KAJ/eap 04/13/2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART MOTION FOR ENFORCEMENT OF DECISION 06-01-043

I. Introduction

On March 29, 2006, five Competitive Local Exchange Carriers (CLECs or Movant CLECs)[1] filed a motion for enforcement of Decision (D.) 06-01-043. On January 26, 2006, the Commission issued D.06-01-043, its Final Decision in the instant arbitration, resolving issues disputed between AT&T California (AT&T)[2] and the CLECs. In that decision, the Commission approved CLEC-proposed contract language stipulating that, in the event a CLEC is unable to submit a transition order for a line that it has been using to provide service to an end-user under the Unbundled Network Element Platform (UNE-P), AT&T is authorized

[1] The five CLECs are Call America, Inc.; CF Communications, LLC d/b/a Telekenex; DMR Communications, Inc.; TRI-M Communications, Inc. d/b/a TMC Communications; and FONES4ALL Corp.

[2] When this application was filed, the company was operating under the name "SBC California." Since the merger with AT&T has been completed, the company is now operating under the name "AT&T California."

to charge only the total service resale rate for such line.[3] In making this finding, the Commission ruled specifically that it would be "unduly punitive" to CLECs to impose the market-based rates that AT&T sought to charge for such lines.

II. Parties' Positions

On March 10, 2006, AT&T sent a notice to each CLEC that had been unable to complete the submission of its UNE-P transition orders. The notice, which is attached as Exhibit 1 to the CLECs' motion, indicates that AT&T plans to charge $37.24 for each UNE-P line. An e-mail message from AT&T regulatory attorney Ed Kolto to counsel for CLECs provided additional clarification as follows: "This resale rate incorporates the basic resale rates from the tariff, and includes a component for usage, three features, the EUCL [End User Common Line] charge, and an access charge."

According to the CLECs, the average usage on the CLECs' UNE-P lines is no more than 500 minutes, of which 125 are initial minutes and 375 additional minutes.[4] Thus, a reasonable maximum assumption of monthly usage charges is $2.70. Added to the typical $8.59 line charge, this yields a typical rate of $11.29 per line per month. Even adding two features at their average resale rate of around $4, this brings a typical CLEC UNE-P user's resale rate to $19.29.

The CLECs assert that imposition of access charges on CLECs is entirely inappropriate, since most CLECs use another carrier to provide long distance service. In that case, AT&T collects access revenues from the long-distance provider, not from the CLEC. Further, the CLECs claim that AT&T has offered no indication of its assumptions regarding local usage, and has given no

[3] D.06-01-043 at 47.

[4] This is based on attached Declarations of Jeffrey Buckingham, Anthony Zabit, David Lee, and Ron Ireland in Support of the instant Motion.

justification for assuming that each and every CLEC resale line carries three custom-calling features, nor has it revealed its assumption regarding the average price of such features.

The CLECs find it telling that the $37.24 that AT&T plans to impose on CLECs for each UNE-P line for which a CLEC has yet been unable to provide transition orders is "suspiciously" near the rate that AT&T would charge for each line purchased under its market-based Local Wholesale Complete (LWC) commercial agreement for the replacement of UNE-P service. The CLECs indicate that they have reviewed the rates for LWC service but were required to enter into a confidentiality agreement under which they are not permitted to reveal publicly the actual rates AT&T has proposed.

According to the CLECs, the rate AT&T proposes is almost double the resale rate calculated as line charge plus usage derived from AT&T's resale tariff, even assuming an average of two features per line. The CLECs indicate that the attached Declarations of CEOs and managers of the Movant CLECs demonstrate that it would be ruinous to their finances to have to pay the extra $17[5] for each UNE-P line for which they have not yet been able to submit transition orders.

The CLECs state that if the Commission permits AT&T to charge a "proxy" rate for CLECs' resale lines, it should not be based on overblown assumptions regarding average CLEC usage of minutes and features, as well as the unjustifiable inclusion of access revenues.

The CLECs claim that limiting AT&T to $20 per line per month for resale service until CLECs are able to complete submission of their transition orders would not harm AT&T in any way, since the Movant CLECs agree to a true-up

[5] $17 represents the difference between the $20.00 proposed by CLECs and the $37.24 proposed by AT&T.

to their customers' actual usage in the first month of usage-based resale billing. The Movant CLECs indicate that they expect that this will result in higher charges for some lines, and lower for others, than the $20 cap sought in their motion.

The Movant CLECs urge the assigned Administrative Law Judge to grant relief in the nature of a temporary restraining order or preliminary injunction.

AT&T filed its opposition to the CLECs' motion on April 5, 2006. AT&T asserts that the $20.00 proxy rate proposed by the CLECs is not appropriate. AT&T proposes a blended proxy rate that consists of a proxy residential rate and a proxy business rate, weighted according to the relative number of unconverted UNE-P residential and business lines existing in California as of January 31, 2006. The components of both the residential and business proxy rates are the rates for the line itself (including unlimited usage), three vertical features, a EUCL charge, and an access charge.

III. Discussion

AT&T's methodology to develop its proxy rate is more comprehensive than that used by the CLECs so I will use AT&T's model. AT&T uses its standard tariffed business and residential service as a starting point.[6] While usage is included in the residential rate, AT&T adds $23.99 for unlimited business usage, in contrast to the 500 minutes at $2.70 modeled by the CLECs. I do not find AT&T's usage assumptions to be reasonable. AT&T states that it selected the unlimited calling standard because it is "comparable to the UNE-P model, where high usage was relatively inexpensive."[7] AT&T presents no proof

[6] CLECs used the resale rate for measured PBX trunk lines.

[7] Smith Declaration ¶ 19.

that actual usage on the average exceeds the 500 minutes proposed by the CLECs. I cannot accept the "Cadillac" of usage which would allow for unlimited local calling. The CLECs' proposal is reasonable and AT&T's is not. Therefore, I will adopt the $2.70 proposed by the CLECs, for 500 minutes of usage, rather than the $23.99 unlimited usage proposed by AT&T.

AT&T includes three vertical features, rather than the two features proposed by the Movant CLECs, and I agree with AT&T that three features is appropriate. As AT&T states, this is consistent with the FCC's finding in the California Section 271 proceeding that "three features…is the average number of features per access line for both retail and wholesale usage."[8] AT&T also points out that movant Fones4All's own website makes clear that three features or more is common.[9] Likewise, movant Call America's website lists more than 20 available features that it markets to customers."[10] I concur that AT&T's selection of three features per line is reasonable.

AT&T has included the EUCL charge and points out that the CLECs' calculation fails to include or even acknowledge the EUCL charge. It is appropriate to include the EUCL, so I have included the $4.38 EUCL in my calculations.

AT&T includes $3.40 for access charges, saying that the access component is necessary and appropriate in order to account for AT&T's lost opportunity to bill interexchange carriers (IXCs) for access charges. A CLEC purchasing UNE-P

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[8] Memorandum Opinion and Order, *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc. for Authorization To Provide InterLATA Services in California,* 17 FCC Rcd 25650, ¶ 61 (2002).

[9] *See* www.fones4all.com/fones4all_us/bundlepackages.html.

[10] *See* www.callamericacom.com/products_services/local_feature_description.html.

was entitled to sell exchange access to IXCs delivering or receiving traffic destined to or from a CLEC carrier customer. Accordingly, there was no need for AT&T Carrier Access Billing System (CABS) to process IXC billing information, and it is not set up to do so. In contrast, states AT&T, in a resale arrangement the incumbent LEC rather than the reselling CLEC is entitled to collect access charges from IXCs. Here, however, because CABS is used to bill UNE-P lines, AT&T states that it does not have the ability to bill the IXC for exchange access usage. It is therefore appropriate to include an access component to recover those lost charges. I disagree. The CLECs states that since most CLECs use another carrier to provide long distance service, it is inappropriate for AT&T to impose access charges on the CLECs. The access charge of $3.40 has been removed from the model.

To summarize, I have adopted AT&T's assumptions in its model for the price for the access line, the number of custom calling features, and the inclusion of the EUCL. I have reduced the local usage charges for business customers to 500 minutes at $2.70 per month, rather than the $23.99 proposed by AT&T, which includes unlimited usage. I have also eliminated the access charges proposed by AT&T, since most CLECs use another carrier to provide long distance service. The result is a blended rate of $25.19. The Movant CLECs shall pay this rate until they have submitted the orders to transition their customers off of UNE-P service.

In their motion, the Movant CLECs agree that once they have completed submission of their transition orders, AT&T should be permitted to "true up" the charges imposed on them to a level based on the first month of measured resale usage and features for each former UNE-P line. The Movant CLECs expect that this will result in higher charges for some lines and lower for others. However, AT&T points out that a hot cut to UNE-L would not result in a conversion to

AT&T's Customer Records Information System (CRIS) billing since those loops would still be handled by CABS. Accordingly, tracking of the actual usage that the CLECs claim would enable a true-up would not be possible.

To the extent that the UNE-P lines are transitioned to resale service, AT&T shall be permitted to true up the charges as described above.

IV. Is Injunctive Relief Warranted?

First, I will address the authority of an ALJ to grant a temporary restraining order or preliminary injunction. In D.04-09-056, the Commission ruled:

> An individual assigned Commissioner or ALJ may issue a temporary restraining order or preliminary injunction in order to preserve the status quo, subject to its ratification or reversal by the full Commission. (See the California Constitution, Article XII, Section 2 ["Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval."]; see also Pub Util. Code § 310; *Systems Analysis and Integration, Inc. d/b/a Systems Integrated v. Southern California Edison Company,* D.96-12-023, 69 CPUC2d 516, 522…[11]

Based on the decision cited above, I find that I have the authority to issue a temporary injunction to preserve the status quo, subject to its ratification or reversal by the full Commission.

The CLECs point out that the Commission set out the standard for the issuance of a preliminary injunction in *AT&T Communications of California, Inc. et al., v Verizon California Inc.,* 2004 Cal. PUC LEXIS 478 (2004) at *16-*17 as follows:

> The Commission uses the same test for temporary restraining orders that it uses for preliminary injunctions. (See Westcom Long

[11] *AT&T Communications of California, Inc. et al., v. Verizon California Inc.,* 2004 Cal. PUC LEXIS 478 (2004) at *16 - *17.

> Distance, Inc. v. Pacific Bell et al., D.94-04-082, 54 CPUC2d 244, 259; see also Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates, D.98-12-075, 84 CPUC2d 155, 169.) To obtain a temporary restraining [*19] order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.

AT&T states that under the dispute resolution provisions of their respective agreements, the CLECs must establish that they are entitled to injunctive relief in order to gain any relief at all on their motion.

AT&T asserts that the CLECs have not demonstrated the requisite elements for an injunction. I will examine each element in turn.

The first element is whether the moving party has demonstrated the likelihood of prevailing on the merits. As I have shown above, I believe that the CLECs are correct that AT&T's assumptions are not all appropriate. I have made two adjustments to AT&T's assumptions: first I have eliminated the $23.99 for unlimited local calling and replaced it with $2.70, based on 500 minutes of use. I have also determined that it is inappropriate to include access charges. Using the model developed by AT&T, those two adjustments reduced the rate from the $37.24 rate proposed by AT&T to $25.19. Therefore, I find that the CLECs have met the requirement that they would prevail, at least in part, on the merits. I find that the revised proxy rate is closer to what the Commission envisioned in D.06-01-043 when it ruled that customers that had not been transitioned from UNE-P by March 11, 2006 would be billed at the resale rate, rather than the LWC rate found in AT&T's commercial agreements. As the CLECs state, AT&T's proposed proxy rate is remarkably similar to the LWC rate, which the Commission rejected in D.06-01-043.

The second element for injunctive relief relates to whether the moving party will sustain irreparable injury without the order. According to AT&T, the CLECs' claim of irreparable harm is based on the assertion that paying the difference between AT&T's proxy resale rate and what they believe to be a true resale rate threatens them with bankruptcy. In other words, the CLECs are alleging monetary loss. AT&T points out that the Commission has held, "monetary loss alone is not an adequate showing of irreparable harm,"[12] AT&T acknowledges that the Commission has made an exception where the monetary loss in question cannot later be recovered,[13] but AT&T asserts that that exception does not apply here. According to AT&T, if the Commission ultimately agrees with the CLECs on the merits on their claims, the CLECs could simply seek a refund. AT&T finds the CLECs' claims that AT&T proxy rate could push the CLECs close or into bankruptcy as incredible on its face. According to AT&T, the CLECs themselves can relieve any perceived financial distress simply by completing the UNE-P transition process by converting their lines to resale.
I disagree with AT&T's conclusions on two grounds. First, a monetary loss cannot later be recovered if the company goes into bankruptcy. Therefore, I find that the Commission's determination that monetary loss alone is an adequate showing of irreparable harm applies in this case, since the monetary loss in question may not be later recovered.

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[12] Order Denying Emergency Motion for Stay of Decision 01-09-058, Utility Consumers' Action Network v. Pacific Bell, D.01-11-069, 2001 Cal. PUC LEXIS 1121, at *8 (Cal. PUC Nov. 29, 2001).

[13] *See e.g.*, Order Granting Stay of Ordering Paragraphs 2 and 3 of Decision 94-11-068 and Ordering Paragraphs 14 and 15 of Decision 94-11-069, *Investigation on the Commission's Own Motion Into the Causes of Recent Derailments of Southern Pacific Transportation Company Trains,* D.95-02-047, 58 CPUC2d 654, 1995 Cal. PUC LEXIS 98, at *3 (Cal. PUC Feb. 8, 1995).

Also, AT&T suggests that the CLECs should just complete the process to convert their lines to resale. However, in their motion, the CLECs indicate that "most of the Movant CLECs are not moving to resale arrangements, but are attempting to deploy their own switching and transport so that they can provide facilities-based service to their customers…"[14] Therefore, AT&T's suggestion that the CLECs should just convert their remaining lines to resale, so as to avoid the application of AT&T's proxy rate is without merit. It does not address the needs of a carrier that is attempting to transition to UNE-L.

The third element for injunctive relief is that it would not result in harm to other interested parties. The CLECs state that "[AT&T] will be made whole by a true-up to usage-based resale rates, once the CLECs complete submission of their transition orders."[15] AT&T asserts that a true-up will not recompense AT&T for creating a temporary billing system that will be useless to all other CLECs. AT&T asserts that it would incur substantial costs if it were compelled to bill CLECs on an individual basis as if the bills were generated out of the genuine resale billing system. AT&T's argument is not convincing because, in this case, both AT&T and the CLECs are proposing a proxy rate. The only difference is the amount of that proxy rate.

AT&T also states that the moving parties fail to acknowledge the effect their requested relief – an artificially depressed resale rate available only to CLECs that have failed to complete the transition -- would have on the CLECs in California with whom they compete. This argument is without merit. I do not believe that the proxy rate I have adopted here is an "artificially depressed resale

[14] Motion for Enforcement of D.06-01-043 at 10.

[15] CLEC motion at 13.

rate." Rather, it is a reasonable approximation of what these CLECs would pay if their customers were on resale service. Those rates should be comparable to the rates paid by other CLECs that are purchasing resale service.

The final element for injunctive relief is whether there is any harm to the public interest. According to AT&T, it would frustrate the Federal Communications Commission's intent if the CLECs that have failed to initiate the transition mandated in the Triennial Review Remand Order were permitted to continue to compete using UNE-P, priced at the artificially depressed rate the CLECs propose. That argument does not have merit since I have already determined that the proxy rate I have adopted is a reasonable proxy for resale rates. It is in the public interest to assure that CLECs' customers continue to receive service from their carrier of choice.

In sum, I find that the CLECs have met their burden for injunctive relief and grant that relief as follows:

IT IS RULED that**:**

1. The motion of the Movant CLECs is hereby granted in part and denied in part, in accordance with the terms and conditions outlined above.

2. AT&T shall bill those CLECs that have not transitioned their UNE-P customers at a resale proxy rate of $25.19 per month.

3. The Movant CLECs' interconnection agreement provisions requiring them to "pay and dispute" are hereby suspended, but only with regard to payment of charges for UNE-P customers that had not been transitioned as of March 11, 2006.

4. For those CLEC customers that are transitioned to resale service, AT&T shall be permitted to true-up the charges imposed on CLECs to a level based on the first month of measured resale usage and features for each former UNE-P line.

Dated April 13, 2006, at San Francisco, California.

/s/ KAREN A. JONES
Karen A. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting in part Motion for Enforcement of Decision 06-01-043 on all parties of record in this proceeding or their attorneys of record.

Dated April 13, 2006, at San Francisco, California.

/s/ ERLINDA PULMANO
Erlinda Pulmano

N O T I C E

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