

Decision 07-03-008 March 1, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC Advanced Solutions, Inc. (U 6346 C) Pursuant to Section 853(b) of the Public Utilities Code for Exemption From the Provisions of Section 851 of the Public Utilities Code With Respect to the Transfer of Certain Local Field Organization Assets.

Application 04-08-041
(Filed August 31, 2004)

**OPINION GRANTING EXEMPTION
FROM THE REQUIREMENTS OF PUBLIC UTILITIES CODE SECTION 851
FOR THE TRANSFER OF CERTAIN LOCAL FIELD ORGANIZATION ASSETS**

Summary

By this order, the Commission grants SBC Advanced Solutions, Inc.'s¹ (SBC ASI or Applicant) application pursuant to Pub. Util. Code § 853(b) and exempts SBC ASI from the requirements of Section 851 with respect to the transfer by SBC ASI of certain Local Field Organization (LFO) assets, primarily trucks, test kits, and certain leases relating to garage space, to its affiliate, Pacific Bell Telephone Company, doing business as SBC California.² This proceeding is closed.

¹ The company is currently doing business as AT&T Advanced Solutions, Inc.

² Currently, the company is doing business as AT&T California.

Background

1. The Parties

SBC ASI is a certificated competitive local exchange carrier (CLEC) providing packet switching-based advanced services in California.³ SBC ASI's advanced services are comprised of DSL Transfer service, Asynchronous Transfer Mode (ATM) and Frame Relay Service (FRS). The company also provides intrastate RLAN DSL Transport services to a small number of customers pursuant to tariffs on file with the Commission. Its principal place of business is 1010 N Saint Marys Street, San Antonio, Texas 78215. SBC ASI is organized under the laws of the state of Delaware.

SBC ASI seeks an order from the Commission, under Pub. Util. Code § 853(b), exempting it from the requirements of Section 851 for the transfer of certain SBC ASI's LFO assets⁴ to its affiliate, SBC California. It asserts that an exemption under Section 853(b) is appropriate given the limited scope, quantity and value of the assets in question, as well as the fact that the assets will continue to be used by SBC ASI on a contract basis in the field installations and repairs for its DSL Transport services.

³ SBC ASI operates in this state pursuant to authority granted by the Commission in Decision (D.) 00-05-021, and pursuant to authority granted by the Federal Communications Commission (FCC) to provide interstate data services, specifically Wholesale Digital Subscriber Line (DSL) Transport service for use by Internet service providers (ISPs) and high-speed Internet access.

⁴ The assets consist primarily of trucks, test kits, and certain leases relating to garage space. SBC ASI's LFO is directly responsible for field installation, maintenance and repair of DSL Transport service facilities at the ISP customers' premises.

The California ISP Association, Inc. (CISPA) filed a response to the application urging the Commission to “undertake a sufficient review” and to impose adequate safeguards to protect the public interest. Specifically, CISPA asks the Commission to require SBC ASI and SBC California to report any and all customer complaints associated with local field activities on a quarterly basis for a full calendar year if it approves the application. CISPA also calls for the Commission to continue to exercise oversight of SBC ASI and related SBC entities involved in provisioning DSL services in California.

The Division of Ratepayer Advocates⁵ (DRA) and The Utility Reform Network (TURN) also filed a joint response, which included an agreement the two had reached with SBC ASI and SBC California.⁶ Under the terms of the accord, DRA and TURN have agreed not to oppose the transfer of the LFO assets, and requested that the Commission not deem SBC ASI’s valuation to be “final or binding on any party,” but rather should be “audited and, if necessary, corrected at a later time.” (DRA/TURN Response at 1-2, 3-4, and Attachment A.) In turn, SBC ASI agreed that the issue of the appropriate valuation of the assets remains open for later resolution.

2. Description of the Assets

SBC ASI’s LFO is directly responsible for field installation, maintenance and repair of DSL Transport service facilities at the ISP customers’ premises. Its 540 employees are service technicians, maintenance administrators, and managers. Among the service technicians’ duties at the ISP customers’ premises

⁵ Formerly known as the Office of Ratepayer Advocates.

⁶ While SBC California is a party to the agreement, it is not a party to this proceeding.

are trouble isolation, surface wiring, and hardware and software modem setup and repair. The maintenance administrators perform centralized installation and repair dispatch functions for the service technicians. The managers coordinate, supervise, and administer LFO functions and personnel. SBC ASI proposes transferring all of the LFO employees to SBC California where they will continue their current functions.

LFO functions do not involve the installation, maintenance or repair of SBC ASI's central office (CO) equipment, such as digital subscriber line access multiplexers, splitters and other CO-based facilities. Instead, the LFO's work is limited to ISP customers' premises, without any involvement in customer service ordering, or record and billing functions. SBC ASI currently owns 520 motor vehicles⁷ and 686 test sets⁸ at its California LFO, and records each of these types of assets in its Continuing Property Records at original cost.⁹ In this transaction, SBC ASI also proposes to transfer limited amounts of certain expensed assets including hand tools and furniture. Overall, it sets the valuation of the various resources as follows: 1) Original Cost-\$13,104,729.85; 2) Fair Market Value-\$8,345,000; and 3) Net Book Value-\$9,462,051.29.

SBC ASI asserts that its LFO assets comprise "a relatively small percentage" of its investment in plant and equipment necessary to provide data

⁷ These are primarily vans, which transport the service technicians to job sites.

⁸ The test sets are used to test and verify electronic parameters required for viable DSL transport service.

⁹ In the Continuing Property Records, original cost is either the transfer payment cost for assets transferred from SBC California or the purchase price for assets acquired by SBC ASI in the open market.

services, including primarily DSL Transport services to customers in California. (SBC ASI Application at 5.) As of the end of 2003, SBC ASI's net undepreciated plant in service in the state was approximately \$700 million.¹⁰ Comparatively, as set forth above, the aggregate Fair Market Value of the trucks, test sets, and other expensed assets to be transferred to SBC California was just over \$8 million, slightly more than 1% of SBC ASI's total California assets. These assets support services that comprise a small fraction of SBC ASI's annual gross revenue in California, which also was \$700 million in 2003.

According to SBC ASI, transferring the LFO assets to SBC California will not disrupt or diminish service to its customers because the assets will continue to be used to provide DSL LFO functions. Indeed, the expectation is that the transfer will facilitate SBC California more efficiently providing LFO functions for a variety of telecommunications services.

3. Transfer of Utility Assets

Transfers of utility property such as those requested by this application require approval of the Commission under Section 851.¹¹ Any such transfer

¹⁰ *Id.* at Attachment B: SBC ASI's Annual Report filed with the Commission including Balance Sheet and Income Statement for calendar year 2003.

¹¹ Section 851 reads, in relevant part: "No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000), or for qualified transactions valued at

Footnote continued on next page

without approval of the Commission is void. (*Transport Clearings-Bay Area v. Simmonds*, 226 Cal App.2d 405, 419 (1964).) However, Section 853(b) provides an exemption from the requirements of Section 851:

(t)he 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.

In the past, the Commission has utilized its authority under Section 853(b) to provide a broad exemption for CLECs from the requirements of Section 851 for the transfer or hypothecation of assets for the purpose of securing debt, recognizing the burden formal Section 851 approval of each such transaction would place both on the CLECs and on the Commission. (*See Petition of Pac-West Telecom, Inc. For Modification of Decision (D.) 97-01-015*, 70 CPUC 2d 582, 584 (January 13, 1997) and *Re SBC Advanced Solutions, Inc.*, 6 CPUC 3d 88, 104 (May 4,

five million dollars (\$5,000,000) or less, filed an advice letter and obtained a resolution from the commission authorizing it to do so. . . . Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property that is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property that is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with that property in good faith for value, provided that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.”

2000).) The Commission has also used its Section 853(b) authority to provide a broad exemption for the sale of meters by electric utilities to their customers, citing the burden of requiring individual Section 851 applications for each such sale. (*In Re the Application of Pacific Gas & Electric Company Proposing Prices and Conditions for the Purchase by Customers of Their Existing Meters in Compliance with Decisions (D.) 98-07-032 and D.99-11-008 et al.* 2002 Cal. PUC LEXIS 636.)

The Commission has also utilized its Section 853(b) authority to grant an exemption of more fundamental utility transactions, including exemption from the requirements of Section 854 for the full corporate financial reorganization of WorldCom as it emerged from bankruptcy. (*In Re Application of WorldCom, Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of Sections 851 and 854 of the Public Utilities Code With Respect to its Bankruptcy Reorganizations.* 2003 Cal. PUC LEXIS 554.)

Noting that it grants exemptions under Section 853(b) only in “extraordinary” situations, the Commission nevertheless granted WorldCom’s request citing the facts that the transaction, which involved a full financial reorganization, would alter no rates or other terms of service, the company was taking steps to change its past corporate practices, and the plan of reorganization would preserve a viable competitor in the California telecommunications market. (*Id.* at *15-*16.)

Discussion

One of the fundamental purposes of Section 851 approval of the sale or transfer of utility assets is to permit the Commission to make a determination that the assets transfer will not impair the ability of the utility to provide adequate service to its customers following the transaction. (*See Camp Meeker Water Co.*, 66 CPUC 2d 314 (1996).) Here, SBC ASI plans to transfer a limited

group of assets, essentially trucks, test kits, and garage space to its affiliate SBC California where the assets will continue to be utilized in the same manner and by the same personnel to support DSL Transport service to California customers. Thus, we find that following the transfer of these assets to SBC California, SBC ASI's customers should see no change in the nature of the DSL LFO service and repair activity that they currently experience.

Another important function of the Commission's Sections 851 and 854 approval process is the determination that the selling/transferring utility has obtained a fair price for the assets in question. (*Re AT&T Corporation*, 85 CPUC 2d 249, 256 (1999).) In this transfer proposed by SBC ASI, the price to be paid by SBC California is to be determined by the Commission's and the FCC's affiliate transaction rules. Under the Commission's rules, for the sale of assets by Applicant to SBC California, SBC ASI will be paid the lower of net book value or fair market value for assets it purchases from its affiliates. These rules appear to have been followed here in determining the appropriate transfer price.

In their joint response, DRA and TURN recommend that the Commission "approve ASI's request for exemption of this particular transaction" from its Section 851 requirements. (Joint Response at 4.) Their support is based on their review of the application, their determination that reintegration of the LFO functions back into SBC California is a good idea and on an accord reached with Applicant and SBC California, and appended to the joint response. That agreement simply preserves the right of DRA and TURN to review the valuation of these LFO assets by SBC ASI and their booking by SBC California in a separate appropriate proceeding. It further acknowledges that Commission approval is limited to the facts of this case. SBC ASI affirms the commitments it made in the agreement, one of which was to provide a copy of the valuation of the LFO assets

that are to be transferred to SBC California. Given the DRA/TURN recommendation, the fact that the absolute value of the assets is small both in absolute terms and in relation to the overall assets of both Applicant and SBC California, we find little merit in subjecting this aspect of the transaction to a full Section 851 inquiry.

The California Environmental Quality Act (CEQA) requires the Commission, when approving “projects,” to assess the impact of its approval on the environment. These LFO assets will be used by SBC California in the same manner as they have been used by SBC ASI, installing, maintaining, and repairing equipment located in the field at the customers’ premises. Since it can be seen with certainty that the transfer of these will have no significant impact on the environment, we find CEQA review is not required; thus, a Section 851 assessment is unnecessary.

Regarding CISPA’s recommendation, there is not any specific problem with SBC ASI’s local field organization activities that would justify the new reporting requirements it urges. Moreover, there does not appear to be any allegation that the LFO function is inadequate currently or will become inadequate upon transfer to SBC California. Thus, there is no basis to impose the reporting condition that CISPA recommends.

When all of the above factors are considered, application of the requirements of Section 851 to this transaction “is not necessary in the public interest.” Accordingly, we grant SBC ASI’s application pursuant to Section 853(b) and exempt SBC ASI from the requirements of Section 851 with respect to the transfer by SBC ASI of certain LFO assets, primarily trucks, test kits, and certain leases relating to garage space, to its affiliate, SBC California.

Categorization

In Resolution ALJ 176-3139, dated September 23, 2004, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, the Commission concludes that a public hearing is not necessary; thus, the preliminary determinations in Resolution ALJ 176-3139 will not be altered.

Comments on Proposed Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2) and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Jacqueline A. Reed is the assigned Administrative Law Judge.

Findings of Fact

1. Resolution ALJ 176-3139 preliminarily categorized this as a ratesetting proceeding and preliminarily determined that hearings were not necessary.
2. Notice of this application appeared in the Commission's Daily Calendar of September 23, 2004.
3. No protests were filed.
4. SBC ASI sought review under Pub. Util. Code § 851 through § 854, and requested an exemption from the requirements of Section 851 for its transfer of certain LFO assets to its affiliate, SBC California.
5. Following the transfer of the LFO assets to SBC California, SBC ASI's customers should see no change in the nature of the DSL LFO service and repair activity that they currently experience.

6. In accordance with Commission rules, for the sale of assets by Applicant to SBC California, SBC ASI will be paid the lower of net book value or fair market value for assets it purchases from its affiliates.

7. DRA and TURN submitted a joint response recommending that the Commission “approve ASI’s request for exemption of this particular transaction” from its Section 851 requirements.

8. It can be seen with certainty that the transfer of these assets will have no significant impact on the environment.

9. There is no basis to impose the reporting condition that CISPA recommends because there does not appear to be any allegation that the LFO function is inadequate or will become inadequate upon transfer to SBC California.

Conclusions of Law

1. This proceeding is designated as a ratesetting proceeding; no protests have been received; no hearing is necessary.

2. CEQA review is not required.

3. Application of the requirements of Section 851 to this transaction “is not necessary in the public interest”; therefore, the Commission should exempt SBC ASI from those requirements pursuant to Section 853(b).

4. Since the matter is uncontested, the decision should be effective on the date it is signed.

O R D E R

IT IS ORDERED that:

1. Application (A.) 04-08-041 of SBC Advanced Solutions, Inc. (SBC ASI) is granted, pursuant to Pub. Util. Code § 853(b), thereby exempting A.04-08-041

from the full requirements of Pub. Util. Code § 851 with respect to the transfer by SBC ASI of certain Local Field Organization assets, which consist primarily of trucks, test kits, and certain leases relating to garage space, to its affiliate, Pacific Bell Telephone Company, doing business as SBC California.

2. SBC ASI shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control authorized herein, within 10 days of the later of either the date of consummation of such transfer, or the date of the signing of this order.

3. A.04-08-041 is closed.

This order is effective today.

Dated March 1, 2007, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners