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Decision 97-09-005 September 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application)
of Pacific Bell (U-1001-C), a California)
Corporation, and Qwest Communications)
Corporation (U-5335-C), a Delaware)
corporation, for authority to lease)
a certain Pacific Bell conduit system)
to Qwest Communications Corporation and)
to lease a certain Qwest Communications)
Corporation conduit system to Pacific)
Bell.)

Application 97-02-036
(Filed February 25, 1997)

ORIGINAL

O P I N I O N

1. Summary

Pacific Bell and Qwest Communications Corporation (Qwest) seek authority to enter into a reciprocal agreement in which Pacific Bell would gain the right to install fiber optic cable in a Qwest conduit system between North Hollywood and King City and Qwest would gain the right for similar installation in a Pacific Bell conduit system in the San Diego area. Granted.

2. Background

Pacific Bell and Qwest filed this joint application on February 25, 1997, pursuant to Public Utilities (PU) Code § 851. Section 851 requires Commission approval of any lease or other transfer of public utility property. Pacific Bell is a public utility providing local exchange and toll service throughout California. Qwest, which has its California office in San Jose, is certificated to provide resold and facilities-based telecommunications services in the state.

The parties propose to enter into an agreement by which each party would be granted an indefeasible right of use of space within certain conduit systems owned by the other party. Pacific

Bell would be granted exclusive use of one-half of an existing two-inch conduit system owned by Qwest along rail corridors between North Hollywood and King City, with an indefeasible right of non-exclusive use of ancillary facilities. Qwest would be granted a right of exclusive use of space in a single one-inch conduit within Pacific Bell's multiple conduit system located between Anaheim and the San Diego central office, the San Diego central office and San Ysidro central office, and from the San Diego central office to the Rancho San Diego central office, together with a right of non-exclusive use of ancillary facilities.

Pacific Bell states that it needs the capacity in the Qwest system to transport telecommunications between its central offices along the route served by the Qwest system. Without such capacity, Pacific Bell states that it would have to construct new stand-alone facilities between Central California and Southern California at a cost that would greatly exceed the cost of placing fibers in the Qwest system. Qwest states that it would use the capacity in the Pacific Bell system to expand its network in a cost-effective manner.

The parties note that, as certificated telecommunications utilities, both Pacific Bell and Qwest have eminent domain authority to install their own facilities along the public streets and rights-of-way. By using each other's conduit systems, they state that they can avoid eminent domain proceedings and construction that would otherwise be required to serve their customers.

3. Environmental Considerations

In previous applications involving similar agreements for lease of existing available facilities, the Commission has concluded that no environmental review is required for compliance with the California Environmental Quality Act, Pub. Resources Code §§ 21000 et seq. (See, e.g., In re Southern California Edison (1994) 55 CPUC2d 126.) The Commission reasoned that these

transactions qualified for a categorical exemption as minor alterations of existing utility structures involving negligible expansion of use beyond previously existing uses, and, moreover, it could be seen with certainty that there was no possibility that the proposals would have a significant effect on the environment. (14 Cal. Code of Regulations § 15061(b)(3).) This reasoning is equally applicable to this application as it relates to the use of existing, available facilities.

4. Prior Decisions

The relief requested by this application is similar to that previously approved for other telecommunications utilities and for both Southern California Edison Company (Edison) and Pacific Gas & Electric Company (PG&E).

In July 1992, the Commission authorized MCI Telecommunications Corporation to place its fiber optic cable on transmission towers belonging to PG&E. (In re Pacific Gas & Electric Company (1992) 45 CPUC2d 24.) In 1993, the Commission approved Edison's request to lease available capacity for underground conduit space to Metropolitan Fiber Systems of California. (In re Southern California Edison Company (1993) 48 CPUC2d 602.)

In 1994, the Commission approved another Edison request to lease currently available conduit capacity to Access Transmission Services, Inc. (In re Southern California Edison Company (1994) 55 CPUC2d 126.) Later, Edison was authorized to enter into a lease arrangement with another competitive telecommunications carrier, Linkatel Pacific, L.P., for above-ground pole space. (In re Southern California Edison Company, Decision 95-05-039.)

5. Exclusivity Provisions

In reviewing this application, the Commission's Telecommunications Division raised the question of whether the parties' grant of "exclusive use" of conduit space conforms with

the nondiscriminatory access requirements of the Telecommunications Act of 1997, 47 U.S.C. §§ 151, et seq. By ruling dated June 16, 1997, the administrative law judge directed Pacific Bell and Qwest to respond to this question.

In comments filed on July 7, 1997, Pacific Bell and Qwest stated their view that the proposed agreement does not conflict with the Telecommunications Act or with implementing requirements issued by the Federal Communications Commission (FCC).

First, Qwest asserts that it is not subject to the access requirements of Sections 251 or 224 of the Telecommunications Act because those requirements, by definition, apply to local exchange carriers. Qwest is not a local exchange carrier under the FCC's definition. While Pacific Bell is bound by these requirements, the parties assert that the exclusivity provisions of their agreement are not precluded by the access rules.

In Paragraph 1161 of FCC Order 96-325,¹ the FCC appears to require a utility to expand conduit capacity at the request of a party seeking access if access is denied for lack of space. According to applicants, Qwest's use of Pacific Bell's innerduct does not preclude use of the conduit system and ducts by other carriers. The proposed agreement provides only for exclusive use of an innerduct (that is, a single tube within a larger tube, or duct) and non-exclusive access to the conduit system. Other parties requesting access can place their fiber optic cable in other innerducts within the conduit system. As in the proposed agreement with Qwest, third parties occupying Pacific's duct share non-exclusive use of the entire conduit system. It is only when a duct is filled to capacity that Pacific arguably would be required

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First report and Order, CC Docket No. 96-98, FCC 96-325 (released August 8, 1996).

by the FCC rules to build additional ducts to accommodate others seeking access.

We agree with the parties that the conduit access requirements of the Telecommunications Act do not prohibit the exclusivity provisions of the proposed agreement between Qwest and Pacific Bell. Paragraph 1161 of FCC Order 96-325 arguably would require Pacific Bell to build additional capacity if a duct containing an innerduct occupied by Qwest were full. It would not disallow use of the innerduct by Qwest.

Based on this analysis, and in the absence of protests to the application, we will grant the request by Pacific Bell and Qwest for authority to enter into the proposed agreement.

6. Terms of Agreement

Pursuant to a protective order, leave has been granted to permit the parties to file the financial and other proprietary terms of their proposed agreement under seal, for competitive reasons. We have examined the confidential terms of the reciprocal agreement, and we are satisfied that the terms reflect a range of financial accord that we would expect commercial parties bargaining on their own account to settle within.

7. Discussion

We will grant the requested authority to Pacific Bell and Qwest. The arrangement between the two companies makes good sense from several perspectives, and we have noted this in earlier decisions approving use of unused utility space for fiber optic installation. The agreement makes productive use of currently available capacity. Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for productive purposes without interfering with a utility's operation. Our order today provides that neither Pacific Bell nor Qwest shall use these facilities to provide service beyond that authorized under each of their certificates of public convenience and necessity.

Findings of Fact

1. Pacific Bell is a public utility and local exchange carrier subject to the jurisdiction of this Commission.
2. Qwest is a public utility and interexchange carrier subject to the jurisdiction of this Commission.
3. Pacific Bell and Qwest filed this application on February 25, 1997.
4. Notice appeared in the Daily Calendar on March 3, 1997.
5. Pacific Bell and Qwest propose to enter into an agreement by which each party would be granted an infeasible right of use of space within certain conduit systems owned by the other party.
6. Pacific Bell would be granted use of one-half of an existing Qwest conduit between North Hollywood and King City.
7. Qwest would be granted use of a Pacific Bell innerduct within a conduit located between Anaheim and San Diego and within the San Diego area.
8. Installation of fiber optic cable by each party in the conduit system of the other party is a minor alteration of existing utility structures involving negligible expansion of use beyond previously existing uses.
9. It can be seen with certainty that no significant effect on the environment could result from our granting the requested authorization.
10. No protests have been filed, and the time for filing of protests has expired.

Conclusions of Law

1. A public hearing is not necessary.
2. Joint use of utility facilities should be encouraged in appropriate cases because of the obvious economic and environmental benefits.
3. Our approval of this application is exempt from the California Environmental Quality Act.

4. Pacific Bell and Qwest should be authorized under PU Code § 851 to enter into an agreement by which each would be granted a right to use certain space within conduit systems owned by the other party.

5. Exclusivity provisions of the proposed agreement are not in conflict with the access requirements of the Telecommunications Act of 1996.

6. Because the agreement offers substantial benefits for ratepayers of Pacific Bell and Qwest, this decision should be effective on the date signed.

O R D E R

IT IS ORDERED that:

1. Pacific Bell and Qwest Communications Corporation are authorized pursuant to Public Utilities Code § 851 to enter into a definitive, reciprocal Indefeasible Right of Use Agreement as described in Exhibit A of this application.

2. Neither party shall use these shared conduit facilities to provide service beyond that authorized under its certificate of public convenience and necessity.

3. Application 97-02-036 is closed.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

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