

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own
Motion into the Exemption from Pub. Util.
Code § 851 for Uniform Regulatory
Framework and other Competitive
Carriers.

FILED
PUBLIC UTILITIES COMMISSION
MAY 7, 2009
SAN FRANCISCO, CALIFORNIA
RULEMAKING 09-05-006

**ORDER INSTITUTING RULEMAKING TO CONSIDER
EXEMPTING COMPETITIVE TELECOMMUNICATIONS
CARRIERS FROM PUB. UTIL. CODE § 851**

1. Summary

With this order, the Commission institutes a rulemaking to consider exemptions for specific actions of all telecommunications carriers in California, except general rate case incumbent local exchange carriers (GRC ILECs),¹ from Pub. Util. Code § 851's requirements for the disposition or encumbrance of necessary and useful property.² Section 853(b) permits the Commission to

¹ The Commission regulates GRC ILECs through cost-of-service reviews as required by General Order (GO) 96-B. These carriers are designated carriers of last resort in their franchise territories per D.96-10-066, which defined what is meant by basic telephone service for Universal Service funding.

² 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

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exempt any public utility or class of public utilities from § 851 if applying § 851 procedures is not necessary in the public interest.³ The primary goal of this rulemaking is to consider whether granting exemptions from § 851 is appropriate for Uniform Regulatory Framework (URF) carriers.⁴ Secondly, the Commission will consider whether conditions under § 853(b) should be placed on those exemptions.⁵ The Respondents to this rulemaking are the URF carriers

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. The Commission shall determine the types of transactions valued at five million dollars or less, that qualify for advice letter handling. For a qualified transaction valued at five million dollars or less, the commission may designate a procedure different than the advice letter procedure if it determines that the transaction warrants a more comprehensive review. . .

³ 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.

⁴ URF carriers have full pricing flexibility over substantially all of their rates and charges. URF carriers include incumbent local exchange carriers regulated through the Commission's uniform regulatory framework established in D.06-08-030, competitive local exchange carriers and interexchange carriers.

⁵ This relief from § 851 procedures is being considered for URF carriers only. The rationale for considering an exemption from § 851 does not apply to GRC ILECs and other regulated industries.

identified in Appendix A. URF carriers include URF ILECs,⁶ competitive local exchange carriers (CLEC),⁷ and non-dominant interexchange carriers (NDIEC).⁸

2. Background

In Decision (D.) 94-05-051, 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 § 851. In D.04-10-038 and D.07-09-019, the Commission imposed conditions on § 851 procedures for NDIECs and CLECs. The advice letter procedure for NDIECs and CLECs is the Tier 2 advice letter. Tier 2 advice letters may be deemed approved in 30 days if not protested.

The advice letter must advise the Commission if the NDIEC or CLEC is a party to a pending transaction for which Commission authority is required, provide the general terms of the transaction and identify any decided or pending legal complaints against the entities in either California or other states. Customer notification requirements must be followed if authority is requested to transfer customers. The advice letter must describe the terms of the transaction and indicate how any surviving Commission certified entities would modify their tariffs. The advice letter must attest that the transaction does not have the

⁶ An URF ILEC is a local telephone company that used to be the exclusive certificated local telephone service provider in a franchise territory established before the Telecommunications Reform Act of 1996. *See* Pub. Util. Code §§ 234 and 1001.

⁷ CLECs must obtain a CPCN to provide local telephone services in competition with ILECs in the service territories where ILECs formerly were the sole certificated provider. *See* Pub. Util. Code §§ 234 and 1001 and D.95-07-054.

⁸ A non-dominant interexchange carrier or long distance carrier is exempt from obtaining a CPCN under § 1013 and is only required to register with the Commission before providing long distance telephone services in California.

potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment pursuant to the California Environmental Quality Act (CEQA) Guideline 15378. The advice letter procedure cannot be used (1) where an entity acquiring assets or control is not either an already certificated entity or the parent or subsidiary of a presently certified entity; (2) where the transaction involves a CLEC owned or affiliated with a California ILEC; (3) where transactions are subject to the requirements of §§ 854(b) and (c); or (4) where the transaction has environmental implications under CEQA Guideline 15378.⁹

In D.07-11-048, the Commission adopted the advice letter process for URF ILECs seeking authority to transfer assets pursuant to § 851, consistent with the procedures and conditions 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.07-09-019.¹⁰ The advice letter procedure does not apply to withdrawals from basic service.

