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Decision 97-05-092 May 21, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 Certificated Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT.	Application 97-01-012 (Filed January 3, 1997)

ORIGINAL

INTERIM OPINION

Summary

In this interim opinion, we determine the procedural schedule for our consideration of the proposed merger between MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) (hereinafter also jointly referred to as applicants). We find that this transaction is subject to scrutiny under Public Utilities (PU) Code § 854(a). Pursuant to the authority granted us in PU Code § 853(b) and § 854(a), we believe that this application should be exempt from compliance with §§ 854(b) and (c) because such compliance is not necessary in the public interest based on the specific facts and circumstances before us. Therefore, we deny the motion of the Pacific Telesis Group and SBC Communications, Inc. (Telesis/SBC) to stay further proceedings in this docket until applicants amend the application to comply with §§ 854(a) and (b). We further find that consideration of the merger should be placed before the entire Commission as the application does not qualify for expedited Executive Director (ED) approval.

We also grant the motion of the Office of Ratepayer Advocates (ORA) to accept its late-filed protest, but direct our Docket office to file it as a response rather than a protest,

in compliance with our Rules of Practice and Procedure (Rules). The joint petition of the Greenlining Institute (GI) and the Latino Issues Forum (LIF) to intervene is denied as procedurally incorrect. However, GI and LIF may utilize the procedure set forth in Rule 54 to intervene in this application at a hearing, if any.

The Application

On January 3, 1997, MCIC and BT filed the instant application seeking expedited, ex parte Executive Director approval under PU Code § 854(a) for the change in control of MCIC's five California certificated carriers. These subsidiaries are: 1) MCI Telecommunications Corporation, an interexchange carrier providing interLocal Access and Transport Area (LATA) and intraLATA private line and metered services and intrastate resale switched cellular services; 2) MCI Metro Access Transmission Services, Inc., a competitive local exchange carrier operating in the service area of Pacific Bell which also provides intraLATA toll services and switched and special access service intrastate; 3) Teleconnect Company, an interexchange carrier providing interLATA and intraLATA metered services; 4) Teleconnect Long Distance Services and Systems, an interexchange carrier providing interLATA and intraLATA private line services; and 5) Nationwide Cellular Services, Inc., a cellular carrier providing intrastate resale switched cellular service and interexchange metered services.

The application asserts that only PU Code § 854(a) applies to the transaction "as the gross annual California revenues for each of the affected carriers, as well as all the affected carriers in the aggregate, do not exceed five hundred million dollars ($500,000,000)." The applicants contend that approval without a hearing on an expedited basis under § 854(a) will be in the public interest and that, from the applicants' standpoint, it is important that the transaction occur in an expeditious manner. Pursuant to Section 7.1(b) of the Agreement and Plan of Merger, the termination date for the transaction is October 31, 1997, which

shall be extended to April 30, 1998 if required regulatory approvals are not yet obtained.

The transaction is structured for U.S. federal income tax purposes as a reorganization under Internal Revenue Code (IRC) § 368(a).[1] Under the Agreement and Plan of Merger, dated as of November 3, 1996, each issued and outstanding share of common stock, par value $.10 per share, of MCIC, other than shares already owned directly or indirectly by BT or MCIC, will be converted into the right to receive ordinary shares of BT represented by American Depositary Shares (ADS) of BT, each representing ten ordinary shares of 25 pence (p) each of BT, and $6.00 cash per share of MCI exchanged. MCIC shareholders will receive 0.54 ADSs plus $6.00 for each share exchanged. As a result of the exchange of MCIC shares, MCIC will become a wholly owned subsidiary of BT. MCIC will then immediately be merged into Tadworth, another wholly owned subsidiary of BT. Tadworth's name will be changed to MCI Communications Corporation upon consummation of the MCIC-Tadworth merger. All certificated California carriers owned by MCIC will thus become indirectly owned by BT, but shall continue to operate under their present names and pursuant to their tariffed rates, terms, and conditions. Applicants allege that the manner in which service is provided to California telephone subscribers will not be affected by the change in control. Upon consummation of the change in control, BT will then change its name as the parent company to Concert plc and will create a new subsidiary for its United Kingdom operations called British Telecommunications plc.

1 This IRC provision would exempt the exchange of shares from capital gains taxes, though taxes would be due on the receipt of the cash consideration by MCIC shareholders.

Notice of the application appeared in the Commission's Daily Calendar of January 15, 1997. The protest period expired on February 14, 1997.

The Responses to the Application

AT&T Communications of California, Inc. (AT&T) and Telesis/SBC filed timely responses to the application.[2]

AT&T asks that the Commission defer its decision on the application until the Federal Communications Commission (FCC) rules on the applicants' request for FCC approval of the transaction. AT&T's federal antitrust concerns over the merger are raised in that forum, and AT&T believes that the FCC's resolution of these issues will provide important guidance to the Commission. AT&T requests that the Commission accord the proper deference to the FCC's resolution of the interstate and international issues that the merger poses. Appended to AT&T's response is a copy of its comments to the FCC.

Telesis/SBC raise the issue of whether any MCIC California subsidiary has more than $500 million in gross annual California revenues, thus triggering the application of PU Code §§ 854(b) and (c).[3] Telesis/SBC observe that applicants fail to

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2 Pursuant to Rule 44, "a response is a document that does not object to the authority sought in an application, but nevertheless presents information that the party tendering the response believes would be useful to the Commission in acting on the application."

3 PU Code § 854(b) requires that the Commission make certain antitrust and economic benefit findings before authorizing a change in control "where any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars." Section 854(b) also requires the Commission to equitably allocate, where the Commission has ratemaking authority, at least 50% of the total short-term and long-term economic benefits to ratepayers. PU Code § 854(c) requires that the Commission consider eight criteria and find that

(Footnote continues on next page)

provide any information to support their assertion that MCIC's California revenues do not exceed the jurisdictional amounts under subsections (b) and (c). Due to the lack of financial data provided by applicants, Telesis/SBC contend that the Commission must make its own determination of MCIC's gross annual California revenues prior to determining which subsections of PU Code § 854 apply to the transaction. Since the Commission must make a fact-finding as to the amount of revenues, Telesis/SBC believe ex parte relief should not be granted. In an argument made prior to the issuance of our decision on their merger, Telesis/SBC also asserted that, if the Commission applied § 854(b) to their then pending PU Code § 854 request to approve the combination of their two holding companies, then the Commission should also apply § 854(b) to this transaction. [4]

The Motion to Accept a Late-filed Protest

On February 28, 1997, the Commission's ORA filed a motion to accept a late-filed protest which also questions whether there

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(Footnote continued from previous page)
on balance the change in control is in the public interest "where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars."

4 In Decision (D.)97-03-067 (March 31, 1997) we rejected Telesis/SBC's argument that § 854(b) does not apply to holding-company-to-holding-company mergers in which indirect control of a utility subsidiary is transferred. (Mimeo. at 12-14.)

are $500 million in gross annual California revenues.[5] The deadline for filing of protests under our Rules was February 14, 1997. ORA's protest, if accepted, would request that the Commission hire an outside auditor to determine whether MCIC's gross annual California revenues exceed $500 million. No hearing was requested in the pleading.

Applicants oppose ORA's motion to file the late protest, alleging that no reason for not making a timely filing has been shown, and that the protest raises no new issues and will unduly and unnecessarily delay the proceeding. Applicants also assert that the pleading is not properly a protest under our Rules, as it does not contain the information required by Rule 44.2. Rule 44.2 requires that:

> "A protest must state the facts constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protestant requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application."

ORA did not make a Rule 45(g) request for permission to reply to applicants' response.

While we believe that ORA has shown little justifiable cause for permitting a late-filed protest, we believe that ORA should be permitted to become a party to the proceeding. Such action should not unduly delay the proceeding as we note ORA did not object to the relief sought in the application, nor did it request a hearing on any factual issue. However, our review of the

5 Rule 44 declares that, "[a] protest is a document objecting to the granting in whole or in part of the authority sought in an application."

ORA pleading convinces us that it is merely a response, rather than a protest under the definitions in our Rules. Therefore, we will grant the ORA motion to accept its pleading, but direct our Docket office to file it as a response, rather than as a protest.

The Petition to Intervene

On March 26, 1997 GI and LIF filed a Notice of Intent to Participate and Petition for Leave to Intervene (petition) under Rules 53 and 54. The GI and LIF petition the Commission for leave to participate in the application proceeding. They state that the petition does not seek to broaden the issues in the proceeding, and they "do not yet either support or oppose the Application." Therefore, GI and LIF request that the petition be granted and that they be allowed to become parties to Application (A.) 97-01-012 and their names be added to the list of active participants who receive all documents.

The service list utilized by GI and LIF was defective and did not include applicants or any representative thereof. Applicants were not served until a copy of the petition was faxed to them on April 28, 1997 by LIF. On May 2, 1997 applicants filed their response in opposition to the petition. Applicants assert the petition is defective procedurally. They argue GI and LIF have given no substantive reasons to support intervention, especially in light of GI's and LIF's election to address the Commissioners informally during the pendency of the protest period.

Rule 53 calls for intervention upon petition of one seeking to become a party only in complaint cases. Rule 53 does not apply to application proceedings. Rule 54 declares that in application proceedings:

> "an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be

> reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed."

If an appearance is entered in this manner at a hearing, the person or entity becomes a party to and may participate in the proceeding to the degree indicated by the administrative law judge (ALJ).

The GI and LIF have utilized the wrong procedural vehicle to attempt to intervene in this proceeding. Therefore, the petition should be denied. At any hearing in this proceeding, if any, GI and LIF may request to avail themselves of the Rule 54 appearance, and, should they qualify, may then participate to the degree permitted by the ALJ. Until then, GI and LIF have no standing in this docket. We also observe that, while GI and LIF were not served with the original application,[6] GI was served on January 10, 1997 with changed pages of the application and an attachment. Additionally, both GI and LIF had notice of the application by virtue of public notice in our Daily Calendar and chose not to file a timely response or protest. Indeed, GI and LIF met and corresponded with members of the Commission to discuss this application during the pendency of the protest period. By virtue of their failure to become a party to this proceeding because they failed to file a timely response or protest, they circumvented our ex parte rules regarding the sunshining of such correspondence and meetings. We highly disapprove of such tactics by individuals or groups who are likely to become, or to seek to become, parties in our proceedings. Therefore, if GI and LIF believe they are prejudiced, it is by their own inaction and as a result of their strategic maneuvering around our ex parte rules.

6 Our Rules do not require such service for change in control applications.

Applicants' Reply to the Responses

On March 6, 1997, applicants filed their reply to Telesis/SBC's and AT&T's responses. Applicants contend that, regardless of whether MCIC has $500 million in gross annual California revenues, PU Code §§ 854(b) and (c) do not or should not apply to this transaction. Applicants assert that under § 854(a) the Commission is given the discretion to establish by rule or order the guidelines for examining mergers, acquisitions or changes of control and therefore may conclude this merger only requires scrutiny under § 854(a). Applicants also argue that PU Code § 853(b) permits the Commission to exempt any utility or class of utility from the provisions of PU Code § 854 if it finds that such an exemption is in the public interest. Applicants declare that exercising such exemptive authority, the Commission should conclude that, when no regulated monopolist or dominant carrier is involved in a merger, §§ 854(b) and (c) should not apply. Applicants aver that the public policy reasons behind the benefits-sharing provisions of § 854(b) do not exist when there is no captive ratepayer base which has borne a substantial portion of the risks of doing business and when a utility has no exclusive territorial franchise with guaranteed customers. Applicants also contend that the legislative history of §§ 854(b) and (c) supports their position that these subsections were intended only to apply to mergers involving monopoly or dominant utilities.

Although the main thrust of applicants' reply is their assertion that §§ 854(b) and (c) should not apply to this transaction, the reply contains in its Exhibit C supplemental financial information filed under seal, pursuant to the ruling of the Law and Motion ALJ. Applicants state that they are willing to provide the confidential revenue information to interested parties subject to their execution of an appropriate non-disclosure statement. Applicants assert that these 1996 year-end revenue records show that no MCIC California-certificated subsidiary has

gross annual California revenues in excess of $500 million. Exhibit C discloses for one MCIC California regulated subsidiary an amount of "gross revenue" which is defined as actual billed amounts which are net of sales allowances and post-billing adjustments for large customer and carrier discounts. Were these sales allowances and discounts not deducted from the actual billed amounts, "gross revenue" would exceed $500 million.

Finally, applicants cite PU Code § 854(g), which states that §§ 854(b)(1) and (2) "shall not apply to the formation of a holding company." They argue that the effect of the merger is to create a new holding company, leaving in place the same corporate entity, MCIC, as the California telephone corporation providing service to California consumers prior to the merger. Therefore, applicants assert that the provisions of §§ 854(b)(1) and (2) are inapplicable to the application, even if the $500 million jurisdictional threshold were exceeded.

The Motion to Stay the Proceedings

On April 18, 1997, Telesis/SBC filed a joint motion to stay further proceedings until applicants amend their application to conform to the requirements of §§ 854(b) and (c). They request that we require the amendment because MCIC's gross annual California revenues exceed $500 million. Telesis/SBC argue that the definition of gross revenue is total sales from operations and does not permit the deduction of any returns or allowances for returns, such as the sales allowances and discounts deducted by applicants in Exhibit C. Telesis/SBC contend the actual billed amounts shown by MCIC fit the definition of net revenue, which is the total sales from operations less such returns or allowances for returns. Therefore, they assert that the financials in Exhibit C

disclose gross annual California revenues of more than $500 million when no deductions from total sales are permitted.[7]

Telesis/SBC also object to the fact that the California intrastate revenue figures in Exhibit C are calculated by MCIC's tax department from overall revenues, yet no methodology is provided. They believe applicants should provide the figures and methodology used by MCIC's tax department to arrive at these revenues.

Telesis/SBC further note that the sales allowance deducted by MCIC in determining gross revenues consists, by MCIC's definition of "bad debt write-offs (uncollectibles), fraud and other billing adjustments". Telesis/SBC demand that numbers be given for each category within the sales allowance, and that applicants supply the methodologies used to calculate each. They also assert that applicants should specify the types of "other billing adjustments" included in this broad category and break down figures and methodologies for each of these.

Telesis/SBC contend that each MCIC California regulated subsidiary should not be treated separately in determining whether the $500 million jurisdictional threshold is met. Since the Commission determined that Pacific Bell was a utility which was a party to the transaction between Telesis and SBC by analogizing to the doctrine of piercing the corporate veil (D.97-03-067 mimeo. at

7 Telesis/SBC's motion is accompanied by the declaration of Brian E. Thorne, the former technical accounting director for Pacific Bell. Because this declaration in its unredacted form refers to confidential numbers found in the sealed Exhibit C furnished to movants under a confidentiality agreement, this declaration was permitted to be filed under seal. However, an unredacted version, absent the numbers from Exhibit C, is part of the public record in this proceeding. Mr. Thorne opines that gross revenues do not properly embrace the subtractions and deductions for sales allowances and post-billing discounts to large customers and carriers found in the Exhibit C financials.

12-13), Telesis/SBC argue that we must view all MCIC California subsidiaries in the aggregate to determine gross revenues when calculating the jurisdictional amount. Telesis/SBC admit that this aggregation still falls below $500 million, if the sales allowances and discounts are permitted to be deducted. However, they contend such aggregated revenues are so close to the threshold that an error in any one of the adjustments to gross revenue would cause them to exceed $500 million.

Telesis/SBC argue that applicants have the burden to demonstrate that §§ 854(b) and (c) do not apply, and applicants have not met their burden. Therefore, they request we stay further proceedings until applicants amend the application to include the showings under §§ 854(b) and (c). Absent such an amendment, Telesis/SBC assert that the application must be denied.

Due to MCIC's alleged inaccurately reported gross California revenues in this proceeding, Telesis/SBC also call for the Commission to investigate MCIC's general reporting practices to ensure the accuracy of MCIC's reports regarding Commission funding, universal-service obligations and other programs.

On April 30, 1997, applicants filed their response to the Telesis/SBC motion. Applicants oppose the motion and accuse Telesis/SBC of using the motion as a tactic to seek delay of their pro-competitive, pro-consumer transaction.

Applicants assert that actual billings are not tantamount to actual revenues. Applicants declare that if discounts and credits are granted, there is no receipt of revenues, and hence no revenue is obtained from them. Applicants contend that the credits and discounts are unrecovered amounts. Since these discounts and credits are not received revenue, applicants argue that they do not fit within Telesis/SBC's definition of gross revenues as "all revenues obtained by a corporation." Applicants note that MCIC's annual report to its shareholders describes revenue as "the amount of communications services rendered, as measured primarily by the

minutes of traffic processed, after deducting an estimate of the traffic which will be neither billed nor collected." (Application at Exhibit B-1 at 18.) Therefore, applicants assert that the sales allowances and post-billing adjustments are properly deducted.

Applicants furnish, under seal, a declaration by Walter Nagel, vice president of MCIC's tax department, which explains the details of the tables in Exhibit C. Applicants also present verifying information from its outside independent auditors Price Waterhouse LLP. The auditor's letter declares that it has audited the statements of gross annual California intrastate revenues for MCIC for the year ended December 31, 1996 (financial statements) in accordance with generally accepted auditing standards. However, the letter also states that the financial statements are not intended to be a presentation in conformity with generally accepted accounting principles. The letter then declares that, "In our opinion, the statements of gross annual California Intrastate revenues referred to above present fairly, in all material respects, the gross annual California intrastate revenues of MCI[C] for the year ended December 31, 1996 on the basis of accounting described in Note 1." Note 1 explains for each MCIC California subsidiary shown in the Exhibit C table, the basis of presentation and management calculations.

Applicants assert that the plain language of §§ 854(b) and (c) calls for the determination of the $500 million jurisdictional amount to be made on a utility-by-utility and entity-by-entity basis, without aggregation of the revenues of all such subsidiaries as claimed by Telesis/SBC.

Finally, applicants refute the contention in Thorne's declaration for Telesis/SBC that adding back in sales allowances would push one MCIC subsidiary over the jurisdictional amount.

In summary, applicants declare that the motion for the stay is groundless. They argue that a stay may only be invoked in extraordinary circumstances and upon a showing of manifest

injustice and irreparable injury, and that Telesis/SBC have not made such a showing.

The Motion to Grant the Application Without Delay

In their response to Telesis/SBC, applicants move the Commission to exercise its authority under PU Code §§ 853(b) and 854(a) and grant the application without delay. Applicants again point to legislative history to support their assertion that the Commission has the flexibility to approve a merger at its discretion under whatever terms we deem fair due to these provisions.

Applicants then cite various expedited ex parte approvals granted by the ED or the Commission in allegedly similar circumstances. However, each such decision concerns utilities and entities with less than $500 million in gross annual California revenues.

Applicants assert that since no one has raised any pubic-interest objection to the merger or any other substantive reason for opposing it, the Commission should proceed expeditiously to assure our regulatory processes do not delay the merger. They contend that a full record exists for a decision and that evidentiary hearings or further proceedings are not needed.

Discussion

We believe that regardless of whether any MCIC California certificated carrier has gross annual California revenues in excess of $500 million, this transaction should be granted an exemption from both subsections (b) and (c) of PU Code § 854 pursuant to the authority granted us in PU Code § 853(b), as well as § 854(a). For this reason, we do not address the parties' contentions regarding accounting methodology or § 854(g), nor do we choose to institute an investigation into MCIC's accounting procedures. We caution that we limit this §§ 854(b) and (c) exemption to the unique facts and circumstances of this transaction.

PU Code § 853(b) declares that:

> "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."

The article referred to by § 853(b) is Article 6 of the PU Code which deals with transfer or encumbrance of utility property and embraces §§ 851 through 856.[8] The instant application is filed under PU Code § 854. Section 854(a) declares that no person or corporation shall merge, acquire, or control, either indirectly or directly, any public utility organized and doing business in California without first securing our authorization. Applicants filed their application under § 854(a) seeking such approval.

PU Code § 854(a) itself gives the Commission additional latitude in determining what change-in-control transactions it shall review. It states that, "The Commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section." We believe that the extent of the authority granted by this Code section gives rise to ambiguity and uncertainty when

8 Until 1985, § 853(b) permitted us to grant an exemption only from PU Code §§ 851 and 852. In 1985, our exemptive authority was extended to cover the entire Article 6, including § 854.

construed in context with the conflicting dictates of § 853(b) and §§ 854(b) and (c). Since the meaning of the words is not clear, the language alone does not control and we as decisionmakers should take the second step and refer to its legislative history. (IT Corp. v. Solano County Bd. of Supervisors, 1 Cal.4th 81, 98 (1991).) Therefore, while the extent of our broad exemptive powers in § 853(b) is clear on the face of that statute, we believe that legislative history throws light on the meaning of the language in § 854(a) itself.

The subject language was inserted in § 854(a) when § 854 was revised in 1989 by Senate Bill (SB) 52 to add subsections (b) and (c). These latter subsections require applicants to make more detailed showings in their applications when any utility which is a party to the transaction or any entity which is a party to the transaction has "gross annual California revenues" exceeding $500 million. The impetus for SB 52 was the change in control of San Diego Gas & Electric Company (SDG&E) which was then subject to two takeover attempts. Ultimately, an agreement to merge was reached between SDG&E and Southern California Edison Company (Edison). Their combination would have created the largest energy utility in the United States.[9] For this reason, subsections (b) and (c) became known as the Edison conditions. In the analysis of SB 52 by the Assembly Committee on Utilities and Commerce, the new § 854(a) provision permitting the Commission to define control activities was discussed. The analysis concluded that "Whether the Edison conditions will apply to any transaction other than the pending Southern California Edison/San Diego Gas & Electric merger proposal may depend to a large extent on the definitions of control activities that the PUC adopts pursuant to the bill's directive."

9 In Re SCE Corp, 40CPUC2d 159 (1991) we disapproved the proposed merger between Edison and SDG&E.

We think this evinces a legislative intent to permit us to use our powers under both § 853(b) and § 854(a) to exempt transactions from review under §§ 854(b) and (c), regardless of the presence of gross annual California revenues in excess of $500 million. For this reason, we reject the contention that we must review this transaction under the criteria in (b) and (c) if any utility or entity which is a party to this transaction has gross annual California revenues exceeding $500 million. We believe our exemptive power under § 853(b) extends to the granting of an exemption from §§ 854(b) and (c) if such an exemption is in the public interest. The import of the language added to § 854(a) by SB 52 makes the broad extent of our exemptive power clear.

The thrust of the applicants' arguments in favor of an exemption from review under §§ 854(b) and (c) focuses on MCIC's status as a nondominant carrier and applicants' review of the full legislative history of §§ 854(b) and (c). They contend it was never the intent of the legislature to cover non-monopolists, especially non-dominant interexchange carriers (NDIECs). While there may be much merit to consideration of a blanket exemption from §§ 854(b) and (c) for NDIECs, we do not consider such an blanket exemption today. Instead, any such blanket exemption should be subjected to a separate generic rulemaking with full opportunity to comment and, if we find the statute ambiguous regarding its application to NDIECs, with a full review of the legislative history of the statute. Until convinced otherwise, we stand by our determination that the plain meaning of § 854(b) prevails as set forth in D.97-03-067 mimeo. at 11. The same is true of its counterpart § 854(c). We will not go past the plain meaning of those sections to determine legislative intent with respect to NDIECs as a class of public utility.

As we did when finding § 854(b) applied to the indirect acquisition of control of Pacific Bell, here we look to substance rather than form. (Id. at 12.) First, we observe that this

application does not involve putting together two traditionally regulated telephone systems. Instead, BT 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. And, while not a controlling interest,[10] BT has since 1994 held 20% of MCIC's voting stock with the power, pursuant to certificate-of-incorporation provisions and an investment agreement, to position itself to assume control once federal laws prohibiting foreign ownership of telecommunications companies were abolished.[11]

10 We observe that due to certificate of incorporation provisions and an investment agreement, BT has since 1994 had the power to block certain major corporate actions of MCIC.

11 The Telecommunications Act of 1996 removed such foreign ownership prohibitions. (Pub.L.104-104, February 8, 1996.)

In D.97-03-067 we found that Pacific Bell, a heavily regulated local exchange carrier, was key to the Telesis/SBC merger, so SBC could add 15.8 million telephone access lines to its existing 14.2 access lines. The instant transaction is in no way analogous to the substance of that merger.

Second, because of the form of our regulation over Pacific Bell, we possessed the ratemaking authority referenced in § 854(b) to jurisdictionally permit our allocation of benefits from the merger to ratepayers. By contrast, MCIC is a nondominant carrier, whose main revenues are from nondominant interexchange carrier (NDIEC) and cellular services.[12] We do not rate regulate MCIC in the same manner as local exchange carriers such as Pacific Bell. A similar scheme is employed for the new class of competitive local carriers, such as MCI Metro. Our authority over cellular rates is even less due to federal preemption.

Third, we recognize that §§ 854(b)(1) and (2)'s requirement for a finding of merger benefits and an allocation of a portion to ratepayers does not fit MCIC which has grown under competitive forces at the sole risk of its shareholders without a captive ratepayer base and guaranteed franchise territory to buffer risk and reward. We believe that to subject this particular transaction to extensive regulatory review when no ratemaking scheme extends over the parties to permit us to allocate benefits will stifle competition and discourage the operation of market forces. In our view, this goes against the main thrust of the Telecommunications Act of 1996 and our telecommunications policy to

12 We recognize that MCI Metro Access Transmission Services, Inc. (MCI Metro) is a competitive local carrier. However, its revenues are small and we take official notice of the fact that it is no longer accepting new customers in California. The fact it is a competitive local carrier and is therefore not subject to the same type of regulation as an incumbent local exchange carrier distinguishes it from Pacific Bell.

open the field to competitive forces for the benefit of consumers. For this reason, competitive market forces, rather than mandated rate reductions, will distribute any benefits of the merger to MCIC ratepayers. And we are mindful of the fact that in our final decision on this merger, § 853(b) empowers us to impose any requirements deemed necessary to protect customers or subscribers. Therefore to review this transaction under PU Code §§ 854(b) would be a futile exercise that is not in the public interest.

It is the combination of all of the above factors, not just one factor, that leads us to conclude the grant of an exemption from application of PU Code §§ 854(b) & (c) is warranted.

We observe that under Northern California Power Agency v. Public Util. Com., 5 Cal.3d 370, 379-380 (1971) we will still take into account necessary antitrust aspects of this application. We simply shall not request the Attorney General's opinion under § 854(b)(3), although we welcome any input that office may desire to offer us on a timely basis.

We also are mindful of the fact that the criteria enumerated in § 854(c) were codified because they are various factors that we have oft employed when relevant to transactions reviewed under § 854(a). Our review under any relevant factors, plus our ability under § 853(b) to impose any necessary requirements to protect the public interest in the final order in this proceeding, convince us that the grant of an exemption from review under §§ 854(b) and (c) is in the public interest. Therefore, we deny the Telesis/SBC motion to stay the proceeding and require the amendment of A.97-01-012 to make the affirmative showing under those subsections.

Applicants have argued that this application may be decided by the ED under the expedited ex parte procedure applicable to NDIECs for transactions under PU Code §§ 851-855. We disagree.

In D.86-08-057 (21 CPUC2d 549) (1986) the Commission permitted the ED to grant noncontroversial applications by nondominant telecommunications carriers for authority to transfer assets or control under PU Code §§ 851-855. However, in order for the ED to sign such orders, no protests to the application can be filed or, if a protest is filed, it must be withdrawn or compromised by the parties. We believe that the fact we have categorized ORA's protest as a response under our Rules means that no protests to this application have been filed.

However, in D.96-08-015 (August 2, 1996), we authorized ex parte the transfer of control of Continental Telecommunications of California, Inc. (CTC) from its parent Continental Cablevision, Inc. (Cablevision) to U.S. West, Inc. (U.S. West). Under an Agreement and Plan of Merger, Cablevision merged with U.S.West, with U.S. West as the survivor. CTC would continue to operate under its current names and certificates of public convenience and necessity, one as a facilities-based reseller and another as a competitive local carrier. Although the applicants requested approval by the ED, the decision was placed before the Commission. We declared that the application did not qualify for an expedited ED decision because:

> "First, the authority granted to the Executive Director in [D.86-08-057] did not cover competitive local carrier [sic]. Second, it has been Commission policy that initial entry into intrastate operations will not be by Executive Director decision but by Commission decision." (Id., mimeo. at 4.)

Therefore, this application is not subject to approval in an ED decision because MCIC's California subsidiary MCI Metro is a competitive local carrier. In addition, although BT is not itself physically entering into intrastate operations, it is doing so very indirectly by assuming ultimate ownership of MCIC. Therefore, we direct the ALJ, in consultation with the co-assigned Commissioners, to consider the application under § 854(a), to set

the appropriate procedural schedule, determine what hearings, if any, are necessary, and bring the final decision before the entire Commission.

Today's decision renders applicants' motion urging the Commission to approve the merger without delay moot.

Conclusion

We find that this transaction should be exempt from review under PU Code §§ 854(b) and (c). We declare such an exemption is in the public interest. We base this decision on the combination of facts and circumstances particular to this transaction involving BT and MCIC's operations and structure pre and post merger, our form of regulation over MCIC and its California subsidiaries, and MCIC's growth solely at shareholder risk. Therefore, the merger transaction should be reviewed under PU Code § 854(a), with a decision coming before the entire Commission.

Findings of Fact

1. Applicants filed for approval of the proposed merger between MCIC and BT by application under PU Code § 854(a).

2. Notice of the application appeared in the Commission's Daily Calendar on January 15, 1997. The protest period expired on February 14, 1997.

3. AT&T and Telesis/SBC filed timely responses to the application. Telesis/SBC contend that MCIC has gross annual California revenues in excess of $500 million.

4. On February 28, 1997, ORA filed a motion to accept a late-filed protest. The putative protest requests that the Commission appoint an outside auditor to determine whether MCIC has in excess of $500 million in gross annual California revenues. Little justifiable cause for the delay is shown in the motion. The issues raised by the pleading are duplicative of those raised by Telesis/SBC. The pleading does not meet our requirements under Rule 44.2 for a protest, but is instead a response.

5. On March 6, 1997 applicants filed a reply to AT&T and Telesis/SBC's responses. The reply annexes as Exhibit C confidential financial data, filed under seal, which applicants contend shows that MCIC does not have any subsidiary with gross annual California revenues in excess of $500 million. However, gross revenues are shown as actual billed amounts after deduction of sales allowances and post billing adjustments for discounts and credits. If these deductions were not taken, gross annual California revenues for 1996 would exceed $500 million for one MCIC subsidiary.

6. In applicants' reply, applicants also requested that the Commission grant the transaction an exemption from review under PU Code §§ 854(b) and (c) due to MCIC's status as a nondominant carrier operating in a competitive market.

7. Applicants also argue that this transaction qualifies as the creation of a holding company, entitling them to the PU Code § 854(g) exemption from application of PU Code §§ 854(b)(1) and (2).

8. On April 18, 1997, Telesis/SBC filed a joint motion to stay further proceedings until applicants amend their application to conform to the requirements of §§ 854(b) and (c). Telesis/SBC contend that the deductions from actual billed amounts shown on Exhibit C to applicants' reply are not permitted under accounting theory when calculating gross revenues.

9. Telesis/SBC also request that the Commission investigate MCIC's general reporting practices to ensure the accuracy of MCIC's reports regarding Commission funding, universal service obligations and other programs.

10. On April 30, 1997, applicants filed their response to the Telesis/SBC motion. Applicants assert proper accounting procedure was followed in preparing Exhibit C.

11. On April 30, 1997, applicants also filed a motion urging the Commission to approve the merger without delay.

12. On March 26, 1997, GI and LIF filed a petition for leave to intervene under Rule 53. The service list utilized was defective and did not include applicants or any representative thereof.

13. Applicants were served with the petition via fax on April 28, 1997. On May 2, 1997 applicants filed their response opposing the petition.

14. Rule 53 does not apply to application proceedings and may only be used to petition for intervention in complaint proceedings. Rule 54 sets forth the procedure for intervention in an application proceeding and requires an appearance at a hearing. No hearing has yet been held in this proceeding.

15. The instant application does not involve putting together two traditionally regulated telephone systems, nor are contiguous or nearby service territories involved. BT itself currently has no physical presence in California, nor does it intend to have such a presence after the merger. It will be merely the ultimate parent for MCIC's United States operations. The acquisition does not involve merging any BT operations into MCIC operations. No consolidation of MCIC subsidiary management with BT management is contemplated. The substance of the transaction is to substitute an international corporation as the ultimate corporate parent of the MCIC California subsidiaries, with no change in name, rates, or conditions of service. MCIC will still exist as the parent holding company over the California subsidiaries only with Concert plc as MCIC's parent company. BT has since 1994 held 20% of MCIC's voting stock with power to block certain major MCIC corporate actions and to assume control once federal laws prohibiting it were abolished. The Telecommunications Act of 1996 abolished such prohibitions on foreign ownership. We do not have traditional ratemaking authority over MCIC's operations. Competitive market forces will distribute any benefits of this merger to ratepayers, therefore, to review this transaction under PU Code § 854(b) would be a futile exercise. MCIC has grown under competitive forces at the sole risk of its shareholders without a captive ratepayer base and guaranteed

franchise territory to buffer risk and reward. Review of this particular transaction under §§ 854(b) and (c) will stifle competition and discourage the operation of market forces and is contrary to the main thrust of our telecommunications policy and The Telecommunications Act of 1996.

16. The public interest will be protected by review under PU Code § 854(a) and the powers to impose any necessary requirements on our approval under PU Code § 853(b).

17. D.96-08-015 does not permit expedited BD approval when a competitive local carrier is involved or initial entry into intrastate operations is being made by a change in control. MCI Metro is a competitive local carrier. Technically BT will be a new entrant to California markets by virtue of its assumption of very indirect control of MCIC as its ultimate corporate parent.

Conclusions of Law

1. The motion by ORA to accept a late-filed protest should be granted, but the Docket office should be directed to file the pleading as a response rather than a protest.

2. The petition of the GI and LIF to intervene under Rule 53 should be denied.

3. PU Code § 853(b) in conjunction with § 854(a) gives the Commission broad authority to exempt transactions from review under §§ 854(b) and (c) if the exemption is in the public interest.

4. The issue as to whether MCIC has in excess of $500 million in gross annual California revenues is moot and need not be addressed.

5. The issue whether applicants should be granted an exemption from §§ 854(b)(1) and (2) under § 854(g) is moot.

6. An investigation into MCIC's accounting procedures is not necessary at this time.

7. An exemption from PU Code §§ 854(b) and (c) should be granted to this application due to the particular facts and circumstances of this transaction.

8. Such an exemption is in the public interest. However this exemption is not precedential. It applies solely to the facts before us.

9. The joint motion of Telesis/SBC to stay further proceedings and require amendment of the application under PU Code §§ 854(b) and (c) should be denied.

10. The motion of applicants urging the Commission to approve the merger without delay is rendered moot by today's decision.

11. The application should be processed under PU Code § 854(a) in consultation with the co-assigned Commissioners.

12. The application is not subject to expedited ED approval. The decision on this application should be brought before the entire Commission.

INTERIM ORDER

IT IS THEREFORE ORDERED that:

1. The joint motion of Pacific Telesis Group and SBC Communications, Inc. to stay the proceedings and require the amendment of Application (A.) 97-01-012 to conform to Public Utilities (PU) Code §§ 854(b) and (c) is denied.

2. The assigned administrative law judge shall process A.97-01-012 under PU Code § 854(a) for consideration by the entire Commission.

3. The applicants' motion urging the Commission to exercise its authority and approve the merger in furtherance of the public interest without delay is moot.

4. The petition of the Greenlining Institute and the Latino Issues Forum to intervene is denied.

5. The motion of the Office of Ratepayer Advocates to accept its late-filed protest is granted, but the Docket office is directed to file the pleading as a response.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners