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Before the
 Federal Communications Commission
 Washington, D.C. 20554

In the Matter of)
)
 Tariffs Implementing) CC Docket 97-250
 Access Charge Reform)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 29, 1998

Released: September 29, 1998

By the Commission:

I. Introduction

1. On June 1, 1998, the Commission released an order concluding an investigation of the tariffs implementing access reform filed by the price cap local exchange carriers (LECs).¹ SBC Communications, Inc. (SBC)² has filed a petition for reconsideration of the *Access Reform Implementation Order*. In this Order, we grant SBC's petition in part and deny it in part.

II. Definitions of Primary and Non-primary Residential Lines

2. SBC seeks reconsideration of the Commission's decision in the *Access Reform Implementation Order* to require refunds of excess charges that resulted from the undercount of Pacific Bell's non-primary residential lines.

A. Background

3. The Commission's rules permit price cap LECs to recover their permitted common

¹ *Tariffs Implementing Access Charge Reform*, CC docket No. 97-250, Memorandum Opinion & Order, FCC 98-107 (rel. June 1, 1998)(*Access Reform Implementation Order*).

² SBC filed on behalf of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, referred to jointly as "the SBC Companies."

line revenues through: (1) a monthly per-line subscriber line charge (SLC) billed to end users; (2) a monthly per-line pre-subscribed interexchange carrier charge (PICC) billed to the IXCs to whom the end user has presubscribed; and (3) a per-minute carrier common line (CCL) charge billed to IXCs.³ Effective January 1, 1998, the SLC is capped at \$3.50 for primary residential lines and single line businesses, \$5.00 for non-primary residential lines, and \$9.00 for multi-line businesses (MLB).⁴ Permitted interstate common line revenues not recoverable from SLCs because of the caps may be recovered through PICCs. PICCs are capped at \$.53 for primary residential lines and single-line business lines, \$1.50 for non-primary residential lines, and \$2.75 for MLB lines in 1998.⁵ The remainder of permitted common line revenues is recoverable through the CCL charge. In the *Access Charge Reform Order*, the Commission intended LECs to recover non-traffic sensitive costs through flat fees, such as SLCs and PICCs, and to eliminate implicit cross-subsidies between classes of end users.

4. If price cap LECs' non-primary residential line counts are too low, revenues recoverable through SLCs and PICCs are understated, and the maximum CCL charge is too high. For price cap LECs that no longer have a CCL charge or other per-minute residual charges,⁶ non-primary residential lines not identified as non-primary make a smaller contribution to permitted common line revenues than they should, and the maximum multi-line business PICC is too high.

5. On January 28, 1998, the Common Carrier Bureau (Bureau) designated for investigation the line counts for primary and non-primary residential lines for all price cap LFCs.⁷ The Bureau observed that non-primary residential line counts were lower than various published estimates and price cap LECs' public statements. The Bureau required the price

³ *Access Charge Reform*, CC Docket No., 96-262, First Report and Order, 12 FCC Rcd 15982, 16005 (1997) (*Access Charge Reform Order*); *Southwestern Bell Telephone Company, et al. v. Federal Communications Commission*, 1998 WL 485387 (8th Cir., August 19, 1998); Order on Reconsideration, 12 FCC Rcd 10119 (1997); Second Order on Reconsideration, 12 FCC Rcd 16606 (1997) (collectively, *Access Charge Reform Proceeding*).

⁴ 47 C.F.R. § 69.152(e).

⁵ 47 C.F.R. § 69.153(d).

⁶ See 47 C.F.R. §§ 69.155, 69.156(d)(e).

