

REVIEW OF RECENT EVENTS IN THE TELECOMMUNICATIONS ARENA

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Ninth Circuit Affirms California District Court's Decision on Entrance Facilities and DS-1 Transport

On March 4, 2010, the United States Court of Appeals for the Ninth Circuit (the "9th Circuit") upheld the U.S. District Court for the Northern District of California's (the "District Court") decision regarding the availability of entrance facilities and DS-1 transport. *Pacific Bell Tel. v. California Public Utils. Comm'n*, No. 08-15568, D.C. No. 3:07-CV-01797-SI (9th Cir. Mar. 4, 2010). Available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/08-15568.pdf> The District Court previously affirmed the California Public Utilities Commission's ("CPUC") conclusion that section 251(c)(2) requires incumbent local exchange carriers ("incumbent LECs") to lease entrance facilities to competitive LECs ("CLECs") at Total Long Run Incremental Cost ("TELRIC") rates for purposes of interconnection. The District Court, however, vacated the CPUC's decision that held that the Federal Communications Commission's ("FCC") regulation that caps the number of DS-1 circuits CLECs may lease on an unbundled basis did not apply on routes where CLECs are impaired as to DS-3 circuits.

At issue on appeal were (a) whether section 251(c)(2) of the Communications Act of 1934, as amended (the "Act"), requires an incumbent LEC to lease its entrance facilities to a

CLEC at TELRIC rates when the CLEC wishes to use the entrance facility to permit its own customers to reach customers of the incumbent LEC; and (b) whether section 51.319(e)(2)(ii)(B) of the FCC regulations, which limits to ten the number of low-capacity DS-1 circuits an incumbent LEC may lease to a CLEC at TELRIC rates along certain routes, is a limitation which also applies to any route, regardless of whether the CLEC is “impaired” as to high-capacity DS-3 circuits.

As to the first issue, the 9th Circuit agreed with the 7th and 8th and circuits’ prior conclusion that FCC regulations authorize state public utility commissions to order incumbent LECs to lease entrance facilities to CLECs at TELRIC rates for the purpose of interconnection. As to the second issue, the 9th Circuit held that, under the plain language of the FCC’s regulations, the DS-1 cap rule limits to ten the number of DS-1 circuits an incumbent LEC must lease to a CLEC at TELRIC rates on *all* routes, *i.e.*, regardless of whether the CLEC is impaired as to DS-3 circuits.