

Decision 05-06-063

June 30, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company dba SBC California to Modify D.94-09-065 to Enable SBC California to Reduce Prices to Meet Competition.

Application 04-03-035
(Filed March 30, 2004)

ORDER MODIFYING DECISION (D) 04-11-022
AND DENYING REHEARING OF THE DECISION AS MODIFIED

I. INTRODUCTION

On March 30, 2004, Pacific Bell Telephone Company dba SBC California (“SBC”) filed an application seeking Commission authorization to “lower or waive any tariffed charge . . . to meet a competitor’s legal price, irrespective . . . of the . . . price floor tests described in the IRD [Decision 94-09-065].” SBC argued that consumers would benefit from modifying the price floors to enable SBC to lower its prices to meet competitor offerings, and that pricing to meet competition is legal, regardless of costs. Verizon California, Inc. (“Verizon”) supported the application.

At the Prehearing Conference (“PHC”), held on July 2, 2004, the parties agreed that a motion for summary judgment by SBC would be an efficient initial means of addressing the issues raised by the application, with further proceedings, if necessary, to resolve any remaining issues. The purpose of the motion was to resolve policy and legal issues, and identify disputed issues of material fact, if any, that would require further evidentiary hearings. (D.04-11-022, pages 2-3.) Verizon also filed a motion for summary judgment.

On July 13, 2004, the Assigned Commissioner and ALJ consolidated SBC Advice Letters 24278 and 24279 into this proceeding. SBC’s application and the

consolidated advice letters seek the Commission's approval of two different mechanisms. The application seeks broad authority for SBC to lower or waive any tariff charged to meet a competitor's price. The advice letters seek authority to waive installation charges for customers returning to SBC from another facilities-based carrier. In the Decision, we concluded that SBC's proposal to lower or waive any tariffed charge to meet a competitor's price irrespective of cost is inconsistent with the fundamental principles of the IRD decision, and should be denied. The Commission, therefore, rejected SBC's application as not consistent with the IRD decision and as otherwise not justified as being in the public interest.

On December 21, 2004, Verizon filed this application for rehearing. Opposition to the Application was filed by the California Association of Competitive Telephone Companies ("Association"), Cox California Telecom and Pac-West Telecom ("Cox"), TURN and the Office of Ratepayer Advocates ("ORA-TURN") and Anew Telecommunications Corp. ("Anew").

II. DISCUSSION

Verizon contends that the Decision errs by including a finding of fact, a conclusion of law and other statements characterizing the state of competition in the telecommunications market in California, which Verizon would correct with its own proffered language. (Application, page 1.) Verizon's fundamental argument is that SBC stipulated to local market dominance at the pre-hearing conference for the sole and explicit purpose of avoiding what would almost certainly have been a protracted factual dispute regarding the state of competition in the telecommunications market. Verizon further alleges that the company clearly intended its stipulation to be used only for the purposes of streamlining this proceeding, not as an admission to be used against it in other cases. Verizon alleges that the final Decision includes a number of "highly subjective characterizations regarding the state of competition in the telecommunications market and SBC and Verizon's alleged domination of that market." (Application, page 3.)

Specifically, Verizon objects to the following language:

- Finding of Fact No. 4: “Neither SBC nor Verizon dispute that their share of the residential and small business telephone market and financial resources, as compared to their competitors, have not materially changed since this Commission adopted the NRF and IRD decisions.”
- Conclusion of Law No. 7: “SBC’s and Verizon’s domination of the residential and small business telephone market has not materially changed since the Commission adopted the IRD principles.
- Pp. 17-18: “At this time, the availability of other modes of telecommunications service has not substantially changed this fact [that SBC and Verizon dominate the telecommunications market]. Consequently, we conclude that the underlying facts have not changed sufficiently to warrant deviation from the IRD principles.”
- Last sentence of footnote 8: “No party disputes that SBC and Verizon are dominant firms.”
- Footnote 9: “We also note that SBC and Verizon have a substantial presence in the market for other modes of telecommunications services as well. For example, SBC’s Cingular affiliate and Verizon’s wireless affiliate serve a significant share of the wireless market.”

(Application, page 4.)

Verizon finally argues that no formal Finding of Fact was included in the Decision indicating that these characterizations were based on SBC’s stipulation. The point is well-taken. We will add an additional Finding of Fact to accomplish this.

1. The Competitive Findings do not Violate Rule 51.8 of the Commission’s Rules of Practice and Procedure.

Rule 51.8 provides as follows:

“Commission adoption of a stipulation . . . is binding on all parties to that proceeding in which the stipulation is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding any principle or issue in the proceeding or in any future proceeding.”

Verizon alleges that, although the Decision acknowledges SBC's stipulation in passing, it fails to explicitly limit its competitive findings to this case, "making it likely that other parties will attempt to use the findings against SBC and Verizon in other cases where the competition issue will be addressed." (Application, page 5.)

As pointed out by Cox in their Opposition to the Application for Rehearing at page 10 "the language of Rule 51.8 is clear that unless the Commission expressly provides otherwise, a stipulation cannot be used as precedent in another proceeding". It could therefore reasonably be argued that any further language on this matter is unnecessary. However, in an abundance of caution, we will make it clear that the results of such stipulations cannot be used in other proceedings without express Commission authorization. Accordingly, we will add a new Conclusion of Law to accomplish this.

2. The Competitive Findings do not Violate the Summary Judgment Standard.

Verizon complains that the Commission violated its own standard for evaluating summary judgment motions as described in *Westcom*, D.94-04-082,54 CPUC 2d 244, 249: "The Motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." But if "the party's filings disclose the existence of a disputed issue of material fact, the motion must be denied."

Verizon argues that the competitive findings included in the Decision violate this standard because both SBC and Verizon explicitly disputed the purported factual basis for these findings in the record, and the Commission clearly found them to be material to the outcome of the Decision. (Application, page 6.)

What makes this argument particularly difficult to understand is that SBC itself filed the motion for summary judgment, supported by Verizon, pursuant to an agreement entered into by the majority of the parties to the proceeding with the Assigned Commissioner and ALJ. As Association states in its Opposition to the Application For Rehearing at page 2: "it is almost amusing that Verizon sought a decision by means of a

summary judgment motion and then, faced with a decision it does not like, now contends that the Commission was not in a position to grant summary judgment.”

Verizon should be estopped from proposing a procedural method for resolving a dispute and then complain when the result of that procedural method goes against it. Further, Verizon is not here asking that the Decision be overturned, but only that certain language should either be deleted or modified. (Application, page 10.) Verizon does not deny its and SBC’s dominance in the local telecommunications market in California. Verizon’s complaint is, rather, that the Commission exaggerated the extent of that dominance in the Decision. This argument is partly meritorious, as set out in the following section. However, the fact remains that Verizon and SBC affirmed their dominance in the local telephone market in California. The allegation that the Commission erred in denying the motion for summary judgment requested by Verizon and SBC based on SBC’s own stipulation acquiesced in by Verizon is without merit.

3. The Decision Should be modified to Accurately Reflect the Stipulation Made.

Verizon admits in its Application that SBC stipulated to local market dominance for the purpose of this proceeding. (Application, page 1.) As stated by counsel for SBC at the PHC “It can be assumed, for purposes of this proceeding, that we are a dominant firm.” Verizon’s complaint is that the Commission went beyond this simple stipulation and added language in the Decision that nothing has changed in the telecommunications market in California with respect to Verizon and SBC vis-à-vis their competitors since the IRD Decision. The argument has merit. SBC stipulated, for the purpose of this proceeding, that they are a dominant firm, but not that the telecommunications industry has remained unchanged for the previous 15 years. The Decision should therefore be modified to reflect this fact.

III. CONCLUSION

D.04-11-022 should be modified to replace Finding of Fact 4 and Conclusion of Law 7 and to add Conclusion of Law 18. Rehearing of the modified decision is denied.

IT IS ORDERED that:

1. Finding of Fact 4 at page 25 is modified to read as follows:
“4. Neither SBC nor Verizon dispute their dominance in the local residential and small business telephone market and financial resources, as compared to their competitors.”
2. Finding of Fact 8 is added as follows:
“8. SBC stipulated at the Prehearing Conference that it is a ‘dominant firm’ in the local telecommunications industry.”
3. Conclusion of Law 7 at page 27 is modified to read as follows:
“7. Pursuant to stipulation, SBC and Verizon continue to dominate the local residential and small business telephone market.”
4. Conclusion of Law 18 is added at page 28:
“18. Pursuant to Rule 51.8, unless the Commission specifically provides otherwise, the competitive findings made in this proceeding may not be used by any party in any other proceeding before the Commission.”
5. Rehearing of D.04-11-022, as modified herein, is denied.
6. This proceeding is closed.

This order is effective today.

Dated June 30, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY R. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

Commissioner John A. Bohn, being necessarily absent,
did not participate.