

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

November 4, 2005

Agenda ID #5080

Alternate to Agenda ID #5026



TO: PARTIES OF RECORD IN APPLICATION 05-02-027

This is the alternate proposed decision of Commissioner Brown. It will be on the Commission's agenda at the meeting on November 18, 2005. The Commission may act then, or it may postpone action until later. This is an alternate to the proposed decision of Administrative Law Judge Pulsifer and the alternate proposed decision of Commissioners Kennedy and Peevey made available to parties on October 19, 2005.

When the Commission acts on the alternate proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(6)(d) of the Commission's Rules of Practice and Procedure, comments on the alternate proposed decision must be filed at least seven days before the Commission meeting of November 18, 2005 and no reply comments will be accepted. Because day seven falls on a holiday, comments may be filed on or before Monday, November 14, 2005.

Comments must be filed with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 2.3 and 2.3.1. Electronic copies of comments should be sent to Commissioner Brown's Advisor Peter Hanson at [pgh@cpuc.ca.gov](mailto:pgh@cpuc.ca.gov) and ALJ Glen Walker at [gew@cpuc.ca.gov](mailto:gew@cpuc.ca.gov). All parties must serve hard copies on ALJ Walker and Commissioner Brown, and for that purpose I suggest hand delivery, overnight mail or other expeditious methods of service. The current service list for this proceeding is available on the Commission's web site, [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

/s/ ANGELA K. MINKIN by LTC  
Angela K. Minkin, Chief  
Administrative Law Judge

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Attachment

Decision **ALTERNATE PROPOSED DECISION OF**  
**COMMISSIONER BROWN** (Mailed 11/4/2005)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027  
(Filed February 28, 2005)

**ALTERNATE OPINION REMANDING THIS APPLICATION  
FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS ORDER****1. Summary**

We find that all provisions of Section 854 of the Public Utilities Code apply to the application of SBC Communications Inc. (SBC) and AT&T Corp. (AT&T) (collectively, Applicants) to transfer control of AT&T's California utility subsidiaries to SBC. We also find that merger conditions proposed by the Federal Communications Commission (FCC) on October 31, 2005, may or may not affect any conditions that we might impose on this merger. The FCC has issued a press outlining what its proposed decision is intended to say, but the actual decision has not been released. Accordingly, we remand this proceeding

to the Assigned Commissioner and the assigned Administrative Law Judge (ALJ) for further consideration and findings not inconsistent with this order.

## **2. Background**

We have before us the Proposed Decision of ALJ Pulsifer (Proposed Decision) and the Proposed Alternate Decision of Commissioner Peevey and Commissioner Kennedy (Alternate Decision), each of which approves the application of SBC and AT&T to transfer control of AT&T's California utility subsidiaries to SBC. The proposed decisions impose different conditions on their approval of the merger.

The Proposed Decision finds that Pub. Util. Code § 854 applies in its entirety to this transaction. The Alternate Proposed Decision finds that § 854(a) applies to this transaction, but that §§ 854(b) and 854(c) do not apply.

## **3. Applicability of Section 854**

The Applicants must obtain authorization from this Commission for approval of the proposed acquisition of AT&T by SBC in accordance with the requirements of Pub. Util. Code § 854, which sets forth the standard for review of the transaction. While all parties agree on the general statutory applicability of § 854, there is significant disagreement as to which subsections of the statute apply, and how extensive the scope of review should be. Section 854(a) provides, in relevant part, that “no person or corporation shall merge, acquire, or control either *directly or indirectly* any public utility organized and doing business in this state without first securing authorization to do so from this commission” (emphasis added). Any merger, acquisition, or transfer of control without prior Commission authorization is void and of no effect. As discussed below, we conclude that the standard of review in this Application must take into account all provisions of § 854.

In weighing the evidence before us, we note that Applicants bear the burden of proof. Applicants are required to prove by a preponderance of the evidence that the proposed merger meets the requirements warranting approval pursuant to § 854(e). Preponderance of the evidence:

“means that evidence in support of Applicants' position, when weighed with that opposed to it, must have the more convincing force and the greater probability of truth. (1 Witkin, California Evidence (3d. Ed. 1986) § 157, and cases cited thereunder.)

In particular, we must find the proposed merger provides short-term and long-term economic benefits to ratepayers, does not adversely affect competition, and is in the public interest (§§ 854(b) and (c)). To the extent that we find Applicants have not met their burden of proof, we consider the countervailing evidence of opposing parties concerning mitigating measures that are warranted in order for the merger to meet § 854 requirements in the public interest. Accordingly, the findings that we make concerning the proposed transaction apply this evidentiary standard in fashioning conditions on our approval.

### **3.1. Applicability of §§ 854(b) and (c)**

Applicants acknowledge that the Commission has authority over approval of the transaction pursuant to § 854(a), but deny that § 854(b) applies. Applicants argue that § 854(b) only applies to “transactions in which a regulated utility is a direct party.” (SBC Application, at 17.) This transaction is designed as a merger only between corporate holding companies. Because the merger agreement does not specifically define any California utility entity as a party, Applicants claim that § 854(b) does not apply. Pub. Util. Code § 854(b) requires, as a condition for Commission approval, that a transaction:

1. Provides short-term and long-term economic benefits to ratepayers.
2. Equitably allocates, where the Commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50% of those benefits.
3. Not adversely affect competition.<sup>1</sup>

Sections 854(b) applies where any utility that is a party to the transaction has gross annual California revenues exceeding \$500 million. In this instance, even though SBC California and AT&T California each have gross annual California revenues exceeding \$500 million, the Applicants argue that this proposed transaction does not come under the provisions of § 854(b). Applicants assert that because this is a merger of holding companies and the utilities are at a lower level, the utilities are not “parties” within the meaning of § 854(b). However, Applicants cite no precedent to the effect that “parties” must be interpreted in an exceedingly narrow fashion.

In support of the claim that § 854(b) does not apply, Applicants note that the term “utilities” referenced in § 854(b) differs from the term “entities” that is used in § 854(c).<sup>2</sup> Section 854(c) states that it applies to any entity that is a party

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<sup>1</sup> In making this finding, the Commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.

<sup>2</sup> The requirements of § 854(c) apply to any *entity* that is a party to the transaction with gross annual California revenues exceeding \$500 million, and require the Commission

*Footnote continued on next page*

to the transaction with gross annual California revenues exceeding \$500 million, and requires the Commission to consider each of the criteria listed in that subsection, and to find, on balance, that the proposal is in the public interest.

Applicants construe the use of different terms (i.e., “utility” in § 854(b) versus “entity” in § 854(c)) as an intentional distinction made by the Legislature to indicate different categories of applicability. Applicants would have us infer that § 854(b) only applies to a narrow category of transactions in which a utility is named as a direct party to the transaction. This was an argument previously made by SBC in the Pacific Telesis 1997 merger case and vociferously rejected by this Commission as in contravention of the “plain meaning” of the statute.<sup>3</sup> Applicants’ attempts to distinguish the case have misstated its holding and its rationale.

Applicants have defined the parties to this merger as parent-level holding companies only that are not subject to § 854(b).<sup>4</sup> However, the precatory and

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to consider each of the criteria listed in paragraphs (1) through (8) of that subsection, and to find, on balance, that the proposal is in the public interest.

<sup>3</sup> Pacific Telesis Group, Joint applicant: SBC Communications, Inc. D.97-03-067, 71 CPUC2d 351.