⁷ *Tariffs Implementing Access Charge Reform*, CC Docket No. 97-250, Order Designating Issues for Investigation and Order on Reconsideration, 13 FCC Rcd 2249 (1998) (*Access Reform Tariffs Designation Order*).

cap LECs to identify the number of lines⁸ in each of the following categories: (1) primary residential lines; (2) single-line business lines; (3) non-primary residential lines; and (4) Basic Rate Interface - Integrated Services Digital Network (BRI-ISDN) lines.⁹

6. The *Access Charge Reform Order* did not provide a definition of primary and non-primary residential lines. Instead, the Commission initiated a rulemaking proceeding that sought comment on how to define primary and non-primary residential lines.¹⁰ Incumbent LECs, therefore, developed their own definitions of primary and non-primary residential lines in order to comply with the access reform rate structure reforms, which became effective January 1, 1998. In the *Access Reform Tariffs Designation Order*, the Bureau designated for investigation, for all price cap LECs, the issues of whether their definitions of primary and non-primary lines were reasonable, and whether the definitions were applied consistently and in a reasonable manner in calculating the number of primary and non-primary lines.¹¹ The Bureau also tentatively concluded that the definition used by SBC, among others, was unclear and required further elaboration. SBC filed additional language attempting to clarify its definition.¹²

7. In the *Access Reform Implementation Order*, the Commission calculated the percentage of non-primary residential lines to total residential lines reported by the price cap LECs and compared these percentages with data collected by the Commission staff, independent studies of additional residential line penetration levels, and price cap LECs' public statements.¹³ Upon completing the investigation, the Commission determined that SBC reported unreasonably low percentages of Pacific Bell's non-primary residential lines. Pacific Bell reported non-primary residential line counts of only 2.67 percent, the lowest penetration

⁸ Number of lines are reported in price cap LECs' tariffs as demand figures over a twelve-month period. In their Tariff Review Plans (TRPs), price cap LECs report the number of lines as the actual number of residential loops times twelve.

⁹ *Access Reform Tariffs Designation Order*, 13 FCC Rcd at 2257.

¹⁰ *Access Charge Reform Order*, 12 FCC Rcd at 16016.

¹¹ *Access Reform Tariffs Designation Order*, 13 FCC Rcd at 2257.

¹² See SBC Direct Case at 2; see also *Access Reform Implementation Order* at ¶ 37.

¹³ *Access Reform Implementation Order*, at ¶ 11. The two Commission staff studies, the Additional Line Study and Excess Residential Loop Study, are based on data filed on the record in that proceeding by the Commission staff. See Letter from David L. Hunt, Staff Attorney, FCC to Magalie Roman Salas, Commission Secretary (dated May 27, 1998). The independent studies and public statements made by price cap LECs were also made part of the record in that proceeding. *Id.*

level reported by any price cap LEC. This estimate is approximately 15 percentage points lower than the 17.61 percent non-primary residential line count reported by the Additional Line Study for Pacific Bell. Thus, Pacific Bell reported only 15 percent of the non-primary residential lines identified in the Additional Line Study.¹⁴ The Commission ordered Pacific Bell to make refunds for any overcharges in multi-line PICCs, non-primary residential PICCs, or residual per-minute rates that resulted from the undercount of its non-primary residential lines.¹⁵ The Commission prescribed a non-primary line count that was 70 percent of the non-primary line count identified by the Additional Line Study.¹⁶ Additionally, the Commission investigated the issue of whether the definitions of primary and non-primary lines provided by all price cap LECs were reasonable. The Commission concluded that SBC's definition of non-primary lines, as applied by Pacific Bell, was unreasonable. The Commission stated that Pacific Bell's application of SBC's definition "is patently unreasonable because it fails to identify additional residential lines even when the lines are billed to the same name and location."¹⁷

B. SBC's Petition for Reconsideration

8. SBC contends that the *Access Reform Implementation Order* forces Pacific Bell to implement retroactively a heretofore unstated Commission definition of non-primary lines.¹⁸ SBC argues that the Commission should reverse its order for Pacific Bell to make refunds to those customers that would have paid lower PACC rates.¹⁹ SBC further maintains that, in the *Access Reform Implementation Order*, the Commission made its finding based on irrelevant evidence to which SBC did not have an opportunity to respond. Alternatively, SBC argues that even if the evidence would justify the Commission's result, a refund is not warranted in this matter.²⁰

C. Discussion

¹⁴ *Access Reform Implementation Order*, at ¶ 25.

¹⁵ *Access Reform Implementation Order*, at ¶ 179.

¹⁶ *Access Reform Implementation Order*, at ¶ 29-31.

¹⁷ *Access Reform Implementation Order*, at ¶ 38.

