Decision 08-04-057 April 24, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities.	Rulemaking 05-04-005 (Filed April 7, 2005)

OPINION APPROVING PACIFIC BELL TELEPHONE COMPANY ADVICE LETTERS 28800 AND 28982 WITH MODIFICATION

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OPINION APPROVING PACIFIC BELL TELEPHONE COMPANY ADVICE LETTERS 28800 AND 28982 WITH MODIFICATION

1. Summary of Decision

This decision resolves issues raised by the protest of DRA and TURN to Advice Letters (ALs) 28800 and 28982 filed by Pacific Bell Telephone Company now doing business as AT&T California (AT&T).[1] As the Procedural History reflects, we held evidentiary hearings on these issues and considered whether AT&T met its burden of proof to justify certain changes that it made to its Tariff Rule 12 through ALs 28800 and 28982 (Rule 12 Advice Letters).

We find that AT&T has provided evidence that supports certain modifications that it has made to its Tariff Rule 12 through AT&T ALs 28800 and 28982. However, we also find that AT&T has failed to meet its burden of proof with regard to one aspect of its tariff – that, is whether it is providing consumers with adequate information about its least-cost options for stand-alone basic service. Accordingly, we order AT&T to file an advice letter with modifications to its current Tariff Rule 12 to require AT&T customer service representatives to explain to customers seeking new service the difference between flat rate and measured rate for basic service and to disclose the monthly cost of each before marketing bundled services to such customers. We will also require that AT&T modify its Tariff Rule 12 to require it to post the rates for basic flat rate and measured rate service on its website. The information shall be posted on the

[1] Pacific Bell Telephone Company was, and remains, the legal name of the incumbent local exchange carrier that is the subject of this decision. Although it has operated under various assumed names, all references within this decision are to the same company as noted.

same web page as information regarding the cost and composition of bundles and shall be no less prominently displayed.

2. Procedural History

On September 20, 2001, the Commission issued Decision (D.) 01-09-058 (*Rule 12 Decision*), which imposed a significant monetary penalty of $25.55 million and remedial measures on Pacific Bell Telephone Company (Pacific) for marketing abuses.[2] The Commission concluded in D.01-09-058, as later modified by D.02-02-027, that Pacific had violated various statutes, decisional law, and its own Tariff Rule 12 by, among other things, failing to adequately disclose information to consumers, and by selling optional services sequentially starting with the highest priced packages, as well as deceptively labeling some of its packages.[3] The Commission further found in that decision that Pacific had reinstated certain abusive marketing practices that we had enjoined in 1986, and ordered remedial measures (to be embodied in advice letters) that included a clear separation between Pacific's service and sales activities, and disclosure of the lowest price option for requested services, and

[2] The lead action, *UCAN v. Pacific Bell,* C.98-04-004, was consolidated with three other complaints and one Commission-initiated investigation: *Telecommunications Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO (TIU) v. Pacific Bell*, C.98-06-049 (action brought by Pacific's own employees); *Greenlining Institute and Latino Issues Forum v. Pacific Bell*, C.98-06-003 (action brought on behalf of low-income and language minority customers who had been allegedly victimized by Pacific's conduct); *Office of Ratepayer Advocates v. Pacific Bell*, C.98-06-027; and *Investigation on the Commission's own Motion into the Establishment of a Forum to Consider Rates, Rules, Practices, and Policies of Pacific Bell and GTE, California, Inc.*, I.90-02-047.

[3] *See* D.01-09-058, Slip Op. at 70-75. The Commission also found Pacific failed to provide adequate information to low-income market segments with regard to "basic service."

for such remedial measures to remain in effect as long as Pacific served "60% or more of residential access lines" within its service territory.[4]

On November 26, 2001, pursuant to D.01-09-058, Pacific filed AL 22435. The Telecommunications Division (now Communications Division) reviewed AL 22435 and informed Pacific that the revised Tariff Rule 12, as shown on AL 22435 did not comply with the directives described in Section 9.3[5] and

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[4] Ordering Paragraph 7, referencing Section 9.3, required that Pacific "create a clear distinction between [its] customer service and [its] sales or marketing efforts."

Ordering Paragraph 8 provided more elaboration: "[S]ervice representatives … must first fully address and resolve the customer's request. The service representative must describe the lowest-priced option for purchasing the requested service."

[5] Section 9.3 of D.01-09-058 provided, in relevant part:

> At the core of our objections to Pacific Bell's offer on every call policy, incentive compensation, and sequential sales methods is the commingling of marketing of optional services with Pacific Bell's customer service obligations that arise from its role as essentially the sole provider of basic residential service. To provide customers protection where warranted, while also allowing Pacific Bell to participate in the marketplace, we find that a clearer distinction is needed between Pacific Bell's customer service function and its marketing opportunities. This distinction will allow customers to receive the protections inherent in §§ 451 and 2896 for customer service, but will allow Pacific Bell the appropriate latitude when engaging in conventional marketing.
>
> … To ensure that Pacific Bell provides customer service as a priority, we direct Pacific Bell to address customer service requests prior to engaging in marketing efforts. We establish the four essential components to this directive below. Pacific Bell shall modify Tariff Rule 12 to fully implement each of these components:
>
> a. Resolve Customer's Request First
>
> On incoming calls to a residential customer service center, Pacific Bell must first provide the service requested by the customer. In addition, Pacific Bell shall describe options for purchasing any requested service beginning with the least-expensive option. This ensures that the needs of the customer are first addressed by the utility prior to their being subjected to a sales pitch.

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Ordering Paragraph 7 of D.01-09-058.[6] On or after December 17, 2001, Office of Ratepayer Advocates (Division of Ratepayer Advocates' (DRA) predecessor in interest) and two telecommunications entities filed protests, complaining similarly that Pacific's filings did not comport with the letter or intent of D.01-09-058.

On February 7, 2002, the Commission issued D.02-02-027, amending some sections of D.01-09-058, but leaving intact the Rule 12 provisions discussed in Section 9.3 and Ordering Paragraph 7.

> After completely addressing all the customer's requests, the service representative shall summarize the customer's order including itemized prices.
>
> b. Indicate to Customer that Requested Order is Complete
>
> After summarizing the order, Pacific Bell shall inform the customer that the requested order is finished, and allow the customer an opportunity to terminate the call.
>
> c. Seek Permission to Present Marketing Information on Other Services
>
> Having completed the customer's request, and so informing the customer, Pacific Bell may then seek the customer's permission to offer information about additional services. Should the customer decline to grant such permission, Pacific Bell must cease offering such services and conclude the call.
>
> d. If Customer Agrees, Present Marketing Information
>
> If the customer desires to receive marketing information, then Pacific Bell may present marketing information to the customer. Such information need not be presented in any particular order but must include the prices for each service offered. For packages of services, Pacific Bell must inform the customer that the components are available separately. This requirement (d) shall apply to outbound marketing calls as well as inbound.

[6] These and other facts related to AL 22435 and its amendments are recited in Commission Resolution T-16550.

On March 12, 2002, Pacific filed the last of four revisions to AL 22435. Telecommunications Division staff took the position that these revisions failed to comply with D.01-09-058.[7]

On May 2, 2002, the Commission issued Resolution T-16650 which accepted some parts of the AL 22435 Tariff, as amended, but found that Pacific still had not fully complied with D.01-09-058, and in particular with Ordering Paragraph 13 which required the company to propound new "internal corporate rules and practices that would prohibit unfair, misleading, and predatory sales practices."

On May 7, 2002, Pacific submitted further AL 22908, subsequently amended by AL 22908A, filed on July 2, 2002.

Attached to AL 22908A were new "Sales Integrity Guidelines" for Pacific's Consumer Markets Group, in which Pacific agreed that its employees would:

3. Not engage in unfair, misleading, and predatory sales practices such as but not limited to the following:

   Failure to describe requested service beginning with least expensive option.

   Failure to describe three options available for inside wire.

   Failure to describe Selective and Complete Caller ID Blocking options.

   Failure to include prices in all descriptions of optional services.

   Failure to resolve customer's request prior to offering additional services.

[7] *Id.*

> Failure to gain customer's permission before offering additional services.
>
> Use of unlawful, unfair, or misleading names of products or services.

Also attached to AL 22908A was 6th Revised [Tariff] Sheet 84.1 that repeated the Integrity Guidelines as Tariff Rule 12.[8]

In 2003, without objection from Commission staff, Pacific submitted further refinements to the advice letters, in the form of ALs 23471, 23471A, 24390, and 24390A. Although these advice letters slightly modified Tariff Rule 12, they left its core provisions intact.

On April 7, 2005, the Commission instituted Rulemaking 05-04-005 (Order Instituting Rulemaking (OIR) on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities) to review whether to revise the regulatory framework for large and mid-sized incumbent local exchange carriers (ILECs) in California. The primary purpose of the proceeding was to develop a Uniform Regulatory Framework ("URF") to replace the New Regulatory Framework ("NRF") that had previously applied to the ILECs. *See, e.g.,* D.06-08-030 at p. 13.

On August 24, 2006, the Commission unanimously issued D.06-08-030 in this docket, which found that ILECs lack market power for voice telecommunications services and, therefore, ILECs should be permitted increased pricing flexibility in many areas, with exceptions relating to basic rates and rates subsidized by certain public policy programs. The Commission noted that over the last 18 years, dramatic changes have occurred in the voice

[8] Sheet 84.1 was originally promulgated as part of AL 23435D (see above).

communications marketplace, with far more competition from multiple wireless carriers, competitive local exchange carriers, cable television companies adding Voice over Internet Protocol products, and pure-play VoIP providers that will add a voice connection over any broadband connection.[9] One of the broad goals of D.06-08-030 was to place the incumbent telephone companies on a more level playing field with their new competitors, and to adopt more technologically and competitively neutral approaches to regulation.[10] Ordering Paragraph 21 of D.06-08-030 further stated:

> 21. With the exception of conditions relating to basic residential rates, all asymmetric requirements concerning marketing, disclosure, or administrative processes shall be eliminated.

On September 11, 2006, AT&T filed AL 28800, which modified Tariff Rule 12 by deleting most of the Sales Integrity Guidelines previously incorporated in the tariff, based on Ordering Paragraph 21. Because these marketing requirements are not imposed on competitors of AT&T, AT&T sought to remove them pursuant to Ordering Paragraph 21 by means of a one day advice letter.

On September 29, 2006, DRA and The Utility Reform Network (TURN) (jointly) and Disability Rights Advocates filed Applications for Rehearing of D.06-08-030. Among the issues that DRA and TURN raised in their Joint

[9] D.06-08-030, pp. 4-5.

[10] *See,* for example, discussion of leveling the playing field with regard to geographically deaveraged pricing (D.06-08-030, at pp. 139-140), and as to tariff filings (*Id*. at p. 183).

Application was an allegation that Ordering Paragraph 21 was "unlawfully vague."[11]

On October 2, 2006 DRA and TURN (jointly), UCAN, Latino Issues Forum and Centro La Familia Advocacy Services, Inc. filed timely protests to AT&T's AL 28800. DRA and TURN argued that AT&T's AL 28800 is an improper procedural attempt to modify the Commission's underlying decision D.01-09-058; and that the advice letter substantively should be rejected as it poses a real threat to consumers who depend on AT&T for basic telephone service.[12] Latino Issues Forum protested AL 28800 similarly on the grounds that the changes to AT&T's Tariff Rule 12 cannot be effectuated through the advice letter process and that AT&T should seek to modify the tariff through an application.[13] Centro La Familia Advocacy Services, Inc. protested the proposed advice letter, asserting that the Commission should not permit elimination of "rules designed to protect consumers against deceptive marketing tactics" particularly where the rules were put in place because Pacific was previously found by the Commission to have used "aggressive, misleading marketing tactics."[14]

On October 23, 2006, AT&T filed AL 28982, which added back some but not all the disclosure language to Rule 12 removed by AL 28800.[15] ALs 28800 and 28892 are hereafter referred to as the "Rule 12 Advice Letters."

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[11] Joint Application of DRA and TURN for Rehearing of D.08-06-030, pp. 35-40.

[12] Protest of DRA and TURN to AL 28800, p. 2.

[13] Protest of Latino Issues Forum to AL 28800, p. 2.

[14] Protest of Centro La Familia to AL 28800, p. 1.

[15] As further discussed below, AT&T added back disclosure language in its Tariff Rule 12. This advice letter specifically clarified that AT&T would: (i) respond to customer's request first (before beginning any sales offerings); (ii) seek permission from

Footnote continued on next page

On November 3, 2006, DRA and TURN filed timely Protests to AL 28982. DRA and TURN argued that even though AL 28982 added back disclosure language, "large portions of Rule 12" are still missing from the tariff. DRA and TURN reiterate the same arguments that this second advice letter also is defective procedurally (as it modifies an underlying decision) and substantively, as certain disclosures are no longer in the tariff.

On November 30, 2006, the Commission issued Resolution L-339 which directed that the Protests of ALs 28800 and 28892 should be addressed in the URF proceeding and left both advice letters in effect pending action in the URF docket. On December 14, 2006, the Commission issued D.06-12-044 which, among other things, granted limited rehearing as to Ordering Paragraph 21, and the elimination of asymmetric marketing, disclosure, and administrative requirements. In addition, the Commission prospectively suspended Ordering Paragraph 21 of D.06-08-030, pending the outcome of rehearing on Ordering Paragraph 21 in Phase II.

On December 21, 2006, the assigned Commissioner issued a Ruling and Revised Scoping Memo that sought comment from parties on various issues tentatively scheduled to be considered in Phase II of the above captioned docket, including the issues raised in the Rule 12 Advice Letter Protests.

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the customer before accessing customer proprietary network information (CPNI);
(iii) disclose to customers who identify themselves as tenants that the landlord is responsible for inside wire repair and maintenance for one jack per residence;
(iv) inform customers of Caller ID selective and complete blocking options; and
(v) provide customers with a confirmation letter describing the services ordered and recurring and non-recurring rates within 10 business days after taking a completed order for new business or residence service or moves, changes, or additions to existing service.

On August 6, 2007, the assigned Commissioner issued a Ruling on Hearings Regarding AT&T Advice Letters and *Ex Parte* Ban (Ruling on Hearings), scheduling evidentiary hearings on AT&T's unilateral modifications of the Rule 12 marketing restrictions. The Ruling noted that it would examine in this proceeding whether the modifications made through the Rule 12 Advice Letters should be approved. The Ruling also placed an *ex parte* ban on communications with regard to the issues raised by the AT&T Rule 12 Advice Letters and the protests to the advice letters.

On September 6, 2007, in D.07-09-018, the Commission stated that Ordering Paragraph 21 was never intended to apply to "requirements imposed as a result of an enforcement or complaint case."[16] The Commission clarified in that decision that on a prospective basis, carriers may not remove such asymmetric requirements through an advice letter filing and must file a petition to modify the underlying decision that imposed such condition or requirement. The Commission further recognized that, prior to this clarification, there may have been some confusion as to the scope of the Ordering Paragraph 21, and indicated that it would resolve issues pertaining to the protests to the AT&T Rule 12 Advice Letters in the next phase of this URF proceeding.

On September 11, 2007, the assigned Commissioner and Administrative Law Judge (ALJ) issued a final Ruling on the scope of this proceeding. The September 11 Ruling characterized the Tariff Rule 12 Advice Letters as substantially equivalent to a Petition to Modify D.01-09-058 and imposed on

[16] D.07-09-018, p. 56 (footnote omitted).

AT&T the burden of proving that the marketing restrictions imposed on it by that decision were no longer necessary.

On November 19 and 20, 2007, evidentiary hearings were held and attended by the ALJ and the presiding assigned Commissioner, and previously served testimony was admitted into the record.

On January 10, 2008 AT&T and DRA/TURN filed post-hearing opening briefs on these issues and on January 31, 2008 AT&T and DRA/TURN filed reply briefs.

3. Positions of the Parties

A summary of AT&T's and DRA and TURN's specific responses to questions raised by the Assigned Commissioner and ALJ Ruling are set forth below.

3.1. Responses to Specific Scoping Issues

Issue 1. Whether any other events subsequent to the issuance of D.01-09-058 support the modifications made by the AT&T Advice Letters.

AT&T relies on the factual finding of the Phase 1 decision in this URF Phase I docket that the market for voice communications in California is now competitive.[17] It argues that this event alone is sufficient to justify the tariff changes made by the Rule 12 Advice Letters. As support for this argument, AT&T cites the Commission's 2001 *Rule 12 Decision* for the proposition that marketing practices regulation is no longer appropriate as competition

[17] D.06-08-030, Finding of Fact 50, p. 265.

develops.[18] In that decision, the Commission exempted local toll and other services it deemed to be competitive from the marketing restrictions enumerated in Tariff Rule 12. Applying the competition finding to the facts of this case, AT&T argues that all company or sector specific marketing regulations restrain competition[19] and should be eliminated from tariffs in accordance with Ordering Paragraph 21 of the URF Phase 1 decision.[20] In short, AT&T argues that:

> "Competition alone – and the consumer control that has resulted from it – is a sufficient reason to eliminate the asymmetric requirements of the [*Rule 12 Decision*]."[21]

and that in light of a competitive market,

> "…companies that mistreat, mislead, or appear unresponsive to their customers, or who are unable to offer what the market has come to expect, will pay the ultimate price by losing their customers to a competitor."[22] (Italics in original.)

AT&T also argues that a second major change has occurred since the 2001 Rule 12 Decision; namely, a change in AT&T's methods of dealing with its customers:

> "AT&T California has developed tools and processes that allow its service representatives to quickly identify the right service or combination of services for a customer based on information

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[18] *AT&T California's (U 1001 C) Opening Brief* at p. 6, citing the *Rule 12 Decision* at p. 80 ("In contrast, some services offered by Pacific Bell, such as local toll, are subject to actual competition. Pacific Bell needs to be free to market toll and other optional services in order to be on a level playing field with its competitors.")

[19] *Id.,* p. 3.

[20] *Id.,* p. 7.

[21] *Id.,* p. 3.

[22] *Id.,* p. 18.

> provided by the customer, to let the customer know about potential savings or new products, and to ensure the customer is getting the best value AT&T California has to offer."[23]

AT&T's new tools and processes are discussed in detail under Issue 3 below.

In contrast, DRA and TURN state that D.01-09-058 should not be modified on the grounds that the Commission found that asymmetric regulation should be eliminated in Phase I of this proceeding. DRA and TURN assert that D.01-09-058 was based on the relationship of Pacific with its customers and on Pacific's dominant market position. Moreover, they argue that neither the typical customer's relationship with AT&T nor AT&T's dominance of the wireline market has changed since 2001. Therefore, they contend, any changes that have taken place in the market for phone services since 2001 are irrelevant to whether the original Tariff Rule 12 restrictions on AT&T's marketing practices should be removed. In support of this argument, they assert that:

a) There is a relationship of trust between AT&T and its customers based on its long history as "the phone company." DRA and TURN contend that the AT&T name is synonymous with phone service and millions of people still rely on this ILEC as their primary source of telephone services. Furthermore, they state that AT&T is the sole carrier of last resort (COLR) everywhere in its service territory other than Orange County and that AT&T served 3.4 million Lifeline customers in California in 2004.[24]

b) There is a relationship of asymmetrical information between customer and company that disproportionately benefits the

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[23] *Id.*, p. 3.

[24] *Joint Opening Post-Hearing Brief of the Division of Ratepayer Advocates and The Utility Reform Network on AT&T's Proposed Modifications of Decision 01-09-058,* pp. 26-28.

company.[25] DRA and TURN contend that the typical telephone customer has "only one contact with the company," and during that contact, "AT&T strictly controls the information available to the consumer."[26] DRA and TURN assert that, with AT&T, "consumers are not provided the most essential term – the rate – about the most essential service AT&T provides…"[27]

c) AT&T's relationship of trust with its customers has historically been subject to abuse. DRA and TURN cite the series of Commission decisions (D.86-05-072, D.93-05-062 and D.04-09-062) that have found that AT&T and its predecessors had abused their relationship of trust with consumers in the past two decades. They assert that the conduct found abusive in these decisions as well as D.01-09-058 closely parallels the marketing practices that AT&T engages in today.[28] Furthermore, DRA and TURN argue that AT&T has exploited its dominant market positions to constrict the information available to consumers by making switching costs high through early termination fees and other strategies to make its services as "sticky" as possible.[29] In addition, DRA and TURN argue that AT&T has a track record of anti-competitive practices.[30]

With regard to AT&T's position in the residential wireline market, DRA and TURN argue that AT&T's own data fail to demonstrate that it has changed in any material way since 2001. D.01-09-058 mandated the continuance of the original Tariff Rule 12 restrictions so long as Pacific Bell served 60% or more of

[25] *Id.,* p. 29 and see footnote 66.

[26] *Id.,* pp. 28-29.

[27] *Id.,* p. 30.

[28] *Id.,* p. 32 and see footnotes 73-80.

[29] *Id.,* p. 34.

[30] *See* D.02-09-050 (*Bottleneck Services Decision).*

residential access lines in California. DRA and TURN assert that AT&T has failed to provide evidence to show that AT&T has reached this benchmark.[31]

Issue 2. The relationship between the modifications to Tariff Rule 12 made by the Rule 12 Advice Letters and D.01-09-058 and subsequent decisions or resolutions modifying D.01-09-058.

The Commission's 2001 decision D.01-09-058 required AT&T to implement a number of disclosure requirements through its Tariff Rule 12. AT&T explains that in that decision, the Commission specifically required the following of AT&T:

- Resolve the customer's request first. AT&T must resolve the specific reason for the customer's call before asking to market other services.
- Describe options for purchasing any requested service beginning with the least expensive option. (AT&T asserts that this requirement was later expanded to permit AT&T to discuss any packages or bundles that include the product requested and that may include product discounts).
- After addressing the customer's reasons for the call, AT&T shall summarize the order including itemized prices.
- After summarizing the order, AT&T shall inform the customer that the requested order is complete and allow the customer an opportunity to terminate the call.
- After completing the customer's request and informing the customer, AT&T may seek the customer's permission to present marketing information about additional services; if the customer declines to grant permission, AT&T must cease offering such services and conclude the call.

[31] *DRA-TURN Opening Brief*, p. 35.

- If the customer agrees to receive marketing information, then AT&T may present marketing information to the customer, and may ask the customer for permission to access CPNI. Marketing information need not be presented in a particular order, but must include prices for each service offered. AT&T must inform the customer for packages of services that the components are available separately and quote the component prices.
- AT&T shall disclose information regarding Caller ID selective and complete blocking options, including the ability to unblock Complete Blocking on a per call basis, to new customers who have not chosen a blocking option.
- Disclose information about inside wire repair and that landlords are responsible for the maintenance and repair of inside wire.

In AL 28800, AT&T removed those marketing requirements based on its interpretation of Ordering Paragraph 21 of D.06-08-030. In AL 28982, AT&T added the following disclosures back to its Tariff Rule 12:

- Respond to customer request – address customer's request first.
- Seek customer permission prior to accessing CPNI, as required by 47 C.F.R. Section 64.2001 *et seq*.
- Disclose to consumers who identify themselves as tenants in response to inquiry by AT&T, that landlords are responsible for inside wire maintenance and repair.
- Inform customers about Caller ID selective and complete blocking options (same disclosure as previously required).

DRA and TURN take issue with AL 28982 in that the following requirements have been removed from Tariff Rule 12, and were not added back by AT&T to its tariff:[32]

- Requirement to *resolve* customer's request or reason for calling before marketing other services.

[32] Joint Post-Hearing Opening Brief of DRA and TURN, pp. 22-23.

- Requirement to offer the customer the "lowest price option [and state the price] for the service requested, prior to gaining the customer's agreement to market further services and bundles of services."
- Requirement that the utility indicate to the customer that the requested order/request is complete.
- Requirement that the customer agree to listen to marketing offers on other services.

DRA and TURN argue that AT&T's reliance on the language of Ordering Paragraph 21 of the URF Phase 1 decision to justify the Rule 12 Advice Letters is no longer valid since the subsequently released D.07-09-018 (the *URF Phase 2 Decision* of September 2007) ruled that the "asymmetric requirements" removed by Ordering Paragraph 21 of the URF Phase 1 decision did not include requirements imposed as a result of an enforcement or complaint case.[33] Based on this finding in D.07-09-018, DRA and TURN argue that the modifications made by AT&T through the Rule 12 Advice Letters should be declared null and void. Specifically, DRA and TURN assert that AT&T must restore the previous Rule 12 restrictions of resolving the customer's reason for call first, and disclosing to the customer the rates of basic flat and measured rate service.

In addition, DRA and TURN suggest new modifications to AT&T's Tariff Rule 12: (i) require AT&T to offer customers a 30-day period to cancel without early termination penalty; (ii) affirm the right of Commission staff to monitor AT&T's customer service performance; (iii) disclose to customers that if the customer cancels a service in a bundle, pricing for the remaining services revert to a la carte prices; (iv) disclose to customers that cancellation of optional services

[33] *Id.,* p. 24.

in a bundle more than 30 days after the initial order may trigger an early termination fee; and (v) require AT&T to offer an estimate of the full actual bill amount for all orders including basic flat, measured or Lifeline telephone service including fees, taxes, and surcharges.[34]

[34] DRA and TURN Post-Hearing Opening Brief, pp. 2-3.

Issue 3. Whether AT&T has reformed its processes and procedures to ensure that the abuses found in C.98-04-004 do not occur.

AT&T explains that, since the 2001 *Rule 12 Decision*, it has either changed or created a number of tools employed by its Customer Service Representatives when responding to a call from an existing or potential customer. The tools include:

a) The Customer Rules[35]

b) HOMERUN[36]

[35] Customer Rules are the following objectives "(1) Take Ownership and Show We Care – We Value our customers and we let them know it by all we do; (2) Be Responsive and Deliver – We listen to customers and deliver with speed; (3) Do It Right – We deliver with quality the first time, every time; (4) Make It Seamless – AT&T has many parts, but to our customers we are one team; (5) Meet Our Commitments – We communicate, follow through and work hard to keep our promises." *AT&T Opening Brief pp. 20-21.*

[36] HOMERUN is a mnemonic that stands for:
"**H**ave Enthusiasm to answer the call…"
"**O**btain first Call Resolution…"
"**M**ake use of your Sales Tools to provide the right the right offer to the customer…"
"**E**xplain the AT&T Advantages…"
"**R**eally make a Quality Offer…"
"**U**pbeat and Skillful Close…"
"**N**eed to Follow the Contact Guide…"
Id., pp. 21-22.

c) Call Center Transformation Program (CCTP)[37] CCTP is a desktop application that obtains information from a calling customer via the customer's responses to prompts from an Intelligent Voice Recognition (IVR) system. CCTP "routes the call to the most qualified agent available." On the agent's screen, CCTP displays information about the customer including the customer's reason for calling. This allows the agent to immediately address the customer's reason for calling. The application also contains an embedded Help screen so that the agent can look up information relevant to the reason for the call.

d) Sales Assistant and Discovery Questions[38] Sales Assistant is a customer relations management tool that uses consumer-specific information (including information about the products available at the customer's residence, products the customer subscribes to, and products the customer is credit-qualified for) to provide service representative with product and service options "that are likely to be of interest to the customer."

e) Bundles Calculator[39] The Bundles Calculator is a tool the service representative can use to quickly calculate and compare what customers are currently paying for their services (or what another company has offered them) versus what they would pay if they subscribed to the same services from AT&T. The tool calculates the bundle price for any available bundle of services.

AT&T argues that these tools, taken together with training and supervision of consumer service representatives who employ the tools and the scripts the service representatives are trained to use, ensure that the kinds of marketing behavior enjoined by the *Rule 12 Decision* do not occur. In particular,

[37] *Id.,* p. 23.

[38] *Id.,* pp. 23-24.

AT&T argues that these tools ensure that: (i) the customer's reason for calling is addressed first; (ii) the customer is told that he can obtain the stand-alone price for any bundled service; and (iii) the customer is only offered those services he qualifies for and which are of potential interest to him.

DRA and TURN counter that AT&T has failed to show any changes in its processes and procedures that will ensure the abuses of the past will not re-occur.

Specifically, DRA and TURN refute AT&T's assertion that its customer service representatives "resolve" the customer's request before making sales offers. DRA and TURN point to the language of AT&T's current Tariff Rule 12 (as modified by AL 28982), which "does not contain the word 'resolve.'"[40] DRA and TURN acknowledge that in some cases, there may be certain calls (such as those for a new connect) where the customer service representative may begin marketing prior to "resolving" the customer's stated reason for calling. However, they assert that AT&T should resolve billing and service inquiries prior to engaging in marketing and that "the only way to insure that the customer's stated concerns have indeed been resolved, and do not become hostage to AT&T's marketing, is the now abandoned 'recap and bridge' procedure."[41]

Moreover, they allege that AT&T has resumed all of the following practices which it was directed to abandon or modify in the *Rule 12 Decision,* including:

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[39] *Id.,* pp. 24-25.

[40] DRA and TURN Post Hearing Reply Brief, p. 3.

[41] DRA and TURN Post Hearing Reply Brief, p. 6.

a) Pushing for sales on every call, regardless of whether the call was from an existing customer or new customer or related to a problem with existing service.[42]

b) Commingling sales and service. AT&T service representatives no longer summarize the resolution of the issues that caused the customer to call and obtain the customer's permission before they begin marketing additional services.[43]

c) Failing to meaningfully disclose the lowest price services that meet the customer's needs and selling the most expensive bundles first. They allege that AT&T service representatives offer the most expensive packages first and only offers lower priced packages or stand-alone services if the customer specifically requests to hear about them.[44]

d) Confusing Sales Scripts. The service representatives do not clearly explain terms such as "basic service" and "discounted bundles" in an effort to persuade customers to buy more expensive bundles.[45]

e) Implying that the service representative is an "expert" who will give disinterested advice to the customer rather than a commission-earning sales person who has a financial incentive to sell the highest-price products.[46]

f) Disciplining service representatives for failing to meet sales quotas. Neither this fact nor the fact that the service representative is a commission salesperson is disclosed to the customer.[47]

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[42] *Id.,* p. 40.

[43] *Ibid.*

[44] *Id.,* p. 42.

[45] *Id.,* pp. 43-44.

[46] *Id.,* pp. 44-47.

[47] *Id.,* pp. 48-49.

AT&T vigorously disputes each of these characterizations of its methods of dealing with customer inquiries. AT&T makes the following arguments in response to DRA and TURN:

a) With regard to the alleged impropriety of pushing for sales on every call, AT&T responds that the *Rule 12 Decision* explicitly permitted AT&T to offer services on every call so long as the service offering did not interfere with "providing customers with information to which they are entitled."[48] As discussed more fully in Section IV of this Decision, AT&T argues that its current marketing scripts ensure that customers receive all information to which they are entitled as part of any call.

b) AT&T argues that its evidence demonstrates that this allegation by DRA/TURN is simply false. The customer service training materials introduced in evidence "require service representatives to first resolve the customer's reason for calling and to base any offers on the customer's needs."[49]

c) AT&T argues that by having customer service representatives (CSRs) mention flat rate and measured rate service at the same time as they recommend bundled services, it is giving customers adequate notice that stand-alone basic service is available:

> If a customer qualifies for Lifeline service, the service representative *always* provides the Lifeline prices for Flat and Measured Rate Service. And if a non-Lifeline customer is interested in stand-alone basic service, the service representative *always* provides the prices for both Flat Rate and Measured Rate Service. Thus, the basic service options are *always* given to *every* customer that calls for a new connect, and the prices for basic service are

[48] *AT&T California's (U 1001 C) Reply Brief*, p. 27, citing *Rule 12 Decision,* pp. 54-55 and COL 33.

[49] *Id.,* p. 28.

provided to all Lifeline customers and all other customers that are interested in stand-alone basic service.[50]

d) AT&T denies that its explanations of these terms are inadequate but admits that it provides explanations only to customers who request them.[51] Further, AT&T argues that nothing in the only model script to which DRA/TURN objected is confusing, much less deliberately deceptive.[52]

e) AT&T notes that in a response to a federal court ruling that it lacked jurisdiction to regulate incentive compensation agreements between AT&T and its union, the Commission eliminated caps on sales commissions from the original *Rule 12 Decision*.[53] AT&T also notes that the average amount of total compensation actually paid to service representatives through incentive compensation in recent years is less than the cap the Commission attempted to impose in that decision.[54]

f) AT&T notes that there is no legal requirement to disclose employee compensation arrangements to customers and that, in any case, DRA/TURN misread and misinterpret motivational language in company documents designed to encourage high performance by Customer Service Representatives.[55]

Issue 4. The impact on consumers of AT&T's removal of the disclosure language in its Rule 12 tariff.

[50] *Id.,* p. 35.

[51] *Ibid.*

[52] *AT&T Reply Brief*, p. 41.

[53] *Id.,* p. 45.

[54] *Id.*, p. 46.

[55] *Id.*, p. 47.

AT&T argues that the fact that DRA/TURN could produce only eleven complaints of various types out of 45 million calls handled during the period following the filing of the Rule 12 Advice Letters demonstrates that removal of the disclosure language had no adverse impact on consumers.[56] AT&T notes that those complaints "have little, if any relevance to the removed TR-12 requirements."[57] AT&T contends that, moreover, DRA and TURN complain about certain things that are not addressed by Rule 12, including the speed at which customer service representatives speak; their use of "jargon;" and service representatives' making marketing offers on every call."[58]

DRA and TURN in response assert that the fact that TURN produced eleven complaints in a period where the AT&T customer service representatives handled millions of calls is "not evidence that there is no problem at AT&T."[59] DRA and TURN note that AT&T produced "almost none of the complaint evidence" that it has from that period, and further assert that "it is well known that most consumers do not file complaints with third-party agencies like the CPUC."[60] They argue that there is, however, evidence that AT&T's modified marketing practices have resulted in customers' failure to learn about the price for stand-alone measured rate service; that consumers were confused by AT&T's customer service representatives' sales offers; and that customer segments,

[56] *Id.,* p. 40.

[57] *Id*., p. 39.

[58] *Id*., pp. 39-40.

[59] DRA and TURN Post Hearing Reply Brief, pp. 37-38.

[60] DRA and TURN Post Hearing Reply Brief, pp. 38-39.

including those who have limited English proficiency (LEP), would be especially harmed by AT&T's marketing practices.[61]

DRA and TURN moreover claim that the testimony of the witnesses who monitored AT&T customer service calls provides clear evidence of customer confusion based on AT&T's newly implemented Rule 12 tariffs. According to DRA witness Koppman, the CSRs he monitored:

a) avoided telling non-Lifeline customers the actual prices of basic local service[62]
b) offered customers more expensive services before offering less expensive alternatives[63]
c) spoke "rapidly" and in "jargon" to customers, who often seemed not to understand what the CSR was saying[64]
d) aggressively marketed high-priced services, usually unsolicited, to all customers, including Lifeline or other limited income customers[65]
e) marketed to customers on all calls, often before resolving the customer's stated concerns[66] and
f) falsely portrayed themselves as disinterested experts.[67]

DRA and TURN also provide various examples of actual consumer complaints to support the claim that customers are confused about AT&T's product offerings.[68]

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[61] DRA and TURN Post Hearing Reply Brief, pp. 44-46.

[62] *DRA/TURN Opening Brief,* pp. 64-65.

[63] *Id.,* pp. 67-69.

[64] *Id.,* pp. 69-72.

[65] *Id.,* pp. 72-73.

[66] *Id.,* pp. 74-75.

[67] *Id.,* pp. 75-77.

AT&T refutes the testimony of Mr. Koppman. AT&T asserts that that points a, b, d, e and f have been effectively rebutted by the testimony of AT&T's witnesses together with the written training materials introduced in evidence.[69] AT&T contends that its "call monitors also provided much more accurate, detailed, and complete summaries than the DRA monitors."[70] AT&T further argues that "Mr. Koppman said nothing more than that AT&T California followed the scripts and that he had a subjective impression that was different from the other people that monitored the calls."[71]

4. Discussion

In Phase 1 of this proceeding, we determined that the market for voice communications services in California is now competitive. We reviewed the various provider choices for voice services that consumers today enjoy, including ILECs, cable companies, competitive local exchange carriers (CLECs), wireless, and Voice over Internet Protocol (VoIP), and concluded that these competitive options mean that ILECs lack market power to sustain prices above the level that a competitive market would produce.[72] In keeping with that determination, the need for regulation of the telecommunications market for competitive services is reduced, but not eliminated. This Commission is still charged under the Public Utilities Code with protecting consumers against fraudulent behavior such as cramming and slamming, and against market

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[68] *Id.,* pp. 79-80.

[69] *AT&T Reply Brief,* pp. 61-71.

[70] *AT&T Reply Brief*, p. 63.

[71] *AT&T Reply Brief*, p. 65.

[72] D.06-08-030, FOF Para. 50.

failures, i.e., circumstances in which the existence of a competitive market alone is not sufficient to insure that consumers will receive the protection to which they are entitled under state law.

In Phase 2 of this proceeding, we clarified that it was not our intention in making the competition finding of Phase 1 and in Ordering Paragraph 21 of D.06-08-030 to permit a previously disciplined utility to rid itself unilaterally through an advice letter of requirements imposed in a prior enforcement or complaint case to correct past instances of abusive behavior. However, we did find that AT&T relied on a good-faith interpretation of Ordering Paragraph 21 in filing the Rule 12 Advice Letters, and thus we allowed the Rule 12 Advice Letters to remain in effect while we considered whether or not to reject them. At the same time, we treated the Rule 12 Advice Letters as, in substance, equivalent to a petition to modify D.01-09-058 and clarified that future modifications to Commission-imposed sanctions could only be accomplished through petitions to modify the prior decisions imposing the sanctions.

Consistent with this approach, we placed on AT&T the burden of proving that the marketing controls imposed on AT&T in the *Rule 12 Decision* were no longer necessary. In keeping with long-standing Commission practice, the standard of proof that AT&T must meet in order to carry its burden is a "preponderance of the evidence."[73] In short, AT&T must show that the evidence supporting its modification of the marketing restrictions imposed in the *Rule 12*

[73] *See, e.g.*, D.97-06-079 (denying petition for modification because petitioner failed to justify modification by preponderance of the evidence.) *See also* Pub. Util. Code § 1702 (standard of proof for complaint case is "preponderance of the evidence).

Decision outweighs the evidence against maintaining all the restrictions in the *Rule 12 Decision*.

The evidence presented by AT&T in support of its *de facto* petition for modification consists of two basic sorts: an affirmation of our conclusion that the market for voice communications in California is competitive and a detailed description of how AT&T's Consumer Service Representatives deal with service inquiries from new or existing customers. DRA and TURN, on the other hand, assert that there has *not* been a substantial change in the relationship between AT&T and its customers and that the market has not changed in a material way to support the modifications; that AT&T has reverted back to its old marketing practices; and that consumers are confused by AT&T's marketing script. Although DRA and TURN acknowledge that D.01-09-058 may be modified some to reflect changes in the marketplace,[74] they recommend that AT&T should make specific modifications to its Tariff Rule 12, two of which were previously included in AT&T's prior version of Rule 12: (i) resolve a consumer's complaint or reason for call prior to marketing services; and (ii) disclose the least-cost options for basic service and any service about which the customer seeks

[74] Joint Post-Hearing Brief of DRA and TURN, p. 4. DRA and TURN's other recommendations include requiring AT&T to: (i) offer consumers the right to cancel service within 30 days of the first invoice without early termination fees; (ii) acknowledge the Commission staff's right to inspect and monitor AT&T customer service performance; (iii) disclose that if a customer cancels part of a bundle, pricing may revert to a la carte prices; (iv) disclose possible early termination fees; (v) provide an estimate of the full bill amount for all orders that include basic service flat or measured rate service; and (vi) disclose basic service rates on AT&T's website.

information; and several new requirements, including a requirement that AT&T disclose basic service rates on its website.[75]

We address the evidence and the arguments presented by the parties below.

4.1. The Competitive Marketplace

AT&T has not provided evidence that it has less than 60% of residential access lines, as required by D.01-09-058, as a condition for removing the Rule 12 marketing restrictions in that decision. However, as noted in Section 3 above, AT&T has argued that our competition finding in Phase 1 of this proceeding justifies the elimination of the marketing constraints imposed in the *Rule 12 Decision.* AT&T asserts that competition will deter abusive marketing practices, and ensure that it will "satisfy new, existing, and potential customers."[76] AT&T argues, therefore, that "[i]f circumstances have sufficiently changed then the 60% requirement… should no longer be applied."[77] We agree with AT&T that the competition findings in Phase 1 justify considering modifications to the Rule 12 marketing restrictions imposed on AT&T;[78] as discussed below, however, we are not convinced by AT&T that the URF Phase 1 competition findings alone justify complete elimination of the Rule 12 disclosure requirements.

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[75] *Id*., pp. 84-92.

[76] AT&T Opening Brief, p. 3.

[77] AT&T Opening Brief, p. 19.

[78] In Phase 1 of this proceeding, we relied on evidence of market *power* (i.e., the unilateral ability to raise prices or reduce services without losing customers to competitors) rather than market *share* as the touchstone for our finding that the voice communications market in California is competitive. See D.06-08-030, pp. 127-133.

Footnote continued on next page

Public Utilities Code Section 2896 requires all telephone corporations to "provide customer service to telecommunication customers that includes, but is not limited to, all the following: (a) Sufficient information upon which to make informed choices among telecommunications services and providers." This requirement includes information regarding the provider's identity, service options, pricing, and terms and conditions of service. Therefore, all telephone corporations operating in California – even those voice carriers beyond AT&T – are required to provide adequate information and disclosure of their products and services in marketing their offerings to California consumers.

AT&T argues that the competitive market has eliminated the need for specific disclosure requirements in its Rule 12 tariff and particularly for asymmetric marketing conditions. We agree that the much more competitive telecommunications landscape supports our consideration in this proceeding of whether to relax some of the marketing restrictions that were imposed on AT&T in D.01-09-058. Although the Commission held that the marketing restrictions in D.01-09-058 should remain so long as AT&T retains 60% or more of residential access lines,[79] the Commission also recognized in that decision that AT&T should have flexibility to market services where there is competition.[80] We recently concluded in Phase 1 that market share is not the only factor for finding market power or competition in a market. We also found that there are many

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In Phase I of this proceeding, we also found that market share was not itself a sole determining factor in whether a company possesses market power. D.06-08-030, p. 127.

[79] D.01-09-058 specifically required with regard to the Tariff Rule 12 restrictions that: "[t]his rule shall remain in effect so long as [AT&T] serves 60% or more of residential access lines."

[80] D.01-09-058, p. 80.

competitive options for consumers seeking telecommunications services. Given our findings in Phase 1 that there are many competitive telecommunications options and our earlier recognition that AT&T should be allowed to market on a level playing field with competitors where there is competition, we find that it is appropriate to consider whether to modify the Rule 12 marketing restrictions. Because we are considering whether to *modify,* and not eliminate all of AT&T's Tariff Rule 12 restrictions, we do not need to address as an initial matter whether AT&T satisfied the 60% benchmark in this proceeding. Our discussion below with regard to the AT&T Rule 12 Letters therefore rests on analysis of whether the *modifications* are justified.

However, we find that our reliance on factors other than market share for finding that there is competition in Phase 1 also provide support for modifying the 60% benchmark requirement in the *Rule 12 Decision*. Accordingly, it is appropriate to modify here the relevant sections of D.01-09-058 and Ordering Paragraph 7 with regard to the strict 60% benchmark. Consistent with the competition findings in URF Phase 1, we modify Ordering Paragraph 7 so that the relevant sentence now reads: "This rule shall remain in effect so long as [AT&T] serves 60% or more of residential access lines, *or demonstrates through other relevant facts or law that the requirements are no longer necessary.*" We will not prescribe further at this time the scope of such relevant evidence, but in the future, if AT&T believes that facts or circumstances have changed, it may petition this Commission to remove the marketing restriction in its entirety.

We reiterate that consumer protection by this Commission remains appropriate and necessary, particularly in areas of fraud and abuse. This Commission will continue to enforce Section 2896 vigorously, particularly where it appears that individual companies require further reminders of the directives

of this statute. As we discuss in the next section below, our review of AT&T's current marketing practices does require a determination as to whether AT&T's current marketing disclosures fully comply with Section 2896. Merely citing our previous conclusion that the market for voice communications services is competitive is insufficient on its own to meet the burden of proof for AT&T to sustain all its modifications in its Rule 12 Advice Letters.

4.2. AT&T's Business Practices

In the *Rule 12 Decision,* we found that AT&T engaged in marketing practices that could influence customers into purchasing telephone service bundled with other services and features[81] in place of stand-alone basic service, even if stand-alone basic service is the better option for certain consumer segments.[82] Among the findings in the *Rule 12 Decision* was a finding that AT&T had labeled some of its bundled service offerings with names that were confusing and potentially misleading. Accordingly, the *Rule 12 Decision* required AT&T to disclose to consumers certain information about its service offerings

[81] By "services" we refer to other communication services apart from voice communication including such things as Internet service and video programming. "Services" also includes Directory Assistance which is automatically provided as part of stand-alone telephone service but separately billed on the basis of usage. By "features" we refer to enhancements of stand-alone telephone service such as caller ID, anonymous call rejection, three-way calling, call forwarding and the like that add functionality to the telephone.

[82] *See* D.01-09-058, Conclusion of Law 35 ("Package sales tactics that result in a quotation of rates for individual services only if customers persistently refuse the packages violates Tariff Rule 12 because information necessary to allow customers 'to designate which optional services they desire' is withheld."), and Conclusion of Law 51 ("public interest requires that Pacific Bell provider to ULTS customers who also subscribe to optional services a specific explanation of the price for ULTS service as clearly distinguished from optional services").

and required AT&T to delineate when it was making sales offers to consumers. AT&T contends that its marketing practices today are intended to provide consumers with the information that they need to make informed choices.

Specifically, in the years since the original *Rule 12 Decision*, AT&T asserts that it has refined its marketing methods and added computerized tools that make it possible for a Customer Sales Representative to quickly create an offer of bundled services and features that takes into account the customer's location, the services and features he currently subscribes to or has been offered by another carrier and the customer's willingness to pay for other services and features in addition to telephone service. Nevertheless, the evidence presented by AT&T in the form of marketing and customer service scripts, service manuals, and descriptions of desktop applications available to CSRs demonstrates that after filing the Rule 12 Advice Letters, AT&T may have resumed some marketing practices that were found objectionable in the *Rule 12 Decision*.

4.3. Disclosure of Stand-Alone Basic Service Offerings

AT&T argues that the combination of an evolving competitive market for voice communications and the customer service protocols and relationship management software it has adopted since the *Rule 12 Decision* results in guarantees that the company will not abuse its relationship with its customers (actual and potential). AT&T argues that throughout all but a very small portion of its service territory there is at least one competitor, either a CLEC or a cable company, providing voice and other services that compete directly with the services offered by AT&T and that a dissatisfied customer may "vote with his feet" at any time. The existence of actual and potential competitors acts as brake

on AT&T's conduct such that, even if it wanted to engage in undesired high-pressure sales tactics, the market would quickly punish it for doing so.

We agree that the presence of competitors will provide a disciplining force on AT&T's marketing practices. A consumer who does not feel that his or her service or billing request is being resolved adequately will be a disgruntled consumer who may look for other options in telecommunications services. However, there may be certain segments of the population that are not as easily able to sign up service with a competitor. For example, certain consumers may desire only to purchase basic service and may need to get adequate information about the basic service offerings before he or she can make an informed choice. Further, those consumers who desire only to purchase stand-alone basic service may not have a comparable basic service option offered by VOIP, wireless, or cable providers. Therefore, we believe that certain disclosures by AT&T are necessary for these types of consumers. Based on the evidence in this proceeding, we believe that we should continue to require AT&T to make certain disclosures concerning basic service in furtherance of the goals of Pub. Util. Code § 2896.

Specifically, we find that some of the language that AT&T CSRs use in marketing to new customers is not clear. We are not persuaded that it is in the interest of a customer to be required to listen to a sales pitch for bundled services before being told the difference between flat rate and measured rate (which are the two stand-alone basic service offerings), and the monthly cost for basic service telephone service. The script currently used by the AT&T CSR to inform a customer ordering new service that the company offers flat and measured rate service reads as follows:

> We offer Flat and Measured Rate service, separately and in bundles. I can provide you individual pricing for those services, but I recommend our discounted bundles with Flat Rate service. Which would you like to hear more about?[83]

This script's presentation of the options may influence the customer to choose a bundle without first being given an explanation of the difference between flat rate and measured rate service or being told the monthly cost of either form of basic service. The current script also may prevent a customer from obtaining "sufficient information upon which to make informed choices among telecommunications services" as required by the Pub. Util. Code § 2896. Thus, this script appears to be at odds with a fundamental finding of the *Rule 12 Decision*, that pursuant to § 2896 it is the *carrier's* obligation to provide a certain amount of information to the customer so that she or he may be able to make an informed choice among services, not the customer's obligation to request it from the carrier.[84] Although AT&T has made many positive changes to its marketing practices, it is still inconsistent with Public Utilities Code Section 2896 to place the burden on customers to ask for such basic information as the monthly cost of stand alone basic service and the difference between flat rate and measured rate service, especially when being prompted to ask about bundles after a "recommendation" by the CSR to buy a discounted bundle.

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[83] A*T&T Reply Brief*, p. 35. This language was filed under seal but pursuant to an order of the assigned ALJ it was admitted into the public record. *See* ALJ Ruling dated February 11, 2008. Anyone calling for new connect service hears this message, so the argument that it is confidential lacks merit.

[84] *Rule 12 Decision Section 5.2*, pp. 15-17 and COL 6, p. 100.

Accordingly, we will require as a condition of permitting the Rule 12 Advice Letters to remain in effect, that AT&T file a further advice letter within 120 days[85] adopting the requirement that a CSR must explain the difference between flat rate and measured rate service, and state the price for each, before offering or recommending a bundle to a customer requesting new service.

We have also considered DRA and TURN's recommendation that the prices for flat rate and measured rate service be posted on AT&T's webpage. Although this requirement was not originally in AT&T's Tariff Rule 12, we agree that that recommendation is consistent with our goals to ensure that consumers are provided with adequate information to make informed choices, particularly given the increased use of the Internet among consumers. Therefore, AT&T shall further modify its Tariff Rule 12 to require it to publish the rates for basic flat rate and measured rate service on its website. The information shall be posted on the same webpage as information regarding the cost and composition of bundles and shall be no less prominently displayed. With the exception of this requirement, we reject DRA and TURN's other suggestions for modifying AT&T's Tariff Rule 12 with new requirements.[86] Those suggestions go beyond what we find necessary for providing adequate information to AT&T's consumers and the scope of this proceeding.

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[85] We have ordered this Advice Letter to be filed after 120 days in order to give AT&T time to train its thousands of CSRs and to update its website with the required information in a manner consistent with this order. The existing Tariff 12 Advice Letters may stay in effect in the interim.

[86] *See, e.g., Joint Opening Post-Hearing Brief of DRA and TURN,* pp. 86-92.

4.4. AL 28982 Remaining Modifications

We specifically approve the remainder of modifications made by AL 28982 to AT&T's Tariff 12. A&T has demonstrated that the customer relationship management tools it has developed in recent years provide it with greatly improved means to respond to customer inquiries and market to customers in non-abusive ways. We find that, with AT&T's modified customer relationship tools and today's competitive environment, the following Rule 12 restrictions of requiring customer call resolution first; providing a "recap and bridge," and obtaining customer permission prior to making offers, are not necessary.

Although DRA and TURN asserted that there were some consumer complaints regarding AT&T's modified marketing practices, we find that these complaints were generally unrelated to the removed Rule 12 requirements and do not establish that the original Rule 12 restrictions should remain in place.[87] For example, complaints about the length of time that AT&T customer service representatives took in responding to calls are beyond the scope of this proceeding and are not related to Rule 12 requirements. DRA and TURN also point to AT&T's marketing practices as disproportionately affecting the low-income and LEP community on the grounds that they lack the ability to

[87] DRA and TURN provided some evidence that there were consumers who had complained about certain marketing practices of AT&T since its modification of Tariff Rule 12. However, the evidence provided on this point did not establish that there were significant problems with these practices to require adding back these requirements of Tariff Rule 12. The specific problems cited by Testimony of Michael Shames, for example, included complaints about "extensive delays in reaching a live CSR," the inability of customers to find alternative options for telephone service, the transfer of "old" AT&T customers to the "new" AT&T, and some low income consumers who were sold services that they "didn't want or didn't need." Testimony of Michael Shames on Behalf of TURN, pp. 14-15.

understand the marketing "jargon" that they encounter on calls to AT&T. DRA and TURN also argue that consumers appeared confused by some of the terms that customer service representatives used.[88] We do not believe that the record establishes that AT&T's marketing practices result in a disproportionate impact on the LEP community. Moreover, issues pertaining to the LEP community are beyond the scope of this proceeding.[89] To the extent that DRA and TURN assert that consumers could not easily obtain relevant information about basic service options under AT&T's current practice, we agree that AT&T's marketing script should be modified to address this concern. We have already addressed this issue above with the requirement that AT&T proactively provide its consumers with information about its basic service flat and measured rate services.

Currently, AT&T's model script requires the CSR to "address" the customer problem first before marketing other services to the customer. Although the script does not specify that the CSR must "resolve" a customer's request or problem first, AT&T asserts in its Opening Brief[90] that it does, as matter of practice, require CSRs to resolve the problem before the CSR may proceed to market services.[91] The call monitoring reports and other evidence produced by AT&T support the claim that customer problems are, as a matter of practice, generally resolved before an additional service offering is made, even though the new tariff does not require such an outcome.

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[88] *See* Supplemental Testimony of Dale G. Piiru on Behalf of DRA, pp. 7-8.

[89] This Commission has another proceeding in place to address LEP issues. *See* R.07-01-021.

[90] *Ibid*., pp. 25-29.

For this reason, we do not believe that it is necessary to require AT&T to separate its response to a customer call from its marketing offers, engage in a structured "recap and bridge" or request explicit permission from consumers to make sales offers. We find that such structured requirements could inhibit the natural flow of a customer service call, and that, in some cases, a bundled service offering may in fact provide the best package for a particular customer's needs. Prohibiting AT&T's CSRs from making bundle offers as part of the process of resolving the customer's request for new service is not necessarily in the customer's best interest. Therefore, we do not believe that it is necessary to require AT&T to modify its tariff to require resolution of the customer's call strictly prior to marketing services in every instance.[92] Similarly, we find that it is not necessary to require AT&T to indicate to a customer that a requested order is complete, to do a "recap and bridge," or to obtain the customer's permission prior to making further marketing offers. We believe that a customer has the

[92] We note that in some cases, it is not possible for the customer service representative to resolve the reason for a customer's call immediately. For example, in some cases, the customer service representative sometimes must research records before there is a full resolution of some complaints. AT&T's current tariff, however, requires it to respond to and address the reason for the customer's call first. Further, AT&T's training tools urge AT&T customer service representatives to obtain resolution of the complaint on the first call. *See* Advice Letter 28982 and infra, Section III.A. (Issue 3). Moreover, the marketing scripts indicated that AT&T customer service representatives do address and resolve the customer's request before making further sales offers. Taken together, we believe that this is adequate to ensure that customer's have the reason for their call addressed, before being "pitched" for additional services. We wish to make clear that AT&T should resolve any billing questions or service questions prior to making sales offers. If, in the future, there is evidence that AT&T is not responding to and resolving to the extent practical customer's requests on calls prior to making marketing offers, particularly with regard to service or billing questions, we will investigate and consider whether additional marketing restrictions should be imposed.

ability to terminate a call once the customer has had his or her concerns addressed and these additional steps are superfluous. Finally, given evidence that AT&T is generally resolving its customers' requests before making any additional sales offers, we find that these requirements do not need to be added back to the tariff.[93]

We caution AT&T that we will be alert to complaints that the CSRs are deviating from the marketing scripts and the requirements of the tariffs as amended. In particular, we want to make sure CSRs are informing customers of the costs and types of stand alone basic rate service prior to marketing bundles. Should it come to our attention that AT&T has reverted to the kinds of sales tactics prohibited in the *Rule 12 Decision,* we will not hesitate to suspend the operation of the Advice Letters and open a new proceeding to deal with such tactics.

5. Categorization and Need for Hearings

This proceeding was characterized as quasi-legislative and it was preliminarily determined that hearings are necessary. We affirm the characterization and the preliminary determination. There remains an *ex parte* ban on the issues addressed in this decision.

6. Comments on Proposed Decision

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice

[93] AT&T should have the flexibility to make offers to a customer during a call where the consumer is seeking information about a service, but is not aware that there is another offering that may better suit the customer's needs.

and Procedure. Comments on the proposed decision were received from AT&T California; Cox California Telecom, LLC ("Cox") and jointly from DRA and TURN on April 3, 2008. Reply comments from AT&T California and jointly from DRA and TURN on April 8, 2008.

Most of the comments re-argue positions already taken in briefs and are accorded no additional weight. We consider below those comments that raise substantive questions about the proposed decision that were not previously considered.

As an initial matter, we will revise the reference to the scoping Issues 1 and 4 in our decision (as noted by DRA and TURN) and refer instead to the September 11, 2007 Assigned Commissioner and Administrative Law Judge Ruling instead of the preliminary ruling of August 6, 2007 setting forth tentative issues. Therefore, Issues 1 and 4 are revised to read as set forth in the September 11, 2007 Ruling.

DRA and TURN argue that the PD incorrectly changes the scope of the proceeding, by reducing the number of issues that AT&T must address to establish its case.[94] DRA and TURN assert that the PD incorrectly permits AT&T to satisfy its burden of proof by demonstrating that Issue 1 of the Final Scoping Ruling has been met. There is no merit to these assertions. The Assigned Commissioner and Administrative Law Judge Ruling of September 11, 2007 did not establish the specific evidence that AT&T must demonstrate to support its Rule 12 modifications. Instead, the September 11 Ruling set forth the scope of issues that AT&T may address; however, the Ruling stated that AT&T "may

[94] Joint Comments of DRA and TURN on Proposed Decision of Commissioner Chong (April 3, 2008).

produce such evidence as it believes will support the modification[s]" that it made in its Rule 12 Advice Letters.[95] Therefore, the September 11 Ruling did not prescribe the manner in which AT&T should meet its burden of proof and recognized that AT&T might produce evidence that would fit under any of the scope of issues.

DRA and TURN further note that the PD's description of AT&T's burden of proof is inaccurate, to the extent that it indicates that the burden placed on AT&T was for it to demonstrate that "conditions in the voice communications marketplace and/or AT&T's marketing methods had changed sufficiently since 2001" to justify eliminating the Rule 12 Decision requirements.[96] As discussed above, we established issues that the parties could address to demonstrate whether AT&T should be permitted to modify its Tariff Rule 12. We stated that AT&T may provide evidence on such issues to meet its burden of proof. We agree that the sentence in the PD may be confusing as to the scope and burden of proof that we placed on AT&T, and thus we revise the sentence that was in the PD accordingly:

> Consistent with this approach, we placed on AT&T the burden of proving that ~~conditions in the voice communications marketplace and/or AT&T's marketing methods had changed sufficiently since 2001 that~~ the marketing controls imposed on AT&T in the *Sales Practices Decision* were no longer necessary.

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[95] Assigned Commissioner and Administrative Law Judge Ruling dated September 11, 2007, at p. 6.

[96] Joint Comments of DRA and TURN on Proposed Decision of Commissioner Chong (April 3, 2008) at p. 3.

DRA and TURN also argue that the record does not contain substantial evidence to support the approval of any modifications to AL 28982. We reject this assertion. The record has reflected that AT&T has revised customer relationship tools that provide it with the ability to offer customers targeted service offerings. The record also reflects that the market has changed considerably since 2001 when the Rule 12 Decision was issued. We note that the combination of a competitive market and AT&T's revised customer relationship tools, along with our requirements in this decision for AT&T to modify its Tariff Rule 12, should protect consumers from marketing abuses. Given these changes, we believe that the record supports the modifications that this decision approves.

Cox argues that the restrictions imposed by the decision on AT&T's marketing practices should expressly apply only to AT&T. AT&T argues that the restrictions imposed on it should also be imposed on all its competitors. DRA and TURN argue that if another competitor engages in the types of marketing practices that the decision finds to be in violation of Pub. Util. Code § 2896, that competitor would also be violating the statute.

With regard to Cox's arguments that the language in Conclusions of Law 4 and 5 could be misconstrued to apply to all telecommunications carriers and not only to AT&T, we clarify that these conclusions are specific to AT&T in the context of this proceeding and our consideration of whether to modify the Commission's Rule 12 Decision. This proceeding grants in part and denies in part AT&T's *de facto* petition to modify the earlier sales practices decision. Cox's understandable concern derives from the fact that we reach this conclusion in a rulemaking proceeding. However, as the September 11, 2007 Ruling makes plain, the resolution of AT&T's petition to modify is being taken up in this rulemaking as a matter of procedural convenience and in recognition of the

unique circumstances under which the issue of modifying the earlier decision arose. Our findings and conclusions are made based on the specific facts and circumstances of this case. AT&T's conduct at issue here, combined with AT&T's past marketing abuses, form the basis of our conclusion that AT&T should explain the difference between flat rate and measured rate service and the prices for each before offering to sell a bundle of services. We will revise Conclusions of Law 4 and 5 into one paragraph as follows:

4. AT&T's marketing script disclosures regarding its stand-alone basic services and its flat and measured basic service rates ~~failure to explain the difference between flat rate and measured rate service before offering to sell a bundle of services~~ does ~~not~~ not demonstrate that it provides consumers with sufficient information on which to make informed choices, as required by Pub. Util. Code § 2896.
5. ~~AT&T's failure to disclose the price of stand-alone basic service before offering to sell a bundle of services does not provide consumers sufficient information on which to make informed choices among services, as required by Pub. Util. Code § 2896.~~

We reject AT&T's argument that the decision imposes "asymmetric" requirements on AT&T. This phase of the URF rulemaking was specifically characterized by the Assigned Commissioner as equivalent to a consideration of a petition to modify a prior enforcement decision. Further, the Commission has made clear that conditions or restrictions imposed in a prior enforcement decision cannot be lifted by the filing of an advice letter. The decision's modifications to the Rule 12 Advice Letters are equivalent to modifications of a prior enforcement decision and, as such, affect only the party against whom the restrictions were originally imposed. We re-affirm our stated intention to enforce Section 2896 whenever appropriate.

We reject DRA and TURN's argument that the PD should impose monetary penalties on AT&T for violations of Section 2896. As noted above, this phase was focused on whether there should be modifications to AT&T's Tariff Rule 12. We have determined that AT&T should further modify its existing practices. We will not impose penalties as we have permitted the Rule 12 Advice Letters to be effective, pending further consideration of the issues in this proceeding.

AT&T argues that the proposed requirement of informing customers of rates and terms for basic service before offering to sell bundles is overbroad. AT&T argues that its customer service representatives should be excused from the basic service disclosure requirements if a customer calls specifically to inquire about bundles or affiliate services or if AT&T is making a bundles offer to win back a former customer. DRA and TURN do not object to the exceptions for customer-initiated inquiries about bundles or affiliate services but argue that permitting such an exception should be conditioned on continued monitoring of AT&T's customer service representatives.

We agree with AT&T that no disclosure of basic service rates or explanation is required prior to providing information about bundled services, *if a customer calls specifically to inquire about purchasing a service bundle or affiliate services*. However, we caution AT&T that we will interpret this exception strictly. It is the carrier's obligation to provide the consumers with adequate information to make informed choices, as required by Section 2896. Unless a customer specifically and without prompting from a customer service representative requests information about bundles or affiliate services, the requirement to offer information about basic service flat rate and measured rates shall apply. AT&T's customer service training materials should be modified to include a clear

explanation of the limited nature of these exceptions to the decision. We reject the recommendation of DRA and TURN that these exceptions be conditioned on continued monitoring of customer service representatives.

With regard to so-called "win-back" calls, we agree with DRA and TURN that there is no reason to suppose that such previous customers might only want bundles and not basic service. Therefore, we reject AT&T's proposal to create an exception for "win-back" calls.

AT&T objects to the requirement that information about basic service options should be displayed on its web site in conjunction with its bundled service offerings. AT&T argues that web site disclosures are beyond the scope of the proceeding.

We disagree. This proceeding is in substance a modification of a prior enforcement proceeding and decision. We have determined that this new disclosure requirement should be applied in lieu of prior requirements, in recognition of the reality of today's web-based marketing. Such substitution or modification of disclosure requirements is within the remedial powers of the Commission and an appropriate response to changing technology.

7. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

Findings of Fact

1. In D.01-09-058, the Commission imposed marketing restrictions on AT&T, which required it to make certain disclosures to customers. AT&T implemented these marketing requirements in its Tariff Rule 12.

2. By AT&T's AL 28800, AT&T removed most of the marketing restrictions previously imposed on AT&T by D.01-09-058. AT&T relied on Ordering

Paragraph 21 of D.06-08-030's elimination of "asymmetric" marketing or disclosure requirements in eliminating its marketing requirements in its Tariff Rule 12.

3. DRA and TURN and other parties protested AT&T's AL 28800. AT&T's AL 28982 restored some of the marketing restrictions removed by AL 28800. The protests argued that the advice letter was procedurally improper to modify D.01-09-058 and that the elimination of the marketing restrictions were adverse to the public interest.

4. AL 28982 did not restore the following requirements of AT&T's Tariff Rule 12 restrictions imposed by D.01-09-058: (i) requirement to *resolve* customer's request or reason for calling before marketing other services; (ii) requirement to offer the customer the "lowest price option and price for the service requested, prior to gaining the customer's agreement to market further services and bundles of services; (iii) requirement that the utility indicate to the customer that the requested order/request is complete; and (iv) requirement that the customer agree to listen to marketing offers on other services.

5. Protests were filed to AT&T AL 28982 again raising procedural and substantive objections.

6. The Commission decided to permit AT&T's AL 28800, as modified further by AL 28982, to stay in effect until it could consider the issues raised by the protests in a later phase of this proceeding.

7. In URF Phase 1, the Commission found that the market for voice communications in California is competitive and that there are various options for consumers, including wireline, wireless, cable, and VOIP services.

8. The competition findings from URF Phase 1 and the recognition by the Commission in D.01-09-058 that AT&T should have the ability to market

competitive services on a level playing field, supports considering whether to modify D.01-09-058.

9. We do not need to find that AT&T has met the 60% benchmark requirement (to remove Rule 12 restrictions) contained in Ordering Paragraph 7 of D.01-09-058, because we are not eliminating AT&T's Tariff Rule 12 in this decision.

10. The competition findings of URF Phase 1 provide support for modifying the 60% benchmark requirement for the marketing restrictions in the *Rule 12 Decision*.

11. We modify here the relevant sections of D.01-09-058 and Ordering Paragraph 7 with regard to the strict 60% benchmark.

12. AT&T's customer service representatives are trained to resolve customer service requests before attempting to sell additional products or services.

13. AT&T's customer service representatives are trained to offer a bundle of services as a first recommendation to a customer interested in new telephone service.

14. AT&T's customer service representatives determine the components of the bundle offered to each customer based on a computerized analysis of the customer's personal circumstances and the customer's responses to "discovery questions."

15. AT&T supervisors monitor the performance of customer service representatives to ensure compliance with company guidelines and legal requirements.

16. Pub. Util. Code § 2896(a) requires AT&T to provide each customer with sufficient information on which to make informed choices among telecommunications services.

17. AT&T has developed customer relationship management tools that provide it with the ability to respond to customer inquiries and market to customers in non-abusive ways.

18. AT&T's model script requires customer service representatives to respond to a customer's request or problem prior to marketing services. In practice, AT&T customer service representatives appear to be resolving the customer's inquiry or reason for calling prior to making sales offers.

19. AT&T does not appear to be engaging in a pattern of marketing services/offers to customers before first responding to and resolving the reason for a customer's call.

20. AT&T's marketing script does not provide customers seeking new service with information explaining the difference between flat and measured rate service and the prices for those services, unless the customer specifically asks for this information.

21. AT&T should modify its Tariff Rule 12 to require customer service representatives to explain the difference between flat rate and measured rate basic service, and state the price for each before offering or recommending a bundle to a customer requesting new service. The only exception to this requirement is when a customer calls specifically to inquire about bundled services and/or AT&T's affiliate services.

22. AT&T should further modify its Tariff Rule 12 to publish the prices for flat and measured rate basic service on the same webpage as information regarding the cost and composition of bundles and such information shall be no less prominently displayed.

23. Other than adopting DRA and TURN's recommendation to require AT&T to incorporate prices for flat and measured rate basic service on its webpage, we

reject DRA and TURN's other recommended suggestions for new requirements. Those suggestions are beyond the scope of this proceeding.

24. AT&T's other modifications to its Tariff Rule 12 (as implemented by AL 28982) are approved. There is insufficient evidence that the removal of the following requirements have resulted in substantial confusion to customers: i) *resolve* a customer's problem or call prior to marketing; (ii) indicate to the customer that the requested order/request is complete; and (iii) obtain the customer's permission prior to making marketing offers on other services.

Conclusions of Law

1. AT&T's standard of proof to modify D.01-09-058 is preponderance of the evidence.

2. AT&T has met its burden of proof to modify some of its Rule 12 marketing restrictions made in AL 28982.

3. AT&T has not met its burden of proof to modify Tariff Rule 12 with regard to the failure to provide the least-cost options for basic service prior to making offers on bundled services.

4. AT&T's marketing script disclosures regarding its stand-alone basic services and its flat and measured basic service rates do not demonstrate that it provides consumers with sufficient information on which to make informed choices, as required by Pub. Util. Code § 2896.

5. AT&T's Tariff Rule 12 should be further amended to require customer service representatives to explain the difference between flat rate service and measured rate service and quote the prices of stand-alone service before offering service bundles except in response to customers who call only to inquire about bundles or affiliate services. AT&T's customer service training materials should be modified to include a clear explanation of the limited nature of this exception.

6. AT&T's Tariff Rule 12 should be modified to require it to publish the rates for basic flat rate and measured rate service on its web site. The rate disclosures shall be posted on the same web page as information regarding the cost and composition of bundles and shall be no less prominently displayed.

7. The remaining modifications made by AT&T's ALs 28800 and 28982 are supported by the evidence.

8. As modified by this decision, AT&T's ALs 28800 and 28982 may be allowed to remain in effect.

9. We affirm the assigned Commissioner and Administrative Law Judge's Ruling dated September 11, 2007 and maintain an *ex parte* ban on the issues addressed in this decision.

O R D E R

IT IS ORDERED that:

1. Within 120 days of the date hereof, AT&T California (AT&T) shall file an advice letter amending its Tariff Rule 12 to provide that before a customer service representative offers a bundle to a customer requesting new service, the customer service representative shall explain to the customer the difference between flat rate service and measured rate service and shall disclose to the customer the monthly charges for flat-rate and measured rate stand-alone telephone service, except where the customer specifically calls to inquire only about bundles or affiliate services.

2. AT&T shall post on its web site an explanation of the difference between flat rate service and measured service and the monthly charges for flat-rate and measured rate stand-alone service. Such explanation and price disclosures shall be on the same web page as the descriptions of AT&T's bundled service offering and shall be displayed no less prominently than bundled service offering descriptions.

3. AT&T shall modify its training materials, including its model scripts, to comply with this decision.

4. As modified by this decision, AT&T's Advice Letters 28800 and 28982 are approved.

5. We modify Ordering Paragraph 7 of Decision (D.) 01-09-058 and page 82 of D.01-09-058 so that the relevant sentence now reads: This rule shall remain in effect so long as [AT&T] serves 60% or more of residential access lines, *or demonstrates through other relevant facts or law that the requirements are no longer necessary.*

6. The *ex parte* ban on the issues addressed in this decision remains in effect until either: (1) the date when the Commission serves the decision finally resolving any application for rehearing, or (2) where the period to apply for rehearing has expired and no application for rehearing has been filed.

This order is effective today.

Dated April 24, 2008, at San Francisco, California.

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