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Decision 08-09-044 September 18, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company, dba AT&T California (U1001C), Complainant vs. CBeyond Communications, LLC (U6446C), Covad Communications Company (U5752C), and Arrival Communications, Inc. (U5248C), Defendants.	Case No. 06-03-023 (Filed March 22, 2006)

ORDER MODIFYING DECISION (D.) 08-04-055, AND DENYING REHEARING OF DECISION, AS MODIFIED, AND DENYING REQUEST FOR STAY

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 08-04-055 ("Decision") filed by CBeyond Communications, LLC ("CBeyond"), Covad Communications Company ("Covad"), XO Communications Services, Inc. ("XO"), Mpower Communications Company ("Mpower"), and U.S. TelePacific Corp. (collectively, "the CLECs").

The Decision resolves a complaint filed by Pacific Bell Telephone Company, dba AT&T California ("AT&T") against CBeyond, Covad, and Arrival Communications, Inc. ("Arrival").[1] The complaint sought a Commission determination that AT&T had

[1] AT&T is an incumbent local exchange carrier ("ILEC") providing local and intra-local access and transport area ("intraLATA") toll services in California. CBeyond, Covad, and Arrival are competitive local exchange carriers ("CLECs") certified to provide local service in California.

properly designated certain wire centers[2] as non-impaired (competitive) for purposes of its obligation to offer high capacity loops and dedicated transport to CLECs at Commission-approved unbundled network element ("UNE") rates.[3]

Impairment[4] issues are governed generally by the 1996 Telecommunications Act ("1996 Act") and the Federal Communications Commission ("FCC") *Triennial Review Remand Order* ("*TRRO*").[5] The *TRRO* adopted two proxies for determining whether there is a competitive marketplace at a particular wire center: the number of fiber based collocators ("FBCs"); and the number of business lines.[6] Where wire centers meet or exceed the established thresholds, they may be designated as non-impaired by an ILEC.[7] At that point, a CLEC is no longer entitled to the lower UNE rate and must either: (a) find other third party carriers willing to provide wholesale high capacity loops or transport at lower rates; (b) invest in their own additional facilities; or (c) convert existing agreements with ILECs to those subject to higher Special Access rates.

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[2] A wire center is the location of an ILEC local switching facility containing one or more central offices. The wire center boundaries define the area in which all customers served by a given wire center are located.

[3] UNE rates are based on Total Long Run Incremental Costs.

[4] The term impaired is used to mean that the level of activity at a wire center is presumptively insufficient to support competition and market entrance by interconnecting CLECs. (See TRRO ¶ 10 which states: "…a requesting carrier is impaired 'when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic'". In that circumstance, CLECs can obtain high capacity (DS1 and DS3) loops and dedicated transport from ILECs at lower UNE rates. However, if an ILEC demonstrates that a wire center is competitive and thus, non-impaired, it is presumed there are sufficient alternatives for CLECs to obtain the needed services without ILEC access and rate assistance.

[5] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), as affirmed by *Covad Communications Company v. FCC* (D.C. Cir. 2006) 450 F.3d 528 (codified as 47 C.F.R. § 51.319(a)(4) & (a)(5).) The *TRRO* vacated Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (2003) 18 F.C.C.Rcd 16978 ("*Triennial Review Order*" or "*TRO*").

[6] *TRRO* ¶¶ 93, 94, 104.

[7] *TRRO* ¶¶ 66, 114-124; 47 C.F.R. §§ 51.5 & 51.319(a)(4) & (a)(5).

The *TRRO* took effect on March 11, 2005.[8] Under its procedures, the ILECs act first to designate wire centers they believe meet the non-impairment thresholds. The CLECs then review and self-certify whether the designations are accurate.[9] Based on the *TRRO* AT&T made designations on March 11, 2005. CBeyond, Covad, and Arrival contested those designations, and consistent with dispute resolution procedures under the *TRRO*, AT&T filed the instant complaint to bring the matter before the Commission for resolution.[10]

Our Decision resolved specific disputes regarding: the vintage of data to be used for purposes of the March 11, 2005 non-impairment designations; the proper counting methodology for FBC's and business lines; and four other factual disputes. We affirmed only those designations that had not been challenged by the CLECs,[11] and we directed AT&T to revise the remaining designations to correct any inaccuracies and reflect our determinations regarding data vintage and counting methodology.[12]

On May 29, 2008 a timely application for rehearing was filed by the CLECs.[13] They challenge the Decision on the grounds that: (1) it is procedurally flawed; (2) it contains substantive errors; and (3) it denies them adequate due process. A response was filed by AT&T.

On June 13, 2008 CBeyond and Covad filed a motion to stay D.08-04-055, arguing: (1) they will suffer irreparable harm if a stay is denied; and (2) they are likely to

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[8] *TRRO* ¶¶ 235, 239.

[9] *TRRO* ¶ 234.

[10] *TRRO* ¶ 234; see also *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996* [D.06-01-043] (2006) 2006 Cal.PUC LEXIS 33, __ Cal.P.U.C.3d __, Attachment to Amendment ("Att. to Amend.") §§ 4.1, 4.1.1.4, 4.1.1.6, 4.1.3 (slip op.).

[11] D.08-04-055, at pp. 3, 31-32 [Ordering Paragraph Number 1].

[12] D.08-04-055, at pp. 3, 30 [Conclusion of Law Number 13] & p. 32 [Ordering Paragraph Number 2].

[13] XO, Mpower, and U.S. TelePacific Corp. were granted leave to intervene in the proceeding, and Arrival was dismissed by stipulation of the parties after AT&T"s amended complaint was filed. (D.08-04-055, at p. 9.)

prevail on the merits of the application for rehearing. A response was filed by AT&T. A reply to AT&T's response was filed by CBeyond and Covad.[14]

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that while the Decision is lawful, we see the need to modify the Decision to clarify our explanation of certain changes that were made between the Presiding Officer's Decision ("POD") and our final Decision (Modified Presiding Officer's Decision or "MODPOD"). Specifically, we will clarify our statements relating to: data vintage; and the elimination of POD Ordering Paragraph Number 3(c). Good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.08-04-055, as modified herein, because no legal error has been shown. We also deny the related motion for stay of D.08-04-055.

II. DISCUSSION

A. CLECS Application for Rehearing

1. Procedural Issues

The CLECs contend the Decision errs because it fails to explain changes between the POD and the final Decision as required by Public Utilities Code section 1701.2(a).[15] The changes in question concern: (a) the vintage of data to be reflected in the March 11, 2005 designations; (b) the elimination of Ordering Paragraph ("OP") 3(c); and (c) miscellaneous other changes. (CLECs Rhg. App., at pp. 10-19.)

Section 1701.2 requires that in any adjudicatory proceeding:

[14] Commission procedures normally do not allow an applicant for rehearing to file a reply. However, permission was granted in this instance. CBeyond and Covad, and AT&T also filed certain confidential information under seal along with motions for their acceptance. Some of the confidential information was already in the record of the proceeding. None of it was dispositive to resolving the legal issues attendant to stay. Thus, it is not necessary to separately act on those motions.

[15] The CLECs also cite to Commission Rule of Practice and Procedure 15.5(b) stating in pertinent part: "A decision different from that of the presiding officer shall include or be accompanied by a written explanation of each of the changes made to the presiding officer's decision." (Cal. Code of Regs., tit. 20, § 15.5, subd. (b).) All subsequent section references are to the Public Utilities Code unless otherwise specified.

> A decision different from that of the assigned commissioner or administrative law judge [presiding officer] shall be accompanied by a written explanation of each of the changes made to the decision.

(Pub. Util. Code, § 1701.2, subd. (a).)

a) Data Vintage

The initial POD issued in this proceeding required AT&T to revise its March 11, 2005 non-impairment designations to reflect competitive conditions using the most recent and current data available at this time.[16] Our Decision requires AT&T to include data reflecting competitive conditions as of March 11, 2005 (even if the relevant data was not included or available at the time the initial designation was made).[17] The CLECs contend the Decision fails to explain why this change was warranted. In their view current data would provide a more accurate reflection of competitive conditions at AT&T's wire centers.[18] (Joint CLECs Rhg. App., at p. 10.)

The CLECs disregard that the issue is not what data would provide the most accurate reflection of competitive conditions today. As our Decision explains, at issue is what data is relevant under the *TRRO* for the designations made on March 11, 2005.[19] That is apparent by the fact that March 11, 2005 is the date the requirements under the *TRRO* took effect.[20] And that is the date AT&T made the designations at issue in this proceeding.[21] Accordingly, we found that our determination must conform to the legal requirements of the *TRRO*.[22]

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[16] POD, at pp. 12-16, 28-29 [Ordering Paragraph Number 8].

[17] D.08-04-055, at pp. 12-15, 29 [Conclusion of Law Number 5] & pp. 32-33 [Ordering Paragraph Number 2(a)(6)].

[18] The CLECs argued that the FBC count designations should be revised to reflect current data (as of 2008), and the business line counts should be revised to include ARMIS 2005 data. (See CLECs Opening Brief, dated November 13, 2006, at pp. 9-10.)

[19] See e.g., D.08-04-055, at pp. 7-9, 10 (Issue 1.c.iii.), 12-15.

[20] *TRRO* ¶¶ 235, 239.

[21] See Exh. 3, Att. CAC-1, CAC-3.

[22] See e.g., D.08-04-055, at pp. 12-13, 29 [Conclusion of Law Number 29].

We also explained that the FCC analyzed ILEC 2003 Automated Reporting Management Information System (ARMIS 43-08) data in determining the competitive thresholds which were adopted under the TRRO.[23] Consequently, we reasoned that AT&T was entitled, as a matter of law, to use the 2003 ARMIS data (at least as a start point) to provide a snapshot of the prevailing competitive conditions for its March designations.[24]

However, we went on to explain that the *TRRO* did not expressly specify that only 2003 ARMIS data could be used for the March 2005 designations.[25] For that reason, we concluded the Commission has some latitude to require AT&T to also include more recent data.[26] In determining exactly what more recent data should be required, we were guided by the *TRRO's* finding that once a wire center designation is properly made, it is irrevocable.[27] The CLECs fail to acknowledge or address this critical provision under the *TRRO.* However, the result is consistent with the *TRRO* and our prior determination that once a non-impaired designation is made (here March 11, 2005), data reflecting any subsequent market changes is irrelevant.[28] Accordingly, the fundamental basis for the

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[23] D.08-04-055, at pp. 14-15 & fn. 14. See also *TRRO* ¶ 105 [indicating the FCC relied on 2003 ARMIS 43-08 data in determining the competitive thresholds].

[24] D.08-04-055, at pp. 13, 29 [Conclusion of Law Number 5].

[25] D.08-04-055, at p. 13. See generally *TRRO.* While we are not bound by the determinations of other states, we note similar conclusions reached in *Michigan Bell Telephone Company v. Lark et al.*(E.D. Mich. 2007) __ F.Supp. __, U.S. Dist. LEXIS 33682, at *12, *13; and *Re Covad Communications Company, et al., Request for Commission Approval of Non-Impairment Wire Center List* (2007) Oregon Public Utilities Commission Order No. 07-109, at p. 6 (slip op.). The ALJ took official notice of all final rules, decisions and orders of federal and state regulatory agencies, and of the courts of the United States for purposes of this proceeding. (See ALJ Ruling On Intervention, Reopening Of The Record, And Submission, dated February 1, 2007, at p. 2, para. 5.)

[26] D.08-04-055, at pp. 13-15, 29 [Conclusion of Law Number 5]. See also similar conclusions in *Michigan Bell Telephone Company v. Lark et al.*(E.D. Mich. 2007) __ F.Supp. __, U.S. Dist. LEXIS 33682, at *12, *13; *Re Covad Communications Company, et al., Request for Commission Approval of Non-Impairment Wire Center List* (2007) Oregon Public Utilities Commission Order No. 07-109, at p. 7 (slip op.).

[27] D.08-04-055, at p. 29 [Conclusion of Law Number 6]. See *TRRO* ¶ 167 fn. 466. [the designation cannot be reversed based on subsequent market conditions]. See also 47 C.F.R. § 51.319(a)(4), (a)(5), & (e)(3).

[28] *TRRO* ¶ 167 fn. 466 [noting in part: "To facilitate application of a federal standard, we rely on objective criteria that are administrable and verifiable, but could be disruptive as applied to a dynamic market if

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modification is explained. The CLECs may disagree with the outcome, but their disagreement does not establish that we erred. Nevertheless, because this point is central to the determination, we will modify D.08-04-055 in the manner described in OP 1.a. through 1.b. of today's Order.

For the above reasons, we lawfully determined that AT&T can only be required to revise its March 11, 2005 non-impairment designations to include 2004 ARMIS data as well as 2005 ARMIS data applicable up to March 11, 2005.[29]

b) Ordering Paragraph Number 3 (c)

The CLECs contend the Decision fails to explain why POD OP Number 3 (c) was eliminated.[30] OP 3 set forth a process to resolve any dispute regarding AT&T's revised wire center list, and the CLECs assert its deletion will harm their right to review and challenge any revised designations. (Joint Rhg. App., at pp. 11, 19.)

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modest changes in competitive conditions resulted in the reimposition of unbundling obligations"]. See also *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order* ("*Decision Adopting Amendment To Existing Interconnection Agreement*") [D.06-02-035] (2006) __ Cal.P.U.C.3d __, p. 47 & fn. 21 (slip op.), 2006 Cal.PUC LEXIS 47.

[29] See also similar conclusions reached in *Michigan Bell Telephone Company v. Lark et al.*(E.D. Mich. 2007) __ F.Supp. __, U.S. Dist. LEXIS 33682, at *12, *13; *Re Covad Communications Company, et al., Request for Commission Approval of Non-Impairment Wire Center List* (2007) Oregon Public Utilities Commission Order No. 07-109, at p. 7 (slip op.).

[30] OP 3 of the POD states:

> (c) In the event that the parties disagree, after meeting and conferring, with one another, about any issue of fact that arises under the foregoing redesignation procedure, they shall jointly submit the dispute within 10 days, with any supporting evidence, to the assigned administrative law judge (ALJ) for determination in accordance with the principles announced in this decision. The proceeding shall be reopened for the limited purpose of making this determination and thereafter shall be closed. The determination of the ALJ on any such matter shall be deemed to be the decision of the Commission, shall be effective as of the effective date of our order, and shall be final.

(POD, at p. 23 [Ordering Paragraph Number 3, subd. (c)].)

The CLECs are wrong that absent POD OP 3 (c) they have no right to challenge disputed wire center designations. Dispute resolution procedures are already in place under the *TRRO* as well as Commission implementing decisions and rules.[31] Further, nothing in the Decision precludes the CLECs right to review AT&T's underlying data, as provided for in OP 2(a)(8) of our Decision, and as otherwise authorized under D.06-01-043, *supra,* at Att. to Amend. §§ 4.1.1.8 & 4.1.4 (slip op.).

Although we believe the existence of these provisions makes it obvious that OP 3(c) was unnecessary, we agree that our Decision does not explicitly state as much. Accordingly, we will modify the Decision in the manner set forth in OP 1.c. through 1.e. of today's Order.

c) Miscellaneous Other Changes

The CLECs contend there are 21 other miscellaneous changes between the POD and the Decision which are not adequately explained.[32] (CLECs Rhg. App., at pp. 12-18.)

We note that eighteen of the 21 changes in question relate to the issue of what vintage of data AT&T should have used for its designations. All of those changes

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[31] *TRRO* ¶ 234 & fn. 658, 660; D.06-01-043, *supra,* at Att. to Amend. §§ 4.1. 4.1.1.4, 4.1.1.6, 4.1.3 (slip op.); and Article 14 of the Commission's Rules of Practice and Procedure regarding complaints.

[32] The CLECs also suggest the process resulting in changes between the POD and D.08-04-055 was procedurally flawed or unfair, because: (a) they did not have the opportunity to comment on modifications in the Decision; (b) we voted on the item by consent (without discussion at the Commission's public business meeting); and (c) our April 24, 2008 business meeting agenda did not permit public comment on D.08-04-055. (CLECs Rhg. App., at pp. 18-19.) Contrary to their claim, the procedure we followed was lawful and consistent with Commission rules and practice regarding Presiding Officer's Decisions.

Here, after the POD was issued AT&T filed an appeal pursuant to Rule 14.4. (Cal.Code Regs., tit. 20, § 14.4) (See AT&T Appeal of Presiding Officer Decision, dated September 6, 2007.) The CLECs had and exercised their opportunity to comment on the relevant issues. (CLEC Response, dated September 21, 2007.) Our Decision considered both pleadings. However, we are not required to publish for additional public comment, any modifications to a POD resulting from an appeal. And our rules permit consideration of an appeal in closed session, followed by a vote on the matter in public session. There is also no legal requirement that we discuss a matter upon which we vote. Finally, while we make every effort to afford members of the general public an opportunity to speak at Commission public business meetings, the CLECs are not considered members of the public for purposes of Government Code § 11124.

are subsumed within the Decision's aforementioned explanation of the legal requirements under the *TRRO*. Moreover, many of the referenced changes are merely minor, non-substantive, and largely just semantic adjustments that have no meaningful effect on the outcome of any material issue.[33] There is no legal requirement that we explain such minor changes.

Three of the 21 changes relate to separate issues which warrant some discussion. First, the CLECs contend the Decision deleted, without explanation, the POD's conclusion that inaccuracies in AT&T's non-impairment designations were material. (CLECs Rhg. App., at p 18.) Specifically, the POD states:

> The number of inaccuracies in AT&T's list of non-impaired wire centers is material, and may have affected the number of wire centers designated as delisted. (POD, at p. 30 [Conclusion of Law Number 15].)

By comparison, the Decision states:

> The number of inaccuracies in AT&T's list of non-impaired wire centers may have affected the number of wire centers designated as delisted, and should be corrected to conform to our order. (D.08-04-055, at p. 30 [Conclusion of Law Number 13].)

We see no practical or meaningful change to the fundamental conclusion that is articulated. Both the POD and the Decision conclude there may have been inaccuracies in AT&T's data. While our Decision eliminates the word "material," that change had no effect on any issue that was decided or the number of designations which we ultimately approved or ordered AT&T to revise. The Decision merely went on clarify that AT&T should correct any errors. We consider this to be a reasonable and self-explanatory change that requires no additional explanation.

Next, the CLECs contend the Decision is inherently inconsistent. They point to our discussion regarding the counting methodology for FBC's which states: "…the

[33] For example, the CLECs complain the Decision did not explain changes such as: replacing the word "observation" with "presumption"; replacing the word "do" with "may"; whether or not the stakes of a non-impairment designation are high; and other miscellaneous changes related to rejecting, as a matter of

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CLEC must effectively be operating as an independent telephone company within the ILEC's network on the date of the impairment analysis…."[34] The CLECs interpret the phrase "date of the impairment analysis" to mean the date of this proceeding. They view this as contradicting the March 11, 2005 date otherwise used in the Decision. (CLECs Rhg. App., at p. 16.)

We do not see, nor did we intend any inconsistency. The context of the Decision makes it reasonably clear that the relevant date for purposes of the impairment analysis in question (and data to be used) is March 11, 2005.

Finally, the CLECs assert the Decision failed to explain the resolution of four factual disputes which the POD concluded could not be resolved based on the existing record. They also argue we failed to cite to any relevant evidence to support our conclusions. (CLECs Rhg. App., at p. 16.)

Contrary to the CLECs assertion, the POD does not state that the issues *could not* be resolved. The POD merely stated that resolution is not simple, because much of the record is disputed.[35] However, as AT&T pointed out in its appeal of the POD, a record had in fact been developed on the issues.[36] It is a valid and reasonable exercise of our discretion to consider such comment and reevaluate the matter. And while we are not legally compelled to resolve all issues that parties may raise, it is not our preference to decline such action just because doing so is not simple. Based on our reevaluation of the record we thus resolved the issues at least provisionally, subject to AT&T's revision of its non-impairment wire center designations.[37] More importantly, we did explain why it was possible to do so. We were clear that one issue is now moot,

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law, the CLECs preference that AT&T revise its designation to reflect current data.

[34] D.08-04-055, at p. 18.

[35] POD, at p. 23.

[36] AT&T Appeal of Presiding Officer's Opinion, dated September 6, 2007, and Joint CLECs Response, dated September 21, 2007.

[37] D.08-04-055, at p. 22.

one is a ministerial counting error that can be corrected, and the others can be resolved based on the evidence.[38] Although these explanations are brief, they do reasonably apprise parties of our reasoning. The CLECs do not provide any authority that also requires that we enumerate all the evidence we relied upon leading to a Decision.

2. Substantive Issues

The CLECs contend the Decision errs because: (a) it was not based on the record as required by section 311(d) and 1701.2; and (b) AT&T failed to meet its burden of proof. (Joint CLECs Rhg. App., at pp. 19-28.) As discussed below, these contentions are without merit.

a) Record Evidence

Section 311(d) and 1701.2 provide in pertinent part that a Commission decision must be based on the record.[39] The CLECs assert the Decision violates this standard by setting a March 11, 2005 impairment date that is not supported by the law or the record. (CLECs Rhg. App., at pp. 21-24.) .

Contrary to the CLECs suggestion, March 11, 2005 is not an arbitrary or fabricated date. It is supported by the law, here the *TRRO,* as we previously explained. It is also supported by the record, which shows that March 11, 2005 is the date AT&T made the designations at issue.[40] Further, the record contains 71 exhibits all having to do with the March 11, 2005 designations. The CLECs ignore all this, to argue March 11, 2005 should be rejected for the reason that neither party advocated for, or relied upon, that date in this proceeding.[41] That much is true. AT&T preferred the use of its 2003 ARMIS

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[38] D.08-04-055, at p. 23.

[39] See Pub. Util. Code, § 311, subd. (d) & Pub. Util. Code, § 1701.2, subd. (a).

[40] See Exh. 3, Att. CAC-1 & CAC-3.

[41] The CLECs also argue the non-impairment designations must reflect "actual deployment." (CLECs Rhg. App., at p. 23.) That is not correct. The FCC stated that it did draw inferences regarding potential deployment (and indicia of competition), which were intended to reflect characteristics of actual deployment (See e.g., *TRRO* ¶ 28). However, the FCC explicitly rejected requiring actual deployment as the benchmark. (*TRRO* ¶ 108; see also ¶ 88 ["The tests we adopt today are designed to capture both actual and potential competition…"] & ¶ 90 ["…even if a particular wire center exhibits few or no competitive fiber facilities, the fact that other wire centers displaying similar economic characteristics

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data, and the CLECs preferred current data. However, the carriers' preferences are beside the point.

The *TRRO* in combination with the fact that AT&T actually made its designations on March 11, 2005, act to establish the cutoff date for data which can be used for the disputed designations. We understand the CLECs position that it would be more efficient for purposes of future designations to use more current data.[42] However, requiring such a result would run directly counter to the *TRRO's* instruction that once a non-impaired designation is made, that designation is permanent.[43] For these reasons, we properly relied on the relevant law and record to reach our conclusions.[44]

The CLECs also contend the Decision violates California Code of Civil Procedure section 2023(b)(3), because it allows AT&T to rely on new data not in the record to support the revised list of unimpaired wire centers. (CLECs Rhg. App., at pp. 24-26.)

Our proceedings are not subject to Civil Code section 2023, and thus, statutory provision is inapplicable. Further, even if it was applicable, we note that it pertains only to abuse of discovery in civil proceedings, and was repealed in 2005.[45] We are also perplexed by the somewhat inconsistent rationale to the CLECs position. In this

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tend to be the site of more significant competitive facilities deployment will serve as the basis for a reasonable inference that the wire center in question could potentially support such deployment"].

[42] The CLECs request that we take official notice of another FCC order that was referenced in its testimony in this proceeding. (CLECs Rhg. App., at p. 22 fn. 68.) Official notice has already been taken of all decisions of state and federal agencies and the Courts. (See ALJ Ruling On Intervention, Reopening of the Record, And Submission, dated February 1, 2007.) We do not find the case persuasive regarding the general impairment date compelled by operation of the *TRRO*. The cited case was specific to the transfer of control between SBC Communications, Inc. and AT&T.

[43] *TRRO* ¶ 167 fn. 466. [the designation cannot be reversed based on subsequent market conditions]. See also 47 C.F.R. § 51.319(a)(4), (a)(5), & (e)(3).

[44] The CLECs also fear the Decision will be interpreted to establish March 11, 2005 as the cutoff date for data used in future AT&T unimpaired wire center designations. (CLECs Rhg. App., at pp. 20, 24 fn. 74.) Despite this fear, our Decision is clear that the holding is applicable only to AT&T's March 11, 2005 wire center designations.

[45] California Code of Civil Procedure section 2023(b)(3) was repealed by Stats. 2004, ch. 182 (AB 3081), § 22 (operative July 1, 2005).

proceeding, their primary argument was that AT&T's 2005 designations are not accurate and should be revised to include more current data than AT&T had originally used. We agreed, and ordered AT&T to revise its list.[46] It is not unlawful to require such corrections and revisions. To the extent the CLECs wish to review supporting data for any revised designations, their rights are governed by the *TRRO* and D.06-01-043, *supra*. These decisions only contemplate CLEC discovery and review after a particular designation (and thus revision) is made.[47]

Next, the CLECs challenge the Decision on the grounds that AT&T's witness testimony was inadequate. In their view it was conclusory, and flawed by the fact the witnesses did not actually supervise or perform the relevant wire center line counts.[48] (CLECs Rhg. App., at pp. 24-25.)

Despite these allegations, there is nothing to suggest the testimony does not support the Decision, or that the witnesses were unqualified to testify. As is common practice for parties appearing before the Commission, AT&T offered management level witnesses with general oversight responsibility and experience concerning the topics in question.[49] In addition, AT&T's witness testimony was available, in writing, prior to the evidentiary hearings in this proceeding.[50] If the CLECs wished to contest the veracity of the testimony, or the qualifications of the witnesses they had ample opportunity to do so during the proceeding. However, they did not and in fact, waived their right to cross-examine AT&T's witnesses.[51] It is too late now to raise these particular criticisms.

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[46] D.08-04-055, at p. 30 [Conclusion of Law Number 13] & p. 32 [Ordering Paragraph Number 2].)

[47] *TRRO* ¶ 234; D.06-01-043, *supra*, at Att. to Amend. §§ 4.1, 4.1.1.2, 4.1.1.4, 4.1.1.8, 4.1.4 (slip op.).

[48] The CLECs also argue AT&T did not meet its burden of proof. Burden of proof is addressed separately in this order.

[49] Exh. 1, at p. 2 (AT&T/Nevels/Direct) [Mr. Nevels is an Area Manager representing AT&T on regulatory and wholesale market issues pertaining to collocation]; Exh. 3, at p. 1 (AT&T/Chapman/Direct) [Ms. Chapman is an Associate Director overseeing broad issues including implementation and compliance with the Telecommunications Act of 1996].

[50] See e.g. Exhs. 1, 3 (AT&T direct testimony dated March 22, 2006) & Exh. 4 (AT&T rebuttal testimony dated July 8, 2006.) Evidentiary hearings took place in October 2006.

[51] See Reporters Transcript, Vol. 1, at p. 9.

The CLECs also assert that the record is flawed because AT&T failed to provide verifiable data in the form of photographs. They similarly suggest the findings are unsupported because AT&T failed to contact the entities collocated in its wire centers. (CLECs Rhg. App., at pp. 24-25.)

There is no dispute that ILECs have an obligation to provide relevant data to support their non-impairment designations. Yet we find nothing in the *TRRO* or relevant Commission decisions which explicitly requires the production of photographs. Nor is there any requirement that an ILEC contact collocators as a means of verification. The absence of such information does not establish that the record here is inadequate. It is perhaps of more concern that the CLECs contend AT&T did not provide billing records.[52] The *TRRO* does indicate that ILECs should review their billing records and conduct physical inspections of their central offices as two readily available means to determine whether the competitive thresholds are met.[53] And in D.06-01-043 we required ILECs to provide: (a) ARMIS or other data used to calculate the number of business access lines; (b) the data used to calculate the number of leased UNE loop; (c) the identity of FBCs; and (d) data demonstrating that these collocators are FBCs.[54]

Here, AT&T testified that it did conduct physical inspections of its wire centers,[55] and that it notified the CLECs of the availability of all confidential information that was provided to the FCC.[56] The CLECs acknowledged that they received and reviewed AT&T's 2004 and 2005 supporting data.[57] That information was entered into the record and the CLECs do not establish how or why that particular evidence is not

[52] The CLECs state we have recognized that an ILEC's failure to provide supporting data creates "inordinate problems of proof." That is not what we said. Rather, we found that inordinate problems of proof are created when a CLEC waits too long after the fact [the designation of non-impaired wire centers] to self-certify. (See D.06-01-043, *supra,* at p. 58 (slip op.).

[53] *TRRO* ¶¶ 99, 100.

[54] D.06-01-043, *supra,* at Att. to Amend. § 4.1.1.8 (slip op.).

[55] Exh. 1, at pp. 14-15 (AT&T/Nevels/Direct); Exh. 3C, at pp. 12, 27 (AT&T/Chapman/Direct).

[56] Exh. 3C, at pp. 8-9 (AT&T/Chapman/Direct).

[57] Exh. 51, at pp. 72-73 (CLECs/Starkey /Direct).

adequate to support the Decision.[58] Thus, even if it is true AT&T did not give the CLECs billing records, it is not clear it would effect or invalidate our determination.

b) Burden of Proof

The CLECs contend that in adjudicatory proceedings, the complainant must meet its burden of proof by a preponderance of the evidence. As applied here, they argue this means that we must presume that all wire centers in California remain impaired "*unless and until*" AT&T proves otherwise. They claim AT&T failed to meet that burden.[59] (CLECs Rhg. App., at pp. 26-28.)

We have generally agreed that in an adjudicatory proceeding the complainant carries the burden of proof. However, for purposes of impairment/non-impairment disputes, relevant case law establishes that the burden of proof is on CLECs. For example, in *Covad Communications Company v. FCC* ("*Covad*") (2006) 450 F.3d 528, 548 CLECs similarly argued the ILEC must establish non-impairment. The Court rejected that position, finding:

> …the burden of persuasion rests on the shoulders of the party that urges the Commission to find impairment. [citation omitted.] And the rationale for our conclusion is simple: The plain text of § 251 (d)(2) permits unbundling only where the Commission receives evidence that UNEs are 'necessary' to prevent 'impair[ment]' of the CLECs competitive aspirations. Thus, the 1996 Act does not obligate the ILECs to prove non-impairment – it forces the CLECs to prove impairment.[60]

Given this accepted standard, we reject the CLECs contentions regarding burden of proof in this particular instance.

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[58] See Exh. 54 [AT&T December 2004 data provided to the FCC]; Exh. 65C [confidential business line data for 1004 and 2005].

[59] The CLECs claim the POD found that AT&T had failed to meet its burden of proof in this proceeding. However, nothing in the POD or our Decision addressed the issue of burden of proof.

[60] *Covad, supra*, 450 F.3d at 548, relying also on *United States Telecom Association v. FCC* ("*USTA I*") (D.C. Cir. 2002) 290 F.3d 415, 427, *cert. denied sub. nom. WorldCom, Inc. v. United States Telecom Association* (2003) 538 U.S. 940; and *United States Telecom Association v. FCC* ("*USTA II*") (D.C. Cir.) 359 F.3d 554, 576, *cert. denied sub. nom. National Association of Regulatory Commissioners v. United States Telecom Association* (2004) 543 U.S. 925.

3. Due Process

Due process requires that we provide adequate notice and opportunity to be heard before a valid order can be made.[61] The CLECs argue the Decision violates their due process rights because: (a) it sets an impairment date that is not based on the law or record; (b) it allows AT&T to revise its non-impaired wire center designations when the POD found there was insufficient evidence; (c) it allows AT&T to revise the designations to reflect new data not in the record; and (d) it rejects the holding of the POD, producing an inaccurate result; and (e) it precludes the CLECs right to review and challenge revisions or data by deleting POD OP 3.[62] (CLECs Rhg. App., at pp. 28-30.)

Each of the above allegations has been previously raised and addressed by our Order. Accordingly, we will not repeat the discussion here. In addition, however, the CLECs claim AT&T was ordered to "begin again to collect or create new data", and that they are denied due process because such information is not in the record.[63] Neither

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[61] See e.g., *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 632.

[62] The CLECs reference two cases for miscellaneous due process arguments. However, neither case offers guidance here. *Ohton v. Board of Trustees of The California State University* (2007) 148 Cal.App.4th 749, 768-769 merely states the general requirement that fair procedure provide adequate notice and opportunity to be heard. The CLECs make no argument they lacked notice of the issues in controversy or an opportunity to be heard. *English v. City of Long Beach* ("*English*") (1950) 35 Cal.2d 155, 159-160 establishes that it is a violation of due process to take evidence outside the record. The CLECs point to no evidence outside the record that was taken or relied upon to reach the relevant determinations regarding data vintage, counting methodology, or the resolution of other factual disputes.

[63] The CLECs rely on *United States and Interstate Commerce Commission v. Abilene & Southern Railway Company* ("*U.S. v. Abilene*") (1924) 265 U.S. 274, 287-289 and *Interstate Commerce Commission* ("*ICC*") (1913) 227 U.S. 88, 91-92 to argue an agency may not base its decisions on its own information or consider evidence not in the record. These cases are not analogous. In *U.S. v. Abilene* an agency relied upon and made findings based on evidence that was not introduced as evidence. The CLECs may disagree with our conclusions, however, they do not identify any findings in D.08-04-055 that were not based on evidence in the record. In *ICC*, parties were denied a statutory right to a hearing, and the findings were contrary to the "indisputable character of the evidence." There is no comparison here. We held hearings in this matter on October 4-5, 2006. (D.08-04-055, at p. 11.) And the findings in accordance with the character of evidence concerning data vintage, counting methodology, and other factual disputes.

The CLECs also rely on *Prade v. Department of Water and Power* ("*Prade*") (1945) 27 Cal.2d 47, 52 and *Universal Consolidated Oil Company v. Byram* ("*Univ. Consolidated*") (1944) 25 Cal.2d 353, 355, 362. These cases are not analogous. In *Prade*, a determination was rejected because there was no evidence of any kind introduced on the issue to be determined. Here, there are approximately 71 exhibits containing evidence on the issues in controversy. In *Univ. Consolidated*, a determination was invalid because a board refused to consider evidence and decide questions of fact. While our Decision rejected certain of

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claim is true. AT&T was not directed to collect or create new data. AT&T is only required to incorporate data that reflects the competitive conditions at its wire centers between the time of the 2003 ARMIS data and March 11, 2005. This information already exists, and should be readily available in AT&T's 2004 and 2005 ARMIS Report data that it must provide to the FCC.

Further, AT&T was merely ordered to correct and revise its March 11, 2005 designations to reflect the conclusions reached in this proceeding. There is no legal authority to establish that the CLECs are denied due process because the prior designations were not perfect or error-free. Similarly, they are not denied due process by the Commission requiring errors or inaccuracies to be corrected. Our Decision ensures the CLECs will have adequate notice of any revisions by requiring AT&T to publish any revisions on its CLEC OnLine website.[64] And the applicable dispute resolution procedures ensure they will have the opportunity to be heard regarding continued disputes as to the revised non-impairment designations.[65]

B. Motion for Stay of D.08-04-055

CBeyond and Covad request a stay of D.08-04-055, asserting that: (1) absent a stay they will suffer irreparable harm; and (2) they are likely to prevail on the merits of their application for rehearing.[66] (Motion for Stay ("Motion"), at pp. 7-20.)

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the CLECs contentions, they identify no evidence that we refused to consider. Further, unlike the board in *Univ. Consolidated*, we did decide the issues before us.

[64] D.08-04-055, at p. 32 [Ordering Paragraph Number 2(a)].

[65] See *ante*, fn. 10.

[66] CBeyond and Covad contend they need only establish one of these two factors to qualify for a stay. (Motion, at p. 6 relying on *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities* ("*Consumer Protection OII*") [D.04-08-056] __ Cal.P.U.C.3d __. It is true that we could, in our discretion, grant a stay where only one factor is met. However, the *Consumer Protection OII* does not limit the test to two factors as they imply. Further, we found that only a rather compelling demonstration of irreparable harm would merit such consideration. Specifically, we stated:

> …a moving party need not demonstrate that both factors have been met. Rather, if there is a high degree of irreparable harm, something less than likelihood of success on the merits *may* justify a stay. Similarly, if there

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1. Serious or Irreparable Harm

In evaluating serious or irreparable harm, we generally follow the standard under *North Shuttle Service, Inc. v. Public Utilities Commission* ("*North Shuttle Service*") (1998) 67 Cal.App.4th 386. In that case, the Court noted: "…the Legislature has erected substantial barriers to granting temporary stays."[67] Accordingly, this Commission has stated:

> Under the standard applied by the California Court of Appeal, and cited by the Commission, monetary loss alone is not an adequate showing of irreparable harm. [citation omitted.] According to *North Shuttle,* the Court of Appeal will only consider monetary loss to be irreparable harm where the applicant has specifically demonstrated that the loss is severe enough to jeopardize an applicant's entire enterprise. [citation omitted.]

(*Consumer Protection OII* [D.04-08-056], *supra,* __ Cal.P.U.C.3d __, p. 4 (slip op.)

According to CBeyond and Covad, they will be harmed because: AT&T's revised non-impairment designations violate our Decision; CBeyond and Covad may have to reconfigure their networks; and they may be forced to pay erroneous true-ups to AT&T. (Motion, at pp. 7-17.)

Despite these claims, the CLECs fail to offer the requisite specific demonstration of monetary loss. Nor do they make any tangible argument or provide evidence to show that their business enterprises are threatened.[68] We also point out that a

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> is no harm to the moving party, a stay may not be appropriate even if the party may ultimately prevail.

(*Consumer Protection OII* [D.04-08-056], *supra,* at pp. 2-3 (slip op.) (emphasis added).)

As discussed herein, CBeyond and Covad offer no tangible evidence of irreparable harm.

[67] *North Shuttle Service, supra,* 67 Cal.App.4th at p. 392 [also stating that a Court will start with presumption that a Commission decision is correct and will be implemented, such that granting a stay is viewed as an atypical event (*Id.* at pp. 395-396.)].

[68] CBeyond and Covad contend there is no requirement to submit specific fact based verified petitions and/or affidavits to establish irreparable harm. (See Reply, at p. 3, fn. 6.) This contention is refuted by *North Shuttle Service.* (*Id, supra,* 67 Cal.App.4th at pp. 392, 395.)

stay is not the appropriate remedy for an allegation that AT&T has violated our Decision.[69] Resulting disputes as to the revised wire-center designations are governed by the procedures under the *TRRO*, our implementing decisions, and the Commission's Rules of Practice and Procedure regarding complaints.[70]

We are not persuaded by CBeyond's and Covad's argument that it will be costly and time consuming to reconfigure their networks, find other carriers that are willing to negotiate alternate facilities agreements at less than Special Access Rates, or convert affected circuits to AT&T's market-based Special Access Rates. (Motion, at pp. 14-15.)

Indeed, the *TRRO* reflects that the FCC contemplated, and apparently intended, that CLECs would have to engage in some or all of these activities as part of transitioning to a competitive telecommunications market.[71] These possible consequences have been known since 2005. Even if some of AT&T's non-impairment designations were disputed, there has been a reasonable period of time to plan in terms of both time and money. Further, CBeyond and Covad fail to provide any information to support their claim that some customers may go unserved.[72]

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[69] CBeyond and Covad claim that AT&T: (a) wrongly included two fiber based cross-connected collocation arrangements; (b) improperly included a new wire center (SIMICA11); (c) improperly used 2004 rather than March 11, 2005 data for its business line counts; and (d) failed to provide all the underlying data. (Motion, at pp. 7-13.) As discussed elsewhere in this order, these arguments are without merit.

[70] See *ante*, fn. 10. See also Commission Rules of Practice and Procedure, Article 4, Complaints (Cal. Code of Regs., tit. 20, art. 4.).

[71] See e.g., *TRRO* ¶¶ 1, 2, 3, 11, 134, 135 [the FCC intends transition to competition and with it market-based (Special Access) rates], ¶¶ 3, 4, 11 [the FCC intends to encourage increased CLEC investment in new facilities] & ¶ 134 [the FCC intends that CLECs find alternate facilities in areas where competitors have or could deploy]. See also *TRRO* ¶¶ 142, 196-198 [regarding transition plans and contemplated CLEC transition to alternate facilities or agreements, to self-provided facilities, or to ILEC Special Access Rate services].

[72] CBeyond and Covad claim they will be harmed by AT&T's possible withdrawal of access to its wire centers causing them harm. (Motion, at p. 14 & Reply, at pp. 5-6 & referring to an attached AT&T Accessible Letter (CLECC08-046).). However, review of AT&T's Accessible Letter makes no mention of possible withdrawal. It indicates only that UNE rate agreements must be transitioned [to Special Access Rate pricing]. Assuming non-impairment designations are correctly made, this result is consistent with the *TRRO's* cessation of protected pricing arrangements.

Finally, CBeyond and Covad argue that Special Access Rates will be substantially higher than UNE rates, and that AT&T will seek additional retroactive true-ups to March 11, 2005. They contend this will cause substantial economic burden at a time when the economy is weak and competitive carriers are failing. And relying on *Re Southern Pacific Transportation Company* ("*Southern Pacific*") [D.95-02-047] (1995) 58 Cal.P.U.C.2d 654, they argue a stay is warranted because it would be particularly difficult to recover any erroneous charges from AT&T. (Motion, at pp. 15-17.)

We recognize that the current economic climate may be difficult. However, the fact remains that the *TRRO* establishes an ILEC's right to charge Special Access Rates and collect retroactive true-ups as a matter of law.[73] At best, we could delay the inevitable. We can see no justification to grant a stay here based on *Southern Pacific*, nor does the CLECs fear of erroneous true ups constitute error in our Decision.[74]

Southern Pacific dealt with a Commission decision which ordered, in part, that penalties be paid into the State's general fund. We agreed to stay that payment, reasoning it could be particularly difficult to obtain any refunds from the general fund.[75] (*Id.* at 655.) We are not faced with that situation here. This matter does not involve penalties or the potential recovery of erroneous charges from the general fund. This case involves the right to collect permissible rates which at worst, if found erroneous, can be

[73] *TRRO* ¶ 145 fn 408, ¶ 198 fn. 524. See also Motion, at p. 10 fn. 27 [acknowledging the three year true-ups (to March 11, 2005) at Special Access Rates are permissible].

[74] CBeyond and Covad do not specify any wrongly designated non-impaired wire centers that might result in an erroneous true-up. They previously identified one disputed wire center designation in AT&T's May 27, 2008 revised list (SIMICA11). However, AT&T subsequently removed wire center, thus rendering that concern moot. (See AT&T July 3, 2008 updated compliance filing.)

[75] CBeyond and Covad rely on *Re Pacific Bell Telephone Company* [D.06-01-043], *supra*, to argue AT&T will delay any refunds making it difficult to recover an erroneous charges. (Motion, at pp. 16-17.) However, the delay in D.06-01-043 appeared to result from the pending resolution of disputes regarding the carriers' interconnection agreements and arbitration agreements. There is no evidence that AT&T delayed payment once the matter was resolved and AT&T was directed to make certain payments. (See *Re Pacific Bell Telephone Company* [D.07-03-024] (2007) __ Cal.P.U.C.3d__, 2007 Cal. PUC LEXIS 402.)

recovered directly from the utility. Under similar circumstances, we have declined to grant stays.[76]

2. Likelihood to Prevail on the Merits

CBeyond and Covad contend a stay is warranted because they are likely to prevail on the merits of their application for rehearing. (Motion, at pp. 17-19.) As discussed above, CBeyond and Covad are incorrect. Accordingly, because the elements for stay have not been established the motion should be denied.

III. CONCLUSION

For the reasons stated above, D.08-04-055 is modified to reflect the clarifications specified below. The application for rehearing D.08-04-055, as modified, is denied because no legal error has been shown. The motion for stay is also denied.

THEREFORE, **IT IS ORDERED** that:

1. D.08-04-055 is modified as follows:

   a. Page 13, second sentence of the second full paragraph (beginning with: "AT&T asserts…"), is deleted as well as the statement "We disagree." Insert:

> Under the TRRO, and as we recognized in D.06-02-035,[77] once a wire center is determined to meet the criteria for unbundling (i.e., as non-impaired), it can not be changed back to impaired status even though market conditions may be dynamic.[78]

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[76] See e.g., *Re PG&E, supra,* 2 Cal.P.U.C.3d at pp 331-332 [*Southern Pacific* deemed inapplicable because, similar to the case here, the refund could be sought directly from the utility].

[77] See *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order* ("*Decision Adopting Amendment To Existing Interconnection Agreement*") [D.06-02-035], *supra*, (2006) 2006 Cal.PUC LEXIS 47, __ Cal.P.U.C.3d __, p. 47 & fn. 21 (slip op.).

[78] *TRRO* ¶ 167, fn. 466 stating in pertinent part:

> To facilitate application of a federal standard, we rely on objective criteria that are administrable and verifiable, but could be disruptive as applied to a dynamic market if modest changes in competitive conditions resulted in the reimposition of unbundling obligations. Therefore, once a

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b. Page 29, Conclusion of Law Number 6 is revised to state:

> Under the TRRO, once a wire center is determined to meet the criteria for unbundling it can not be changed even though market conditions may be dynamic.

c. Page 24, second full sentence of the first paragraph, replace the word "Finally," with the word "Third."

d. Page 24, first paragraph, add the following final sentence:

> Finally, AT&T notes that OP 3(c) is unnecessary and inconsistent with established Commission rules and dispute resolution procedures.

e. Page 24, second paragraph, add a first sentence to state:

> AT&T is correct that OP 3(c) of the POD is unnecessary. Applicable procedures already exist under the TRRO, D.06-01-043, and our Rules of Practice and Procedure. Accordingly, we will delete that provision. In addition, our order resolves the other issues raised by AT&T's appeal based on the parties' arguments and the facts already in the record of this proceeding.

2. The application for rehearing of D.08-04-055, as modified, is hereby denied.

3. This proceeding, Case No. (C.) 06-03-023, is closed.

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> wire center satisfies the standard for no DS1 loop unbundling, the incumbent LEC shall not be required in the future to unbundle DS1 loops in that wire center. Likewise, once a wire center satisfies the standard for no DS3 loop unbundling, the incumbent LEC shall not be required in the future to unbundle DS3 loops in that wire center.

As we have previously concluded: "…a state commission is preempted from ordering unbundling in those instances where the FCC has determined that no unbundling should be required." (See D.06-02-035, *supra*, 2006 Cal.PUC LEXIS 47, __ Cal.P.U.C.3d__ at p. 8 (slip op.); see also *TRRO* ¶ 203.)

This order is effective today.

Dated September 18, 2008, at San Francisco, California.

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