

Decision 08-11-033 November 6, 2008

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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

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

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

**1. Summary**

The Commission declines to adopt CALTEL's proposed rules requiring California's incumbent local exchange carriers to seek this Commission's permission before permanently retiring copper wire local loops from the telephone network.<sup>1</sup> We find that the party requesting such rules, the California Association of Competitive Telecommunications Companies (CALTEL), has not

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<sup>1</sup> For the purposes of this proceeding, we define copper retirement as the replacement of copper loops or copper subloops with fiber to the home or fiber to the curb loops, as referred to in the Federal Communications Commission's *Triennial Review Order* and in 47 C.F.R. § 51.333(b)(2). See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Development of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003) (TRO) at ¶ 281.

demonstrated a current need for action by this Commission. We also believe that the rules proposed by CALTEL will discourage and delay fiber systems from being built in California, contrary to clear state legislative direction to bring affordable and widespread high quality communications services to all Californians. We therefore decline to adopt the proposed CALTEL rules at this time; however, as discussed below, we do establish a notice and negotiation process at the state level for the incumbent local exchange carriers (ILECs) to comply with when retiring copper loops.

We find that CALTEL has not demonstrated any current harm that necessitates the issuance of its proposed rules.<sup>2</sup> The record of this proceeding contains no evidence showing that the installation of facilities to replace the copper network by ILECs has resulted in adverse impacts to consumers or competition. However, we will require the ILECs to file *concurrently* with our Communications Division any notices of network changes that the carriers file with the Federal Communications Commission (FCC) for fiber to the home (FTTH) or fiber to the curb (FTTC) deployment that results in the retirement of copper plant. Filing such notices with our Communications Division staff will allow this Commission to monitor ILEC copper retirement practices. The FCC has found, and we concur, that such notices will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain

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<sup>2</sup> We note that evidence of harm or absence of harm is not the standard for adopting rules in a quasi-legislative proceeding. However, we have considered harm, in addition to other factors, including our pro-investment policies, in determining whether to adopt CALTEL's proposed rules.

access to loop facilities. We strongly encourage the carriers to coordinate in such instances to ensure that service to CLEC customers is not unduly disrupted.

Moreover, to facilitate negotiations to access the loop, we will require the ILEC to serve concurrently with its filing at the CPUC, notice of the copper retirement upon all CLECs that are interconnected with the ILEC, regardless of whether the CLEC is serving customers currently on the specific retiring copper loop.<sup>3</sup> Within 20 days of the date that the notice of network change has been filed with the FCC, the CLEC must request, in writing, negotiations with the ILEC either to purchase the entire copper loop from the ILEC or to reach an agreement with the ILEC on price and terms and conditions for continued access to loop facilities. The CLEC shall include in its request for negotiations the following information:

- a. Whether the CLEC seeks to purchase the copper loop, or whether the CLEC seeks only to have the ILEC maintain access to a loop;
- b. the number of current or planned customers on the copper loop;
- c. the services that the CLEC provides over the loop or plans to provide over the loop; and
- d. the number of UNEs that the CLEC currently purchases.

We will require the ILEC to enter into good faith negotiations with the CLEC for a period of 60 days either to sell the copper loop at issue at fair market

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<sup>3</sup> Effectively, the ILEC shall serve its notice on CLECs and Commission Communications Division staff at the same time that it files it with the FCC. By copper loop, we refer to the copper “transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an

*Footnote continued on next page*

value; or to reach a fair and equitable agreement with the CLEC on price and terms to ensure access to loop facilities. A “fair and equitable” agreement for access to the copper loop should include all fair and reasonable costs incurred by the ILEC for maintaining access to the copper loop facility for the requesting party, vis-à-vis the retirement of the copper loop facility. If a requesting party seeks to purchase the copper facility from the ILEC, the price shall be the fair market value of the copper facility to the ILEC, and all maintenance and operating costs of the copper facility thereafter shall be the responsibility of the purchasing party from the date of purchase.

## **2. Background**

Copper wiring has been used in telephone networks across the country for more than 100 years, but as fiber optic cable becomes more widely used, competitive local exchange carriers (CLECs) and consumer groups have raised questions about whether this Commission should impose rules to preserve the copper facilities in order to safeguard choices by consumers and protect competition by CLECs.

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

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end-user customer premises, including inside wire owned by the incumbent LEC.” *See TRO*, at n. 638.

drops and, if so, what action we may take to ensure their replacement where a customer so requests.

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

In addition to the comments and data we received in response to P.07-07-009, we took comments in connection with this Rulemaking. CALTEL, Integra Telecom of California, Inc. (Integra), the United States Department of Defense/Federal Executive Agencies (DOD/FEA), the Commission's Division of Ratepayer Advocates (DRA), and The Utility Reform Network (TURN) filed comments generally supporting CALTEL's proposed rules, while the ILECs - Pacific Bell Telephone Company dba AT&T California (AT&T), Verizon California Inc. (Verizon), SureWest Telephone (SureWest) and the small California ILECs<sup>4</sup> (Small LECs) - each filed comments, data request responses, or both in P.07-07-009 (with comments filed on August 13, 2007, August 23, 2007,

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<sup>4</sup> Calaveras Telephone Company (U1004C), Cal-Ore Telephone Co. (U1006C), Ducor Telephone Company (U1007C), Foresthill Telephone Co. (U1009C), Global Valley Networks, Inc. (U1008C), Happy Valley Telephone Company (U1010C), Hornitos Telephone Company (U1011C), Kerman Telephone Company (U1012C), Pinnacles Telephone Co. (U1013C), The Ponderosa Telephone Co. (U1014C), Sierra Telephone Company, Inc. (U1016C), The Siskiyou Telephone Company (U1017C), Volcano Telephone Company (U1019C), Winterhaven Telephone Company (U1021C) ("Small LECs").

and October 16, 2007, and data request responses<sup>5</sup> filed on October 4, 2007) and in this proceeding (with comments filed on March 14, 2008 and May 28, 2008).

We sought information from the ILECs as to whether they were permanently removing or retiring copper facilities in the “local loop,” located between the ILECs’ central offices and customers’ homes and businesses, including the “drop” line that attaches underground or overhead telephone facilities to individual customer premises.<sup>6</sup> Based on the record, it appears that Verizon is the only large ILEC whose new broadband-based network – called FiOS – consists entirely of fiber. Thus, Verizon is the ILEC most likely to remove copper plant from its central office all the way to the home (FTTH), although its removal of copper loops to date and plans for future removal are somewhat limited, as we discuss below.

Verizon's actions to date consist of removal of approximately 40,000 copper drops, the short span between customers' premises and Verizon's poles

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<sup>5</sup> The Administrative Law Judge (ALJ) issued a ruling on September 14, 2007 asking the ILECs to disclose the extent of their removal of copper facilities, how they defined retirement, the impact of such retirement, and related information. The ILECs' responses are the data request responses referred to in text above.

<sup>6</sup> Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services, Rulemaking (R.) 08-01-005, Order Granting Petition for Rulemaking and Instituting Rulemaking as to Whether to Adopt, Amend or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services (OIR), Appendix A, at 2 (R.08-01-005).

or underground facilities.<sup>7</sup> Because Verizon will replace these facilities upon customer request, Verizon contends that removal of copper drops does not constitute *permanent* removal of copper loops. We agree that as long as Verizon continues to replace drops upon request, such action does not constitute permanent removal of the copper loop.

In contrast, AT&T's network, U-Verse, is a hybrid network of fiber and copper that will require AT&T to leave the copper portion of the network in its system. AT&T's current network plan does not involve either an FTTH or FTTC approach; instead, it is placing fiber in the system between the central office and the remote terminal, but the copper loop from the remote terminal to the home remains in place. Thus, AT&T asserts, it has no plans to remove the copper network in the foreseeable future.<sup>8</sup>

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

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<sup>7</sup> P.07-07-009, Additional Comments and Information Request Responses of Verizon California, Inc, October 16, 2007, Attachment A, at A-2, Response to Question 3 and Question 4 (Verizon Additional Comments and Information); see also Initial Comments of The Utility Reform Network to Order Granting Petition for Rulemaking, R.08-01-005, filed March 14, 2008 (TURN Opening Comments) at 17; Reply Comments of Verizon California Inc. and Verizon West Coast Inc. on Order Instituting Rulemaking, R.08-01-005, filed May 28, 2008 (Verizon Reply Comments) at 19.

<sup>8</sup> Comments of AT&T on Order Granting Petition for Rulemaking, R.08-01-005, filed March 14, 2008 (*AT&T Opening Comments*) at 27.

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

We also asked CALTEL to identify any harm it had suffered as a result of the *status quo*.<sup>9</sup> Neither CALTEL nor the other parties favoring CALTEL's proposed rules were able to identify any harm, or pattern of harm relevant to copper retirement, that convinces us to adopt prescriptive rules at this time. CALTEL could point to no customer of its members that had lost service, no customers who had complained, and no member companies that had lost their ability to serve customers as a result of ILEC removal of copper facilities to date. This Commission believes that extensive rules on this issue could discourage the significant investment of carriers in advanced fiber communications systems in our State, contrary to Pub. Util. Code § 709.<sup>10</sup>

### **3. The Commission has Jurisdiction to Act**

We find that we have jurisdiction to address the issues raised by the CALTEL petition and to establish the process we adopt here. As an initial matter, we note that in its *Triennial Review Order (TRO)*,<sup>11</sup> the FCC declined to

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<sup>9</sup> Order Instituting Rulemaking, § 4.3 (Issues to be Considered) & Appendix A; P.07-07-009, *Administrative Law Judge's Requesting Additional Information and Noticing Prehearing Conference*, filed Sept. 14, 2007.

<sup>10</sup> Pub. Util. Code § 709 sets forth the Legislature's policies for telecommunications in California as, among other things, to encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.

<sup>11</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the

*Footnote continued on next page*

adopt any rules to prohibit the ILECs from retiring copper loops or subloops that they have replaced with FTTH loops.<sup>12</sup> The FCC explicitly left open for state commissions "to evaluate whether retirement of copper loops complies with state legal or regulatory requirements":

...[W]e stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements. We also stress that we are not establishing independent authority based on federal law for states to review incumbent LEC copper loop retirement policies. We understand that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements.<sup>13</sup>

We find that in this passage the FCC recognized this Commission's express authority to consider whether state law, rules or procedures exist or should exist to govern ILEC retirement of copper facilities. Even if, as the ILECs contend, the state law had to pre-date the 2003 TRO decision by virtue of the FCC's use of the present tense in stating that "many states *have* their own requirements,"<sup>14</sup> at least two California statutes qualify.

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

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Telecommunications Act of 1996; Development of Wireline Services Offering Advanced Telecommunications Capability, 18 FCC Rcd 16978 (2003) (TRO).

<sup>12</sup> *Id.* at ¶ 281.

<sup>13</sup> *Id.* ¶ 284.

<sup>14</sup> We do not necessarily agree with the ILECs' interpretation of the FCC language as applying only to pre-existing state law, but assume that interpretation for purposes of argument.

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

The record of this proceeding demonstrates that the copper network is increasingly useful to facilitate advanced services in this state. As Integra points out in material submitted with its comments,<sup>15</sup> digital subscriber line (DSL) is but one use of copper plant to facilitate broadband. While ADSL started out with up to 1.5 megabits per second (Mbps) of capacity, ADSL2 can provide 25 Mbps/pair. VDSL2 can provide up to 100 Mbps/pair on short loops of less than 1,000 feet, enough bandwidth to support services such as high definition television and video-on-demand. Ethernet over copper is a relatively recent robust application (with speeds up to 20 Mbps) for California business, especially small business. Thus, use of copper wiring for broadband purposes is one way of meeting our obligations to advance broadband deployment under § 709. Thus, § 709 is a statute under which we have authority to act.

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<sup>15</sup> Comments of Integra Telecom of California, Inc. on Order Instituting Rulemaking, R.08-01-005, dated March 14, 2008, Exhibit 1, at 8-9.

Pub. Util. Code § 851, enacted in 1951, requires utilities to apply for Commission approval to sell, lease, assign, mortgage, or otherwise dispose of or encumber facilities that are necessary or useful in the performance of their duties to the public. CALTEL argues that the retirement of copper loops is removal of plant that is necessary or useful and that the ILECs must obtain Commission approval regarding such retirement.<sup>16</sup> AT&T argues on the other hand that Section 851 “by its own terms, does not apply to property that is no longer necessary or useful to the ILEC in the performance of the ILEC’s duties to the public.”<sup>17</sup>

Verizon argues that Pub. Util. Code § 851 does not apply to the “retirement” of copper loops, as it only applies to “transactions” such as the sale, lease, encumbrance or “disposition” of public utility property that is necessary or useful to its public service obligations.<sup>18</sup> We disagree, and find that the term “otherwise dispose of” is broad enough to encompass copper loop retirements, as CALTEL asserts.<sup>19</sup> See *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 308 (1934) (holding that a hydroelectric power company could not release excess water

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<sup>16</sup> *Comments of CALTEL on Order Instituting Rulemaking, R.08-01-005*, dated March 14, 2008 (*CALTEL Opening Comments*), at 14-15. CALTEL’s argument is that Section 851 applies to the retirement of copper facilities because the facilities are an integrated part of the network that is used by the ILECs and CLECs. CALTEL also asserts that the ILECs have a duty to serve the CLECs; and that copper facilities are used to provide wholesale services.

<sup>17</sup> *Comments of AT&T on Order Granting Petition for Rulemaking, R.08-01-005*, filed March 14, 2008 (*AT&T Opening Comments*) at 8.

<sup>18</sup> *Verizon Reply Comments*, at 29-30. Verizon further asserts that absent a “transaction,” Section 851 does not apply on its face to copper loop retirement.

from a river to maintain the level of a pool without the prior approval of the Railroad Commission [this Commission's precursor] because the river water had been dedicated to a public purpose). The common dictionary definition of "dispose" includes "to get rid of, or to deal with conclusively," and therefore includes retirement.<sup>20</sup>

However, for the following reasons, we believe that we should not require Section 851 approval for the retirement of individual copper loops. The Commission has previously stated that “[o]ne of the fundamental purposes of Section 851 approval of the sale or transfer of utility assets is to permit the Commission to make a determination that the assets transfer will not impair the ability of the utility to provide adequate service to its customers following the transaction.”<sup>21</sup> Section 851 applies to plant that is “necessary or useful in the performance of the utility’s duties to the public.” Pub. Util. Code § 851. The FCC permitted ILECs to retire copper loops if they are replacing the loop with FTTH or FTTC loops; therefore, the FCC effectively relieved ILECs of the *duty* to provide the copper loop if the ILEC is actually retiring the copper facility.

We take a similar approach to the FCC’s policy of permitting ILECs to retire copper loops under specific circumstances. We note that there is not evidence of actual harm that has occurred in this State with ILEC copper

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<sup>19</sup> *CALTEL Opening Comments*, filed Sept. 2, 2008, at 5.

<sup>20</sup> *Id.* at 3, citing Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/dispose>.

<sup>21</sup> See D.07-03-008; D.05-09-008 (noting that “Our primary objective in reviewing the sale of utility property is to ensure that disposition or encumbrance of public utility property does not impair a utility's public service to customers”).

retirement. Further, two statutes establish our policy to encourage the deployment of broadband networks. Our State policy under Section 709 is to promote advanced services networks and to encourage the deployment of new technologies. Moreover the Digital Infrastructure and Video Competition Act (DIVCA), at Pub. Util. Code § 5800 *et seq.*, establishes our State policy to “[p]romote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner.” Pursuant to DIVCA, the ILECs are deploying their fiber-based networks in part to support broadband and video services. We have a legislative mandate to ensure that our policies do not deter network investment, and, instead, promote such investment. The ILECs have asserted that maintaining copper networks along with new fiber networks would prevent them from fully deploying their fiber networks.<sup>22</sup> A requirement that the ILECs seek approval for retirement of their individual copper loops may thus deter or prevent the ILECs from proceeding with their network plans. For these reasons, we decline to interfere with the network investment plans of ILECs, by requiring Section 851 approvals for copper retirement.

Therefore, consistent with the FCC’s policy in the *TRO*, and pursuant to our authority under Section 853(b), we find that it is not necessary in the public interest for ILECs to obtain Section 851 approval for the retirement of copper loops. We thus exempt ILECs from seeking Commission approval pursuant to Section 851 of the retirement of copper loops, on the condition that the ILEC complies with obligations under FCC rules and with the notice and good faith

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<sup>22</sup> See, e.g., AT&T Opening Comments at 25-26, Verizon Opening Comments at 33-34.

negotiation provisions that we establish herein. If there is evidence that the ILECs are engaging in anti-competitive behavior in this regard, we may revisit the issue. As for the impact of the ILEC's retirement of copper loop on its retail customers, when retiring a copper loop, we require the ILEC to offer to its retail end-user customer the comparable service over fiber that the customer was previously receiving.

As discussed above, the Commission has jurisdiction with regard to the issues raised by CALTEL's petition. However, we do not believe that there is adequate evidence in the record that the ILECs are unilaterally disrupting competitors' service over copper lines, or that consumers are being harmed. The Commission has a strong interest in advancing policies that promote the widespread availability of broadband networks (including fiber deployment) to ensure global competitiveness and economic development in our State. Thus, we decline to adopt a policy that is inconsistent with the FCC *TRO*.

#### **4. CALTEL has not Provided Evidence to Justify its Proposed Rules**

As discussed above, the FCC rejected proposals for “extensive rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities,” and noted that such a requirement is not necessary because its existing rules “serve as adequate safeguards.”<sup>23</sup> We agree with this approach. The FCC determined not to prevent copper retirement based on its policy to promote advanced services and the networks supporting such services. We believe that imposing a substantial and onerous process for approving copper retirements would delay fiber system deployment without providing major benefits to competition or consumers. The decision we make today represents a careful balance between policies of this Commission: encouraging the rapid deployment of high speed telecommunications services to all Californians consistent with Section 709 for economic development purposes against ensuring fair competition and uninterrupted service for CLEC retail consumers.

Neither CALTEL nor any other commenter in this proceeding has provided evidence of harm justifying rules such as those CALTEL proposes.<sup>24</sup> While TURN supports CALTEL's request that we adopt rules, it acknowledges a "lack of data" showing that problems currently exist.<sup>25</sup> We find that hypothetical

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<sup>23</sup> TRO at ¶ 281.

<sup>24</sup> Indeed, by asking us to preserve the *status quo* pending the outcome of this rulemaking, CALTEL essentially concedes that the current situation poses no harm.

<sup>25</sup> TURN Reply Comments at 11 ("TURN submits that the lack of data is one reason that establishing copper retirement rules is important.").

problems do not provide a basis for new regulations in this highly competitive area of telecommunications service. The California legislature in 2006 enacted DIVCA<sup>26</sup> to encourage ILECs to build fiber systems that would support video services in California. This Commission believes that requiring an ILEC to maintain its copper network for its competitors would be inconsistent with the intent of DIVCA. Copper retirement rules could provide a disincentive for carriers to bring advanced communications systems to our state, as opposed to other states with a more favorable regulatory climate. This outcome would conflict with the desire of our state legislature and this Commission to ensure that California's communications systems be as advanced as possible.

CALTEL's rules would require that an entity seeking to retire copper facilities file an application with the Commission and make a showing that the copper removal would serve the public interest, convenience and necessity, among other requirements.<sup>27</sup> The rules would prohibit ILECs who could not meet this test from retiring the facilities, perhaps indefinitely. These proposed rules also would delay retirement of copper facilities by a number of months should a CLEC protest the regulatory application.

Such rules would be contrary not only to the FCC's intent in the *TRO*, but to our own state's policy as expressed in Section 709 to advance the installation of high speed networks. As noted previously, no ILEC participating in this proceeding is currently retiring copper loops. Verizon's removal of copper drops does not constitute retirement so long as it replaces the drops upon request.

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<sup>26</sup> Pub. Util. Code § 5800 *et seq.*

<sup>27</sup> *Id.* at 2.

Despite the absence of current harm, CALTEL asks us to act proactively to preserve the copper network. DRA, FEA/DOD and TURN concur. The ILECs, in contrast, assert that the proposed rules are unnecessary in light of the FCC's existing rules and CALTEL's failure to demonstrate harm.

As we discuss below, implementing rules governing the retirement of copper loops could require an extensive and complex examination of who will bear the cost of maintaining a network an ILEC no longer needs. CALTEL and the ILECs have vastly different opinions about how to calculate such costs and who should bear them. Moreover, CALTEL itself has noted that its members are not interested in acquiring the copper network from the ILECs. The FCC has effectively declined to require ILECs to provide the copper loop as a UNE if ILECs are replacing the copper loop with FTTH or FTTC facilities. In the absence of a clear FCC requirement that the copper loop remain as a UNE under such circumstances, we are reluctant to adopt an extensive approval process for the ILEC to retire its copper facilities when it deploys FTTC or FTTH facilities.

Further, the record shows that copper is currently not being removed on a large scale and that the ILECs' deployment of all-fiber networks is limited to date.<sup>28</sup> While Verizon and AT&T have both announced plans to increase the pace of their fiber network build outs, all-fiber networks are still the exception

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<sup>28</sup> See AT&T Opening Comments at 27; Response of The Division of Ratepayer Advocates on Order Instituting Rulemaking, R.08-01-005, filed May 28, 2008 (DRA Reply Comments) at 2-3; Response of Dr. William E. Taylor prepared for AT&T California on Order Instituting Rulemaking, R.08-01-005, filed May 28, 2008 (AT&T's Expert Reply Comments) at 9. See also Comments of Small LECs on Order Instituting Rulemaking, R.08-01-005, filed March 14, 2008 (Small LECs' Opening Comments) at 7.

rather than the rule in California.<sup>29</sup> Verizon's fiber-only FiOS network is far from ubiquitous and AT&T's fiber network is still copper dependent.<sup>30</sup>

CALTEL's proposed rules would place a heavy burden of proof on ILECs to prove that removal of copper facilities is in the public interest. We note that the FCC adopted these copper loop retirement policies in the *TRO* after weighing the costs and benefits of unbundling and intermodal competition that the ILECs face from non-ILECs in the voice area, and in considering how to advance its goal of "swift and ubiquitous broadband deployment."<sup>31</sup> We support these policies and believe that existing FCC notice requirements provide an adequate mechanism for CLECs to transition during an ILEC's copper retirement.

The FCC specifically established notice requirements (as discussed below) that would "ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities." The FCC thus anticipated that the carriers would work to maintain loop facilities access. We

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<sup>29</sup> CALTEL Opening Comments at 19, Response of AT&T California to Order Instituting Rulemaking, R.08-01-005, filed May 28, 2008 (AT&T Reply Comments) at 32, DRA Reply comments at 2-3. See also Response of Small LECs to Order Instituting Rulemaking, R.08-01-005, filed May 28, 2008 (Small LECs' Reply Comments) at 3; AT&T's Expert Reply Comments at 12.

<sup>30</sup> See CALTEL Reply Comments at 16-17. While CALTEL introduced evidence in comments on the proposed decision in this proceeding that AT&T is now installing fiber-only networks in two small California cities ("AT&T issued two Accessible Letters, and published two short term network changes notices on its public Internet site, in July describing plans to replace copper feeder cable with fiber-fed DLC (digital loop carrier) systems in the Downieville and Watsonville areas later this year"), these replacements of copper are not part of a FTTH or FTTC deployment and therefore, outside the scope of the FCC's *TRO* rules governing copper loop retirement. See *CALTEL Opening Comments on Commissioner Chong's Proposed Decision*, filed August 25, 2008, at 11.

<sup>31</sup> *TRO* at ¶ 234.

expect that the ILECs will work in good faith to provide such access to their wholesale CLEC customers.

The FCC also stressed that it was not eliminating the rights of competitive carriers “to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers.”<sup>32</sup> Balancing our policy goals to promote advanced broadband services in the state with the interests of competitors to have access to network facilities, we strongly encourage the affected ILECs to coordinate and work with the CLECs to ensure that CLEC service is not disrupted if an ILEC seeks to retire a copper loop. We will look closely to ensure anticompetitive actions do not adversely affect CLEC services to end users.<sup>33</sup> Therefore, we will not take the action CALTEL urges, given the complexities involved in determining the future costs of maintaining access to copper facilities; the lack of proof of harm; lack of actual removal of copper facilities or plans to do so; and the limited deployment of fiber networks to date.

We will instead as outlined below adopt a state process for ILECs to file notices with the Commission and serve notices on CLECs; and to foster commercial negotiations between the parties. We will also monitor advances in technology that may eliminate CLEC reliance on copper local loops.

## **5. The FCC Has Rules in Place**

The FCC has rules in place that require ILECs to provide notice of proposed action to remove copper loops. Those rules are found at 47

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<sup>32</sup> See *TRO* at ¶ 294.

<sup>33</sup> On the other hand, if a CLEC fails to submit a request for negotiations to the ILEC in a timely manner, this Commission will not provide a forum for any later dispute.

C.F.R. 51.333 *et seq.* We do not express an opinion on whether those rules are adequate for all potential future copper retirement, but do summarize them here.

The FCC rules give competitors that lease lines from an ILEC proposing to remove copper facilities the right to file objections to gain time to smoothly transition service. Under these rules, ILECs planning to retire copper loops that have been replaced with a FTTH or FTTC loop must comply with the network disclosure requirements set forth in 47C.F.R. 51.325-51.335.<sup>34</sup> These rules provide that ILECs must provide public notice of planned changes at the “make/buy point.”<sup>35</sup> The make/buy point, in this instance, is the time at which an ILEC decides to replace copper loops within its network with fiber facilities.<sup>36</sup> The notice requirement depends on when the planned change can be implemented after the make/buy point. The ILEC must give notice within 12 months of the make/buy point except:

- (1) If the changes can be implemented within 12 months of the make/buy point, public notice must be given at the make/buy point but at least six months before implementation.
- (2) If the changes can be implemented within six months of the make/buy point, public notice may be given pursuant to the short-term notice procedures provided in 51.333.<sup>37</sup>

The short term notice requirements under 47C.F.R. 51.333 require public notice if the ILEC wishes to implement the planned network changes less than

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<sup>34</sup> 47 C.F.R. § 51.325(a)(4).

<sup>35</sup> 47 C.F.R. § 51.331(b).

<sup>36</sup> *Id.*

<sup>37</sup> 47 C.F. R. § 51.331(a).

six months after public notice.<sup>38</sup> In this case, the ILEC must serve a copy of its public notice upon each telephone exchange service provider that directly interconnects with the ILEC's network at least five business days in advance of its filing with the FCC.<sup>39</sup> Under the FCC's rules for notice of replacement of copper loops or copper subloops with FTTH or FTTC loops, the FCC requires that notices shall be given within a minimum of 90 days of such change.<sup>40</sup> Notices of replacement of copper loops or subloops with FTTH or FTTC loops shall be deemed approved on the 90th day after release of the FCC's public notice of the filing, unless an objection is filed.<sup>41</sup>

An information service provider or telecommunications service provider that directly interconnects with the ILEC's network may file objections to an ILEC's notice.<sup>42</sup> These objections must be filed with the FCC and served on the ILEC no later than the ninth business day following the release of the FCC's public notice.<sup>43</sup> The objecting party must clearly set forth reasons why it cannot accommodate the ILEC's changes by the date stated in the public notice and must indicate any specific technical information required that would enable the objector to accommodate those changes.<sup>44</sup> Further, the objector must list steps

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<sup>38</sup> 47 C.F. R. § 51.333(a).

<sup>39</sup> *Id.*

<sup>40</sup> 47 C.F.R. § 51.333(b)(2).

<sup>41</sup> *Id.*

<sup>42</sup> 47 C.F.R. § 51.333(c).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at (c)(1).

that it is taking to accommodate the planned retirement and state the earliest possible date (not to exceed six months from the original date given in the public notice) by which the objector anticipates it can accommodate the proposed retirement.<sup>45</sup> It must also provide an affidavit stating that the objection is reasonable and not being submitted for purposes of delay.<sup>46</sup>

The ILEC shall have until no later than the 14th business day following the release of the public notice to file a response to the objection with the FCC and serve the response on all parties that filed objections.<sup>47</sup> If an objection is filed, the FCC will issue an order determining a reasonable public notice period.<sup>48</sup>

Under the FCC's rules, ILECs must provide a minimum of 90 days of notice to CLECs that will be directly affected by planned copper retirement.<sup>49</sup> Further, ILECs must notify affected CLECs directly if they plan to implement the retirement in fewer than six months. Thus, while the FCC rules do not allow a CLEC to prevent a proposed retirement, the rules do give affected CLECs notice and information regarding the planned retirements. Moreover, as discussed above, the FCC noted that it expected the carriers to work together to maintain access to the facilities.

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<sup>45</sup> *Id.* at (c)(2) and (3).

<sup>46</sup> *Id.* at (c)(5).

<sup>47</sup> *Id.* at (d).

<sup>48</sup> *Id.* at (e).

<sup>49</sup> *Id.* at (f).

The FCC's website also lists the number of copper retirement notices that have been filed with the FCC.<sup>50</sup> Since January 1, 2006, there have been over 250 notifications of proposed copper retirements by ILECs throughout the country, although the number in California is small. Despite these numerous notifications, filed pursuant to the FCC's rules, commenters in this proceeding failed to submit any evidence that CLECs or consumers have been harmed in any way as a result of these copper retirements. The Commission believes that there would be at least some evidence of harm if copper retirement posed the significant threat to competition, customers, and safety that CLECs claim, and if the FCC's rules were inadequate to protect against this threat.

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

For the reasons discussed above – the lack of actual harm to competitors or customers, the limited build-out of fiber facilities, the limited removal or plans for removal of copper facilities, and our pro-investment policies – we decline to adopt the proposed CALTEL rules. Instead, we have balanced the competing interests of the CLECs and the ILECs and the previously discussed policy goals of our State and the FCC in the *TRO*, in establishing the following process below.

Specifically, we will require an ILEC that plans to retire a copper loop and replace it with FTTH or FTTC loops, to file concurrently with our Commission's Communications Division a copy of the notice of network change that it files

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<sup>50</sup> The FCC website may be found at [http://www.fcc.gov/wcb/cpd/other\\_adjud/network.html](http://www.fcc.gov/wcb/cpd/other_adjud/network.html).

with the FCC pursuant to 47 C.F.R. 51.333.<sup>51</sup> By FTTH loop, we refer to the FCC's definition, which is a "local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center."<sup>52</sup> Further, we will use the FCC's definition of FTTC, which is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises."<sup>53</sup> The ILEC shall also concurrently serve the notice on all CLECs that are interconnected with the ILEC, regardless of whether a CLEC is currently serving a customer on that

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<sup>51</sup> By "copper loop," we mean the transmission facility from an incumbent LEC central office that connects to the loop demarcation point at an end-user customer premises. *TRO* at n.638.

<sup>52</sup> *TRO* at n.802. The FCC notes that other fiber in the loop architectures exist, including "fiber to the curb." Verizon has explained that it is not retiring copper loops and placing FTTH or FTTC loops in an area until it is economically advantageous to do so. Verizon builds its fiber network to a distribution hub that serves approximately 200 to 400 customers. At that distribution hub, if an individual customer requests fiber-based service, Verizon will install fiber to the customer's premise, but does not retire the copper drop at that time. Verizon notes that, when there are enough customers in a distribution hub that have migrated to the fiber-based service, it may then migrate its remaining customers to the fiber-network and retire all its copper loops at that distribution hub at that time. Verizon OIR Comments, Appendix B, at paras. 30-35. In contrast, AT&T acknowledges that its fiber network plans currently use copper plant from the remote terminals at the feeder-distribution interface of the access network to the customer premises. *AT&T Reply Comments*, Appendix A, at 12-13. AT&T asserts that it may, however, alter its network plans in the future such that it would deploy fiber closer to the end-user premises.

<sup>53</sup> In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Triennial Review Order on Reconsideration, FCC 04-248 at ¶10 (Oct. 2004).

loop or not.<sup>54</sup> If a CLEC files an objection to the copper retirement with the FCC pursuant to 47 C.F.R. 51.333(c), the CLEC shall file a copy of such objection with the Communications Division at the same time.

Any CLEC that seeks to use the relevant copper loop facility shall provide to the incumbent carrier within 20 days of the notice's filing with the FCC, a request for negotiations with the ILEC either to purchase the copper loop facility or to reach a fair and equitable agreement with the ILEC on price, terms and conditions to access loop facilities. The CLEC shall include in its request for negotiations the following information:

- a. whether the CLEC seeks to purchase the copper loop facility, or whether the CLEC seeks only to maintain access to a loop facility;
- b. the number of current or planned customers on the copper UNE;
- c. the services that the CLEC provides over the loop facility or plants to provide over the facility; and
- d. the number of UNEs that the CLEC currently purchases.

We will require the ILEC to enter into good faith negotiations with the CLEC for a period of 60 days either to sell the copper loop facility at issue; or to reach a fair and equitable agreement with the CLEC on price, terms and conditions to ensure continued CLEC access to loop facilities for a commercially reasonable time period. A fair and equitable agreement for access to the copper loop should include all fair and reasonable costs to the ILEC for preserving and

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<sup>54</sup> This means that the ILEC should at a minimum serve the Communications Division staff and all CLECs interconnected with the ILEC with the copies of the copper retirement notices at the same time as it files the notices with the FCC.

maintaining access to the copper loop facility for the requesting party, vis-à-vis the retirement of the copper loop facility. For example, the price of access to the copper loops where the ILEC has retired its copper plant should include the total costs of operating and maintaining or preserving the copper cable, and all associated facilities used to provide the leased loops. If a requesting party seeks to purchase the copper facility from the ILEC, the price shall be the fair market value of the copper facility to the ILEC, and all maintenance and operating costs of the copper facility shall be the responsibility of the purchasing party from the date of purchase.

We reiterate that it is this Commission's policy under Pub. Util. Code § 709 to promote the development and deployment of new technologies and the ubiquitous availability of a wide choice of state-of-the-art services. We are reluctant to contravene the national policies set forth in the FCC's *TRO*, especially as its policy to encourage the deployment of fiber and broadband services is consistent with our own state's policies to encourage broadband deployment. The California Legislature has expressed its goal to "[c]omplement efforts to increase investment in broadband infrastructure and close the digital divide."<sup>55</sup> Given these express state and federal goals, we are exempting the ILECs from Section 851 requirements regarding copper loop retirement, and from additional detailed rules requiring affirmative approval before an ILEC may replace copper facilities with FTTC or FTTH facilities. The process we establish above promotes state and federal goals for broadband deployment, ensures competitive neutrality, is consistent with the FCC's *TRO*, and provides

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<sup>55</sup> Pub. Util. Code § 5810(a)(1)(E).

opportunities for the competitive carriers to negotiate access to loop facilities while not unduly delaying the ILECs' ability to retire copper facilities.

## **7. Emergency Preparedness Addressed in a Separate Proceeding**

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

Moreover, to the extent that an ILEC has transferred a customer to its fiber-based service, the underlying copper loop cannot be easily used in the event of an emergency. Once Verizon switches a group of customers on a particular copper facility to FiOS, for example, it removes or disables the copper drop to make room for the fiber facility, subject to replacement on customer request. In the event of an emergency, therefore, the customer may not easily switch back to copper-based service for emergency purposes without a visit from a Verizon service technician. Further, electric outages often result from cable cuts that also affect telecommunications wiring, so power outages also sever the copper connection to the home.<sup>56</sup> In view of these facts, it is far from clear that redundancy in copper-fiber networks is the best way to ensure emergency

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<sup>56</sup> *Verizon Opening Comments* at 38, and Declaration (App. B), ¶ 29; *AT&T Opening Comments* at 32.

preparedness. Access to wireless phones and computer phones via Wi-Fi already provides significant redundancy.<sup>57</sup>

Thus, we do not find that the emergency preparedness issues, standing alone, merit rules prohibiting copper removal absent evidence that ILECs are currently engaged in such removal on a large scale.

## **8. Cost Issues are Complex**

In seeking parties' input on CALTEL's proposed rules, we learned that the ILECs and CALTEL have disparate views on who should pay to maintain the network, the costs involved and how to calculate them, and whether we should have CLECs purchase portions of the network the ILECs no longer need. We are well aware of the time consuming and complex disputes that arose over cost and pricing of UNEs, both at this Commission and around the country.<sup>58</sup>

Evidence the parties submitted in this record indicates that any effort to determine the cost to an ILEC of preserving aspects of the copper network that it no longer needs could be equally difficult. CALTEL asserts that UNE pricing or special access rates for loops approximates the ILEC costs of maintaining a

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

<sup>58</sup> See *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 Hous. L. Rev. 1311, 1330 (2007) ("For its part, TELRIC [the price CLECs ultimately were required to pay ILECs for UNEs] has a storied history.").

retired copper loop.<sup>59</sup> While Total Element Long Run Incremental Cost – the UNE standard – might be the appropriate cost basis according to the CLECs, the ILECs certainly would dispute this methodology and assert that many other costs should be included in any price to competitors of maintaining a network the ILECs no longer use. The ILECs, for example, argue that the existing UNE prices for copper loops are based on the total element long run incremental cost (TELRIC) model, which represents the costs of building the most efficient forward-looking network and not the cost of replacing copper networks with more copper plant.<sup>60</sup> Further, neither CALTEL nor the ILECs expressed interest in having the Commission broker a purchase by competitors of copper facilities that the ILECs no longer need.

Thus, any proceeding on this topic could require extensive litigation on how to compute costs. We are reluctant to expend the substantial resources and time that would be required to take on this task without a clear showing of need. Instead, we believe that the process we set forth here will encourage the parties to negotiate privately to reach an agreement on access to the copper loop, or alternative facilities.

## **9. Comments on Proposed Decision**

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<sup>59</sup> CALTEL Opening Comments at 10, 28.

<sup>60</sup> *Verizon Opening Comments*, Appendix A at ¶¶ 97-98 (noting that any pricing methodology that would apply to preservation of copper plant would need to account for the long run costs of replacing copper plant with new copper). Additionally, the ILECs note that once they begin to migrate more existing customers off copper plant, the “fill factor” for ILEC plant will be substantially lower with retired copper plant than for plant providing service to both ILEC and CLEC customers; therefore, the cost of providing UNEs on retired copper plant must reflect actual CLEC-only usage. *See Id.* at Appendix A at ¶ 100.

CALTEL, AT&T, Verizon, SureWest, the Small LECs, DRA, TURN and Integra filed comments and reply comments. Their points, and our responses, appear below.

*First*, several parties claim<sup>61</sup> that "ripeness" is technically a concept only applicable to adjudicatory cases.<sup>62</sup> While the Commission has applied the ripeness principle in other contexts than adjudications – *see* D.01-07-009, declining to adopt rules in a rulemaking<sup>63</sup> – we modify the proposed decision to state that we have made a policy decision not to act at this time in the absence of evidence of actual or threatened harm and consistent with our state policies and the FCC's goals of encouraging broadband deployment. Such a decision is within our discretion. While CALTEL would like us to act "proactively,"<sup>64</sup> we are not required to do so, especially if we are not faced with evidence of customer or competitor harm.

*Second*, several parties claim the evidence of harm is greater than the decision indicates, or introduce new evidence they claim should prompt us to act

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<sup>61</sup> Opening Comments of DRA on Commissioner Chong's Proposed Decision, filed August 25, 2008 (DRA PD Opening Comments) at 3-4; Opening Comments of CALTEL on Commissioner Chong's Proposed Decision, filed August 25, 2008 (CALTEL PD Opening Comments) at 4; Opening Comments of Integra on Commissioner Chong's Proposed Decision, filed August 25, 2008 (Integra PD Opening Comments) at 2; Opening Comments of TURN on Commissioner Chong's Proposed Decision, filed August 25, 2008 (TURN PD Opening Comments) at 2.

<sup>62</sup> An earlier version of the Proposed Decision stated that the issues were not yet "ripe."

<sup>63</sup> 2001 Cal. PUC LEXIS 548, at \*12-13, cited in the original proposed decision, in which we declined to establish rules regarding eight digit dialing in telecommunications context on ripeness grounds.

<sup>64</sup> See CALTEL PD Opening Comments at 9.

now. CALTEL notes that "in the past six weeks" AT&T has expressed plans to install a copper-only network in Downieville and Watsonville, California, rather than the hybrid copper-fiber network AT&T told the Commission about and on which the proposed decision relies. However, CALTEL notes that "it appears that no competitive carriers are directly impacted by these planned changes...."<sup>65</sup> Further, these changes were not copper replacements with FTTH or FTTC installation or part of a coordinated campaign to change copper to fiber, but came about in special circumstances where there is no evidence of harm to competitors or customers.<sup>66</sup>

We are not persuaded by this new evidence that a problem exists requiring comprehensive new rules. We have, however, decided to require the ILECs to file concurrently with Commission's Communications Division and all CLECs that are interconnected with the ILECs, a copy of their FTTH or FTTC related copper retirement notices that are filed with the FCC. We are also establishing a process as discussed above, for the parties to negotiate with each other over the loop facilities.

In this regard, DRA erroneously asserts that we are "tacitly allowing the ILECs to retire copper loops without any state oversight."<sup>67</sup> As discussed above, the FCC established a clear policy in the *TRO* not to prevent the ILECs from

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<sup>65</sup> *Id.* at 11. CALTEL also refers to a change AT&T is making in Georgia, which is irrelevant here. *Id.* at 12.

<sup>66</sup> See Reply Comments of AT&T California on Commissioner Chong's Proposed Decision Declining to Adopt etc., filed September 2, 2008 (AT&T PD Reply Comments) at 2-3.

<sup>67</sup> DRA PD Opening Comments at 10.

retiring copper loop when they deploy FTTH or FTTC facilities. Further, the state has a clear policy encouraging ILECs to build fiber facilities as evidenced by DIVCA and Pub. Util. Code § 709. These fiber networks support both voice and advanced services, and represent one type of advanced communication system desired by the FCC and our State legislature. We are reluctant to impose rules on the retirement of copper loops in light of the FCC's and our state's clear policies and in the absence of evidence of any actual harm to competition or customers. Further, TURN claims the decision ignores its evidence that Verizon's practice regarding reinstallation of copper drops on customer request is "confusing, time-consuming and burdensome to customers and very likely discourages customers from having Verizon complete the process to reinstall copper drops that should not have been disconnected in the first place."<sup>68</sup> Contrary to TURN's claim, this Commission does not believe there is harm to the ILEC's retail consumers from the replacement of copper loop given the scant evidence in this proceeding to date. To the contrary, this Commission believes that these advanced communications systems will greatly benefit retail consumers by giving them more choices in their voice, video and Internet service providers. Should actual harm occur, any party may bring this information to this Commission's attention.

*Third*, the parties supporting rules continue to assert that the FCC rules are inadequate because they do not allow the FCC to prohibit copper removal,<sup>69</sup> but only contain procedural notice requirements. We note that the FCC in the *TRO*

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<sup>68</sup> TURN PD Opening Comments at 4.

rules effectively provided notice to competitive carriers that unbundled copper loops may not be available indefinitely. The FCC's rationale for this policy was in part to increase facilities-based investment. Similarly, in California, Pub. Util. Code § 709 encourages the deployment of new technologies and services to meet customer need and encourage the ubiquitous availability of state-of-the-art services. We are also charged with increasing competition for video and broadband services under Pub. Util. Code § 5800 *et seq.* Although we believe that we have jurisdiction to review issues where there may be substantial, actual harm to customers or competition, we decline to establish rules that may interfere with these pro-investment policies. At this time, in the absence of anti-competitive behavior by the ILECs, we are setting forth a limited notice and negotiation process.

*Fourth*, the ILECs dispute the conclusion that the Commission has jurisdiction to promulgate rules in this area.<sup>70</sup> This issue was fully briefed, and we are satisfied with our conclusion that the Commission has jurisdiction.

*Fifth*, Verizon asserts that the process the proposed decision sets forth for parties to return to the Commission with evidence of actual harm is overly vague. It asks us to consider reopening of this proceeding only if a party can make a showing of significant, actual harm to the public interest that applicable

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<sup>69</sup> See, e.g., Integra PD Opening Comments at 4; DRA PD Opening Comments at 8; TURN PD Opening Comments at 6.

<sup>70</sup> AT&T PD Opening Comments at 1-2; Opening Comments of SureWest on Commissioner Chong's Proposed Decision, filed August 25, 2008 (SureWest PD Opening Comments) at 2; Opening Comments of Small LECs on Commissioner Chong's Proposed Decision, filed August 25, 2008 (Small LECs' PD Opening Comments) at 2.

law does not already anticipate and address. We have established a process for the parties to negotiate access to loop facilities in the event of copper retirement plans.

*Sixth*, TURN and DRA raise issues regarding our emergency preparedness discussion. We clarify that section with citations to the record and other minor wording changes.

*Finally*, several parties dispute the proposed decision's conclusion that cost issues could be complex and time-consuming. CALTEL, for example, reiterates its position that the ILECs bear no cost from retaining copper.<sup>71</sup> However, the ILECs strongly dispute this claim, and contend CLECs or others wishing to use copper facilities that would otherwise be retired should bear full responsibility for those facilities' maintenance.<sup>72</sup> We decline to change our prior conclusion that the cost issues are complex and could require a great deal of time-consuming litigation. In light of limited agency resources, we decline to engage in these issues absent evidence of any actual harm at this time.

We retain our initial conclusion rejecting CALTEL's proposed rules at this time. We will, however, require the ILECs to file concurrently with Commission's Communications Division a copy of their FTTH or FTTC related copper retirement notices that are filed with the FCC. ILECs must also serve copies of those notices on all CLECs that are interconnected with the ILECs, regardless of whether a CLEC is currently serving a customer on the copper loop. We establish a process for the CLEC to request negotiations for either the

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<sup>71</sup> See also DRA PD Opening Comments at 11.

<sup>72</sup> See, e.g., AT&T Opening Comments, filed March 14, 2008, at 27.

purchase of the copper loop, or negotiation for continued access to loop facilities. As discussed above, we also require the ILEC to negotiate in good faith with the CLEC.

#### **10. Comments on Revised Proposed Decision**

CALTEL, AT&T, Verizon, SureWest, the Small LECs, DRA and TURN (jointly) and Integra filed comments in response to the revised proposed decision. Their points, and our responses, appear below.

*First*, many parties disagree with the revised proposed decision's conclusion that the Commission is not enacting "rules" or "regulations" with this proposed decision. CALTEL argues that not enacting rules will lead to ILEC claims that the Commission has simply encouraged compliance.<sup>73</sup> CALTEL claims that the unwillingness of the Commission to issue a binding determination on proposed retirements deprives the parties of any venue in which they may resolve a dispute over which the Commission has sole jurisdiction. Similarly, DRA and TURN object to the "process" that this proposed decision creates as it is "outside the Commission's formal proceedings and informal advice letter process."<sup>74</sup> We are satisfied with our conclusion that there has been insufficient evidence of harm presented in the record of this proceeding to require comprehensive new rules. The decision has been amended to make clear that we are establishing a notice and commercial

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<sup>73</sup> Comments of CALTEL on Commissioner Chong's Revised Proposed Decision, filed October 14, 2008 (CALTEL RPD Comments), at 1.

<sup>74</sup> Comments of DRA/ TURN on Commissioner Chong's Proposed Decision, filed October 14, 2008 (DRA/ TURN RPD Comments), at 4.

negotiation process for the ILECs to comply with when retiring copper loops where a CLEC has indicated interest in purchase or lease.

*Second*, no parties object to the requirement of filing concurrent copies of all notices of network changes filed with the FCC. This requirement, therefore, will be adopted in the final decision and ILECs wishing to retire copper facility will be required to provide the Commission's Communications Division with a concurrent copy of notices filed with the FCC pursuant to 47 C.F.R. § 51.325.

*Third*, ILECs object to the requirement for mandatory arbitration if negotiations with CLECs are not successful. These parties express concerns that such a requirement would divert financial resources away from advanced infrastructure build-out.<sup>75</sup> Further, ILECs note that parties are already free to engage in commercial negotiations today without the need for regulatory intervention<sup>76</sup> and that CLECs have successfully negotiated intermodal access options and self deployed or leased their own last-mile facilities without unnecessary regulatory interference.<sup>77</sup> ILECs maintain that *if* a mandatory arbitration procedure is adopted, it must be non-binding. They assert that the FCC rejected proposals that would have required affirmative regulatory approval prior to the retirement of such copper loop facilities, placing the

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<sup>75</sup> Comments of Verizon on Commissioner Chong's Proposed Decision, filed October 14, 2008 (Verizon RPD Comments), at 2, Comments of AT&T California on Commissioner Chong's Revised Proposed Decision, filed October 14, 2008 (AT&T RPD Comments), at 2.

<sup>76</sup> *Verizon RPD Comments* at 3.

<sup>77</sup> *Verizon RPD Comments* at 7.

decision to retire copper loops in connection with fiber in the sole control of the ILEC.<sup>78</sup>

CLECs, however, assert that if arbitration is non-binding there will be no incentive on the part of the ILEC to reach a negotiated settlement. Further, CALTEL notes that if the default process favors one party, if there is no final resolution that party (the ILEC) will always prevail.<sup>79</sup> CALTEL proposes three alternatives to the revised proposed decision's non-binding arbitration model including one requiring Commission approval of the non-binding arbitration determination.<sup>80</sup>

After consideration of these comments, we agree that the non-binding arbitration process would not add more to the commercial negotiation process that we set forth. We find that mandating non-binding arbitration would only consume additional resources of the parties and the Commission. Those resources may be put to better use with the parties engaging directly in negotiation. We continue to provide a process for CLECs to negotiate with the ILEC to purchase, or for access to, the copper facility, and require the ILEC to negotiate in good faith with the CLEC.

*Fourth*, Verizon emphasizes the complexity of the cost issue, noting that CALTEL has stated on the record that its members are not interested in purchasing retired copper facilities and would demand to continue paying the incremental costs of leasing individual loops, ignoring the substantial costs

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<sup>78</sup> *AT&T RPD Comments* at 1, 3.

<sup>79</sup> *CALTEL RPD Comments* at 5.

<sup>80</sup> *Id.* at 5.

required to maintain any given copper cable in working condition regardless of how many individual copper pairs are in use.<sup>81</sup> We understand that the cost issues are complex, and have noted that the costs associated with access to a copper facility over retired copper plant may encompass a variety of costs. We maintain our decision to require good faith negotiations between parties to attempt to resolve these cost issues privately. To the extent that an ILEC is required to provide certain facilities under the FCC's rules or our rules, nothing in this decision relieves the ILEC of those duties.

*Fifth*, Integra again states that CALTEL's proposed rules should be adopted.<sup>82</sup> We retain our initial conclusion rejecting these rules at this time.

*Finally*, DRA and TURN urge the Commission to require ILECs and CLECs to provide notice to all of their customers who may be affected by a copper retirement.<sup>83</sup> We find that the Commission already has sufficient rules in place to protect consumers with respect to ILEC and CLEC notification of changes to service. For example, if a CLEC will need to discontinue service to a customer where the copper loop is being retired, the carrier of last resort will be required to provide service to the customer, and the CLEC is required under our rules to provide notice of its discontinuance/transfer of service to the customer. Moreover, an ILEC will need to provide 30-day notice to customers when the ILEC is retiring a copper loop and transferring them to a fiber-service, if there is

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<sup>81</sup> *Verizon RPD Comments* at 4-5.

<sup>82</sup> Comments of Integra on Commissioner Chong's Revised Proposed Decision, filed October 14, 2008 (Integra RPD Comments), at 2.

<sup>83</sup> *DRA/TURN RPD Comments* at 3.

a change in the rates, terms, and conditions associated with the service. The ILEC must also offer its customer the comparable service over fiber.

Further, if an ILEC is advertising its new fiber-based service to customers, it should not represent that the customer *must* purchase the fiber-based service.

### **11. Assignment of Proceeding**

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

### **Findings of Fact**

1. Verizon is installing an all fiber network.
2. AT&T's U-Verse broadband network is a hybrid of copper and fiber.
3. No CLEC in SureWest's service territory obtains UNE loops from SureWest using copper plant.
4. The Small LECs are not building fiber optic networks to replace copper facilities, and have no CLECs leasing their lines.
5. No ILEC is currently permanently retiring copper loops in California.
6. Verizon's removal of copper drops is not permanent removal of copper loop facilities so long as it replaces such drop(s) upon request.
7. AT&T's actions to replace copper with fiber in Downieville and Watsonville, California, were not part of AT&T's U-Verse network or replacements with FTTH or FTTC facilities.
8. AT&T's actions to replace copper with fiber in Georgia relate to a Fiber to the Home overbuild in Georgia that predates the AT&T/Bell South merger.
9. Verizon's FiOS network and AT&T's U-Verse network are far from ubiquitous.
10. No party has made a showing of harm justifying the rules CALTEL proposes.

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

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

13. Redundancy for emergency preparedness purposes exists, in part, via wireless services such as cellular service and Wi-Fi.

14. Cost issues regarding the copper network are complex and may take years to litigate.

15. The Commission is charged by our statutes to promote the deployment of broadband networks.

16. A requirement that the ILECs seek approval to retire their individual copper loops may deter or prevent the ILECs from fully deploying fiber-based networks.

17. A fair and equitable agreement for access to the copper loop should include all fair and reasonable costs to the ILEC for preserving and maintaining access to the copper loop facility for the requesting party, vis-à-vis the retirement of the copper loop facility.

18. For example, the price of access to the copper loops where the ILEC has retired its copper plant should include the total costs of operating and maintaining or preserving the copper cable, and all associated facilities used to provide the leased loops.

19. If a requesting party seeks to purchase the copper facility from the ILEC, the price shall be the fair market value of the copper facility to the ILEC, and all maintenance and operating costs of the copper facility shall be the responsibility of the purchasing party from the date of purchase.

20. The FCC permits ILECs to retire copper loops when deploying FTTH or FTTC facilities.

21. The FCC has existing rules providing notice to and an opportunity to object from interconnected CLECs that may be adversely affected by ILEC copper facility removal.

### **Conclusions of Law**

1. We have jurisdiction to impose rules regarding copper retirement.

2. It is this Commission's policy under Pub. Util. Code § 709 to promote the development and deployment of new technologies and the ubiquitous availability of a wide choice of state-of-the-art services.

3. The Commission is also charged with implementing Pub. Util. Code § 5800 *et seq.*, which sets forth the goal to promote widespread access to the most technologically advanced cable and video services to all California communities.

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

5. The extensive copper retirement rules proposed by CALTEL are not necessary.

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

7. The process that we adopt for the ILECs and CLECs to negotiate with each other is consistent with the FCC's and our state's broadband policies, and competitively neutral.

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

9. Consistent with the FCC’s policy and our state policy to encourage the deployment of broadband networks, we decline to require an approval process for the ILECs’ retirement of copper loops.

10. Pursuant to Section 853(b), we find that it is not necessary in the public interest for ILECs to obtain Section 851 approval prior to retirement of individual copper loops, provided that they comply with the notice and good faith negotiation process we set forth in this order.

11. If an ILEC is advertising its new fiber-based service to customers, it should not represent that the customer *must* purchase the fiber-based service.

## **O R D E R**

### **IT IS ORDERED** that:

1. We decline to adopt the rules proposed by the California Association of Competitive Telecommunications Companies (CALTEL) in this proceeding on the ground that such rules are not necessary.

2. Incumbent Local Exchange Carriers are exempted from the requirements of Pub. Util. Code Section 853(b) when they retire copper loops and deploy fiber-to-the-home or fiber-to-the-curb facilities, provided that they comply with Ordering Paragraphs 3-4.

3. If an Incumbent Local Exchange Carrier (ILEC) seeks to retire a copper loop facility with fiber-to-the-home or fiber-to-the-curb facilities, the following

4. Process shall apply within the 90 days that follows the ILEC’s decision to retire a copper loop:

- a. The ILEC shall file concurrently with Communications Division a copy of its notice of network change that it files with the FCC pursuant to 47 C.F.R. 51.333 when that copper loop is being used by a CLEC. The ILEC shall serve at the same time the notice on all CLECs that are interconnected with the ILEC, regardless of whether a CLEC is currently serving a customer on that loop or not.
  - b. A CLEC that is interconnected with the ILEC shall file with Communications Division a copy of any objection that it files to a proposed copper retirement with the FCC under 47 C.F.R. 51.333(c).
  - c. Any CLEC that seeks to use that copper loop facility shall provide to the incumbent carrier within 20 days of the FCC notice a request for negotiations in writing either to purchase or lease the loop facilities and file a copy of its request with the Communications Division. The CLEC shall include in its request for negotiations the following information:
    - i) Whether the CLEC seeks to purchase the copper loop facility, or whether the CLEC seeks only to have the ILEC maintain access to a loop facility;
    - ii) the number of current or planned customers on the copper loop;
    - iii) the services that the CLEC provides over the loop facility or plans to provide over the loop;
    - iv) the number of UNEs that the CLEC currently purchases
  - d. Upon receipt of the CLEC's request for negotiations, the ILEC shall negotiate in good faith with the CLEC for a period of 60 days either to:
    - i) sell the copper loop facility to the CLEC; or
    - ii) reach a fair and equitable agreement with the CLEC on price and terms to ensure access to loop facilities.
5. When retiring copper loops, ILECs shall also offer to their retail end-user customers a comparable service over fiber that the customer was previously receiving.

6. Rulemaking 08-01-005 is closed.

This order is effective today.

Dated November 6, 2008, at San Francisco, California.

MICHAEL R. PEEVEY

President

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

I reserve the right to file a dissent.

/s/ DIAN M. GRUENEICH

I will file a concurrence.

/s/ JOHN A. BOHN

I reserve the right to file a concurrence.

/s/ TIMOTHY ALAN SIMON

### **Dissent of Commissioner Dian M. Grueneich**

I do not support the decision approving a process for the retirement of copper loops (Decision) by incumbent local exchange carriers (ILECs). First, I am concerned that the process defined in the Decision does not provide enough protection to maintain a strong level of competition in California and may further limit the provider choices that residential and small business telecommunications customers have in the future. Eventually this lack of protection may lead to the elimination of many competitive local exchange carriers (CLECs). Secondly, I am strongly opposed to the exemption from Public Utilities Code § 851 requirements for ILECs seeking to retire or remove copper loops.

I am pleased that the Decision made the right call in finding that the California Public Utilities Commission (Commission) has the jurisdiction to address the issues raised in this proceeding and to establish a process for the ILECs to follow when retiring or removing copper loops. Especially relevant is the Decision's reference to the Federal Communications Commission's (FCC) explicit statement in the Triennial Review Order stressing that the FCC is "not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements."

While the Decision adopts a notification process mirroring the FCC's process and requires ILECs to enter into commercial negotiations with the CLECs, I remain skeptical regarding the light-handed regulatory approach embraced in the decision. By relying on "good faith negotiations" by the ILECs, the Decision establishes a one-sided approach to address this issue - favoring the

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ILECs and their plan to build out fiber networks, yet leaving little assurance for the continued use of copper loops by CLECs. The lack of assurances for the CLECs may lead to more competitors forced to close their businesses thus leaving California customers with fewer telecommunications carriers from which to choose.

I acknowledge the California Legislature's directive to the Commission that we bring affordable and widespread high quality telecommunications to California. However, we must not execute this directive at the expense of the competitors' demise. The Decision recognizes that copper facilities are another viable alternative in the competitive marketplace and are, therefore, another way to meet the obligations to advance broadband deployment. Thus, preservation of copper facilities is beneficial to the telecommunications industry, the Commission, and, because of the resulting competition, beneficial to California customers. The Decision claims to carefully balance the rapid deployment of high speed telecommunications services against ensuring fair competition. Yet, it ignores its own conclusion that copper facilities are another way to meet the Commission's obligations to advance broadband deployment. For, these reasons, I find the process set forth in the Decision unfairly balanced toward the needs of the ILECs in their endeavor to construct a ubiquitous fiber network.

My other concern with the Decision is the exemption of Public Utilities Code § 851 requirements for ILECs retiring copper loops. Although the exemption is predicated on the condition that the ILECs negotiate in good faith with the CLECs, this is a door that once opened may not be closed again. § 853 gives the commission the authority to exempt any public utility from the requirements of § 851 if such application is not in the public interest. The

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Decision argues that “it is not **necessarily** in the public interest for ILECs to obtain § 851 approval for the retirement of copper loops.” Based on that weak conclusion, the Decision “decline[s] to interfere with the network investment plans of ILECs, by requiring § 851 approvals for copper retirement.” Here again, the Decision tips the scales in the direction of promoting ILEC fiber investment at the expense of the competitors that use the copper network for the same advanced services. The exemption of § 851 requirements further facilitates the elimination of the competition.

The approach of the Decision – exempting § 851 approval and relying solely on good faith negotiations by the ILECs to ensure fair competition – adds up to an approach that tips too far to one side in addressing the retirement of copper loops. Because of this imbalance, I oppose the Decision.

Dated November 6, 2008, at San Francisco, California.

/s/ DIAN M. GRUENEICH  
Dian M. Grueneich  
Commissioner

## **Commissioner Bohn's Concurrence to D.08-11-033**

I support this decision which weighs carefully the Commission's responsibility to ensure that the communications utilities we regulate do not engage in anti-competitive behavior against the Commission's position that it should not micro-manage those utilities or their copper networks. We made our determination that copper retirement rules are not needed at this time based on our assumption that there is adequate competition in the communications marketplace. I have two concerns that stem from this assumption.

First, it would have been better if this decision had adopted an arbitration process to ensure that ILECs and CLECs will work to reach an agreement on a fair price to buy or lease copper loops. If an arbitration process had been adopted, the Commission could have more closely monitored whether ILECs and CLECs are able to reach equitable agreements. Instead, this decision adopts a process requiring ILECs and CLECs to enter into commercial negotiations upon request by CLECs.

While the Commission will not be involved in the negotiation process approved by this decision, ILECs and CLECs should bring to the Commission any claims that a party failed to negotiate in good faith. Thus, even though this Commission did not adopt an arbitration process, ILECs and CLECs may come to the Commission, by filing a complaint for example, to have their concerns heard, as long as they follow the negotiation process outlined in the decision. In this way, the Commission will be able to monitor whether anti-competitive behavior is occurring with regard to the sale or lease of copper loops. Anti-competitive behavior includes unreasonable prices and terms. In its review of any complaints, the Commission will consider whether negotiations were not made in good faith and whether unreasonable terms were proposed in negotiations, as these are hallmarks of anti-competitive behavior.

Second, this decision grants ILECs an exemption from Public Utilities Code Section 851 pursuant to Public Utilities Code Section 853(b) by finding that it is not necessary in the public interest for ILECs to obtain Section 851 approval for the retirement of copper loops. I think it is difficult to know fully at this point whether our grant of a Section 853(b) exemption is actually "in the public

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interest.” Given the evidence in the record at this time, I have concluded that an exemption is appropriate.

I recognize that the Commission may need to revisit its grant of a Section 853(b) exemption. If CLECs assert or demonstrate that ILECs are engaging in anti-competitive behavior with regard to copper loop retirements, then this Commission will reconsider whether to continue granting ILECs an exemption to the requirements of Section 851. A showing that ILECs are retiring copper loops in order to drive competitors out of the marketplace, for example, would be a persuasive argument in demonstrating that a Section 853(b) exemption is not in the public interest.

I want to be very clear to the ILECs and put them on notice: while you are exempted from the requirements of Section 851 for the time being (subject to the notice and negotiation process adopted in this decision), in the future the Commission may find that an exemption is no longer appropriate, and may require you to file Section 851 advice letters to retire copper loops. The Commission has determined in this decision that it is not necessary to regulate copper loop retirement now. But it may find that more regulation is necessary in the future to ensure that there is sufficient competition.

/s/ John A. Bohn

John A. Bohn  
Commissioner

**Concurring Opinion of Commissioner Timothy Alan Simon  
on the Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations  
Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and  
Related Facilities Used to Provide Telecommunications Services  
(Rulemaking 08-01-005.)**

There is substantial public benefit in safeguards that foster the preservation of competitive markets. I commend Commissioner Chong for the changes she has made to her Proposed Decision over these intervening weeks in recognition of concerns voiced by my office, the other Commission offices, and, in particular, Commissioner Bohn. I have withdrawn my Alternate because the Revised PD sufficiently—although not completely—addresses policy considerations that I would have proposed.

The revisions permit this Commission to act proactively to protect against the significant threat to competition, customer choice, and public safety that copper retirement poses.

The original PD declined to adopt rules requiring ILECs to obtain Commission approval before permanently removing copper wire local loops from their networks. Although the Revised PD continues to see no current or imminent harm to CLECs, it nonetheless adopts a process for ILECs and CLECs to negotiate in good faith for continuing access to copper loop facilities. Notable, ILECs are admonished to negotiate in good faith with requesting CLECs seeking to purchase copper facility or to have the ILEC maintain access to the loop. Price of competitive access is established at the fair market value of the facility including the ILEC's maintenance and operating costs.

The adopted limited process supports the legislative mandate under Public Utilities Code section 790 for widespread broadband deployment to all Californians. Since the FCC's TRO decision, new technologies unleash the existing copper network—that the FCC had written off—

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are capable of broadband speeds of 20 Mbps to 100 Mbps and supporting state of the art services such as video-conferencing and video on demand. These new emerging broadband technologies, such as VDSL2, ADSL2, and Ethernet over Copper speeds are critical to small and medium sized business customers typically located in buildings not served by fiber and or cable. Wireless is often not practical to meet the high data communications volume needs of these business customers.

It is disconcerting that the Revised PD exempts ILECs from Public Utilities Code section 851's requirements regarding copper loop retirement. The Revised PD may be technically legal, but as a policy matter, I disagree with Commissioner Chong in this respect. Clearly, competitive access to ILEC copper facilities is useful and necessary to support the Commission's obligations under Public Utilities Code section 790 to advance broadband deployment and to CLECs whose very survival depends on access to ILEC copper loop facilities.

In the end, the Revised PD addresses my bottom line—that we facilitate continued competitive access to ILEC owned copper facilities and establish that ILECs and competitors must negotiate in good faith on the terms. To this extent, the Revised PD serves the public interest. Competitive and end-user consumer choice is preserved and protected.

/s/ TIMOTHY ALAN SIMON  
Timothy Alan Simon  
Commissioner

San Francisco, California  
November 6, 2008