⁹ The advice letter must be served on the Director of the Consumer Protection and Safety Division. Financial statements must accompany the advice letter for any applicant that will continue operations after the transaction has been completed. Financial statements may be filed under seal but doing so is subject to protest.

¹⁰ The following conditions were imposed on URF ILEC's use of the advice letter process in D.07-11-048. The advice letters shall disclose pending complaints and shall be served on the Commission's Consumer Protection and Safety Division. 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). The

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In D.07-11-048, the Commission deferred to a rulemaking consideration of a full exemption from § 851 for URF carriers. The Commission has exempted two classes of telecommunications carriers from § 851 review, wireless carriers and broadband over power line (BPL) carriers (under certain circumstances). The Commission has relied on encouraging competition as a rationale for exempting wireless and BPL carriers from § 851. For wireless carriers, the Commission found it 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 from § 851. (D.95-10-032, 62 CPUC2d 3, 12-13.) In 2006, the Commission granted an exemption to BPL carriers, because to do so would encourage a new broadband provider for consumers, promote broadband competition, and reduce the level of scrutiny for routine transactions. (D.06-04-070, 2006 Cal. PUC LEXIS 147 *59.)¹¹

The Commission is conducting a pilot program for utilities' eligible transactions subject to § 851. Pursuant to Resolution (Res.) ALJ-202 (August 23, 2007) eligible transactions for URF carriers include transactions (1) not subject to environmental review by the Commission as a lead agency or responsible agency

Commission clarified that where a valid protest is filed and the issue requires the exercise of discretion, staff shall prepare a resolution for Commission consideration under General Order (GO) 96-B. As a condition of the exemption provided under § 853(b), URF ILEC advice letters were classified as Tier 2 advice letters under GO 96-B. As provided in D.07-11-048, the retirement of copper loops is governed by the procedures adopted in D.08-11-033 in the Copper Loop Rulemaking, Rulemaking 08-01-005. The § 853(b) conditional exemption granted for the retirement of individual copper loops in D.08-11-033 will not be revisited in this proceeding.

¹¹ BPL transactions are not exempt when CEQA categorical exemptions do not apply and when utility assets are sold.

under CEQA; (2) that will not have an adverse effect on the public interest or on the ability of the utility to provide safe and reliable service to customers at reasonable rates; (3) where the property in the transaction generally does not have a fair market value in excess of \$5,000,000; (4) where transfers or changes in ownership of facilities currently used in regulated utility operations do not result in a physical or operational change in the facility other than in the normal course of business; and (5) do not warrant a more comprehensive review that would be provided through a formal application. Eligible § 851 filings are submitted to the appropriate Industry Division as Tier 3 advice letters in accordance with GO 96-B. The Industry Division reviews and processes the advice letter in accordance with the GO 96-B 30-day review period. The Industry Division may reject the advice letter if it is inappropriate, because (1) the proposed transaction does not satisfy the criteria for the pilot program; (2) the proposed transaction presents unusual issues of fact or law that require more complete fact-finding and informed decisionmaking; or (3) the proposed transaction is inappropriate for advice letter consideration because it involves the exercise of discretion or is otherwise barred by GO 96-B; (4) the transaction involves the division of a single asset into smaller parts valued at less than \$5,000,000 in order to avoid a formal application; (5) the transaction warrants a more comprehensive review or may require an evidentiary hearing; and (6) the utility has failed to respond in a timely manner to a request by the Industry Division for additional information or documentation.

3. Respondents

The telecommunications carriers that may be affected by this rulemaking are the URF carriers, including large and medium sized ILECs, CLECs, and NDIECs. Accordingly, the carriers identified in Appendix A are hereby named

as respondents to this rulemaking and this rulemaking will be served on all CLECs and NDIECs.

4. Preliminary Scoping Memo

This rulemaking is instituted for the purpose of considering broader exemptions from § 851 and conditions on those exemptions pursuant to § 853(b) for URF carriers. The issues to be considered are:

1. Are exemptions from § 851 for all URF carriers, including large and medium sized ILECs, CLECs and NDIECs, in the public interest?
2. Would granting exemptions from § 851 for URF carriers, including large and medium sized ILECs, CLECs and NDIECs, promote competition?
3. Should conditions be imposed on the relief granted pursuant to § 853(b)?
4. If conditions should be imposed, should they conform to the conditions imposed in D.97-06-096, D.04-10-038, and D.07-11-048 concerning CEQA requirements, withdrawals from providing basic service, customer notification, eligible entities (certified carrier) and transactions subject to § 854(b) and (c)?
5. If conditions are imposed, should they conform to the conditions imposed in the pilot program renewed in Res. ALJ-202, specifically transactions that involve unusual issues of fact or law or property that is still necessary and useful in the public utility operations?

6. Should carriers of last resort¹² be eligible for an exemption for property that still is necessary and useful in the public utility operations?
7. Should central offices with collocation be included in transactions eligible for exemption from § 851? If yes, what conditions should be placed on that exemption to ensure consistency with the requirement that ILECs provide CLECs available space to collocate CLEC equipment?
8. Are there any other conditions that should be placed on relief from § 851?

Parties to Application (A.) 06-07-026, which resulted in D.07-11-048, requested that the Commission take official notice of comments filed in that proceeding. For purposes of the record in this proceeding, a preferable process would be for parties to designate any comments or portions of comments filed in A.06-07-046 upon which they propose the Commission should rely in reaching a decision in this rulemaking. The parties shall attach those comments or portions thereof to their comments in this proceeding and list the issues set forth in this rulemaking to which the comments are responsive and the pages on which the A.06-07-046 comments respond to the issues.

The Commission seeks comments on the issues described above according to the schedule discussed below.

¹² Pursuant to D.96-10-066, a carrier seeking to be a carrier of last resort must file a notice of intent with the Commission in order to have access to high cost fund subsidies. Carriers of last resort are required to serve upon request all customers within their designated service areas. Once a carrier is designated as a carrier of last resort, the carrier must get the Commission's approval to opt out of its obligation to serve.

5. Category of Proceeding

The Commission's Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding and the need for hearing.¹³ As a preliminary matter, we determine that this proceeding is "quasi-legislative" as defined in Rule 1.3(d).¹⁴ It is contemplated that this proceeding shall be conducted through a written record. Any person who objects to the preliminary categorization of this rulemaking as "quasi-legislative" or to the preliminary hearing determination that no hearings are required, or to the issues or schedule shall file its objections no later than 10 days from the issuance of this rulemaking. The assigned Commissioner will issue a scoping ruling making a final category determination; this final determination is subject to appeal as specified in Rule 7.6.

6. Schedule

The preliminary schedule for the proceeding is set forth below. The assigned Commissioner and Administrative Law Judge may change these dates as needed, and will adopt any further procedural processes.

Proceeding Milestone	Date
Rulemaking Adopted	May 2009
Objections to preliminary categorization and to the preliminary no hearing determination	10 days after the issuance of this rulemaking

¹³ Rule 7.1(d).

¹⁴ Rule 1.3(d) defines "quasi-legislative" proceedings as proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry.

Proceeding Milestone	Date
Scoping Memo	June 2009
Initial Comments and Proposals, filed and served (the exact date will be set in scoping memo)	June 2009
Initial Comments and Proposals, filed and served (the exact date will be set in scoping memo)	July 2009
Proposed Decision	October 2009
Final Decision	November 2009

The revised schedule will be set forth in the Scoping Memo and we anticipate this proceeding will conclude in 2009. In any event, we anticipate that this proceeding will conclude within 18 months of the issuance of the Scoping Memo, pursuant to Pub. Util. Code § 1701.5.

7. Service of OIR, Filing Requirements, and Service List

URF carriers listed in Appendix A are made respondents to this proceeding. CLECs and NDIECs also will be served. We will also serve this order on those who are on the service lists for the following related proceedings:

- A.06-07-026, Pacific Bell Telephone Company's § 851 exemption application; and
- R.05-04-005, the URF rulemaking.

We will follow the electronic service protocols adopted by the Commission in Rule 1.10 for all documents. This rule provides for electronic service of documents, in a searchable format, unless the appearance did not provide an e-mail address. If no e-mail address is provided, service should be made by first-class mail. Parties are expected to provide paper copies of served

documents upon request. Paper format copies, in addition to electronic copies, shall be served on the assigned Commissioner and the Administrative Law Judge (ALJ).

The official service list for this proceeding is available on the Commission's web page. Parties should confirm that their information on the service list is correct, and serve notice of any errors on the Commission's Process Office, the service list, and the ALJ. Prior to serving any document, each party must ensure that it is using the most up-to-date service list. The list on the Commission's website meets this definition.

The respondents and persons who file comments in response to this rulemaking will be added to the Official Service List as parties pursuant to Rule 1.4. Non-parties who wish to receive electronic service of all documents in this rulemaking may request addition to the Official Service List by completing the Request for Addition or Change to Service List (http://www.cpuc.ca.gov/forms/service_list_addition_change.pdf) and providing it to the Commission's Process Office (process_office@cpuc.ca.gov). In order to receive service of comments, persons other than respondents should request addition to the Official Service List as "Information Only" or "State Service" by no later than May 26, 2009.

8. *Ex Parte* Communications

This proceeding is subject to Rule 8.2 which specifies standards for engaging in *ex parte* communications and the reporting of such communications. Pursuant to Rule 8.2(a) *ex parte* communications will be allowed in this proceeding without any restrictions or reporting requirements.

IT IS ORDERED that:

1. A rulemaking is instituted for the purpose of considering broader exemptions from Pub. Util. Code § 851 and conditions on those exemptions pursuant to § 853(b) for Uniform Regulatory Framework carriers.
2. This rulemaking is preliminarily determined to be a quasi-legislative proceeding as that term is defined in the Commission's Rules of Practice and Procedure, Rule 1.3(d), and it is preliminarily determined that no hearings are required. A person who objects to these preliminary determinations shall file any objections no later than 10 days from the issuance of this rulemaking.
3. Pursuant to Rule 8.2(a) *ex parte* communications will be allowed in this proceeding without any restrictions or reporting requirements.
4. The specific issues to be considered in this proceeding are listed and described in this Order. These issues constitute the general scope of this proceeding. The exact scope of this proceeding will be determined in one or more rulings issued by the assigned Commissioner.
5. The preliminary schedule for conducting this proceeding is set forth in this Order. The assigned Commissioner and the assigned Administrative Law Judge may revise the schedule of this proceeding.
6. The telecommunications carriers identified in Appendix A are named as respondents to this proceeding. The respondents shall file comments on the matters set forth in this Order. Other persons may file comments, as set forth in this rulemaking.
7. The telecommunications carriers that may be affected by this rulemaking are the Uniform Regulatory Framework carriers, including large and medium sized incumbent local exchange carriers, competitive local exchange carriers, and non-dominant interexchange carriers.

8. This Order shall be served on: (a) the respondents, (b) all competitive local exchange carriers and non-dominant interexchange carriers and (c) the service lists for Application 06-07-026 and Rulemaking 05-04-005.

9. Persons wishing to be placed on the service list of this proceeding shall follow the procedure set forth in Section 7.

This order is effective today.

Dated May 7, 2009, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

APPENDIX A

Respondents

The following telecommunications utilities are named as respondents to this proceeding:

1. Pacific Bell Telephone Company d/b/a AT&T California.
2. Verizon California Inc.
3. SureWest Telephone
4. Citizens Telecommunications Company of California d/b/a Frontier Communications of California

(END OF APPENDIX A)

APPENDIX B

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APPENDIX B

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APPENDIX B

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APPENDIX B

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