¹⁸ Petition for Reconsideration of SBC Communications, Inc. (SBC Petition) 2-4.

¹⁹ SBC Petition at 2.

²⁰ SBC Petition at 2.

9. The Commission did not promulgate a new definition of non-primary lines in the *Access Reform Implementation Order*. In the *Access Reform Tariffs Designation Order*, the Bureau stated that the purpose of the investigation of the definitions used by some price cap LECs to identify primary and non-primary residential lines was "to determine whether the definitions that price cap LECs did use are reasonable, and whether these definitions were applied consistently and in a reasonable manner in calculating the number of primary and non-primary residential lines."²¹ As stated by AT&T, "the Commission undertook an extensive investigation of the non-primary line issue" (emphasis in original).²² Upon the conclusion of its investigation, the Commission found one aspect of Pacific Bell's definition to be unreasonable. Specifically, the Commission found unreasonable the definition of non-primary lines applied by the SBC Companies in cases where a company does not identify as non-primary the additional residential lines billed under the same name at the same location.²³ In finding the definition of non-primary lines as used by Pacific Bell to be unreasonable, the Commission did not adopt a new definition of non-primary lines, but simply acted pursuant to its well-established authority to make interpretations of its rules and orders.²⁴ When the Commission thus exercises its discretion to develop the meaning of its rules on a case-by-case basis, applying an interpretation in the case in which it is developed is in no sense "retroactive."²⁵ Indeed, such interpretations *must* be applied in the cases in which the interpretations are made.

10. SBC argues that it was not afforded an opportunity to respond to evidence, including a staff study, placed into the record on May 27, 1998, and was therefore denied due process.²⁶ SBC's opportunity to respond to the evidence filed on May 27, 1998, in its instant Petition for Reconsideration, satisfies due process requirements. As the Commission has stated previously, as long as a petitioner is able to petition for reconsideration, "there has been

²¹ *Access Reform Tariffs Designation Order*, at 2255.

²² *Ex Parte -- AT&T Opposition to Petition for Reconsideration of SBC Communications, Inc., Tariffs Implementing Access charge Reform*, CC Docket No. 97-250 (filed July 1, 1998) (filed August 4, 1998) (AT&T Opposition) at 2.

²³ *Access Reform Implementation Order*, at ¶ 33, 37-38.

²⁴ *Stinson v. United States*, 508 U.S. 36, 45 (1993).

²⁵ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

²⁶ SBC Petition at 5-6.

no deprivation to which a due process claim might apply."²⁷ Indeed, SBC, in its Petition for Reconsideration, addresses its concerns with the May 27, 1997, evidence. Specifically, SBC claims that the materials used by the Commission in the investigation of primary and non-primary line counts are irrelevant. SBC also claims that the studies included: (a) an unidentified number of facilities which may not have had "working number[s]," and (b) an unidentified number of reported households which may have contained "multiple family units." SBC also asserts that the studies produced by Merrill Lynch and Salomon Brothers were "estimates," not "facts." Although the studies by Commission staff, Merrill Lynch, and Salomon Brothers may not be without flaws, they were and continue to be the best objective analyses available to the Commission for determining whether Pacific Bell's non-primary line count was reasonable. In attacking the two Commission staff studies, SBC is essentially stating that the Commission cannot base its findings on data and materials compiled by its staff. This Agency's mission would be severely impaired if it could not rely on materials and analyses of its staff. Additionally, both the Additional Line Study and the Excess Residential Loop Study relied heavily on data that was more than three years old and available to the public.²⁸ If anything, the use of such data inured to the benefit of SBC because the record showed that the growth rate for non-primary lines exceeds the growth rate for primary lines.²⁹ Furthermore, the Commission accounted for the imprecision in the studies, and the lack of a definition for primary and non-primary lines, by prescribing a non-primary residential line count of 70 percent of the Additional Line Study, instead of applying 100 percent of the Additional Line Study, also inuring to the benefit of Pacific Bell.³⁰

11. Although SBC objects to the studies used by the Commission, SBC does not argue that the Commission prescription overstates the non-primary line count that would result if a reasonable non-primary line definition were applied to Pacific's actual billing records.³¹ In fact, in the past year, SBC has made several statements extolling Pacific Bell's percentage of residential secondary line penetration. As recently as July 16, 1998, SBC released a statement that asserted Pacific Bell's residential line growth was driven by, "additional residential lines which increased 14.8 percent over the last 12 months, pushing total

²⁷ See, e.g., *Ten Applications For Authority To Construct And Operate MultiPoint Distribution Service Stations At Five Transmitter Sites*, 10 FCC Rcd 11671 at ¶ 57.

²⁸ See 5 U.S.C. § 552.

²⁹ *Access Reform Implementation Order*, at ¶ 21.

³⁰ *Access Reform Implementation Order*, at ¶¶ 29-30.

³¹ See MCI Opposition to SBC Petition for Reconsideration (MCI Opposition) *Tariffs Implementing Access charge Reform*, CC Docket No. 97-250 (filed July 1, 1998) (filed July 14, 1998) (MCI Opposition) at 5.

penetration to an industry-leading 30.8 percent."³² By comparison, the *Access Reform Implementation Order* prescribed a revised non-primary line count of 15.14 percent.

12. SBC challenges the Commission's inclusion of lifeline lines in the calculation of total residential lines. SBC claims that none of the approximately 29 million lifeline lines in Pacific Bell's territory could be classified as non-primary, because, in order to obtain and keep a lifeline line, a customer may only have one line for the household.³³ SBC argues that the Commission's method unfairly skews Pacific Bell's percentage lower. In the *Access Reform Implementation Order*, the Commission includes lifeline lines in the calculation of total residential lines, because the Additional Line Study included customers with lifeline lines. An accurate comparison of the percentage of non-primary lines reported by LECs to the percentage of non-primary lines in the Additional Line Study requires the inclusion of lifeline lines in the calculation of total residential lines. In any case, even if the lifeline lines were removed from the calculation of total residential lines, Pacific Bell's percentage of non-primary lines would only change from 2.67 percent to 3.52 percent.³⁴ This is still far short of the 17.61 percent of non-primary residential lines identified by the Additional Line Study.³⁵ Revising our calculations in this way would not, therefore, persuade us to change our decision to prescribe a non-primary residential line count for Pacific.

13. SBC's other specific criticisms of the Additional Line Study do not lead us to alter our conclusion. There is no reason to expect that the Additional Line Study included an unidentified number of facilities which may not have had "working numbers." As noted in the *Access Reform Implementation Order*, the survey upon which the Additional Line Study was based asked respondents: "Does your household have more than one telephone line (*i.e.*, more than one telephone number)?"³⁶ There is no reason to believe that respondents would have answered this question if only one phone number were operational. Although the

³² See SBC Press Release, July 14, 1998, *SBC Grows Second Quarter Earnings Per Share - Broad Customer Demand Drives Results*; see also, SBC Press Release, October 22, 1997, *SBC Announces Third-Quarter Results; Record Gains in Access Lines*; SBC Press Release, May 27, 1998, *SBC Communications Announces Broad ADSL Deployment Across California* ("The California marketplace already has the highest percentage of 'wired' households and the **greatest number of second phone lines** of any state in the country.") (Emphasis added.)

³³ SBC Petition at 7.

³⁴ SBC Petition at 7.

³⁵ *Access Reform Implementation Order*, at Figure 2.

³⁶ *Access Reform Implementation Order*, at ¶ 17, fn. 29.

Additional Line Study may have included an unidentified number of households with multiple family units, we specifically accounted for that, and other possible inaccuracies, when we chose to prescribe only 70 percent of the total of non-primary lines identified by the Additional Line Study.³⁷ Further, as noted in the *Access Reform Implementation Order*, the Additional Line Study contained a countervailing downward bias because the survey did not distinguish among households with multiple residential lines between those with only two residential lines and those with more than two residential lines, and the survey did not identify one-line households that have ISDN service.³⁸ Finally, as the United States Court of Appeals for the 8th circuit recently acknowledged, the Commission may properly employ "a number of short-term, transitional solutions to protect against needless disruption and unfairness. . ." in reforming its access charge system. Reliance on the Additional Line Study is just one of many short-term, transitional solutions this Agency must adopt to ensure an orderly transition during the implementation of access reform.³⁹ In light of these factors and SBC's public statements, we reaffirm our conclusion that our line number prescription for SBC was both reasonable and conservative, and based on the best evidence available.

14. SBC puts forth a procedural argument under the Paperwork Reduction Act of 1996, Pub. L. No. 104-13.⁴⁰ SBC argues that the *Access Reform Implementation Order* "improperly require[d] a new information collection" without first obtaining Office of Management and Budget (OMB) approval.⁴¹ SBC claims that the Commission's "new definition" of non-primary residential lines requires Pacific Bell to gather information not previously required of it, specifically, the number of residential lines billed to the same name at the same location.⁴² This argument is meritless because the *Access Reform Implementation Order* does not define non-primary residential lines and it does not impose an information collection requirement on Pacific Bell. The Commission has merely required Pacific Bell to

³⁷ *Access Reform Implementation Order*, at ¶ 30.

³⁸ *Access Reform Implementation Order*, at ¶ 16, as amended by *Errata Order* (Rel., June 10, 1998) 97-250 at ¶ 4.

³⁹ See *Southwestern Bell Telephone Company, et al, v. Federal Communications Commission*, 1998 WL 485387, *18. See also, *The Lincoln Telephone and Telegraph Company v. Federal Communications Commission*, 659 F.2d 1092, 1101 (D.C. Cir. 1981) ("And by not specifying the procedure to be employed, Congress allowed the Commission flexibility to mold its procedures to the needs of the situation.")

⁴⁰ 44 U.S.C. §§ 3501-3520. See SBC Petition at 11-12.

⁴¹ SBC Petition at 11-12.

⁴² SBC Petition at 11.

make refunds to IXCs. Calculating this refund does not require Pacific Bell to perform any "information collection" within the meaning of the Paperwork Reduction Act, and therefore OMB approval was not required. Even if it could be argued that the Commission has required Pacific Bell to undertake an information collection, those requirements could stem only from the original *Access Charge Reform Order* and the *Access Reform Tariffs Designation Order*, not the *Access Reform Implementation Order*.⁴³ The *Access Charge Reform Order* placed Pacific Bell on notice that it would have to develop and apply a reasonable definition of non-primary lines for its 1998 access reform filings, and the OMB expressly approved all of the Commission information collection requirements in that order.⁴⁴ Moreover, the *Access Reform Tariffs Designation Order* expressly required all price cap LECs, including Pacific Bell, to develop, defend, and apply a reasonable definition of non-primary lines, and the OMB issued the necessary approvals for that order as well.⁴⁵

15. SBC argues that the required refund of overcharges resulting from misclassification of residential lines is unwarranted under the *Access Reform Implementation Order*'s own guidelines for refunds.⁴⁶ SBC notes that the *Access Reform Implementation Order* permits "offsets" when the "same general group of customers" was affected by rates that were too high and rates that were lower than they could have been. SBC contends that a refund of overcharges resulting from misclassification of residential lines is unwarranted because "the IXCs that will be recipients of the refund will also be the same entities that were not charged the non-primary line rate."⁴⁷ As we stated in the *Access Reform Implementation Order*, it is not possible to determine the amount that any particular IXC saved by paying the primary residential PICC instead of the higher non-primary residential PICC because Pacific Bell has not identified these lines. Pacific Bell does not, and cannot, refute this observation. Thus, we will not permit Pacific Bell to offset refunds to an IXC for MLB PICC, non-primary residential PICC, or residual per-minute overcharges by the amount that the IXC saved by paying the primary residential PICC instead of the higher non-primary residential PICC.⁴⁸

⁴³ AT&T Opposition at 4, fn. 5.

⁴⁴ *Access Charge Reform Order*, 12 FCC Rcd at 16016 and 16169.

⁴⁵ *Access Reform Tariffs Designation Order*, 13 FCC Rcd at 2255-2257, 2288; Notice of Office of Management and Budget Action, OMB No. 3060-0760 (January 29, 1998).

⁴⁶ SBC Petition at 10.

⁴⁷ SBC Petition at 10.

⁴⁸ See *Access Reform Implementation Order*, at ¶ 179.

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