ALJ/GEW/sid

Mailed 4/25/2002

Decision 02-04-057 April 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell Telephone Company (U 1001 C) For Authority Pursuant to Public Utilities Code Section 851 to Lease Space in Administrative Buildings and Central Offices and to Transfer Assets to SBC Advanced Solutions, Inc.	Application 00-01-023 (Filed January 14, 2000)

Michael D. Sasser, Attorney at Law, for Pacific Telesis Group, applicant.
MBV Law LLP, by Andrew Ulmer and Kristopher E. Twomey, Attorneys at Law, for California ISP Association, Inc.; and William H. Booth and Merrie M. Cavanaugh, Attorneys at Law, for SBC Advanced Solutions, Inc.; interested parties.
Christine A. Mailloux, Attorney at Law, for The Utility Reform Network; and Laura J. Tudisco, Attorney at Law, for the Office of Ratepayer Advocates; protestants.

O P I N I O N

1. Summary

Pacific Bell Telephone Company (Pacific) seeks formal authorization to transfer assets and lease space to SBC Advanced Solutions, Inc. (ASI). The transfer enables ASI to provide broadband and other advanced services that previously were provided by Pacific. This proceeding has been stayed three

times, at Pacific's request, while Pacific considered whether to proceed with the transfer. Our decision today concludes that the record developed in three days

of hearings in December 2000 has become stale, and that a United States Circuit Court of Appeals decision in January 2001 has changed the ground rules under which ASI operates. Accordingly, we dismiss the application and direct Pacific to refile its application to take account of the changed circumstances that now prevail.

2. Background

Pacific filed its application to facilitate compliance with the conditions of the October 1999 order of the Federal Communications Commission (FCC) approving the merger between SBC Communications, Inc. (SBC) and Ameritech Corporation.[1] Pacific's application asks the Commission for authority to lease space and transfer assets to a separate advanced services affiliate, ASI. The transfer involves approximately $123 million in assets, lease of space in 80 administrative offices and 31 central offices, and reassignment of some 2,500 Pacific employees to ASI.

Following hearing in December 2000, and during the briefing stage of this proceeding, the United States Court of Appeals for the District of Columbia Circuit decided *Association of Communications Enterprises v. Federal Communications Commission* (D.C. Cir. 2001) 235 F.3d 662. The Circuit Court reversed the FCC's determination that the separate advanced services affiliate could operate free of obligations under Section 251(c) of the Telecommunications Act of 1996, 47 U.S.C.S. §§ 151 et seq. Instead it ruled, in effect, that ASI is a successor or assign of Pacific under Section 251(c) and therefore is subject to the

[1] *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee* (F.C.C. Oct. 8, 1999) 14 FCC Rcd. 14,712 (hereinafter "Merger Order").

same resale and other obligations of Pacific under that section of the Telecommunications Act.

Under the terms of the Merger Order, nine months after the court's decision had become final and non-appealable, SBC no longer would be obligated to provide advanced services through a separate affiliate, although it may choose to do so.[2] The court's decision became final and non-appealable in April 2001, and the Merger Order authorizes advanced services operations of ASI to be brought back into Pacific on or after January 9, 2002.

A ruling by the Administrative Law Judge (ALJ) dated March 9, 2001, stayed this proceeding and a proposed decision. The ruling directed Pacific to file a motion by May 7, 2001, notifying the Commission and all parties of the status of the application and proposing further procedural steps. On May 7, 2001, Pacific filed a motion in which it stated that SBC was still evaluating whether to reintegrate advanced services back into Pacific and other SBC incumbent local exchange carriers. Pacific stated that a decision on reintegration was not expected until September 2001, and it requested a further stay until that time, with a further status motion to be filed by August 1, 2001. The stay was granted.

On August 1, 2001, Pacific requested a further stay until December 14, 2001, with a further status report on November 14, 2001. Pacific stated:

> "SBC is continuing to evaluate the economic, regulatory and legal implications of reintegrating advanced services operations of ASI into Pacific and the other SBC incumbent LECs. At this time, no final decision has been made on reintegration. We

[2] Merger Order at ¶ 445.

> continue to believe that action on Pacific's Application probably will still be required by the Commission. We also continue to be concerned, however, about recommending any course of action that might turn out not to have been necessary, given the current limited resources of the Commission and the parties." (Pacific Motion, August 1, 2001, at 3.)

The motion for a further stay was opposed by the Office of Ratepayer Advocates (ORA) and by the California ISP Association, Inc. (CISPA). They recommended dismissal of the application without prejudice to refiling once SBC and Pacific decided what to do.

By ruling dated October 22, 2001, Pacific's motion for a third stay was granted, but the ruling also concluded that the record had become stale and that further proceedings would be required if Pacific decided to go forward with the transfer of assets.

3. Decision to Go Forward

At a prehearing conference conducted on January 16, 2002 – a week after the date on which Pacific was authorized to reintegrate advanced services assets into its operation – Pacific announced that it had elected to go forward with the transfer of assets to ASI. It urged that a decision should be issued promptly in this docket based on the existing record. It argued that ASI had been authorized by the Commission on May 4, 2000, to operate as an interexchange and competitive local exchange carrier (D.00-05-021) and that this application is and should be confined to whether affiliate transaction rules have been followed correctly in the transfer of assets to ASI.

ORA, joined by CISPA and The Utility Reform Network (TURN), argues that the application should be dismissed without prejudice to refiling or, alternatively, additional discovery should be conducted to correct and amplify

the record. ORA presents two arguments in favor of a dismissal. First, it states that the Circuit Court decision changes ASI from an "under-regulated but dominant CLEC," or competitive local exchange carrier, to a CLEC that this Commission now will regulate more formally. Second, ORA states that the Commission now has information about ASI's service that was not available a year ago, because ASI has been in operation during the pendency of this case.[3] Based on that new information, ORA states that the Commission may want to reconsider the conditions that it places on the transfer of assets from Pacific to ASI.

ORA and CISPA assert that Pacific's provision of advanced services through ASI has led to service quality problems and confusion for its customers, particularly in broadband services, including digital subscriber line (DSL) service, and that further proceedings may clarify ASI's new obligations under the Telecommunications Act. They argue that ASI's experience to date also may suggest new consumer-oriented conditions that should be imposed as part of any approval of the transfer of assets.

TURN argues that Pacific and SBC are responsible for the delay in dealing with this application and that the other parties should have a right to satisfy themselves that nothing has changed substantively since the application was filed in January 2000. It states that the nature of the transfer of assets has changed from one in which Pacific was required by the FCC to make the change

[3] Pacific has transferred employees, assets, and space to ASI pursuant to General Order (GO) 69-C, which permits a utility to grant revocable licenses for limited uses of utility property without further authorization by the Commission. The property and space were transferred under revocable licenses and leases, but Section 851 approval is sought to make the transfers permanent.

into a proceeding in which Pacific is permitted – but not required – to transfer assets and operate advanced services through an affiliate.

4. Discussion

As Pacific points out, the parties and the Commission have devoted a great deal of time and effort to this application. There was substantial discovery. Three days of hearings took place on December 5, 6, and 7, 2000. Lengthy briefs were filed in January and February 2001. After the Circuit Court decision was issued on January 9, 2001, all parties agreed that a brief stay was sensible to give Pacific and SBC time to decide whether to withdraw this application and transfer employees and assets from ASI back to Pacific and to SBC's other local exchange carriers.

However, more than a year passed before Pacific announced on January 16, 2002, that it would go forward with ASI's operation. It is obvious that much has changed since the hearings in December 2000 and, as a result, the record now is not only stale but may be misleading. Testimony and cross-examination were premised on the FCC requirement that advanced services be transferred from Pacific to ASI. As a result of the Circuit Court ruling, that requirement no longer exists. ASI's obligations in the important operations, installation and maintenance (OI&M) functions were said to be different from the OI&M obligations of Pacific. The Circuit Court's conclusion that ASI is a "successor or assign" of Pacific as to Section 251(c) requirements now casts doubt upon that assertion.

While we could elect to supplement the existing record, we are not inclined to do so when much of the existing record, including the parties' recommendations for conditions of transfer, is premised on assumptions that are no longer correct. As the ALJ commented at the recent prehearing conference,

"I'm reluctant to go to the Commission with findings based on [a] record [that] looked at an animal, ASI, that is different from the animal that ASI has become." (January 16, 2002 Transcript, at 105.)

Accordingly, we will adopt the recommendation of ORA that this application be dismissed without prejudice to refiling, and we will direct Pacific within 90 days of the date of this order to file a revised application based on its decision to go forward with the transfer of assets to ASI.

We believe that neither Pacific nor protestants are unduly disadvantaged by our order today. Pacific has in fact transferred its advanced services assets and leased space to ASI under temporary lease arrangements authorized by GO 69-C. ASI is in operation, and this Section 851 proceeding is intended to formally review and evaluate those transfers. As to protestants, they favor refiling as the most efficient and expeditious method of obtaining an accurate record upon which to base any conditions of transfer that they seek to recommend.

With that said, we agree with Pacific and ASI that portions of the evidence introduced at hearing in December 2000 are likely to be unchanged or little changed, and that recompiling it will be unnecessarily time-consuming. The value of assets is one example. The parties' positions on the issue of "on-going enterprise" is another. To avoid unnecessary duplication of work, we encourage the parties to consider stipulations for admission of exhibits and testimony received in the earlier proceeding if little or no change in such evidence is anticipated.

5. Pacific's Motion to Supplement Record

At the prehearing conference on January 16, 2002, Pacific was granted leave to file a motion proposing alternatives to a dismissal of this application. In

its motion on January 22, 2002, Pacific urged that either a proposed decision be written based on the existing record, or that the record be reopened for the limited purpose of showing changes, if any, required by the Court of Appeals decision.

ORA and TURN filed a joint response opposing Pacific's motion and supporting a dismissal without prejudice to a new filing. ORA and TURN assert, "The record in this proceeding is stale. The legal premise upon which the original application was founded no longer exists." (ORA/TURN Response, at 4.) They argue that SBC did not have to wait a year to decide whether to go forward with an ASI operation, stating that Verizon Communications, facing similar facts with respect to a separate data affiliate, petitioned the FCC for a waiver, which was granted, and in November 2001 filed for authority to reintegrate its advanced services assets.

For the reasons set forth above, we agree with ORA and TURN that the existing record is of limited value in view of the changed circumstances of this case. Seeking to supplement that record is more likely to create confusion than clarity. Accordingly, Pacific's motion is denied.

6. Comments on Proposed Decision

The proposed decision of the ALJ was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. ORA in its comments supports the proposed decision. Pacific and ASI oppose it, arguing that a re-filing of the application is wasteful and inefficient. Pacific states that the only thing that has changed in the existing record is the Circuit Court decision, and it would be more efficient simply to reopen the record to consider the effects of that decision on the transfer of assets to ASI. ASI argues that the proposed decision implies that the Commission

should take a fresh look at ASI's qualifications to provide advanced services. Since the Commission determined in D.00-05-021 that ASI was qualified, ASI maintains that a reexamination of its fitness in this proceeding is improper.

The assertions of Pacific and ASI would be more persuasive had these parties not waited a year to announce their intention to go forward. We agree with ORA, TURN and CISPA that the record has become stale. Contrary to ASI's assertion, a re-filing of the application does not mean that ASI's fitness will be reexamined. It does mean that the Commission and the parties will reexamine conditions of transfer based on ASI's new status as a successor or assign of Pacific. There appears to be considerable disagreement as to whether, and how, that designation changes ASI and its relationship with the Commission. We expect direct testimony and cross-examination to help guide us on that issue. ASI's performance over the past year also may suggest conditions of transfer that were not envisioned in the earlier proceeding. We agree with Pacific that the existing record may be sufficient on some issues – valuation and "going concern" come to mind – but, as the proposed decision makes clear, we will welcome stipulations for admission of exhibits and testimony received in the earlier proceeding if little or no change in such evidence is anticipated.

In Resolution ALJ 176-3032 dated February 3, 2000, the Commission preliminarily categorized this as a ratesetting proceeding and preliminarily determined that a hearing would not be necessary. Following receipt of protests, a Scoping Memo was issued determining that hearings were necessary. Hearings were held December 5-7, 2000. Our order today notes the change in the determination on hearings.

Findings of Fact

1. The October 1999 order of the FCC approving the merger of SBC and Ameritech Corporation required that advanced services of the combined company be provided through a separate affiliate.

2. This Commission in D.00-05-021 authorized the establishment of ASI as the separate affiliate required by the FCC order.

3. Application (A.) 00-01-023 seeks authority for Pacific to transfer assets and lease office space to ASI for the provision of broadband and other advanced services.

4. A hearing in A.00-01-023 was conducted on December 5-7, 2000.

5. On January 9, 2001, the District of Columbia Court of Appeals reversed the FCC determination that ASI could operate free of obligations under Section 251(c) and held that ASI is a successor or assign of Pacific as to that section.

6. Under the terms of the FCC order, the Court's ruling meant that SBC as of January 9, 2002, would no longer be required to provide advanced services through a separate affiliate, although it may choose to do so.

7. Proceedings in A.00-01-023 were stayed three times at Pacific's request pending a decision by SBC on whether to continue ASI.

8. At a prehearing conference on January 16, 2002, Pacific announced that SBC had decided to continue ASI and, therefore, the transfer of assets sought in A.00-01-023 should be approved.

9. ORA, joined by CISPA and TURN, urge that A.00-01-023 be dismissed and that Pacific be required to refile its application to take account of the changed circumstances brought about by the Circuit Court decision and the FCC order.

Conclusions of Law

1. Because of the passage of time and court-ordered changes in the FCC merger order, the record in this case developed in December 2000 is now stale and may be misleading.

2. Because of the change in law affecting this application, parts of the testimony, cross-examination and positions of the parties were based on assumptions that are no longer correct.

3. In the interests of having an accurate record, A.00-01-023 should be dismissed, and Pacific should be directed to refile a revised application that takes into account the changed circumstances that now prevail.

4. Pacific will not be unduly prejudiced by such an order because it already has transferred assets to ASI under limited operating licenses authorized by GO 69-C.

O R D E R

IT IS ORDERED that:

1. The application of Pacific Bell Telephone Company (Pacific) for authority pursuant to Pub. Util. Code § 851 to lease space in administrative buildings and central offices and to transfer assets to SBC Advanced Solutions, Inc., is denied without prejudice to refiling.

2. Within 90 days of the date of this order, Pacific is directed to revise and refile the application to take account of the changed circumstances that now prevail as to this application.

3. The categorization of this proceeding in Resolution ALJ 176-3032 is amended to show that hearings are required and were conducted on December 5-7, 2000.

4. Application 00-01-023 is closed.

This order is effective today.

Dated April 22, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners