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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Telecommunications Division
Carrier Branch

RESOLUTION T-16818
January 22, 2004

R E S O L U T I O N

Resolution T-16818. SBC California (U-1001-C). Request To Waive the Installation Service Charge for Eligible Residence and Business Customers Returning and Switching From Facilities-based Carriers to SBC California. By Advice Letter Nos. 24278 and 24279, filed October 10, 2003.

Summary

By Advice Letters (AL) Nos. 24278 and 24279, SBC California (SBC) requests the Commission grant a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible residence and business customers returning and switching from facilities-based carriers to SBC.

This resolution approves SBC's request in part and denies SBC's request in part. This resolution addresses "winback customers," i.e., those customers who have switched to a SBC competitor and decide to return to SBC within six months of the initial change date. This resolution also addresses "win-over customers," i.e., those customers who have switched to a SBC competitor and decide to return to SBC after having service with the competitor(s) for more than a six month period and also those customers who have never had SBC's services previously.

This resolution approves a one-year provisional tariff authorizing SBC to waive the installation service charge for eligible residence and business customers returning from facilities-based carrier service who are served on an Unbundled Network Element-Platform (UNE-P) basis. This resolution denies SBC's request to waive the installation charge for eligible residence and business customers returning from facilities-based carrier service who are served on an Unbundled Network Element-Loop (UNE-Loop) basis. Additionally, this resolution denies SBC's request to waive the installation charge for "win-over" customers from other carriers.

Background

On June 13, 2003, SBC filed AL Nos. 23879 and 23880 on June 13, 2003, requesting the Commission to grant a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible residence and business customers transferring their services from facilities-based carriers to SBC. Multiple parties, including AT&T, Cox Communications, CPUC Office of Ratepayer Advocates (ORA), and TURN filed protests to these ALs.

On August 27, 2003, the Telecommunications Division (TD) rejected SBC's ALs without prejudice (see Attachment I), on the basis of CPUC Decision (D.) 02-02-049, Attachment A, Section IV.B, which states, "An advice letter must be rejected without prejudice if it requests relief that can only be granted after an evidentiary hearing, if a protest raises a disputed issue of material fact, or the advice letter otherwise requires a formal proceeding." The TD had determined that the ALs raised several issues that fell under one or more of the three conditions stated in D.02-02-049, and therefore, was required to reject the ALs without prejudice.

On October 10, 2003, SBC resubmitted its request in AL Nos. 24278 and 24279 for a one-year provisional tariff to waive the installation service charge for eligible residence and business customers that were either returning to SBC or switching to SBC from facilities-based carriers. SBC asserts that its resubmitted request is supported by current Commission policy and practice. These resubmitted ALs are addressed in this resolution.

Notice and Protests

SBC states that a copy of the ALs and related tariff sheets were mailed to competing and adjacent utilities and/or other utilities. A notice of Advice Letter Nos. 24278 and 24279 was published in the Commission Daily Calendar on October 15, 2003 and October 17, 2003, respectively. Protests to the ALs were all timely received from Cox Communications (representing itself and the California Association of Competitive Telecommunications Companies (CALTEL); Anew Telecommunications Corp., d/b/a Call America; Pac-West Telecomm, Inc.; Sage Telecom, Inc.; Tri-M Communications, Inc. d/b/a TMC Communications; and, U.S. TelePacific Corp.) on October 30, 2003; AT&T Communications (AT&T) on October 30, 2003; and ORA on November 3, 2003.

SBC timely responded to the protests of Cox, et. al. and AT&T on November 6, 2003, and to the protest of ORA on November 10, 2003.

Discussion

A. SBC'S INITIAL FILING OF ADVICE LETTERS NO. 23879 AND 23880

SBC filed AL Nos. 23879 and 23880 on June 13, 2003 requesting the Commission to grant a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible residence and business customers returning from facilities-based carriers to SBC. SBC presented several arguments in support of its AL filings and in response to the protests filed by parties. The three major arguments raised by SBC in its AL filings and in its supporting documents filed with the Commission are as follows:

1. SBC Contends That The Commission Should Allow SBC to Market Services to Meet Competitive Offers Extended by Competitors, Even If the Offer is Below-Cost.

SBC cites California Business and Professions Code (BPC) Section 17050(d) to support its argument that it is appropriate to price products below cost. SBC contends that competition in local access is accelerating, and, as such, SBC should be permitted to meet the prices of its competitors for the same services and products so that consumers can obtain the benefits of additional competitive choices.

2. SBC Contends That The Commission Should Revise the Policy Adopted in Resolution (R.) T-16116.

SBC recognizes that in Resolution (R.) No. T-16116, dated April 9, 1998, the Commission denied SBC's request for a 90-day promotion waiving the non-recurring service charge (NRC) for customers returning to SBC from facilities-based Competitive Local Carriers (CLCs) and Shared Service Providers (SSPs) because SBC's request failed to meet Implementation Rate Design's (IRD's) imputation tests and because the current Commission policy on imputation tests is for services to be assessed on a stand-alone basis. SBC, nevertheless, believes that the current highly competitive marketplace warrants a public policy exception to the IRD's imputation tests.

3. SBC Contends That The Telecommunications Marketplace is Currently Highly Competitive and Thus, It Asserts That SBC Should be Permitted to Meet the Prices of its Competitors for the Same Services and Products.

SBC argues that the level of competition in the local access service industry has changed dramatically since the Commission adopted R. T-16116. At that time, SBC contends that the number of customers returning from facilities-based carriers was 1% or less of the total number of returning customers. Today, it states that most of SBC's competitors offer facilities-based services, which include the services offered by UNE-P providers. SBC states that resellers make up only a small portion of the industry.

SBC contends that its competitors are currently waiving installation charges for residence and business customers. SBC also claims that the current NRC rules discriminate against SBC and harm consumers.

**B. PROTESTANTS' RESPONSE TO SBC'S INITIAL FILING OF ADVICE LETTER
NOs. 23879 AND 23880**

Protestants to SBC's initial ALs 23879 and 23880 made a number of arguments against the contentions raised by SBC in its AL filing and in SBC's responses to the protestants' protests. In general, the protestants made the following arguments in their protests to the ALs:

1. Protestants Contend that SBC's AL Filings Violate Previous Commission Decisions.

Protestants argue specifically that the tariff changes SBC seeks to make through ALs 23879 and 23880 do not comport with Commission Decisions 89-10-031, 94-09-065 (IRD), and 96-03-020, all of which resulted from formal proceedings. They state that SBC's proposal to waive NRCs fails all three imputation tests adopted in the IRD. They also state that a NRC is a charge that is paid by the customer only once, not on a monthly basis and that none of the Commission's regulations that led to the findings and orders in R. T-16116 have changed. Lastly, they state that SBC's support for its allegation of "public policy reasons" for making an exception to existing Commission rulings is insufficient.

Protestants point out that the Commission can only modify a decision or order made by it through a formal proceeding, pursuant to Public Utilities Code (PU) Sections 1708 and 1708.5. They state SBC has not shown good cause as to why the Commission should "make an exception" by not adhering to California statutes or Rules 14.7 or 47 of the Commission's Rules of Practice and Procedure, and ignoring or reversing policies that have been set forth in Commission decisions through the informal advice letter process.

2. Protestants Dispute SBC's Assertions of the Level of Competition in California's Local Exchange Market.

Protestants also dispute SBC's assertions regarding the level of competition in California's local exchange market. ORA, in its protest, cites the Federal Communications Commission (FCC) data that show that, as of December 31, 2002, the Competitive Local Exchange Carriers (CLECs) held only 11% of all end-user switched access lines served in California. In addition, ORA cites to the Commission's Competition reports to the Legislature which state that, "ILECs have a 95% share of the

local residence market statewide, as measured by June 2002 access line data, compared to the CLEC's 5% market share...". The Commission also noted that, "California's local business market has been somewhat more competitive with CLECs attaining a market share in excess of 16%, compared to the ILECs almost 84% market share." Other protestants presented additional data to contest SBC's assertions regarding the level of competition in California.

3. Cox Argues that SBC Seeks to Install a "Provisional Tariff," a Device Not Contemplated in the Commission Rules.

Cox, et. al, argues that SBC seeks to install a "Provisional Tariff," a device not contemplated in the Commission rules. It argues that SBC does not explain or cite authority for its proposal to establish what amounts to a new type of tariff heretofore unknown at the Commission. It argues that the proposals in the ALs would permit SBC to unreasonably discriminate among similarly situated customers, contrary to Resolution T-14174¹. It also argues that the Commission has consistently limited the duration of SBC's promotions to a maximum of 240 days and that SBC is calling its proposal "provisional" rather than "promotional" to skirt the limitations on duration that apply to its "promotional" tariffs.

C. SBC's RESPONSE TO THE PROTESTANTS' COMMENTS

1. SBC Contends That its Proposed Advice Letters 23879 and 23880 Do Not Violate Previous Commission Decisions.

The carriers protesting the previous ALs contend that waiving the non-recurring charge on access lines violates previous Commission decisions, including the IRD (D.94-09-065), which set forth a methodology for establishing price floors. SBC states, in its response, that this interpretation of the IRD is incorrect and asserts that the methodology set forth in the IRD did not include non-recurring costs. SBC contends that this policy was validated in OANAD (D.99-11-050, Appendix D) where the specific price floors for 1 Party Flat Rate Service (1 FR), and 1 Party Measured Business Service (1 MB), were identified and adopted, with neither adopting a price floor methodology which includes non-recurring costs.

SBC also contends that, although previous Commissions resolutions (T-14174 and T-16116) have been interpreted to support the application of the imputation tests on a stand-alone basis, today's competitive environment supports its request for a waiver of the NRCs.

¹ Resolution T-14174, dated October 12, 1990, gave provisional authority to Pacific Bell to file advice letters to waive or discount specific tariffed charges during a promotional period. By Advice Letter No. 15782, filed on August 6, 1990.

2. SBC Contends that the Current Telecommunications Marketplace is Competitive.

SBC contends that competition in the local exchange market is much broader than the narrow data cited by the protestants. SBC asserts that, “the market has evolved such that SBC California estimates that incumbent local exchange carriers’ customers represent only 52% of the total number of California communications market subscribers.” SBC also states that focusing on only switched access lines to determine whether competition exists is misleading and provides three examples of (SBC defined) market realities to support its position.

D. THE TELECOMMUNICATIONS DIVISION REJECTED, WITHOUT PREJUDICE, SBC’S ADVICE LETTERS NO. 23879 AND 23880

TD rejected, without prejudice, SBC’s AL Nos. 23879 and 23880 on August 27, 2003. TD determined that several of the issues raised by SBC’s initial ALs fell under one or more of three conditions stated in CPUC Decision 02-02-049, Attachment A, “Guidelines for Advice Letter Rejection, Suspension, and Hearings, Section IV.B,” which states that, “An advice letter must be rejected without prejudice if it requests relief that can only be granted after an evidentiary hearing, if a protest raises a disputed issue of material fact, or the advice letter otherwise requires a formal proceeding.”

First, TD determined that the level of competition in the telecommunications market in California is a disputed issue of material fact, and thus, TD determined that this issue could not be resolved in a resolution, but must be addressed through an evidentiary hearing.

Second, TD determined that NRCs are “Rate Elements” and that the treatment of NRCs was addressed in D.88-09-059 and D.94-09-065. Therefore, TD did not agree with SBC’s interpretation of D.94-09-065 with regard to the treatment of NRCs. As such, TD determined that this was also a disputed issue of fact and thus, needed to be addressed through an evidentiary hearing.

Third, TD determined that the California’s Unfair Practices Act does not apply to services regulated by this Commission. SBC assert that BPC Section 17050(d) allows companies to price products and services below cost to compete. Thus, TD determined that the applicability of the Unfair Practices Act to SBC’s initial AL filing also constituted a disputed legal issue and as such, needed to be addressed through an evidentiary hearing.

E. AFTER TD REJECTED SBC's AL NOs. 23879 and 23880, SBC RESUBMITTED ITS REQUEST IN AL NOs. 24278 AND NO. 24279, FOR A ONE-YEAR PROVISIONAL TARIFF, AUTHORIZING SBC TO WAIVE THE INSTALLATION SERVICE CHARGE FOR ELIGIBLE RESIDENCE AND BUSINESS CUSTOMERS RETURNING OR SWITCHING FROM FACILITIES-BASED CARRIERS TO SBC

SBC resubmitted its ALs on October 10, 2003. SBC made no revisions to its previous filings, nor address any issues raised by TD in its Rejection Without Prejudice of August 27, 2003. In a letter to Jack Leutza, Director of the Telecommunications Division, dated October 10, 2003, SBC stated that, "The three issues cited in your (TD's) August 27th letter, do not raise disputed issues of material and legal fact, but rather are a reversal of previous policy." SBC then restated its arguments made in its initial AL filings, embellished with additional points, as summarized below:

1. NRCs Are Not Separate Rate Elements and Therefore the IRD Imputation Tests Do Not Apply.

SBC contends that NRCs are not treated as separate rate elements and therefore the IRD "rate element test" does not apply. SBC also claims that, "Following the price floor methodology adopted in IRD, OANAD adopted price floors for Consumer and Business access lines, neither of which includes non-recurring costs." SBC states that Commission staff recognized that NRCs are not treated as rate elements and worked with SBC to develop a new test called the NRC burden test. It states that the NRC burden test demonstrates whether or not any non-recurring shortfall is recovered by recurring rates. SBC states that it has been using the NRC burden test ever since and that the use of the NRC burden test is now Commission policy.

2. The Business and Professions Code (BPC) Should be Used by the Commission as a Reference.

SBC asserts that the BPC may be used as a reference for competitive principles and should be a valid consideration for the Commission. SBC does not disagree that the BPC specifically exempts services provided by a utility regulated by the Commission. SBC, nevertheless, states that the Commission should consider that the BPC specifically acknowledges that, in competitive markets, companies can price below cost in a good faith attempt to meet competitor's offers.

3. California's Telecommunications Marketplace is Competitive.

SBC reasserts that California's marketplace is competitive and states that the current level of competition in California is not a disputed issue of material fact. SBC bases this statement on its conclusion that its "competitors are waiving installation charges day in and day out" and documents SBC submitted along with its AL filing.

F. PROTESTANTS' RESPONSE TO SBC ADVICE LETTERS 24278 AND 24279

SBC's resubmitted ALs were timely protested by Cox Communications, et al, and AT&T on October 30, 2003 and ORA on November 3, 2003. The protestants put forth the same arguments they and other previous protestants made to the originally filed AL Nos. 23879 and 23880, and additionally argue that:

1. SBC's Re-submittal of the Previously Rejected Advice Letters is Procedurally Improper.

All protestants argue that SBC's resubmission of previously rejected advice letters is not only procedurally improper, it is a waste of the Commission's and other parties' resources. TD clearly had the authority to reject AL Nos. 23879 and 23880 and properly did so as the issues raised by SBC were clearly larger than what should be addressed in an Advice Letter Filing.

G. SBC'S RESPONSE TO PROTESTS FILED BY PARTIES

SBC responded timely to the protests of Cox and AT&T on November 6, 2003, and to ORA on November 10, 2003, with the same arguments with which SBC responded to the protests to AL Nos. 23879 and 23880. In addition, SBC made the following arguments:

1. SBC's Advice Letters Are Properly Resubmitted and Do Not Violate Commission Procedures.

SBC points out that its prior ALs were rejected without prejudice and that it is not challenging TD staff's authority to suspend or reject ALs. After discussing its previous advice letters and the issues raised in Mr. Leutza's August 27th letter, SBC made a decision to re-file the advice letters in good faith to allow TD staff to reconsider its position.

SBC also reasserts that the NRC burden test is the current Commission policy regarding recovery of NRCs. SBC then adds that, therefore, modification of a prior decision is not required. SBC disagrees with ORA's assertion that a resolution is a "decision" and can only be changed by an application for rehearing. SBC asserts that the advice letter process is the appropriate method to use for filing or revising tariff sheets.

2. SBC Adds to its Argument That the Commission's Policy and Practice Has Been and Continues To Be To Treat Any NRC Shortfall As a "Cost Burden to be Recovered Over Time Through Recurring Rates" Rather Than as Separate Rate Element.

SBC states that following the price floor methodology adopted in both the IRD and OANAD proceedings, price floors for consumer and business access lines were adopted in D.99-11-050. SBC states that these adopted price floors do not include NRCs. SBC states that because of the outcome of D.99-11-050, it worked with TD staff to develop the NRC burden test, which SBC claims is used to demonstrate whether or not a non-recurring shortfall is recovered by recurring rates. SBC asserts that since that time, (July, 2001), SBC has been using the NRC burden test in every cost study it performs, including those for retail promotions and any newly tariffed service offering that is developed.

SBC states that its cost information submitted shows that NRC related costs would be recovered from average customer revenues, and therefore meets the NRC burden test.

3. SBC's Advice Letters Will Promote Competition.

SBC states that its ALs will promote competition, especially for low-income customers and small businesses that are limited in their ability to return to or switch carriers by their ability to pay installation charges assessed by local carriers. Such customers may be reluctant to switch from SBC to try out another carrier because they fear that they will incur charges if they later want to switch again. Thus, according to SBC, granting its ALs will promote competition by increasing customers' ability to choose.

SBC also asserts that it is asking for no greater flexibility than that currently enjoyed by its non-ILEC competitors.

4. SBC's Request for a Provisional Tariff is Appropriate.

SBC asserts that a provisional tariff is not novel, and that its request does not constitute an attempt to circumvent Commission rules regarding promotions. SBC states that its ALs are not requesting a promotion and that provisional tariffs have been used in past instances for trials and tests, and allow TD to monitor the affects of a new offering without granting permanent authority. SBC states that in recognition of the dynamic nature of the current marketplace, it has offered this one-year term as a compromise to give staff additional control over this process and an opportunity to observe the effects of the waiver.

**H. TELECOMMUNICATIONS DIVISION'S RESPONSE TO THE RESUBMITTED
ADVICE LETTER Nos. 24278 AND 24279**

TD stands by its letter of "Rejection Without Prejudice"(Attachment I), sent on August 27, 2003. TD reiterates that it has the authority to reject ALs pursuant to D.02-02-049. TD reasserts that the issues it had determined to be disputed issues of fact and or law in its "Rejection Without Prejudice" remain disputed issues of fact /law and therefore, should be decided in a formal evidentiary proceeding.

In response to SBC's assertion in its letter of October 10, 2003, in which it states, "The three issues cited in your August 27th letter, do not raise disputed issues of material and legal fact, but rather are a reversal of previous policy," TD states the following:

1. TD's Position That NRCs Are Rate Elements and Subject to Imputation Tests Is Not a Reversal of Policy.

NRCs are separate rate elements and that the imputation tests in IRD do apply to NRCs. TD's position is not a reversal of previous policy. TD disagrees with SBC's statement in its October letter that, "Working with staff, a new test was developed, the NRC burden test which demonstrates that any non-recurring shortfall is recovered by recurring rates. Since then, SBC California has been using the NRC burden test."

TD conveyed to SBC on March 27, 2002, that it did not agree with SBC's position that the NRC burden test was now Commission policy. TD revisited its position that any agreement TD had made with SBC in the past was not binding. SBC responded to TD on the same date, with documents intended to support SBC's position on NRCs, including the statement, "Staff agreed [during a meeting on May 4, 2001] that OANAD [D.99-11-050] was silent on treatment of non-recurring costs and that they were not defined in the decision as rate elements that should be included in the price floor."

This is precisely because in D.99-11-050 the Commission only addressed "unbundled network elements (UNEs)" (the network functionalities that must be made available to other telecommunications carriers) and not "rate elements" (the discrete items listed and priced in tariffs). Contrary to SBC's assertion, the Commission, in D. 88-09-059, indicated that NRCs are rate elements, which are subject to imputation tests as set forth in IRD D. 94-09-065.

Specifically, in D.88-09-059, (the NRF Phase 1 Settlement, approving pricing flexibility for Centrex and high-speed digital private line services) the Commission refers to "rates and charges" and "recurring and non-recurring charges" in the context of establishing "[price] caps and floors" and "filings requesting rate flexibility" applicable to flexibly priced services. (29 2nd CPUC at 378):

- “All floor *rates and charges* will be set at or above these costs.” (P. 383, emphasis added)
- In Commission nomenclature, “rates” are recurring charges and “charges” are non-recurring charges.
- “...the LEC may change the *rates or charges* between the authorized cap and floor as follows...” (P. 385, emphasis added)
- “...the LEC, may...propose to deaverage tariffed *rates and charges* for high speed digital private line services. If the LEC deaverages high speed digital private line services, it must also deaverage the corresponding element in the same manner and simultaneously in the high speed digital special access tariff...” (P. 388, emphasis added)

Should SBC disagree with the decisions cited above, SBC is strongly encouraged to file a petition for modification of those decisions that it believes need further clarification.

2. The Level of Competition In the Local Exchange Carrier Market Has Not Been Established by the Commission and Remains an Issue of Disputed Fact.

The level of competition in the local exchange carrier market has not been established in any Commission proceeding and remains an issue of disputed fact. TD does not accept SBC’s or any other party’s representations as to the current level of competition in telecommunications markets.

3. The Commission is Not Required to Follow the California Business and Professions Code.

SBC concedes that the neither the Commission, nor its regulated entities are subject to the Business and Professions Code. However, SBC contends that the Commission can be guided by the provisions of the BPC, and not following that guidance is a reversal of previous Commission policy. TD does not accept the premise that Commission policy should be guided by the BPC.

4. The Commission Has Used Provisional Tariffs in the Past

Cox , et. al, argues that SBC seeks to install a “Provisional Tariff,” a device not contemplated in the Commission rules. However, the Commission has used provisional tariffs in the past. For example, in Resolution T-16148, dated June 18, 1998, Pacific was granted authority to offer ACR service on a provisional basis for two years, subject to certain conditions. Cox’s argument is unsubstantiated.

I. THE COMMISSION APPROVES SBC'S REQUEST FOR A ONE-YEAR PROVISIONAL TARIFF TO WAIVE THE INSTALLATION SERVICE CHARGE FOR ELIGIBLE RESIDENCE AND BUSINESS "WINBACK" CUSTOMERS RETURNING FROM A FACILITIES-BASED WHO WERE SERVED ON A UNBUNDLED NETWORK ELEMENT-PLATFORM (UNE-P) BASIS

The Commission approves the portion of SBC's request as it applies to eligible residence and business "winback" customers returning from Facilities-Based Carrier Service who are served on an Unbundled Network Element-Platform (UNE-P) basis.

To reach this decision, the Commission reviewed its Resolution No. T-16116. This resolution granted Pacific's request to waive the NRC for "winback" customers who convert their existing residence local service from Competitive Local carrier (CLC) resellers back to Pacific, but denied Pacific's request to waive the NRC for customers returning from facilities-based CLCs and Shared Service Providers (SSPs).

In R. T-16116 the Commission approved Pacific's request for a NRC waiver to "winback" CLC reseller customers based on the following argument: "A new customer of Pacific pays nonrecurring charges which include the connect and disconnect functions, (sic) if this customer goes to a competitive Local Carrier reseller, the customer only pays the reseller a \$5.00 supersedure charge to cover Pacific's cost of making the record change. This activity does not require the customer to be physically disconnected from Pacific 's network. Therefore, when the same customer returns to Pacific, no reconnection function needs to be performed." (Footnote 1, from T-16116, pg. 9).

In R. T-16116 the Commission denied Pacific's request for a NRC waiver for "winback" CLC facilities based or SSP customers based on the following argument: when customers return from facilities-based carriers or from SSPs, Pacific would be required to perform certain "installation" functions. Thus, the NRC a new customer paid to Pacific to cover the initial connect and disconnect functions would not cover the cost of the "installation" type functions required when returning to Pacific from a facilities-based carrier or SSP.

After consideration of R. T-16116, the Commission then reviewed the process for returning customers from facilities-based carriers who are served on a UNE-Platform and the process for returning customers from facilities-based carriers who are served on a UNE-Loop basis.

Based on that review, the Commission also concludes that the process for switching "winback" customers returning from facilities-based carriers who are served on a UNE-Loop basis requires "installation" type activities, the cost of which are not covered by the NRC paid by a new customer to SBC. Therefore, the Commission asserts that

denying SBC's request, for authority to waive the NRC for customers returning from facilities-based carriers based on UNE-loop basis, is consistent with the Commission's denial of the same waiver for customers returning from facilities-based carriers in R. T-16116.

TD concludes that SBC should be allowed to waive the NRC for "winback" customers returning from facilities-based carriers who are served on a UNE-P basis, as this meets the requirements set forth in the Commission Orders and G.O. 96-A. TD also recommends that the Commission approve that portion of SBC's AL filings. TD concludes that SBC's request, to waive the NRC for "winback" customers returning from facilities-based carriers who are served on a UNE-Loop basis, do not meet the requirements set forth in the Commission Orders and G.O. 96-A and recommends that the Commission deny that portion of SBC's AL filing.

Commission approval is based on the specifics of the AL and the associated contract, and does not establish a precedent for the contents of future filings or for Commission approval of similar requests.

Comments

In accordance with P.U. Code Section 311 (g) TD mailed a copy of the original draft resolution on December 19, 2003 to SBC and other interested parties. Comments received within 5 business days from December 19, 2003 will be addressed in any final resolution.

Findings

1. SBC, in AL Nos. 24278 and 24279, requests that the Commission grant a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible residence and business customers returning and switching from facilities-based carriers to SBC.
2. SBC, in AL Nos. 24278 and 24279 request to "winback" as well as to "win-over" customers. "Winback" customers are customers who have switched to a SBC competitor and decide to return to SBC within six months of the initial change date. "Win-over" customers are customers who have switched to a SBC competitor and decide to return to SBC after having service with the competitor(s) for more than a six month period and also includes customers who have never had SBC's services previously.
3. SBC initially filed AL Nos. 23879 and 23880 on June 13, 2003, requesting that the Commission grant a one-year provisional tariff, authorizing SBC to waive the

installation service charge for eligible residence and business customers returning and switching from facilities-based carriers to SBC.

4. Timely protests to AL Nos. 23879 and 23880 were filed by AT&T on June 27, 2003; Cox on July 2, 2003; TelePacific, Telescape, and MPower, jointly, on July 2, 2003; and, ORA / TURN on July 3, 2003.
5. TD rejected SBC's AL Nos. 23879 and 23880 without prejudice on August 27, 2003, on the basis of CPUC Decision (D.) 02-02-049, Attachment A, Section IV.B. TD determined that the ALs raised several issues that fell under one or more of the three conditions stated in D.02-02-049, and therefore, was required to reject the ALs without prejudice.
6. SBC resubmitted AL Nos. 24278 and 24279 on October 10, 2003.
7. Cox, et al, and AT&T filed a timely protest to AL Nos. 24278 and 24279 on October 30, 2003. ORA filed a timely protest on November 3, 2003.
8. Resolution T-16116, dated April 9, 1998 approved SBC's request for a 90-day promotion waiving the NRC for customers returning to SBC from reseller CLCs.
9. Resolution T-16116 denied SBC's request for a 90-day promotion waiving the NRC for customers returning to SBC from facilities-based CLCs and SSPs, as SBC's proposed waiver of the NRC would fail to meet IRD's imputation tests.
10. NRCs are rate elements and are therefore subject to the imputation tests required by Commission decision D.94-09-065.
11. It is not Commission policy that NRCs are not rate elements.
12. It is not Commission policy that NRCs are not subject to the imputation tests in (D.) 94-09-065 and instead are subject to a "NRC burden test."
13. D. 94-09-065 requires that imputation tests for services should be assessed on a stand-alone rate element basis and not on a service basis.
14. Informal agreements made between SBC and TD are not binding on TD or the Commission
15. The level of competition in the local exchange carrier market has not been established by the Commission and remains an issue of disputed fact.

16. The Commission is not required to take guidance from the California Business and Professions Code.
17. It is appropriate for SBC to waive the NRC for Winback customers from facilities-based carriers served on a UNE-P basis.
18. It is not appropriate for SBC to waive the NRC for Winback customers from facilities-based carriers served on a UNE-Loop basis.

THEREFORE, IT IS ORDERED THAT:

1. SBC's request for a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible "winback" residence and business customers returning from a facilities-based carrier, served on a UNE-P basis, is granted.
2. SBC's request for a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible "winback" residence and business customers returning from a facilities-based carrier, served on a UNE-Loop basis, is denied.
3. SBC's request for a one-year provisional tariff, authorizing SBC to waive the installation service charge to "win-over " residence and business customers from all carriers, is denied.
4. Within 15 days from the effective date of this Resolution, SBC shall file a supplement to Advice Letter Nos. 24278 and 24279 to revise the draft tariff sheets to implement Ordering Paragraph Nos. 1, 2 and 3, above.
5. SBC's Advice Letter Nos. 24278 and 24279, their Advice Letter supplements, and the revised tariff shall become effective immediately upon Telecommunication Division's approval.

This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on January 22, 2004. The following Commissioners approved it:

WILLIAM AHERN
Executive Director