Decision 08-04-055 April 24, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company, dba AT&T California (U1001C), Complainant, vs. Cbeyond Communications, LLC (U6446C), Covad Communications Company (U5752C), and Arrival Communications, Inc. (U5248C), Defendants.	Case 06-03-023 (Filed March 22, 2006)

Ed Kolto, Attorney at Law, for AT&T California; and Kellogg, Huber, Hausen, Todd, Evans & Figel, by Colin Stretch, Attorney at Law, complainant.

Mediasportscom P.C., by Kimberly Kirby, Attorney at Law, and William H. Weber, Attorney at Law, for Cbeyond Communications, LLC; Law Offices of Anita Taff-Rice, by Anita Taff-Rice, Attorney at Law, and Katherine K. Mudge, Attorney at Law, for Covad Communications Company, defendants.

Marilyn H. Ash, Attorney at Law, Mpower Communications Corp, and U.S. TelePacific Corp.; Law Offices of Earl Nicholas Selby, by Earl Nicholas Selby, Attorney at Law, for XO Communications Services, Inc., intervenors.

MODIFIED PRESIDING OFFICER'S DECISION ON PACIFIC BELL TELEPHONE COMPANY'S AMENDED COMPLAINT FOR DISPUTE RESOLUTION AGAINST CBEYOND COMMUNICATIONS, LLC, COVAD COMMUNICATIONS COMPANY, AND ARRIVAL COMMUNICATIONS, INC., REGARDING WIRE CENTER UNBUNDLED NETWORK ELEMENT DECLASSIFICATION

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1. Introduction and Summary of Decision

The federal Telecommunication Act of 1996 (1996 Act) (47 U.S.C. § 251 *et seq*.) was enacted to promote competition in the telecommunications industry. The 1996 Act specifies regulatory roles for both the federal government and the states. Its established a framework requiring incumbent telecommunications carriers to lease to competitive local exchange carriers certain wire center network elements necessary for competitors to enter the telecommunications market. Initially this included many of the components necessary to serve customers, including high capacity loops and dedicated transport. Pricing of these elements was based upon costs determined under a federally established methodology.

In subsequent rulings the Federal Communications Commission (FCC) determined that provision of certain network elements was no longer essential for network operation. For others the FCC determined that it may be necessary to continue to furnish these to competitors, or else they would be "impaired" in their ability to offer service competitively. If provision of these facilities on a cost basis was determined not to be necessary, based on criteria developed by the FCC, a determination was made that competitive carriers were "unimpaired" in providing service. And that they were not entitled to obtain them for cost-based rates. The FCC created a process to determine which wire centers were impaired and which were unimpaired.

Pacific Bell Telephone Company, doing business as AT&T California (AT&T) filed this complaint against Cbeyond Communications, LLC (Cbeyond), Covad Communications Company (Covad), and Arrival Communications (Arrival) to seek relief in the nature of a declaratory order that certain wire centers AT&T has delisted (i.e., removed from its list of impaired facilities) are non-impaired as AT&T claims, pursuant to guidelines adopted by the FCC in its Triennial Review Remand Order (TRRO)[1] and in 47 C.F.R part 51.319(a)(4) and (a)(5).

AT&T is an incumbent local exchange carrier (ILEC) providing local and intra-local access and transport area (intraLATA) toll services in California. Cbeyond, Covad, and Arrival are competitive local exchange carriers (CLECs) certificated to provide local service in California. Resolution of the central issue in this matter affects not only the defendants, but all other CLECs that are collocated in AT&T's wire centers in California.

We affirm AT&T's determination that a California wire center is non-impaired and delisted under the TRRO and criteria in 47 CFR § 51.319 (a)(4) and (a)(5), effective as of March 11, 2005, where that determination has not been challenged by the self-certifications of the defendants. We deny AT&T's request for a declaration that non-impairment designations challenged by the defendants are non-impaired, but we grant leave for AT&T to restudy and redesignate those wire centers in accordance with our order. Case (C.) 06-03-023 is closed.

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1 Order on Remand, In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 01-338, FCC 04-290 (Feb 4, 2005) (TRRO).

2. Background and History of the Dispute

The Telecommunications Act of 1934 (47 U. S.C. § 151 *et seq.*) establishes a system of dual state and federal regulation of telecommunication services, and confers federal jurisdiction on the FCC. This Commission has regulatory jurisdiction in California. The 1996 Act amended the Telecommunications Act of 1934 to promote competition and reduce regulation in the telecommunications industry in order to secure lower prices and high quality services for American telecommunications consumers, and in order to encourage the rapid deployment of new telecommunications technology.

The 1996 Act established interconnection obligations for telecommunications carriers. Section 251(c) imposes the duty upon each ILEC to interconnect with other carriers, and in most instances to provide any carrier with nondiscriminatory access to ILECs' network elements at wire centers on an unbundled basis. Under regulatory principles, the FCC has developed to implement this requirement, Section 251 has, until recently, generally entitled CLECs to lease from ILECs high-capacity loops and dedicated transport needed to provide local service at unbundled network element (UNE) rates, which are based upon Total Element Long-Run Incremental Costs.[2]

In certain geographical markets, the evolution of an environment with the potential to sustain competition between carriers has eliminated the need for CLECs to receive favorable terms in obtaining facilities from ILECs, and thus for CLECs to pay cost-based UNE rates in order to carry out the purposes of the 1996

[2] UNE rates are designed to reimburse ILECs for the cost of the facilities or equipment used by CLECs to provide telecommunication services, and by those means to enable CLECs to enter the competitive marketplace without incurring significantly lower than the Special Access rates that otherwise apply.

Act. The FCC accordingly adopted a procedure to relieve ILECs of the obligation to furnish high capacity loop and transport facilities for CLECs at UNE rates in the corresponding wire centers. Where this procedure identifies a wire center that has the requisite competitive potential, CLECs collocated in that wire center must either obtain high capacity loop and transport from the ILEC at more costly Special Access rates, or make arrangements to obtain those network elements from third parties. The underlying concept is that in order to foster competition CLECs must be able to obtain high capacity loops and transport at cost-based rates, but once the revenue potential at a wire center reaches a level at which CLECs can be self-sustaining, they should provide these network elements without assistance.

The FCC has selected certain indicators ("proxies") to measure the competitive potential of a wire center. A wire center that meets or exceeds the FCC's threshold criteria is designated "non-impaired," and a wire center that does not is designated "impaired," a reference to whether or not competition is impaired in that environment or, conversely, whether the environment would support competition. An "impaired" designation signifies that the level of revenue at a wire center, as measured by the proxies, is presumptively insufficient to support unassisted competition by interconnecting CLECs. The host ILEC may remove non-impaired wire centers from its list of facilities where it must offer high-capacity loops and transport to CLECs at UNE rates, a process known as "delisting."

Under the TRRO the proxies are stated in terms of total numbers of fiber-based collocators and business access lines present in a specific wire center. If the numbers equal or exceed the specified thresholds, or "triggers," the wire center is deemed to be non-impaired, a presumption based upon the FCC's finding that there is a "correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served by that wire center."[3] This presumption is coupled with the FCC's determination that CLECs can most economically deploy dedicated transport facilities and high-capacity loops in geographic markets where revenue opportunities are highest, as confirmed by evidence of actual deployment.[4]

The triggers established by the FCC to identify non-impaired wire centers are the following:

- DS1 transport on routes connecting a pair of wire centers that both have at least four fiber-based collocators (FBCs) or at least 38,000 business access lines;
- DS3 or dark fiber transport on routes connecting a pair of wire centers that both contain at least three FBCs or at least 24,000 business access lines;
- DS1 capacity loops on any building within the service area of a wire center containing four or more fiber-based collocators or at least 60,000 business lines; and
- DS3 capacity loops in any building within the service area of a wire center containing four or more FBCs and at least 38,000 business lines.

The FCC has also defined the following key terms that are used in these criteria:[5]

- <u>Business line</u>. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases

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[3] TRRO ¶ 43.

[4] *Id.*

[5] See 47 C.F.R. Part 51.5.

the line from the incumbent LEC. The number of business lines in a wire center is deemed to be equal to the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

(1) Include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services;

(2) Do not include non-switched special access lines; and

(3) Account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. (The TRRO provides the example that a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines.")

- FBC. An FBC is any carrier, unaffiliated with the ILEC, that maintains a collocation arrangement in an ILEC wire center, with active electrical power supply, and that operates a fiber-optic cable or comparable transmission facility that:

  (1) Terminates at a collocation arrangement within the wire center;

  (2) Leaves the ILEC wire center premises; and

  (3) Is owned by a party other than the ILEC or any affiliate of the ILEC, with the exception that dark fiber obtained from an ILEC on an indefeasible right of use basis is treated as non-ILEC fiber-optic cable. Two or more affiliated FBCs in a single wire center are collectively counted as a single fiber-based collocator.

2.1. History of AT&T's Complaint

The TRRO and the associated amendments to C.F.R. Part 51 took effect on March 11, 2005.[6] Previously, on February 4, 2005, the FCC's Wireline Competition Bureau had asked each ILEC to submit a list identifying the wire

[6] TRRO, ¶¶ 235, 239.

centers in the company's operating areas that satisfied the non-impairment thresholds for high-capacity UNE loops and interoffice transport.[7] On February 18, 2005, SBC Communications Inc. (SBC) [predecessor parent of complainant AT&T], filed its responsive lists of non-impaired wire centers with the FCC, including non-impaired wire centers located in California.[8] On February 22, 2005, the complainant issued Accessible Letters CLECALL05-027 and CLECALL05-031 notifying CLECs that the lists had been filed and were publicly available on complainant's CLEC OnLine website.

On December 16, 2005, following a merger with AT&T Corporation in which SBC Communications Corp. became the merged entity and subsequently changed its name to AT&T, AT&T revised its non-impaired wire center list to exclude duplicative FBC counts resulting from the merger, and filed a revised list with the FCC showing its putative non-impaired wire centers in California as of March 11, 2005, the effective date of the TRRO.

After AT&T revised its list, CLECs Covad, XO Communications Services, Inc. (XO), and Arrival self-certified, on the basis of a "reasonably diligent inquiry," that AT&T's wire center designations in California were inaccurate.[9] These self-certifications contradicted AT&T's designations of non-impaired wire centers in California, and the CLECs are consequently entitled to continue to

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[7] The FCC asked ILECs to identify these wire centers in Common Language Location Identifier (CLLI) Code.

[8] AT&T Corp. was known as SBC Communications Inc. at the time of these events. On November 18, 2005, SBC and the former AT&T Corporation consummated a merger. AT&T Corp. is the post-merger parent entity, of which Pacific Bell Telephone Company dba AT&T California is an operating subsidiary.

[9] Paragraph 234 of the TRRO allows CLECs to undertake self-certification in this manner.

obtain access to DS1 and DS3 loops and transport at UNE rates at the affected wire centers unless AT&T disproves their claims. In response to their self-certifications, AT&T filed this complaint against Cbeyond, Covad, and Arrival pursuant to dispute resolution procedures specified in the carriers' interconnection agreements.[10] Three additional CLECs, XO, Mpower Communications Corp. and U.S. TelePacific Corp., were subsequently granted leave to intervene in this proceeding.[11] AT&T seeks an order declaring that the wire centers it designated to be delisted are non-impaired under the TRRO guidelines and the criteria set forth in 47 C.F.R. part 51.319(a)(4) and (a)(5) to confirm its position.

2.2. Issues

At the outset of this proceeding the parties furnished the following list of issues concerning whether AT&T had properly implemented the FCC criteria, and thus had accurately designated its wire centers:[12]

1. FBCs: How should FBCs be counted under the FCC's definition of "Fiber-based collocator" in 47 C.F.R. part 51.5 and applicable orders?
    a. Are there instances in which the Commission should count as an FBC a connecting carrier [that] uses a collocation-to-collocation cross-connect to access fiber capacity from the second collocator as a separate FBC (*i.e.*, in addition to the collocation of the second

[10] On January 26, 2006, the Commission approved an amendment to AT&T's interconnection agreements adopting, inter alia, provisions of the TRRO that enable AT&T to challenge CLECs' self-certifications.

[11] Arrival was dismissed from the proceeding by stipulation of the parties after the Amended Complaint was filed.

[12] Footnotes from the parties' original statement of the issues are omitted.

collocator)? If so, what are the circumstances in which such connecting carriers should be counted as an FBC?

b. What constitutes a "comparable transmission facility" under the FCC's definition of a "fiber-based collocator"?

c. What data should be used to identify FBCs in the disputed wire centers?

   i. Should affiliate relationships (other than the affiliation between AT&T and SBC Communications Inc.) be examined based on the carrier's affiliate status at the time that the wire center is designated as non-impaired or should more recent data be considered? Should the affiliate relationship between Verizon and MCI affect the FBC count (regardless of the date of affiliation)?

   ii. How should fiber that AT&T deployed prior to the merger with SBC Communications Inc., and that is operated and/or utilized by other carriers, be treated?

   iii. Are network changes that occurred after March 11, 2005, relevant to the disputed wire center determinations?

   iv. Is a carrier that sub-leases collocation space from another carrier eligible to be considered as an FBC?

d. Taking all relevant factors into consideration, are the FBCs identified by AT&T appropriate? If not, what adjustments to the FBC count should be made?

2. Business Line Counts: How should Business Lines be counted in order to comply with the FCC's definition of "Business Lines" in 47 C.F.R. part 51.5 and applicable orders?

   a. What is the appropriate vintage for the supporting data used in evaluating the Business Line counts governing proper classification in the disputed wire centers?

   b. How should UNE Loops be counted?

i. How should digital UNE-L lines be counted under the FCC's definition of business line?

ii. How should digital UNE-P lines be counted under the FCC's definition of business line?

iii. Should UNE lines be counted in the same manner as AT&T's retail active voice grade circuits?

c. Should business switched access lines provided under a commercial agreement be counted as business lines under the FCC's definition of business line?

d. Taking all relevant factors into consideration, are the Business Line Counts identified by AT&T appropriate? If not, what adjustments to the Business Line counts should be made?

3. Based on the Commission's determinations for the issues presented in Parts 1 and 2 above, what are the appropriate classifications for the wire centers at issue in this proceeding?

3. Procedural History

AT&T filed the Amended Complaint on March 27, 2006. As provided in AT&T's Commission-approved interconnection agreements with California CLECs, AT&T served and lodged its direct case testimony and exhibits at the time it filed the Amended Complaint. The defendants served responsive testimony, and AT&T served additional testimony with the consent of the Administrative Law Judge (ALJ) before the evidentiary hearing (EH).

The Amended Complaint, and the Answers filed in response, indicate that this proceeding should be categorized as adjudicatory, and that hearings are needed. Our order does not change those determinations.

The proceeding was initially assigned to ALJ Kim Malcolm, but was reassigned to ALJ Victor Ryerson on September 13, 2006. The EH was held on October 4 and 5, 2006. The majority of the evidence was received by stipulation at the EH. The matter was submitted on February 5, 2007, following the filing of three rounds of post-hearing briefs and receipt of other documents for the record, but the defendants subsequently furnished copies of decisions issued by other tribunals with the request that we take official notice of them in conducting our deliberations in this matter.

The Commission issued Decision (D.) 07-03-026 and D.07-09-039, ordering that the 12-month statutory deadline for resolving this proceeding be extended until November 26, 2007.

The Presiding Officer's Decision (POD) was mailed on August 7, 2007. On September 6, 2007, AT&T filed an appeal of the POD. Our decision today addresses the issues raised by AT&T's appeal.

4. Discussion

The issues framed by the parties fall into two basic areas. The first relates generally to timing: the vintage of the data used to determine the wire center designations, and the designation date selected. The second area concerns the methodology used in computing business line and FBC totals. Establishing parameters for these general subject areas is the key to deciding the issues identified by the parties.

4.1. Data Vintage and the Date of Non-Impairment Designations

The vintage of the data used in AT&T's impairment analysis is the source of disagreement regarding the total counts of business lines and FBCs, because those counts may vary over time as new activity occurs at a wire center. AT&T contends that its non-impairment designations must be based upon data that was available as of March 11, 2005, the effective date of the TRRO, after adjustment for the subsequent effects of the SBC/AT&T Corporation merger. The defendants respond that AT&T's approach is inconsistent with the purposes of the 1996 Act, because the resultant tallies fail to reflect the most current state of competitive deployment at AT&T's wire centers at this time. Consequently, they argue that the most recent available data should be used in designating non-impaired wire centers, and that the impairment determination date should be the submission date for this proceeding.

The TRRO does not expressly specify a particular date for the proxy "snapshot" that determines whether the revenue potential at a wire center has reached the competitive level, but inasmuch as the TRRO took effect on March 11, 2005, that is the earliest date on which a wire center could be designated as non-impaired under the new rules. In apparent anticipation of issuance of the rules the FCC also caused ILECs to commence their data compilation roughly a month beforehand. Although the later the count, the more reflective of current deployment the data would be, AT&T is entitled to provide a "snapshot" of prevailing conditions on the effective date of the TRRO.

In issuing the TRRO the FCC selected criteria developed by reviewing the number of business lines and FBCs at wire centers available when it drafted the order, and made assumptions about competitive relationships based upon those tallies. AT&T asserts that the effective date of the TRRO should accordingly compel use of the latest data available as of March 11, 2005, to count business lines and FBCs, even though more recent pre-TRRO data subsequently became available. We disagree. Just as AT&T revised its counts to adjust for the effects of its merger, the counts must also be subject to revision for more recent, and more accurate, pre-March 11, 2005 data that has become available. We therefore order AT&T to adjust its count for new data that came to light after the TRRO went into effect, which will provide the most accurate data snapshot as of that date, before delisting any of the disputed wire centers.

There is no significance to the fact that the FCC examined earlier data counts to derive criterial proxies that are employed in the impairment analysis, as AT&T contends. The FCC either could not or would not measure the actual amount of revenue or level of telecommunications traffic associated with a wire center, so it used indirect measures to assess competitive potential by generalizing to comparable markets.[13] But those measures are based upon static concepts of capacity and economic viability. The digital equivalency relationships that the FCC defined for different facility types are constant; the business line counts can be applied to measure the assumed level of traffic irrespective of the date they are applied; and corresponding revenue relationships may thus be assumed without regard to timing. Although the "nose count" of FBCs present in a wire center at any particular time is at best an artificial measure of competitive potential because it does not necessarily demonstrate the existence of a particular level of revenue, in the FCC's determination it is a valid measure of competition irrespective of the date of the count. We do not find AT&T's reasoning compelling.

AT&T relied upon data for the year 2003 obtained from carriers' reports to FCC's Automated Reporting Management Information System (ARMIS).[14] As

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[13] "[T]o the extent competitors have deployed facilities sufficient to demonstrate that entry is economic in one geographic market, we presume that those facilities are reasonably efficient and that the carrier, or other carriers, could enter other, similar geographic markets on an economic basis using similar (or even more efficient) technologies [footnote deleted]." (TRRO ¶ 28.)

[14] As required by the FCC, large ILECs periodically furnish financial, operational, service quality and network infrastructure data to ARMIS for an electronic database. Using this database, ARMIS produces ten reports that show year-end results during the following calendar year. Carriers file the ARMIS information at the beginning of the year immediately following the report year, and the reported data are released early in

Footnote continued on next page

explained above, AT&T argues that its reliance upon data from that report should determine the date of business line counts for its impairment analysis. But as we also explain, ARMIS data available now is several years more recent than that upon which AT&T relied, and we perceive no reason why 2003 data should be used. This dispute is current, not historical, and our preference is that the most accurate data reflecting conditions that existed on March 11, 2005, be used to develop the final counts and impairment analysis. Any data that would distort the 2005 snapshot of the network, including counts of premerger AT&T Corporation fiber provided to other FBCs, should be excluded from the tallies.

4.2. Methodology of Data Development

As we explained earlier, a wire center may be designated as non-impaired when it satisfies FCC criteria that are stated in terms of the number of FBCs and the number of business lines present at the wire center. The parties disagree on the appropriate methodology for counting each of the components of these criteria, and we now turn to that area of their dispute.

4.2.1. FBC Count

The parties agree that a CLEC that has a collocation arrangement in the wire center and fiber that terminates in the arrangement and leaves the wire center should be counted as an FBC. They also agree that a CLEC should be counted if it cross-connects to a splice point within the wire center to obtain fiber from a third-party wholesale dark fiber provider that has an alternative fiber-optic transmission facility terminating in and leaving the wire center.[15]

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the first quarter. The specific ARMIS report from which AT&T obtained data was the ARMIS 43-08 Report for the year 2003.

[15] The FCC specifically recognizes Verizon's Competitive Alternative Transport Terminal as an alternative facility of this type, and connecting carriers are counted as

Footnote continued on next page

However, the parties disagree about whether it is proper to count a collocated carrier that is cross-connected to a second carrier in the wire center but lacks the means to "light" the fiber, or where one carrier simply leases transmission capacity from the other. In either of these latter situations the "piggybacking" carrier uses capacity made available by the presence of the first carrier's arrangement in the wire center, but under the FCC's analysis it presumptively cannot operate economically in the wire center without such access because of the embedded investment that would be necessary.

In these situations, the collocated host carrier has undertaken the cost of provisioning the facilities that make possible the operation of the lessee or cross-connected carrier. The cross-connected carrier does not have those facilities. Specifically, it lacks the optronics (the apparatus that "lights" fiber) necessary to function independently as an FBC.[16]

AT&T contends that cross-connected carriers should be counted as FBCs in analyzing whether the wire center is impaired, regardless of this critical difference in facilities deployment. The defendants disagree. The key to resolving this conflict is to understand the reason behind the FCC's rule.

As explained in the TRRO:

> Wire centers that possess a high level of demand for telecommunications services are most likely to attract and support competing carrier transmission facilities that *duplicate the incumbent LEC's network.* (TRRO ¶103, *italics supplied*.)

FBCs. However, at the time of the hearing in this matter there were no FBCs of this type on AT&T's network in California, so the issue appears to be academic for our purposes, apart from any value it may have for illustrating the attributes of an FBC.

[16] The TRRO encourages such alternative facilities deployment because it uses capacity efficiently, but does not hold that this establishes the cross-connected carrier as an FBC.

The FCC looks at observable evidence of existing competition as a way to measure the level of demand at a wire center. On the carrier (or cost) side, carrier presence in the form of transmission facilities equivalent to those which the ILEC would itself need to provision so as to operate is such an indication of competition. On the customer (or revenue) side, the FCC relies upon the presence of a threshold number of business lines, based upon actual experience with competitive deployment, to signal the existence of revenue sufficient to support competitive facilities deployment at the wire center.[17]

The feature that complicates this analysis is that an ILEC's facilities-based competitors are present in its own wire centers, as compelled by the 1996 Act. In other words, each CLEC does not own and operate its separate network. The 1996 Act opened access to ILECs' wire centers, and to other network elements, in recognition of the need to maintain a single integrated network in lieu of creating competing networks of duplicative facilities, which would be wasteful.[18] In order to foster the creation of competition, the 1996 Act also makes UNEs available to CLECs at cost-based rates until such time as total revenues support

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[17] We discuss this part of the analysis in the following section on counting business lines.

[18] We are very much cognizant of the fact that during the infancy of the telecommunications industry competing telephone companies strung their wires separately and operated their own respective exchanges, creating a mass of duplicative network facilities. This nation long ago recognized that such duplication was expensive and inefficient, and that an integrated telecommunications network was preferable.

The 1984 breakup of the Bell System into competing carriers, and the implementation of competition under the 1996 Act, require the FCC and state regulators to develop parameters for creating and fostering competition without returning to wasteful facilities duplication. By analogizing to the competitive provisioning that would otherwise have to occur, the FCC seeks to generate true competition without causing undesirable investment in redundant facilities, a difficult undertaking in light of the monopoly history of the network.

"competing carrier transmission facilities that duplicate the incumbent LEC's network." (*Supra*.) This obviously requires independent investment by the CLECs to acquire those competitive network elements. When that has occurred in the market area of a specific wire center, competition is no longer impaired in that geographical location by the revenue limitations of an immature market.

To ensure that the ILEC's impairment analysis is fair, the FCC has established limitations on the definition of an FBC to ensure that the ILEC's tally of FBCs is supportable. For example, a CLEC must not be affiliated with the ILEC in order to be counted as a competitor of the ILEC, because affiliates presumably do not compete fully with the ILEC. The CLEC must also have in the wire center a collocation arrangement that has an active electrical power supply, and must operate a fiber-optic cable (or a comparable transmission facility) into the collocation arrangement and out of the wire center.[19] With the limited exception of cable provided under an indefeasible right of use, the cable or equivalent facility must be owned by a party other than the ILEC or an affiliate of the ILEC. In short, *the CLEC must effectively be operating as an independent telephone company within the ILEC's networ*k on the date of the impairment analysis in order to support the presumption that it is a viable competitive FBC under the FCC's analytical framework. Contrary to what AT&T appears to argue, even though every FBC may be a CLEC, not every CLEC is an FBC.

Under the FCC's framework, the touchstone for counting a CLEC as an FBC is that it must "operate" the fiber or comparable facility. The FCC has not

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[19] TRRO, ¶ 102. A single transmission path from the cross-connected carrier out of the wire center by way of a collocated FBC's actively operated arrangement does not satisfy this requirement, as AT&T urges.

defined what it means by the term, "operate," but it is not sufficient that a carrier collocated in a wire center leases transmission capacity from another carrier, purchases transport service on another CLEC's fiber, or in any other manner merely uses some of the capacity of competitively deployed fiber. There is no bright line test that we are aware of. However, we regard as a strong clarification of the FCC's intent part of an AT&T Corporation merger commitment in its recent merger with BellSouth. That commitment, which was ratified by the FCC as a merger condition, states that the CLEC must "own or manage the optronics on the fiber."[20] It follows that any collocation relationship which falls short of satisfying this requirement fails to create the presumption that the cross-connected CLEC is an FBC.

A cross-connected CLEC that lacks ownership of the optronics or the means for managing the fiber that exits a wire center should not be counted, because only the host carrier can function independently by reason of its investment in facilities.[21]

Apart from FBCs that meet the criterion of "operating" fiber that terminates in its collocation arrangement and leaves the wire center, only CLECs with comparable transmission facilities – facilities that have all of the same features and functionality as those which are literally fiber-based – may be

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[20] Letter dated December 28, 2006, from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, Merger Commitments, p. 3.

[21] An analogy can be made to the situation where a tenant in an apartment building rents an extra room to a subtenant who is unable to rent a separate apartment. Although the subtenant pays the tenant for the room and uses the kitchen and common living areas, it would not be appropriate for the landlord to count the subtenant as an independent source of rental income for purposes of evaluating the building as an investment.

included in the FBC count.[22] Absent more explicit guidance from the FCC, we must attempt to determine its intent and draw the line somewhere. The BellSouth merger commitment provides some insight about the FCC's thinking, and suggests that the FCC is striving to implement a nationally uniform analytical framework for identifying FBCs. We will not swim against this current by adopting a different standard in California.

4.2.2. Business Line Count

As we observed earlier, the business line count falls on the revenue side of the impairment analysis. The FCC uses this measure of transmission capacity as an alternative indication of revenue potential in addition to the FBC count: If the total number of business lines in a wire center is equal to or greater than the number that, in the FCC's determination, correlates with an economically viable market, competitive revenue potential exists in that wire center. This is parallel to the FCC's assumption that competitive potential exists when there is evidence, in the form of the number of FBCs, of a concentration of facilities (and corresponding investment) correlating with sufficient demand to support competition.

As we explained earlier, the FCC's rule defines the number of business lines in a wire center as the total of all ILEC switched access lines, plus all UNE loops connected to the wire center, including those provisioned in combination

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[22] What constitutes a "comparable facility" is not limited by specific definition. In the TRRO the FCC states that its test "is actually agnostic as to the medium used to deploy an alternative transmission facility, because … a technologically neutral test better helps us to capture the actual and potential deployment in the marketplace than would a wireline-specific test." (TRRO ¶ 102 n.295.) What this elegant explanation means is that the CLEC does not literally have to utilize fiber technology in order to be counted as an FBC, but it must nevertheless have the same functional elements as though it did.

with other unbundled elements. This definition reflects the FCC's presumption that under 47 CFR Section 51.5, all UNE loops are "business lines." This Commission has employed the same presumption in its Decision Adopting Amendment to Existing Interconnection Agreements in *Application of Pacific Bell Telephone Co. d/b/a SBC for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*. (D.06-01-043 in Application (A.) 04-03-014 (Jan. 26, 2006)). A demonstration that a line identified as a "business line" is actually used to serve a business customer is not required. The only qualification applicable to the methodology for performing the business line count relates to the concept of digital equivalency, which is a system of explicit numerical equivalents used to convert certain high-capacity digital loops into specified line counts. That qualification is also independent of the actual use to which the loops are devoted.

The FCC implemented this presumption on the basis of its record in the TRRO proceeding, and it would not be appropriate for us to limit the presumption by applying proportional utilization factors to the UNEs, as the CLECs request. The FCC sought a simple test for counting business lines, based upon information that was readily available to the ILEC. Our decision not to qualify the procedure is consistent with the FCC's stated purpose of adopting objective criteria based upon readily ascertainable facts to which the ILEC has access. (*See, e.g.*, TRRO ¶¶ 108, 234.)

The remaining issue is that of whether lines provided by AT&T under a commercial agreement should be counted as ILEC business switched access lines. Commercial agreements govern AT&T's provision of CLECs with a UNE-P substitute, a type of line that did not exist at the time that impairment analysis was under development. However, lines furnished under a commercial agreement are AT&T commercial UNE-P replacements that provide the same revenue signal as UNE-Ps, and accordingly should be considered to be access lines connecting end-user customers with the ILEC end offices for switched access, and thus counted as business lines, to the extent consistent with the data vintage principles we adopt.[23]

4.3. Accuracy of the Data Count and the Necessity for Adjustments

The defendants devoted considerable effort to challenging the accuracy of AT&T's data counts in addition to addressing the larger issues involving interpretation of the TRRO. Many of the resultant disputes about the status of individual carriers (as contrasted with a class of carriers) concern factual questions about their certification, or even their existence, based upon the occurrence of various transactions or discontinued operations in California. In other instances, questions about the FBC count were raised by ambiguities about such things as corporate interrelationships and affiliate status.

Most of these factual controversies have now been resolved by the parties. Others may be resolved under the principles we articulate in this decision in response to AT&T's appeal of the POD. However, AT&T appealed four relatively narrow disputes, and argues that these must be resolved in our decision in order to bring closure to the case. We will provisionally resolve these disputed items subject to AT&T's adjustment of its non-impaired wire center list, as provided in our order. Our order allows AT&T to file this revised information

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[23] We note that the Texas commission has already required future business line counts to include those provided via commercial agreements comparable to UNE-P lines used to serve business customers. (*Texas Wire Center Order* 37-38 and Attachment A, § X.1.2.1.)

within 30 days, a compliance deadline that parallels the one AT&T was required to meet when it made the original designations.

First, there is a surviving dispute about whether AT&T counted an empty collocation cage as an FBC in a specified wire center. Although the timing of this count is unclear, we hold that it should not have counted an empty collocation cage as an FBC if it was empty as of March 11, 2005. On the other hand, if at that time it was an unaffiliated operating FBC under the standards we articulate in this decision, it was appropriate to include it in the FBC count.

Second, there is a dispute concerning whether one CLEC, ELI, should have been counted as an FBC. Again, this controversy may evaporate under the data vintage rules we articulate, which would indicate that ELI should have been counted as an FBC if it satisfied the other standards to be counted as of March 11, 2005.

Third, there is a dispute as to whether flaws in AT&T's affiliate list affected the accuracy of the count. The weight of the evidence indicates that AT&T took appropriate precautions to eliminate affiliates so that only a single FBC would be counted, and we so find.

Finally, there is a dispute as to whether AT&T properly included Covad in a specified wire center, where AT&T now admits that Covad was collocated in that wire center under a different CLLI. This appears simply to be a ministerial counting error based upon confusion of two CLLIs. We provisionally find that counting Covad was proper, subject to adjustment in the compliance filing that it should not have been counted under the facts prevailing on March 11, 2005.

5. Appeal

AT&T filed a timely appeal of the POD, citing three issues as errors of law and fact. First, AT&T's appeal claims that the POD's refusal to accept AT&T's

election of March 11, 2005, as the compulsory date for identifying non-impaired wire centers is erroneous. Second, AT&T appeals the POD's finding that cross-connected carriers that do not own, or lack the capacity to operate, fiber are not FBCs within the FCC's definition. Finally, AT&T challenges the POD's refusal to address what AT&T characterizes as a few narrow disputes about the inclusion of particular carriers in its tally supporting its identification of non-impaired wire centers.

Our order today addresses the issues raised by the appeal and makes certain changes following close review of the parties' arguments. Most significantly, we have concluded that the determination of non-impaired wire centers should be based upon the state of the facts on March 11, 2005, with the proviso that the data utilized to determine those facts must be the latest available in time, even if it became available after March 11, 2005. Our intent is to ensure, to the greatest feasible extent, that the impairment analysis is based upon the most accurate count of business lines and FBCs.

6. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Victor D. Ryerson is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. This proceeding was filed as a complaint, and involves the adjudication of disputed facts and legal principles. A hearing was necessary.

2. The FCC has adopted a procedure to relieve ILECs of their obligation to furnish high capacity loop and transport facilities for CLECs at UNE rates in certain wire centers that show that competitive facilities deployment would be economic. The procedure is set forth in the TRRO and in Part 51 of Title 47 of the Code of Federal Regulations.

3. In the TRRO, the FCC defined proxies that demonstrate the existence of competitive potential at a wire center. A wire center that meets or exceeds these criteria is "non-impaired," and a wire center that does not is "impaired." An "impaired" wire center, as measured by these proxies, is presumptively insufficient to support unassisted competition by interconnecting CLECs. Under the framework adopted in the TRRO, the proxies are in the form of the number of FBCs and the number of business access lines present in a specific wire center. If these numbers equal or exceed specified thresholds, the wire center is deemed to be non-impaired.

4. On February 4, 2005, FCC's Wireline Competition Bureau asked each ILEC to submit a list identifying the wire centers in the company's operating areas that satisfied the non-impairment thresholds for high-capacity UNE loops and interoffice transport. The ILECs were requested to respond within 30 days.

