

Decision 11-10-030 October 20, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of SureWest Telephone (U1015C) for exemption from California Public Utilities Code Section 851 to encumber assets to secure indebtedness.

Application 11-04-022  
(Filed April 27, 2011)

**DECISION DENYING REQUEST FOR EXEMPTION  
FROM PUBLIC UTILITIES CODE SECTION 851  
TO ENCUMBER ASSETS TO SECURE INDEBTEDNESS**

**1. Summary**

Today's decision denies SureWest Telephone's request for an exemption from California Public Utilities Code Section 851, which, in part, requires a utility to request our authority to encumber its assets for the purpose of securing indebtedness.<sup>1</sup> We also provide alternative solutions which SureWest Telephone may act on in order to resolve its concerns regarding compliance with California Public Utilities Code Section 851, including filing a petition to modify Decision 10-05-019, or requesting authority pursuant to California Public Utilities Code Section 851 prior to its being needed. This proceeding is closed.

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<sup>1</sup> In the case of SureWest Telephone and its parent, SureWest Communications, lenders require them to encumber all of their assets. Pursuant to Decisions 07-11-048 and D.10-05-019, we have granted partial exemptions from California Public Utilities Code Section 851, but not full exemptions for ILECs regulated under the uniform regulatory framework.

## 2. Background

On April 27, 2011, SureWest Telephone (SureWest) applied for an exemption from California Public Utilities (Pub. Util.) Code § 851, which, among other things, requires it to request authority to encumber all or part of its assets for the purpose of securing indebtedness.<sup>2</sup> No protests were filed.

SureWest, a subsidiary of SureWest Communications, provides telecommunications services in portions of Sacramento and Placer Counties in California. SureWest operates as an incumbent local exchange carrier (ILEC),<sup>3</sup> and is regulated in California under the uniform regulatory framework (URF).<sup>4</sup>

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<sup>2</sup> All subsequent statutory references are to the Public Utilities Code, unless noted otherwise.

<sup>3</sup> Basically, an ILEC is a local telecommunications provider that operates in the United States that was in existence on the date the Telecommunications Act of 1996 was enacted. This includes independent telephone companies such as SureWest (formerly Roseville Telephone) and General Telephone (which has since been absorbed into Verizon), as well as the Regional Bell Operating Companies, which resulted from the breakup of the AT&T in existence at that time.

<sup>4</sup> During the late 1980's and early 1990's, in various proceedings, we addressed issues such as pricing flexibility and alternative ratemaking for basic telecommunications service rates which resulted in a New Regulatory Framework (NRF) applicable to telecommunications providers in California. NRF was authorized for Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and Verizon California, Inc. (Verizon) in Decision (D.) 89-10-031, for Frontier in D.95-11-024, and for SureWest in D.96-12-074. Since the NRF decisions were issued, changes in the voice communications market have occurred, in particular, increased competition from the inclusion of multiple wireless carriers; competitive local exchange carriers (CLECs); and cable television companies. In 2005, we undertook a comprehensive review of the regulation of local exchange carriers in R.05-04-005. By D.06-08-030, we further changed rate regulation for California's four largest ILECs, including SureWest, by adopting a URF. By that decision, we eliminated such requirement as price regulations, and price caps; relaxed the procedural requirements for the four ILECs when offering new services and filing tariffs; reduced or eliminated accounting rules that cause regulatory accounts to diverge from financial accounts; and eliminated all monitoring reports tied

*Footnote continued on next page*

Other URF ILECs include AT&T, Verizon, and Frontier Communications of California (Frontier).<sup>5</sup>

### **2.1. Prior Consideration of URF ILEC Exemption from Section 851**

We have considered exemptions of URF ILECs from § 851 in two recent proceedings. In both, we granted partial exemptions, neither of which included an exemption from the requirement that an URF ILEC request authority to encumber all assets for securing indebtedness.

In A.06-07-026, AT&T requested authority for full exemption from § 851 for the disposition or encumbrance of necessary and useful property. SureWest and Verizon supported this application and requested that the exemption requested by AT&T apply to all URF ILECs.<sup>6</sup> The responding ILECs favored full exemption but would accept CLEC/nondominant interexchange carrier (NDIEC) - equivalent treatment as an interim measure.<sup>7</sup> Even though we determined that an application by a single carrier is not the appropriate proceeding in which to consider a full exemption, we decided to include URF ILECs in any relief granted AT&T in A.06-07-026.<sup>8</sup> In D.07-11-048 in that proceeding, we denied the request by AT&T for full exemption from § 851, but extended to all of the URF ILECs

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to NRF governing the ILECs, replacing them with standardized reporting requirements consistent with reports provided by all carriers to the Federal Communications Commission.

<sup>5</sup> Throughout this decision we refer to SureWest, AT&T, Verizon, and Frontier collectively as URF ILECs.

<sup>6</sup> See D.07-11-048 at 2.

<sup>7</sup> See D.85-11-044 for NDIEC authority and D.97-01-015 for CLEC authority.

<sup>8</sup> See D.07-11-048 at 4-5.

relief from the requirements of § 851, subject to certain limitations.<sup>9</sup> We also, deferred consideration of full exemption by URF ILECs from § 851 to a rulemaking.

In Rulemaking (R.) 09-05-006, we considered, among other issues, the full exemption of both mid-size and large URF ILECs from § 851 with regard to the disposition or encumbrance of necessary and useful utility property.<sup>10</sup> In its opening comments regarding the scope of R.09-05-006, SureWest supported exemption of URF ILECs from § 851. By D.10-05-019, we granted URF ILECs further exemptions from § 851 with respect to the disposition of certain non-controversial assets, but did not grant them full exemption from § 851.<sup>11</sup>

### **3. Request for Exemption from Pub. Util. Code § 851 Encumbrance of All Assets to Secure Indebtedness**

SureWest seeks authority for exemption from § 851 regarding the encumbrance of all assets for the purpose of securing indebtedness of its parent company. SureWest states that, upon obtaining Commission approval, it would grant a security interest in all of its assets in connection with credit facilities described in its application, as well as guarantee notes secured by these assets on behalf of its parent company, SureWest Communications.<sup>12</sup> SureWest Communication's lenders require it to encumber all of its assets to secure

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<sup>9</sup> See D.07-11-048 at Ordering Paragraph 2.

<sup>10</sup> See R.09-05-006 at 1 and 7. Also considered exemption by CLECs and NDIECs from § 851.

<sup>11</sup> See D.10-05-019 at 2.

<sup>12</sup> Since SureWest's finances are managed at the holding company level, its parent, SureWest Communications, obtains financing for SureWest.

indebtedness, including those assets of SureWest. Since SureWest Communications (and consequently SureWest) represents that it is required by its lenders to encumber all of its assets to secure indebtedness, and the exemption from § 851 that we authorized in D.10-05-019 applies to some but not all of the assets of URF ILECs, SureWest (as a subsidiary of SureWest Communications) must still file an application requesting authority to encumber its assets pursuant to § 851.

In support of its desire for this type of exemption from § 851, SureWest refers to past decisions in which we have granted URF ILECs partial relief,<sup>13</sup> while granting its competitors more extensive relief.<sup>14</sup> SureWest states that in these decisions, the Commission recognizes that the § 851 process does not suit the needs of the current telecommunications marketplace or its customers. SureWest also states that, unlike other URF ILECS, such as AT&T, Verizon, and Frontier, which are subsidiaries of large national holding companies, SureWest's parent is smaller, with operations in just a few states. SureWest concludes that the remaining applicable requirements of § 851 have a greater effect on it than on the other URF ILEC's.

SureWest Communications finds that, given its size, as well as current credit market conditions, the difference between interest rates offered for secured loans is much less than for an unsecured loans. Therefore, in order to acquire indebtedness at a lower rate, SureWest and SureWest Communications must

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<sup>13</sup> See D.10-05-019.

<sup>14</sup> See D.85-11-044 and D.97-01-015.

now encumber all of their assets to secure indebtedness, which they believes puts them at a disadvantage relative to its competitors.

SureWest finds that, in its most recent request to encumber assets to secure new indebtedness,<sup>15</sup> that it was unable to “nimply” adjust the amount of indebtedness it had requested in that § 851 application, when, subsequent to filing its application, the lender offered to increase the amount of the loan. Since it would have had to amend its application, including notice of the amendment as well as allowance for a protest period regarding the amendment, SureWest decided not to amend its application. SureWest states that if it had been exempted from § 851 as requested in the current application, it would have been able to accept the increased loan amount. SureWest posits that, inherent in being required to receive Commission approval, its ability to take advantage of low interest rates is jeopardized and it is placed at a competitive disadvantage.

SureWest assures that, if its requested exemption is granted, the property it encumbers to secure indebtedness could not be transferred without Commission approval.

#### **4. Discussion**

We deny SureWest’s request for exemption from § 851, which requires a utility to request our authority to encumber its assets (in the case of SureWest, all of its assets) to secure indebtedness. We also propose alternatives that SureWest may pursue in order to resolve its concerns regarding compliance with § 851.

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<sup>15</sup> See Application (A.) 10-12-013 and D.11-02-022. In that decision, the Commission granted SureWest Communications and SureWest authority to encumber assets for the purpose of securing specific amounts and forms of debt.

SureWest's request is one that affects all URF ILECs, not just itself. SureWest may be smaller than the other URF ILECs and may not operate throughout the country, but it is subject to the same regulation as the other URF ILECs. SureWest's requested exemption is therefore a matter that affects all telecommunications carriers in California that are subject to URF regulation. As such, SureWest should raise its request in a proceeding such as a rulemaking, in which all affected utilities may participate, instead of an individual application. As discussed in Section 2 of this decision, we have considered the exemption of URF ILECs from § 851 in a recent rulemaking. In D.10-05-019, we granted, after considering a full exemption, only a partial exemption from § 851. If SureWest would like us to reconsider our decision in R.09-05-006, a petition for rulemaking would be the appropriate vehicle in which to do so, to modify that decision. By so doing, SureWest could make its request, and that request could be commented on by other URF ILECs and other interested parties that are affected by any change to our regulation of URF ILECs.<sup>16</sup>

Another alternative for SureWest to resolve its concern that it is not able to quickly react to changes in the credit market because it is required to comply with § 851, is to request such authority prior to entering into negotiations with a lender for new indebtedness.<sup>17</sup> By so doing, it will have the authority "on the

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<sup>16</sup> Since it is now more than one year since that decision was issued, SureWest will have to prove why it did not file such petition sooner.

<sup>17</sup> Rule 3.6 of the Commission's Rules of the Practice and Procedure requires, in part, that applications to encumber utility rights (for example, utility assets) pursuant to Sections 851-854, "should be signed by all parties to the proposed transaction, except the lender." Therefore, in the case of a utility requesting Section 851 authority to encumber assets to secure debt, the only signatory to the application is the utility applying for such authority. For example, in D.08-10-013 at page 6, we authorized the

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shelf” and ready to be used. SureWest and its parent would be able to take advantage of any changes in the credit market or offers from a lender, while continuing to comply with § 851.

Lastly, since we granted SureWest authority in D.11-02-022 to encumber all of its assets to secure indebtedness, we find no need to exempt SureWest from a Pub. Util. Code Section that it has complied with at this time.

### **5. Categorization and Need for Hearing**

In Resolution ALJ-176-3273, dated May 5, 2011, we preliminarily categorized this application as ratesetting, and preliminarily determined that evidentiary hearing would be necessary. The matter was not protested. No prehearing conference was held, and no Scoping Memo was filed, thereby conserving limited Commission and party resources while expeditiously processing this matter. Given these developments, we make a final determination here that the category is ratesetting, and a public hearing is not necessary.

### **6. Comments on Proposed Decision**

As provided by Rule 14.3 of our Rules of Practice and Procedure and Pub. Util. Code § 311 (g)(1), the proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties on August 25, 2011. Opening Comments were filed by SureWest on September 14, 2011. We have considered the comments in our final order.

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encumbrance of utility property pursuant to Section 851 to secure an aggregate amount of Debt Securities - no specific lenders or issuance amounts were identified in the decision.

## **7. Assignment of Proceeding**

Catherine J. K. Sandoval is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. In addition to SureWest, URF ILECs include AT&T, Verizon, and Frontier.
2. We have considered exemption of URF ILECs from § 851 in A.06-07-026 and R.09-05-006.
3. In D.07-11-048 and D.10-05-019, we granted URF ILECs partial exemptions from § 851. Neither of these decisions granted an exemption from the § 851 requirement that an URF ILEC request authority to encumber all assets to secure indebtedness.
4. In D.07-11-048, we determined that an application by a single carrier is not the appropriate proceeding in which to consider full exemption by an URF ILEC from § 851, and that a rulemaking was the appropriate vehicle for considering broader exemption from § 851.
5. In D.11-02-022, we granted SureWest authority to encumber all of its assets to secure indebtedness, pursuant to § 851.

### **Conclusions of Law**

1. The appropriate proceeding in which to consider a request for exemption from § 851 is a rulemaking.
2. SureWest's request for exemption from § 851 to encumber all assets to secure indebtedness should be denied.
3. This proceeding should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. SureWest Telephone's request in Application 11-04-022 for exemption from California Public Utilities Code Section 851 to encumber all assets to secure indebtedness is denied.
2. The appropriate proceeding in which to consider a request for exemption from California Public Utilities Code Section 851 is a rulemaking.
3. No hearings are necessary.
4. Application 11-04-022 is closed.

This order is effective today.

Dated October 20, 2011, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners