Decision **DRAFT DECISION OF ALJ BEMESDERFER** (Mailed 9/9/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC California (U 1001 C) for Authority Pursuant to Section 851 of the California Public Utilities Code Lease Space to SNET Diversified Group, Inc.	Application 03-05-017 (Filed May 9, 2003)

OPINION CONFIRMING THAT SBC CALIFORNIA MAY GRANT A LICENSE PURSUANT TO GENERAL ORDER 69-C TO ITS AFFILIATE SNET DIVERSIFIED GROUP, INC. FOR SPACE IN THREE SBC CENTRAL OFFICE BUILDINGS

Summary

In this decision, we confirm that SBC California (SBC) may enter a license agreement with its affiliate SNET Diversified Group, Inc. (SNET), which permits SBC to license the use of small amounts of space in each of three central office buildings to SNET, pursuant to General Order (G.O.) 69-C, without prior Commission approval. We therefore dismiss SBC's application because under G.O. 69-C, the Commission need not consider the application further.

Background

On May 7, 2003, SBC filed an application to lease space in three of its central office buildings[1] to its affiliate SNET, a wholesale provider of signaling

[1] The offices are located at 2350 Main Street, Irvine, CA; 420 South Grand Avenue, Los Angeles, CA; and 14,800 Ventura Boulevard, Sherman Oaks, CA.

services to CLECs, NDIECs and wireless carriers. In each case, SBC represented that the proposed leases would involve small amounts of excess space for which the utility had no present or contemplated future need, and would be revocable at will. SBC further indicated that even though it was filing an application under § 851, it believed the transactions could be entered into without prior Commission approval pursuant to G.O. 69-C and requested that the Commission alternatively rule that the transactions could be consummated pursuant to G.O. 69-C.

Following a telephone conference on June 9, 2003 between SBC's outside counsel Caroline Mitchell and assigned Administrative Law Judge Karl J. Bemesderfer,[2] on June 10, 2003, SBC filed its motion to withdraw the application, indicating its intention to proceed under G.O. 69-C. The motion to withdraw was based on SBC's understanding that because the contemplated transactions were revocable at will they fell within the scope of G.O. 69-C.

On June 12, 2003, the Office of Ratepayer Advocates (ORA) protested the application. ORA questioned whether the proposed leases to SNET would impair SBC's ability to provide service to the public; whether the revenue from the leases would be properly accounted for; and whether the leases involved cross-subsidization or other anti-competitive effects.

On June 23, 2003, SBC filed its reply to the ORA protest. The SBC reply claimed that the proposed leases were consistent with the Commission's affiliate

[2] SBC filed a notice of ex parte communication regarding this conversation on June 12, 2003.

transaction rules and prior Commission decisions. SBC also specifically disagreed with each of the points made by ORA in the protest.

On June 24, 2003, ALJ Bemesderfer granted ORA a one-day extension of time to respond to the motion to withdraw. On June 26, ORA filed its response to the motion to withdraw. In the response, ORA pointed out that the application sought permission to lease the spaces to SNET and that leases were categorically outside the scope of G.O. 69-C.

On July 7, 2003, SBC filed a reply to ORA's response. In its reply, SBC clarified that it was prepared to restructure the transactions as licenses in order to bring them within the literal terms of G.O. 69-C and reiterated its contention that none of the substantive objections raised by ORA in its protest were meritorious. On July 30, ALJ Bemesderfer issued a ruling denying SBC's motion to withdraw the application.

Discussion

In his Ruling, ALJ Bemesderfer took note of the fact that we have never adopted a specific rule covering the application of G.O. 69-C to affiliate transactions, noting that as a result each such proposed transaction "presents both the utility and the Commission with a novel problem for decision." When, as in this case, the utility has chosen to submit the matter to us for consideration either as an application under § 851 or, alternatively, as a potential action under G.O. 69-C, we need to make at least a preliminary examination of the facts to determine under which framework the matter should proceed.

As set forth in the application, the three parcels on which the central offices are located are 80,370 square feet (Irvine), 236,503 square feet (Los Angeles) and 124,968 (Sherman Oaks) in size. At each location, SNET would require 400 square feet of interior space in which to locate signaling

equipment necessary to provide service to the interexchange carriers, CLECs and wireless carriers who are its customers. Each 400 square foot space would have wall separation from the rest of the building.

SBC represents that none of the spaces are currently used by SBC, nor does SBC have any plans for their future use. In the original application, SBC proposed to lease these spaces to SNET, pursuant to leases that would be revocable at will. In its reply to ORA's response, SBC volunteered to convert the leases into licenses so as to bring the transactions within the literal language of G.O. 69-C. For purposes of this decision, we will treat the application as having been amended by SBC's reply to an application to license rather than lease the spaces.

G.O. 69-C provides a narrow exception to § 851's requirement for advance Commission approval of any sale, lease, assignment, mortgage or encumbrance of utility property. Under G.O. 69-C, utilities may, in certain circumstances, convey limited, revocable uses of utility property, such as easements, licenses, permits or other limited use of land, to third parties without prior Commission approval.

G.O. 69-C establishes three key criteria for permitting a utility to grant minor interests in utility property without Commission approval pursuant to § 851, as follows:

- The interest granted must be for a "limited use" of utility property[3];

[3] G.O. 69-C does not authorize utilities to grant permanent, irrevocable interests in utility property to third parties or to permit permanent, physical changes to utility property by or on behalf of third parties.

- The interest granted must not interfere with the utility's operations, practices and service to its customers;
- The interest granted must be revocable either upon the order of the Commission or upon the utility's own determination that revocation is desirable or necessary to serve its patrons or consumers.[4]

We believe that the proposed license agreements here meet each of these requirements, as discussed below.[5]

Limited Use

The proposed agreements affect only a small part of each of the referenced central office buildings. Except for construction of a demising wall, if none presently exists, SNET will not perform any permanent construction in the buildings.

Non-Interference with SBC Operations and Practices

SBC has represented in the application that SNET's activities under the proposed license agreement will not impair or affect SBC's ability to provide utility service.

Revocability

The standard terms of the specific licenses to be entered into pursuant to the application are contained in a general agreement between local SBC

[4] See D.02-10-057.

[5] Since G.O. 69-C applies to this application, we need not address SBC's alternate request for approval pursuant to § 851.

operating companies and SNET dated as of January 1, 2003.[6] Paragraph 15 of the general agreement regarding termination reads:

> "This agreement shall be effective January 1, 2003 and shall continue in effect until terminated by either party as provided below. Either party may terminate this Agreement in whole or in part upon giving at least thirty (30) days advance written notice to the other party."

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed license agreements are for a "limited use" consistent with G.O. 69-C.

2. The proposed license agreements will not interfere with SBC's operations, practices or provision of services to its customers.

3. The proposed license agreements are revocable at will as required by G.O. 69-C.

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[6] *General Agreement Between SBC Local Exchange Companies: Nevada Bell Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone, L.P., The Southern new England Telephone Company (Seller) and SNET Diversified Group, Inc. (Buyer).*

Conclusions of Law

1. The proposed license agreements are authorized by G.O. 69-C and the requirement for prior Commission approval pursuant to § 851 does not apply.

2. Since the Commission need not further consider this application, the application should be dismissed.

O R D E R

IT IS ORDERED that:

1. SBC California may grant licenses to its affiliate SNET Diversified Group, Inc. for the use of 400 square feet of interior space in each of its central office buildings located at 2350 Main Street, Irvine, California; 420 South Grand Avenue, Los Angeles, California; and 14800 Ventura Boulevard, Sherman Oaks, California, pursuant to General Order 69-C without prior Commission approval.
2. This application is dismissed.
3. This proceeding is closed.

This order is effective today.

Dated_____, at San Francisco, California