5. On February 18, 2005, SBC Communications Inc. (predecessor of complainant AT&T), filed responsive lists of non-impaired wire centers with the FCC, including non-impaired wire centers located in California.

6. On February 22, 2005, the complainant issued Accessible Letters CLECALL05-027 and CLECALL05-031 notifying CLECs that the lists had been filed and were publicly available on complainant's CLEC OnLine website.

7. The TRRO, and the amendments to Part 51 of Title 47 of the Code of Federal Regulations, took effect on March 11, 2005, as specified in Paragraphs 235 and 239 of the TRRO.

8. On December 16, 2005, following a merger with AT&T Corporation in which SBC Communications Inc. became the merged entity and parent of complainant AT&T, AT&T revised its non-impaired wire center list to exclude duplicative FBC counts resulting from the merger, and filed a revised list with

the FCC showing its non-impaired wire centers in California as of March 11, 2005, as adjusted for the effects of the merger.

9. After AT&T revised its list designating non-impaired wire centers in California, CLECs Covad, XO, and Arrival self-certified that AT&T's wire center designations in California were inaccurate. These self-certifications contradicted AT&T's designations of non-impaired wire centers in California, and entitle the CLECs to continue to obtain access to DS1 and DS3 loops and transport at UNE rates at the affected wire centers if they are ultimately determined to be correct in this proceeding.

10. AT&T filed the Amended Complaint on March 27, 2006, against Cbeyond, Covad and Arrival, under dispute resolution procedures specified in the carriers' interconnection agreements.

11. The number of business lines and FBCs in an ILEC's wire centers may vary over time by reason of mergers, bankruptcies, service discontinuances, and other factors.

12. The TRRO does not expressly specify the date as of which the "snapshot" of proxies must be taken to determine whether revenue potential at a wire center has reached the level where it should be designated as non-impaired.

13. The FCC selected criteria developed by reviewing the most recent data available to the FCC at the time it drafted the TRRO to identify the number of business lines and FBCs at wire centers, and made certain assumptions about the viability of competition corresponding to certain threshold values. These threshold values are the non-impairment "triggers."

14. The FCC's selection of triggers indicating that sufficient revenue potential to support competitive deployment of facilities exists in a wire center is based upon its finding that there is a correlation between the number of business lines

and/or fiber collocations in a wire center, on one hand, and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served by that wire center, on the other hand. The FCC also determined that CLECs can most economically deploy dedicated transport facilities and high-capacity loops in geographic markets where revenue opportunities are highest, as confirmed by evidence of actual deployment

15. AT&T relied upon data obtained from carriers' reports to FCC's ARMIS for data pertaining to calendar year 2003 in counting business lines pursuant to the TRRO. ARMIS data closer in time to March 11, 2005, than that upon which AT&T relied are now available.

16. In the situation where a carrier in a wire center is cross-connected to another collocated carrier, and only the second carrier has optronics to "light" fiber in the wire center, the first ("piggybacking") carrier uses capacity made available because of the presence of the second carrier's arrangement in the wire center. The second carrier has undertaken to bear the cost of investing in the optronics facilities, and owns or operates those facilities. In making use of an existing alternative facilities deployment, the cross-connected carrier does not directly bear the expense of acquiring optronics necessary to function independently as an FBC, but instead uses the capacity available through the second (host) carrier.

17. The ownership or operation of transmission facilities equivalent to those which the ILEC would need in order to provide service to customers is an indication of competition that was identified and relied upon by the FCC in its assessment of whether competition is present in a wire center.

18. The FCC relied upon the presence of a threshold number of business lines, based upon its experience with competitive deployment, as an indication of the

existence of sufficient revenue to support competitive facilities deployment at the wire center.

19. Digital equivalents are numerical equivalents for converting certain high-capacity digital loops into specified line counts under the FCC's rules.

20. No test based on the actual use of a UNE loop is used by the FCC as a means of determining whether the loop is considered to be a business line, nor has the FCC adopted presumptive utilization factors to modify the basic presumption that UNE loops in a wire center are business lines.

21. Commercial agreements govern AT&T's provision of CLECs with a UNE-P substitute, a type of line that did not exist at the time that the FCC was developing its impairment analysis. Lines furnished under a commercial agreement are AT&T commercial UNE-P replacements that provide the same revenue signal as UNE-Ps.

22. In compiling and publishing its list of wire centers that were non-impaired on March 11, 2005, AT&T relied upon certain facts and principles that are inconsistent with those reflected in this decision, and upon erroneous data. This reliance produced inaccuracies in AT&T's current list.

Conclusions of Law

1. This proceeding should be categorized as adjudicatory.

2. The Commission's order in this proceeding should be consistent with the FCC's underlying rationale for the TRRO and Part 51 of Title 47 of the Code of Federal Regulations.

3. In this proceeding, AT&T seeks an order declaring that the wire centers it designated to be removed from its list of impaired facilities are non-impaired under the TRRO guidelines and the criteria set forth in 47 C.F.R., Paragraphs 51.319 (a)(4) and (a)(5), as of March 11, 2005.

4. The concept embodied in the 1996 Act is that to foster competition, CLECs must be able to obtain high capacity loops and transport at rates based upon long-run incremental costs, but that once the revenue potential at a wire center reaches the level at which CLECs can be self-sustaining, the CLECs must provide these network elements for themselves, either by direct ownership or by acquiring them from third parties.

5. As a matter of law, the impairment date applicable to delisting of wire centers by AT&T in California is March 11, 2005. However, in performing its impairment analysis, AT&T must use the most accurate and recent data available to determine the state of the facts as of that date. The fact that the FCC had relied upon pre-TRRO data to develop criteria before it issued the TRRO has no inherent significance, and does not constrain the Commission to accept wire center designations determined from data available on or before the date the TRRO became effective.

6. An ILEC's non-impairment designation of a wire center is irrevocable, unless it is contested by a CLEC and this Commission determines that the wire center was impaired on the designation date.

7. In determining the number of FBCs in a wire center under the terms of the TRRO, a CLEC must not be affiliated with the ILEC to be counted as a competitor of the ILEC. The CLEC also must have in the wire center a collocation arrangement with an active electrical power supply, and must operate a fiber-optic cable (or a comparable transmission facility) into the collocation arrangement and out of the wire center. With one very limited exception (that of cable provided under an indefeasible right of use), the cable or equivalent facility must be owned by a party other than the ILEC or an affiliate of the ILEC.

8. The touchstone for counting a CLEC as an FBC is that it must "operate" the fiber or comparable facility. Under the FCC's impairment analysis framework, this means that the CLEC must own or manage the optronics that operate the transmission facilities. To be counted as an FBC, it is insufficient that a collocated carrier leases transmission capacity from another carrier in the wire center, purchases transport service on another CLEC's fiber, or in any other manner only uses capacity on competitively deployed fiber.

9. Cross-connected CLECs in a wire center should not be counted as FBCs, because only the host carrier has the ability to function independently.

10. Apart from FBCs that meet the criterion of "operating" fiber that terminates in the CLEC's collocation arrangement and leaves the wire center, only CLECs with comparable transmission facilities – facilities that have all of the same features and functionality as those which are literally fiber-based – may be included in the FBC count.

11. UNE loops are "business lines," irrespective of whether they are actually used to serve business customers. Demonstration of "business" use of such a line is not a requirement. The only requirement for a business line for purposes of the impairment analysis is that it is a UNE loop.

12. To the extent that they are at issue in this case, lines furnished under a commercial agreement should be considered to be access lines connecting end-user customers with the ILEC end offices for switched access in lieu of UNE-Ps, and thus counted as business lines.

13. The number of inaccuracies in AT&T's list of non-impaired wire centers may have affected the number of wire centers designated as delisted, and should be corrected to conform to our order.

14. AT&T should be required to revise its data and non-impaired wire center list, so that the list is factually accurate and consistent with our order before it ceases to offer network elements to the defendants and other CLECs at unbundled rates at any contested wire center.

15. The specific disputed issues concerning the correctness of the data counts that were raised on appeal should be resolved as follows:

a. Regarding the dispute about whether AT&T counted an empty collocation cage as an FBC in a specified wire center, if the collocation cage was in fact an unaffiliated operating FBC under the standards we articulate in this decision as of March 11, 2005, it should be included in the FBC count.

b. Regarding the dispute concerning whether ELI should have been counted as an FBC, if ELI satisfied the data vintage principles we articulate in this decision, ELI should counted as of March 11, 2005.

c. Regarding the dispute as to whether flaws in AT&T's affiliate list affected the accuracy of the count, we determine that AT&T took appropriate precautions to eliminate affiliates so that only a single FBC would be counted.

d. Regarding the dispute as to whether AT&T properly included Covad in a specified wire center, where AT&T now admits that Covad was collocated in that wire center under a different CLLI, we provisionally determine that counting Covad was proper, subject to confirmation in the compliance filing.

O R D E R

IT IS ORDERED that:

1. Any previous determination by complainant Pacific Bell Telephone Company dba AT&T California that a wire center is non-impaired and delisted under the Federal Communication Commission's Triennial Review Remand Order and criteria in 47 CFR § 51.319(a)(4) and (a)(5), which determination has

not been challenged by the self-certifications of the defendants in this proceeding, is affirmed, effective as of March 11, 2005.

2. With respect to any designation that is not affirmed pursuant to Ordering Paragraph (OP) 1, AT&T California's request for a declaration that wire centers designated as non-impaired and delisted by AT&T Corp. is denied, pending confirmation or adjustment in accordance with the following compliance requirements:

(a) Within 30 days after the effective date of this Order, AT&T California may file and publish on the AT&T CLEC OnLine website, in Common Language Location Identifier format, a new designation of non-impaired California wire centers in addition to the designations affirmed under paragraph 2, that are consistent with our decision. Specifically, in redesignating any non-impaired wire centers AT&T California shall:

(1) Only count as a fiber-based collocator (FBC) a collocated CLEC that "operates" fiber, *i.e.*, that owns or manages the optronics on the fiber. Cross-connected CLECs that do not operate their fiber may not be counted as FBCs;

(2) Count as FBCs only those CLECs with comparable transmission facilities that have all of the same features and functionality as FBCs that are actually fiber based;

(3) For purposes of counting FBCs, accurately determine the operating status and affiliation, if any, of every CLEC counted as an FBC as of March 11, 2005, and include only those that at that time were authorized to operate, and were in fact operating, in California;

(4) Count each UNE loop as a business line, irrespective of whether or not the line is actually used to serve a business customer, as of the effective date of the Order;

(5) Count lines furnished under a commercial agreement as of March 11, 2005, as business lines;

(6) Utilize the most accurate reports available on the date this order is issued that provide relevant data concerning FBCs and business lines in AT&T wire centers on March 11, 2005, including the latest relevant ARMIS report;

(7) Resolve all disputed issues in a manner consistent with the findings and conclusions set forth in our decision; and

(8) Provide all underlying data to the defendants, or any of them, upon request. The defendants shall treat as confidential any data so designated by AT&T California.

(b) The revised list shall become binding on the parties as of the effective date of the final Order in this proceeding.

(c) Finalization of this Order as provided in this paragraph shall not affect any party's right to apply for rehearing pursuant to Article 16 of the Commission's Rules of Practice and Procedure.

3. The Motion for Protective Order dated September 21, 2007, and filed on behalf of Joint CLECs concerning confidential materials filed under seal is granted, and shall be effective for a period of two years from the final date of this order.

4. The Motion of Pacific Bell Telephone Company d/b/a AT&T California for Official Notice, dated April 27, 2008, is granted.

5. Case 06-03-023 is closed.

This order is effective today.

Dated April 24, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners