

Decision 09-04-005 April 16, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Assess and Revise
the Regulation of Telecommunications Utilities.

Rulemaking 05-04-005
(Filed April 7, 2005)

**DECISION REGARDING ADVICE LETTER FILINGS
FOR SPECIAL ACCESS SERVICE PRICE CHANGES**

On August 18, 2008, Assigned Commissioner Rachelle B. Chong issued an Assigned Commissioner's Ruling (ACR) on the proposed treatment of advice letters containing price changes for special access services.¹ The ACR asked parties to file comments on the proper advice letter tiers² for filing of price changes for special access services.

Decision (D.) 07-09-018 and D.07-09-019 established that under our Uniform Regulatory Framework (URF), carriers may file Tier 1 notices of price changes for services that were permitted pricing flexibility in the URF Phase I decision.³ Because the URF Phase I decision carved out "special access services"

¹ The ACR sought comment on the proper advice letter treatment for "retail special access services." However, as discussed below, we have determined in this decision that we should establish advice letter rules generally for all "special access services" and not just "retail special access services." See Discussion, sub-paragraph 1, below.

² Advice letter tiers referred to herein are set out in Commission General Order (GO) 96-B as modified by D.07-09-018, D.07-09-019 and D.08-05-019.

³ See D.06-08-030.

from those services that were granted pricing flexibility, the ACR sought comment on how Incumbent Local Exchange Carriers (ILECs), Competitive Local Exchange Carriers (CLECs), and Interexchange Carriers (IXCs) should implement special access service price changes.

Recognizing that the Commission has already granted CLECs and IXCs “full pricing flexibility”⁴ for retail special access services, the ACR tentatively proposed that CLECs and IXCs should file their price changes through advice letters in Tier 1. The ACR also proposed certain filing treatment for ILECs to make special access price changes, consistent with the filing requirements that existed previously for ILEC special access services.

In this decision, we define “special access services” as the offering of non-switched lines dedicated to a customer’s use between two points and establish advice letter filing rules for all “special access services” – retail and wholesale. We conclude that CLECs and IXCs may file special access price changes in Tier 1 as proposed in the ACR.

We affirm that ILECs shall file their price changes to special access services that were previously categorized as Category II under the New Regulatory Framework (NRF) in the manner that we proposed in the ACR: i) price changes between previously approved floors and ceilings by Tier 1 advice letters; ii) price reductions below previously approved floors by Tier 2 advice letters (with cost support); and iii) price increases above previously approved ceilings by applications.

⁴ In this context, by “full pricing flexibility,” we refer to the ability to change prices for services without restriction, including price floors, or ceilings.

However, because the Commission has already permitted some ILEC special access services to be classified as Category III under NRF, we recognize that those special access services have been granted more relaxed treatment. For those Category III special access services, we direct ILECs to file advice letters for all price changes in Tier 1, except for price increases greater than 5% of the maximum price, which shall be filed in Tier 2. Because we have not changed pricing treatment for special access services, we believe that this treatment most closely approximates the advice letter filing requirements that the ILECs complied with prior to the establishment of GO 96-B's advice letter tiers. We also reiterate that no URF Carriers may impose use and user restrictions on special access services.

Background

The URF Phase I decision of August 2006 concluded that there is competition in the telecommunications market and granted the ILECs pricing flexibility for their retail services (with certain exceptions). As a result, ILECs are regulated, for the most part, under the same regulatory framework as CLECs and IXCs.

Although we granted the ILECs increased pricing flexibility as to most of their retail services, we stated that the URF Phase I decision did not apply to special access services.⁵ In D.08-09-015, we concluded that we would maintain the same pricing regulations over ILEC special access services as had existed

⁵ D.06-08-030, Finding of Fact 14.

prior to the URF Phase I decision.⁶ Consistent with maintaining the same pricing treatment for special access services, the August 2008 ACR proposed the following advice letter filing requirements for special access price changes:

1. CLECs and IXC's may change retail special access prices by filing Tier 1 advice letters.
2. ILECs may change retail special access prices within previously approved floors and ceilings by filing Tier 1 advice letters.
3. ILECs must file applications to raise retail special access prices above previously approved ceilings.
4. ILECs may lower retail special access prices below previously approved floors by filing Tier 2 advice letters (with cost support).

Opening comments were filed on August 28, 2008 by the California Association of Competitive Telecommunications Companies (CALTEL) and on September 2, 2008 by Pacific Bell Telephone Company d/b/a AT&T California, Sprint Communications, L.P. and its affiliates (SprintNextel) and tw telecom of california (TimeWarner). Reply comments were filed on September 8, 2008 by AT&T California, SprintNextel, TimeWarner and Verizon California, Inc. and its affiliates (Verizon California). In addition to commenting on the proposed Tier filings for retail special access services, the parties also commented on the use of the term "retail special access" and on whether IXC's and CLECs may detariff retail special access services. We address these issues below.

⁶ We also noted in D.08-09-015 that CLECs and IXC's historically had pricing flexibility for special access services and that nothing in the decision was intended to reduce that flexibility.

Discussion

1. Definition of “retail special access services”

The commenting parties assert that the term “retail special access services” is confusing and questions whether there is a distinction between “retail” and “wholesale” special access services.

Specifically, AT&T asserts that the term “retail special access” should be changed to “special access” as it offers the same special access tariff to both retail and wholesale customers.⁷ AT&T states that if the Commission does not grant pricing flexibility for its “retail” special access services as it requested,⁸ then its current special access tariffs will continue to apply to both retail and wholesale special access services and that there is no distinction between these special access services.

CALTEL also explains that CLECs do not offer “retail” special access and that we should eliminate any reference to “retail” special access offered by carriers other than ILECs.⁹ CALTEL asserts that confusion may result from the term “retail special access” as applied to CLECs, because the Commission’s

⁷ Comments of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) on the Assigned Commissioner’s Ruling Seeking Limited Additional Comment on Proper Advice Letter Tier Filings for Retail Special Access Price Changes (“AT&T Comments”) at 2.

⁸ AT&T and Verizon sought full pricing flexibility for retail special access earlier in this proceeding. In D.08-09-015, we declined to grant the ILECs full pricing flexibility for “retail” special access services.

⁹ Comments of the California Association of Competitive Telecommunications Companies on the Assigned Commissioner’s Ruling Seeking Limited Additional Comment on Proper Advice Letter Tier Filings for Retail Special Access Price Changes (“CALTEL Comments”) at 2-3.

consideration of whether to grant pricing flexibility for “retail special access” applied only to ILECs. CALTEL contends that CLECs offer a variety of point-to-point dedicated services to business customers, but that CLECs only use the term “special access” to refer to the services offered at wholesale to other carriers.¹⁰ SprintNextel and TimeWarner assert that there is confusion about the meaning of “retail special access” and the Commission should defer ruling on the ACR at this time.¹¹ They argue that the ACR’s proposed advice letter treatment for such services is acceptable if the Commission also adopts safeguards to prevent discriminatory or anticompetitive pricing.¹²

As an initial matter, we clarify what we mean by “special access services” in this decision. In D.08-09-015, we defined the term “special access service” for the purpose of determining whether to grant ILECs pricing flexibility for this service and referred to “special access service” as the ILECs’ offering of non-switched lines dedicated to a customer’s use between two points.¹³ However, in this decision, we are determining the proper advice letter treatment for all “special access” services, and thus do not limit the definition only to ILECs. Consistent with our past decisions, we clarify that special access service is the

¹⁰ CALTEL comments at 2.

¹¹ Reply Comments of SprintNextel and tw telecom of california in Response to Assigned Commissioner’s Ruling Seeking Limited Additional Comment on Proper Advice Letter Tier Filings for Retail Special Access Price Changes (“Joint Commenters’ Reply Comments”) at 1-2.

¹² *Ibid.* at 2-7.

¹³ D.08-09-015 at 85, 87, and n.93.

*service offering of non-switched lines dedicated to a customer's use between two points*¹⁴ (whether offered to a retail or wholesale customer and whether offered by an ILEC or non-ILEC).

Moreover, upon review of the comments and prior Commission decisions, we agree with commenters that there is currently no meaningful distinction between retail and wholesale special access services, as carriers are required to offer special access services at the same price, terms, and conditions to all customers.¹⁵ We affirmed in D.08-09-015 that there shall be no “use” or “user” restrictions on special access services.¹⁶

Therefore, we agree that the term “retail” special access does not have relevance for the purposes of determining the proper advice letter treatment for these services, and refer herein to “special access services” and not “retail” special access.

¹⁴ In D.94-09-065 (which concluded the Commission’s implementation rate design under the New Regulatory Framework), the Commission defined “private line” as allowing communications from one customer location to another customer location within the same LATA without the use of a LEC’s switches and defined “special access” as identical to private line circuits, except that one leg of the special access connection is to an IXC point of presence. In D.94-09-065, the Commission permitted the ILECs to merge the retail private line tariff into the wholesale special access tariff, so that there was no distinction between a private line and a special access line.

¹⁵ In D.97-08-059, the Commission noted that special access and private lines are available for resale under the LECs’ existing wholesale tariff and that there is no retail tariff for such services. The Commission affirmed in D.97-08-059 that special access service is “essentially wholesale in nature” and that there should be no distinction between the price a CLEC reseller and an IXC pays for the service.

¹⁶ D.08-09-015, Section 4.2.2: “We further note, however, that the CLECs and IXCs should not impose use or user restrictions on their service offerings, as such practice would be inconsistent with Pub. Util. Code § 453.”

2. Advice Letter Tiers for ILECs' Special Access Services:

The ACR proposed certain tiers for filing price changes for ILEC special access services, based on prior Commission decision treatment for the ILECs' special access services in Category II.¹⁷ However, AT&T pointed out that some of its special access services were deemed Category III services prior to URF and that the Commission has provided more flexible filing procedures for these services than identified in the ACR.¹⁸ Specifically, AT&T asserts that the Commission classified various services as Category III services, including many that are included in AT&T's D12 tariff. The prior filing rules for Category III services provided that if there is a current rate and a maximum rate for a service:

- The current rate can be modified on one-day notice, as long as the new rate is below the maximum rate.
- If there is a decrease in the maximum rate, it is temporarily effective on one-day notice and permanent on the 20th day after filing if not protested.
- Increases in the maximum rate of less than 5% are temporarily effective on the five-day notice and permanent on the 20th day after filing if not protested.
- Increases in the maximum levels of 5% or greater would become effective on 30-days notice, permanently if no protest is entered, temporarily if a timely protest is filed.

¹⁷ See ACR, dated August 18, 2008 at n.1 (citing D.96-03-020 in which the Commission assigned special access and private line services to Category II under the New Regulatory Framework).

¹⁸ AT&T Comments at 3-4.

AT&T proposes that all price changes for these Category III services be filed in Tier 1, or at a minimum, and that the price changes for D12 tariff services be filed as follows:

- Tier 1 for price changes below the maximum price and for increases in the maximum price of 5% or less, and
- Tier 2 for an increase in the maximum price greater than 5%.¹⁹

Verizon argues that there are some Category III services under the prior regulatory framework that should qualify for Tier 1 treatment in filing advice letters.²⁰ Verizon asserts that some of these services (Dedicated Sonet ring, frame relay) may be included in its special access tariff, but they are “not traditional special access services (non-switched, dedicated private line).”²¹

In the ACR, we noted that for special access services, ILECs have had to file applications to raise the prices above previously approved ceilings and that ILECs must continue to do so for such services.²² We also noted that ILECs that wish to lower retail special access prices below previously approved floors may do so by advice letter in Tier 2, with appropriate cost support. Any price changes between the previously approved floor and ceilings are permitted to be filed in Tier 1 under GO 96-B. We affirm that this is the proper filing treatment for special access services that are in *Category II*.

¹⁹ *Ibid.* at 4-5.

²⁰ Verizon Reply Comments at 3.

²¹ *Ibid.*

²² ACR dated August 18, 2008, at 2, n.1.

However, because there are some ILEC special access services that the Commission classified as *Category III* under NRF, the proposed tier treatment in the ACR may be more restrictive than prior filing requirements. If there is a special access service for which an ILEC has obtained Category III regulatory treatment (as described by AT&T), we conclude that AT&T's proposed tiers for filing these special access services are reasonable. By classifying certain special access services as Category III, the Commission granted pricing flexibility for those services. Verizon argues that some Category III services are in its "special access" tariff, but are not traditional special access services. To the extent that a service is not "special access" and was granted pricing flexibility in D.06-08-030, that service shall be filed in Tier 1. Any ILEC special access services that were classified as Category III shall be subject to the following filing treatment:

- ILECs may adopt any *decreases* in maximum rates and increases of 5% or less by Tier 1 advice letters for Category III special access services; and
- ILECs may adopt *increases* in maximum rates greater than 5% by Tier 2 advice letters for Category III special access services.

To the extent that there are special access services that were not granted Category III treatment and were subject to requirements in D.96-03-020, the ILECs shall:

- file price changes within the previously approved floor and ceilings by advice letter in Tier 1;
- file price reductions below previously approved floors by Tier 2 advice letter (with cost support); and
- file price increases above previously approved ceilings by application.

This treatment most closely approximates our practice before creation of the tiered advice letter system.

3. CLECs' Special Access Services

CALTEL asserts that rates for comparable services offered by CLECs or IXC's should be subject to Tier 1 advice letter treatment.²³ We agree that special access services offered by CLECs and IXC's should be subject to Tier 1 advice letter treatment, as these carriers have always had pricing flexibility for these services.

SprintNextel and TimeWarner also ask us to rule that *CLECs and IXC's that are affiliates of ILECs* may not offer special access services on a detariffed basis and that URF Carriers may not distinguish between retail and wholesale special access services.²⁴ They are concerned that the ILECs might have their CLEC and IXC affiliates offer "retail special access" services on a detariffed basis rather than file advice letters themselves. They interpret Conclusion of Law 26 from D.07-09-018 (our detariffing decision) as flatly prohibiting the detariffing of special access services by any type of carrier: "Detariffing of resale or other services that were not granted full pricing flexibility in D.06-08-030 [such as special access services] is not in the public interest."

We have already stated that CLECs and IXC's may offer special access services on a detariffed basis. In our most recent URF decision, we specifically clarified that CLECs and IXC's have already had full pricing flexibility for these

²³ AT&T Comments at 3.

²⁴ Joint Commenters' Comments at 2-7.

services and that they may currently detariff their special access services.²⁵ To the extent that a CLEC or IXC detariffs special access services, the carrier must post the generally available rates, terms and conditions on its website and is subject to the non-discrimination requirements of Pub. Util. Code § 453. We further reiterate that URF Carriers may not impose use and user restrictions on special access services and that the URF Carriers shall offer the same special access service to both retail and wholesale customers.

GO 96-B shall be revised to reflect that price changes to special access service shall be made in the appropriate tiers, consistent with the Commission's order. *See* Appendix A.

Comments on Proposed Decision

The proposed decision (PD) of the Commissioner in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on the PD on March 30, 2009, and reply comments on April 6, 2009. The following parties filed comments on the PD: Citizens Telecommunications Company of California, Inc., d/b/a Frontier Communications Company of California, and SureWest Telephone ("Frontier/SureWest"); SprintNextel and tw telecom of California, lp ("SprintNextel and TimeWarner"); Verizon California Inc. ("Verizon"). Pacific Bell Telephone Company d/b/a AT&T California ("AT&T"), California Association of Competitive Telecommunications Companies ("CALTEL"),

²⁵ *See* D.08-09-015 at 41-42 ("we clarify that ... this decision applies only to ILECs' special access services, [and] nothing prohibits a CLEC or an IXC from seeking to detariff ... their special access services.").

Frontier/SureWest, SprintNextel and TimeWarner, and Verizon filed reply comments. We address the comments below.

SprintNextel and TimeWarner assert that the PD fails to address explicitly whether CLECs and IXC's that are affiliated with ILECs may offer special access services on a detariffed basis.²⁶ They argue that ILEC-affiliated CLECs and IXC's should not be able to detariff their special access services so as to prevent discrimination or pricing abuses by the affiliates. However, as the PD notes above, the Commission did address in D.08-09-015 the issue of whether CLECs and IXC's may detariff their special access services, as they have always had pricing flexibility for these services. The Commission did not exempt ILEC-affiliated CLECs and IXC's from this finding and these arguments have already been addressed. If the Commission finds evidence in the future that *ILEC-affiliated CLECs and IXC's* are discriminating or engaging in pricing abuses, we may reconsider this issue.²⁷

Verizon seeks clarification as to whether services that are not "special access," as defined in the PD, are eligible for detariffing. Verizon specifically mentions that a service such as its "Transparent LAN" service is not "special access" as defined by the PD and should therefore be eligible for detariffing.²⁸ SprintNextel and TimeWarner oppose Verizon's request and assert that

²⁶ SprintNextel and TimeWarner Comments on PD, at 1.

²⁷ As we noted above, any detariffed service must have its generally available rates, terms, and conditions posted on its website.

²⁸ Verizon Comments on PD at 2.

Verizon's request lacks record support and is untimely.²⁹ SprintNextel and TimeWarner further request that the Commission modify the definition of "special access" to reflect that it is the "Offering of non-switched lines dedicated to a customer's use between two or more points."³⁰ We will not address the specific classification of Verizon's Transparent LAN service in this decision as such a clarification is outside of the scope of this decision. Furthermore, our previous decision made clear that retail services that were granted full pricing flexibility are eligible for detariffing.³¹ We decline to modify our definition of "special access" as defined above; however, we note that the definition of "special access" turns on whether there are *dedicated connections* between points, and not the amount of points at issue.

Frontier and SureWest seek Category III treatment for some special access services that they contend are currently being treated as Category II. Given that we did not revisit the pricing framework for special access services here, we decline to grant Frontier and SureWest's request. Instead, Frontier and SureWest may file an application to reclassify those Category II services that they believe should be Category III.

CALTEL asserts that we should not eliminate the requirement that the URF ILECs produce cost support for price decreases to Category II special access services, as requested by Verizon.³² As stated previously, we are not revising at

²⁹ SprintNextel and TimeWarner Reply Comments on PD, at 2.

³⁰ SprintNextel and TimeWarner Reply Comments on PD at 3.

³¹ See D.08-09-015, at Conclusion of Law Para. 4.

³² CALTEL Comments on PD at 2; *see* Verizon Comments on PD at 2-3.

this time our pricing regulation for the URF Carriers with regard to special access services.³³ Therefore, there is no basis for eliminating the pre-existing requirements that URF ILECs must file cost support for price decreases to Category II special access services.

Based on the foregoing, we see no need to modify the PD as requested in the comments.

Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge.

Findings of Fact

1. "Special access service" means non-switched lines dedicated to a customer's use between two points.
2. Special access services are offered to both retail and wholesale customers at the same rates, terms, and conditions.
3. The Commission classified some special access services offered by ILECs as Category III and some special access services as Category II under NRF.
4. D.08-09-015 authorizes CLECs and IXC's to offer special access services on a detariffed basis.
5. D.07-09-018 prohibits ILECs from offering special access services on a detariffed basis.
6. Price changes in Tier 1 advice letters are effective immediately pending disposition.
7. Price changes in Tier 2 advice letters are effective upon staff approval.

³³ See D.06-08-030; D.009-08-015.

Conclusions of Law

1. For special access services that were classified as Category II, a Tier 1 advice letter is the appropriate means for an ILEC to change the price of the service within previously approved floors and ceilings.
2. A Tier 2 advice letter is the appropriate means for an ILEC to reduce the price of a special access service below a previously approved floor.
3. An application is appropriate for an ILEC to increase the price of a special access service above a previously approved ceiling.
4. For special access services that were classified as Category III, it is reasonable for the ILEC to change the price of the service through a Tier 1 advice letter, except for an increase in the maximum price of greater than 5%, in which case a Tier 2 advice letter is reasonable and approximates the filing treatment established previously under NRF.

O R D E R

1. Competitive Local Exchange Carriers and Interexchange Carriers may offer special access services on a detariffed basis.
2. Incumbent Local Exchange Carriers shall offer special access services on a tariffed basis.
3. No Uniform Regulatory Framework Carriers shall impose use and user restrictions on special access services.
4. Incumbent Local Exchange Carriers may change the prices of Category II special access services through the following means:
 - a. Tier 1 advice letters for price changes within previously approved floors and ceilings,
 - b. Tier 2 advice letters for price reductions below previously approved floors (with cost support), and

- c. Applications for price increases above previously approved ceilings.

5. Incumbent Local Exchange Carriers may change the prices of Category III special access services through the following means:

- a. Tier 1 advice letter for price changes below the maximum price and for increases in the maximum price of 5% or less, and
- b. Tier 2 advice letter for an increase in the maximum price greater than 5%.

6. General Order 96-B shall be revised as reflected in Appendix A.

This order is effective today.

Dated April 16, 2009, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners