A.05-04-020
D.05-11-029

Dissent of Commissioner Geoffrey F. Brown

In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI
A. 05-04-020

Our decision errs in fundamental ways, particularly its improper interpretation of our exemption authority, its failure to afford litigants substantive due process, and its disregard of what limited record there was. For these reasons, *inter alia*, I cannot support the 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 swallow the rule.[4] If a major monopoly telephone utility may merge with one of its

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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.

[4] As the majority points out (mimeo, p. 18, fn. 28), 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

primary long distance competitors 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 assigned commissioner's ruling of September 19, 2005,[8] that we ratify by today's decision,[9] is emblematic of the mental gymnastics necessary to permit this merger without compelling Verizon and MCI to pay to ratepayers at least half of the net economic benefits of the merger. The administrative law judge assigned to this case estimated that amount at approximately $103 million.[10]

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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 its core, deceptive and unbecoming.

[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/word_pdf/COMMENT_DECISION/50931.doc. 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] Assigned Commissioner's Ruling denying evidentiary hearings and ruling §854(b) inapplicable to the transaction (September 19, 2005) at: http://www.cpuc.ca.gov/word_pdf/RULINGS/49670.doc.

[9] Mimeo, p. 29: "Consistent with the discussion above, we affirm the ruling of the Assigned Commissioner concerning the applicable law and deny ORA's motion for further review." What this sentence seems to say is §854(b) is disregarded until such time as the rationale of *SBC-Telesis* is interposed, at which time this Commission will overlook the fact that the litigants and the Attorney General relied on the applicability of §854(b), and instead rely on exemptive authority under §853(b).

[10] See November 3, 2005, Alternate Decision of Commissioner Brown, written with the assistance of Administrative Law Judge Glen Walker, concluding, on a limited record (that included no cross examination of witnesses and an abbreviated, disjointed and extremely onerous schedule), that $206 million in net economic benefits were derived from the Verizon-MCI merger in California and that 50%, or $103

This decision's back-door acquiescence to the overruling of *SBC-Telesis* by implication (precipitated by *one* commissioner's ruling and its ratification borne of the urgency associated with this merger) is offensive to both due process and regulatory certainty.[11] More repugnant than the surreptitious overruling of SBC-Telesis is the fact that litigants were not permitted to effectively argue the law on §854(b), the law on §853(b), the facts bearing on §854(b), or the reasons why an exemption pursuant to §853(b) was or was not appropriate as a matter of precedent or policy. Non-applicant litigants were handed, by fiat, a ruling gutting the essence of their case, even before the "hearing." Then, 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,[12] 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*.

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 15, fn. 21), it cites *In re Application of WorldCom* [13] ("[T]here is no question that §853(b) grants the full Commission the power to exempt a transaction from the requirements of… [§]854."). This citation is misleading. The actual quote is, "Whatever the limits of the Executive Director's delegated authority, there is no question that § 853(b) grants the full Commission the power to exempt a transaction from the requirements of §§ 851 and 854." Only three paragraphs preceding the abbreviated quote is the following sentence that the decision omitted: "The Commission grants exemptions under § 853(b) *only* in *extraordinary situations*" (emphasis added). No fair reading of the *WorldCom* case permits its citation for the assertion that it supports *broad discretion* in the application of §853(b)'s exemption. Interestingly, the §853(b) exemption here was

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million, of that should go to ratepayers:
http://www.cpuc.ca.gov/word_pdf/COMMENT_DECISION/50873.doc

[11] The majority's opinion on the applicability of §854(b), because it was rushed, is confusing. It continues to reaffirm its questionable interpretation of §854(b) while omitting it in its conclusions of law (see n. 12, 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."

[12] Conclusions of Law #6 (Mimeo, p. 125) is blank. The failure to eliminate the provision remaining in the decision (Mimeo, p. 37) to the effect that §854(b) does not apply as a matter of law presumably reflects an error.

[13] *In re Application of WorldCom, Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of section 851 and 854 of the Public Utilities Code With Respect to its Bankruptcy Reorganization*, Decision 03-11-015, 2003 Cal. PUC LEXIS 554, *10 (Aug. 20,2003)

conferred in order to facilitate MCI-WorldCom's emergence from bankruptcy and its assertion of stringent ethical restrictions on its officers.

Similarly in 1999, we referred to §853(b) exemption as a "seldom-used procedure" "invoked in extraordinary cases."[14] Now, in today's decision what was "extraordinary" in the recent past has become the commonplace and ostensibly prophylactic "specific facts and circumstances presented."[15]

The decision also states (mimeo, p 15): "In examining the plain language of §853(b) in the *British Telecom-MCI* merger,[16] 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 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."[17] Here, of course,

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[14] Pacific Gas and Electric Company (1999), D.99-04-047, 86 CPUC 2d 33, 1999 Cal. PUC LEXIS 194
[15] Mimeo, p. 19.
[16] *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)
[17] 72 CPUC 2d 656, 657

our opinion blithely assumes that the inevitable consolidation is routine.[18] Verizon, like SBC (California's other 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.

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.

Failure to Conduct Fair Hearings

By June 30, 2005, as is apparent from the scoping memo, the assigned commissioner had assigned herself as principal hearing officer[19] and was already entertaining the notion of disregarding the commission's specific instruction that evidentiary hearings be held. Her opinion on the ostensible inapplicability of §854(b) can be inferred from both from the actual tentative language and the fact that she did not request from the Attorney General an anti-trust analysis pursuant thereto until August 12, 2005.[20] Public Utilities Code §854(b) (3) dictates that "the commission *shall* request an

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[18] Mimeo, p. 11: "The Agreement does not call for the merger of any assets, operations, lines, plants, franchises, or permits of the MCI California Subsidiaries with the assets, operations, lines, plants, franchises, or permits of any Verizon entity. To the extent that any such reorganization might be made at a later date, it will be made in the normal course of business and subject to such regulatory approvals as may be required." Those who might surmise from this language that further serious regulatory scrutiny of these subsequent consolidations will be, if at all, anything but *pro forma* fail to recognize that the good faith, deference, and exhaustion in the bureaucratic culture of the Public Utilities Commission preclude re-litigating this matter as its subordinate constituent parts are reorganized.

[19] By assigning herself as principal hearing officer, the assigned commissioner assured that the administrative law judge was precluded from writing the proposed decision; it also meant that the principal hearing office must attend more than half of the hearing days. See §1701.3

[20] Scoping Memo, June 30, 2005 at: http://www.cpuc.ca.gov/PUBLISHED/RULINGS/47526.htm. If, in fact, §854(b) was inapplicable, the Public Utilities Commission would not be required to request an advisory opinion from the Attorney General.

advisory opinion from the Attorney General regarding whether competition will be adversely affected," yet from the time of categorization (May 5, 2005)[21] to August 12, 2005, no such request was made. The date for filing motions on whether evidentiary hearings were necessary was August 26, only two weeks later. There followed a series of motions to modify the schedule and finally on September 16, 2005, three days after the Attorney General opined that the transaction would not adversely affect competition, the Assigned Commissioner ruled evidentiary hearings were unnecessary.[22]

Disputed Material Facts

Consumer groups alleged at least six areas of material disputed facts that warranted evidentiary hearings. They were as follows.

A. Inter-modal Competition**:**

- The extent of actual adoption of "inter-modal" alternatives as substitutes for primary wireline telephone service.

Applicants claimed widespread substitution of wireless, VoIP and cable telephony for primary wireline service. Consumer groups alleged that substitution was extremely limited and that generally substituted service – particularly wireless and VoIP – were purchased *in addition to* primary wireline service and were perceived as satisfying distinctly different consumer needs (e.g., mobile vs. fixed).

- The technical quality, reliability, functionality, safety, and security status of purported inter-modal alternatives to wireline

Applicants claimed that wireless, VoIP, and cable were sufficiently close technically to wireline phone service as to be perceived as close substitutes by consumers. Consumer groups argued that these services present sufficiently different attributes and shortcomings as to be perceived as inferior alternatives for residence service (e.g., signal quality, requirement for local power, E911, etc.).

- Whether purported inter-modal alternatives operate to constrain Verizon's wireline prices.

Applicants contended that the presence of inter-modal alternatives operated to limit Verizon's ability to increase wireline prices. Consumer groups contended that applicants offered no formal analysis or own-price and cross-price elasticity studies to support this contention. Consumers alleged that such factual evidence that is available contradicts applicants' claim.

Applicants claimed that "the available quantitative studies of substitution do not offer an estimate of a cross-price elasticity that would yield information that might serve as the basis of a SSNIP [small but significant and non-transitory increase in price] test"

[21] Preliminary Categorization, June 30, 2005, at: http://www.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/46210.doc

[22] Assigned Commissioner's Ruling denying evidentiary hearings and ruling §854(b) inapplicable to the transaction (September 19, 2005) at: http://www.cpuc.ca.gov/word_pdf/RULINGS/49670.doc.

and, on that basis, claim that they are only required to demonstrate that these services are "reasonably interchangeable in use" *vis-à-vis* wireline telephony. Applicants claimed that such a demonstration is satisfied by superficial, anecdotal evidence of interchangeability. Consumers claimed that other than witness Rubinfeld's claim that there are no "available quantitative studies of substitution," applicants offered no evidence that such studies could not have been undertaken, or that the specific "reasonably interchangeable in use" evidence that they do offer is sufficient to satisfy the standard they purport to attribute to *Brown Shoe*.

- Applicants involvement in offering putative "inter-modal alternatives" themselves.

Consumer groups stated that, since Verizon is itself engaged in both the wireless and VoIP business, applicants' characterization of these as "inter-modal competitors" ignores the fact that a post-merger Verizon will be able to "manage" the migration of its customers to such alternatives, and to develop bundles of wireline, wireless, broadband, and VoIP that will exploit the far more important (from a consumer perspective) *complementarity* among these services than the purported substitutability being claimed by applicants.

B. MCI's "Irreversible" Exit from the Consumer Market

- The circumstances surrounding MCI's activities before announcement of the merger.

Consumer groups alleged that MCI still provides mass market services in California and that there is no evidence that MCI would exit this segment rather than, for example, seeking to sell its mass market customer base to another CLEC, if the merger is not approved. In addition, MCI's decision to reduce its mass market services marketing efforts appears to have been motivated by its goal of merging with a large carrier.

C. Synergies – Allocation to Intrastate California

- The entities to be included in a § 854(b) (2) calculation.

Applicants would limit the California portion of synergies to Verizon-CA intrastate services, and would exclude MCI, Verizon-West Coast, and other Verizon and MCI entities.

- The definitions of "short-term" and "long-term."

Applicants made no distinction between "short-term" and "long-term" and argue that "long-term" means four (4) years, after which the ratepayer allocation of merger benefits would cease. Consumer groups defined "long-term" as running in perpetuity, the same time frame used by applicants in synergy estimates provided to investors and shareholders.

Because applicants charged the entirety of the California share of up-front merger implementation costs against synergy gains in the year in which such costs are incurred,

"short-term" economic benefits are actually negative, which violates the requirement of § 854(b)(1).

- The treatment of up-front merger implementation costs.

Because applicants assigned merger costs to the year in which the costs were incurred, consumer groups alleged that if the Commission truncated the § 854(b)(2) allocation of economic benefits to a specific time frame, ratepayers will be charged for 100% of the California share of costs, but will receive only a small share of the benefits.

D. Mutual Competitive Forbearance

Applicants claimed that Verizon will compete with SBC; opponents sought to present evidence of a longstanding pattern of mutual competitive forbearance iby a de facto duopoly.

E. Internet Monopolization

Consumer groups alleged that the integration of Verizon's retail DSL customers with the MCI Tier 1 backbone, particularly when coupled with similar integration as a result of the proposed SBC/AT&T merger, would produce two mega-backbone networks that will be able to enter into exclusive bilateral peering with each other, and can exclude other nonintegrated backbone networks from peering. The effect will be to limit the ability of nonintegrated ISPs and IBPs (Internet Backbone Providers) to compete with Verizon and SBC, enabling Verizon and SBC to exploit their in-region DSL customer base and backbone integration to effectively monopolize Internet access in their respective ILEC regions.

F. Negative Impacts on the California Economy

- Loss of California jobs.

Applicants planned to eliminate 7,000 jobs nationwide, but have not specified the number of job cuts in California. ORA estimated California job cuts of over 400, and calculated the resulting economic impact on California's economy of $807 million, including the multiplier effect. Applicants disputed ORA's California headcount reduction estimate and the use of a multiplier, notwithstanding the fact that the Commission applied a multiplier in the SBC/Telesis decision. Applicants claimed that ORA's estimate of California job cuts exceeds total MCI employment in California.

Necessity of Evidentiary Hearings

Upon reading the foregoing, it is hard to believe due process would require such fundamental issues to be heard for eight days of evidentiary hearings in the analogous SBC-AT&T case and not at all in the Verizon-MCI case. Of course, it is always possible

that the eight days of hearings of analogous issues in the SBC-AT&T case were superfluous and done solely for show.[23]

Nonetheless, the summary of disputed material issues of fact in the Verizon-MCI case seems daunting. Even the three days of hearings that the initial scoping memo[24] contemplated seem abbreviated in light of the fundamental issues involved. One of the major reasons that the Assigned Commissioner's Ruling declined to consider evidentiary hearings was that §854(b) was not applicable due to the holding company status of the applicants.[25] Inasmuch as our decision effectively omits its justification language to that effect, we are left with litigants who were told that their concerns were largely irrelevant because of the inapplicability of §854(b) as a matter of law, only to now find that their concerns were irrelevant because of a discretionary exemption for which evidentiary hearings were similarly not needed. When one looks at the non-applicant litigants' complaints of preemptory and high-handed rulings on scheduling and hearings,[26] as a rehearing petition should, the conclusion does not seem far-fetched that the principal hearing officer in this case embarked upon a result-oriented process designed, above all, to curtail the inquiry that litigation should entail.

If one doubts that the principal hearing officer in this matter did not relish her role as a fact-finder, one can find no more eloquent testament than her 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.[27] ***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.[28] (emphasis added)

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[23] See October 5, 2005, letter from Senators Escutia, Dunn, Bowen, Kuehl, Alarcon, and Cedillo, entitled "*Interlocutory Appeal in A. 05-04-020 Verizon/MCI Merger Proceeding,"* calling for evidentiary hearings, the applicability of §854(b), and the recusal of Commissioner Kennedy. In the letter, the six senators commended President Peevey for adhering to his promise to conduct evidentiary hearings, contrasting her performance unfavorably to his. Given that the SBC-AT&T and Verizon-MCI decisions of Commissioners Peevey and Kennedy are largely mirror images, and wildly at variance with the factual findings of the administrative law judge who listened to the testimony, it could be argued that the eight days of hearings were really unnecessary. In fact, Commissioner Kennedy actually disparaged the necessity of having hearings "for show" in the Verizon-MCI case, at http://cpuc.granicus.com/ViewPublisher.php?view_id=2 (November 18, 2005 Commission Meeting, at 1:08:00).

[24] June 30, 2005 Scoping Memo, at: http://www.cpuc.ca.gov/word_pdf/RULINGS/47526.doc

[25] Assigned Commissioner's Ruling Denying Motions for Hearings and Determining the Applicability of §854 to the Proposed Transaction, September 19, 2005, at: http://www.cpuc.ca.gov/word_pdf/RULINGS/49670.doc

[26] In this respect, it is worth noting that many of the attorneys (representing smaller companies or consumer groups) involved were also involved in the analog SBC-AT&T hearings, thus putting them under intolerable pressures.

[27] The majority in footnote 48 (Mimeo, p. 26a) point out the disparate synergy benefit claims, ranging from $6.9 million for applicants to $731.4 million for one consumer group (TURN)

[28] Mimeo, p. 26a.

This statement says, in essence, because adjudication is hard, 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 with exaggerated claims of parties on a daily basis 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.

At core, what is at issue is not whether this matter in some abstract sense might have been fairly conducted without evidentiary hearings, but whether the process *actually* provided was fair. The erratic mish-mash of citations proffered by the majority to the effect that evidentiary hearings are not required as a matter of law in rate-setting cases is not analysis; it is emblematic of the management of this case; it is done to further a goal, rather than to ascertain what is the appropriate level of inquiry.[29] The issues involved were complex and seriously contested, the application was by all accounts a major proceeding (and in the normal course of things routinely would have warranted an evidentiary hearing), the issues involved went to the heart of telephone regulation in the foreseeable future, and the matter was of substantial concern to consumer groups, the financial community, and to legal and regulatory authorities. One proceeding afforded an evidentiary hearing. Its analog did not. One cannot but wonder how affording evidentiary hearings to SBC-AT&T while not doing so to Verizon-MCI is not, on its face, arbitrary and capricious.

In this matter, I conclude that the process was not fair, irrespective of whether another principal hearing officer might have been able to examine the record without the orderly introduction of evidence, cross-examination, and adequate argumentation that evidentiary hearings imply. In this case, the decision does not appear to sufficiently correspond with the evidence and argument submitted to permit a conclusion that the process was fair.

On its specific facts, a hearing was necessary, if only to afford a counterbalance to all of the evidence that the case's conclusions were the product of a pre-existing opinion. One need only compare the level of detailed analysis in the companion SBC-AT&T proposed decision by Administrative Law Judge Pulsifer[30] and the mirror image decisions of the assigned commissioners, adopted today by the majority, to see the manifest difference between an analytical approach that is respectful of process and one that is result-oriented. While the assigned commissioner in this case undoubtedly sees an

[29] The majority seems to place great emphasis on whether the rights being adjudicated in this rate-setting proceeding were "vested" (Mimeo, p. 32); its inquiry should more appropriately have been directed at whether they were fundamental, complex, and susceptible to being determined without the use of the orderly process that our administrative law judges routinely apply when they are designated "principal hearing officers."

[30] Proposed decision SBC-AT&T Merger, A.05-02-027, at: http://www.cpuc.ca.gov/cyberdocs/cyberdocs.asp?loginmsg=Your+log+on+session+has+timed+out%2C+please+re-log+on&user=

evidentiary hearing as akin to fondling the beads in a needless catechism, I see it as a spur to reflection. Our Constitutional and statutory role as an independent body requires independent analysis of evidence, something we did not do here. As a trial lawyer of more than three decades of experience and on substantive review of the briefs by the litigants, I conclude that *in this instance* the failure to conduct an evidentiary hearing was emblematic of a lack of reflection and, as such, a denial of substantive due process. The litigants and the public deserved better.

For the foregoing reasons, I respectfully dissent.

Dated November 18, 2005, at San Francisco, California

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