Decision 07-01-019 January 11, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.	Application 05-07-024 (Filed July 28, 2005)

ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 06-01-043 ON THE ISSUE REGARDINIG RULES ON FIBER-TO-THE-HOME (FTTH), FIBER-TO-THE-CURB (FTTC) AND HYBRID LOOP, MODIFYING THE DECISION AND DENYING REHEARING, AS MODIFIED, IN ALL RESPECTS

I. SUMMARY

This decision grants limited rehearing to modify D.06-01-043 (the Decision), a change-of-law proceeding resulting from changes in federal unbundling obligations of incumbent local exchange carriers (ILECs). The Decision adopts an amendment to existing interconnection agreements (ICAs) that various competitive local exchange carriers (CLECs) have with SBC California (SBC). SBC was directed to negotiate amendments to its ICAs with CLECs in order to implement the changes in unbundling rules and to initiate a consolidated proceeding to resolve any disputed issues. Issues upon which the parties were unable to agree are the subject of the Decision.

We modify our ruling with respect to whether Federal Communications Commission (FCC) rules on fiber-to-the-home (FTTH), fiber-to-the-curb (FTTC), and hybrid loop rules apply to all customers, or only to mass market customers. We originally held that these rules apply only to mass market customers. Upon reconsideration of this issue, we have determined that FTTH, FTTC and hybrid loop rules apply to all customers. In addition, we clarify the Decision in certain respects, as

discussed herein, and correct clerical errors. The rehearing of D.06-01-043, as modified, is denied in all respects.

II. BACKGROUND/FACTS

On July 28, 2005, Pacific Bell Telephone Company, dba SBC California (SBC), filed its application to initiate a generic proceeding to amend the existing interconnection agreements (ICAs) between SBC and various competitive local exchange carriers (CLECs).[1] This proceeding implements orders issued by the Federal Communications Commission (FCC) in 2003 and 2005. The first order, the *Triennial Review Order* (*TRO*), was released on August 21, 2003.[2] The *TRO* re-interpreted the "impair" standard of Section 251(d)(2) and revised the list of unbundled network elements (UNEs) that ILECs must provide to requesting carriers.[3] Various parties appealed the *TRO*, and on March 2, 2004, the D.C. Circuit decided *United States Telecom Ass'n v. FCC* (D.C. Cir. 2004) 359 F.3d 554 (*USTA II*) *cert. denied*, (2004) 125 S.Ct. 313. In response to the court's directives in *USTA II*, the FCC issued the *Triennial*

[1] Pacific Bell Telephone Company was doing business as SBC California (SBC-CA). After its merger with AT&T Corporation on November 21, 2005, it now does business as AT&T California. References to SBC, SBC-CA, or AT&T are to the same company.

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (2003) 18 F.C.C. Rcd. 16978, FCC 03-36 (TRO). Prior to the *TRO*, the FCC issued its *Local Competition Order* which established a list of seven UNEs that the ILECs were required to provide and established the TELRIC methodology. (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order (1996) 11 F.C.C. Rcd 15499, 15846-50 (subsequent history omitted). At the Eighth Circuit Court of Appeals, the Court affirmed some parts of the order and reversed others. (*Iowa Utils. Bd. v. FCC* (8th Cir. 1997) 120 F.3d 753. The FCC and various other parties appealed to the U.S. Supreme Court. In January 1999, the Supreme Court held that the FCC had not adequately considered the "necessary" and "impair" standards of §251(d)(2) in establishing the seven network elements. (*AT&T Corp. v. Iowa Utils. Bd.* (1999) 525 U.S. 366. In November 1999, the FCC responded to the Supreme Court's remand by issuing the *UNE Remand Order* (1999)15 F.C.C. Rcd 3696), which reevaluated the unbundling obligations of the ILECs and promulgated new unbundling rules. The D.C. Circuit granted petitions for review and vacated and remanded those portions of the *UNE Remand Order* interpreting the "impair" standard and establishing a nationwide list of mandatory UNEs. (*United States Telecom Ass'n v. FCC* (D.C.Cir. 2002)290 F.3d 415 (*USTA I*).

[3] All section references are to U.S. Code, unless otherwise specified.

Review Remand Order (*TRRO*) in 2005.[4] Among other things, the *TRRO* established a nationwide bar on unbundled switching.

On July 22, 2005, this Commission issued D.05-07-043, its *TRO Closure Order*, closing its TRO proceeding.[5] SBC was directed to negotiate amendments to its ICAs with CLECs in order to implement the *TRRO* and to initiate a consolidated proceeding to resolve any disputed issues. Accordingly, SBC filed this application, A.05-07-024.

On September 16, 2005, the CLECs filed a consolidated response to SBC's application. Administrative Law Judge (ALJ) Ruling of September 23, 2005 directed that any carrier with an interconnection agreement with SBC that has a dispute concerning the change-of-law provisions related to the FCC's *TRO* and *TRRO* orders will be subject to the outcome of this proceeding. On October 6, 2005, the ALJ issued a ruling establishing a procedural schedule for the proceeding. The proceeding was set to operate on three separate tracks: (1) first track does not require evidentiary hearings; (2) track for batch hot cut portion; and (3) evidentiary hearings for disputed issues of fact. This decision proceeded under the first track.

On January 27, 2006, the Commission issued D.06-01-043 (Decision), which resolved 44 disputed issues. On February 27, 2006, SBC timely filed an application for rehearing of the Decision on numerous grounds: (1) the Decision should follow the clear text of the FCC's Rules on fiber-to-the-home (FTTH) and Hybrid Loop, which found that these loop apply to all customers; (2) the Commission should reverse its holding that the CLECs may get entrance facilities at total element long run incremental cost (TELRIC) rates pursuant to Section 251(c)(2), in consideration of the fact that the Decision does not make any sense in light of the FCC's "no impairment" holding; (3) the

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[4] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand* , (Feb. 4, 2005) 20 F.C.C. Rcd. 2533, FCC 04-290 (*TRRO*).

[5] *Order Closing the Triennial Review Nine-Month Phase* (*TRO Closure Order*) [D.05-07-043] (2005) ___ Cal.P.U.C.3d ___, in R.95-04-043 & I.95-04-044.

Decision incorrectly reads Section 251(c) to require the provision of facilities; (4) the DS1 cap applies to all routes; (5) the Decision is inconsistent and incorrect in its treatment of conversion charges; (6) the Decision incorrectly mandates resale pricing after March 11, 2006; (7) the Decision incorrectly resolves wire center certification issues; (8) the Commission cannot change tariff requirements here; and (9) the Commission should clarify that it has made no determination regarding whether it has jurisdiction over Section 271 rates.

