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Item # __
DRAFT **Agenda ID # 3564**
Alternate to Agenda ID # 3108
05/27/04

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Telecommunications Division **RESOLUTION T-16818**
Carrier Branch **May 27, 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 Letter (AL) Nos. 24278 and 24279, SBC California (SBC) 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.

This resolution reaches two decisions. First, this resolution denies SBC's request in its entirety, without prejudice, on substantive grounds. Due to procedural defects that are discussed below, this resolution reaches no decision on the merits of SBC's request for a waiver of nonrecurring charges (NRCs) for eligible residential and business customers returning and switching from facilities-based carriers to SBC. SBC is in the process of filing an application.

Second, this resolution denies SBC's request in its entirety, with prejudice, on procedural grounds. SBC's request involves disputed issues of material fact and law, and thus, the Commission's advice letter process is not the appropriate vehicle in which to consider such a request. SBC's request also does not conform to the Commission's requirements set forth in the Implementation Rate Design decision (D.94-09-065), which requires SBC to bring both of its rates and NRCs to their respective Commission-approved price floors prior to exercising pricing flexibility. Lastly, SBC's request is denied because it would require the Commission to modify a prior decision and any such modification cannot be done through the advice letter process, but only through a

formal process, such as through a petition to modify a prior decision or a formal application with the Commission.

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 Director of 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." 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.

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 asserted that its resubmitted request was 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's 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 LETTER NOs. 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 other 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 nonrecurring service charge 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 requires services to be assessed on a stand-alone basis. SBC, nevertheless, asserts 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 Resolution 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 further 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 that 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 ignore or reverse 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-14174[1]. 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.

Protestants contend that waiving the NRC 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 that 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 three market conditions to support its position.

D. THE DIRECTOR OF 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 needed to 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.[2] 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 asserts 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.

[2] In D.89-10-031, the Commission held that the term "rates" used throughout this decision encompasses both rates and charges unless specified otherwise. (*See* D.89-10-031, 33 CPUC 2nd at 251, fn. 15).

E. SBC RESUBMITTED ITS REQUEST IN AL Nos. 24278 AND 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 and, did not 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, and emphasized its position that NRCs are not separate rate elements and therefore the IRD Imputation tests do not apply.

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 SBC's re-submittal of the previously rejected ALs is procedurally improper.

All protestants argue that SBC's resubmission of previously rejected advice letters is not only procedurally improper, but that it was also a waste of the Commission's and other parties' resources. Protestants assert that 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 argues that its ALs were properly resubmitted and do not violate Commission procedures. SBC states that it re-filed its ALs in good faith, in order to allow TD an opportunity to reconsider its position. SBC also argues that it is its position that the Commission's policy and practice for its new service offerings 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 a separate rate element.

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

TD reaffirms its letter of "Rejection Without Prejudice"(*See* Attachment 1), sent to SBC 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.

Nonrecurring charges are separate rate elements and 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, 2003 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 used by SBC for its advice letter filings involving new services 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."

SBC's statement is correct as far as it goes, but 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), non-recurring charges, as rate elements, and the treatment of non-recurring costs, were therefore not discussed. 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).

In addition, SBC's tariffs consistently apply the terms "rates" and "charges" to "recurring" and "non-recurring," respectively. For example, Schedule CAL.P.U.C. NO. A2.1.1 (Rule No. 1 – Definition Of Terms) contains the following definition:

> "Each regular monthly customer bill for Residence Telephone Service shall provide itemized billing of the ***recurring rates, nonrecurring charges,*** and labor charges that are applicable as the result of new service connections or additions, moves and changes to existing services." (Sheet 71.1, Emphasis added)

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 BPC. However, SBC contends that the provisions of the BPC can guide the Commission, and that by now not following this guidance, the Commission is reversing its previous 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 (Anonymous Call Rejection) service on a provisional basis for two years, subject to certain conditions. Cox's argument is unsubstantiated.

I. THE COMMISSION'S RESPONSE TO SBC'S REFILED ADVICE LETTERS AND THE COMMENTS AND REPLY COMMENTS OF THE PARTIES FILED IN RESPONSE TO SBC'S REFILED ADVICE LETTERS

Based upon SBC's refiled ALs and the comments and reply comments of the protestants filed in response to SBC's refiled ALs, the Commission tentatively decided in the draft resolution to approve 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 carrier who were served on an UNE-P basis, but to reject SBC's request for a one-year provisional tariff to waive the installation service charge for eligible residence and business customers returning from a facilities-based carrier who were served on an UNE-Loop basis.

With respect to "winback" customers served on a UNE-P basis, the Commission looked to Resolution No. T-16116, which 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). This decision recognized that this activity would not require the customer to be physically disconnected from Pacific's network. Therefore, when the same customer returns to Pacific, no reconnection function would need to be performed.

The Commission observed that the process for switching "winback" customers returning from facilities based carriers who are served on a UNE-P basis was similar to that of switching back "winback" CLC reseller customers, and that because no reconnection function would need to be performed, there would be little cost associated with the activity. The Commission also noted that the process for switching "winback" customers returning from facilities based carriers who are served on a UNE-Loop basis would require that a reconnection function be performed, and that there would be significant cost associated with that activity.

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 are addressed below.

J. PARTIES' RESPONSES TO DRAFT RESOLUTION T-16818

1. SBC's Opening Comments on Draft Resolution T-16818

SBC filed its Opening Comments on January 22, 2004. SBC reiterates its arguments made in its previous comments in this proceeding, and raises the following two additional arguments. SBC claims that Draft Resolution T-16818 establishes new definitions of "winback" and "win-over" creating competitive disparity. SBC also states that the draft resolution is practically and legally not feasible to implement. SBC argues that implementing the draft resolution would require it to violate current regulations regarding the use of Customer Provided Network Information (CPNI).

2. Protestants' Opening Comments on Draft Resolution T-16818

Opening comments on Draft Resolution T-16818 were filed by jointly by Cox California Telecom, L.L.C. and Pac-West Telecom, Inc. on December 30, 2003; by AT&T Communications of California, Inc. on December 29, 2003; and, by the CPUC Office of Ratepayer Advocates on December 29, 2003. All parties reiterated their previous arguments, emphasizing that it was procedurally incorrect to use the advice letter process to review SBC's requests in ALs Nos. 24278 and 24279.

In addition, the protestants objected to the Commission's decision reached in the draft resolution to partially approve SBC's request. AT&T specifically states that it and other carriers have not had the opportunity to review or comment on the Commission's analysis relating to the similarities or differences between migrating UNE-P customers and resale customers from CLECs to SBC. AT&T asserts that the Commission's analysis may be incorrect.

3. Reply Comments to Opening Comments on Draft Resolution T-16818 were filed by all Parties.

Reply comments were filed by SBC on January 5, 2004; by AT&T on January 5, 2004; jointly by Cox and Pac-West on January 5, 2004; and, by ORA on January 5, 2004. All parties generally reiterated arguments made in their previous comments to these two AL filings.

K. THE COMMISSION REJECTS, WITH PREJUDICE, SBC'S AL Nos. 24278 AND 24279 BECAUSE SBC'S FILING IS PROCEDURALLY INAPPROPRIATE. THE COMMISSION REACHES NO DECISION ON THE MERITS OF SBC'S REQUEST FOR WAIVER OF NRCS. THE COMMISSION REAFFIRMS THAT NRCS ARE RATE ELEMENTS AND SUBJECT TO THE PROVISIONS OF THE IRD DECISION

In Draft Resolution T-16818, the Commission tentatively approved 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 carrier and were served on an unbundled network element-platform (UNE-P) basis.

However, as discussed in Section J. above, in their opening comments to Draft Resolution T-16818 all parties, including SBC, argued against the Commission's approving the waiver only for customers returning from a facilities-based carrier and, served on a UNE-P basis. The parties also rejected the waiver for those customers returning from a facilities-based carrier and, served on a UNE-Loop platform.

Notably, SBC argues that it is not practically or legally feasible to implement Draft Resolution T-16818. In addition, protestants continue to argue that the ALs violate the IRD and other Commission decision and orders, and for the Commission to consider the issues raised via the AL process is procedurally in appropriate.

The Commission has reviewed all opening comments and based on the parties' arguments, the Commission rejects AL Nos. 24278 and 24279, in their entirety.

Commission action is based on the specifics of these Advice Letters and does not establish a precedent for the contents of future filings or for Commission approval of similar requests.

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 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.

3. 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.

4. 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.

5. SBC resubmitted AL Nos. 24278 and 24279 on October 10, 2003. These ALs were identical to AL Nos. 23879 and 23880 rejected by TD on August 27, 2003.

6. 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.

7. It is Commission policy that NRCs are rate elements.

8. It is Commission policy that NRCs are subject to the imputation tests set forth in (D.) 94-09-065.

9. 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.

10. Informal agreements made between SBC and TD are not binding on TD or the Commission.

11. The level of competition in the local exchange carrier market has not been established by the Commission and remains an issue of disputed fact.

12. The Commission is not required to take guidance from the California Business and Professions Code.

13. It is appropriate for the Commission to reject, with prejudice, SBC's ALs. Nos. 24278 and 24279, on the basis of CPUC Decision (D.) 02-02-049, Attachment A, Section IV.B.

14. It is appropriate for the Director of the Telecommunications Division, to reject advice letters, without such rejection being put before the Commission in a resolution.

15. SBC's requests in AL Nos. 24278 and 24279 can only be pursued in a formal evidentiary proceeding. SBC should consider initiating an appropriate formal venue for such consideration of the merits of its requests.

THEREFORE, IT IS ORDERED THAT:

1. SBC's requests for a one-year provisional tariff, authorizing SBC to waive the installation service charge for eligible residence and business customers returning from facilities-based carriers is denied in its entirety.

2. We affirm our policy as adopted in T-14174 (adopted 10/12/1990) and T-15164 (adopted 3/24/1993) that the criteria for waiving or discounting NRC's requires that the financial impact on the entire service be included to reflect the revenue required to recover the cost of the promotion. This resolution adopts this policy for all tariff filings where the NRC is discounted or waived.

This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on May 27, 2004. The following Commissioners approved it:

WILLIAM AHERN
Executive Director

COM/SK1

ATTACHMENT I TO DRAFT RESOLUTION T-16818
AGENDA ITEM #3108, May 27, 2004 Commission Meeting

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 27, 2003

Cynthia Wales
Executive Director
Regulatory
SBC California
140 New Montgomery Street
Room 1728
San Francisco, CA 94105

Dear Ms. Wales:

Subject: Pacific Bell Advice Letters No. 23879/23879A/23879B and No. 3880/23880A/23880B

This letter is to inform you that the Telecommunications Division (TD) is rejecting SBC's Advice Letter (AL) Nos. 23879/23879A/23879B and AL Nos. 23880/23880A/23880B without prejudice, pursuant to CPUC Decision 02-02-049, Attachment A, "Guidelines for Advice Letter Rejection, Suspension, and Hearings", Section IV.B, "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".

It would be appropriate for SBC to refile AL Nos. 23879B and 23880B with the Telecommunications Division, to be evaluated on their own merit. AL Nos. 23879B and 23880B, as currently written, conform to the requirements of Resolution T-16116 and do not raise issues that are disputed issues of material fact or law.

There are several issues raised by the AL filings that TD has determined fall under one or more of the three conditions stated in Section IV.B, and therefore, require TD to reject the AL filings without prejudice. The issues are discussed below:

1. In its AL filings and subsequent correspondence on the AL filings, SBC asserts, "(W)e believe that the current highly-competitive marketplace warrants this request for an exception". Specifically, in its July 11, 2003 correspondence to Jack Leutza, Director of the Telecommunications Division, SBC states, "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 presents a great deal of additional data to support its assertion that the California local exchange market is vigorously competitive.

The Protestants[1] to AL 23879 and AL 23880 dispute SBC's assertions as to the level of competition in California's local exchange market. For example, ORA counters with recent FCC figures that show that as of December 31, 2002, CLEC's hold 11% of all end-user switched access lines served in California. There are several other data presented by the Protestants to counter SBC's assertions as to the level of competition.

Clearly the level of competition in the telecommunications market in California is a disputed issue of material fact, and as such should be determined through an evidentiary hearing.

2. In its AL filings SBC asserts, "While SBC realizes that current Commission policy is that imputation tests for services should be assessed on a stand-alone basis, we believe that the current highly-competitive marketplace warrants this request for an exception". TD previously, in Resolution T-16116, denied SBC's request for the same waiver as proposed in today's AL filings, as the proposed waiver, "fails all three imputation tests adopted in IRD".

Nevertheless, SBC maintains[2] that the "IRD (D.94-09-065) set forth a methodology for establishing price floors which did not include non-recurring costs. OANAD (D.99-11-050, Appendix D) validated this policy when it set price floors for residential and business access lines. Neither adopted floor includes non-recurring costs".

TD is of the position that non-recurring costs (NRCs) are "Rate Elements", and as such are addressed in D.88-09-059, "The provided cost support must be either a direct embedded cost or fully allocated embedded cost analysis…All floor **rates and charges** will be set at or above these costs", and, D.94-09-065, "To guard against subsidization of competitive services, we will apply the LRIC floor on a rate element basis, rather than a service basis. Thus, the price floors for Category II services should be based on the LRICs of **all rate elements** of the competitive components". (Emphasis added)

Clearly the application of imputation tests to NRCs, and the interpretation of the IRD in regard to the treatment of NRCs, are disputed issues of material fact, and as such, should be decided through an evidentiary hearing.

3. In its reply to the protests filed by various parties, SBC California cites Business and Professions (B&P)
Code Section 17050(d) to support its contention that companies may price products and services below cost to compete. However, according to the Commission's Legal Division, the Commission has held that the Unfair Practices Act does not apply to services regulated by the Commission. In Investigation on the Commission's own motion into the establishment of a forum to consider rates, rules, practices and policies of Pacific Bell and GTE California Incorporated; 1993 Cal. PUC LEXIS 753; 51 CPUC2d 519, the Commission held as follows:

Conclusion of Law:

4. The California Unfair Business Practices Act does not apply to services provided by a public utility regulated by the Commission.

[1] The following parties have filed protests against AL 23879 and AL 23880: Office of Ratepayer Advocates, TURN, COX and "Joining Protestants"(U.S. TelePacific Corp. d/b/a /TelePacific Communications, Telscape Communications, Inc. and Mpower Communications Corp.).
[2] "SBC California Installation Charge Waiver ", Discussion with TD Staff, July 23, 2003.

The Commission's conclusion of law is statutorily supported in B&P Code Section 17024, which states as follows:

Nothing in this Chapter [referring to the Unfair Practices Act, Section 17000 et al.] applies:

(2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Public Utilities Commission if this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

Clearly, the applicability of Unfair Practices Law to this AL filing is a disputed issue of material and legal fact, and, as such, should be decided by evidentiary hearing.

Given the three issues discussed above that are all clearly disputed issues of material fact, and issue 3., which is also an issue of disputed legal fact, in accordance with the Commission's "Guidelines for Advice Letter Rejection, suspension, and Hearings", TD is required to reject the AL filings without prejudice.

Sincerely,

Jack Leutza, Director
Telecommunications Director

cc: Gregory H. Hoffman, AT&T
Jose Jimenez, Cox Communications
Denise Mann, ORA
John L. Clark, Attorney at Law
Christine Mailloux, TURN