §1803(b), in certain instances by making a "substantial contribution," *id.* §1803(a) to the Commission.

²¹ See *e.g.*, *Consumers Lobby Against Monopolies vs. Public Utils. Comm'n [CLAM]*, 25 Cal 3d 891, 906-07, 603 P.2d 41, 50 (1979).

and neither is applicable here. Indeed, the Commission has recognized that “no award should be made where a party’s own economic interest is sufficient to motivate participation. This test would exclude substantial customers of utility services or parties seeking to preserve or obtain some competitive position.”²²

We concur with AT&T’s position that CALTEL is not entitled to reimbursement for attorneys’ fees. As AT&T points out, we have recognized in numerous cases that the Commission’s jurisdiction normally is limited to reparations and not general damages or attorney fees. In the instant case, CALTEL’s members have an economic interest in the proceeding, and that should be sufficient to motivate participation. CALTEL’s request for attorneys’ fees is denied.

V. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission’s Rules of Practice and Procedure. Comments were filed March 1, 2007 and reply comments were filed on March 6, 2007. These comments have been taken into account, as appropriate, in finalizing this order.

VI. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Karen A. Jones is the assigned ALJ in this proceeding.

²² Final Opinion, *Consumers Lobby Against Monopolies v. PT&T Co.*, 1981 Cal. PUC LEXIS 154, at *12, 6 CPUC.2d 374, D.93251, C.10666 (Cal PUC 1981).

Findings of Fact

1. McGraw and O1 entered into negotiated amendments to their ICAs with AT&T in accordance with the TRO/TRRO.
2. It is clear from the language inserted in each amendment that they were not expected to be the only amendments arising from the TRO/TRRO.
3. The language that both parties agreed to explicitly reserved, and expressly disclaimed the waiver of, their disputes with AT&T regarding changes of law under the TRO and TRRO.
4. The two McGraw/AT&T advice letters submitted by CALTEL address only a few issues, and do not cover the many issues included in the arbitrated amendment.
5. The fact that two separate ICA amendments were filed for McGraw is evidence that McGraw and AT&T were implementing the TRO and TRRO in segments.
6. O1 signed an ICA amendment that allowed its ULS and UNE-P lines to be re-priced to a market-based rate.
7. AT&T may not charge NRCs for conversions that do not involve physical work.
8. Section 2.1.3.4 in the arbitrated amendment acknowledges that not all ULS/UNE-P lines would be transitioned by the March 11, 2006 deadline.
9. Failure to transition ULS/UNE-P lines by the March 11, 2006 deadline does not constitute a breach of the ICA.

Conclusions of Law

1. Under the terms of the ICA amendments they executed with AT&T, McGraw and O1 would be considered carriers that had a dispute with AT&T and therefore were entitled to the terms of the arbitrated amendment, to the extent

that the arbitrated amendment is not in conflict with their earlier negotiated amendments.

2. If any specific terms of the earlier ICA amendments are inconsistent with the terms of the arbitrated amendment, CALTEL's members will be bound by the specific terms of the earlier amendment.

3. O1 is not entitled to the resale rates established in the arbitrated amendment for ULS/UNE-P lines that had not been transitioned by March 11, 2006, because it had earlier agreed to a different rate.

4. McGraw's negotiated amendments did not address the rates for ULS and UNE-P lines so McGraw is entitled to that provision in the arbitrated amendment.

5. The prohibition on NRCs for transitions that do not involve physical work applies to lines transitioned both before and after March 11, 2006.

6. In those cases where the arbitrated amendment is in opposition to language in the underlying ICA, the arbitrated amendment governs, since it is intended to implement change-of-law provisions.

7. All CLECs, including McGraw and O1, are entitled to the adopted provisions in the arbitrated amendment for the pricing of the disconnection of UNEs.

8. CALTEL does not meet the conditions for an award of attorneys' fees.

O R D E R

IT IS ORDERED that the motion of the California Association of Competitive Telephone Companies requesting an order requiring Pacific Bell Telephone Company (dba AT&T California) to comply with Decision (D.) .06-01-043 and D.06-05-040 is granted, in part, as described in this order.

This order is effective today.

Dated March 15, 2007, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners