Decision **DRAFT DECISION OF ALJ THOMAS (Mailed 11/24/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company (U 1001 C) d/b/a SBC California for Expedited Dispute Resolution of a Right-of-Way Agreement with Roseville Telephone Company Pursuant to 47 U.S.C. § 224(c) and Decision 98-10-058.	Application 03-10-039 (Filed October 15, 2003)

OPINION ADOPTING FINAL ARBITRATOR'S REPORT

I. Summary

This decision adopts a Final Arbitrator's Report (FAR) setting telephone pole and conduit rates to be paid by Pacific Bell Telephone Company, d/b/a SBC California (SBC) to SureWest Telephone, formerly known as Roseville Telephone (SureWest). It also approves the full pole and conduit agreement (entitled Support Structure Use Agreement) prepared and filed by the parties to this arbitration, which incorporates the FAR results.

This case was arbitrated under rules we established in Decision (D.) 98-10-058. The Arbitrator resolved the three disputes that remained between the parties when they filed for dispute resolution, as follows:

1. Whether to include SureWest's costs for general support facilities (GSF) in the calculation of pole and conduit rates. Resolution: The Arbitrator declined to include GSF costs in pole and conduit rates as SureWest proposed. Instead, she allowed SureWest to charge pole and conduit rates according to the methodology developed by the Federal Communications Commission (FCC), which still allows SureWest recovery of administrative costs.

2. How to divide the annual cost of pole ownership among pole attachers when setting pole rates. Resolution: The Arbitrator adopted SBC's proposed means of calculating the percentage of the pole it uses, and counted SBC as an attacher for purposes of calculating pole rates.
3. Whether SBC's own competitive local exchange carrier (CLEC) should be permitted to use an interoffice fiber facility constructed by the SBC incumbent local exchange carrier (ILEC). Resolution: The Arbitrator allowed the SBC CLEC to use the interoffice facility.

We find that the Arbitrator's findings are supported by the record and applicable law and should be upheld in their entirety. Therefore, we adopt the FAR, attached hereto as Appendix A, for the reasons set forth therein. We also adopt the parties' Support Structure Use Agreement (Appendix B hereto), which incorporates the Arbitrator's findings.[1]

II. Parties' Positions and FAR Resolution

SBC filed this request for dispute resolution pursuant to D.98-10-058 (*Right of Way Order*), which established an expedited dispute resolution procedure for disputes involving "initial access to utility rights of way and support structures." The Arbitrator resolved the parties' three disputes as follows, and as more fully discussed in the attached FAR, which we incorporate into this decision by reference.

[1] The portions reflecting the FAR appear on page 1 and in Exhibit E of the Support Structure Use Agreement.

A. Whether to Include Costs of GSF in Pole and Conduit Rates

The first dispute concerned which overhead costs SureWest could include in its pole and conduit rates. SureWest proposed to include "General Support Facility" (GSF) costs in its rates, resulting in higher rates for SBC. SureWest claimed that if its rates did not include these costs, it would be under-compensated for use of its poles and conduits. According to SBC, SureWest's witnesses conceded that many of the GSF costs SureWest proposed be included in rates were not related to SureWest's pole and conduit operations.

The Arbitrator agreed with SBC, and adopted the FCC methodology for setting pole rates. Under that methodology, the utility may only include costs from certain, specifically identified accounts under Part 32[2] in calculating pole and conduit rates.[3] Using the FCC methodology and a joint exhibit the parties prepared agreeing on what the rate should be if the Arbitrator adopted that method, the Arbitrator set the conduit rate at $0.95 per inner duct foot per year, and the pole rate at $6.79 per pole per year.

B. Percentage of Pole Allocated to Each Attacher, and Number of Attachers

The second dispute related to how to allocate pole costs to each attacher. This issue had two subparts: first, what percentage of total pole costs each attacher should bear; and second, how many attachers one should presume for purpose of calculating pole rates.

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[2] Part 32 appears at 47 C.F.R. § 32.1 *et seq.*, and prescribes a uniform system of accounts for telecommunications companies.

[3] The accounts are Account 2411 ("Poles") for pole rates and Account 2441 ("Conduit Systems") for conduit rates. 47 C.F.R. §§ 32.2411, 32.2441.

The Arbitrator found that state case law and statutes did not provide clear guidance on the issue, and therefore adopted a percentage based on the FCC's methodology. The Arbitrator found that SBC should bear 14.2% of the costs of each pole based on this methodology. The Arbitrator found that the parties agreed–upon figure of 2.7 attachers (not counting SBC) should be augmented by one attacher (to 3.7) on the SureWest poles SBC occupies. SBC should pay for each pole it leases based on the assumption that 3.7 parties share the costs of each such pole.

C. Interoffice Facility

The third issue related to whether SBC's CLEC, doing business in SureWest's territory, should be allowed to use an interoffice fiber optic facility that the SBC ILEC installed between SBC's Fair Oaks and Rocklin central offices. SureWest claimed it would be anticompetitive to allow SBC's CLEC to use the facility, while SBC claimed it would be inefficient to require SBC to construct a duplicate facility. The Arbitrator ruled that SBC's CLEC should be allowed to use the existing facility.

III. Standard of Review

In D.98-10-058, the Commission explained its role in reviewing a FAR filed pursuant to the rules that decision established, as follows:

> **3. Standards for Review**
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> The Commission may reject arbitrated agreements or portions thereof that do not meet the requirements of the Commission, including, but not limited to, quality of service standards adopted by the Commission.
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> **4. Written Findings**

> The Commission's decision approving or rejecting an arbitration agreement shall contain written findings. In the event of rejection, the Commission shall address the deficiencies of the arbitrated agreement in writing and may state what modifications of such agreement would make the agreement acceptable to the Commission.

This is the first arbitration proceeding conducted under the D.98-10-058 rules. We are not aware of any standards the FAR violates, including those related to service quality, and find the FAR to be supported by the facts and law. Therefore, we adopt the FAR and the parties' Support Structure Use Agreement in their entirety.

IV. Comments on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. SBC and SureWest each filed comments on December 14, 2004 and reply comments on December 20, 2004. SBC's comments agree with the draft decision. While SureWest continues to disagree with the decision on all three issues, it addresses only the pole rates in comments.

SureWest states that the draft decision misapplies the FCC formula to calculate SureWest's pole attachment rate. The result is a rate that is too low in SureWest's view. Rather than the $6.79 rate the draft decision adopts, SureWest proposes an $8.83 per pole rate.

SBC counters that under SureWest's methodology, SBC's attachments (erroneously) have no practical effect on the calculation of the number of attachers. It states that, "SureWest claims that SBC … should not increase the average number of attachers per SureWest pole (which the parties agree is 2.7

before considering [SBC's] attachments) unless SBC … intends to attach to a very large proportion of SureWest poles."

SureWest's comments are not new. They boil down to an assertion, as the FAR recites, that "[SBC's] speculative future attachments should not be included in the [pole] rate development."[4] The arbitrator dealt with this issue fully in her FAR, and we adopt her reasoning:

> Third, SureWest claims that the [Draft Arbitrator's Report] DAR artificially overstates the number of attachers for calculating pole attachment rates. SureWest claims that the DAR mixes apples and oranges by starting with 2.7 attachers – the figure both sides agree upon to represent the average number of attachers on each of SureWest's 11,915 poles – and adding one attacher (for a total of 3.7 attachers) to the poles on which SBC proposes to attach. To combine the *average* of 2.7 with the *actual* of one attacher reflects confusion in the DAR, SureWest claims.
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> I disagree. The parties agree that the 2.7 average figure does not include SBC as an attacher. The only way that SBC can get the benefit of the fact that its presence on a pole increases the number of attachers among which the costs should be spread is to count SBC as an additional attacher on that pole.
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> It is true that another possible outcome would be to calculate a new average based on the number of SureWest poles to which SBC attachers. If, for example, SBC attaches to 1191 (or 10 percent) of SureWest's 11,915 poles, the average number of attachers – spread over SureWest's entire stock of poles – will increase 10 percent (0.1), rather than by one. However, for some reason, SureWest does not support this method, but rather advocates that only the 2.7 rate be used – a rate that all concede does not include SBC as an attacher.
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> In the absence of a proposal by SureWest to add this percentage to the 2.7 figure, and in recognition of the fact that including SBC as one attacher results in a fair rate for SBC on the poles to which SBC attaches, I adopt SBC's methodology.

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[4] *Final Arbitrator's Report*, Appendix A hereto, at 12.

SBC supports the draft decision, but proposes a change in the wording of ordering paragraph 3 regarding SBC's right to use the Fair Oaks-Rocklin interoffice fiber cable facility; SureWest opposes the change because it does not want the decision to be interpreted to affect the SBC ILEC's right to the facility. While we make the change SBC proposes, our decision today is meant only to allow SBC's CLEC to use that facility. SBC should not interpret the change in language to have any bearing on its ILEC's right to use the interoffice facility.

V. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. The parties waived the deadlines set forth in the *Right of Way Order.*
2. Including GSF costs as SureWest proposes would necessitate a full-scale ratemaking exercise.
3. There is an insufficient record to engage in a full-scale ratemaking exercise with regard to GSF costs.
4. SureWest proposes that a flat percentage of every account conceivably related to poles and conduits be assumed as part of its pole/conduit cost structure.
5. SureWest's allocation of costs from the foregoing accounts is very imprecise, and includes costs SureWest agrees bear no relationship to poles or conduits.
6. Under the FCC methodology for allocating overhead costs, the utility may only include costs from certain, specifically identified Part 32 accounts in calculating pole and conduit rates.

7. Section 767.5 applies only to cable companies seeking to attach to utility poles and place facilities in utility conduits.

8. There is no evidence in this case that the general ratemaking doctrines we have used in other, very different contexts (*e.g.*, regarding the CHCF-B and UNEs) apply here.

9. SureWest is not proposing allocation of actual identifiable overhead costs to pole and conduit rates, but assumes that its cost mismatches work themselves out automatically.

10. SureWest's GSF methodology has no support in any cited pole/conduit case.

11. The parties agreed in Exhibits 200-C and 201-C to pole and conduit rates assuming various outcomes.

12. The record supports a conduit rate of $0.95 per inner duct foot per year.

13. The record supports a pole rate of $6.79 per pole per year.

14. Case law and the California cable television statute do not assist us in determining the portion of each pole that should be allocated to the pole owner and attachers in calculating the pole rate.

15. SureWest's proposed 50-50 cost allocation percentage for poles finds no support in any CPUC or FCC decision.

16. The pole owner has rights that are more valuable than those of a pole lessee.

17. The pole rate for SBC will be used only for those SureWest poles to which SBC attaches.

18. It is technically feasible for the SBC CLEC to use the interoffice fiber facility at issue in this proceeding.

19. SureWest did not object to SBC's placement of the interoffice fiber facility when it was installed.

20. Installing a new interoffice fiber facility would be expensive.

21. The FAR violates no Commission standards, including those related to service quality.

22. The facts and law support the FAR and the parties' Support Structure Use Agreement.

Conclusions of Law

1. D.98-04-062, D.98-10-058 and D.03-05-055 are not applicable in reaching a conclusion regarding the inclusion of GSF costs.

2. The FCC methodology provides a basis for allocating overhead costs to pole and conduit rates.

3. A pole lessee should not bear 50% of pole costs, but rather some lesser percentage.

4. Under § 767.5, pole attacher/lessee bears only 7.4% of the costs of the pole.

5. If SBC is bearing a portion of pole costs, SBC should be included as an attacher in calculating those costs.

6. It is not inherently anticompetitive for a CLEC to realize certain economies of scale and scope resulting from the proximity of its existing local exchange facilities to MSLECs' service territories.

7. SureWest did not establish that SBC placed the interoffice facility to later cream skim SureWest's customers with its SBC CLEC operation.

8. The FAR and the parties' Support Structure Use Agreement should be adopted in their entirety.

O R D E R

1. SureWest Telephone's (SureWest) conduit rate for Pacific Bell Telephone Company, d/b/a/ SBC California (SBC) shall be $0.95 per inner duct foot per year.
2. SureWest's pole rate for SBC shall be $6.79 per pole per year.
3. SBC's competitive local exchange carrier (but not SBC's incumbent local exchange carrier) may use the interoffice fiber cable facility that runs between the SBC Fair Oaks and Rocklin, California central offices at issue in this proceeding to provide service to customers in Roseville's serving territory.
4. The Final Arbitrator's Report and the parties' Support Structure Use Agreement are adopted in their entirety.
5. This order is effective today.

Dated _____, 2004, at San Francisco, California.