Decision 04-12-053 December 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Telscape Communications, Inc., Complainant, vs. Pacific Bell Telephone Company, Defendant.	Case 02-11-011 (Filed November 5, 2002)

John L. Clark, Goodin, MacBride, Squeri, Ritchie & Day, LLP, for Telscape Communications, Inc., complainant.
Randolph W. Deutsch, Sidley Austin Brown & Wood LLP, for AT&T Communications of California, Inc., intervenor.
William C. Harrelson, WorldCom, Inc., for WorldCom, Inc., intervenor.
Michael J. Kass, Pillsbury Winthrop LLP, for Pacific Bell Telephone Company, defendant.

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OPINION RESOLVING COMPLAINT

1. Summary

This complaint, filed by Telscape Communications, Inc. (Telscape), in which AT&T Communications of California, Inc. (AT&T) and WorldCom, Inc. (MCI)[1] have intervened,[2] alleges that several policies and practices of defendant Pacific Bell Telephone Company (SBC-CA)[3] with respect to the provision of local exchange telephone service (local voice service) are anticompetitive and discriminatory. We find that SBC-CA's refusal to process orders for changing a customer's local voice service to that of a competitive local exchange carrier (CLEC) if the customer also subscribes to SBC Yahoo! DSL (SBC-CA's retail digital subscriber line (DSL)[4] service) and, in some circumstances, other retail DSL service, violates Pub. Util. Code §§ 451 and 453(a).[5]

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[1] During the course of this proceeding, WorldCom changed its name to MCI, Inc.

[2] We sometimes refer to complainant Telscape and the two intervenors collectively as "complainants."

[3] During the course of this proceeding, defendant began using the name SBC California, and we will use it as well.

[4] DSL is a broadband service that relies on the traditional copper telephone wire to transmit broadband data to and from the service customer's location. The signals for DSL travel through the high frequency portion of the loop (HFPL), while the signals for ordinary telephone service travel through the low frequency portion of the loop (LFPL). There are several types of DSL; asymmetric DSL is used in the circumstances addressed in this proceeding. Although the existence of different types of DSL is sometimes noted by using the acronym "xDSL," we refer simply to "DSL."

A table of acronyms is provided in Appendix A.

[5] Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and citations to rules refer to the Commission's Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

We further find that the partial settlement entered into by AT&T, MCI, and SBC-CA to resolve allegations that SBC-CA has abused the winback process and encouraged incorrect accusations of slamming is reasonable in light of the whole record, consistent with law, and in the public interest. We therefore approve it. We further require SBC-CA to extend its third-party verification process to include slamming allegations for residential local voice service.

We conclude that Telscape has not demonstrated that its broad objections to the functioning of SBC-CA's operational support systems (OSS) are well-founded, but we order SBC-CA to remedy deficiencies in its treatment of certain non-recurring service order charges, in its handling of billing disputes with CLECs, and in its implementation of its Performance Incentives Plan.

2. Regulatory Background

For more than a decade, we have taken steps to foster telecommunications innovation and competitive markets, as exemplified in the Open Access and Network Architecture Development of Dominant Carrier Networks proceeding (OANAD), R.93-04-003 / I.93-04-002; the Competition for Local Exchange Service proceeding, R.95-04-043 / I.95-04-044; our decision (Decision (D.) 02-09-050) on SBC-CA's application for long distance authority pursuant to Sec. 271 of the Telecommunications Act of 1996, Pub. L. No. 104-104;[6] and our decision on SBC-CA's compliance with the requirements of Sec. 709.2 (D.02-12-081). The Legislature has consistently expressed its policy of encouraging open markets

[6] The Federal Communications Commission (FCC) subsequently approved SBC-CA's entry into the long-distance market in *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization to Provide In-Region InterLATA Services in California,* WC Docket No. 02-306, 17. F.C.C.R. 25,650 (Dec. 19, 2002).

and consumer choice and discouraging anticompetitive conduct. See Secs. 709; 709.2; 709.5.

With the passage of the 1996 Telecommunications Act, the federal government also asserted its interest in opening local voice service markets to competition and promoting innovation in telecommunications, and provided us with additional direction and requirements for opening telecommunications markets to competition.[7] The 1996 Act also preserved states' authority to enforce state law and to regulate, as long as the state activities do not substantially prevent implementation of the 1996 Act. (47 U.S.C. §§ 252(e)(3); 251(d)(3); 261(b), (c).)

Early in the process of establishing competitive markets, we noted our intention to continue monitoring the progress of competition on an ongoing basis and stated that we would not "prematurely remove regulatory safeguards which are in place to ensure that carriers cannot abuse their market power to the detriment of the public interest." (D.96-03-020, 65 CPUC2d 156, 168.) In our

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[7] We note that the structure of conditions for competition is not completely established. The FCC recently revised some of its prior requirements for fostering meaningful competition. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability* (*TRO*), CC Docket Nos. 01-338, 96-98, 98, 147, 18. F.C.C.R. 16, 978 (Aug. 21, 2003), *vacated in part and remanded in part sub nom. United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004). (We refer to this order hereafter as the *Triennial Review Order*.) The FCC has issued a Notice of Proposed Rulemaking (FCC 04-179) following on the D.C. Circuit's decision. See 19 FCC Rcd 16783 (Aug. 20, 2004); http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179A1.pdf.

The permanent line sharing phase of our OANAD proceeding, as well as part of the triennial review order nine-month phase of our Local Competition proceeding, are still active. Since this area of law remains dynamic, we cannot wait for complete certainty before we address the issues in this complaint.

Sec. 271 decision, we noted that our regulatory oversight was a reasonable check on the possibility of anticompetitive behavior. (D.02-09-050, p. 260 (*mimeo.*).) In D.02-12-081, we reiterated our determination to impose sanctions on demonstrated anticompetitive conduct. (p. 24, *mimeo.*) In this proceeding, we are presented with claims by some of SBC-CA's competitors that SBC-CA is not playing by the rules of a competitive local voice service marketplace. On March 17, 2004, this case was submitted for decision.

3. Statement of Facts

3.1 Complainants

Telscape is a CLEC that focuses on the provision of local and long distance telephone service to Spanish-language dominant Hispanic households, largely in Southern California. It provides facilities-based services, using its own switches and unbundled network elements (UNEs) leased from SBC-CA; this arrangement is often referred to as UNE-Loop (UNE-L). Telscape also provides services using the "UNE platform" (UNE-P), which consists of leasing from SBC-CA all the elements needed for service to the end-user customer.

AT&T is a CLEC that provides local and long distance services, as well as DSL services in some areas. In California, it uses UNE-P for its mass market local voice services.[8]

MCI is a CLEC that is the largest competitive provider of local residential voice service in the United States. It provides local and long distance services, as well as DSL service in some areas. In California, it uses UNE-P for its mass market local voice services.

[8] The parties have referred to residential and small business customers as "mass market" customers, as will we.

3.2 Defendant

SBC-CA is an incumbent local exchange carrier (ILEC) that provides local and long distance services. It is a wholly owned subsidiary of SBC Communications, Inc. (SBC), whose headquarters are in San Antonio, Texas. SBC-CA markets to mass market customers the retail product SBC Yahoo! DSL, which consists of DSL transport provided by SBC Advanced Solutions, Inc. (ASI) through UNEs leased from SBC-CA; internet service provider (ISP) services provided by SBC Internet Services (SBC IS); and content provided by Yahoo!, Inc. The SBC Yahoo! DSL product is advertised throughout the 13-state area in which SBC operates. In California, the SBC Yahoo! DSL product is available only to SBC-CA local voice customers.

3.3 DSL and Local Voice Service

SBC-CA provides approximately 73% of residential local voice service in California. Statewide, all CLECs serve about 6% of local residential customers.[9] In California, about 49% of broadband connections utilize DSL, and 39%, cable modem. This is different from the nation as a whole, where 59% of broadband connections utilize cable modem and 34%, DSL.[10]

If a customer wishes to change her local voice provider from SBC-CA to a CLEC, he or she makes arrangements for service with the CLEC. The CLEC then makes a Local Service Request (LSR) to SBC-CA to "migrate" the customer's service to the CLEC. If the SBC-CA customer also subscribes to SBC Yahoo! DSL, however, SBC-CA will automatically reject the request for the local voice service

[9] California Public Utilities Commission, "The Status of Telecommunications Competition in California: Third Report for the Year 2003, " p. 16 (Oct. 31, 2003) (Third Competition Report). Data are as of the end of 2002. We take official notice of the information in the Third Competition Report pursuant to Rule 73.

[10] Third Competition Report at 39. Other forms of broadband make up the balance.

migration. This rejection is triggered by SBC-CA's requirement that the LSR include instructions from the new voice CLEC that specify how DSL service will be provided once the customer's local voice service has been migrated.[11] ASI, the DSL transport provider for the retail product SBC Yahoo! DSL, does not have line splitting arrangements with any voice CLEC[12] and does not provide DSL transport services unless SBC-CA provides the local voice service. Thus, no LSR for the migration of any SBC-CA voice customer with SBC Yahoo! DSL will meet SBC-CA's criteria of validity, and all will be rejected.[13]

Telscape estimates that, when it investigated the situation about two years ago, approximately 10 percent of its LSRs were rejected because the potential customer had SBC Yahoo! DSL. SBC-CA rejected approximately 3,000 such LSRs from AT&T in the period from December 29, 2002 through May 3, 2003, and approximately 7,800 such LSRs from MCI in the period from January 1, 2003 to August 15, 2003.

The SBC-CA customer with SBC Yahoo! DSL who wants to change her local voice service to a CLEC must go through several steps. She must first find

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[11] SBC-CA provided a clear explanation of this ordering requirement for the first time in its appeal of the Presiding Officer's Decision (POD). Because this explanation, though not given at the evidentiary hearing (EH), is not inconsistent with the evidence presented at the EH and was not contradicted by any other parties in their responses to SBC-CA's appeal, we will accept it here.

[12] The FCC defines line splitting as "the scenario where one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop." *Triennial Review Order*, ¶ 251.

[13] LSRs may also be rejected when the SBC-CA voice customer has a retail DSL arrangement other than SBC Yahoo! DSL, but there is no evidence in this record of how often or in what circumstances this occurs. We therefore refer to SBC Yahoo! DSL in this order, unless clarity requires otherwise.

out that she cannot switch to the CLEC while she maintains SBC Yahoo! DSL. She must then cancel SBC Yahoo! DSL. She next must call the CLEC of her choice and arrange for local voice service. Once SBC-CA has processed the cancellation of SBC Yahoo! DSL, the LSR for the migration of local voice service to the CLEC can be processed. If the customer wants to regain DSL service, she must arrange for another DSL provider. (Some CLECs, such as Telscape, do not provide retail DSL service. Some, such as AT&T, do.)[14] With a new DSL provider, the customer will also have to install hardware and software for the new DSL service. The customer will then also need to find a new ISP to provide connection to the internet (including a new electronic mail (e-mail) address for the customer) using the new DSL service.

Very few SBC-CA Yahoo! DSL customers change their local voice service to a CLEC. Information reviewed by AT&T from several states where SBC Yahoo! DSL is offered shows that all potential AT&T customers informed by AT&T sales representatives that they would have to cancel SBC Yahoo! DSL in order to change their local voice service to AT&T indicated that they no longer wanted to change to AT&T. Because they have concluded that virtually no potential customer with SBC Yahoo! DSL will change local voice service, AT&T and MCI instruct their sales representatives to ask potential customers whether they currently subscribe to SBC Yahoo! DSL, and to turn down the potential customer's business if the answer is "yes." Telscape does not have specific instructions for its sales representatives on this subject, but expects them also to advise potential customers with SBC Yahoo! DSL that Telscape will not be able to

[14] In some circumstances, it may not be possible to regain DSL service. For example, if no CLEC providing DSL transport has a collocation facility in a central office close to the customer, it will be impossible for the customer to have DSL service because of the limitations on the distance over which signals for DSL are able to travel.

provide local voice service. The approximately 11,800 rejected AT&T and MCI LSRs in late 2002 and 2003 therefore represent only orders in which the CLEC did not know about the potential customer's existing SBC Yahoo! DSL, or submitted the LSR in error.

3.4 Winback Practices

When a customer switches phone service from one carrier to another, the carrier that has lost the customer often engages in "winback" activity to try to persuade the customer to return. SBC-CA has an extensive winback operation for local voice service, in which its retail marketing personnel make use of information compiled from SBC-CA computer data about customers who are changing their service. The CLEC's LSR for the customer migration is entered into SBC-CA's Service Order Retrieval and Distribution system. The starting point for winback activities is the posting of the status "complete" for the order in this system, *i.e.*, SBC-CA's records show that the customer's service has been changed to the CLEC. This information is then moved through various SBC-CA data systems over a period of about two days, resulting in a list of former customers that is provided to the SBC-CA personnel who work on winback programs.

SBC-CA's winback efforts include sending letters and making telephone calls to former customers. SBC-CA uses a variety of winback letters, which may offer special deals to former customers (*e.g.*, discounts or rebates on some services). Some winback letters have also included the suggestion that the customer's service had been switched without the customer's consent (a practice known as "slamming"). Scripts followed by SBC-CA winback personnel in telephone calls to former customers also may include special offers and inquiries suggesting the customer was slammed. The scripts do not require the SBC-CA

personnel to verify that the person with whom they are speaking is the only person in the household who is authorized to initiate changes in telephone service. A joint investigation by Telscape and SBC-CA within the last two years showed that Telscape sales personnel and SBC-CA winback personnel often talked with different members of the household for which local voice service was switched from SBC-CA to Telscape. SBC-CA's third-party verification process for substantiating allegations of slamming is applied to slamming allegations about local toll and long distance services, but not to allegations of slamming for local voice service. SBC-CA plans to extend this process to local voice service.

On December 5, 2003, AT&T, MCI, and SBC-CA filed a Motion for Adoption of Partial Settlement. The proposed partial settlement (Settlement), attached as Appendix B, is intended to settle the claims of AT&T and MCI with respect to winback practices.[15] The Settlement requires SBC-CA to remove from all its winback materials any suggestion that the former customer was slammed or that the former customer received incomplete or inaccurate information prior to making the local service change, and to educate its winback personnel to avoid making any such suggestions to former customers. The Settlement provides that SBC-CA will implement its provisions within four weeks of our approval. Telscape did not file comments on the Settlement. (See Rule 51.4.)

3.5 OSS Issues

OSS consists of five major functions supported by the ILEC's databases and information: pre-ordering, ordering, provisioning, maintenance and repair,

[15] As part of the settlement, AT&T MCI withdrew previously distributed prepared testimony of their witnesses on winback issues.

and billing.[16] SBC-CA's OSS functions are available to CLECs on a nondiscriminatory basis.

3.5.1. Non-recurring Charges

When a CLEC places an order for UNEs, or requests a change in configuration or disconnection of UNEs, SBC-CA is authorized to assess non-recurring service order charges to cover its costs for the ordering process, separate from the costs of the actual connection, reconfiguration, or disconnection of the UNEs.[17] Service orders are processed in different ways. A "fully mechanized" service order is transmitted by the CLEC to SBC-CA electronically, and processed by computers without human intervention. A "semi-mechanized" service order is transmitted electronically by the CLEC, but requires some intervention by SBC-CA personnel in a Local Service Center (LSC) in order to be completed. A "manual" service order is generally submitted by the CLEC in the form of a facsimile transmission and requires personnel in the LSC to enter all the information into SBC-CA's order system. SBC-CA is authorized to charge different rates, based on both the UNEs ordered and the form of processing needed, ranging from a few cents for most fully-mechanized orders to more than $100 for some manual orders.[18]

Electronically-submitted orders are eligible for fully mechanized processing according to standards and policies established by SBC-CA, with input from CLECs through the Change Management Process, a forum for CLECs and SBC to address OSS issues. Electronically-submitted orders that are

[16] *Triennial Review Order,* ¶ 561.

[17] The costs associated with the retail services of SBC-CA (or any ILEC) may not be considered in UNE pricing. (47 C.F.R. § 51.505(d)(2).)

[18] The initiation of this system is explained in D.98-12-079, 84 CPUC2d 272, 289 (1998).

processed without the need for work by LSC personnel are said to "flow through." SBC-CA has increased the number of orders that will flow through over the course of several years, and continues to add to that group. Not all orders will flow through, however. Electronically-submitted orders may "fall out of flow-through" either because they are exceptions to flow through (*i.e.*, a special case of an order type that generally would flow through) or because they are exclusions from flow through (*i.e.*, the orders are in a category for which SBC-CA has not made fully mechanized ordering possible). Because of the large differentials in cost among the types of order processing, maximizing the number and utility of orders that are eligible for flow-through is important to CLECs.

3.5.1.1. Exceptions to Flow-through

Electronically submitted orders for UNE-P service are generally eligible for flow-through. In some circumstances, however, such orders fall out of flow-through. Four such exceptions remain at issue in this proceeding.

First, an order will fall out if it seeks to migrate from SBC-CA to a CLEC one of two telephone lines that do not "hunt" (seek the other line if the one called is unavailable). This type of order falls out of flow-through so that the LSC may create documentation for SBC-CA to use in properly billing the SBC-CA line remaining to the customer.

Second, an order will fall out if one of several UNEs in the order requires LSC intervention to be processed. In that case, all parts of the order are treated on a semi-mechanized basis.

Third, a CLEC's order for new service to a customer will fall out if there is working telephone service on the premises (WSOP) to which the order

relates.[19] A UNE-P order will fall out for this exception if the CLEC leaves blank one of the fields of the order form.

Fourth, an order to migrate a customer who is eligible for Universal Lifeline Telephone Service (ULTS) to UNE-P or UNE-L with number portability will fall out if SBC-CA does not have a current ULTS certification on file for the customer.[20] LSC personnel check the certification status in order to allow SBC-CA to rebill the customer for the difference between ULTS rates and regular retail rates if it turns out that the customer did not meet the requirements for ULTS. After discussions in the CLEC User Forum in 2002, SBC-CA agreed to charge fully mechanized rates for ULTS migrations, although LSC personnel continue to be involved in those orders for SBC-CA's billing purposes. SBC-CA has not, however, changed the billing status of ULTS orders in its OSS system. Telscape is currently billed at semi-mechanized rates for ULTS migrations, with SBC-CA issuing credits for overcharges after Telscape identifies and disputes the semi-mechanized charges.

3.5.1.2. Exclusions from Flow-through

SBC-CA's OSS does not currently allow all orders that are potentially able to flow through to do so. SBC-CA adds to the list of flow-through eligible orders at various times, either in response to recommendations of the Change Management Process or CLEC User Forum, or for other reasons.

[19] *E.g.*, the customer wants to add a new telephone line or a renter or a roommate wants his or her own line.

[20] General Order 153 sets out the requirements for self-certification and recertification of ULTS eligibility.

Changes to flow-through eligibility are announced in Accessible Letters and then incorporated in SBC's CLEC Handbook.[21]

3.5.1.3 EISCC Cabling Charges[22]

For facilities-based service, a CLEC, such as Telscape, must have a collocation facility in the central office of the ILEC, here, SBC-CA. An expanded interconnection service cross-connect (EISCC) connects SBC-CA's intermediate distribution frame to Telscape's collocation facility. In order for the facilities-based service to work smoothly, both SBC-CA and Telscape must, among other things, keep track of the assignment of EISCC cable pairs to their respective facilities. In some cases of trouble on a customer's line, the EISCC can be the source of the problem. To identify and fix the problem, a CLEC can use "tech-to-tech" testing with SBC-CA, which became generally available in April 2002. It can also order a change in "connecting facility assignment" (CFA), which is a change in the relevant EISCC cable pair.

To order a CFA change, Telscape prepares an LSR by following SBC-CA's instructions for the CFA Expedite Process. SBC-CA then makes the CFA change and bills Telscape. The billing includes the following elements: service order connect charge ($30.43); channel connect charge ($18.87); service order disconnect charge ($21.38); channel disconnect charge ($8.71); EISCC cable connect charge ($2.11); and EISCC cable disconnect charge ($3.35). The total that

[21] The CLEC Handbook and other information and instructions for CLECs are available at SBC's CLEC web site, https://clec.sbc.com/clec. At the request of the parties, we take official notice of the contents of this web site.

[22] Telscape's petition to set aside the case submission and reopen this proceeding to take additional evidence and briefing on the EISCC issue was granted by an Administrative Law Judge's Ruling dated March 3, 2004. SBC-CA and Telscape then submitted additional briefs and exhibits.

SBC-CA charges for a CFA change is $84.85. The Telscape-SBC-CA interconnection agreement does not establish a charge for a CFA change.[23]

3.5.2. Billing

SBC-CA has a variety of systems and processes that are employed in generating bills for CLECs and resolving billing disputes. The Customer Record Information System is used primarily for SBC-CA retail billing, but also bills CLECs that are resellers. The Carrier Access Billing System is used to bill CLECs for UNEs and interconnection products; recurring charges, non-recurring charges, and usage charges are billed through this system. Bills are presented to CLECs in formats that comply with the standards set by a voluntary national organization, the Ordering and Billing Forum.

SBC-CA LSCs are organized by products. CLECs, such as Telscape, may be assigned to multiple LSCs: Telscape has one LSC for UNE-P orders and one for all other business. LSC personnel answer billing inquiries, process adjustments for incorrectly billed amounts, and participate in resolving billing disputes. CLECs submit billing disputes to the LSC, which has the goal of resolving all correctly presented disputes within 30 days. If the dispute is not resolved in 30 days, the LSC must notify the CLEC of the dispute status. If a billing dispute is not initially resolved to the CLEC's satisfaction, the CLEC may use the LSC "escalation" procedure, which involves going to an LSC manager, then the LSC area manager, then the director of the LSC.

SBC-CA "account team" personnel are organized by CLEC. Multiple account managers may be assigned to one large CLEC or multiple CLECs may be

[23] At the request of SBC-CA, with Telscape's agreement, we take official notice of the parties' interconnection agreement, which adopted the interconnection agreement between Pacific Bell and MCImetro Access Transmission Service LLC.

assigned to one account manager; Telscape is in the latter category. There is also a dispute resolution process within the account team structure. The escalation process within the account team is usually invoked if the CLEC is not satisfied with the response from the LSC. Escalation moves from the CLEC's account manager, to the account team director, to the account team vice president.

Disputes may be resolved rapidly, or may take months. Once a billing dispute has lasted beyond 30 days, SBC-CA does not have any quantitative standard for the period of time within which it should be resolved. When disputes are resolved, any credits due to the CLEC may appear on the CLEC's next bill or may appear on a later bill, possibly several months later.

In any given month, Telscape typically has more than two dozen open billing disputes with SBC-CA; Telscape typically disputes $15,000-$30,000 of the amounts billed by SBC-CA. Many of Telscape's disputed bills are for non-recurring charges for UNEs, but bill disputes also arise with respect to usage charges and other billing categories. Some of Telscape's billing disputes relate to inaccurate or incomplete credits for amounts agreed on in previously resolved disputes.

3.5.3. Waiver of Performance Measure Remedies

In a series of decisions in our proceeding on Monitoring Performance of Operations Support Systems, R.97-10-016, I.97-10-017, we established performance measurements, performance criteria, and monetary incentives to help ensure that SBC-CA's OSS provides appropriate service to CLECs. In at least one instance, SBC-CA and Telscape have negotiated a settlement of Telscape's claim for overcharges through SBC-CA's internal dispute resolution procedures in which Telscape agreed to waive performance remedies. Following Telscape's waiver, SBC-CA did not report a deficiency in performance to the

Telecommunications Division. SBC-CA has made similar agreements involving waiver of performance measure remedies with more than one other CLEC.

4. Discussion

4.1. DSL and Local Voice Service

In principle, any customer of SBC-CA may switch his or her local voice service to a CLEC with one phone call to the CLEC. SBC-CA, however, does not follow that principle if the customer has SBC Yahoo! DSL.[24] That customer must make multiple phone calls to both the CLEC and SBC-CA, as well as find a new DSL provider in order to regain DSL service.

Complainants assert that refusing to process otherwise complete and accurate requests to change local voice service is, on its face, anticompetitive and in violation of the mandate of Sec. 451 that "[a]ll rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."[25] SBC-CA offers four justifications for its practice. First, SBC-CA contends that the complainants have shown not that customers are harmed, but merely that they are inconvenienced, by SBC-CA's refusal to allow local voice migrations of customers with SBC Yahoo! DSL. Second, SBC-CA claims that its rule is not tailored to hold SBC-CA voice customers with SBC Yahoo! DSL hostage, but is neutrally applied to all LSRs for local voice migration to a CLEC using UNE-P. Third, SBC-CA states that its rule is justified because numerous

[24] SBC-CA voice customers with a retail DSL service other than SBC Yahoo! DSL may also be in this situation, since SBC-CA states that it rejects the LSR for local voice migration if SBC-CA's ordering system detects DSL service but the new voice CLEC does not provide information on provision of DSL service. No evidence was introduced at the EH on how often this scenario may occur.

[25] The fact that the rejection of the request is automatically accomplished by a computer program does not make the rejection, which is invariant, something other than a "rule."

operational difficulties would ensue if it allowed the LSR order to be executed. Fourth, SBC-CA asserts that, regardless of the impact of its rule, it is consistent with state and federal legal requirements.

SBC-CA's assertion that the complainants failed to demonstrate harm to customers is not supported by the record. The record shows that thousands of customers who wanted to change their local voice service to a CLEC were prevented from doing so when SBC-CA rejected the LSRs for the change. Many customers who want to make this change are preemptively informed by the CLECs that they will not be able to do so. The harm to the customer is SBC-CA's frustration of the customer's intention to take advantage of competitive services in the local voice marketplace, and complainants have amply demonstrated the existence of that frustration.[26]

SBC-CA's affirmative claim that only minor inconvenience to customers results from its policy is supported neither by the record nor by common experience. In making that argument, SBC-CA puts great weight on the availability of free web-based e-mail services, such as hotmail.com and Yahoo.com. These services, SBC argues, allow anyone to have a stable e-mail address (*e.g.*, janecustomer@hotmail.com) regardless of whether the customer maintains SBC Yahoo! DSL service.[27]

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[26] This harm would exist both in the case demonstrated on this record, where the customer subscribes to SBC Yahoo! DSL, and in the case suggested by SBC-CA's submission on appeal, where the customer does not subscribe to SBC Yahoo! DSL but has a different current DSL transport provider triggering rejection of the LSR.

[27] At the EH, the parties offered a number of exhibits consisting of excerpts from various web sites. In order to allow reference to information from the entire web site, the parties agreed that official notice could be taken of the web sites. Because the contents of the web sites are not reasonably subject to dispute (though their significance may be disputed), we take official notice of the contents of the web sites of the parties to this proceeding.

This point is accurate as far as it goes, but it does not go far enough to justify SBC-CA's policy. If free web-based e-mail were all that customers needed, there would be no market for SBC Yahoo! DSL, which is not free. More fundamentally, ending SBC Yahoo! DSL service means not simply ending the customer's e-mail address; it means ending the customer's *DSL access*. A hotmail.com e-mail address does not help customers who have lost the ability to connect to the internet because they have had to cancel their SBC Yahoo! DSL as a step in the process of transferring their local voice service.[28]

SBC-CA also ignores the impact of the process itself on the customer's ability to change his or her local voice provider. The SBC Yahoo! DSL subscriber must have at least three interactions in order to change local voice providers and regain DSL access— 1) with SBC-CA to cancel SBC Yahoo! DSL, 2) with the CLEC to arrange the local voice service change, and 3) with a new DSL provider—while the SBC-CA customer without SBC Yahoo! DSL who wants to change local voice providers merely has to call the CLEC. Even if the customer is willing to give up DSL service altogether, he or she still needs to have at least two interactions, with both SBC-CA and the CLEC, to make the local voice service change.

In its appeal, SBC-CA asserts for the first time that the rejection of LSRs complained of is in fact a method of protecting customers' interests. SBC-CA will reject the order "if the existing DSL service has not properly been addressed," regardless of the DSL transport provider or the identity of the local

[28] In view of our analysis of its significance, we do not examine the issue of e-mail addresses at the level of detail that the parties presented at the EH.

voice provider. By rejecting the order, SBC-CA "ensures that customers. . . do not lose their DSL service inadvertently. . ." [29]

This rationale, however, proves too much. SBC-CA essentially admits that, through its order processing system, it is interfering in the relationships among the customer, the voice CLEC, and the DSL transport provider. SBC-CA advances no technical or legal justification for this behavior other than its asserted concern about customers' loss of DSL service. Protecting customers' DSL connections—provided by a separate DSL transport provider—is not, however, properly the province of an ILEC as the wholesale provider of services.

The overall plan of competition in telephone services and products, as noted earlier, is to allow *the customer* to choose the services, combination of services, and service providers that best meet the customer's needs. A customer who desires to switch local voice service from SBC-CA to a CLEC (or from one CLEC to another) should be fully informed of the risks and benefits of doing so, and then should be free to weigh and make all the choices involved, without SBC-CA's thumb on the scales. It is certainly possible that, if SBC-CA were to stop rejecting these LSRs, some customers switching their local voice service would lose DSL service because the new CLEC had not thoroughly explained the options, or because the customer failed to take the necessary steps to make an appropriate transition. This is a hazard of the competitive marketplace for which customers, DSL transport providers, and voice competitors must be prepared. SBC-CA's "protecting the customer" rationale for its refusal to effectuate the customer's desire to change local voice service is not an appropriate justification for its practice.

[29] Appeal by SBC California (U-1001-C) of the Presiding Officer's Decision (July 9, 2004), at pp. 10-11.

SBC-CA does not argue that it is not technically possible to allow the migration of the local voice customer with SBC Yahoo! DSL to the local voice service of a CLEC using UNE-P. Nor does it argue that it is not technically possible to allow the migration of the local voice customer with some other form of retail DSL service to the local voice service of a CLEC using UNE-P. Rather, as AT&T points out, most of the operational issues SBC-CA advances are related to the administration of possible line splitting arrangements between the new voice CLEC and the DSL provider. These fears are not realistic, since the two line-splitting CLECs have the active roles, and the ILEC has a very limited role. Indeed, the FCC has reminded ILECs that they must facilitate line splitting.[30] Nothing in the record supports SBC-CA's speculation that it would be overwhelmed by the administrative problems of line splitting if it stopped blocking customers' changes in local voice provider due to the customers' DSL arrangements.

SBC-CA also identifies a potential operational problem in billing the SBC Yahoo! DSL customer whose local voice service has been moved to a CLEC, since SBC-CA will no longer be providing a bill for local voice service, on which it had been including the SBC Yahoo! DSL charge. AT&T points out, however, that the current requirements of a credit card or Yahoo! "wallet" account on file for SBC Yahoo! DSL customers gives the SBC Yahoo! DSL providers options for billing a customer who no longer has SBC-CA local voice service. Whether or not these are the best ideas, they demonstrate that there are likely to be solutions to the potential billing issues. The record does not show that billing would be such an insuperable problem as to justify SBC-CA's refusal to allow the migration of the SBC Yahoo! DSL customer's local voice service to a CLEC.

[30] *Triennial Review Order*, ¶¶ 251, 252.

Finally, SBC-CA asserts that its policy is in accord with federal and state regulatory requirements, and thus cannot be in violation of Sec. 451. SBC-CA's regulatory arguments fall into three broad groups: SBC-CA is in compliance with its obligations to support line sharing and line splitting; it is in compliance with its obligations to make UNEs available and cannot be forced to create new UNEs; and it is not depriving customers of choice.

SBC-CA's compliance with its regulatory obligations to support line sharing and line splitting is not relevant to this proceeding. It is not the provision of DSL services that is at issue, but the effect of SBC-CA's practices related to SBC Yahoo! DSL on the market for local voice services. This distinction between DSL and the impact of DSL practices on competition in local voice markets has also been made by other state commissions, in varying circumstances.[31] Similarly, complainants do not question, and we do not need to decide, whether SBC-CA has properly unbundled the HFPL or made the HFPL available to CLECs on a nondiscriminatory basis. SBC-CA's unbundling of the

[31] *See, e.g.*, Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996, Florida Public Service Commission Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, 2002 Fla. PUC LEXIS 401 (June 2, 2002) (arbitration); In re BellSouth's provision of ADSL Service to end-users over CLEC loops, Louisiana Public Service Commission, Docket R-26173, Order R-26173, 2002 La. PUC LEXIS 20 (Dec. 18, 2002) (rulemaking); Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996, Georgia Public Utilities Commission, Docket No. 11901-U, 2003 Ga. PUC LEXIS 38 (Oct. 21, 2003) (arbitration); Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to 47 U.S.C. Section 252, Kentucky Public Service Commission Case 2001-00432, 2002 Ky. PUC LEXIS 722 (Oct. 15, 2002), *aff'd sub nom. BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F.Supp.2d 946 (E.D.Ky.2003) (arbitration).

HFPL and the existence of its line sharing arrangements with, *e.g.*, ASI, are part of the background to the issues in this case.

SBC-CA asserts that it is required by FCC rules to offer the entire loop to the DSL transport provider if SBC-CA loses the local voice service. This obligation, SBC-CA argues, requires it to reject LSRs for local voice service migration in order to give the current DSL transport provider a chance to take over the loop. SBC-CA misinterprets the FCC's position. In the *Triennial Review Order*, the FCC made clear that if "the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop. . ." (¶ 269). The FCC does not require that the DSL transport provider be given, in essence, the right of first refusal on the loop when the voice customer leaves the ILEC. Indeed, consistent with the FCC's position, all parties to this proceeding, including SBC-CA, agree that the new voice CLEC "wins" the entire loop. This rationale is therefore not legally sustainable. Nor is it factually sustainable, as the evidence at the EH showed that ASI will not provide DSL transport service on a loop unless SBC-CA provides voice service on that loop.

SBC-CA also fears that, if we find it in violation of its legal obligations, we would require it to unbundle the LFPL. SBC-CA, relying on the FCC's conclusion that unbundling the LFPL is not required,[32] asserts we cannot order such relief. In fact, however, SBC-CA would not have to unbundle anything more than it already has if it allowed SBC Yahoo! DSL customers to switch local voice service to a UNE-P CLEC. The CLEC wins the loop when it wins the voice customer, thus setting the stage for, if anything, a conventional line splitting arrangement. Looking at the same situation from another angle, SBC-CA urges

[32] *Triennial Review Order*, ¶270.

that we would force it to provide DSL service when it is no longer the voice provider, contrary to the policy announced by the FCC in *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, 17 F.C.C.R. 9018 (May 15, 2002), ¶157. But since SBC-CA does not provide the DSL service, we cannot and do not force it to continue to do so.

SBC-CA's reliance on the Memorandum and Order in *Wisconsin Bell, Inc. v. AT&T Communications of Wisconsin, L.P.*, 03-C-671-S (W.D.Wisc.) July 1, 2004), appended to its appeal, is thus misplaced. In that case, the federal district court, apparently following the Public Service Commission of Wisconsin, treated Wisconsin Bell and its affiliated provider of DSL transport services as essentially the same entity for purposes of the decision. We, however, consider SBC-CA as the ILEC and ASI as a DSL provider with a line-sharing agreement with SBC-CA and a joint marketing arrangement with SBC-CA and SBC IS for the SBC Yahoo! retail product. The premise of the *Wisconsin Bell* decision being the opposite of ours on this key point, it lacks persuasive value.[33]

SBC-CA argues that its practices cannot be harming consumers or competition because consumers continue to have choices in high-speed internet

[33] Uncertainty about how we should treat the various SBC entities involved runs through the presentations of all the parties, including SBC-CA. Complainants urge that we treat all SBC affiliates as "one SBC," without regard to their formal corporate status or separate functions as ILEC (SBC-CA), DSL transport provider (ASI), or ISP (SBC IS). SBC-CA at times insists on the separation, (*e.g.*, in arguing that we cannot provide any relief if ASI and SBC IS are not parties), while at other times it relies on lack of separation (*e.g.*, in arguing that *it* cannot be forced to provide DSL to a CLEC's voice customer). Since we grant relief based on SBC-CA's behavior alone, it is not necessary for us to examine in any detail the relationship among these affiliated entities beyond their collaboration in the SBC Yahoo! DSL retail product.

access services—for example, cable modem, wireless services, or DSL providers other than SBC Yahoo! DSL. SBC-CA is, however, confusing the market for high-speed services with the market for local voice services. The existence of other forms of broadband access is not relevant to the issue here: the SBC-CA voice customer who wants to take advantage of a competitive market to change to a voice CLEC but is not allowed to do so by SBC-CA because she currently subscribes to a particular retail DSL service.

SBC-CA compounds this confusion when it argues that the application of federal antitrust analysis shows that it has not violated Sec. 451 because it does not have market power in the provision of broadband services. The Legislature did not incorporate antitrust doctrines into Sec. 451 (*compare* Official Code of Georgia Annotated, Section 46-5-169(4)), though it is well-settled that we may consider antitrust issues in our decisions on certificates of public convenience and necessity. *Northern California Power Agency v. PUC* (1971) 5 Cal.3d 370. No party cites any case in which we have based our interpretation of Sec. 451 on federal antitrust doctrines, and it is not necessary to do so in this case. The policy of this state to promote consumer choice and prevent anticompetitive conduct in telecommunications, as expressed in secs. 709 and 709.2, undergirds our application of Sec. 451.

AT&T urges that, in addition to violating Sec. 451, SBC-CA's policy of refusing to process orders for changing the local voice service of a customer with SBC Yahoo! DSL is discriminatory, in violation of Sec. 453(a)[34] The SBC-CA local voice customer without SBC Yahoo! DSL (or other retail DSL arrangement that

[34] Sec. 453(a) provides that "[n]o public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject an corporation or person to any prejudice or disadvantage."

will cause rejection of the LSR) may simply choose another local voice provider; the SBC Yahoo! DSL customer may not. This, AT&T argues, is unjustifiable discrimination against some SBC-CA local voice customers.

SBC-CA argues that this is not a discriminatory disadvantage, but the result of an objective difference between customers with and without SBC Yahoo! DSL. This argument is not persuasive. SBC-CA constructed this difference itself, by setting up its ordering system the way it has. If SBC-CA did not reject certain orders, the "difference" between customers with and without SBC Yahoo! DSL would not exist.[35]

In enacting Sec. 453(a), the Legislature created "a broad ban on discriminatory conduct." *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478. A customer who wants to use a "mix and match" approach to acquiring different services from different providers is deprived by SBC-CA's policy of one of the principal advantages of a competitive telephone marketplace. SBC-CA's policies subject such a customer to disadvantage in the marketplace.

SBC-CA has not justified the barrier to competition and discrimination among customers in the local voice market that it has created by its refusal to allow its local voice customers with SBC Yahoo! DSL service (or other retail DSL arrangement that will cause rejection of the LSR in SBC-CA's current system) to take their local voice business to a UNE-P CLEC.[36] SBC-CA must cease this

[35] The other arguments advanced by SBC-CA with respect to complainants' claims under Sec. 451, which we have analyzed above, for the same reasons do not provide an adequate defense to the claims under Sec. 453(a).

[36] Because the parties litigated only the issues as related to UNE-P, the record does not support any conclusions about whether SBC-CA is or is not justified in rejecting the migration request if a CLEC using UNE-L presents a complete and accurate LSR to SBC-CA for the migration of the local voice service of an SBC-CA mass market

anticompetitive and discriminatory behavior. To remedy this, SBC-CA must make the presence or absence of DSL service irrelevant in the processing of requests to migrate SBC-CA local voice customers to a CLEC using UNE-P.

Although SBC-CA protests that any relief we order necessarily includes ASI and SBC IS, neither of which is a party, we can require SBC-CA to cease its unlawful practice without ordering ASI or SBC IS to do anything at all. Our order today may lead SBC-CA, ASI, and SBC IS to reevaluate their relationships with respect to SBC Yahoo! DSL, but we do not impose any legal obligations on non-parties ASI and SBC IS.[37]

4.2 Winback Practices

The record shows that, in its residential local voice service winback efforts, SBC-CA has systematically suggested to former customers that they may have been slammed. Because SBC-CA does not verify that its suggestions about slamming have been made to the only person in a household authorized to change local voice service, this practice has the potential for generating inaccurate reports of slamming. The Settlement commits SBC-CA to a comprehensive review of its winback materials that will result in removal of any suggestions that the former customer may have been slammed or misled, and commits SBC-CA to training its winback personnel not to make such suggestions. These steps, when implemented, will substantially reduce the possibility of inaccurate slamming allegations without inhibiting the former customer from volunteering information that he or she had been slammed. The

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customer who also has SBC Yahoo! DSL to the CLEC. We therefore limit our decision to situations where the CLEC provides services using UNE-P.

[37] We do not authorize SBC-CA to provide an access loop to ASI where there is no purchase of the loop by a local customer, ASI, or the CLEC.

Settlement therefore should be approved. In addition, we will order SBC-CA to carry out its representation at the evidentiary hearing that the third-party verification process will be applied to local voice service, to ensure an independent verification of slamming allegations consistent with that used for other services.

Although it is clear that SBC-CA's winback program is aggressive and well-organized, the record does not support Telscape's allegation that SBC-CA is improperly jumping the gun in its winback efforts by using confidential information from the LSR process (customer proprietary network information) before the change of local voice service has occurred. There is also insufficient evidence to support Telscape's claim that SBC-CA's special winback offers are predatory and anticompetitive. While Telscape's concerns about SBC-CA's winback offers are plausible in view of the differential in resources between Telscape and SBC-CA, there is no evidence in this record that SBC-CA's offers in fact are effective in retrieving former customers or that they do not comply with established tariffs or other relevant regulatory requirements. Nor is this proceeding the proper forum for considering Telscape's suggestion that we should impose a four-month moratorium on SBC-CA's winback efforts. This is a policy preference, not a remedy for a demonstrated violation of a provision of law or of one of our orders, as required by Sec. 1702.

4.3 OSS Issues

We have long considered access to OSS functions to be an essential element of a competitive local telephone market. *See, e.g.*, D.96-02-072, 65 CPUC2d 65, 83 (1996); D.98-12-079, 84 CPUC2d 272 (1998). In this complaint, Telscape makes a broad critique of SBC-CA's OSS performance. Telscape asserts that, viewed as a whole, the OSS structure and the way SBC-CA employs it

create anticompetitive barriers that are so severe as to violate both our UNE pricing orders and Sec. 451. The record shows that some aspects of SBC-CA's OSS implementation are not in compliance with SBC-CA's legal obligations, but it does not show that the problems are so pervasive or intractable that we ought to accept Telscape's implicit invitation to become the day-to-day supervisor of SBC-CA's OSS.

4.3.1 Non-recurring Charges

4.3.1.1. Exceptions to Flow-through

The specific exceptions to flow through that Telscape challenges are a heterogeneous lot, but Telscape has demonstrated that, as to some of them, SBC-CA's OSS processes result in charges to CLECs that are not just and reasonable, in violation of Sec. 451. The source of the illegality is not the dollar amounts of the charges themselves, which are in accord with the various pricing orders issued in our OANAD proceeding. Rather, the problems arise in SBC-CA's practices leading to the assessment of semi-mechanized or manual charges when mechanized charges are appropriate.

In the circumstance in which one of the SBC-CA customer's lines is being changed to a CLEC, the evidence shows that the order falls out of flow-through so that SBC-CA can reorganize its own billing for the remaining line. This results in a semi-mechanized charge to the CLEC for the benefit of SBC-CA's retail operations. In support of its practice, SBC-CA asserts that this issue was never raised in either the Change Management Process or the CLEC User Forum, and SBC-CA therefore had no reason to believe that this exception mattered to any CLEC's business and had no reason to take steps to change it. Raising an issue in such voluntary forums is not, however, a condition precedent to bringing a complaint under Sec. 1702.

SBC-CA's implicit argument that the continued existence of the exception is essentially harmless because CLECs have not previously complained about it is not supportable in this circumstance. Although SBC-CA has some discretion in making improvements to flow-through, its options must be exercised within legal bounds. The record shows that the semi-mechanized charge here is the result of SBC-CA's retail operational requirements. Pursuant to 47 C.F.R. § 51.505(d)(2), SBC-CA is simply not authorized to impose a charge based on its own retail costs. SBC-CA's billing of this charge is therefore not just and reasonable, in violation of Sec. 451. SBC-CA must refund to Telscape the difference between the semi-mechanized and fully mechanized rate for any semi-mechanized order charges billed to Telscape that are attributable to this "partial migration" exception.

SBC-CA agreed in 2002 to change its policy on the rate for ULTS migrations, from semi-mechanized to fully mechanized. SBC-CA has not, however, changed the OSS system, so ULTS migrations continue to fall out of flow-through. Bills continue to be generated at semi-mechanized rates, which must be detected by SBC-CA personnel and changed to mechanized rates. When the semi-mechanized rates are nevertheless billed, Telscape pays these bills and then seeks a refund. SBC-CA asserts that, because Telscape ultimately gets its money back, this issue is resolved. Nothing in our UNE pricing decisions, however, authorizes SBC-CA to impose charges, even subject to refund, to which it has agreed it is not entitled. Such charges cannot be just and reasonable.[38]

[38] *Cf. Hidden Valley West v. San Diego Gas & Electric Co.*, D.87305, 81 C.P.U.C. 627, 636 (1977) (utility violates Sec. 451 if it fails to return balance to customers who made payments based on estimated costs that were higher than actual costs).

SBC-CA should therefore take whatever steps are necessary to ensure that bills for ULTS migrations are generated at the proper rate in the first instance.[39]

A different problem is presented by the WSOP exception. The record shows that a UNE-P order will fall out under this exception if the CLEC's order leaves a particular field blank. The instructions given in SBC-CA's Local Service Ordering Requirements, however, identify that field as "conditional," meaning that it may not need to be filled in. The instructions allow, if not encourage, a CLEC to fill out the order in a way that causes the order to fall out of flow-through, even though there may be no reason for the WSOP exception to be applied. This defeats the CLEC's right to nondiscriminatory access to OSS and results in higher semi-mechanized charges that are a windfall to SBC-CA. These charges are not just and reasonable. SBC-CA should refund to Telscape the difference between semi-mechanized and mechanized rates charged due to this exception. SBC-CA should also revise the instructions for the WSOP field to eliminate the misleading implication of the current instructions. Because the record shows that clarifying the instructions is likely to prevent UNE-P orders from falling out of flow-through, we need not reach Telscape's contention that the WSOP exception is itself unjustified.

Telscape has not shown a violation of law in SBC-CA's practice of applying semi-mechanized charges to an entire order that falls out of flow-through because one of its elements requires LSC intervention. There is no evidence that this treatment occurs because of SBC-CA's retail needs or that it is based on any other impermissible criterion. It may make orders more expensive

[39] Telscape presented testimony on an analogous claim about SBC-CA's billing of end-user returns, the migration of a UNE-P customer from a CLEC to SBC-CA. In its brief, however, Telscape conceded that this claim was no longer alive, so we do not address it here.

for CLECs, and it might be possible for SBC-CA to change the way such orders are treated, but that does not mean that SBC-CA's current practice is unlawful.

4.3.1.2. Exclusions from Flow-through

In its brief, Telscape acknowledges that evaluating its complaints about the pace at which SBC-CA is implementing flow-through improvements and the choices SBC-CA has made about priorities for flow-through is largely a matter of judgment, requiring us to decide how fast is fast enough, and how helpful to CLECs is helpful enough. It is true that SBC-CA's control over the OSS process gives it the ability to influence CLECs' business by making some activities more expensive than others, or by keeping some activities more expensive than they perhaps could be. It is also true that the OSS process is complex; it is not reasonable at this time to expect that process to meet all needs of all CLECs all the time. While the existence of forums such as the Change Management Process and the CLEC User Forum does not insulate SBC-CA from complying with its legal obligations, it is significant that there is no evidence in the record that other CLECs share Telscape's view of SBC-CA's progress, or lack of it, on flow-through improvements. Telscape's evaluation alone is not enough to persuade us that we ought to interfere in SBC-CA's development and implementation of flow-through improvements, though this record shows that there is room for improvement.

4.3.1.3. EISCC Cable Charges

With the implementation of tech-to-tech testing, SBC-CA has made available a direct method of checking possible EISCC trouble. Telscape acknowledges that tech-to-tech testing will improve its ability to deal with EISCC problems at lower cost, but adheres to its position that SBC-CA's billing of $84.85 for CFA changes, when they are ordered, is too high. Telscape locates the pricing

problem in SBC-CA's choice of what UNEs to put together to make up the CFA charge. Telscape asserts that the CFA change work is more accurately captured by a loop channel change charge ($15.50) and a mechanized service order charge ($1.10).

In the absence of a charge specified in the interconnection agreement, we are unable to resolve this dispute. Telscape may be making a sensible pricing proposal. SBC-CA's very different pricing, combining a number of UNEs, may be justifiable. The correct pricing may lie in some other combination of charges, or a new, separate charge. Whatever the answer, this complaint proceeding is not the appropriate forum in which to try to find, or create, a price for a UNE.

4.3.2. Billing

SBC-CA's systems for billing CLECs are complex, as are its methods of resolving billing disputes. SBC-CA notes that its billing meets high standards of formal correctness and that many employees deal with CLEC billing issues. Telscape does not dispute these points; rather, Telscape asserts, the problems lie in substantively erroneous charges presented in a formally correct manner and in inordinately long periods of time needed to resolve billing disputes.

Some of the billing issues Telscape describes as substantive are simply the reflection in its bills of the issues about non-recurring charges we have addressed in Sec. 4.3.1, and need not reexamine here. Some of the issues, such as how SBC-CA presents usage information in its bills, are not appropriate for resolution in a complaint proceeding.

The record shows that a small CLEC, like Telscape, must be very alert and very persistent to make effective use of the structure and policies SBC-CA has developed to handle billing disputes. Telscape has shown that, having

successfully negotiated a resolution to a billing dispute, it often has to wait for more than one billing interval to receive the agreed credit, and sometimes the initially credited amount is inaccurate. By failing to return proper credits to Telscape (or any other CLEC) promptly, SBC-CA is imposing an unjustified, if temporary, charge.[40] This violation of Sec. 451's requirement that all charges must be just and reasonable would be remedied if CLECs were promptly credited in the correct amount after disputes are resolved. SBC-CA should review its policies and systems for posting credits to CLECs and make any changes that are needed to ensure that CLECs are correctly credited no later than the second bill after a dispute is resolved.

4.3.3. Waiver of Performance Measure Remedies

Telscape urges that SBC-CA not be allowed to conclude settlements of disputed billings with CLECs that include waivers of performance remedies. Telscape notes that such settlements deprive other CLECs and the Commission of information about SBC-CA's performance, and argues that they could allow SBC-CA to discriminate in fact among CLECs by settling with some CLECs on terms of which others are unaware and therefore cannot use.

We adhere to our strong policy in favor of settlements. See, *e.g.*, *Re Pacific Bell*, D.92-07-076, 45 CPUC2d 158, 169 (1992). Although we share Telscape's concern that some settlement agreements between ILECs and CLECs might lead to what are essentially secret amendments of interconnection agreements, the record in this case does not provide any examples of that problem, and thus does not support Telscape's request that all settlement agreements be barred.

[40] *Cf. Hidden Valley West v. SDG&E*, 81 C.P.U.C. at 636.

The record in this case does show, however, that some settlements negotiated by SBC-CA are inconsistent with our order in D.02-06-006, which clarified details of the implementation of SBC-CA's Performance Incentive Plan. In that decision, we expressed our intention " to preserve the incentive nature of the PIP by maintaining the relationship between overall performance and incentive amounts." (*mimeo.*, p. 2) The record in this case shows that at least one settlement between Telscape and SBC-CA resulted in the effective disappearance of any performance measure remedy. Although Telscape could agree to waive payment of remedies to itself, that waiver could not authorize SBC-CA either to omit payment of remedies for the benefit of ratepayers or to omit reporting the performance failure. SBC-CA must now pay the remedies for the benefit of ratepayers and make the reports for all performance problems for which Telscape agreed to waive performance remedies.

5. Appeals

The POD was mailed June 9, 2004. Telscape and SBC-CA each filed appeals on July 9, 2004. SBC-CA filed a response to Telscape's appeal on July 26, 2004. Telscape filed a response to SBC-CA's appeal on July 26, 2004. MCI and AT&T filed a joint response to SBC-CA's appeal on July 26, 2004.

Telscape contends that the POD did not go far enough in requiring changes to SBC-CA's OSS and billing practices. It argues that the evidence supported all of its original claims. Telscape also wants the relief expanded to include requirements that SBC-CA automatically provide necessary refunds or credits to CLECs without the need for settlement agreements, and that SBC-CA stop assessing semi-mechanized charges for any electronically submitted LSR.

In most regards, we adhere to the POD. Telscape notes that the POD failed to order refunds for improper billings of semi-mechanized charges due to failure

to fill out the WSOP exception fields in the order form; we correct that oversight. The main import of Telscape's appeal, however, is that the record in this proceeding suggests that SBC-CA may be systematically overcharging CLECs for some UNEs, may be dragging its feet on making improvements in its ordering system (especially with respect to flow-through), and may be using its bargaining power to obtain settlements of disputes on terms unfavorable to CLECs. Telscape urges us to order sweeping changes in SBC-CA's processes as a result. We agree with Telscape that the record shows a number of problematic practices by SBC-CA, but conclude that it does not provide sufficient basis to order large-scale changes in SBC-CA's processes. We do, however, add a requirement that SBC-CA inform CLECs of the requirements of this order by posting them on its CLEC web site.

SBC-CA contests the POD's conclusions on the issue of the treatment of LSRs for local voice migrations. In its appeal, SBC-CA altered its presentation of its LSR system from that made in the EH and in briefing prior to the POD. This change in SBC-CA's explanatory emphasis has led us to understand that SBC-CA's interference in the ordering process is more extensive than stated in the POD. We do not change our conclusion that SBC-CA is in some circumstances unlawfully preventing the processing of requests to migrate a customer's local voice service to a CLEC using UNE-P. We do, however, rework our discussion of this issue in §§ 3.3 and 4.1 above, and rephrase our findings of fact, conclusions of law, and order. We also reduce from 90 to 60 days the time for SBC-CA's compliance, because SBC-CA's current explanation of its system leads us to believe that changing its order system will be easier than appeared in the POD.

SBC-CA also contests the POD's conclusion that the semi-mechanized billing of partial migration orders is improper. We adhere to the POD's analysis and conclusions on this issue because the record does not support the characterization of the partial migration ordering process that SBC-CA argues in its appeal.

We provide the clarifications requested by SBC-CA to the portions of our order related to billing for migrations of ULTS customers and the timing of credits appearing on CLEC's bills.

6. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Anne E. Simon is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Telscape provides facilities-based local voice service in California, using its own switches and unbundled network elements (UNEs) leased from SBC-CA; this arrangement is often referred to as UNE-Loop (UNE-L).

2. Telscape also provides local voice service in California using the "UNE platform" (UNE-P), which consists of leasing from SBC-CA all the elements needed for service to the end user customer.

3. AT&T provides local voice service in California using UNE-P.

4. MCI provides local voice service in California using UNE-P.

5. SBC-CA is an incumbent local exchange carrier (ILEC) that provides local and long distance services. It is a wholly owned subsidiary of SBC Communications, Inc. (SBC).

6. In California, as of the end of 2002, about 49% of high-speed internet connections were via DSL.

7. Through a joint marketing and sales agreement with SBC IS, SBC-CA markets to mass market customers the retail product SBC Yahoo! DSL, which consists of DSL transport provided by ASI through UNEs leased from SBC-CA; ISP services provided by SBC IS; and content provided by Yahoo!, Inc.

8. In California, SBC Yahoo! DSL is available only to local voice service customers of SBC-CA.

9. If a CLEC using UNE-P presents an otherwise complete and accurate LSR to SBC-CA for the migration of the local voice service of an SBC-CA mass market customer to the CLEC, SBC-CA will automatically reject the migration request if the customer currently has SBC Yahoo! DSL or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided after the migration.

10. If a CLEC using UNE-P presents an otherwise complete and accurate LSR to SBC-CA for the migration of the local voice service of an SBC-CA mass market customer to the CLEC, there are no technical reasons that require SBC-CA to reject the migration request if the customer also has SBC Yahoo! DSL or other retail DSL service, even if the CLEC does not specify on the LSR how DSL service will be provided after the migration.

11. If a CLEC using UNE-P presents an otherwise complete and accurate LSR to SBC-CA for the migration of the local voice service of an SBC-CA mass market customer to the CLEC, there are no operational considerations that require SBC-CA to reject the migration request if the customer also has SBC Yahoo! DSL or other retail DSL service, even if the CLEC does not specify on the LSR how DSL service will be provided after the migration.

12. The record does not support any conclusions about whether SBC-CA is or is not justified in rejecting the migration request if a CLEC using UNE-L presents

a complete and accurate LSR to SBC-CA for the migration to the CLEC of the local voice service of an SBC-CA mass market customer who also has SBC Yahoo! DSL or other retail DSL service.

13. SBC-CA winback personnel receive information about former residential local voice customers no less than two days after its order system shows the LSR as "complete."

14. SBC-CA's winback efforts include letters and telephone calls to former customers, which may offer special deals to former customers.

15. SBC-CA's winback efforts may include the suggestion, made without adequate inquiry as to its basis, that the former customer has been slammed.

16. SBC-CA's third-party verification process does not apply to allegations of slamming for residential local voice service.

17. Telscape did not file comments on the Settlement.

18. The Settlement is reasonable in light of the whole record.

19. The Settlement is in the public interest.

20. SBC-CA's OSS allow CLECs non-discriminatory access to the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing.

21. SBC-CA is authorized to impose non-recurring service order charges when a CLEC places an order for UNEs, or requests a change in configuration or disconnection of UNEs, to cover SBC-CA's costs for the ordering process.

22. SBC-CA is not authorized to impose charges for UNEs when SBC-CA's costs are attributable to its retail services.

23. An electronically-submitted order to migrate one of two telephone lines that do not hunt of an SBC-CA customer to a CLEC using UNE-P falls out of flow-through so that LSC may create documentation for SBC-CA to use in properly billing the SBC-CA line remaining to the customer.

24. An electronically submitted UNE-P order with more than one UNE, one of which requires LSC intervention to be processed, falls out of flow-through. In that case, all parts of the order are treated on a semi-mechanized basis.

25. An electronically submitted UNE-P order for new service falls out of flow-through if the CLEC does not put a code in the field of the order intended to check for working service on premises (WSOP).

26. An electronically-submitted order to migrate a customer who is eligible for Universal Lifeline Telephone Service (ULTS) to UNE-P or UNE-L with number portability falls out of flow-through so that LSC personnel may check the ULTS certification status in order to allow SBC-CA to rebill the customer for the difference between ULTS rates and regular retail rates if the customer did not meet the requirements for ULTS.

27. In 2002, SBC-CA agreed to charge fully-mechanized rates for electronically submitted orders to migrate a ULTS customer to UNE-P or UNE-L with number portability.

28. SBC-CA currently bills electronically submitted orders to migrate a ULTS customer at semi-mechanized rates, which are changed by LSC personnel to mechanized rates. SBC-CA issues credits for overcharges after a CLEC identifies and disputes the semi-mechanized charges.

29. SBC-CA's OSS does not currently allow all orders that are potentially able to flow through to do so. SBC-CA adds to the list of flow-through eligible orders at various times.

30. An expanded interconnection service cross-connect (EISCC) connects SBC-CA's intermediate distribution frame to a CLEC's collocation facility in SBC-CA's central office.

31. SBC-CA made "tech-to-tech" testing generally available to CLECs in April 2002, for, among other things, identifying EISCC problems.

32. A change in "connecting facility assignment" (CFA) is a change in the relevant EISCC cable pair.

33. The Telscape-SBC-CA interconnection agreement does not establish a charge for a CFA change.

34. SBC-CA imposes non-recurring charges of $84.85 for a CFA change, consisting of service order connect charge ($30.43); channel connect charge ($18.87); service order disconnect charge ($21.38); channel disconnect charge ($8.71); EISCC cable connect charge ($2.11) ; and EISCC cable disconnect charge ($3.35).

35. Although SBC-CA has a goal of resolving billing disputes with CLECs within 30 days, many disputes are not resolved within that time period.

36. After a billing dispute with a CLEC has been resolved, there is no specified period of time within which SBC-CA provides credit to the CLEC for the agreed amount.

37. SBC-CA has negotiated settlements of CLECs' claims for overcharges in which the CLEC agreed to waive performance remedies.

38. When SBC-CA and a CLEC enter into a settlement in which the CLEC agrees to waive performance remedies, SBC-CA does not report the issue in its performance measure reporting to the Commission and does not pay performance remedies for the benefit of ratepayers.

39. It is in the public interest for SBC-CA to provide information about the changes to its systems required by this order to all CLECs in California.

Conclusions of Law

1. SBC-CA's rejection of otherwise complete and accurate requests to migrate a mass-market customer from SBC-CA local voice service to the local voice service of a CLEC using UNE-P to provide such service, solely on the basis that the customer subscribes to SBC Yahoo! DSL or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided, is not just and reasonable and therefore violates Sec. 451.

2. SBC-CA's rejection of otherwise complete and accurate requests to migrate a mass-market customer from SBC-CA local voice service to the local voice service of a CLEC using UNE-P to provide such service, solely on the basis that the customer subscribes to SBC Yahoo! DSL or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided, subjects its customers with SBC Yahoo! DSL or other retail DSL service to disadvantage and therefore violates Sec. 453(a).

3. SBC-CA should cease its practice of rejecting otherwise complete and accurate requests to migrate a mass-market customer from SBC-CA local voice service to the local voice service of a CLEC using UNE-P to provide such service, solely on the basis that the customer subscribes to SBC Yahoo! DSL or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided.

4. In order to minimize disruption to customers, CLECs, and SBC-CA, SBC-CA should be given 60 days from the effective date of this order to adjust its systems to end the rejection of otherwise complete and accurate CLEC orders to migrate a mass-market customer from SBC-CA local voice service to the local voice service of a CLEC using UNE-P to provide such service, solely on the basis

that the customer subscribes to SBC Yahoo! DSL or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided.

5. The Settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

6. In order to reduce the possibility of inaccurate allegations of slamming in residential local voice service, SBC-CA should include residential local voice service in its third-party verification process.

7. SBC-CA's imposition of semi-mechanized rates for an electronically-submitted order to migrate one of two telephone lines of an SBC-CA customer to a CLEC using UNE-P is attributable to SBC-CA's retail operations and is therefore not just and reasonable and violates Sec. 451.

8. SBC-CA should cease charging semi-mechanized rates for an electronically-submitted order to migrate one of two telephone lines that do not hunt of an SBC-CA customer to a CLEC using UNE-P and should refund to Telscape the difference between the semi-mechanized and fully mechanized rate for any semi-mechanized order charges billed to Telscape that are attributable to this exception.

9. SBC-CA's continued billing at semi-mechanized rates of electronically submitted orders to migrate a ULTS customer to UNE-P or UNE-L with number portability, giving credits for overcharges to the CLEC later, is not just and reasonable.

10. SBC-CA should revise its OSS processes to ensure that bills for ULTS migrations are generated at the proper rate in the first instance, either by allowing ULTS migration orders to flow through or by making any other changes needed to have ULTS migrations billed at mechanized rates without the

need for intervention by SBC-CA personnel to generate a bill at the mechanized rate.

11. The current misleading instructions for how a CLEC should treat the WSOP field for an electronically submitted order for UNE-P service are inconsistent with CLECs' rights to nondiscriminatory access to OSS and result in service order charges that are not just and reasonable.

12. SBC-CA should revise the instructions for the WSOP field to eliminate the misleading implication of the current instructions and should refund to Telscape the difference between the semi-mechanized and fully mechanized rate for any semi-mechanized order charges billed to Telscape that are attributable to this exception.

13. SBC-CA's imposition of semi-mechanized charges for an entire order when one UNE causes the order to fall out of flow-through does not violate SBC-CA's obligations under our UNE pricing decisions or other applicable law.

14. In the absence of a charge set for a change to a connecting facilities assignment (CFA) in the interconnection agreement between SBC-CA and Telscape, SBC-CA's imposition of non-recurring charges for a CFA change based on service order connect and disconnect, channel connect and disconnect, and EISCC cable connect and disconnect charges does not violate SBC-CA's obligations under our UNE pricing decisions or other applicable law.

15. By failing to promptly return proper credits to CLECs after a billing dispute has been resolved, SBC-CA imposes a charge that is not just and reasonable and therefore violates Sec. 451.

16. SBC-CA should review its OSS policies and systems and make any changes that are needed to ensure that CLECs are correctly credited not later than the second bill issued after a billing dispute is resolved.

17. SBC-CA's negotiation of settlement agreements with CLECs in which the CLEC agrees to waive performance remedies violates our orders related to SBC-CA's Performance Incentive Plan if SBC-CA does not pay remedies for the benefit of ratepayers and report the performance failure to the Commission.

18. All motions that have not been decided should be denied.

O R D E R

IT IS ORDERED that:

1. Within 60 days of the effective date of this order, Pacific Bell Telephone Company (SBC-CA) must cease rejecting otherwise complete and accurate requests to migrate a mass-market customer from SBC-CA local voice service to the local voice service of a competitive local exchange carrier (CLEC) using the unbundled network element platform (UNE-P) to provide such service, solely on the basis that the customer subscribes to SBC Yahoo! DSL (or to any additional or subsequent retail digital subscriber line (DSL) product marketed by SBC-CA) or other retail DSL service and the CLEC does not specify on the LSR how DSL service will be provided.

2. The Settlement Among SBC California (Pacific Bell Telephone Company), AT&T Communications of California, Inc. and WorldCom, Inc. (MCI) of Slamming and Winback Issues Designated for Hearing by the Administrative Law Judge and Assigned Commissioner in Case 02-11-011, submitted for approval on December 5, 2003, is approved.

3. Within 30 days of the effective date of this order, SBC-CA shall include residential local voice service in the services subject to its third-party verification process for allegations of slamming.

4. Within 60 days of the effective date of this order, SBC-CA shall cease charging semi-mechanized rates for an electronically-submitted order to migrate one of two telephone lines that do not hunt of an SBC-CA customer to a CLEC using UNE-P and shall refund to Telscape the difference between the semi-mechanized and fully mechanized rate for any semi-mechanized order charges billed to Telscape that are attributable to this exception.

5. Within 60 days of the effective date of this order, SBC-CA shall revise its OSS processes to ensure that bills for migrating a Universal Lifeline Telephone Service (ULTS) customer to UNE-P or UNE-Loop with number portability are generated at the proper fully-mechanized rate in the first instance, either by allowing ULTS migration orders to flow through or by making any other changes needed to have ULTS migrations billed at mechanized rates without the need for intervention by SBC-CA personnel to generate a bill at the mechanized rate.

6. Within 60 days of the effective date of this order, SBC-CA shall revise the instructions for the working service on premises field of its Local Service Request (LSR) form to eliminate the misleading implication of the current instructions that it is permissible to leave the field blank and still have the LSR processed at fully-mechanized rates and shall refund to Telscape the difference between the semi-mechanized and fully mechanized rate for any semi-mechanized order charges billed to Telscape that are attributable to this exception.

7. Within 60 days of the effective date of this order, SBC-CA shall make any changes to its operational support systems policies and systems that are needed to ensure that CLECs are correctly credited, not later than the second bill issued after a billing dispute is resolved, for amounts agreed to be due them after the billing dispute is resolved.

8. Within 15 days of the effective date of this order, SBC-CA shall inform CLECs, by appropriate posting on SBC-CA's CLEC web site, of the requirements of this order.

9. Within 15 days of the effective date of this order, SBC-CA shall pay performance remedies for the benefit of ratepayers and make the reports for all performance problems for which Telscape has previously agreed in settlements with SBC-CA to waive performance remedies.

10. All motions that have not been decided are denied.

11. This proceeding is closed.

This order is effective today.

Dated December 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

APPENDIX A

TABLE OF ACRONYMS

ASI	SBC Advanced Solutions, Inc.
CFA	Connecting facility assignment
CLEC	Competitive local exchange carrier
DSL	Digital subscriber line (broadband service that relies on the traditional copper telephone wire to transmit broadband data to and from the service customer's location)
EISCC	Expanded interconnection service cross-connect (between intermediate distribution frame and collocation facility)
FCC	Federal Communications Commission
HFPL	High frequency portion of the [copper wire] loop
ISP	Internet service provider
LFPL	Low frequency portion of the [copper wire] loop
ILEC	Incumbent local exchange carrier
LSC	Local Service Center [of SBC-CA]
LSR	Local Service Request
OANAD	Open Access and Network Architecture Development of Dominant Carrier Networks proceeding
OSS	Operational support systems
SBC IS	SBC Internet Services
ULTS	Universal Lifeline Telephone Service
UNE	unbundled network element
UNE-L	UNE-Loop (facilities-based services, using CLEC's switches and UNEs leased from ILEC)
UNE-P	unbundled network element platform (services provided by leasing from ILEC all elements needed for service to the end-user customer)

(END OF APPENDIX A)

APPENDIX B