<sup>4</sup> Applicants fail to produce legislative history that affords any support for the notion that the intent behind the use of the word “utilities” in § 854(b) was meant to restrict its applicability solely to utility to utility mergers; the use of the word “utilities” was added by the Senate on July 19, 1995, contemporaneously with a provision (h) stating legislative intent not to interpret “control” in paragraphs (1) and (2) of subdivision (b) to include electric industry restructuring, then going on in both the Legislature and at the Commission. Paragraph (h) was changed to its current language on August 21, 1995. On August 30, 1995, the Senate adopted the current version of the bill; the Assembly concurred on September 5, 1995. The governor signed the legislation on October 4, 1995. Had the Legislature sought to substantially restrict the Commission’s ability to disapprove of a merger or acquisition of a telephone utility under a merger of two

*Footnote continued on next page*

plenary language prohibiting “direct or indirect” “merger, acquisition, or control” in § 854(a) would not have been retained if the Legislature had sought to exempt holding company mergers from the purview of § 854(b). What the Legislature sought to do in this 1995 law<sup>5</sup> was to reduce from possibly 100% the amount that ratepayers could reap from net benefits in the Contel-GTE Merger (Verizon’s predecessor in interest) to not less than 50% because the prior statute provided a disincentive to shareholders to seek efficiencies through merger.<sup>6</sup>

By contrast, Applicants construe § 854(c) as applying to a “broader category of transactions.” Yet, even though Applicants acknowledge that § 854(c) technically applies here, they likewise argue that the Commission has discretion to exempt this transaction from the requirements of that subsection. Nonetheless, Applicants claim that this transaction satisfies § 854(c) requirements. Mergers subject to § 854(c) require as a basis for approval, findings that the merger is in the public interest by considering the following criteria:

- (1) The financial condition of the resulting public utility doing business in the state.
- (2) The quality of service of the resulting public utility doing business in the state.
- (3) The quality of management of the resulting public doing business in the state.

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holding companies, it is difficult to believe that “control” would not be retained in the language either in § 854(a), § 854(b), § 854(c), § 854(d), or § 854(e).

<sup>5</sup> Chapter 622, Statutes of 1995 (AB 119).

<sup>6</sup> See Senate Floor Analysis of AB 119.

- (4) Fairness to affected public utility employees.
- (5) Fairness to the majority of all affected public utility shareholders.
- (6) Benefits on an overall basis to state and local economies, and to be communities in the area served by the resulting public utility.
- (7) The preservation of jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.
- (8) Mitigation measures to prevent significant adverse consequences which may result.

All active parties in the proceeding other than Applicants take the position that both §§ 854(b) and (c) apply to this transaction, and that the Commission must make findings consistent with those code sections in order to warrant approval of this merger. They argue that Applicants' legal interpretation seeking to limit the applicability of the statute here is invalid and fails to acknowledge the importance of this transaction. Parties also challenge Applicants' attempts to justify a § 854(b) and (c) exemption based upon comparison with other merger cases, claiming that such cases did not involve a dominant carrier and are not comparable to this proceeding.

### **3.2. Discussion**

We conclude that §§ 854(b) and (c) apply to this transaction. Sections 854(b) and (c) together form "the primary statute governing mergers involving California's large energy and telecommunication utilities."<sup>7</sup> This transaction involves both the largest Incumbent Local Exchange Carrier (ILEC)

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<sup>7</sup> *SCEcorp*, 40 Cal. P.U. 2d at p. 171.

(SBC) and the largest Competitive Local Exchange Carrier (CLEC)/NonDominant Interexchange Carrier (NDIEC) (AT&T) in California. The two major transactions creating what is now Verizon Communications Inc. were reviewed under §§ 854 (b) and (c).<sup>8</sup> Likewise, SBC's acquisition of Pacific Telesis was reviewed under §§ 854(b) and (c).

We reject Applicants' argument that special significance attaches to the use of the words "utilities" versus "entities" in assessing the applicability of §§ 854(b) and (c).<sup>9</sup> In the SBC/Telesis merger proceeding, we rejected this line of argument that § 854(b) does not apply merely because the transaction was defined as a transfer of control between holding companies as "parties." As explained in D.97-03-067, the word "party," as used in § 854(b), must be read to include those California entities that are "involve[d]" in the transaction even if the deal is "technically structured" so only the parent-level companies participate in the merger transaction.<sup>10</sup> Even though the SBC/Telesis merger nominally involved two holding companies, we still held that the California operating company, "Pacific[,] is a party within the meaning of § 854."<sup>11</sup> We

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<sup>8</sup> In *GTE Corporation* (1991) 39 Cal. P.U.C.2d 480 (D. 91-03-022), the Commission reviewed the GTE/Contel merger under Section 854 (b) and (c). (*Id.*, at p. 484.) Also, in *GTE and Bell Atlantic* (2000) 2000 Cal. PUC LEXIS 398 (D.00-03-021), the Commission reviewed the merger leading to the formation of Verizon under §§ 854 (b) and (c).

<sup>9</sup> *Pacific Telesis Group* (1997) 71 Cal. P.U.C.2d 351 (D.97-03-067).

<sup>10</sup> *Id.*, at p. 365.

<sup>11</sup> Our analysis "parties" in *Pacific Telesis Group* is instructive: "We focus on substance rather than form in determining whether Pacific is a party within the meaning of § 854. ([California Civil Code § 3528](#).) This is analogous to application of the legal doctrine of "piercing the corporate veil" as necessary properly to account for the substance rather than the form of this transaction. (See, e.g., [City of Los Angeles v. Public Utilities](#)

avoided basing our decision on a mere technical interpretation of the words “utility” and “entity” because such an approach looked too much to the mere form of the statute and the transaction. (*Id.*, at p. 364).<sup>12</sup>

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[Commission 7 Cal.3d 331, 342-344 \(1972\)](#), citing [Pacific Telephone and Telegraph Company v. Public Utilities Commission, 62 C.2d, 634, 659-662](#), which held that a utility could not through corporate instrumentalities obtain a greater rate of return than the utility would be entitled to, absent the separate corporate enterprises. *City of Los Angeles* stated that the “utility enterprise must be viewed as a whole without regard to the separate corporate entities. . . .” ([City of Los Angeles v. Public Utilities Commission, 7 Cal.3d at 344](#). See also [General Telephone Co. v. Public Utilities Commission, 34 Cal.3d 817, 826 \(1983\).](#)) In light of the above discussion, we find that Pacific is a party to the transaction within the meaning of § 854(b).

Our interpretation is also consistent with the statute as a whole. The Applicants' narrow reading would imply that only when a utility is a signatory to the merger documents do the parties bear the burden of proving compliance with § 854(b). However, § 854(e) provides that “the person or corporation seeking acquisition or control of a public utility organized and doing business in this state shall have the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met.” A broader, rather than technically narrow interpretation of § 854(b) is consistent with § 854(e), since § 854(e) places the burden of proving compliance with § 854(b) on the person or corporation seeking acquisition or control of the public utility, not solely on the utility.

Our interpretation is also consistent with § 854(g). Section 854(g) provides that §§ 854(b)(1) and (2) do not apply to the establishment of a holding company. This is consistent with Commission precedent which reviews an application to form a holding company under the standard of ratepayer indifference, not on whether the holding company's formation will provide ratepayer benefits. It would create a contrary result if a utility could avoid the application of § 854(b) on the basis of its corporate structure. Moreover, under such an interpretation of § 854, any applicant for authorization to form a holding company structure would certainly fail to meet the ratepayer indifference test, since such a formation could be used to circumvent § 854(b) in future mergers.”

<sup>12</sup> The fact that the Commission focused on the regulatory status of the acquired company, Pacific Telesis is explained by the fact that the acquiring company, SBC, had

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The SBC/Telesis decision followed California Supreme Court precedent that a utility cannot “through corporate instrumentalities obtain” a result that is different from the result “the utility would be entitled to absent the separate corporate enterprises.” (*Pacific Telesis Group, supra*, 71 CPUC2d 351, at 365.) Despite Applicants’ claims, the substance of the transaction is not changed merely because a holding company structure is formed around a regulated utility. Were it otherwise, the inventiveness of corporate attorneys and their corporate shells, rather than the essence of the transaction, would be determinative of all §854 transactions.<sup>13</sup>

It would be equally improper to elevate form over substance here by exempting the SBC/AT&T transaction from § 854(b) review. Even though the transaction is defined as involving only holding companies as “parties,” the substance of the transaction will have a significant impact on their operating California public utilities and their customers. The Commission has broad statutory powers to assure that ratepayers are not deprived of the benefit of transactions where the utility would have been directly involved *but for* the holding company structure. We view the utility enterprise as a whole without regard to the separate corporate entities which in effect are different departments of one business enterprise (*General Telephone Company v. Public Utilities Commission* (1983) 34 Cal.3d 817, 826).

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no presence in California. Here both the acquired company and the acquiring company have major California operations.

<sup>13</sup> California Civil Code § 3528 provides: “The law respects form less than substance.”

Designing the transaction around a holding company structure provides no reason to reduce the review that the Commission gives to this transaction. Ratepayers can be exposed to even more risk under a holding company structure, as we have previously noted:

The regulator has no choice but to view costs assigned to utility subsidiaries by holding companies very skeptically, especially where the corporate family is in diversified lines of business, because there is always the motive and temptation to have as many costs as possible born by the utility's monopoly operation. (*Re Pacific Bell* (1986) 20 CPUC2d 237, 274-275; D.86-01-026.)

We reject Applicants' argument that the reasoning applied in the SBC/Telesis merger concerning the applicability of §§ 854(b) and (c) does not apply to this transaction because the firm being acquired here is not a dominant carrier. We recognize that the SBC/Telesis merger involved the acquisition of an ILEC, while this merger does not. The fact remains that this transaction involves an acquisition by SBC that will have a substantial impact on the operations of SBC California, as well as on the competitive environment in which the ILEC operates.

Applicants are incorrect in claiming that the Commission does not look to the status of an acquiring firm in assessing the applicability of § 854(b). One of the main considerations in *MCI Communications Corp. and British Telecom* (1997) 72 CPUC2d 656 (D.97-05-092) was the nature of the acquiring firm's business. The Commission relied heavily on the fact that British Telecom (BT), the acquiring firm, "operates exclusively in the United Kingdom and does not propose physically to enter California markets."<sup>14</sup> In addition, the analysis called for in § 854(b) looks to the combined effect of the transaction participants. Transaction benefits are often derived from the combination of two firms. Anti-competitive effects also arise from the combination of two firms. Accordingly,

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<sup>14</sup> *MCI Communications Corp. and British Telecom* (1997) 72 Cal.P.U.C.2d. 656, 664.

we reject Applicants' argument that the Commission should only focus on the acquired firm.<sup>15</sup>

The common element in both the Telesis merger and this transaction is a business combination in which the operations of the largest California ILEC are implicated. While the specific form of business combination is different, the principle remains relevant that form should not be placed over substance in assessing the applicability of §§ 854(b) or (c).

Even though Applicants claim that the SBC California local network is not impacted, their testimony nonetheless indicates that customers of the ILEC will be impacted by the merger. For example, Applicants claim that AT&T services will be delivered to SBC customers (*e.g.*, CallVantage), or use AT&T facilities to deliver services (*e.g.*, AT&T Internet backbone).<sup>16</sup> SBC's role in the enterprise market is emphasized by Applicants as a primary motivation for entering into the merger. Applicants acknowledged that some of the services provided to enterprise customers in California will be subject to the Commission's ratemaking authority.<sup>17</sup> Applicants claim that the combined company will have enhanced resources, expertise and incentive to adapt the sophisticated products that AT&T has developed for its enterprise customers to the needs of SBC California's small and medium businesses and consumers.

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<sup>15</sup> Joint Applicants' Opening Brief, at 34.

<sup>16</sup> Ex. 43, at p. 119, SBC/Kahan, Ex. 33, at p. 5 SBC/Rice.

<sup>17</sup> Tr., vol. 11, at p. 1571, SBC/Kahan.

Both the SBC/Telesis merger and this transaction likewise involve significant changes to the competitive environment within California that warrant review under §§ 854(b) and (c). Moreover, in the SBC/Telesis merger, the two merging parties did not compete against each other within California. By contrast, both SBC and AT&T compete against each other within California. The competitive significance of two major competitors merging should be reviewed at least as carefully as the SBC/Telesis merger where only one California competitor was involved.

While AT&T's California operations relative to the total merged firm may be viewed as "small," AT&T California operations are still significant in relation to competitors in California. SBC California and AT&T California each have intrastate revenues exceeding \$500 million per year, which is the threshold level to trigger the requirements both of §§ 854(b) and (c). Thus, AT&T California operations meet the materiality threshold under § 854(b).

### **3.3. Section 853(b) Exemption**

Applicants argue that even if the Commission were to determine that § 854(b) may technically<sup>18</sup> be applied, it is within the Commission's discretion to grant an exemption. The Commission has discretion to grant an exemption pursuant to § 853(b), which provides in relevant part:

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<sup>18</sup> "Technically applicable" is not our characterization. As outlined previously, reference to the clear meaning of the § 854 statute, as well as the entire jurisprudence of utility regulation in California, and its concern with substance rather than the artificiality of corporate holding company structure is our guiding principle. Wholly independent of the desire to remove top corporate management from a regulatory environment, holding companies generally have as their justification tax, liability, and public relations concerns underlying their creation.

The commission may. . . exempt any public utility. . . from this article [including Sections 854(b) and (c)] if it finds that the application thereof with respect to the public utility . . . is not necessary in the public interest.”

Opposing parties disagree, arguing that to exempt this application from review based upon § 853(b) would not be in the public interest. Parties argue that, in view of the record on the impacts of this merger, there is no factual basis for a finding that applying §§ 854(b) and (c) is “not necessary in the public interest.” Applicants respond that exempting this transaction from §§ 854(b) and (c) is warranted because the Commission has previously exempted other merger transactions involving NDIEC and CLEC assets. Opposing parties disagree, arguing that such a characterization overlooks the major competitive significance of this merger, and ignores critical differences that distinguish this merger from others in which § 854(b) and (c) exemptions were granted. Opposing parties note that in past merger cases where §§ 854(b) and (c) were not applied, the transaction exclusively involved NDIEC and CLEC assets where the surviving utility was nondominant. By contrast, this merger also involves the assets and operations of the (second) largest ILEC in California. Parties thus argue, given the involvement of ILEC operations, the need for the safeguards provided by §§ 854(b) and (c) figures more significantly here.

### **3.4. Discussion**

Given its distinctive historic proportions and long-term implications for competition, we conclude that this merger is not analogous to previous mergers that were routine in nature, and that exclusively involved NDIEC and CLEC assets. The exemptions granted in those past mergers thus provide no comparable basis for §§ 854 (b) and (c) exemptions here.

This merger also has greater long term implications compared with other nondominant carrier mergers in view of the concurrent merger contemplated between Verizon and MCI. The post-merger environment thus anticipates elimination of not just one but both of the two largest competitors of SBC in California. None of the merger precedents cited by Applicants contemplated such a fundamental and historic shift in the competitive makeup of the industry. Concerns over the potential to exercise market power to the detriment of competition are more heightened here where the ILEC's largest competitor will subsequently be controlled by SBC.

Past telecommunications transactions involving utilities exempted from review by virtue of § 853(b) presented factors that are not present here. They did not involve an ILEC, and they often did not involve more than one California operating utility. For example, the proposed BT/MCI transaction was a foreign takeover where MCI would have become the U.S. operating arm of BT. The WorldCom case was a bankruptcy reorganization where MCI succeeded to the business of the discredited WorldCom.

In the Decision involving the incomplete MCI/Sprint merger, we also refused to apply an exemption, and required §§ 854 (b) and (c) review. (*MCI WorldCom and Sprint* (2001) 2001 Cal. PUC LEXIS 142 (D.01-02-040).)

On the other hand, the fact that the SBC/Telesis and the GTE/Bell Atlantic merger transactions did receive scrutiny under § 854(b) and (c) shows that even "pure" change of control transactions merit review under §§ 854(b) and (c). In *Pacific Enterprises* (1998) 79 CPUC2d 343 (D. 98-03-073), the Commission also applied §§ 854(b) and (c) without extensive consideration of exemptions or other legal theories. We find that past precedent supports the application of §§ 854(b)

and (c) to the proposed SBC/AT&T merger and that exemption from those legislative mandates is not warranted.

#### **4. Instructions on Remand**

In view of our finding that §§ 854(b) and (c) apply to this merger transaction, we remand this proceeding to the Assigned Commissioner and the assigned ALJ for further proceedings not inconsistent with this order.

We take official notice that the FCC on October 31, 2005, by press release announced that it preliminarily approved at the federal level the merger application of SBC and AT&T, and that this approval will become final upon publication in the Federal Register at the end of this year or early next year. The FCC imposed conditions on the merger that in some cases are duplicative and in some cases are contradictory to conditions proposed by the Proposed Decision and the Alternate Decision. We believe that further proceedings will enable the Commission to be certain that any conditions it adopts in its decision will be complementary if possible, and not contradictory, to the conditions imposed by the FCC.

Accordingly, our decision today remands Application 05-02-027 to the Assigned Commissioner and to the assigned ALJ to conduct further proceedings consistent with this order. We urge that a proposed decision, and a proposed alternate decision if necessary, be presented to us as soon as practical after the FCC decision becomes final.

#### **5. Comments**

This Alternate Proposed Decision of Commissioner Geoffrey F. Brown was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.6(d) of the Rules of Practice and Procedure. In order that this matter can be acted upon at the Commission's meeting on November 18, 2005, we require that

comments be filed no fewer than seven days prior to the Commission's meeting on November 18, 2005. Because day seven falls on a holiday, comments may be filed on or before Monday, November 14, 2005.

## **6. Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Thomas Pulsifer is the ALJ and Principal Hearing Officer for this proceeding. This Alternate Proposed Decision was prepared by Commissioner Geoffrey F. Brown.

### **Findings of Fact**

1. The Commission has before it the Proposed Decision and the Alternate Decision dealing with the proposed SBC/AT&T merger.
2. The Proposed Decision concludes that §§ 854(b) and (c) are applicable to this transaction; the Alternate Decision concludes that §§ 854(b) and (c) are not applicable.
3. The FCC in a press release issued on October 31, 2005, preliminarily approved the SBC/AT&T merger at the federal level, subject to conditions different from those proposed in the Proposed Decision and in the Alternate Decision.

### **Conclusions of Law**

1. The Commission should find that Section 854 of the Public Utilities Code, including subsections (b) and (c), apply to this transaction.
2. This proceeding should be remanded to the Assigned Commissioner and to the assigned ALJ for further proceedings not inconsistent with this order.

**O R D E R**

**IT IS ORDERED** that:

1. Section 854 of the Public Utilities Code, including subsections (b) and (c), apply to this transaction.
2. This proceeding is remanded to the Assigned Commissioner and to the assigned Administrative Law Judge for further proceedings consistent with this order.
3. A proposed decision and, if necessary, a proposed alternate decision in this matter should be presented to the Commission as soon as practical after the order of the Federal Communications Commission with respect to this matter becomes final.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.