A.05-02-027
D.05-11-028

Dissent of Commissioner Geoffrey F. Brown

In the Matter of the Joint Application of SBC Communications, Inc. (SBC) and AT&T Corp., Inc. (AT&T) for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462) , TGC San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.
A. 05-02-027

Our alternate decision, adopted today, errs in fundamental ways, particularly its improper interpretation of our exemption authority and its disregard of its record. For these reasons, *inter alia*, I cannot support the alternate decision of a majority of my colleagues.

Improper application of our exemption authority under §853(b)

Until now, this Commission has never exempted[1] an incumbent local exchange carrier's merger with a major market competitor from the purview of Public Utilities Code §854(b).[2] That statute requires heightened scrutiny and sharing of merger savings with ratepayers in major merger cases.

We heretofore have not exempted (in the public interest) such mergers from §854(b)[3] analysis for the simple reason that to do so would permit the exception to

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[1] Public Utilities Code § 853(b) affords authority to exempt applicants under the article from its strictures. It provides, in relevant part:

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.

[2] Public Utilities Codes §854(b) provides:

Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($ 500,000,000), the commission shall find that the proposal does all of the following:

(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 percent of those benefits.

(3) Not adversely affect competition. 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.

[3] Unless otherwise indicated, all references are to the Public Utilities Code.

swallow the rule.[4] If a major monopoly telephone utility may merge with its primary long distance competitor and thereby avoid heightened scrutiny and ratepayer sharing of net benefits, such scrutiny, in practical terms, can never be applied.[5] That the legislature afford us exemptive authority in §853(b) from providing heightened scrutiny for large mergers is not license for our *carte blanche* repeal of the §854(b) statute. By this decision, we do precisely that -- using disguised rubric and questionable citation of authority. In practical terms, our decision guarantees that in the foreseeable future there will never be another major merger in California in which ratepayers share in the net benefits. Were we afforded legislative authority to revise the Public Utilities Code at will, some of our members might well consider a repeal of §854(b) as a balm to innovation and efficiency. The law does not so empower us. Ours is delegated authority. We bear a responsibility by our oaths not to so abuse our discretion as to render a lawful statute a nullity. Yet, that is what we have now done.

In earlier iterations, today's decision sought to avoid §854(b)'s application, not through exemption, but through hyper-technical distinctions that contravene our reasoning in the *SBC-Telesis Merger* decision.[6] *SBC-Telesi*s applies longstanding California Supreme Court precedent that a utility business must be viewed as a whole, without regard to separate corporate entities.[7] The earlier decision engaged in extraordinary mental gymnastics in order to permit this merger without compelling SBC and AT&T to pay to ratepayers at least half of the net economic benefits of the merger. The administrative law judge assigned to this case determined that amount at approximately $659.2 million net synergies of which he allocated $329.6 million,[8] or 50% to ratepayers.

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[4] As the majority points out (mimeo, p. 15, fn. 20), we have exempted six mergers from §854(b) scrutiny in recent years. What the majority fails to note is that each exempted merger was of two competitive non-incumbents. To state "Thus it would not be a significant departure from our prior decisions if we recognized an exemption as warranted due to the specific facts and circumstances presented in the merger before us" (mimeo, p. 18-19), without mentioning that none of the exemptions involved an incumbent monopoly has the effect of misleading all but the most sophisticated reader. This inoffensive language, making it appear that this is a mere common law extension of an ongoing trend, masks a sea change in regulatory philosophy and a manifest reversal of existing law and policy. This Commission's failure to so note is, at core, deceptive and unbecoming. In footnotes 25 and 26 (mimeo, p. 19), the majority attempts to convey the impression that §853(b) exemptions are routine for incumbent *monopolies* by citing numerous exemptions granted to *competitive* carriers. This attempt to blur a legitimate and crucial distinction with endless citations is deceptive.

[5] Here, of course, it is not just one monopoly merging with its key competitor, but California's two largest telephone monopolies and their two largest competitors.

[6] *Re Joint Application of Pacific Telesis Group and SBC Communications, Inc.*, D. 97-03-067, 71 CPUC 2d 351 (March 31, 1997) ("SBC/Telesis Merger"). For a detailed analysis of why §854(b) is applicable, see November 4, 2005, Alternate Decision of Commissioner Brown at http://www.cpuc.ca.gov/PUBLISHED/COMMENT_DECISION/50934.htm This analysis *may* have contributed to the last minute removal of the faulty §854(b) analysis in the decision.

[7] *City of Los Angeles v. Public Utilities Com.* (1972) 7 Cal.3d 311, 342-344, *General Tel. Co. v. Public Utilities Com.* (1983) 34 Cal.3d 817, 826.

[8] See (Mimeo, p. 47) ALJ Pulsifer Agenda Decision Approving Transfer of Control at: http://www.cpuc.ca.gov/PUBLISHED/AGENDA_DECISION/51290.htm

This decision's back-door acquiescence to the overruling of *SBC-Telesis*[9] by implication is offensive to both due process and regulatory certainty.[10] In the last few hours before the Commission voted, language changes in the proposed decision converted inapplicability into exemption as the predominant theory. The hyper-technical, sophist rationale for the inapplicability of §854(b) (effectively overruling of *SBC-Telesis*) was largely eliminated,[11] not unlike an *ex post hoc* redaction in the infamous *Soviet Encyclopedia*. In fact, one will search our decision in vain to find any citation or discussion of the seminal case in this area, the *SBC-Telesis Merger*.[12]

In its stead, our decision asserts our "sweeping" authority to grant §853(b) exemptions, thereby obviating any analysis of §854(b) whatever. In support thereof (mimeo, p 12, fn. 14), it cites *In the Matter of MCI-BT Merger* ("[In examining the plain language of §853(b) in the *British Telecom-MCI* merger,[13] we held that the statute grants us sweeping authority: "the extent of our *broad exemptive powers* in §853(b) is clear on the face of that statute" (emphasis in the original). What today's decision omits is the *caveat* in the *MCI-BT* merger decision: "We *caution* that we limit this §§ 854(b) and (c) exemption to the unique facts and circumstances of this transaction" (emphasis added). The facts and circumstances underlying the application of an §853(b) exemption were that the applicant, British Telephone:

> operates exclusively in the United Kingdom and does not propose physically to enter the California market. Its entry will be very indirect by virtue of this transaction. BT itself currently has no presence in California, nor does it intend to have. It will merely be the ultimate parent for MCIC's United States operations. It is an international corporation owning multinational subsidiaries, which is now acquiring MCIC as an additional independent set of operating subsidiaries already under a holding company structure. The acquisition does not involve merging any BT operations into MCIC operations. Nor are contiguous or nearby service

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[9] "While it is not clear that the plain language of §854(b) applies to this transaction, the text of §853(b) establishes that an exemption may apply to transactions of any scale, so long as application of §§854(b) and (c) 'is not necessary in the public interest.'" (Mimeo, p. 11)

[10] The majority's opinion in the companion *Verizon-MCI*, D.05-11-029, case on the applicability of §854(b) is confusing. It continues to reaffirm its questionable interpretation of §854(b) while omitting it in its conclusions of law (see n. 10, below). It states (Mimeo, p. 37) "5.4 Since §854(b) does not apply to this transaction, many issues raised by parties become moot. The first part of this section demonstrated that: 10 as a matter of law, §854(b) does not apply to this transaction; 2) as a matter of Commission precedent, §854(b) should not apply to this transaction; and 3) as a matter of policy, §854(b) should not apply to this transaction. This inconsistency produced confusion at the Commission meeting when Commissioner Brown commented about a lack of congruence between the legal analysis in the SBC-AT&T case and this one: "Regrettably, their changes failed to adequately address the problem. We now have one decision (Verizon) saying that §854(b) doesn't apply and the other (SBC) saying, in essence, perhaps it does, but we'll exempt it."

[11] See Alternate Draft of Commissioners Peevey and Kennedy, conclusions of law, p. 105, at: http://www.cpuc.ca.gov/word_pdf/AGENDA_DECISION/51347.doc

[12] The case is mentioned in former versions; see n. 11 above.

[13] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340, *24 (May 21, 1997) (72 CPUC 2d 656)

> territories involved. The substance of this transaction is merely to substitute BT, albeit under the new name Concert plc, as the ultimate corporate parent of MCIC's California subsidiaries, with no change in name, rates or conditions of service. No consolidation of MCIC subsidiary management with BT management is contemplated. MCIC will still exist as the parent holding company over the California subsidiaries, only with Concert plc as MCIC's parent company. 72 CPUC 2d 656, 664

The *BT-MCI* decision went on to observe that the PUC does not exercise traditional ratemaking authority over either of the merging parties and that MCI California's growth was "under competitive forces at sole risk of its shareholders without a captive ratepayer base and guaranteed franchise territory to buffer risk and reward." 72 CPUC2d 656, 665. Headnote six in the BT-MCI case refers to it as "a change in control in name only, with no change in or any merger of actual operations."[14] SBC (California's largest major telephone monopoly) has a captive ratepayer base and a guaranteed franchise territory. As such, it is *readily* distinguishable from the few other §853(b) exemptions to §854(b) that we have applied.

Clearly, the *BT-MC*I merger decision was a nuanced, restricted and careful application of §853(b)'s exemptive powers, not a "broad" one. If not misleading, our decision's citation is at least markedly incomplete. Interestingly, in the BT-MCI proceeding SBC sought to delay the proceedings until applicant MCI proved the inapplicability of §854(b), an ironic if distinguishable juxtaposition.

Similarly in 1999, we referred to §853(b) exemption as a "seldom-used procedure" "invoked in extraordinary cases."[15] Now, in today's decision what was "extraordinary" in the recent past has become the commonplace and ostensibly prophylactic "specific facts and circumstances presented."[16]

Even if normal restrictions on abuse of exemptive authority do not obtain here and §853(b) does confer upon us virtual license to permit mergers (an unlikely interpretation, to be sure), we still bear a responsibility to examine the anti-trust implications of the transaction under *Northern California Power Agency v. Public Util. Com.*, 5 Cal. 3d 370, 379-80 (1971). One will search in vain through our decision for any mention of this case.

In summary, this proceeding's legal analysis necessary to authorize this merger of an incumbent monopoly and one of its major long-distance competitors (without sharing the net benefits thereof with ratepayers) has been inconsistent, disrespectful of precedent, disingenuous, and result-driven. Under such circumstances, the normal deference our decisions are afforded seems hard to justify.

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[14] 72 CPUC 2d 656, 657

[15] Pacific Gas and Electric Company (1999), D.99-04-047, 86 CPUC 2d 33, 1999 Cal. PUC LEXIS 194

[16] Mimeo, p. 18.

If one doubts that the author of the alternate decision (that the majority in this matter voted to support) did not relish the role of a fact-finder, one can find no more eloquent testament than the author's own words:

> In contrast (sic) any regulatory attempt to enumerate merger benefits would result in a deadweight loss. The difficulty of adjudicating the benefit amount is indicated by the wide disparity of estimates provided by the parties in this proceeding.[17] ***Any such Commission calculation of merger benefits would be time-consuming, costly, and highly speculative***. Attempting to enumerate an exact dollar amount for the merger benefits is complicated by the international scope and scale of these entities.[18] (emphasis added)

This statement says, in essence, because adjudication is arduous, this Commission would just as soon not do it. For the Public Utilities Commission that employs its administrative law judges (as well as associated analysts, accountants, and sundry experts) in myriad rate cases that deal on a daily basis with exaggerated claims of parties to throw up its hands and abandon legally-mandated scrutiny because of difficulty is not just silly; it is an inducement to parties to interpose more obfuscation and complexity into an already difficult process. Complexity *per se* cannot excuse dereliction.

In this matter, I conclude from both attending the evidentiary hearings (something that the authors of the alternate did not do) and from my examination of the proposed decision of Administrative Law Judge Pulsifer that the alternative decision does not appear to sufficiently correspond with the evidence and argument submitted to permit a conclusion that the decision fairly reflects the facts adduced at the hearings. The litigants and the public deserve better.

For the foregoing reasons, I respectfully dissent.

Dated November 18, 2005, at San Francisco, California

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Commissioner

[17] The majority in footnote 35 (Mimeo, p. 27) point out the disparate synergy benefit claims, ranging from $27 million (net present value) for applicants to $1.983 billion for one consumer group (TURN)
[18] Mimeo, p. 27.