On March 14, 2006, approximately 22 CLECs filed their Joint Response to AT&T's rehearing application.[6] The CLECs disagreed with AT&T on essentially all points made in the rehearing application. They asserted that the Commission correctly determined the following: (1) the FCC's Rules for FTTH, FTTC, and Hybrid Loops apply only to mass market customers; (2) entrance facilities are available to CLECS at TELRIC rates for use in interconnection; (3) the cap on DS1 transport should apply only on circuits where DS3 transport is not available as a UNE; (4) correctly applied the requirements of the *TRO* in determining when and how much SBC should be permitted to charge for conversions; and (5) that the Decision correctly resolved wire center certification issues. They argue further that the Commission should not alter its decision that UNE-P lines "default" to resale rates if CLECs could not submit orders by March 10, 2006; that it should maintain its notice and grandfathering requirements regarding SBC's access services upon which CLECs rely for commingling arrangements; and AT&T's "clarifications" set forth in Issue 7 are unnecessary.

[6] The Joint Response was filed by A+ Wireless, Inc., Advanced TelCom, Inc., Arrival Communications, Inc., California Catalog & Technology, Inc., CBeyond Communications, LLC, CF Communications, LLC d/b/a Telekenex, Covad Communications Company, Curatel, LLC, DMR Communications, Inc., Eschelon Telecom, Inc., Lightyear Network Solutions, LLC, Mpower Communications Corp., NII Communications, Ltd., North County Communications, Inc., PNG Telecommunications, Inc., RCN Telecom Services, Inc., TCast Communications, Inc., The Telephone Connection Local Services, Inc., Telscape Communications, Inc., U.S. TelePacific Corp., Utility Telephone, Inc., and Wholesale Air-Time, Inc.

We have reviewed each and every allegation of error asserted by the rehearing applicant, and are of the opinion that legal error was not demonstrated. Therefore, for the reasons stated, we deny in all respects the rehearing of D.06-01-043, as modified herein.

III. DISCUSSION

A. FCC Rules on FTTH, FTTC and Hybrid Loops Apply to All Customers. (Issue 2: Sections 0.1.2, 0.1.3, 0.1.4, and 0.1.5; Issue 50: Section 11.2)

Issues 2 and 50 relate to whether fiber-to-the-home (FTTH), fiber-to-the-curb (FTTC), and hybrid loop rules apply to all customers, or to mass market customers only.[7] AT&T urges the Commission to reverse its decision to adopt the CLECs' definitions of FTTH, FTTC, and hybrid loops, which erroneously restrict the FCC's unbundling relief to "mass market customers." (Decision at 8; AT&T Rhg. App. at 5) AT&T asserts that the Decision is inconsistent with the FCC's rules and the Commission's decision in the Verizon *TRRO* proceeding.[8] The *Verizon Decision* held that the FCC's loop rules apply to all customers, not just to mass market customers.

The CLECs' position is that the *TRO* and the FCC's actions thereafter confirm the FCC's intent that the FTTH, FTTC, and hybrid loop rules apply only to the mass market. They argue that the FCC never intended to apply its FTTH, FTTC, and hybrid loop rules to loops serving all types of customers when the FCC issued its *Errata* to the *TRO*. (CLECs' Joint Response at 4) The CLECs assert that in the *Errata*, the FCC deleted the reference to residential customers in its original FTTH rule because it was inconsistent with the decision in the *TRO* that the rule would also apply to "very small

[7] D.06-01-043, at p. 80, notes that the CLECs and AT&T reversed the order of Issues 49 and 50. The Decision used AT&T's numbering system.

[8] *Decision Adopting Amendment to Interconnection Agreements, Petition of Verizon California, Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order* ("*Verizon Decision*").[D.06-02-035] (2006) ___ Cal.P.U.C.3d ___ .

businesses." The CLECs acknowledge that the *Errata* did not clarify that the rule would be limited to mass market customers, but they assert that the FCC did so in the *TRO* and in statements thereafter.

We agree with AT&T that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers. The text of the FTTH rule provides that: "A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises…."[9] The rule as it originally appeared in the *TRO* referred to "a residential unit," but the FCC later changed the "residential unit" reference. In the *TRO Errata*, the FCC replaced "residential unit" with "an end user's customer premises."[10] We find it significant that the FCC was careful to delete from the rules any qualification limiting the scope of the relief to a particular market segment, and chose instead to use the broad term "customer premises." We note also that the text of the hybrid loop rule makes no reference to customer classes in its statement that: "An incumbent LEC is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops."[11]

We are persuaded that the FCC's loop unbundling rules are customer-neutral, and that the unbundling rules apply with equal force to every customer served by that loop type.[12] Moreover, it is not significant that the section on FTTH loop and hybrid loops appear in a section of the *TRO* entitled "Specific Unbundling Requirements for Mass Market Loop." We agree with AT&T that the heading cannot be used to limit the applicability of the rules themselves. Therefore, we grant limited rehearing, in order to

[9] 47 C.F.R. §51.319(a)(3).

[10] See *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-388, (Oct. 29, 2004) 2004 F.C.C. LEXIS 6241, ¶11 ("FTTC Order Errata").

[11] 47 C.F.R. §51.319 (a)(2)(i).

[12] See *TRO, supra,* ¶210 and ¶197.

modify our finding on this issue. Thus, D.06-01-043 is modified to find that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers.

B. The Decision Correctly Held that Entrance Facilities and SS7 Shall Be Provided to the CLECs at TELRIC Rates for Use in Interconnection. (Issue 51: Sections 14.2, 14.3, 14.4, and 14.5; Issue 52: Sections 15 and 1.1(1X))

An entrance facility is a form of dedicated transport that provides a transmission path between the networks of AT&T and a CLEC. As noted in the Decision at p. 83, the parties agree that both the *TRO* and the *TRRO* held that entrance facilities need not be unbundled, and are no longer a UNE under Section 251(c)(3) of the 1996 Act.[13] Issues 51 and 52, respectively, are whether TELRIC rates apply to entrance facilities for use in interconnection under Section 251(c)(2), and whether those rates apply to Signaling System 7 (SS7). The Decision holds that pricing for entrance facilities and SS7 shall be at TELRIC rates when used for interconnection pursuant to Section 251(c)(2), which governs interconnection.

AT&T disagrees with the Decision's ruling that TELRIC rates apply to entrance facilities and SS7 when used for interconnection pursuant to Section 251(c)(2). AT&T asserts that the ILEC is not required to provide any facilities under Section 251(c)(2). According to AT&T, Section 251(c)(2) only requires it to permit a CLEC to interconnect the CLEC's own facilities to the ILEC's network, i.e., the CLECs are allowed only to choose a point at which to interconnect with the ILEC's network. AT&T claims that Section 251(c)(2) cannot be read to require the provision of *any* facilities. Rather, it requires AT&T to provide interconnection "*for* the facilities and equipment of any requesting telecommunications carrier – but not the facilities themselves."[14] Therefore, AT&T urges the Commission to reverse its holding that CLECs may get

[13] Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. §151 *et seq*., 104 P.L. 104.
[14] SBC Rhg. App., p. 12.

entrance facilities at TELRIC rates pursuant to the interconnection requirements of 47 U.S.C. Section 251(c)(2).

The CLECs take a different position. They argue that although the FCC declassified entrance facilities as a UNE under Section 251(c)(3), that decision does not affect the requirement that ILECs provide entrance facilities at TELRIC prices when used for interconnection pursuant to Section 251(c)(2). They assert that the *TRO* clearly stated, and the *TRRO* affirmed, that ILECS must continue to provide entrance facilities to CLECs for interconnection under Section 251(c)(2), although they need not provide them as UNEs under Section 251(c)(3).[15] The CLECs assert that the FCC recognized that entrance facilities fall into two distinct uses: (1) when used by CLECs for backhaul to their own networks, they would be delisted as UNEs; and (2) when used for interconnection with the ILEC's network, they would continue to be available at TELRIC rates.

The CLECs cite the *TRO* as support for the distinction in the treatment of entrance facilities when used as dedicated transport pursuant to Section 251(c)(3), as opposed to entrance facilities when used for interconnection under Section 251(c)(2):

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECS explicitly must make available for Section 251(c)(2) interconnection [footnote omitted], we find that the Act does not require incumbent LECs

[15] CLECs' Joint Rhg. Response at 18.

> to unbundle transmission facilities connecting incumbent LEC networks to competitive LECs for the purpose of backhauling traffic.[16]

Moreover, as the CLECs note, in the *TRRO*, the FCC reaffirmed its finding that ILECs must offer dedicated transport needed for Section 251(c)(2) interconnection at cost-based rates, although they need not be unbundled and are no longer a UNE under Section 251(c)(3). *TRRO*, ¶140 provides as follows:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service [footnote omitted]. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[17]

Thus, AT&T's argument limiting the ILEC's obligations under Section 251(c)(2) to a point of interconnection, rather than the facilities necessary for interconnection, is clearly refuted by the *TRRO* as cited above.

The Decision determined that the FCC established that interconnection would include the facilities used to effect that interconnection, and those facilities encompass more than just the cross-connects described by AT&T. The Decision noted further that the FCC is clear that interconnection, like UNEs, should be priced at TELRIC.[18] Similarly, the Decision found that the FCC's finding of non-impairment with respect to SS7 signaling does not alter the CLECs' right to interconnect with AT&T's SS7 signaling networks, pursuant to Section 251(c)(2) for use in connection with the

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[16] CLECs' Joint Rhg. Response at p, 20, citing *TRO, supra*, ¶365 (footnote omitted)(emphasis added).

[17] *TRRO, supra*, at ¶140, citing *TRO*, *supra*, at ¶366, emphasis added.

[18] D.06-01-043, p. 85.

exchange of traffic. We continue to believe that these findings are correct. Accordingly, we affirm our determination that TELRIC rates apply to entrance facilities and SS7.

AT&T urges the Commission to look to rulings in other states. While not bound by those rulings, we found a recent decision from the federal district court in Missouri to be particularly compelling. In that case, Southwestern Bell Missouri (SBC-MO) made arguments in federal district court against the Missouri Public Service Commission strikingly similar to those made by AT&T here.[19] In *Southwestern Bell*, SBC-MO asserted that an arbitration order violated the *TRRO* by requiring SBC to provide entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities, and are not entitled to these facilities as UNEs under Section 251(c)(3). The Missouri Commission held that CLECs are entitled to entrance facilities, as needed for interconnection pursuant to Section 251(c)(2), and TELRIC is the correct rate for these facilities. The Court concluded that the Missouri Commission's Arbitration Order correctly implements the FCC's rulings on entrance facilities as set forth in the *TRRO* and the *TRO*. As here, the Court relied on *TRRO*, *supra*, at ¶140 (*TRO*, *supra*, at ¶366), when it stated as follows:

> The TRRO is clear…that the FCC's 'finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to §251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.' [Citation omitted.] 'Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.'[20]

[19] *Southwestern Bell Telephone v. Missouri Public Service Commission* (2006) ___F. Supp. ___ 2006 U.S. Dist. LEXIS 65536.

[20] *Id.,* at *15.

The Court also recognized the distinction between entrance facilities when used for interconnection pursuant to Section 251(c)(2), as opposed to their use as dedicated transport as unbundled network elements pursuant to Section 251(c)(3).

For all of the above reasons, we find no merit in AT&T's challenge of our finding that entrance facilities and SS7, when used for interconnection pursuant to Section 251(c)(2), shall be priced at TELRIC rates. We also concur that the CLECs are entitled to entrance facilities, as needed, for interconnection pursuant to Section 251(c)(2).

C. The Decision Correctly Determined that the DS1 Cap Applies Only on Circuits Where DS3 Is Not Available as a UNE. (Issue 17: Section 3.1.4.1)

This dispute concerns the FCC cap on the number of DS1 transport circuits that a CLEC can obtain as Section 251 UNEs, and whether the cap applies where DS3 transport is available as a UNE. The CLECs assert that the ten circuit limitation for DS1 transport applies only on those transport routes where DS3 transport is not available as a UNE. AT&T's view is that the FCC's DS1 cap does not depend on whether DS3 transport is available as a UNE.

In disputing the CLECs' interpretation that the FCC's DS1 cap depends on whether DS3 transport is available as a UNE, AT&T relies on the following FCC rule from the *TRO*:

> Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.[21]

The CLECs concede that this rule does not explicitly address the limitation on the applicability of the DS1 transport cap. However, they assert that ¶128 of the

[21] 47 C.F.R. §51.319(e)(2)(ii)(B).

TRRO provides the basis for their conclusion that the DS1 cap applies only where DS3 is not available as a UNE.[22]

> Limitation on DS1 Transport. On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits….When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.[23]

The Decision concluded that ¶128 clearly states that the DS1 limitation applies only on those routes for which the FCC determines that there is no unbundling obligation for DS3 transport. The Decision also cautioned that the "Rule itself should not be read in a vacuum, but within the context of the dicta that lead [sic] to creation of the rule."[24] Accordingly, the Decision adopted the CLECs' proposed language in §3.1.4.1, making the ten DSL cap inapplicable to transport routes where DS3 is available as a UNE.

In its rehearing application, AT&T references the *Verizon Decision* [D.06-02-035], *supra*, where, based on a decision from the western district of Texas, the Court ruled that the DS1 cap applies on all routes.[25] The *Verizon Decision* has a rehearing application pending. We will not prejudge the outcome of the Verizon rehearing. Therefore, we reserve our resolution of Verizon's issues for Verizon's rehearing decision. At this time, it is sufficient to say that the Commission may or may not choose to follow federal decisions from other federal circuits.

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[22] CLECs' Joint Rhg. Response at pp. 29-31.

[23] *TRRO*, *supra*, at ¶128.

[24] D.06-01-043, at p. 51.

[25] *Cbeyond Communications of Texas, L.P. v. PUC of Texas* (W. D. Tex. Jan. 24, 2006) ___ F. Supp. ___ 2006 U.S. Dist LEXIS 7381.

