

Decision 07-11-048 November 16, 2007

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

In the Matter of the Application of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) for a Commission Order Exempting AT&T California from the Requirements of Public Utilities Code Section 851.

Application 06-07-026  
(Filed July 25, 2006)

**OPINION GRANTING URF ILECS A PARTIAL EXEMPTION FROM THE SECTION 851 APPROVAL PROCESS**

We deny Pacific Bell Telephone Company's (AT&T California) request for a full exemption from Pub. Util. Code § 851's requirements for the disposition or encumbrance of necessary and useful property.<sup>1</sup> We extend relief from the requirements of § 851 comparable to that in place for nondominant interexchange carriers (NDIEC) and competitive local exchange carriers (CLEC) to AT&T California and other Uniform Regulatory Framework (URF) incumbent local exchange carriers (ILECs), subject to limitations. We defer consideration of

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<sup>1</sup> Pub. Util. Code § 851 provides:

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, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its . . . line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, 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 . . .

full exemption for URF ILECs, CLECs and NDIECs to a rulemaking, which we will issue in the near future.

## **1. Background**

AT&T California applied for an exemption from Pub. Util. Code § 851 under § 853(b). Section 851 requires pre-approval for dispositions of necessary property – by order for property valued above \$5 million and by resolution for property valued at \$5 million or less. Section 853(b) permits the Commission to exempt any public utility or class of public utilities from § 851 if applying § 851 procedures is not necessary in the public interest.<sup>2</sup>

SureWest Telephone (SureWest) and Verizon California Inc. (Verizon)<sup>3</sup> supported the application and requested that the exemption apply to all Decision (D.) 06-08-030 URF ILECs. The Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN) protested the application due to public interest concerns.

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<sup>2</sup> Section 853(b) provides: “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.”

<sup>3</sup> Verizon submitted its comments on behalf of itself and its certificated California affiliates: Bell Atlantic Communications, Inc., d/b/a Verizon Long Distance, MCI Communications Services, Inc., d/b/a Verizon Business Services, MCI Metro Access Transmission Services, d/b/a Verizon Access Transmission Services, TTI National, Inc. d/b/a Verizon Business Services, Teleconnect Long distance Services & Systems Company, d/b/a Telecom USA, and Verizon Select Services, Inc.

By ruling on February 8, 2007, the parties were asked to comment on two potential outcomes. The first outcome would consider exemption from § 851 for URF ILECs, CLECs and NDIECs in a rulemaking and defer the rulemaking until recommendations issue from the § 851 pilot program. The second outcome would extend the advice letter process in place for CLECs and NDIECs to AT&T California and the URF ILECs as an interim measure.<sup>4</sup> The parties responded to these proposals in prehearing conference (PHC) statements and at the March 21, 2007 PHC. The ILECs favor full exemption but would accept CLEC/NDIEC-equivalent treatment as an interim measure. DRA and TURN favor a rulemaking to consider a full exemption without interim relief.

On June 4, 2007, parties in the URF proceeding, Rulemaking (R.) 05-04-005, and in this proceeding were given the opportunity to comment on extending the relief granted in this proceeding (AT&T California's application) to other URF ILECs. On June 14, 2007, the California Association of Competitive Telecommunications Companies (CALTEL) opposed the request because the § 851 approval process is the means for review of copper loop retirements.<sup>5</sup> Sprint Nextel<sup>6</sup> supports extending any relief ordered to CLECs and NDIECs. Both CALTEL and Sprint Nextel support opening a rulemaking to consider

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<sup>4</sup> CLECs and NDIECs use the advice letter process for most § 851 approvals.

<sup>5</sup> AT&T has noticed the retirement of copper loops in other jurisdictions but not in California. In July 2007, CALTEL filed a petition for rulemaking, Petition (P.) 07-07-009, to devise a process for the retirement of copper loops. This petition is still pending before this Commission.

<sup>6</sup> Sprint Communications Company L.P., Sprint Telephony PCS, L.P., Sprint Spectrum L.P. as agent for Wireless Company, L.P., and Nextel of California, Inc.

exemptions from § 851 for URF ILECs, CLECs and NDIECs. The URF ILECs, DRA and TURN filed comments consistent with their earlier positions.

## **2. Discussion**

AT&T California has noted delays with § 851 approvals by this Commission. It notes that in Decision (D.) 06-08-030 we determined that AT&T California and the other URF ILECs lack market power in their service territories, because carriers providing alternative technologies compete with wireline telephone service. These factors are consistent with the criteria we have used to establish simplified procedures for obtaining § 851 approval for CLECs and NDIECs under § 853(b). The application does not support granting a full exemption from § 851, however; we have disfavored applications by a single entity to request relief from § 851 for a class of carriers. Where we have granted full or broader exemption from § 851 for wireless carriers and broadband over power line (BPL) carriers the main criterion used was the furthering of competition.

### **2.1. Full Exemption from Section 851**

We are not persuaded this vehicle, an application by a single carrier, is appropriate to consider a full exemption under § 853(b). Up to the present, we have exempted two classes of telecommunications carriers from § 851 review, wireless carriers and BPL carriers (under certain circumstances). In both instances, we considered exemption in generic proceedings (an investigation for wireless and a rulemaking for BPL). Although this is not a generic proceeding, we have addressed expanding the relief sought to URF ILECs by soliciting

comments from parties in the URF rulemaking.<sup>7</sup> We have not broadened consideration of any relief ordered to include CLECs and NDIECs.<sup>8</sup> They would remain subject to the current advice letter approval process. A rulemaking to consider exemption from § 851 is the preferred venue for addressing generic relief for URF ILECs, CLECs, and NDIECs.

In the past, we have relied on encouraging competition as a rationale for exempting wireless and BPL carriers from § 851. For wireless carriers, we found we retained jurisdiction over § 851 approvals, but determined it was no longer in the public interest to exercise that authority since the benefit of requiring § 851 approval was outweighed by the amount of resources involved and the potential to inhibit competition. (D.95-10-032, 62 CPUC 2d 3, 12-13.) In 2006, we granted an exemption to BPL carriers, because to do so would encourage a new broadband provider to consumers, promote broadband competition, and reduce

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<sup>7</sup> We did so at the request of the other URF ILECs who have actively participated in this proceeding, since they preferred that process to filing separate applications, which would have been consolidated with this proceeding.

<sup>8</sup> We previously have declined to broaden the relief from § 851 requirements currently afforded to NDIECs and CLECs. In D.01-05-041, an application filed by an NDIEC, we denied complete exemption from the advice letter process for § 851 review for all NDIECs and CLECs. We stated an application by a single entity was not the vehicle for granting such relief; a rulemaking would be appropriate. At that time, we were not persuaded that we should relieve NDIECs and CLECs completely from § 851, because we were concerned about asset transfers between NDIECs, and there was insufficient detail about the types of transactions that would be exempted. We also were concerned about the environmental effects of exemption from § 851. In D.04-10-038, we clarified that customer transfers were subject to the requirements of D.97-06-096 and required NDIECs and CLECs to attest in the advice letter that the § 851 transaction does not have a potential for a direct or reasonably foreseeable change in the environment pursuant to CEQA Guideline 15378. We declined to make the advice letter process applicable to all NDIEC and CLEC § 851 transactions.

the level of scrutiny for routine transactions. (D.06-04-070, 2006 Cal. PUC LEXIS 147 \*59.)<sup>9</sup> Wireless markets in 1995 and BPL markets in 2006 differ from the market in which AT&T California operates today. The wireless phone market in 1995 and the nascent BPL market in 2006 were emerging markets. By contrast, AT&T is an established landline carrier in a fully mature telephone market that nonetheless lacks market power in today's competitive intermodal market. If reliance on encouraging competition is one criterion for granting full exemption, we have not fully explored that issue in this proceeding. Also, as discussed *infra*, CALTEL asserts relief from § 851 would have an anticompetitive effect. Thus, we find that we cannot rely on encouraging competition as a basis for granting a full exemption from § 851 under § 853(b) for AT&T California.

Although the URF ILECs believe this vehicle is the appropriate one for granting a § 851 exemption for all telecommunications carriers who lack market power, no other party concurs. The other parties, CALTEL, DRA, Sprint Nextel, and TURN, support opening a rulemaking to consider exempting CLECs, NDIECs and URF ILECs from § 851. A rulemaking is the appropriate vehicle for considering broader exemption from § 851 for all telecommunications carriers which lack market power. At this time, we deny AT&T California's request for a full exemption from § 851. We next will address whether we should grant AT&T California some relief from § 851 prior to opening a rulemaking to consider a full exemption from § 851.

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<sup>9</sup> BPL transactions are not exempt when California Environmental Quality Act categorical exemptions do not apply and when utility assets are sold.

## 2.2. Exemption from Section 851 Subject to Conditions

AT&T California has made a persuasive showing that immediately granting it partial relief from § 851 is in the public interest. We agree that the current application process hinders AT&T California from acting quickly in the market. AT&T California recites the delays it has faced in the § 851 approval process where the Commission has taken years to act on some applications. (*See* Application (A.) 99-07-020 (closed after seven years in D.06-09-007); A.00-01-023 refiled as A.02-07-039 (dismissed after almost five years in D.07-05-010); and A.99-06-052 (approved in part after four years in D.03-08-023).<sup>10</sup> We acknowledge AT&T's point that our slow moving regulatory processes often lead to delays that do not serve the public interest. As discussed above, we have concluded that URF ILECs lack market power. (D.06-08-030, *mimeo.*, pp. 117-133, 265). For similar reasons, we have granted relief from filing formal applications under § 851 for NDIECs and CLECs.

NDIECs have used advice letters since 1994 for transfers of assets or control. (*See* D.94-05-051.) The rationale for relaxing the requirement for NDIECs was the time-consuming process then in place, Executive Director ex parte decisions, and the delay's potential impact on commercial transactions.<sup>11</sup> Several uncontested applications took four months to process. (D.94-05-051, 54 CPUC 2d 520, 521.) CLECs have used advice letters for § 851 approvals since

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<sup>10</sup> We have acted expeditiously on some applications, although those generally have been under a different approval process. (*See* A.03-06-031 (approved under General Order (GO) 69-C in D.04-01-029); A.03-05-071 (approved under GO 69-C in D.03-11-007); and A.05-12-022 (approved in D.06-04-004)).

<sup>11</sup> To prevent the use of the advice letter process for purposes of market entry, the process may not be used where any entity acquiring assets is not a certificated entity or the parent of a certificated entity.

1998 (D.98-07-094). The rationale for extending the advice letter process to CLECs was that they were nondominant and the application process delayed commercial transactions.<sup>12</sup> The same concerns about delays in the approval of commercial transactions apply here.

Other parties assert the advice letter process should not apply to AT&T California. DRA and TURN oppose using the advice letter process. DRA and TURN question whether we can extend the advice letter process without conditions to any carrier. They state that process is too informal to permit a comprehensive review of § 851 transactions. By contrast, the application process permits parties the opportunity to raise concerns before the transactions occur and fulfills the Commission's obligations under the California Environmental Quality Act (CEQA). CALTEL states the § 851 application process remains necessary to address the potential retirement of copper loops and subloops by URF ILECs. If § 851 approvals are removed before another process is in place for evaluating retirement requests, competitors' deployment of broadband services will be inhibited, contrary to statutory mandates, and the provisioning of competitive telecommunications services in California will be harmed.

We concur with DRA and TURN that the advice letter process should not be adopted for AT&T California without exercising our authority under § 853(b) to impose conditions on its use. Conditions are in place for NDIECs and CLECs and should apply equally to URF ILECs, including inapplicability to transfers impacted by CEQA. We recognize CALTEL's concerns about the retirement of copper loops; however, we can best address those concerns by conditioning relief

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<sup>12</sup> The process did not apply to CLECs owned by or affiliated with an ILEC.

from § 851 to exclude the matters being addressed in Petition (P.) 07-07-009. Imposing conditions on the relief granted in this decision is preferable to denying all relief.

**2.1.1. Applicability of a Conditioned Exemption to All URF ILECs**

Extending a conditioned exemption to all URF ILECs is in the public interest. The URF ILECs are in a similar position with respect to the impact of delays on commercial transactions filed under § 851. For example, Verizon's application to sell office space and real estate was granted eight months after it was filed. (A.01-02-026, D.02-05-008.) They also operate in the same competitive market as AT&T California. Since all URF ILECs are similarly situated, it is reasonable to follow our practice of granting use of the advice letter process to the class of carriers, rather than to an individual carrier. We will permit all URF ILECs to use the advice letter process currently in place for NDIEC and CLEC § 851 approvals subject to certain limitations.<sup>13</sup>

**2.1.2.2. Necessary Conditions on an Exemption**

In granting relief under § 853(b), we may impose necessary conditions. We have imposed conditions on the use of the advice letter process by NDIECs and CLECs, and we examine whether those conditions should be applied here. We also discuss conditions specific to URF ILECs.

We recently adopted procedures for the processing of § 851 advice letters as part of our revisions to GO 96-A. In D.07-09-019, we adopted

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<sup>13</sup> We limit the relief granted herein to URF ILECs. The rationale for extending relief to them does not apply to other regulated industries.

telecommunications industry rules for advice letter filings.<sup>14</sup> CLEC and NDIEC § 851 advice letters now are Tier 2 advice letters reviewed and approved by the Communications Division.<sup>15</sup> Where GO 96-B's rules conflict with prior decisions on advice letter requirements, the rules supersede the earlier decisions.

(D.07-09-019, *mimeo.*, pp. 27-28.)

In D.07-09-019, we specifically approved use of the Tier 2 process, which involves industry division review and approval or rejection of an advice letter, over use of a Commission resolution for § 851 transactions valued at less than \$5 million and a Commission order for transactions valued at greater than \$5 million. (*Id.* at 27 n. 18.) We noted we had granted the § 851 exemption for NDIECs and CLECs pursuant to our authority under § 853(b) as follows:

However, in prior decisions, the Commission established the streamlined advice letter process that allows for the advice letters to become effective without a resolution pursuant to the authority it has under § 853 to exempt carriers from the requirements of §§ 851-854. (*Id.*)

We found no basis for limiting our authority under § 853(b) in D.07-09-019, and we see none here. Section 851 now includes a process for approval of transactions under \$5 million by resolution. For NDIECs and CLECs we have permitted all § 851 transactions to proceed by advice letter, and we now are adopting that procedure for URF ILECs. As discussed above, we have found it is in the public interest to do so.

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<sup>14</sup> In D.07-01-024, we adopted rules applicable to review and disposition of advice letters for all utility industries.

<sup>15</sup> Review of Tier 2 advice letters may sometimes result in a Commission resolution or the directive to file an application.

Although we extend the advice letter process to URF ILECs, we acknowledge those advice letters, unlike the advice letters filed by NDIECs and CLECs, sometimes may be controversial. We clarify that where a valid protest is filed and the issue requires the exercise of discretion, staff shall prepare a resolution for Commission consideration under GO 96-B. As we did with NDIECs and CLECs, we will exclude from the advice letter process transactions that require greater oversight. Otherwise, as a condition of the exemption provided under § 853(b), URF ILEC advice letters will be Tier 2 advice letters under GO 96-B.

Specific conditions applicable to NDIEC and CLEC advice letters, adopted in D.04-10-038 and consistent with D.07-09-019, shall apply to URF ILECs. The advice letters shall disclose pending complaints and shall be served on our Consumer Protection and Safety Division.<sup>16</sup> The advice letter process may not be used for market entry; thus, it does not apply where an entity acquiring telephone plant is not either an already certificated entity or the parent or subsidiary of a presently certificated entity. The advice letter process may not be used where the activity proposed in the transaction will require environmental review by the Commission as a lead agency or responsible agency under CEQA, either because no statutory or categorical exemption applies (the applicant must provide a notice of exemption from the lead agency or explain why an exemption applies in its advice letter), or because the transaction is a project under CEQA (the applicant must explain the reasons why it believes that the transaction is not a project in its advice letter).

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<sup>16</sup> We need not impose a further condition concerning transactions that materially affect URF ILECs' rate base as they are not under rate of return regulation.

We conform the advice letter process to the procedures in place for CLEC withdrawals from providing basic service. The advice letter process we adopt here shall not apply to URF ILEC withdrawals from basic service. In D.07-09-019, we concluded that all carriers seeking to withdraw authority for basic service must file an application. (*Mimeo.*, pp. 28-29.) We noted that D.06-10-021, issued in R.03-06-020, adopted rules governing the transfer of customers when a CLEC exits the local telecommunications market and found that the potential for service disruption applies to withdrawing basic service by all carriers.<sup>17</sup>

The advice letter process adopted here shall not apply to the retirement of copper loops and subloops. Retirement of copper loops and subloops shall be governed by the outcome of CALTEL's petition, P.07-07-009, and related proceedings. If CALTEL's petition is denied and there are no further proceedings to consider the relief requested therein, the advice letter process adopted herein shall apply.

### **3. Reduction of Comment Period**

Pursuant to Rule 14.6(c)(9) of the Commission's Rules of Practice and Procedure, the Commission on its own motion has reduced the comment period to 19 days due to public necessity. Comments were filed on November 6, 2007, and reply comments were filed on November 13, 2007.<sup>18</sup> We address parties' recommendations throughout this decision but separately address two

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<sup>17</sup> We are examining the withdrawal of basic service by ILECs in that proceeding and will adopt guidelines that reflect the exigencies faced in those withdrawals.

<sup>18</sup> AT&T California, TURN/DRA, Surewest, and Verizon filed opening comments. AT&T California, TURN/DRA, and Verizon filed reply comments.

recommendations. TURN and DRA recommend that we exempt transactions that could affect the provision of basic service from the procedures adopted herein. Tier 2 and other Commission procedures afford protections for such a scenario. Withdrawals of basic service and market entry require applications. If an asset transfer could affect the provision of basic service and a valid protest is filed, staff no longer would have discretion to review the transfer. Where staff lacks discretion, we will address the requested relief in a resolution. We may grant or deny the transfer or require a more complete record. Parties recommend that we incorporate the record of this proceeding in the full exemption from § 851 rulemaking. We concur that it would be efficient to rely on relevant portions of the record developed in this proceeding in the rulemaking. In the rulemaking, we will address incorporating relevant comments filed herein.

#### **4. Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner and Janice Grau is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. The Commission has exempted two classes of telecommunications carriers from § 851 review, wireless carriers and BPL carriers under certain circumstances, in an investigation and a rulemaking, respectively.

2. In D.94-05-041, D.97-06-096, D.98-07-094, and D.07-09-019, the Commission adopted and modified the advice letter process for NDIECs and CLECs seeking authority to transfer assets or control pursuant to Pub. Util. Code § 851. In D.04-10-038 and D.07-09-019, the Commission imposed conditions on § 851 procedures for NDIECs and CLECs.

3. AT&T California has faced regulatory delays in the § 851 approval process. The Commission has taken years to act on some applications, adversely impacting AT&T's business operations, and is not in the public interest.

4. In D.06-08-030, the Commission determined that URF ILECs lack market power in their service territories, because carriers providing alternative technologies compete with wireline telephone service.

5. Section 853(b) permits the Commission to exempt any public utility or class of public utility from § 851, subject to terms and conditions, if the application of § 851 is not necessary in the public interest.

6. In D.07-09-019, the Commission determined that all carriers seeking to withdraw authority for basic service should file an application.

7. CALTEL has filed P.07-07-009 to address procedures for URF ILEC retirement of copper loops and subloops, and this petition is still pending before this Commission.

### **Conclusions of Law**

1. It is reasonable to deny AT&T California's request for an unconditional exemption from § 851 under § 853(b).

2. It is reasonable to consider a broader exemption from § 851 under § 853(b) for URF ILECs, NDIECs, and CLECs in a rulemaking.

3. It is reasonable to condition the § 853(b) exemption for AT&T California and other URF ILECs seeking authority to transfer assets pursuant to § 851 consistent with the conditions and procedures previously adopted for NDIECs and CLECs in D.94-05-051, D.97-06-096, D.98-07-094, D.04-10-038, and D.07-09-019, except as noted in Conclusions of Law 4 and 5. Applying the current procedures to URF ILECs is not necessary in the public interest.

4. It is reasonable to exempt withdrawals from basic service from the procedures adopted for URF ILECs seeking authority to transfer assets pursuant to § 851.

5. Retirement of copper loops and subloops shall be governed by any procedures adopted in P.07-09-009 and related proceedings. If the Commission denies P.07-09-009, retirement of copper loops and subloops shall be governed by the procedures adopted in this proceeding.

6. It is reasonable to make this decision effective today to conform the requirements for URF ILECs seeking authority to transfer assets pursuant to § 851 to those in place for NDIECs and CLECs. Such advice letters should be filed as Tier 2 advice letters.

## **O R D E R**

### **IT IS ORDERED** that:

1. The application of Pacific Bell Telephone Company is denied.
2. The procedure for Uniform Regulatory Framework (URF) incumbent local exchange carriers (ILEC) seeking authority to transfer assets pursuant to Public Utilities Code § 851 shall be modified to be consistent with the procedures and conditions previously adopted for nondominant interexchange carriers and competitive local exchange carriers in Decision (D.) 94-05-051, D.97-06-096, D.98-07-094, D.04-10-038, and D.07-09-019 except that the procedure will not apply to withdrawals from basic service. The retirement of copper loops and subloops shall be governed by procedures adopted in Petition (P.) 07-09-009 and related proceedings unless P.07-09-009 is denied.
3. The Executive Director shall cause a copy of this order to be served on all URF ILECs certificated in California.

4. Application 06-07-026 is closed.

This order is effective today.

Dated November 16, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners

