Decision 08-08-017 August 21, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network, Complainant, vs. SBC Communications, Inc. dba SBC Pacific Bell Telephone Company (U1001C) and related entities (collectively SBC), Defendants.	Case 05-11-011 (Filed November 14, 2005)

(See Appendix A for List of Appearances.)

MODIFIED PRESIDING OFFICER'S DECISION

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MODIFIED PRESIDING OFFICER'S DECISION

1. Summary

The Utility Consumers' Action Network (UCAN) filed complaints against two telecommunications carriers alleging that they had violated Public Utilities Code Section 2883 by not providing the statutorily required access to 911 emergency services from certain California residential units. The nearly identical complaints were filed against SBC Communications, Inc., a "doing business as" name for AT&T (AT&T) (Case (C.) 05-11-011), and Cox Communications (Cox) (C.05-11-012). The cases were coordinated but not consolidated. Before hearing, UCAN and Cox indicated that they had reached an agreement providing for the dismissal of UCAN's complaint against Cox. In Decision (D.) 07-07-020, the Commission authorized the dismissal of the complaint. UCAN's complaint proceeded against AT&T, and the two parties agreed to submit the merits of the dispute on the prepared testimony and a stipulated set of exhibits.

In this decision, the Presiding Officer finds that AT&T has violated § 2883 and imposes a penalty of $1,691,000. This proceeding is closed.

2. Background

Section 2883, adopted by the Legislature in 1995, requires "[a]ll local telephone corporations, excluding wireless and cellular telephone corporations, to the extent permitted by existing technology or facilities, [to] provide every existing and newly installed residential telephone connection with access to '911' emergency service regardless of whether an account has been established." The purpose of the section, of course, is to expand the availability of 911 emergency services throughout California.

In its complaint, UCAN alleges that AT&T has not fulfilled the requirements of this section. Specifically, UCAN alleges that AT&T terminates the availability of 911 service to residences formerly having billed telephone service after an arbitrary 180-day period. UCAN also alleges that AT&T has not made 911 service available to new residential units, even when the technology and facilities are in place to do so and 911 availability would actually produce financial benefits for the company. For remedies, UCAN seeks imposition of a penalty of $62 million.

AT&T denies liability under § 2883, saying that existing technologies and facilities do not exist for it to provide perpetual 911 service where a customer has voluntarily terminated existing residential service or the company has terminated service to a residential unit because of nonpayment or similar reasons. AT&T also argues, if § 2883 is properly interpreted, the carrier is not required to provide 911 service for new residential units unless a physical connection exists over which telephone calls are actually capable of being placed and received.

3. Proceedings to Date

After AT&T answered UCAN's complaint, a prehearing conference (PHC) was held on January 4, 2006, and a scoping memo was issued on January 20, 2006, setting forth the issues to be decided and the schedule for proceedings. The schedule called for AT&T (along with Cox in the coordinated proceeding) to file a motion to dismiss the complaint. After briefing and argument on the motion to dismiss, the Presiding Officer determined that UCAN had alleged facts sufficient to state one or more causes of action with respect to subsections (a) and (c) of § 2883, but that UCAN had failed to state sufficient facts supporting an alleged violation of § 2883(b) or of §§ 2875 to 2897. The

defendants' motions were, accordingly, granted in part and denied in part.[1] UCAN thereafter filed a First Amended Complaint reasserting its § 2883(b) claim with additional facts, and AT&T and Cox did not again seek dismissal of this cause of action. The parties continued their preparation in anticipation of the evidentiary hearing scheduled to begin on July 31, 2006.

After completing discovery, UCAN and Cox notified the Presiding Officer that the complaint against Cox would be dismissed. At the final PHC in advance of the evidentiary hearing on UCAN's complaint against AT&T, those two parties stipulated to the submission of the merits of the complaint and defenses solely on the basis of the prepared testimony and a stipulated set of exhibits, to be following by briefing by UCAN and AT&T. The Presiding Officer agreed to this procedure, and the evidentiary hearing was vacated. The proceeding was submitted on December 6, 2006.

Before these agreements to dismiss the complaint against Cox and to vacate the evidentiary hearing on the complaint against AT&T, the Presiding Officer learned of alleged impermissible *ex parte* communications by AT&T and Cox representatives with certain of the Commissioners' personal advisors. Pursuant to a joint ruling, the assigned Commissioner and Presiding Officer initiated proceedings to resolve these allegations and notified the parties that the dismissal of UCAN's complaint against Cox would not be approved until the *ex parte* allegations were resolved.[2] The alleged *ex parte* violations were addressed in a separate proposed decision filed by the Presiding Officer. The Commission

[1] Administrative Law Judge's (ALJ) Ruling on Motions to Dismiss (April 6, 2006).

[2] Joint Ruling of the Assigned Commissioner and Presiding Officer (June 26, 2006).

approved an interim revised proposed decision on these *ex parte* allegations in D.07-07-020, imposing a penalty of $40,000 each against AT&T and Cox. The revised proposed decision also authorized the dismissal of UCAN's complaint against Cox; consequently, proceeding C.05-11-012 will be closed. The remainder of this decision resolves the causes of action against AT&T.

4. Questions Presented

The Legislature added § 2883 to the Public Utilities Code in 1995 with an effective date of January 1, 1996. The section provides:

> (a) All local telephone corporations, excluding wireless and cellular telephone corporations, shall, to the extent permitted by existing technology or facilities, provide every existing and newly installed residential telephone connection with access to "911" emergency service regardless of whether an account has been established.
>
> (b) The Commission shall prohibit any corporation from terminating access to the services described in subsection (a) for nonpayment of any delinquent account or indebtedness owed by the subscriber to the telephone corporation. A subscriber and a telephone corporation may arrange payment schedules to regain full service.
>
> (c) The Commission shall require telephone corporations to inform subscribers of the availability of the services described in subdivision (a) in a manner determined by the Commission.
>
> (d) This section shall not be construed to relieve any person of an obligation to pay a debt owed to a telephone corporation.
>
> (e) Nothing in this section shall require a local telephone corporation to provide "911" access pursuant to this section if doing so would preclude providing service to subscribers of residential telephone service.

Section 2883 addresses the availability of 911 service in two common situations: (a) in previously occupied or currently occupied residential units

where normal voice service has been discontinued voluntarily by the customer or involuntarily by the carrier (*e.g.,* for failure to pay the bill); and (b) in new residential units where normal voice service previously has not been available. The availability of 911 service in these situations is often called "warm line access" or "quick dial tone" (QDT).

The first situation raises a relatively simple issue: Under what circumstances can a carrier discontinue 911 access in a previously or currently occupied residential unit? The second situation, involving new residential units, presents more challenging factual and legal issues. For purposes of the statute, what constitutes a "newly installed residential telephone connection?"

Both situations raise the issue of whether the "existing technology or facilities" exception in the statute relieves a carrier of its 911 access obligation. This exception is essentially found twice in § 2883. In subsection (a), "[a]ll local telephone corporations, excluding wireless and cellular telephone corporations, shall to the extent permitted by existing technology or facilities" provide access to 911 services. Subsection (e) also indicates, "Nothing in this section shall require a local telephone corporation to provide '911' access . . . if doing so would preclude providing service to subscribers of residential telephone service."

5. Burden of Proof

UCAN has the burden of establishing the allegations set forth in its complaint by a preponderance of evidence. AT&T argues that UCAN also has the burden of establishing, by a preponderance of evidence, that none of the statutory exceptions relied upon by AT&T as defenses is available to the carrier.

AT&T is incorrect in assuming that UCAN also has the burden to refute any of the carrier's defenses. Section 2883 relieves AT&T of liability if existing

technology or facilities do not allow continued 911 access. Evidence Code § 500 provides appropriate guidance and will be followed here: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[3] It is especially appropriate for AT&T to assume the burden of proof as to a "technology/facilities" defense since most of the information necessary to make such a showing is uniquely within AT&T's possession.

6. What Constitutes a Telephone Connection?

Section 2883 requires local telephone corporations to provide, "to the extent permitted by existing technology or facilities[,] . . . every existing and newly installed residential connection with access to '911' emergency service regardless of whether an account has been established." Before addressing the legal questions presented by § 2883, we describe in simple terms the normal physical components of voice phone service between the local telephone company (local exchange carrier) and residential units. A local loop, owned by the carrier, extends from a circuit switch in the carrier's central office to a residential unit. At the residential unit, the demarcation point (also known as the minimum point of entry) is the box or similar area where the local loop is

[3] *See also* City of Brentwood v. Central Valley Regional Water Quality Control Bd., 123 Cal. App. 4th 714, 725 (1st Dist. 2004) (when charged with wastewater permit violations, alleged polluter has burden of proving that statutory exceptions are available).

connected with the residence's interior wiring. The local loop is owned by the carrier. Everything beyond the demarcation point is owned by the residential property owner.[4]

With this physical description in mind, we apply § 2883(a) to various residential circumstances that are implicated by UCAN's complaint. We start with the easiest situation and then address more difficult applications of the requirement.

7. Section 2883(a) and (b) Allegations

UCAN alleges that AT&T has violated § 2883(a) by failing to provide 911 access in two situations: (a) where there has been an existing residential connection, now discontinued; and (b) where there has been new residential construction. If AT&T has terminated residential service for nonpayment of a bill, and 911 access is unavailable, UCAN alleges this practice also violates § 2883(b). We explore § 2883's requirements in each of these settings.

7.1. Currently Occupied Residential Units Where Service (the Account) Has Been Discontinued

In this situation, the occupant of a rented or owner-occupied residential unit has been receiving voice telephone service, but the service has been disconnected voluntarily or involuntarily. The disconnection may result from a

[4] AT&T's witness provides a more detailed description: "The same network infrastructure is required end-to-end to provide any kind of basic telephone service (sometimes referred to as Plain Old Telephone Service, or 'POTS') . . . . This infrastructure includes: a telephone number, a switch translation, office equipment, and cross-connects at the central office; interconnected distribution, feeder, service drop facilities to tie the central office facilities to the customer location; and a network

Footnote continued on next page

variety of reasons. The owner or tenant remains in the residence but has canceled billed voice service because he or she now relies on a cell phone, Voice Over Internet Protocol service, or no service at all. The local telephone carrier has cancelled billed voice service because the customer has failed to pay the bill or satisfy other contractual obligations.

Section 2883's requirements in these circumstances are easy to ascertain. Because phone service has been provided previously, the necessary technology and facilities exist and are in place to provide 911 access. Before disconnection, 911 access was available. The occupant's inability to make calls normally results from steps taken in the carrier's central office and not as a result of some action at the demarcation point. The physical means are in place for the local telephone company to continue to provide emergency 911 access.[5] Unless the company proves a more specific defense based on the unavailability of telephone numbers or other facilities, the carrier has the continuing obligation under § 2883(a) to provide 911 access from these residential units. This obligation exists under Section 2883(b) even if AT&T discontinued residential service "for nonpayment of any delinquent account or indebtedness owed by the subscriber to the telephone corporation."

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interface device, cross connects, inside wire, and a jack at the residential location." Exhibit No. 6 at 3 (McNeill); *see also* Exhibit No. 1 at 20:4-11 (Murray).

[5] AT&T's witness testified as follows: "When a residential telephone line is disconnected and converted to warm dial tone service, the physical plant is left in place as-is end to end (*i.e.,* it is not actually 'disconnected'). . . . Other than the issuance of a service order to disconnect the customer's residential telephone account and the software transaction keyed into the switch, the process does not involve any physical work or physical modification to the plant." Exhibit No. 6:3-4 (McNeill).

7.2. Currently or Recently Vacant Residential Units Where Service Was Previously Provided

In this circumstance, telephone service had been provided to a residential unit, but the unit is currently, or was recently, vacant. The former tenant may have left and a new tenant is moving in. A house may have sold and the new owners are taking possession. A sales agent may be showing the unit, or a contractor is completing some repair on the unit. Normally in these instances, a voice telephone connection previously existed and the facilities remain in place to provide 911 access.[6] Section 2883 requires that the connection remain in place to the extent necessary for someone present in the unit to access 911 in an emergency.[7] In these situations, the local telephone company has the continuing obligation to provide 911 emergency access, unless a facilities defense applies.

In both these situations (subsections 7.1 and 7.2), a connection has existed and the Legislature mandates that the connection should continue to the extent necessary to provide 911 access, unless a facility or numbering limitation prevents such service.

7.3. New Residential Units Where Service Has Never Been Provided

This situation contemplates a new residential unit where telephone service has never been available and an account for residential service has never been

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[6] *Id.*

[7] The days are gone when the phone in a residential unit was "hard wired" to the phone company's system. Most residences today have one or more modular phone jacks. While Section 2883 may require that 911 emergency phone service be available at the phone jack, it does not ensure or require that a phone is actually plugged in to make

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established. The residential unit could be an apartment, a condominium, or a house. Unlike the previously described situations, which are resolved based on the prior existence of telephone service, this circumstance requires a more discrete probing of the meaning of § 2883(a)'s use of "telephone connection." UCAN and AT&T have divergent interpretations of the term.

UCAN, for its part, argues that the term is ambiguous and the legislative history and AT&T's own tariff must be consulted to understand the term. UCAN suggests that "telephone connection" means "the general infrastructure that is in place up to the point of entry to the particular residential unit, which is in place at virtually all newly constructed residential units prior to being made available for occupancy."[8] Apparently, UCAN suggests that a "telephone connection" exists if the local loop is available within the general vicinity of inside wiring in new residential units.

AT&T, seeing no ambiguity in the statute, interprets the term "telephone connection" to mean "a complete connection from a residence to AT&T California's network over which local telephone calls may be placed and received."[9] In AT&T's view, connections must be in place, both in the central office and at the demarcation point, for there to be a telephone connection under § 2883. AT&T's position is, essentially, that all the steps necessary to provide billed residential service must be in place before any obligation to provide emergency 911 service arises. This argument postulates that all wiring and

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an emergency call. Many unoccupied residential units are likely not to have an available phone that could be used in an emergency.

[8] UCAN, Opening Brief at 23.

[9] AT&T, Reply Brief at 6.

infrastructure from the residential unit to the central office are installed and that certain central office procedures have been accomplished.

Both parties' expert witnesses provide helpful testimony to provide a more detailed understanding of the essential elements of a residential phone connection:

1. Outside plant (OSP) infrastructure, consisting of a Standard Network Interface or Minimum Point of Entry, must be in place at the residential unit.
2. If the residential unit is part of a multiple dwelling or building complex, the property owner must arrange to have jacks in each residential unit wired to secondary Minimum Points of Entry; these secondary units, in turn, must be wired to the primary Minimum Point of Entry.
3. A Connected Through (CT) facility (*i.e.,* wiring and related infrastructure) must be in place from the Minimum Point of Entry at the residential unit or complex to the line side of the central office's main distribution frame.
4. Once all of the foregoing are available, as well as a street address for the residential unit, the telephone company must complete several tasks in the central office: assigning and wiring office equipment, assigning a telephone number, and configuring a switch to limit the telephone line to warm line service.[10]

All of this work is necessary if billed telephone service is eventually ordered for a residential unit, and AT&T's expert indicates that "[t]he OSP infrastructure is installed at this time [when construction is underway] because it is significantly easier and cheaper to do so before the streets are paved, the

[10] Exhibit No. 1 at 20:4-11 (Murray); Exhibit No. 6 at 4-6 (McNeill).

sidewalk is laid, and the residences are fully constructed. The establishment of the CT eliminates subsequent technician dispatches and offers the company efficiency opportunities."[11]

UCAN's expert concludes that most central office procedures and costs for establishing 911 access for new residential units are steps and expenditures the company will ultimately incur when billed residential service is ordered. UCAN's expert also sees that AT&T would benefit "by being able to provide new service more rapidly (if not instantly) when the new customer called to place an order (and having a working telephone line at the residential location enabling the customer to call and place that service order)."[12] Using a 1999 Commission decision as a reference, UCAN's expert estimates the central office costs as $18.89 per connection.[13] This modest cost estimate suggests that central office procedures are minor. The possibility that AT&T might financially benefit from advanced installation of all of the physical components necessary for a telephone connection, however, is not material to the question of whether AT&T has violated a statute requiring the provision of such a connection.

We agree with AT&T that § 2883 is unambiguous—thus not requiring an examination of legislative history. We also agree with AT&T's general rules for

[11] Exhibit No. 6 at 5:A11 (McNeill). The witness does add, "[G]iven today's competitive environment and the service choices customers now have, we need to consider whether it continues to make business sense to establish the CT before receiving a service order from the customer." *Id.*

[12] Exhibit No. 1 at 22:12-15 (Murray).

[13] *Id.* at 21:13-17 (Murray).

statutory interpretation, particular with reference to the tenet that a statute "be construed so as to give significance to every word, phrase, and sentence."[14]

While we do not explore the legislative history, it is obvious that the Legislature, in enacting § 2883, sought to expand the availability of 911 access, even in certain new residential units "regardless of whether an account has been established." However, two limitations in § 2883(a) prevent a universal application of this requirement. First, the availability of 911 access depends on "existing technology and facilities." Second, the Section requires a "telephone connection."

Regardless of these two limitations, we do not accept AT&T tautology, *i.e.*, voice service must already exist before the company is statutorily obligated to provide 911 emergency voice access. Section 2883(a) contemplates that, if "existing technology and facilities" and a "telephone connection" are in place, AT&T must do something: it must take the remaining steps to "provide access to '911' emergency service regardless of whether an account has been established." In order to determine when these preconditions are met, we further probe the meaning of "existing technology and facilities" and "telephone connection" in the typical new residential setting.

In applying our legal authority and telecommunications expertise, we are required to effectuate a statute wherever possible.[15] We interpret "existing

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[14] AT&T, Opening Brief at 3, citing *Watson Land Co. v. Shell Oil Co.*, 130 Cal. App. 4th 69 (2d Dist. 2005).

[15] Pub. Util. Code § 701 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction").

technology and facilities" to mean (a) a CT facility from the Minimum Point of Entry at the residential unit or complex to the line side of the central office's main distribution frame, and (b) interior wiring on the residential side of the Minimum Point of Entry. Together, the CT facility and interior wiring must be sufficient for a telephonic connection -- a path allowing the transmission of voice and other signals from the interior wiring to the line side of the central office.[16] We believe this minimum infrastructure satisfies and gives a common usage meaning to the statutory term, "telephone connection," in the sense of something being joined or linked together. If this infrastructure is in place, and the residential unit is physically located for 911 response by police, fire, and other emergency services, the carrier has the obligation under § 2883(a) to take the remaining steps necessary to provide 911 access, that is, providing the connections and switching necessary at the central office to allow 911 calls to be made from the residential unit (whether or not an account has been established).[17]

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[16] AT&T's expert provides a detailed listing of the components of a CT facility: "AT&T California may work with the contractor or developer of the project to engineer and install the Outside Plant (OSP) infrastructure that AT&T California eventually will need to provide telephone service to the newly constructed premises. This OSP work would include installing a Standard Network Interface (SNI) or Minimum Point of Entry (MPOE) at each Living Unit (LU), pulling multiple pair drop facilities to the SNI/MPOE to the nearest distribution terminals serving the newly constructed LUs, and ensuring the availability of connectivity through the distribution/feeder path to the line side of the central office main distribution frame (MDF)." Exhibit No. 6:4 (McNeill).

[17] AT&T's expert described the central office steps necessary to provide 911 access, once a CT facility is available: "AT&T California still would, for every individual LU, have to perform central office work consisting of assigning and wiring office equipment (OE), assigning a telephone number, and provisioning a switch translation to limit the capability of the telephone line to warm line service (*i.e.*, the ability to call 911 and to

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Because of the "existing technology and facilities" exception, § 2883(a) does not require a carrier to bring a CT facility to new residential structures solely for the purpose of providing 911 access. Once a CT facility is available and the residential unit is wired to the primary minimum point of entry (or secondary minimum point of entry, in the case of multiple dwelling units),[18] the carrier is responsible for taking all remaining steps necessary to provide 911 access, if requested by the residential owner or occupant (essentially the same step that would be required to provide billed service).

AT&T admits that it does not provide 911 access to all new residential units in the manner described above.[19] AT&T argues that it does not provide 911 access "until a customer places and the company provisions an order for telephone service,"[20] an interpretation we reject. While we find that AT&T has violated § 2883(a) as it pertains to new residences, UCAN has failed to provide convincing evidence as to the number of new residential units that may have been deprived of 911 access since § 2883 was enacted.[21] Consequently, we do not consider this violation separate from AT&T's overall violation of § 2883. Because

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receive incoming calls). AT&T California also would have to have received, verified, and uploaded its systems with the LU's postal information (*i.e.,* address), which the city or town is responsible for providing." *Id.* at 5-6.

[18] "If the LUs are a part of a multiple dwelling/multiple building complex, the contractor/developer also must arrange to have the jacks in each unit wired to the secondary MPOE, and to have the secondary MPOEs wired to the primary MPOE." *Id.* at 6.

[19] AT&T Opening Brief at 4.

[20] *Id.*

[21] UCAN's expert Murray testified as to 200,000 new housing starts in California during 2006, but overall her testimony is too general to ascertain the magnitude of any violations. *See* Exhibit No. 1 at 31-32.

we find that AT&T's violation of § 2883 was willful misconduct under the terms of its tariff, schedule CAL. P.U.C. No. A2-T, 2.14.1.B, AT&T's liability to a customer or other person for damages resulting from its violation of § 2883 will not be limited by its tariff. Prospectively, we order AT&T to comply with this interpretation of § 2883(a).

7.4. Availability of a "Technology or Facilities" Defense

We now turn to AT&T's defense based on the unavailability of necessary technology or facilities (including phone numbers) to provide 911 access both to new and previously occupied residential units. AT&T argues that UCAN has the burden of proving that the carrier has sufficient technology and facilities to provide 911 access beyond 180 days. This argument concerning the burden of proof as to AT&T's defenses has been previously considered and rejected.[22] AT&T has the burden of establishing the availability of a "technology/facilities" defense.

In cases where a voice telephone connection has existed in a residential unit, the question is how long, and under what circumstances, this obligation continues. UCAN's expert witness testified that AT&T impermissibly terminates such connections after 180 days.[23] AT&T admits that it employs a 180-day policy to terminate 911 access to previously or currently inhabited residences,[24] but

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[22] *See* Part 5, *supra*.

[23] Exhibit No. 1 at 7:15-22 (Murray).

[24] "AT&T California admits that, where it does provide warm dial tone, it does not do so indefinitely. Instead, its practice is to remove warm dial tone after a period of time (usually some time after six months)." AT&T Opening Brief at 7.

justifies the policy as a reasonable application of the statute's "facilities" limitation.

In this regard, AT&T identifies some facts in support of a "technology/facilities" defense, but the carrier mostly advances arguments that find no basis in the testimony or evidence before the Commission. AT&T uses the Commission's approval of 13 area code splits and one area code overlay since 1995, including a recent 310 area code overlay, to support the argument of "the scarcity of numbering resources in California . . . ."[25] While this evidence suggests a growing demand for numbers, it also suggests the ability and success of the regulatory process to provide needed numbers. This evidence alone is not persuasive as to the unavailability of numbers for "warm line" 911 purposes.

AT&T also uses the June 2006 Central Office Code Assignment Activity Report, prepared by the North American Numbering Plan Administrator (NANPA), to argue that 20 of California's 27 Numbering Plan Areas (NPAs, commonly known as area codes) have been exhausted or are in jeopardy. AT&T, however, provides no foundation for understanding the significance of the "exhausted" or "in jeopardy" characterizations of these area codes. Additionally, AT&T does not explain why a 180-day termination policy would be necessary for area codes not listed as "exhausted" or "in jeopardy."

Two other factual offerings provide little support for AT&T's argument of unavailable facilities. The carrier quotes a Federal Communications Commission (FCC) proceeding conducted in 1999 that noted that within California a number of area codes were "exhausting at a rate far exceeding their initial projected life

[25] AT&T Reply Brief at 9.

spans."[26] However, the FCC's order is eight years old. The FCC adopted certain measures to address this problem, and AT&T provides no more recent information on how successful, if at all, these remedial measures proved to be. AT&T also cites an even older (1997) internal study, upon which the current 180-day policy is based, indicating that if QDT lines were not purged after a certain period, "telephone numbers could be depleted."[27] However, this conclusion is ten years old and does not quantify number availability or project when numbers would be depleted. In both cases, the evidence is not persuasive.

The remainder of AT&T's presentation on the availability of numbering resources is a series of arguments having little basis in the evidentiary record. AT&T argues that carriers should be allowed to "proactively" manage their numbering resources to avoid shortages, since a carrier cannot respond instantaneously to shortages. We agree with this general proposition, but this argument does not persuade us that AT&T has needed to limit 911 access to prevent shortages. AT&T does not make a recent factual showing of actual or prospective number shortages or that its 180-day termination policy and policy of not connecting new residential units are properly calibrated in response to a shortage risk.

For its part, UCAN focuses on an additional report issued by NANPA, "2006 NRUF and NPA Exhaust Analysis,"[28] in its effort to place AT&T's use of

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[26] *In re* California Public Utilities Comm'n, 14 FCC Record 17,486 (1999).

[27] Pacific Bell, CPR-Quick Dial Tone Audit No. 6-302 (R140) (May 13, 1997), Exhibit No. 1, Murray Testimony, Att. TLM-9, C0511011-0190.

[28] In a ruling dated December 6, 2006, the Presiding Officer took official notice of this report.

NANPA's June 2006 Central Office Code Assignment Activity Report in context. The Exhaust Analysis report attempts to estimate when numbering resources within a specific area code are likely to be exhausted and whether the time projected for exhaustion within a specific area code is increasing or decreasing. Using this report, UCAN convincingly demonstrates that (a) numbering shortages in most California area codes are years away, and (b) AT&T's 180-day termination and new residential unit policies are not rationally related to its stated purpose of proactively managing numbering resources to avoid shortages. For California's 26 area codes (as of June 2006), the estimated exhaust events range from the 4th quarter of 2008 (714 area code) to the second quarter of 2025 (213 area code), with most area codes having five to nine years before estimated exhaustion.[29] Only one area code (310) is currently exhausted.[30]

AT&T has not carried its burden that it may benefit from a defense based on unavailable technology or facilities to justify its admitted curtailment of 911 access after 180 days and failure to connect new residential units when infrastructure is already in place. Given the legislative purpose behind § 2883, AT&T's policies, to qualify as a defense, would have to be closely tailored to the risk of exhaustion in that area code. Blanket, statewide policies of 180-day

[29] 2006 NRUF and NPA Exhaust Analysis at 9-10.

[30] The record does not disclose how many numbers AT&T controls or is likely to acquire in these 26 area codes in coming years. After the parties had stipulated to submitting the proceeding on the prepared testimony and stipulated exhibits, AT&T requested that the Commission take official notice of FCC Form 502, which was denied by the Presiding Officer. Because AT&T (not the FCC) generated the information in Form 502, official notice is impermissible under Rule 13.9 and California case law. *See* ALJ's Ruling Resolving Pending Motions re Record and Submitting Proceeding at 2-3 (Dec. 6, 2006).

termination and failing to connect new residential units constitute arbitrary measures that bear no reasonable relationship to actual numbering projections in specific area codes—some of which may not face exhaustion for almost a decade.

In summary, AT&T has conceded that it applies a 180-day termination policy for most currently or previously occupied residential units where voice service has been voluntarily or involuntarily curtailed. AT&T has also conceded that it fails to connect new residential units even when a CT facility exists to the central office. Given these admissions, AT&T has the burden of establishing a defense to a violation of § 2883 by showing that these policies are reasonably necessary because of technology and facilities limitations — including numbering constraints. AT&T has not carried its burden of proof as to the availability of such a defense. In this proceeding, the estimates of when numbers are likely to be exhausted varies considerably by area code, demonstrating that uniform termination after 180 days and a policy of not connecting new residential units are arbitrary measures and not reasonably correlated to the number supply in individual area codes.

8. Section 2883(c) Allegations: Notice to Subscribers

Pursuant to § 2883(c), "The commission shall require telephone corporations to inform subscribers of the availability of the [warm-line access] services . . . in a manner determined by the commission." UCAN argues that AT&T has failed to provide this notice and that the carrier, in one media advertisement, materially misrepresented its 911 policies. AT&T responds that its obligations under § 2883(c) arise upon a condition precedent: that the Commission must affirmatively specify how carriers should inform subscribers.

8.1. Analysis

AT&T's own tariff (Schedule Cal PUC No. A.2.2.1.2.I) promotes the availability of 911 access (Quick Dial Tone) (footnotes omitted): "Quick Dial Tone provides residential locations with basic access capability to the Utility's local loop demarcation point prior to a formal service request from a Customer. Access to outgoing calls is restricted except for calls to 9-1-1 emergency service."

The record indicates that the only other specific mention of AT&T's warm-line policy is contained in the company's final Disconnection Notice sent to a subscriber when residential service is being discontinued for nonpayment. The notice indicates, "[y]our service (except access to 911 service where facilities and operating conditions permit) will be permanently disconnected."[31] This notice is not sent to subscribers who voluntarily terminate service or new occupants of residential units who have not established service.

Section 2883(c) is unambiguous in this respect: the availability of 911 services is to be communicated to subscribers, which means those persons who have established a residential account (*i.e.,* subscribed to service) with AT&T. Section 2883(c) does not require notice to other persons (*e.g.,* a new occupant who has not subscribed to service). However, AT&T may have an obligation to include such accurate information in its tariff, discussed later.

8.2. AT&T's Defense: Commission's Failure to Specify Notice

UCAN argues that § 2883(c) is self-executing and AT&T is obligated to provide notice of its 911 policies even in the absence of Commission action. In

[31] Schedule Cal PUC No. A2.2.3.1.H SAMPLE FORM 101, set forth at Exhibit No. 4, MS-10.

support, UCAN refers to Commission decisions, particularly *UCAN v. PacBell*,[32] which have required carriers to provide information so they can make informed decisions about their phone service. AT&T distinguishes *UCAN v. Pac Bell* and other cases as these decisions did not concern a specific condition precedent (the need for Commission action) but established a minimum disclosure obligation the carriers were required to meet.

Whether or not the Commission has issued specific requirements under § 2883(c), we conclude that carriers have the affirmative obligation under the Section to provide adequate 911 access information to satisfy the minimum information customer information standard set forth in § 2896(a):

> Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service.

Sections 2883(c) and 2896(a) are appropriately read together to ascertain the basic requirement. When issuing rules or orders pursuant to § 2883, the Commission may determine the format of such information and increase the amount of information required; but the Commission may not require less than the statutory minimum information required of utilities by § 2896(a).

When faced with a choice to pay the phone bill or other creditors, or when deciding whether to cancel a landline in favor a cellular service, an existing subscriber should be able to readily obtain accurate information about the continuation of 911 services after termination. At the moment, AT&T provides

[32] D.01-09-058, 2001 Cal. CPUC LEXIS 914.

this information, in cryptic fashion, to the recipients of final disconnect notices and even that information is inaccurate since it does not describe the carrier's 180-day termination policy.

While the Commission has not previously acted under § 2883(c), we conclude that AT&T has violated the subsection by failing to affirmatively provide accurate 911 emergency access information to subscribers whose service has been discontinued—whether voluntarily or involuntarily. We also conclude that AT&T's limiting tariff language, "Quick Dial Tone is provided at no charge where facilities and operating conditions permit," is inaccurate in that it misstates the statutory exception ("existing technology or facilities"). Because we find that AT&T's violation of § 2883 was willful misconduct under the terms of its tariff, schedule CAL. P.U.C. No. A2-T, 2.14.1.B, AT&T's liability to a customer or other person for damages resulting from its violation of § 2883 will not be limited by its tariff.

8.3. Alleged Misleading Advertising

UCAN offered evidence of an AT&T's advertisement commencing in November 2005, concerning 911 access,[33] and argues that the ad violated the Commission's prior orders that telecommunications companies not engage in misleading advertising. The ad promotes the message that, if winter conditions are severe and the electricity goes out, "when it comes to reliable 911 calling, you can continue to count on SBC [AT&T] phone service when you need it."

UCAN argues that this ad was misleading because it failed to completely describe, for the benefit of the consumer, all the limitations in 911 access we have

[33] Exhibit No. 4, Att. MS-11.

previously discussed. UCAN does not convince us that the ad discusses warm line access at all. The advertisement is more reasonably interpreted as touting the benefits of a traditional phone line, with line electricity provided by the carrier's back up power facilities, as compared to cable phone service where continuing service depends on batteries. UCAN has not shown that this advertisement violates Commission orders concerning truthful advertising.

9. Other Arguments

In defense, AT&T argues that it would be "legal error" for the Commission to find it liable for a § 2883 violation at the same time that the Commission consents to UCAN's dismissal of a nearly identical complaint against Cox Communications, Inc. in C.05-11-012. AT&T points to discovery in C.05-11-011 indicating that the 911 practices of both companies are quite similar. AT&T characterizes UCAN's withdrawal of its complaint against Cox as an admission that Cox's practices do not violate § 2883.

It is problematic to compare the 911 practices of AT&T and Cox for one important reason: The Commission has a complete evidentiary record before it on AT&T's practices. No such complete evidentiary record has been compiled for Cox's practices. To allow the defense AT&T requests would require the Commission to conduct, within the parameters of this proceeding, the very trial that UCAN and Cox, for their own reasons, have sought to avoid through settlement. We wish to avoid such a detour. Rather than an admission concerning Cox's 911 policies, UCAN's motion to dismiss could be for any number of reasons (*e.g.,* a confidential financial settlement) that may never become public.

In *In re Pacific Bell Wireless*,[34] we considered arguments concerning selective enforcement:

> As a constitutional agency of the State of California, the Commission has broad discretion with respect to the exercise of its enforcement authority. (See California Constitution, Article XII; see also Pub. Util. Code § 701.) It is a general rule that state agencies have discretion to establish priorities in the use of limited agency resources, and that these agencies are better equipped than the courts to engage in the proper ordering of agency enforcement priorities." (*See, e.g., People v. Cimarusti* (1978) 81 Cal. App. 3d 314, 323 (executive branch agencies and officials have discretion with respect to enforcement and disposition of charges in civil action involving imposition of civil penalties); *People v. Smith* (1975) 53 Cal. App. 3d 655, 658).[35]

AT&T's argument that this decision creates new standards, and retroactively enforces them against the carrier, also lacks merit. AT&T is charged with notice of what conduct is prohibited under applicable statutes, regulations, and Commission decisions. AT&T was aware of the requirements of § 2883, as evidenced by its internal policies and communications to the Commission. AT&T's assertion that the Commission has selectively prosecuted AT&T for violating prospective standards is unconvincing.

10. Remedies

We have found AT&T in violation of subsections 2883(a) and (c). Section 2107 requires that we determine whether a monetary penalty is

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[34] D.04-12-058, 2004 Cal. PUC LEXIS 577.

[35] *In re* Pacific Bell Wireless, D.04-12-058 at 14-15 (Dec. 16, 2004).

warranted. We must also determine whether reparations or disgorgement of impermissible financial benefits are required.

10.1. Penalties

Section 2107 sets forth the parameters for maximum and minimum penalties as follows:

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense.

Since the Public Utilities Code does not specify some other penalty for the violation of § 2883, the monetary range mandated by § 2107 applies here. Also, § 2108 provides, in relevant part, that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

From approximately May 13, 1997, when management received an audit report recommending the 180-day termination policy,[36] to August 15, 2006, the close of the evidentiary record of this issue (a total of 3,382 days), AT&T's official warm line policy, which required a cutoff of access after 180 days, violated § 2883. While we have determined that AT&T has violated two subsections of § 2883, the company pursued essentially one course of conduct: a failure to

[36] Exhibit No. 1, Att. TLM-9, at C0511011-0190 to -0196. In the audit report, the company's efforts to limit warm line access is a departure from a more optimistic representation to the Commission two years earlier, *e.g.*, "Lines that are disconnected for nonpayment will be equipped with QDT and will have access to 911 Emergency Services where technology or facilities permit." Exhibit No. 1, Att. TIL-10, at C0511011-0339.

comply with the warm line polices enacted by the legislature. Considering the record as a whole, we find that the penalty should be calculated on a daily basis for a more than nine-year period (3,382 days).[37]

As the Commission has stated before, "The primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations. Fines should, therefore, be set at a level within the range permitted by § 2107 that is sufficient to achieve the objective of deterrence without being excessive in light of the offending utility's financial resources."[38]

In determining the size of the penalty, where one is levied, the Commission has held that the size of the fine should be proportionate to the severity of the offense and has applied the criteria adopted in D.98-12-075 in the *Affiliate Enforcement Rulemaking*.[39] These criteria include the following: (1) the severity of the offense; (2) the conduct of the utility, including the utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation; (3) the financial resources of the utility; (4) the totality of the circumstances in furtherance of the public interest; and (5) the role of precedent.[40] We noted in D.98-12-075 that "[i]t is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules,"

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[37] See *UCAN v. Pacific Bell*, D.02-02-027, 2002 Cal. PUC LEXIS 189, at *25-26.

[38] *UCAN v. Pacific Bell*, D.01-09-058, 2001 Cal. PUC LEXIS 914, *126, *limited reh'g granted*, D.02-02-027, 2002 Cal. PUC LEXIS 189.

[39] *In re* Standards of Conduct Governing Relationships Between Energy Utilities & Their Affiliates, 1998 Cal. PUC LEXIS 1018.

and that "the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance."[41]

Severity of the offense includes the physical or economic harm caused to the victims or to the integrity of the regulatory process, unlawful benefits gained by the utility, and the number of violations. The conduct of the utility includes the utility's actions to prevent the violation, detect the violation, and disclose and rectify the violation. With respect to the financial resources of the utility, the Commission considers both the need for deterrence and constitutional limitations on excessive fines. Consideration of the totality of the circumstances requires the Commission to look at the unique facts of each case, which may mitigate or exacerbate the degree of wrongdoing, in the furtherance of the public interest.

When we apply these criteria to the evidence in this proceeding, we find that the basic violation is moderately serious. This finding is reinforced by previous incidents where the Commission has sanctioned Pacific Bell (U1001C) (AT&T) for violations of statutes and Commission orders.[42]

The instant violation results from an ongoing corporate policy that resulted in termination of emergency access after 180 days, as well as the failure to connect new residential units where the necessary infrastructure was in place. This policy was implemented without the analysis of facilities and equipment

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[40] *Id.* at *10.

[41] *Id*. at *7.

[42] UCAN v. Pacific Bell Telephone Co., D.02-10-073, 2002 Cal. PUC LEXIS 729 ($27 million penalty settlement for improper DSL billing); *UCAN v. Pacific Bell*, D.02-02-027, 2002 Cal. PUC LEXIS 189 ($15.2 million for marketing violations concerning call ID, wire maintenance plans, and service packages).

availability, number availability, or the needs of the customers in the specific areas affected. We cannot determine the total number of persons harmed, although UCAN's expert estimates that 400,000 California households may have been affected.[43] This corporate policy (which appears to continue) created a situation throughout AT&T's service area where former residential customers and occupants of new residential units could not reach emergency services if in need.

What is not shown in the record is any evidence of *actual* injury to former customers or other persons resulting from this policy and practice. UCAN has not proven, or even attempted to prove, a single incident where a residential occupant was unable to reach 911 emergency services from a unit where warm line access had been terminated or never provided. Had such incidents been proven, the seriousness of AT&T's conduct would have been significantly enhanced.

Second, AT&T continues to maintain that it has done nothing wrong and that its warm line access policies and practices satisfy § 2883. Good faith is not demonstrated when AT&T terminated access after 180 days and failed to connect new residential units without an assessment of need, number, facilities, and equipment availability in the areas affected. Nothing in § 2883 authorizes such a capricious policy.

Further complicating AT&T's position is the Commission's determination in D.07-07-020 that it engaged in impermissible *ex parte* communications concerning substantive issues affecting this proceeding. While that decision

[43] Exhibit No. 1, at 32: 2-6 (Murray).

imposes a separate penalty against AT&T, the carrier's sanctioned conduct can be considered here with reference to the seriousness of the violation and, consequently, undermines any good faith claim in this proceeding.

Third, the record does not reflect what portion of AT&T's revenues since May 13, 1997 is attributable to its 911 access policy, and we have no means to estimate the sum. UCAN does offer testimony that AT&T saved $191 million from its policy because of labor cost savings "to be realized by not having to perform the timely and costly steps of completely disconnecting a residential line, and then reconnecting the very same line when a new occupant moves into a residence."[44] However, this figure is more of a rough estimate of possible savings than a rigorous audit.

The Commission takes official notice that AT&T's consolidated shareholder equity, as of December 31, 2006, was $115.5 billion, its operating revenues were $63.1 billion, and its net income was $7.4 billion for the year.[45]

Regarding the remaining criteria for assessing penalties (totality of the circumstances and precedent), several recent Commission decisions indicate that the size of the penalty imposed here is comparable to other recently imposed penalties. However, the conduct sanctioned here is somewhat unique from that penalized in other proceedings.

In *In re Pacific Bell Wireless,* we imposed a penalty of $12,140,000, plus customer reparations for a two-year period of continuing violation of § 451 (just and reasonable service) in its refund and return policy due to inadequate cell

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[44] Exhibit No. 1 (Murray), Att. TLM-9 at C0511011-0190 (Pacific Bell Audit Report).

[45] AT&T, Form 10-K for 2006, filed with U.S. Securities and Exchange Comm'n (Feb. 26, 2007) (incorporating financial information from report to shareholders).

phone coverage. These sanctions were upheld by the Commission upon rehearing and on review by the Court of Appeal.[46] Unlike the present case where no money from customers is involved, Pacific Bell Wireless had collected money and failed to refund money to customers when service was inadequate.

In re Qwest Communications Corporation imposed a fine of $20,340,000 for 8,362 separately established slamming and cramming offenses perpetrated on utility customers ($5000 for each slamming offense and $500 for each cramming offense).[47] Quest Communications was engaged in a cynical practice to increase revenues by imposing unjustified charges on customers. In this proceeding, AT&T's conduct is more accurately characterized as willful misconduct in failing to satisfy its statutory obligations.

In another proceeding, a consolidation of *In re Pacific Bell, Pacific Bell Internet Services and SBC Advanced Solution*s (I.02-01-024) with a complaint against Pacific Bell (C.02-01-007), the Commission adopted the parties' proposed settlement, which included a penalty of $27 million for an estimated 30,000 to 70,000 offenses related to DSL billing and reporting errors. The Commission noted, "if Respondents were penalized $500 for each offense, the total penalty would equate to 54,000 offenses, well within the range indicated."[48]

UCAN v. Pacific Bell Telephone Co., the marketing abuse decision referenced *supra*, is somewhat similar to this proceeding in that the decision finds

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[46] D.04-09-062, 2004 Cal. PUC LEXIS 453, *reh'g denied,* D.04-12-058, 2004 Cal. PUC LEXIS 577, *aff'd sub. nom.* Pacific Bell Wireless, *LLC v. Public Utilities Comm'n*, 140 Cal. App. 4th 718 (4th Dist. 2006).

[47] D.02-10-059, 2002 Cal. PUC LEXIS, *reh'g denied*, D.03-01-087, 2003 Cal. PUC LEXIS 67.

[48] D.02-10-073, 2002 Cal. PUC LEXIS 729, *22.

continuing violations based upon an ongoing corporate practice, rather than specifically enumerated offenses involving individual customers. The rehearing decision, which reduced the total penalty by shortening the applicable period but did not alter the daily fine, ordered a penalty of $15,225,000, calculated at $17,500 per day for each offense, for a total of $35,000 per day.[49] The Commission determined that Pacific Bell's unlawful conduct was particularly egregious because it concerned the marketing of basic telephone services to captive residential customers, including immigrant and low-income Lifeline customers and because the conduct closely resembled marketing improprieties for which the Commission had fined Pacific Bell $16,500,000 in 1986.[50]

Having examined the foregoing factors and totality of circumstances, we believe AT&T was guilty of a policy of willful misconduct concerning an important statutory purpose (emergency 911 access), a violation that would have been more serious had we received evidence of personal injury or property damage as a consequence of this policy. Thus, we conclude that the public interest is best served by imposing a substantial penalty (but one calculated at the lowest daily rate) coupled with an order requiring AT&T, in short order, to change its policies and practices so that the risk of residential occupants being unable to reach emergency services is reduced.

Therefore, AT&T is penalized $1,691,000 calculated at the rate of $500 per day for 3,382 days dating from May 13, 1997, to August 15, 2006, when the evidentiary record closed on the substantive issues. AT&T shall pay this penalty

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[49] D.02-02-027, 2002 Cal. PUC LEXIS 189, *72.

[50] *See In re* Pacific Bell Telephone Co., D.86-05-072, 21 CPUC2d 182 (1986).

to the State of California General Fund within 45 days after the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive Director within five days of payment.

10.2. Reparations and Disgorgement

Having imposed a penalty for violations of law, we must also ascertain whether reparations may be ordered so that customers may be made whole and the utility is not unjustly enriched. Also, UCAN asks us to require AT&T to "disgorge" any amounts by which it was unjustly enriched by its illegal practices.

We have determined that AT&T has violated § 2883, but the violation is unique in that the persons harmed are occupants of residential units who, by definition, were not paying for telephone service at the time violations occurred. That is, AT&T has violated a statute requiring it to provide emergency access service to new residential units where a connection has been established and in older residential units where service has been voluntarily or involuntarily terminated. Because of this unique circumstance, reparations are not required to return money impermissibly collected and thereby make customers whole.

While there is evidence of unjust enrichment in the savings AT&T achieved by avoiding phone connections, we do not have sufficiently detailed evidence of the number of units affected or convincing estimates of AT&T's savings. We do not have confident information of the number of residential units denied warm line access. Even if we were to establish a post-decision claims facility (where injured persons could assert their claims in an expeditious

fashion),[51] the process would be very expensive and we would not be assured that reparation payments would ever reach many of the persons actually affected by AT&T's behavior.

AT&T may well have financially benefited from its failure to implement § 2883's requirements, but the evidence UCAN has offered is both imprecise and unconvincingly. While UCAN argues that AT&T benefited to the extent of $191 million from its flawed 911 access policies and practices, the figure is based on a prospective estimate rather than an audited finding of actual savings.

While specific information is unavailable for us to order reparations or disgorgement, we will allow customers and other persons to pursue other remedies otherwise available to them at law or in equity. Specifically, we determine that AT&T's failure to provide emergency access service in conformity with § 2883 constituted willful misconduct under its tariff, Schedule CAL. P.U.C. No. A2-T, 2.14.1.B.1. As a consequence under the tariff, "The Company's liability, if any, for its willful misconduct is not limited by this tariff."

11. Appeal of Presiding Officer's Decision

AT&T filed an appeal of the Presiding Officer's Decision (POD) on November 9, 2007 (AT&T App. Brief). UCAN filed its response to AT&T's appeal on December 3, 2007 (UCAN Resp. Brief). The grounds raised by AT&T and the Commission's disposition of these issues are discussed in the following. Based upon this analysis, we deny AT&T's appeal.

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[51] *See*, Frederick D. Dunbar *et al*., Estimating Future Claims: Case Studies from Mass Tort and Product Liability (1996).

11.1. Burden of Proof

AT&T argues that the POD commits legal error by placing the burden of proof on the carrier in this proceeding. AT&T App. Brief, Part III(A). The POD indicated that "Evidence Code § 500 provides the appropriate guidance and will be followed here: 'Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief *or defense* that he is asserting. It is especially appropriate for AT&T to assume the burden of proof as to a 'technology/facilities' defense since most of the information necessary to make such a showing is uniquely within AT&T's possession." POD at 7 (emphasis added; footnote deleted). AT&T's position is that the complainant must prove all the elements of the cause of action including here the availability of existing facilities and technology. AT&T App. Brief at 6.

AT&T cites to one case and the *Witkin, California Evidence (4th Ed.) (Witkin)* treatise to support its argument that UCAN must prove that AT&T has "existing technology and facilities." AT&T argues that UCAN must prove that "existing technology or facilities" exist under § 2883(a) because UCAN is the party with the "affirmative" obligation on the issue. In support, AT&T cites to *LaPrade v. Dept. of Water & Power*, 27 Cal.2d 47 (1995), and *Witkin* § 61. AT&T also argues that California law generally places the burden of proving facts on the party with the obligation to plead the facts. For this proposition, AT&T cites to *Witkin* §§ 5-7.

Neither *LaPrade* nor the cited sections of *Witkin* support for AT&T's conclusion that the availability of "existing technology or facilities" is an element of the plaintiff's cause of action, rather than an affirmative defense, under § 2883.

AT&T relies on *LaPrade* and *Witkin* for the proposition that "Under California administrative law generally, the party with the "affirmative" on an issue – UCAN to prove a violation – has the burden of proof." AT&T App. Brief at 6. The "affirmative of the issue," originally found in § 1981 of the California Code of Civil Procedure (CCP), has been criticized by the Law Review Commission in comments to Evidence Code § 500, which superseded CCP § 1981.

The Law Review Commission suggested that a more accurate statement is that "the burden of proof as to a particular fact is normally on the party to whose case the fact is essential." The Law Review Commission also cited to *Wilson v. California Cent. R.R.*, 94 Cal. 166, 172 (1892), for the proposition that "as a general rule, the burden is on the defendant to prove new matter alleged as a defense . . ., even though it requires the proof of a negative." Ultimately, the Law Review Commission opined, "The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence."

In our view, the substantive law of § 2883 requires a complainant to carry the burden of proof as to these key cause of action elements: (1) that the defendant is a local telephone corporation; (2) that existing and/or new residential telephone connections exist within defendant's service area; and (3) that one or more of the residential telephone connections do not have "911" emergency service. With this showing, it becomes the defendant's burden to establish a defense, such as the unavailability of existing technology or facilities.

An examination of judicial precedent supports this formulation. The courts consider a number of factors concerning the appropriate allocation of the burden of proof: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of

public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. *Lakin v. Watkins Associated Industries,* 6 Cal.4th 644, 660-61 (1993) (*quoting* Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 500, p. 431.); s*ee also Aydin Corp. v. First State Ins. Co.,* 18 Cal.4th 1183, 1192-93 (Cal. 1998).

In particular, where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. *Garcia v. Industrial Acc. Comm'n,* 41 Cal.2d 689, 694 (1953); 9 WIGMORE, EVIDENCE § 2486 (3d ed. 1940); WITKIN CAL. EVIDENCE § 56(b). (1958). For example, in *Morris v. Williams*, 67 Cal.2d 733, 760 (1967), only the defendants could explain why they deemed proportionate reductions in Medi-Cal services not feasible, and the burden on this issue was theirs. The courts often explain this consideration as a matter of fairness: "It is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter." *Chrysler Credit Corp. v. Superior Court,* 17 Cal. App. 4th 1303, 1311 (1st Dist. 1993), *quoting United States v. Hayes,* 369 F.2d 671, 676 (9th Cir. 1966). As explained in the POD, AT&T obviously has more knowledge than a complainant as to the existence and extent of its physical facilities, and as a matter of fairness, AT&T should have the burden of establishing a defense based on these limitations.

Placing the burden on a defendant to prove an affirmative defense is also justified as a matter of public policy. For example, the court placed the burden on the defendant in a water pollution case because "§ 13385 would have virtually

no deterrent effect if the polluter were penalized only when the plaintiff could demonstrate quantifiable damage because 'water pollution . . . results in severe unquantifiable damage.'" (*San Francisco Civil Service Assn. v. Superior Court, supra,* 16 Cal.3d 46, 51.) *State of California v. City and County of San Francisco,* 94 Cal. App. 3d 522, 531 (1st Dist. 1979); *see also* WITKIN, CAL. EVIDENCE § 198 (2d ed. 1966). The same considerations are present here. Section 2883 manifests the legislature's strong public policy intent to achieve universal "911" emergency service. The exceptions to this universal goal should be limited, and it is incumbent on a carrier to explain why emergency access is not available in some areas.

11.2. Legal Standard for New Statute

In the enforcement of a statute "that never before has been interpreted by the Commission," AT&T seeks to invoke a safe harbor under a purported standard that "if a good faith attempt has been made to comply with a statute based on a tenable interpretation, no violation should be found . . . ." AT&T App. Brief, Parts III(B). Without reaching the issue as to whether such a safe harbor is generally available in Commission enforcement, AT&T's argument suffers two preliminary difficulties. First, as UCAN demonstrates in its response, this proceeding is not the first occasion for the Commission to interpret § 2883. UCAN lists nine Commission proceedings involving some interpretation of the section. *See* UCAN Resp. Brief at 23-27.

Second, as the POD determined, AT&T did not engage in good faith in its failure to comply with § 2883, a precondition for application of its own standard. As the POD indicates, AT&T's termination policy "was implemented without the analysis of facilities and equipment availability, number availability, or the needs of the customers in the specific areas affected. POD at 30. Elsewhere, the POD

indicates, "Having examined the foregoing factors and totality of circumstances, we believe AT&T was guilty of a policy of willful misconduct concerning an important statutory purpose (emergency 911 access) . . . ." *Id.* at 34. The POD concludes, "AT&T's violation of § 2883 was willful misconduct under the terms of its tariff . . . ." *Id.,* Conclusion of Law 8, at 42. AT&T does not satisfy the good faith precondition for the lenient interpretation it seeks to invoke. This discussion also answers AT&T's related argument, set forth in Part III(F) of its brief, that there is no basis for the imposition of a penalty because its interpretation of § 2883 was reasonable. The POD justifies its conclusion why AT&T's termination policy was unreasonable.

11.3. New Residential Units

AT&T challenges the POD's determinations concerning emergency access from new residential units. One of its arguments is that the POD adopts a definition of telephone connection that is erroneous, inconsistent, and not supported by the record. AT&T's criticism is inexplicable since the POD relies on AT&T's own expert for identifying the major components of a residential telephone connection (*see* footnotes 4, 10, 16, and 17). In that manner, the POD is supported by the record. Other than minor details, AT&T has not explained how the POD's description of a residential phone connection is materially incorrect. AT&T expresses concern about potential vagueness of the phrase, "if requested by the residential owner or occupant." *See* Conclusion of Law 4. The POD included the phrase for the obvious reason that, especially in the case of multi-unit developments, the carrier needs some notice that new residential construction has been completed and is ready to obtain emergency access. AT&T is unconvincing that this concept somehow relieves it of its § 2883 obligations.

We also do not accept AT&T's continued urging that billed voice service must be in place before the carrier has a responsibility to provide 911 access. In the POD, we describe AT&T's position as a "tautology, *i.e.*, voice service must already exist before the company is statutorily obligated to provide 911 emergency voice access." POD at 14. AT&T repeats this same refrain ("there is … no basis to exclude certain elements included in AT&T's definition, namely the physical connection from the MDF [main distribution frame] to the switch …"), AT&T App. Brief at 11, which if accepted would nullify any protection afforded by the statute. We do not believe the legislature contemplated a meaningless act in its adoption of § 2883. As the POD indicates, when a telephone connection and other prerequisites are in place, "AT&T must do something: it must take the remaining steps to provide access to '911' emergency service"—steps including making the physical connection from the main distribution frame to the switch. POD at 14.

Finally, AT&T again claims that the Commission should compare the carrier's emergency access practice to that of Cox Communications, the defendant in a related action. UCAN dismissed its complaint against Cox for unspecified reasons. The POD, at 25-26, addresses AT&T's argument. Because of the dismissal, an evidentiary record was not developed that would document Cox's 911 policies. No opportunity was available for AT&T or UCAN to examine or cross-examine any Cox witness. Furthermore, UCAN and AT&T agreed to submit this proceeding, in lieu of an evidentiary hearing, on exhibits and prepared testimony. Cox's 911 policies and practices were not part of that record.

11.4. Termination Policy for Existing Residential Units

AT&T faults the POD for finding that the carrier's 180-day disconnection policy for existing residential connections violates § 2883. The carrier advances two arguments: (1) Commissions staff was aware of the policy as early as 1998 and, because staff may not have complained, the Commission is somehow estopped from adjudicating a violation now; and (2) a dozen Commission decisions between 1995 and 2007 (with ten of them between 1995 and 1999) have addressed area code numbering constraints, the basis for its unavailable facilities argument.

As to the first point, the Commission has consistently rejected the use of estoppel or similar arguments to prevent the Commission from performing its regulatory obligations. At a minimum, AT&T's argument does not satisfy one of the indispensable elements of equitable estoppel: that the party to be estopped (here the Commission itself) must intend that its conduct shall be acted on, or must so act that the other party has a right to believe it was so intended. *Longshore v. County of Ventura,* 25 Cal.3d 14, 28 (1979). AT&T has not shown how staff's knowledge of the carrier's practice can somehow be construed as the Commission's own intent to approve of the practice and, accordingly, curtail its regulatory role.

We have rendered similar decisions on equitable estoppel arguments. For instance:

> [T]he mere participation of this Commission in the Economic ERA [Regulatory Administration] proceedings between 1989 and 1990 and lack of criticism of the import arrangement does not preclude the Commission's reasonableness review. It would be unreasonable to conclude that the mere participation at the ERA's proceedings constituted a determination that PG&E's Canadian gas purchases

> were prudent. Such a conclusion would be an improper application of the doctrine of equitable estoppel because it would preclude us from performing our statutory duty to ensure that the actions of utilities are prudent, and that their rates are just and reasonable. . . . . [T]he doctrine of estoppel will not be applied to "defeat the operation of a policy adopted to protect the public."

In re Pacific Gas & Electric Corp., D.92-10-058, 1992 Cal. PUC LEXIS 922, at *38-40 (citation omitted).

Additionally, AT&T maintains that the POD commits legal error by not considering Martha Johnson's letter informing the Commission staff that a disconnect policy was necessary due to numbering constraints. AT&T App. Brief at 14. We have considered the letter, but it does not support AT&T's interpretation. AT&T seems to make the argument that, by communicating the 180-day disconnect policy to Commission staff, the policy thereby became anointed as reasonable.

To the contrary, Johnson's 1998 letter informed Commission staff that "Pacific Bell is in the process of initiating an automated process to recapture useful telephone plant. Upon exceeding a 180-day time period, the QDT will be automatically broken to place its assigned plant facilities back onto the pool of available facilities for re-assignment to new customer service."

While Johnson then mentions the need for reserve capacity, her next paragraph indicates that the true basis for the disconnect policy is *cost – not* numbering shortages: "Although we have not conducted cost studies associated with leaving over-aged QDTs permanently in place, we believe that the dollar amount would easily reach in the tens of millions of dollars." She then concludes with an unauthorized—and in our view incorrect—summary of statutory purpose: "The intent of the QDT was to provide an interim method to

access emergency services . . . ." Absent facilities or numbering constraints in specific areas, we reject the notion (and we believe the legislature would agree) that emergency access was meant to be available only on an interim basis.

AT&T cannot save its arbitrary disconnection policy by citing to a series of Commission decisions finding numbering constraints. AT&T was curtailing emergency access based on a policy of arbitrary length—not because of numbering constraints. AT&T's disconnection methodology is an arbitrary measure not reasonably correlated to the number supply in individual area codes.

Finally, AT&T argues that the POD disregards the company's 1997 internal audit. To the contrary, the POD identifies the audit as the basis for the imposition of the 180-day disconnection policy and, accordingly, dates the period for commencement of penalties from that date. What the POD rejects is the audit recommendation that an arbitrary policy, not tailored to number availability in specific area codes, was the appropriate corporate policy to put in place at that time.

11.5. Notice Issue

AT&T advances several arguments why, in its view, the POD is mistaken in its finding concerning the accuracy of tariff language and notices to customers. As previously discussed, the tariff defines Quick Dial Tone as an emergency access service offered so long as facilities and operating conditions permit. We first observe, as the POD determined, that this limiting language is materially inaccurate. AT&T argues that "facilities and operating conditions" has the same meaning as the statutory term, "existing technology or facilities." We disagree since "operating conditions" would expand the limiting the language to include a multitude of non-structural reasons not contemplated by § 2883.

Second, the limiting language is, as the POD found, materially inaccurate since AT&T's actual policy was based on an arbitrary 180-day period, not upon the actual availability of technology or facilities in the area. The Disconnection Notice, set forth as a sample form in the tariff (Exhibit No. 4, Att. MS-10) repeats the error.

Our discussion above addresses AT&T's misplaced contention that notice of a carrier's practice, when given to Commission staff, automatically means that the Commission itself has approved the practice.

11.6. Consideration of *Ex Parte* Sanction

AT&T argues that the Commission, in fashioning a penalty concerning the carrier's violation of § 2883, cannot consider the imposition of a penalty against the carrier, in an earlier phase of this proceeding, based on a violation of the Commission's *ex parte* rules. *See* D.07-07-020. AT&T complains of the lack of a nexus between the *ex parte* contacts and the earlier corporate decision implementing the carrier's 911 policy. Under the *Affiliated Enforcement Rulemaking* criteria, discussed at pages 28-29 of the POD, the Commission can consider, in fashioning a penalty, the utility's conduct in preventing, detecting, and disclosing and rectifying the violation. AT&T's *ex parte* conduct, in an effort to undermine UCAN's position in this proceeding, demonstrates the carrier's failure to readily disclose and rectify its deficient 911 policies. As such, a nexus does exist between AT&T's conduct and the penalty criteria long-employed by the Commission.

AT&T complains that the consideration of the *ex parte* conduct punishes it twice for the same conduct. Commission remedies, however, are cumulative. *See, e.g., In re Bidwell Water Co.*, D.01-02-079, 2001 Cal. PUC LEXIS 944, at 1*, n.1 ("Our decisions also assessed at that time a punitive penalty of $1000. The

penalty provisions, however, in §§ 2100-2119 do not limit the punitive penalties and other remedies the Commission may assess for Bidwell's continuing non-compliance."). AT&T cites to *Troensegaard v. Silvercrest Industries, Inc.*, 175 Cal. App. 3d 218 (1st Dist. 1985), for the proposition that double punishment for the same offense is not lawful. What *Silvercrest* faults is the imposition of both punitive damages and a penalty on the same conduct in the absence of legislative intent. Here, however, Commission precedent establishes the availability of cumulative remedies. *Cf.* § 2113 ("The remedy prescribed in this section [contempt] does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto."). Also, AT&T's interpretation misconstrues *Silvercrest* where a penalty and damages were imposed on the same conduct. Here, our earlier decision sanctioned AT&T for impermissible *ex parte* communications. This decision sanctions AT&T for violating § 2883. That the most recent penalty calculation is informed by the quality of earlier remedial conduct, among other factors historically relied upon by the Commission, does not mean the same conduct is being sanctioned.

11.7. Statute of Limitations

AT&T argues that the assessment of a penalty in this proceeding, because it is calculated from May 13, 1997 to August 15, 2006, violates both the three-year statute of limitations set forth in Code of Civil Procedure (CCP) § 338 and the one-year statute of limitations set forth in CCP § 349(b). Both the Commission and California courts have repeatedly held "that statutes of limitation codified in the Code of Civil Procedure do not apply to administrative actions." *In re Bidwell Water Co.,* D.99-04-028, 1999 Cal. PUC LEXIS 217, at *3 (*citing Robert F. Kennedy Medical Center v. Department of Health Services,* 61 Cal. App. 4th 1357, 1361-62 (2d Dist. 1998); *Little Company of Mary Hospital v. Belshe,* 53 Cal. App. 4th 325, 329 (2d

Dist. 1997); *Bernd v. Eu*, 100 Cal. App. 3d 511 (3d Dist. 1979)); *Carey v. Pacific Gas & Electric Co.*, D.99-04-029, 1999 Cal. PUC LEXIS 215, at 8.

AT&T also confuses a limitation period, which specifies when an action can be brought, with the measure of time used to calculate a penalty, once a violation of law is determined. Because AT&T's failure to comply with § 2883 was continuing even to the date UCAN's complaint was filed, no credible argument can be made that UCAN did not bring a timely action within the applicable statute of limitations. Having determined a violation of state law, the Commission may fashion the appropriate penalty based on §§ 2107 and 2108, as well as the criteria set forth in *Affiliated Enforcement Rulemaking*. We utilized this method in *Carey* where we imposed a fine based on the period we found PG&E in noncompliance with a safety provision of the Public Utilities Code, *i.e.*, "This covered the time from the November 12, 1994 Pleasanton fire until PG&E reinstated its gas shut-off policy on March 18, 1998." 1999 Cal. PUC LEXIS 215, at *7. We indicated, "Considering the totality of the circumstances, we imposed a fine [calculated at $800 per day for 1221 days] that bore a 'relationship to the unlawful acts' and 'was supported by the record.'" 1999 Cal. PUC LEXIS at 8 (*citing* D.98-12-076 at 21-22). Similarly, the penalty imposed here was reasonably based on the period of AT&T's deliberate noncompliance with the strictures of § 2883.

AT&T's statute of limitations argument would be more persuasive if our decision awarded damages to UCAN. Our decision does not impose damages; rather, it imposes a penalty payable to the California general fund.

11.8. Tariff Limits on Liability

AT&T complains that the POD errors by cancelling any protection the carrier might have to limited civil liability under its tariff, Schedule CAL. P.U.C.

No. A2-T, 2.14.1B. The POD withdrew this immunity because of the AT&T's willful misconduct. AT&T suggests that the POD reaches a conclusion beyond the allegations in UCAN's complaint. The contrary is true: UCAN alleged a deliberate corporate policy in violation of § 2883 ("However, SBC [AT&T] has admitted to implementing a policy where it in fact does so [terminates warm line access contrary to § 2883(b)]." UCAN Complaint at ¶ 18. The POD concludes, based on the facts, that AT&T had adopted a 180-day disconnect policy that "is unreasonable, arbitrary, and capricious and does not support an 'existing technology or facilities' exemption under § 2883(a)." POD at Conclusion of Law 3. "Willful misconduct," in the sense of deliberate and intentional, is encompassed by this conclusion. Based on the arbitrary policy, Conclusion of Law 3, and other determinations made in the POD, the nullification of the tariff's protective language only replicates what § 2106 independently requires: "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the Commission, shall be liable to the person or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom."

11.9. Qualifications of Expert Murray

AT&T's objections concerning the admission of Murray's expert testimony is full of sound and fury but ultimately signifies very little. While the Rules allow the Commission to review evidentiary rulings in determining the matter on its merits, the Commission, in accord with California trial practice generally, affords the Presiding Officer great deference in making evidentiary rulings at

hearing. The standard most often employed is whether the ALJ ruling was clearly erroneous.

The qualification of Murray as an expert witness was reached after special scrutiny was given to her qualifications. Her qualifications are considerable: Masters Degree and all courses toward a PhD in economics from Yale; service at the CPUC as a Commissioner's advisor and Director of the Division of Ratepayer Advocates; and testimony on telecommunications issues before the FCC, District of Columbia regulatory agencies, and the public utilities commissions (or similar entities) of 22 states (including the CPUC).

In supporting her qualifications, Murray indicated:

> [M]y testimony in this proceeding has almost nothing to do with outside plant design and construction. . . . . I have spent literally hundreds of hours learning about the engineering and operation of the primary components of the telecommunications network . . . ." Exhibit No 16 at 2. Concerning "spare capacity," Murray indicated, "In the course of reviewing numerous telephone cost studies (including those of AT&T and its predecessors in California), I have had occasion to review highly disaggregated data concerning the utilization of the various components of modern ILEC telephone networks. I have also reviewed the companies' network engineering guidelines describing their criteria and process for adding capacity to the network. I also authored a paper on capacity utilization factors that was submitted by the pre-merger AT&T to the FCC as part of a publicly filed *ex parte* communication in WC Docket No. 03-173. Finally, with respect to the effect of competition on space capacity . . . , I have reviewed detailed data concerning trends in AT&T's line counts in several dockets, including the uniform regulatory framework rulemaking (R.05-04-005). Exhibit No. 16 at 7.

The Presiding Officer accepted Murray's qualifications with a caveat: "While her testimony on the technical matter of a phone connection may be inconsistent with AT&T's expert, I will compare and weigh the relative

qualifications and competing testimony of the witnesses on this subject." ALJ's Ruling (Aug. 15, 2006).

What AT&T ignores is that the POD does not rely solely on Murray's testimony concerning the technical aspects of AT&T's network architecture. On several occasions where Murray is cited in the POD, AT&T's witness (McNeil) is cited as well, e.*g.*, footnotes 4 and 10 of the POD, providing a description of the essential elements of a telephone connection. In other instances, documents attached to Murray's testimony are relied upon by the POD, but they are actually AT&T's documents (see footnotes 27 & 36 of the POD, citing Pacific Bell documents).

In short, Murray's testimony about network architecture was not the main basis for the POD. AT&T's liability under § 2883 was dictated by its own admission: that it employs an arbitrary 180-day termination policy for voluntary and involuntary disconnections and that it essentially requires a customer billed account before 911 access is available to new residences. AT&T failed to carry its burden of establishing a facilities or numbering affirmative defense.

11.10. AT&T's FCC Utilization Data

AT&T suggests error when the POD considering "a single FCC document introduced by UCAN for the first time in its reply brief," which occurred "On December 6, 2006, [while] the ALJ issued a ruling granting UCAN's request for official notice, and denying our request for official notice." AT&T App. Brief at 3 and 5. What AT&T fails to acknowledge is that it stipulated to official notice being taken of the FCC document while AT&T's separate request was contested by UCAN with the Presiding Officer sustaining the objection. *See* ALJ Ruling

(Dec. 6, 2006). As previously discussed, we do not lightly disturb the evidentiary rulings of the Presiding Officer in our proceedings.

12. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and John E. Thorson is the assigned ALJ and Presiding Officer.

Findings of Fact

1. In 1995, the California Legislature adopted Public Utilities Code Section 2883 requiring "[a]ll local telephone corporations, excluding wireless and cellular telephone corporations, . . . to the extent permitted by existing technology or facilities, [to] provide every existing and newly installed residential telephone connection with access to '911' emergency service regardless of whether an account has been established."

2. In its complaint, UCAN alleges that AT&T has not fulfilled the requirements of this Section. Specifically, UCAN alleges that AT&T limits the availability of 911 service to existing residential service after an arbitrary 180-day period. UCAN also alleges that AT&T has not made 911 service available to new residential units, even when the technology and facilities are in place to do so and 911 availability would actually produce financial benefits for the company. For remedies, UCAN seeks a penalty of $62 million and reparations (what UCAN describes as "disgorgement") of at least $7.5 million.

3. AT&T denies liability under § 2883, saying that existing technologies and facilities do not exist for it to provide perpetual 911 service where a customer has voluntarily terminated existing residential service or the company has terminated service to a residential unit because of nonpayment or similar reasons. AT&T also argues, if § 2883 is properly interpreted, the carrier is not required to provide 911 service for new residential units unless a physical

connection exists over which telephone calls are actually capable of being placed and received.

4. The normal physical components of voice phone service between the local telephone company (local exchange carrier) and a residential unit are (a) a local loop, owned by the carrier, extending from a circuit switch in the carrier's central office to a residential unit, and (b) at the residential unit, a box or similar area (known as the minimum point of entry or demarcation point) where the local loop is connected with the residence's interior wiring. The local loop is owned by the carrier. Everything beyond the demarcation point is owned by the residential property owner.

5. When voice telephone service has been discontinued voluntarily by the customer or involuntarily by the carrier, the necessary technology and facilities exist and are in place to provide 911 access. The limits on the occupant's ability to make other calls are normally imposed in the central office and not as a result of some action at the demarcation point.

6. UCAN alleges and AT&T admits that it employs a 180-day policy to terminate 911 access to previously or currently inhabited residences where billed service has been voluntarily or involuntarily ended.

7. The facts and arguments relied upon by AT&T do not support the 180-day policy. AT&T's reference to Commission-approved area code splits is equivocal, suggesting a growing demand for phone numbers and the ability of the regulatory process to respond to that need. AT&T's reference to the June 2006 Central Office Code Assignment Activity Report, prepared by the NANPA includes no foundation for understanding the significance of the "exhausted" or "in jeopardy" characterizations of 20 of California's 27 Numbering Plan Areas.

AT&T does not explain why a 180-day termination policy would be necessary for area codes not listed as "exhausted" or "in jeopardy."

8. In many areas of new construction, AT&T often installs the necessary outside plant to connect new residential units to the carrier's central office. This advance installation is often cheaper since it is done before streets are paved and other obstacles installed. However, AT&T does not provide 911 access to new residential units because, in the carrier's view, until the customer places and the company provisions an order for telephone service, there is no "residential telephone connection" over which to provide 911 access.

9. If a local loop has been installed between the residential unit and AT&T's central office, and the local loop is connected to the residential unit's demarcation point, the additional steps necessary to complete a telephone connection capable of voice transmission are relatively few and are automated. One manual activity, placing a jumper wire in the central office, generally takes a few minutes and is estimated to cost $18.99.

10. Once a CT facility is available and the residential unit is wired to the primary minimum point of entry (or secondary minimum point of entry, in the case of multiple dwelling units), a telephone connection exists.

11. AT&T's own tariff (Schedule Cal PUC No. A.2.2.1.2.I) promotes the availability of 911 access (Quick Dial Tone) (footnotes omitted): "Quick Dial Tone provides residential locations with basic access capability to the Utility's local loop demarcation point prior to a formal service request from a Customer. Access to outgoing calls is restricted except for calls to 9-1-1 emergency service." The tariff's limiting language, "Quick Dial Tone is provided at no charge where facilities and operating conditions permit," is inaccurate in that it misstates the statutory exception (existing technology or facilities).

12. Other than the incorrect and vague tariff language described in the previously finding, AT&T's only other specific description of its warm-line policy is contained in the final Disconnection Notice sent to a subscriber when residential service is being discontinued for nonpayment (appearing in its tariff as Schedule Cal PUC No. A2.2.3.1.H SAMPLE FORM 101 and set forth as Exhibit No. 4, Att. MS-10). The Disconnection Notice is also incorrect for the same reasons as set forth in Finding of Fact 10.

13. AT&T sends the Disconnection Notice to a subscriber when residential service is being disconnected for nonpayment. The notice is not sent to subscribers who voluntarily terminate service. AT&T also does not send the Disconnection Notice to new occupants of residential units, since these occupants are not subscribers until they have ordered billed residential service.

14. UCAN argues than an AT&T advertisement was misleading because it failed to completely describe, for the benefit of the consumer, the limitations in 911 access discussed in this decision. The advertisement is more reasonably interpreted as promoting the benefits of a phone line, with line electricity provided by the carrier's back-up power facilities, as compared to cable phone service where continuing service depends on batteries.

15. UCAN has failed to provide specific, convincing evidence as to the number of new residential units that may have been deprived of 911 access due to AT&T's policies and practices in failing to implement § 2883.

16. UCAN has failed to provide evidence of a single incident where an occupant of a residential unit was deprived of 911 access in an emergency situation due to AT&T's policies and practices in implementing § 2883.

17. UCAN and AT&T stipulated to the submission of the merits of the complaint and defenses solely on the basis of the prepared testimony and a stipulated set of exhibits, to be following by briefing by the parties.

18. On July 12, 2007, the Commission approved D.07-07-020 finding that AT&T had engaged in impermissible *ex parte* communications with Commission decisionmakers in this proceeding and imposed a penalty of $40,000 against AT&T. This conduct indicates AT&T's lack of good faith in addressing the violation.

19. AT&T argues that it would be "legal error" for the Commission to find it liable for a § 2883 violation at the same time that the Commission consents to UCAN's dismissal of a nearly identical complaint against Cox in C.05-11-012. However, the Commission has a complete evidentiary record before it on AT&T's practices. No such complete evidentiary record has been compiled for Cox's practices.

20. The record does not reflect what portion of AT&T's revenues from May 13, 1997, through August 15, 2006, is attributable to its official emergency access policy, and we have no means to estimate the sum. AT&T's consolidated shareholder equity, as of December 31, 2006, was $115.5 billion, its operating revenues were $63.1 billion, and its net income was $7.4 billion for the year.

21. The persons harmed by AT&T's failure to comply with § 2883 were occupants of residential units who, by definition, were not paying for telephone service at the time the violations occurred.

22. While UCAN argues that AT&T benefited to the extent of $191 million in labor savings from its flawed 911 access policies and practices, the figure is based on a prospective estimate rather than an audited finding of actual savings.

Conclusions of Law

1. UCAN has the burden of establishing the allegations set forth in its complaint by a preponderance of evidence.

2. AT&T has the burden of proof as to the carrier's affirmative defenses.

3. AT&T has admitted that it terminates 911 access to currently occupied residential units (where billed service has been voluntarily or involuntarily terminated) after 180 days. This 180-day policy is unreasonable, arbitrary, and capricious and does not support an "existing technology or facilities" exemption under § 2883(a). Therefore, the record establishes, by a preponderance of the evidence, that AT&T has violated § 2883(a) in terminating 911 access to currently or previously occupied residential units where billed service has been voluntarily or involuntarily terminated.

4. In applying § 2883(a) to new residential units where billed service has not been ordered, once a CT facility is available, the residential unit is wired to the primary minimum point of entry (or secondary minimum point of entry, in the case of multiple dwelling units), and the residential unit has been physically located for 911 response a telephone connection exists and AT&T is responsible for taking all remaining steps necessary to provide 911 access, if requested by the residential owner or occupant. These steps include completing the connections, switching, and other actions at the central office to enable voice transmission from the residential unit to 911 emergency services.

5. The record establishes, by a preponderance of the evidence, that AT&T has violated § 2883(a) in failing to provide access to 911 emergency services in new residential units, but UCAN has failed to provide convincing evidence of the extent of this violation.

6. AT&T has failed to establish an "existing technology or facilities" defense under § 2883(a).

7. The record establishes, by a preponderance of the evidence, that AT&T has violated § 2883(c) by failing to affirmatively provide accurate 911 emergency access information to subscribers whose service has been discontinued, whether voluntarily or involuntarily.

8. AT&T's violation of § 2883 was willful misconduct under the terms of its tariff, schedule CAL. P.U.C. No. A2-T, 2.14.1.B. Accordingly, AT&T's liability to a customer or other person for damages resulting from its violation of § 2883 is not limited by its tariff.

9. Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of § 2883 (including its subsections) for the period May 13, 1997 to August 15, 2006, the date when the evidentiary record closed on these substantive issues (3,382 days), AT&T should pay a penalty of $500 per day, or $1,691,000.

10. AT&T has the financial ability to pay these penalties.

11. Because the persons harmed by AT&T's failure to comply with § 2883 were occupants of residential units who, by definition, were not paying for telephone service at the time the violations occurred, reparations are not required.

12. UCAN has provided only speculative, unconvincing evidence in support of its argument that AT&T should be ordered to "disgorge" any financial benefits from its illegal § 2883 policies and practices. Having failed in its proof, UCAN is not entitled to an order requiring the return of any such financial benefits.

13. AT&T should be ordered to modify its corporate policies, practices, and tariffs in California regarding the availability of emergency telephone access in residential units to conform to § 2883 and this decision.

14. In order to protect those persons protected under the provisions of Section 2883, this decision should be effective immediately.

15. This decision is in furtherance of the Commission's broad discretion with respect to the exercise of its enforcement authority and does not constitute impermissible selective enforcement.

O R D E R

IT IS ORDERED that:

1. For the violations of law found herein, Pacific Bell Telephone Company, formerly known as SBC California, and now known as AT&T California (AT&T) shall pay a penalty of $1,691,000, calculated at $500 per day for the period of May 13, 1997 through August 15, 2006. AT&T shall pay the penalty to the State of California General Fund within 45 days after this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive Director of the California Public Utilities Commission (Commission) within five days of payment.

2. In any action brought by a customer or other person, arising before AT&T has revised its tariff in conformance with this decision, AT&T shall not defend against such claim or suit by asserting any limitation of liability based on its tariff, Schedule CAL. P.U.C. No. A2-T, 2.14.1. B, "Limitation of Liability."

3. No later than 45 days after this decision is mailed, AT&T shall cease and desist in terminating 911 access to occupied or previously occupied residential units in California.

4. Within 45 days after this decision is mailed, AT&T shall revise its corporate policies, practices, and submit or revise any necessary tariffs regarding the availability of emergency telephone access in residential units in California to conform to Public Utilities Code Section 2883 and this decision.
5. AT&T's request for oral argument is denied.
6. AT&T's appeal is denied.
7. The Presiding Officer's Decision is adopted as the Commission's decision.
8. Case 05-11-011 is closed.

This order is effective today.

Dated August 21, 2008, at San Francisco, California.

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

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APPENDIX A

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