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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own Motion into the Exemption From Pub. Util. Code § 851 for Uniform Regulatory Framework and other Competitive Carriers.

Rulemaking 09-05-006
(Filed May 7, 2009)

ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO ON PHASE I OF PROCEEDING

This Ruling and Scoping Memo (Scoping Memo) sets forth the scope, schedule, and category of Phase I of this proceeding pursuant to Rule 7.3 of the Commission's Rules of Practice and Procedure (Rules). As indicated below, this proceeding will be conducted in two phases. I have concluded that hearings are not necessary in the first phase, but I reserve judgment on whether hearings may be needed in the second phase. Similarly, while the schedule for the first phase can be stated with some precision, the schedule for the second phase cannot. This Scoping Memo also addresses other procedural matters, as set forth below.

Pursuant to Rule 7.6, the only part of this Scoping Memo that may be appealed is its determination as to the category of this proceeding.

1. Background

The Commission issued Order Instituting Rulemaking (OIR) 09-05-006 on May 7, 2009. As stated in the OIR, the purpose of the rulemaking is to consider whether to grant exemptions from the requirements of Pub. Util. Code § 851 for specific actions by California telecommunications carriers subject to the Uniform

Regulatory Framework (URF) set forth in Decision (D.) 06-08-030.¹ § 851 concerns dispositions or encumbrances of utility property and provides in pertinent part:

No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...line, plant, system, or other property necessary or useful in the performance of its duties to the public...without first either having secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars, or for qualified transactions valued at five million dollars or less, filed an advice letter and obtained a resolution from the commission authorizing it to do so...

The OIR also stated that as part of the inquiry into whether exemptions from § 851 were appropriate for specific dispositions of property by URF carriers, the rulemaking would also consider whether any conditions should be placed on such exemptions pursuant to Pub. Util. Code § 853(b).² After setting forth a

¹ However, exemptions under § 851 for incumbent local exchange carriers (ILECs) that still file general rate cases (GRCs) are not within the scope of this proceeding.

² Pub. Util. Code § 853(b) provides in full:

The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

history of the various exemptions from § 851's requirements that the Commission has granted to telecommunications carriers, the OIR set forth a list of eight specific questions, invited affected parties to submit comments and proposals on the issues raised by these questions, and proposed a preliminary schedule for the proceeding. (OIR, pp. 7-10.)³

Pursuant to the schedule described in footnote 3, initial comments and proposals were submitted on June 26, 2009 by Pacific Bell Telephone Company d/b/a AT&T California (AT&T), Verizon California Inc. and its certificated California affiliates (Verizon), the Division of Ratepayer Advocates and The Utility Reform Network (DRA/TURN), the California Association of Competitive Telecommunications Companies (CALTEL), SureWest Telephone (SureWest), and the Consumer Federation of California (Consumer Federation).

In their comments, AT&T and Verizon argued that URF carriers (except ILECs still filing GRCs) should be granted a full and unconditional exemption from the requirements of § 851, and that many of the concerns raised in the OIR could be addressed through the special Telecommunications Industry Rules set forth in General Order (GO) 96-B. However, while AT&T sought a full § 851 exemption immediately, Verizon acknowledged that special issues may be raised by sales or other dispositions of assets that can be used to provide unbundled

³ On May 22, 2009, the Assigned Commissioner and the assigned Administrative Law Judge (ALJ) issued a joint ruling noting that both corrections to and clarification of the schedule proposed in the OIR were necessary. In keeping with this observation, the May 22, 2009 Ruling revised the schedule to provide for the filing of initial comments and proposals on June 26, 2009, the issuance of a scoping memo on July 24, 2009, and the filing of reply comments on August 21, 2009. The May 22, 2009 Ruling also stated that depending on the initial comments, additional schedule revisions might be necessary.

network elements (UNEs), collocation or related wholesale services. Verizon therefore proposed that this proceeding be bifurcated, with the first phase of the proceeding being devoted to sales or dispositions of assets unlikely to be controversial.

CALTEL's comments supported the idea of a bifurcated proceeding, although CALTEL took a narrower view than Verizon of what asset sales and dispositions might be viewed as noncontroversial. Like AT&T and Verizon, SureWest sought an unconditional exemption from the requirements of § 851. In their comments, DRA/TURN argued strongly against a wholesale § 851 exemption, and also urged the Commission to address alleged inconsistencies between the trial program for asset dispositions authorized in Resolution ALJ-202 and the decision in D.07-11-048 to extend the advice letter process used for non-dominant interexchange carriers and competitive local exchange carriers to URF ILECs. Consumer Federation argued that a broad exemption from the requirements of § 851 was against the public interest and that the Commission should continue to require URF ILECs to file § 851 applications, while considering waivers on a case-by-case basis.

On August 6, 2009, the Assigned Commissioner and the assigned ALJ issued a joint ruling concerning the issues raised by the parties' initial comments.⁴ The August 6, 2009 Ruling asked the parties to address these issues in their reply comments, and noted that until these questions were addressed, it would not be possible to issue a scoping memo, because neither the schedule nor

⁴ *Joint Assigned Commissioner's and Administrative Law Judge's Ruling Concerning Reply Comments and Proposals*, issued August 6, 2009. Hereinafter, this ruling will be referred to as the "August 6, 2009 Ruling."

the need for hearings could be determined. The questions on which the ruling sought comment consisted of the following:

1. What refinements (if any) should be made to Verizon's proposal to conduct the proceeding in two phases, under which the first phase would be devoted to the disposition of assets unlikely to be controversial, and the second phase would be devoted to asset dispositions more likely to be controversial, such as those involving UNEs, collocation, and other wholesale services?
2. Does it make sense to adopt Verizon's proposal to place all assets falling within Account numbers 2211-2441 of the Uniform System of Accounts of the Federal Communications Division (FCC)⁵ in the second phase of the proceeding?
3. Should CALTEL's alternative proposal for phasing -- under which only assets falling within CALTEL's fourth category would be exempt from § 851 -- be adopted instead of Verizon's?
4. In determining the scope of exemptions from § 851 for URF carriers, should the Commission rely on the fact that some of the key obligations of such carriers -- including withdrawals of basic service, notice obligations in customer base transfer situations, and carrier-of-last resort (COLR) obligations -- are set forth in the Telecommunications Industry rules in GO 96-B, and thus must be complied with independently of any exemptions that might be granted under § 851?
5. Should § 851 requirements be retained in situations where a change of control of a public utility may be contemplated, but the proposed change-of-control is not subject to the

⁵ The FCC's Uniform System of Accounts is set forth at 47 C.F.R. §§ 32.1-32.9000. These section numbers comprise Part 32 of 47 C.F.R.

requirements of Pub. Util. Code § 854?

6. If an exemption of some kind from the requirements of § 851 is granted, how can the Commission ensure that review of relevant projects under the California Environmental Quality Act (CEQA) continues to be adequate?

Pursuant to the August 6, 2009 Ruling, the parties submitted their reply comments on September 4, 2009.

2. Scope of Phase I of the Proceeding

2.1. The Proceeding will be Phased in Accordance with Verizon's Proposal, with Some Modifications

In their reply comments, all parties except Consumer Federation stated their basic support for the concept of a bifurcated proceeding, with the first phase devoted to the identification of asset dispositions unlikely to be controversial, and the second phase devoted to assets used to provide wholesale services. However, both DRA/TURN and CALTEL argued that workshops should be held to identify non-controversial assets with greater precision, since the descriptions set forth in the FCC's Uniform System of Accounts are not always self-evident. In their reply comments, DRA/TURN state:

...DRA/TURN do not agree with Verizon's list of items that are noncontroversial. For example, transactions involving buildings might have significant ratepayer and competitive implications if the building were a corporate headquarters, a large customer call center or billing office, a central office, or a payment center.

DRA/TURN suggest that the Commission order a workshop during Phase 1 for the parties to settle on the types of transactions that truly involve no controversy. The parties could discuss each type of transaction, and hopefully come to agreement on which transactions Phase 1 would cover and how the Commission should review those transactions. (DRA/TURN Reply Comments, p. 2.)

I am rejecting the proposals of DRA/TURN and CALTEL to hold workshops in connection with the first phase of this proceeding, because I believe such workshops would most likely result in unnecessary delay. Verizon's proposal to use the FCC's Uniform System of Accounts for determining which assets should be considered in the proposed first and second phases of the proceeding was quite specific, and the August 6, 2009 Ruling expressly invited other parties to offer refinements to Verizon's approach. While the reply comments of DRA/TURN and CALTEL offer hypotheticals about complications that might arise from using Verizon's approach, they do not identify any fundamental flaws in that approach, or argue that the FCC account descriptions are so lacking in detail that their use would create an unacceptable degree of uncertainty.

Accordingly, I have concluded that Verizon's proposal for a bifurcated proceeding should be adopted, and that the first phase of this proceeding should consider the assets contained within the following FERC account numbers, with the qualifications noted below:

Account No.	Account Title
2111	Land
2112	Motor vehicles
2113	Aircraft
2114	Tools & other work equipment
2121	Buildings ^[6]

⁶ As noted in its June 26, 2009 Initial Comments and Proposal, Verizon is not suggesting that all buildings covered by FCC Account 2121 should be included within the first phase of this proceeding:

Footnote continued on next page

2122	Furniture
2123	Office Equipment
2124	General purpose computers
2690	Intangibles ^[7]

In Phase II of this proceeding, the Commission will consider to what extent a § 851 exemption should be granted for assets used to provide telecommunications service directly, *i.e.*, switched network facilities, and if so,

The only assets that are not included in these accounts but should be reserved for Phase 2 are those portions of buildings containing 'active or reserved collocation space.' Although buildings are included in account 2121, that account does *not* distinguish between buildings and portions of buildings with collocation space *versus* buildings without collocation space (like administrative buildings), the latter being eligible for exemption in Phase 1 under Verizon's proposal. However, internal records should be readily available to identify those buildings including collocation space and space reserved for future collocation use so that the Commission can precisely define the scope of the assets being considered for exemption in Phase 1. (Verizon Initial Comments at 3-4; emphasis in original.)

⁷ The list of accounts to be considered in Phase I does not include Account 2681 (capital leases) and 2682 (leasehold improvements). These two accounts have been omitted because the same issues that Verizon identified with respect to buildings (as set forth in footnote 6) may also apply to capital leases and leasehold improvements. Subsection (a) of Account 2682, for example, states that the account should include "the original cost of leasehold improvements made to *telecommunications plant* held under a capital or operating lease, which are subject to amortization treatment." (47 C.F.R. § 2682(a); emphasis supplied.) Since URF ILECs do not file rate cases and are not subject to rate-of-return regulation, there appears to be no regulatory advantage to them in owning an asset rather than leasing it. Thus, it seems possible that there may be leases covering assets used to provide UNEs, collocation, or other wholesale services, and that the assignment or other disposition of such leases may raise issues that are more appropriately considered in Phase II.

whether any conditions should be imposed on such an exemption. These assets include working telephone plant, collocation space, and vacant space reserved for future collocation use. In keeping with Verizon's suggestion, and subject to the caveats noted in footnotes 6 and 7, the specific asset types to be covered in Phase 2 will be those included within FCC Account Nos. 2211-2232 (Central Office assets), 2311-2362 (Information origination/termination assets), 2411-2441 (Cable and wire facilities assets), and 2681-2682 (capital leases and leasehold improvements).

3. Schedule for Phase I of the Proceeding

As all parties have recognized in their reply comments, the purpose of having a phased proceeding is to allow a prompt decision on a § 851 exemption for non-controversial asset dispositions, while leaving to a later and lengthier phase the more difficult issues that may arise in connection with the disposition of assets used to provide wholesale telecommunications services such as UNEs and collocation.

Because I have concluded that a two-phase proceeding makes sense in this case, I have concluded that hearings will not be necessary in Phase I, and that it should be feasible to issue a Proposed Decision covering Phase I by the end of the first quarter of 2010.

However, I also recognize that questions may remain after this Scoping Memo about the precise inventory of assets to be included in Phase I, as well as about specific issues the parties may have in connection with particular Phase I asset types. Accordingly, all parties are invited to file supplementary comments on December 18, 2009 setting forth any such issues. Based on what is received, reply supplementary comments may also be requested.

If it is necessary to revise the schedule for Phase I because of these comments (or for other reasons), the Assigned Commissioner and the assigned ALJ (who acts as the assistant to the Assigned Commissioner pursuant to Pub. Util. Code § 1701.4 (a)) shall have the power to do so.⁸

4. Phase II of the Proceeding

Because it will presumably involve significantly more complexity, the schedule and precise scope of Phase II of this proceeding cannot be determined at this time. A separate scoping memo covering Phase II will be issued as soon as is reasonably feasible.

Another matter that cannot be determined now is whether hearings will be necessary in Phase II. I agree with the position taken by SureWest in its September 4, 2009 reply comments:

...SureWest believes that it is too early to determine whether phase II would require hearings. If there appear to be disputed issues of fact rather than disputes concerning policy, the Commission may wish to hold a hearing. However, SureWest believes that determination should be made at a later date when additional information is available. (SureWest Reply Comments, pp. 1-2.)

⁸ Although I propose to grant an exemption from § 851 in Phase I for non-controversial asset transfers, I believe URF ILECs should still be required to report these dispositions in an annual report. The report would take the form of a Tier 1 advice letter, which would serve to give interested parties notice of the transfers and an opportunity to protest one or more of them if the interested party believes that a particular transfer cannot legitimately be considered non-controversial. In its advice letter, the utility would be required to identify the type of asset, the sales price, and the nature of the purchaser. In the event the purchaser was an independent third party, no name would be required. In the event the purchaser was an affiliate of the utility, the utility would be required to name the affiliate.

Despite the uncertainties about Phase II and whether a hearing may be necessary, my goal is to resolve this proceeding within 18 months after issuance of this Scoping Memo, as provided in Pub. Util. Code § 1701.5(a).⁹

⁹ In the August 6, 2009 Ruling, the assigned ALJ and I asked the parties to comment on whether it was an adequate answer to some of the objections raised to a broad § 851 exemption that many of the concerns raised by the objecting parties are also dealt with in the Telecommunications Industry Rules in GO 96-B, which must be complied with independently of any requirements the Commission imposes under § 851. DRA/TURN, CALTEL and Consumer Federation all argued in their reply comments that the Telecommunications Industry Rules are not an adequate substitute for a full review under § 851.

Although I do not find these arguments particularly persuasive, it should be pointed out that this issue is more likely to arise in Phase II, in which transfers of assets used to provide wholesale services will be considered. All parties will be given a full opportunity in Phase II to develop their arguments about the adequacy of the Telecommunications Industry Rules as a substitute for some of the review that now occurs under § 851.

The same observation applies to CEQA review. In their reply comments, DRA/TURN and Consumer Federation argue that review of projects under CEQA is an obligation the Commission has independent of its duties under § 851, and that the Commission should not assume other agencies will necessarily fill the role the Commission has played in reviewing projects for environmental impacts. CALTEL, on the other hand, seems to agree with AT&T and Verizon that CEQA issues for URF carriers are being dealt with in R.06-10-006, and thus there is no need to address them here.

In D.09-10-020, the time for issuing a decision in R.06-10-006 was recently extended until December 17, 2009. If the decision in that proceeding does not address the CEQA issues that have been raised in the comments here to the parties' satisfaction, objecting parties will be given a full opportunity in Phase II to develop their arguments that the need for adequate CEQA review is a reason for limiting the scope of any exemption granted under § 851.

5. Proceeding Category and Need for Hearings

Pursuant to Rule 7.1(d), the Commission preliminarily determined in the OIR that this proceeding is quasi-legislative, and that because the proceeding could be conducted on a written record, hearings were not necessary.

This Scoping Memo confirms that the category for this proceeding is quasi-legislative, as defined in Rule 1.3(d). This determination of category can be appealed pursuant to Rule 7.6.

On May 22, 2009, CALTEL filed an opposition to the preliminary determination that hearings would not be necessary in this proceeding. CALTEL also reiterated its opposition in the initial comments that it filed on June 26, 2009, and in the reply comments it filed on September 4, 2009.

With respect to hearings, this Scoping Memo confirms that hearings will not be necessary in Phase I of the proceeding. It is not possible at this time to determine whether hearings may be necessary in Phase II.

6. *Ex Parte* Communications

As noted above, the category for this proceeding is quasi-legislative. Accordingly, pursuant to Rule 8.2(a), *ex parte* communications are allowed without restrictions or reporting requirements.

In accordance with the discussion above, **IT IS RULED** that:

1. The scope and schedule for Phase I of this proceeding are set forth in the body of this ruling. The schedule for Phase I may be revised as necessary by the Assigned Commissioner or the assigned Administrative Law Judge.
2. The scope and schedule for Phase II of this proceeding will be set forth in a future ruling.
3. The category of this proceeding is quasi-legislative.

4. Evidentiary hearings are not required in Phase I of this proceeding.
5. *Ex parte* communications are allowed in this proceeding without restrictions or reporting requirements.

Dated November 9, 2009, at San Francisco, California.

/s/ MICHAEL R. PEEVEY

Michael R. Peevey
Assigned Commissioner

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated November 9, 2009, at San Francisco, California.

/s/ GLADYS M. DINGLASAN
Gladys M. Dinglasan