

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

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

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

**ADMINISTRATIVE LAW JUDGE'S RULING  
GRANTING SBC CALIFORNIA'S MOTION TO STRIKE**

On January 27, 2006, SBC California (SBC) filed a motion to strike the Supplemental Declaration of Michael Mulkey, attached to the Competitive Local Exchange Carriers' (CLECs') Reply Brief on Routine Network Modification (RNM) Issues filed on January 25, 2006, as well as the portions of the CLECs' reply brief (at pages 24-25) that make reference to that declaration.

SBC asserts that the introduction of new evidence with a reply brief is impermissible. As the Commission has explained, introducing evidence with a reply brief "fails to provide" adverse parties "an opportunity to either respond or test the reliability or validity of this evidence" and is accordingly "inherently unfair."<sup>1</sup> The submission of this declaration with the CLECs' reply brief gives SBC California no opportunity to test Mr. Mulkey's assertions or to respond, and

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<sup>1</sup> *In re Southwest Gas Company*, D.02-08-064, at 37-38 (Cal. PUC Aug. 22, 2002); see *In re McCanna Ranch Water Company*, D.99-08-016, 1999 WL 702274, at \*16 (Cal. PUC Aug. 5, 1999).

its consideration by the Commission would accordingly be “inherently unfair.” *Southwest Gas*, D.02-08-064, at 37.

SBC states that the relief SBC seeks here is especially appropriate in light of the substance of Mr. Mulkey’s new declaration. First, the declaration purports to describe two conversations between Arrival and SBC employees, one of which occurred in “mid-December 2005” and the other of which occurred “[e]arlier this month.” *Id.* at 2-3. The CLECs offer no justification for submitting this supplemental declaration now, rather than with their opening brief (filed on January 9). Although an evidentiary submission with their opening brief would itself have been highly irregular, at least it would have permitted SBC California an opportunity to respond. By waiting until the reply brief to produce this information, the CLECs have deprived SBC California of any opportunity to do so.

On February 3, 2006, Arrival Communications, Inc. (Arrival) filed in opposition to SBC’s motion. Arrival asserts that Mulkey’s information does not constitute “new evidence.” Rather, Mulkey was merely bringing to the Commission’s attention that after the hearings in this proceeding had concluded, SBC once again declined to provide important detailed information to CLECs concerning their DS1 UNE loop and DS1 special access circuit orders.

Arrival rebuts SBC’s accusation of waiting until the reply brief to submit Mulkey’s Supplemental Declaration. According to Arrival, SBC’s change in behavior happened over the period between mid-December 2005 and the date the reply brief was filed. Arrival stated it would have been irresponsible for Arrival to make assertions at the first sign of SBC’s change in position. According to Arrival, the validation effort could not have been completed before the opening briefs were filed.



**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting SBC California's Motion to Strike on all parties of record in this proceeding or their attorneys of record.

Dated February 8, 2006, at San Francisco, California.

TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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