The limitation in *TRRO* ¶128 cited above and the CLECs' arguments persuade us that the ten-circuit DS1 transport cap set forth in FCC Rule §51.319(e)(2)(ii)(B) does not apply where DS3 is available as a UNE. The CLECs' explanation simplifies it:

> The DS1 transport cap issue is simple: Where DS1 transport is still available as a UNE (e.g., impairment) and DS3 transport is not available as a UNE (e.g., non-impairment) then the CLECS are not permitted to take advantage of UNE pricing by using DS1s exclusively on such routes. In order to prevent such gaming, the FCC imposed a limit of 10 DS1s ("DS1 cap" or "DS1 10 cap") that a CLEC could purchase on such routes where DS3 transport was no longer available as a UNE.[26]

The CLECs clearly laid out the reasons behind the DS1 limitation. Accordingly, the Decision correctly concluded that "[t]he rule [Rule §51.319(e)(2)(ii)(B)] itself should not be read in a vacuum, but within the context of the dicta that lead [sic] to creation of the rule."[27] Therefore, we reject AT&T's argument of error, and affirm our ruling that the DS1 cap applies only on those routes for which the FCC determines there is no unbundling obligation for DS3 transport.

D. Conversion Charges Involving Physical vs. Non-physical Work (Issue 9: Sections 1.3.3, 2.1.3.3, and 3.2.2.2; Issue 46: Sections 10.1.2 and subsections, and 10.1.3.1)

1. No Charges Are Warranted for Conversion Charges Not Requiring Physical Work.

Issues 9 and 46 relate to AT&T's nonrecurring charges that apply to transitions of *TRO* and *TRRO*-affected UNEs to other serving arrangements, and conversions of wholesale services to UNEs and vice versa.[28] The CLECs' position is

[26] CLECs' Joint Rhg. Response at pp. 24-25 (footnote omitted).

[27] D.06-01-043, at p. 51.

[28] The parties combined the discussion of Issues 9 and 46 because the provisioning processes are

(footnote continued on next page)

that they should not be forced to pay AT&T's non-recurring service order charges for conversions not requiring physical work because they "are getting nothing more, physically, and sometimes less, functionally, than the UNEs for which they have already paid SBC non-recurring service order and service establishment charges." (CLECs' Joint Rhg. Response at 33) They argue that for AT&T to get non-recurring charges would force them to pay twice for essentially the same services from the same vendor. They further assert that the conversions from UNE-P and other discontinued UNE arrangements required pursuant to the *TRO* and *TRRO* are not being undertaken for the benefit of the CLECs, but to enable AT&T to charge higher prices for essentially the same facilities and functionalities the CLECs already have. The CLECs acknowledge that some billing record changes may be necessary, but they believe that making the changes should be automated and of negligible cost to AT&T.

The Decision concurred with the CLECs that no charges are warranted for conversions and transitions that do not involve physical work, and therefore adopted the CLECs' language on this issue in Sections 1.3.3, 2.1.3.3, 3.2.2.2, 10.1.2, and 10.1.3.1. The Commission's rationale is based on the FCC's finding in ¶587 of the *TRO*, as follows:

> Because incumbent LECs are never required to perform a conversion in order to continue serving their customers, we conclude that such charges are inconsistent with an incumbent LECs' duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. [Citation omitted.] Moreover, we conclude that such charges are inconsistent with Section 202 of the Act, which prohibits carriers from subjecting any such person or class or persons (e.g., competitive LECs purchasing UNEs or UNE

(footnote continued from previous page)

nearly identical in each case.

> combinations) to any undue or unreasonable prejudice or disadvantage.[29]

In other words, because ILECs are never required to perform conversions in order to continue serving their own customers, such charges are inconsistent with Section 202 of the 1996 Act, which prohibits undue or unreasonable prejudice or disadvantage to persons or entities that are not AT&T customers.

AT&T objects to this ruling, stating that it makes no sense. AT&T believes that "SBC California's right to recover its order processing costs – i.e., the costs of mechanically or manually processing CLEC order – does not hinge on the type of work that is necessary to provision an order. Rather, it hinges on the type of order the CLEC submits."[30] AT&T further objects that the *TRO* disapproved only those conversion charges that are "wasteful and unnecessary" and that might "unjustly enrich an incumbent LEC."[31] AT&T also argues that the *TRO* did not hold that ILECs are barred from recovering legitimate costs, including service costs incurred when CLECs seek to transition or convert facilities. If there are costs incurred in transitioning the CLECs to lawful serving arrangements, AT&T argues that it is only fair that the CLEC pays those costs.

We affirm the Decision's conclusion that no charges are warranted for conversions and transitions that do not involve physical work**.** The Decision at p. 35 notes that the FCC reiterates that conversions between wholesale and UNEs are largely a billing function and given the nondiscriminatory flavor of ¶587 cited above, it is inappropriate to charge CLECs a nonrecurring charge for record changes when ILECs are never required to perform a conversion in order to continue serving their customers. Moreover, the FCC recognized the risks and dangers inherent in the plethora of charges

[29] *TRO*, *supra*, ¶587.

[30] SBC Rhg. App. at p. 26.

[31] *Id*., citing *TRO*, *supra*, at ¶587.

that could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an ILEC:

> We recognize, however, that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service.[32]

In light of all of the above, we reject AT&T arguments of error and affirm our conclusion in the Decision that no charges are warranted for conversions and transitions that do not involve physical work. The cost of making billing record changes should be automated and of negligible cost to AT&T.

2. A Nonrecurring Charge, For Conversions involving Physical Work, Shall Be Drawn from the Tariff of the End Resulting Service.

As the Decision notes, the parties concurred that CLECs should be required to pay for physical work that is needed in order to effect transitions and conversions, but they disagreed on what constitutes "physical work" and regarding the specific charges to be applied when physical work is performed.[33] The CLECs proposed that where a UNE is converted to a tariff, the non-recurring charges, where physical work is required, would be drawn from the tariff. In other words, the CLECs proposed that non-recurring charges should, in all cases, be drawn from the service that is the end result. AT&T objects, stating that the CLECs' proposal would avoid legitimate charges for activities that it performs on the CLECs' behalf. That is, there are costs captured on the UNE side involving revisions that need to be made to AT&T's ordering and billing systems, while

[32] *TRO*, , *supra*, at ¶587.

[33] D.06-01-043, at pp. 37-38.

on the special access side, there are costs that are necessary to establish the ordering and billing records in various systems AT&T uses to track and bill special access. AT&T maintains that these activities are distinct, and the charges are not duplicative, as the CLECs claim.

We are persuaded by the CLECs' assertion that there would be excess cost recovery in some instances because various costs typically associated with establishing new services will not be incurred by AT&T in carrying out transitions or conversion, yet the CLECs will still be paying non-recurring charges designed to recover such costs. AT&T did not refute the CLECs' allegation. Also, because AT&T never has to perform these functions for its own customers, the Commission adopted the CLECs' proposed language that allows for a single non-recurring charge, that of the service being transitioned to. For example, if a UNE is being converted to a tariff, the nonrecurring charges, where physical work is required, would be drawn from the tariff. The adopted language will ensure that the CLECs are not required to pay for functions not necessary to be performed for the transitions and conversions.

We affirm the Decision on this issue. Consistent with Commission policy, we seek to avoid the over-recovery of costs that would occur if AT&T were allowed to charge the full tariffed non-recurring charges, and the full non-recurring UNE service connection or disconnection charges for conversions.[34] That is, charges should not be applied fully to both ends of the transaction (costs incurred on the UNE side, as well as on the special access side). Such charges would be unnecessary and wasteful, in violation of the ¶587 of the *TRO*.

E. The Commission Correctly Determined that Resale Pricing for ULS/UNE-P Services After March 11, 2006 Should Be at TSR Rates. (Issue 14: Section 2.1.3.4)

This dispute concerns the rates that should apply to ULS/UNE-P services that have not been migrated by the *TRRO*-imposed deadline of March 11, 2006. The

[34] D.06-01-043, at pp. 37-38.

Decision held that the CLECs are entitled to Total Service Resale (TSR) rates if the migration of their customers is not completed by the deadline.[35] The Decision adopted the TSR rates previously approved by the Commission because "adopting SBC's market based rates would be unduly punitive for failure to make the deadline to transition services from ULS/UNE-P arrangements."[36]

In its rehearing application, AT&T opposes TSR pricing, stating that the Decision disregards controlling FCC rules. AT&T states that "when a network element is no longer subject to unbundling under Section 251(c)(3), the FCC has held that the rates, terms, and conditions for such elements need not be included in interconnection agreements established pursuant to the process set forth in §252."[37] It argues that provisioning for de-listed facilities should occur through separate commercial agreements negotiated outside of the Section 252 process, and that the Commission has no authority to establish rates for de-listed UNEs. AT&T also claims that the Commission's rejection of market-based rates for de-listed elements contravenes the FCC's finding that CLECs are not impaired without access to unbundled switching. In addition, AT&T objects to the Decision's assertion that its market-based rates would be unduly punitive, asserting that the FCC held that market rates satisfy the federal "just and reasonable" standard.[38] AT&T also urges the Commission to consider the persuasive authority of other state commissions that have agreed with AT&T on this issue.

In their Joint Rehearing Application, the CLECs concur with the Decision's ruling requiring AT&T to apply TSR rates if the CLECs were unable to submit transition orders to AT&T by the March 10 deadline. The CLECs assert that allowing SBC to charge market-based rates would be unlawful and punitive. In support thereof, they cite

[35] D.06-01-043, at p. 89 [Finding of Fact No. 24].
[36] D.06-01-043, at p. 47.
[37] SBC Rhg. App. at p. 29.
[38] SBC Rhg. App. at 32, citing *TRO*, *supra*, at ¶664.

Public Utilities Code Section 451 and U.S.C §201(b), which require the carriers' rates to be "just and reasonable."[39] They assert that the paucity of the record on this issue makes it impossible for the Commission to determine whether AT&T's market-based rates are "just and reasonable." Specifically, they argue that using market-based rates would violate Public Utilities Code Section 1705 because there is no evidence in this arbitration proceeding that AT&T's market-based rates meet the requirements of the Communications Act of 1934 or the Public Utilities Code.[40] Therefore, the Commission could not make findings of fact or draw the legal conclusions required to accept AT&T's market-based rates. Moreover, they state that those rates are not in a tariff, are not published, and have not been approved or otherwise subjected to this Commission's review. The CLECs assert that the language proposed by AT&T would leave the selection of rates entirely up to AT&T.

The Joint CLECs also reject AT&T's argument that once the FCC finds that a service is no longer subject to Section 251(c)(3) of the 1996 Act, it must automatically revert to market-based rates. Automatically reverting to market-based rates, they argue, would ignore Section 251(c)(4), which requires the ILEC to make wholesale service available at rates that state commissions determine to be in compliance with Section 252(d)(3). They assert that applying TSR rates is the readily-available alternative to the Section 251(c)(3) UNEs, not market-based rates. The Joint CLECs also reject AT&T's contention that defaulting to market-based rates would not be "unduly punitive," and noted that the rates in AT&T's "Local Wholesale Complete" service, taken together, exceed its retail rates by several times. The CLECs see this as a clear indication that the rates would be excessive to the point of being punitive.

To AT&T's argument that the Commission should look to other state decisions in regard to this issue, the Joint CLECs note that AT&T omitted mentioning its

[39] CLECs' Joint Rhg. Response at p. 41.

[40] Public Utilities Code Section 1705 requires that there be findings of fact and conclusions of law on all material issues. (Pub. Util. Code, §1705.)

home state of Texas and the Arkansas Public Service Commission, both of which reached the same result as the Decision.[41] Finally, the Joint CLECs reject AT&T's assertion that it must receive orders for each and every CLEC UNE-P line by March 10 in order to accomplish the transition. They point out that the Decision provides an alternative when it mandated the submission of transition orders by March 10 "unless otherwise agreed to by the Parties." The Joint CLECs stated that AT&T "should be working with the CLECs to get their transition orders accepted and validly completed, with re-pricing undertaken once the orders are submitted."[42] They suggested that AT&T could use its own Local Service Center to provide assistance in generating orders not submitted by March 10. They object to the Commission requiring the CLECs to pay AT&T, as a "default rate," any rate higher than the total service resale rate after March 10, 2006.[43]

We are persuaded that the rate for CLECs unable to complete the submission of transition orders by the deadline should be at TSR rates. To adopt market rates without an evidentiary record would violate Public Utilities Code Section 1705, which requires separately stated findings of fact and conclusions of law on all issues material to the decision. Without a record, the Commission would have no basis for finding that the rates are "just and reasonable," as required by Public Utilities Code Section 451 and §201(b) of the Communications Act of 1934. In contrast, the TSR rates were established after a broad rulemaking and investigation that included hearings. The Decision's TSR rates are derived from D.96-03-020 in R.95-04-043 and I.95-04-044, which determined that AT&T should make all of its retail services available at wholesale to CLECs under total service resale, i.e., at rates set at a seventeen percent discount off of

[41] Joint CLECs' Joint Rhg. Response at pp. 44, fn. 113 & 114, citing *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award – Track II Issues, P.U.C. Docket No. 28821 (June 17, 2005) and *In the Matter of the Petition of Southwestern Bell Telephone*, Memorandum Opinion and Errata Order, Docket No. 05-081-U (November 14, 2005). The Joint CLECs provided the Texas and Arkansas Orders under separate cover and request the Commission to take administrative notice of them.

[42] CLECs' Joint Rhg. Response at p. 44.

[43] *Id*., at pp. 45-46.

AT&T's retail rates.[44] The rates are set out in SBC's resale tariff, Schedule Cal. P.U.C. No. 175-T.

We reject AT&T's challenge to our finding that adopting AT&T's market-based rates would be unduly punitive for the failure to make the deadline to transition services from ULS/UNE-P arrangements.[45] Therefore, we affirm the Decision's adoption of the previously approved CLECs' TSR rates, and the CLECs' proposed language in Section 2.1.3.4.

F. The Decision's Findings on Wire Center Certification Issues Are Correct. (Issue 18: Section 4.1; Issue 22: Sections 4.1.1.6 and 4.8; Issue 29: Section 4.9.)

AT&T challenged three closely related issues, two of which involve deadlines for the self-certification of wire centers, and the last concerns remedies for CLECs when non-impaired wire centers are reverted to impaired wire centers because of an error in AT&T's classification. Issue 18 concerns the question of whether it is appropriate to set a deadline for self-certification. Issue 22 focuses on whether, after AT&T designates new wire centers in Accessible Letters, CLECs can still self-certify more than 60 days after the Accessible Letter. Issue 29 concerns the remedies that may apply where a non-impaired wire center reverts to an impaired wire center "due to an error in SBC's classification."

Issue 18's dispute specifically concerns AT&T's proposed language that a "CLEC may not submit a self-certification for a wire center after the transition period for the DS1/DS3 Loop and/or DS1/DS3 Dedicated Transport and/or Dark Fiber Dedicated Transport impacted by the designation of the wire center has passed."[46] This proposal permits CLECs to self-certify only if they wish to obtain unbundled high-capacity loop or transport at a center AT&T has designated as meeting the FCC's no-impairment

[44] See *Re Competition for Local Exchange Service* [D.96-03-020] (1996) 65 Cal.P.U.C. 2d 156 (.
[45] D.06-01-043, at p. 47.
[46] Amendment §4.1 to Interconnection Agreement.

threshold. The CLECs object that this proposal would require a CLEC to challenge AT&T's initial list within a year, or waive its challenge even if the CLEC had not yet entered a particular wire center.

The Decision points out that the CLECs have agreed in Section 4.1.1 to a one-year limit to make self-certifications for circuits that were in place as of March 11, 2005, and they have agreed to make a reasonably diligent inquiry to determine whether the wire center meets the impairment thresholds before submitting a self-certification and order for a UNE.[47] The Commission reasonably balanced the interests of the CLECs and AT&T. The Decision adopted the CLECs' language, ruling that "CLECs should not have to waive their right to challenge SBC's determination that a wire center meets the FCC's no-impairment threshold because they are not ready to enter a particular wire center."[48] At the same time, the Decision noted that AT&T requires certainty as to the designation of a particular wire center, and it adopted the CLECs' language in Section 4.1. Therefore, AT&T allegation on this issue is without merit.

Issue 22 concerns the question of whether a CLEC may self-certify at any time for wire centers that are subsequently designated as non-impaired. The Commission established a three-year deadline for a CLEC to self-certify and challenge AT&T's wire center designation. The Decision concurs with AT&T that "it is unworkable to have no firm, fixed deadline after which no CLEC would be permitted to self-certify."[49] The Decision therefore set a three-year deadline, consistent with what it perceived to be AT&T's proposal of a three-year deadline for a CLEC to self-certify. Accordingly, the Decision modified the CLECs' language to allow "up to three years from the date SBC designates a wire center as non-impaired" for self-certification.

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[47] D.06-01-043, at pp. 51-52.

[48] *Id*., at p. 52.

[49] *Id*., at p. 58.

In its rehearing application, AT&T states that it did not propose three years as the best solution – that "it mentioned the three-year possibility in its comments on the Draft Arbitrator Report (DAR) only as an alternative fallback that was less harmful than the no-deadline result reached in the DAR."[50] AT&T maintains that it has consistently defended its original 60-day proposal. But the CLECs assert that by challenging the three year limit now, AT&T is trying to do a "bait and switch" because in comments it proposed a three-year limit and now challenges that limit on rehearing.[51]

Both AT&T and the Joint CLECs state that they would not object to a generic proceeding to address all outstanding wire centers that AT&T designated as non-impaired. We do not entertain requests for future proceedings in rehearing applications. The purpose of a rehearing application "is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[52] AT&T has not established legal error with respect to Issue 22. Therefore, we affirm the Decision's ruling on this issue.

With respect to Issue 29, the CLECs' proposed language in Section 4.9 would provide for retroactive re-pricing, through a refund, of high cap loop or transport circuits that transitioned to special access as the result of an AT&T error in designating the wire center as impaired. This language would apply only where a "non-impaired" wire center reverts back to an "impaired" wire center due to an error in AT&T's classification.[53] As noted in the Decision, the CLECs argued that AT&T is the repository of all relevant information for determining non-impairment of a wire center, and is therefore in the best position to ensure that its wire center designations are accurate. AT&T disputed the CLECs' contention that AT&T can unilaterally impose an error on the CLECs since they have an opportunity to challenge AT&T's wire center

[50] SBC Rhg. App. at p. 36.

[51] CLECs' Rhg. Response at p. 48.

[52] Commission's Rule of Practice & Procedure, Rule 16.1, subd. (c); see also, Pub. Util. Code, §1732.

[53] D.06-01-043, at p. 66.

designations. AT&T also objected to being blamed if the final outcome of a given wire center is erroneous.

The Decision concurred with the CLECs that AT&T is the repository of all relevant information in determining the non-impairment of a wire center. Therefore, it adopted the CLECs' language in Section 4.9, except for the language requiring AT&T to transition access circuits to UNEs in ten days. This was determined to be unreasonable, and AT&T's proposal of 90 days was adopted.

Other than stating the Decision's holding on Issue 29, AT&T's rehearing application does not specify what the alleged error is with respect to this issue. The Joint CLEC Response also noted that AT&T does not outline any basis for its apparent objection regarding this matter.[54] AT&T merely states: "Although the Decision's holdings on Issues 18, 22, and 29 are thus objectionable in their own right, the combination of these holdings is particularly inequitable."[55] AT&T has failed to set forth specifically the grounds on which it considers the Commission's resolution of Issue 29 to be unlawful, as required by Rule 16.1(c) of the Rules of Practice and Procedure, and Public Utilities Code Section 1732. We therefore affirm the Decision's holding on this issue.

G. The Decision's Holding Regarding Issue 32 Does Not Change Tariff Requirements. (Issue 32: Section 5.7)

The Decision requires AT&T to give at least 60 days' notice of a proposed change in its access tariffs in those cases where the CLEC is using the affected service as part of a commingled arrangement.[56] It also requires AT&T to grandfather the special

[54] CLEC Joint Rhg. Response at p.49.

[55] SBC Rhg. App. at p. 37.

[56] D.06-01-043, p. 91 [Finding of Fact No. 41].

access services in its California tariff in the event that loss of services would impact a CLEC's commingling arrangement.[57]

AT&T objects to both of the above provisions, asserting that the Commission cannot change tariff requirements in this proceeding because the filed tariff doctrine, among other things, precludes it. The purposes of the filed rate doctrine are to ensure the agency's primary jurisdiction to determine the reasonableness of rates, and to ensure rate uniformity and nondiscrimination among customers.[58] AT&T asserts that carriers who commingle their tariffed services with UNEs will receive favorable terms in regard to notice and grandfathering. AT&T claims that other purchasers of the same tariffed services that do not use them in a commingled arrangement will be "relatively disadvantaged."[59] AT&T further asserts that the notice requirement conflicts with the rules applicable to federal and state tariffs. In addition, AT&T states that the Decision fails to explain why it can or should order a new notice period in the context of a §252 arbitration under the 1996 Act.

The CLECs state that what is involved here is contractual notice that merely facilitates CLEC planning for contemplated tariff changes, and there is no interference with federal or state rules that apply to parties' rights to notice for the purpose of objecting to a tariff change. The CLECs note that the FCC's regulations make it clear that the purpose of the regulations governing notice periods are for the purpose of permitting customers to file "petitions seeking investigation, suspension, or rejection of a new or revised tariff…."[60] The notification involved here is not related to the notice that

[57] D.06-01-043, p. 91 [Finding of Fact No. 42].

[58] See *Arkansas Louisiana Gas Co. v. Hall* (1981) 453 U.S. 571, 577-578. Under the filed rate doctrine, also known as the filed tariff doctrine, a carrier's tariff, once approved by the FCC, is considered to be the law and therefore exclusively enumerates the rights and liabilities between the carrier and the customer. A carrier is forbidden from charging rates other than as set out in its filed tariff, and discrimination among customers is forbidden.

[59] SBC Rhg. App.at p. 41.

[60] CLECs' Joint Rhg. Response at p. 50, citing 47 C.F.R. §1.773(a)(2)(i), *et seq*.

must be given under both state and federal law and rules, so that affected parties might object to a proposed tariff change.

1. It is Reasonable to Give the CLECs Additional Time in Advance of Proposed Tariff Changes that Will Affect the Availability of Commingling Arrangements.

The CLECs proposed language requires 60 days' notice before AT&T can eliminate the availability of a product in its access tariff, and they asked to "grandfather" commingled arrangements if the access service that is part of the commingled arrangement is withdrawn. AT&T objected to the CLECs' language asserting that it is very broad, in that it would require AT&T to provide 60 days' advance notice of any change in its access tariffs that affected DS1 or DS3 transport in any way at all – even as to CLECs who are not using those elements in commingled arrangements. To address AT&T's criticism and to narrow the reach of the CLECs' language, the Commission responded as follows:

> "We agree with SBC that the CLECs' proposed language is broad and confusing. We believe that the notice should go only to the CLECs who are actually purchasing an access service as part of a commingled arrangement, and the notice would be limited to notice about that specific access service."[61]

With these limitations in mind, the Commission determined that the CLECs' request to have 60 days' notice of a proposed change in the access tariff is reasonable because the CLECs will rely on the commingled arrangement to provide service to their customers and will need time to plan how to transition to another service, if necessary.[62] The Decision also acknowledged the CLECs' point that most network changes require considerably longer planning horizons than 60 days, and AT&T must surely plan its special access tariff changes for longer than that. (D.06-01-043, at p. 72.)

[61] D.06-01-043, at p. 72.

[62] See D.06-01-043, p. 91 [Finding of Fact No. 41].

It therefore concluded that there should be no problem in giving the CLECs 60 days' notice of changes that affect their service.

AT&T's reliance on the filed rate doctrine is misplaced. Under the rate strand of the filed rate doctrine, AT&T cannot demonstrate that a difference in rates necessarily constitutes unlawful discrimination:

> Lack of uniformity in the rate charged is not necessarily unlawful discrimination, and is not prima facie unreasonable. Discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges…The fact…that a rate is discriminatory by comparison with another rate does not necessarily establish or imply that either of them is unreasonable in the sense of being inadequate or exorbitant…It is only unjust or unreasonable discrimination which renders a rate or charge unreasonable; and a utility may, without being guilty of unlawful discrimination, classify its customers or patrons upon any reasonable basis, as according to the purpose for which they receive the utility's service or product….[63]

Under the nondiscrimination strand of the filed rate doctrine, only "undue" discrimination is prohibited. As noted in the Decision, "discriminatory treatment is considered undue only if it provides an advantage to some customers and a disadvantage to others. To establish any such effect, comparison must be made between comparable situations."[64] Only CLECs that use an intrastate access service in a commingling arrangement are "similarly-situated" under these facts. In recognition thereof, the Commission made the following finding:

> We find that a CLEC purchasing an access service for commingling with a UNE is different from all other "similarly-situated customers," since the CLEC is relying on

[63] *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 138-139.

[64] D.06-01-043, at p. 71, fn. 22, citing *Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242-243.

> the commingled arrangement of an access service and a UNE to provide service to its customer. Without that access portion of the arrangement, the CLEC cannot provide service to its customer.[65]

Thus, these facts do not present a situation where there is undue discrimination between or among customers that are "similarly-situated."

What we are dealing with here is a contract dispute being resolved by means of arbitration pursuant to Section 252(b) of the 1996 Act. The CLECs are simply being provided additional time to plan, in advance of formal tariff filings at this Commission or at the FCC. As the CLECs point out, the FCC's regulations make it clear that the purpose of the regulations governing notice periods are for the purpose of permitting customers to file "petitions seeking investigation, suspension, or rejection of a new or revised tariff…."[66] The notification at issue here is separate from any obligations created under state and federal law and rules, such that affected parties might object to a proposed tariff change. We agree with the Decision that "[t]his notice has nothing to do with the notice required by this Commission and the FCC for implementing tariff changes. It simply gives the affected CLEC addition time to plan, in advance of formal filings at this Commission or at the FCC."[67]

In sum, the Commission is well aware that it cannot change federal tariffs, as noted in the Decision.[68] Nor are there any tariff changes, including state tariffs, at issue here. Neither the federal nor the state tariff is being changed; they remain intact. This is a contract dispute being arbitrated by the Commission under Section 252(b) of the 1996 Act. In resolving this contract dispute, the Commission has reasonably determined that AT&T should simply notify its CLEC customers 60 days before making changes to

[65] D.06-01-043, at pp. 71-72.
[66] CLECs' Joint Rhg. Response at p.50, citing 47 C.F.R. §1.773(a)(2)(i), *et seq.*
[67] D.06-01-043, at p. 70.
[68] D.06-01-043, at p. 72.

tariffs that would affect the price or availability of a service a CLEC uses in a commingling arrangement.

2. A One-Year Limitation on the Grandfathering of Special Access Services in AT&T's California State Access Tariff Is Reasonable.

The Decision also ordered AT&T to grandfather the special access services in its California tariff, as it will enable the CLECs to continue to serve their customers.[69] Special care was taken to point out that the grandfathering ordered by the Commission applies only to the California tariff because the Commission does not have the authority to require the grandfathering of a federal tariff. AT&T objects to the grandfathering provision on the ground that the filed tariff doctrine prohibits undue discrimination. Its explanation is that carriers that commingle their tariffed services with UNEs will receive favorable treatment, as compared to other carriers, including other CLECs, by obtaining grandfathering of tariffed terms after those terms have become unavailable to other carriers. Thus, it claims, purchasers of the same tariffed services that do not use them in a commingled arrangement will be "relatively disadvantaged."[70]

We disagree. Requiring AT&T to grandfather access services that CLECs use in a commingling arrangement does not give CLECs a service superior to that which is available to similarly-situated customers. We concur with the Decision's finding that "a CLEC purchasing an access service for commingling with a UNE is different from all other 'similarly-situated customers,' since the CLEC is relying on the commingled arrangement of an access service and a UNE to provide service to its customer."[71] Only CLECs that use an intrastate access service in a commingling arrangement are "similarly-situated" under these facts. Therefore, there is no disparate treatment between or among customers that are "similarly-situated."

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[69] See D.06-01-043, at p. 91 [Finding of Fact No. 42].

[70] SBC Rhg. App. at p. 43.

[71] D.06-01-043, at p. 71.

We find that a one year limitation on the grandfathering requirement is reasonable. The CLECs should be able to transition to another service within that time. Therefore, AT&T will grandfather in place for one year commingled arrangements ordered out of its state access tariff that have been ordered prior to the access tariffs effective date.

H. The Commission Need Not Clarify that It Has Made No Determination Regarding Whether It has Jurisdiction Over Section 271 Rates. (Issue 7: Sections 1.1(1X) 1.3.2, 5.8 and 13)

In its rehearing application, AT&T urges the Commission to clarify that it has made no determination regarding whether it has jurisdiction to review §271 rates. AT&T acknowledges that the Decision properly states that "the rates, terms and conditions applicable to [§271] access are not appropriate for inclusion in this Amendment,"[72] and also rejects the CLECs' proposed language identifying elements claimed by the CLECs to be required under §271 and proposed rates and other terms and conditions for those elements. AT&T also claims it has no quarrel with the Decision's statement that "[i]f the CLECs dispute that SBC's rates are just and reasonable, they may file a complaint at this Commission. We will address the jurisdictional issues at that time."[73] Despite the Decision's clear statement, AT&T still maintains that "the Commission should 'clarify' that it has in fact deferred that question."[74]

It is clear that the Commission has deferred the jurisdictional issues, if any, to a complaint proceeding, if filed. We will not engage in a discussion of issues that are not squarely before us. Simply because AT&T objects to the Decision's statement on page 27 that "[w]e do not agree that the FCC has exerted sole jurisdiction over the pricing of Section 271 elements" is not reason enough to resolve an otherwise premature issue.

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[72] SBC Rhg. App. at p. 47, citing D.06-01-043, at p. 28.

[73] D.06-01-043,at p. 28.

[74] SBC Rhg. App. at p. 48.

Moreover, as noted by the Joint CLECs, AT&T cannot point to any authority where the FCC has claimed exclusive jurisdiction over §271 elements.[75] Thus, the Commission declines AT&T's invitation to avoid disputes down the road because it is not a legitimate ground for a rehearing.

IV. CONCLUSION

We have reviewed each and every allegation of error asserted by the rehearing applicant, and are of the opinion that legal error was not demonstrated. However, we grant limited rehearing to modify our holding with respect to whether FCC rules on FTTH, FTTC, and hybrid loop rules apply to all customers, or only to mass market customers. We originally held that these rules apply only to mass market customers. Upon reconsideration of this issue, we have determined that FTTH, FTTC and hybrid loop rules apply to all customers. In addition, we clarify the Decision in certain respects, as discussed herein, and we correct typographical errors. The rehearing of D.06-01-043, as modified, is denied in all respects.

THEREFORE, IT IS ORDERED:

1. Limited rehearing of D.06-01-043 is granted for purposes of modifying the Decision in order to find that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers. Thus, D.06-01-043 is modified as follows:

a. Paragraph 1 on page 8 of the Decision is deleted and replaced with the following language:

> We place no particular significance on the fact that the sections on FTTH loop (¶¶273-284) and hybrid loop (¶¶285-297) appear in a section of the *TRO* entititled "Specific Unbundling Requirements for Mass Market Loop." Rather,

[75] CLECs' Joint Rhg. Response at p. 53. They further point to SBC's reliance on ¶664 of the *TRO* for its jurisdictional arguments during the proceeding. Paragraph 664 states in part: "Whether a particular checklist element's rate satisfied the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." The FCC does not claim exclusive jurisdiction over §271 pricing in this passage, or elsewhere.

> we find it significant that the FCC was careful to delete from the rules any qualification limiting the scope of the relief to a particular market segment, and chose instead to use the broad term "customer premises." As previously stated, the text of FTTH Rule 51.319(a)(3)(i) was modified in the *TRO Errata*, replacing "residential unit" with "an end user's customer's premises."[76] In addition, the text of the hybrid loop rule makes no reference to customer classes: "An incumbent LEC is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loop."[77] Furthermore, as SBC noted, the heading cannot be used to limit the applicability of the rules themselves.
>
> Therefore, we find that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers. The CLECs' proposed language in Sections 0.1.2, 0.1.3 and 0.1.4, which limits the rules to mass market customers is rejected. SBC's language is adopted.

b. Finding of Fact No. 2 is deleted and replaced with the following:

> The rules adopted for FTTH/FTTC and hybrid loops apply to all customers.

2. For purposes of clarification and to correct clerical errors, D.06-01-043 is modified as follows:

a. Page 50, paragraph 3, second line down which reads "Rule 319(e)(2)(ii)(B)" is modified to read as "Rule 51.319(e)(2)(ii)(B)."

b. Page 51, paragraph 1, next to last sentence, is modified to read as follows:

> The Rule itself should not be read in a vacuum, but within the context of the dicta that led to the creation of the rule.

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[76] See *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-388, (FCC Oct. 29, 2004) 2004 F.C.C. LEXIS 6241, ¶11 (("FTTC Order Errata").

[77] 47 C.F.R. §51.319 (a)(2)(i).

c. The following language shall be inserted on Page 72, paragraph 3 immediately preceding:

> We find that a one-year limitation on the grandfathering requirement is reasonable because CLECs should be able to transition to another service within that amount of time.

d. Finding of Fact No. 42 is modified to read as follows:

> SBC should be required to grandfather for up to one year the special access services in its California tariff, in the event that loss of the service would impact a CLEC's commingling arrangement.

e. Finding of Fact No. 52 is modified as follows:

> Entrance facilities, when used for interconnection purposes pursuant to Section 251(c)(2), shall be priced at TELRIC rates.

f. Finding of Fact No. 53 is modified as follows:

> The FCC requires ILECs to interconnect their signaling networks with those of CLECs, at TELRIC rates, pursuant to Section 251(c)(2).

g. Conclusion of Law No. 8 is added to state:

> The FCC's Rule §51.319 applies to all customers.

h. Conclusion of Law No. 9 is added to state:

> The non-impairment of entrance facilities does not nullify a CLEC's right to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.

i. Conclusion of Law No. 10 is added to state:

> CLECS are entitled to interconnect to AT&T's SS7 network pursuant to Section 251(c)(2).

The rehearing of D.06-01-043, as modified, is hereby denied in all respects.

This order is effective today.

Dated January 11, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners