

Decision 97-11-035 November 5, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Pacific Bell Telesis Group (Telesis) and SBC Communications, Inc. (SBC) for SBC to Control Pacific Bell (U 1001), Which Will Occur Indirectly as a Result of Telesis Merger With a Wholly Owned Subsidiary of SBC, SBC Communications (NV) Inc.

ORIGINALApplication 96-04-038
(Filed April 26, 1996)**ORDER DENYING REHEARING AND MODIFYING D.97-03-067**

This order denies in part the petition for modification filed by the Commission's Office of Ratepayer Advocates (ORA) and the application for rehearing of Decision (D.) 97-03-067 filed by The Utility Reform Network (TURN) and partially grants the requests for modification included in TURN's and ORA's applications.

BACKGROUND

In D.97-03-067, we approved the merger of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC). As part of our evaluation of the effects of the merger, we determined that the total forecasted long-and short-term economic benefits approximate \$495 million.¹ Pursuant to the requirements of Section 854(b)(2) of the California Public Utilities Code, therefore, we allocated 50 percent, approximately \$248 million, of the forecasted benefits to the ratepayers.² Of that amount, \$213 million shall be distributed to ratepayers in the form of billing surcredits over a period of five years. The remaining \$34 million (the net present value of \$50 million) is to be allocated to

¹ We noted in Finding of Fact No. 51 that the merger, and the conditions we are imposing in our approval of it, "will create benefits for California ratepayers and the California economy that are in addition to those which are estimated herein pursuant to ... [section] 854(b)." (D.97-03-067, p. 101.)

² Unless otherwise indicated, all statutory references hereinafter shall be to the California Public Utilities Code.

ratepayers by Pacific Bell over a period of 10 years through Community Technology Fund which is to be established as part of the Community Partnership Commitment (CPC) agreed to by Pacific Bell, Telesis, and over 130 community-based groups and several individuals associated with non-profit and educational organizations. (See D.97-03-067, pp.86-87.)³ Pacific Bell will provide \$50 million over 10 years (i.e., the net present value of which is \$34 million) to the Community Technology Fund, as described in the CPC, to expand and modernize the network infrastructure and extend access to advanced telecommunications services to a broad spectrum of the State's population. (D.97-03-067, p. 103, Conclusion of Law No. 9.)

TURN in its application for rehearing of D.97-03-067 does not object to the source of funding for the CTF. Rather TURN urges the Commission to modify the decision to reform the administration and operation of the CPC in order to avoid legal error. The modifications TURN seeks are the following: (1) prohibit Pacific Telesis, or any other utility, from any involvement in the choice of the disbursements committee members or any representation on the disbursement committee itself for the purpose of CTF, the \$3 million additional grants, and the \$1 million "think tank" project. (2) remove the restriction on advocacy and the "company store" provision from the CPC, and (3) make the selection of disbursement committee for the CTF open to representatives of any group representing the interests of ratepayers or particular communities.

ORA's petition of D.97-03-067 is essentially a reiteration of its position with respect to the CPC and its funding in that the CPC can not constitute an economic benefit to ratepayers and hence must be funded by shareholders of Telesis and SBCS. No other party explicitly supports this view of ORA. However, should the Commission decide to uphold its decision regarding funding of the CTF, ORA seeks to modify the CPC by transferring control and supervision of administration of the CPC to the Commission similar to the California High Cost Fund (CHCF) and the Universal Lifeline Service

³ We have attached hereto a list of the organizations and various civic entities which are signatories to the CPC at present.

(ULTS) programs. In the latter, ORA raises essentially the same concerns as TURN with respect to administration of the CPC. The issues raised by ORA are substantively related to the issues raised by TURN. We therefore shall consider ORA's petition for modification and address its requests with TURN's rehearing application in this order.

The Utility Consumers' Action Network (UCAN) filed a joint response supporting both TURN's application and the ORA's petition. UCAN support of these applications, however, is focused on its objection to the certain terms of the CPC, rather than the funding source of the CTF. In this respect UCAN states that the Commission, not Pacific Bell, should disburse and administer the CPC funds inasmuch as the fund is charged to ratepayers. Secondly, UCAN urges that the disbursement of ratepayer funds must be accomplished in a manner that does not provide undue preference to any signatory or participant to the CPC.

Responses opposing TURN's application and ORA's petition were filed by many of the signatories to the CPC, including Greenlining Institute and the Latino Issues Forum, and by Public Advocates, Inc. on behalf of the Southern Christian Leadership Conference, National Council of La Raza, Korean Youth and Community Center, Association of Mexican-American Educators, California Association for Asian-Pacific Bell Bilingual Education, California Association for Bilingual Education, Korean Community Center of the East Bay, Filipinos for Affirmative Action, Filipino Civil Rights Advocates, Joined by the African Americans for Telecommunications Equity, Asian Pacific Bell American Community Partnership, Asian Pacific Bell Islanders California Action Network, Hispanic Association on Corporate Responsibility, Los Angeles Urban League, Universal Service Alliance, and World Institute on Disability. Pursuant to an April 30, 1997 ruling by ALJ Kim Malcolm, ORA filed a reply to the responses. On May 20, 1997, TURN also filed a motion for leave to file a reply and a reply to the responses to its application for rehearing.

With respect to the CPC, which is central to parties' concerns, Pacific Bell pledges: 1) the formation of the "Community Technology Fund," funded by Pacific Bell over ten years with up to \$50 million to promote access to advanced telecommunications services in communities that have hitherto been under-served by Pacific Bell and presumably other telecommunications companies, 2) an annual increase in Pacific Bell's charitable contributions of \$1 million, over the 1996 budget, for three years, 3) the continuation of multilingual customer services, 4) a contribution by Pacific Bell of \$100,000 per year for seven years toward the formation of a Universal Service task force to develop methods to promote universal service by working with community groups, 5) the formation of a "Think Tank" to research interests of under-served communities and the general public in the evolving competitive environment, with funding by Pacific Bell up to \$200,000 a year for five years, 6) commitment by Pacific Bell to continue to employ, promote and contract with minorities, women and people with disabilities, 7) a commitment by Pacific Bell to maintain headquarters for Pacific Bell in California and to expand its employment base by at least 1,000 jobs, and 8) a "challenge" grant under which Telesis will contribute up to an additional \$3 million annually for three years after the merger in amounts equal to those offered by other telecommunications providers. (D.97-03-067, pp. 86-87.)

We determined in D.97-03-067 that the activities supported by the CPC will benefit state and local communities and all California ratepayers. We further determined that the goals of the CPC are consistent with our policy to achieve universal service and to better serve disadvantaged and under-served communities in California. We, therefore, included the CPC in our review of the merger application in two ways. First, we recognized the overall benefits of the CPC to the People of the State, and decided that as a condition of approving the merger, Telesis and Pacific Bell were to honor the commitments made in the CPC. (D.97-03-067, Finding of Fact No. 61, Conclusion of Law No. 29, and Ordering Paragraph No. 1b.) Second, we determined that the CPC's Community Technology Fund of \$34 million, intended to address universal service goals

and provide underserved communities access to advanced telecommunications services will benefit ratepayers. Such benefits are consistent with the State's telecommunications policy as set forth in Sections 709 and 882 of the Public Utilities Code.

We concluded in D.97-03-067, therefore, that it was just and reasonable to have a portion of the economic benefits allocable to ratepayers to fund the Community Technology Fund, with a larger portion of the remaining economic benefit to be allocated to ratepayers through surcredits.

After considering the arguments presented by TURN and ORA, and the responding parties, we affirm our decision in this matter finding it consistent with the applicable law.

TURN, moreover, appears to acknowledge that we have not committed legal error so long as the Commission bars Pacific from being represented in the CTF disbursement committee and is not involved in the selection of members for this committee. By the clarification of our decision which we hereby order, we have provided the assurance sought by TURN and in part shared by ORA. Accordingly, we shall make the following modifications with respect to the \$34 million community Technology Fund:

- (1) We direct Pacific Bell and the signatories to the CPC to establish an independent disbursement committee under the oversight responsibility of the Commission's Telecommunication Division. The selection of members of the disbursement committee shall be open to and include all community and ratepayer interest representative groups that further the goals of the CPC.
- (2) No utility shall be permitted to participate in the selection of members of the committee or be represented in it.
- (3) Pacific Bell shall file an advice letter to account the disbursement of funds earmarked for CTF detailing the expenditure of funds on annual basis to be submitted to Telecommunications Division by the first of October of each year the program is conducted. The Telecommunications Division shall

review these advice letters and inform the Commission on the disbursement of CTF fund.

- (4) The recipients of the CTF grant shall be free to use the money to accomplish the purposes of the grant as described in the Community Partnership Commitment, that is, to advance universal service principles and to provide underserved communities with access to and education about emerging and advanced telecommunications. The recipient's spending under the Community Technology Fund, however, shall be without restrictions imposed by any signatory to the CPC whose interests may be different from that of the recipient.

We grant TURN and ORA the relief they sought with respect to the administration and oversight of CTF as described above and deny their requests for rehearing in all other respect.

DISCUSSION

Section 854(b)(2), the key statutory provision in this matter, prohibits the Commission from approving any merger, acquisition or change of control of an electric, gas or telephone utility when a utility, with gross annual California revenues over \$500,000,000, is a party to the transaction, without finding that the transaction, among other things:

“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.”

One of the provisions of the CPC presented to us by the Applicants as part of the merger application refers expressly to the economic benefits to be shared with ratepayers pursuant to Section 854(b)(2):

“The parties to this Commitment believe that the benefits of this Commitment [i.e. the CPC], together with other benefits of the merger as set forth in the application and the filed testimony of Pacific Bell, Telesis and SBC, fully satisfy the requirements of [s]ection 854(b)... Pacific Telesis and Pacific Bell shall be relieved of the obligation to make all monetary contributions set forth in this Commitment in the event the Commission determines that additional or different financial obligations are necessary to satisfy the requirements of [s]ection 854(b).” (CPC, at 9.)

Our evaluation of the merger was nonetheless based, in part, on recognizing that the commitments of Pacific Bell and Telesis in the CPC would be beneficial to all the People of the State. Despite the clause in the CPC providing for the withdrawal of their financial commitments, therefore, we conditioned our approval of the merger on the implementation of the CPC consistent with our obligation under Section 854(c) to consider whether, on balance, the merger is in the public interest. (D.97-03-067, Findings of Fact Nos. 62 and 64.)⁴

We also recognized that not all of the pledges made in the CPC were of a nature to satisfy Section 854(b)(2) in the allocation of the ratepayers' share of economic benefits measured at \$248 million. The \$50 million (i.e., \$34 million net present value) contribution of Pacific Bell to the Community Technology Fund is, however, clearly a measurable, tangible economic benefit to ratepayers.

TURN is incorrect, therefore, when it argues that by identifying the moneys to be distributed through the Community Technology Fund as part of the ratepayers' benefit, the money to be received by ratepayers is reduced to less than the 50 percent of the forecasted economic benefits of the merger as required by Section 854(b)(2). We cannot

⁴ Section 854(c)(6) requires that the Commission must consider whether the proposed merger will “Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility.”

follow the logic of this argument. First, Section 854(b)(2) refers to "economic benefits" and such benefits may be in a form other than cash. Second, the funds for the Community Technology Fund telecommunications projects are provided not by ratepayers, but by shareholders. As SBC and Telesis argue in their responses to TURN's and the ORA's filings, "the money to fund the CPC will come from Pacific Bell and its shareholders." (SBC's & Telesis' response to application, at 2, response to petition, at 4.) The response filed by Public Advocates, Inc. on behalf of several community based and non-profit organizations correctly recognizes that in our decision we "equitably allocated the merger's economic benefits to ratepayers in two forms, one being surcredits on ratepayer bills (not refunds), the other being the economic- and community-development built into the Community Partnership Agreement." (Public Advocates' response to application for rehearing, at 1.)

Nevertheless, while Public Advocates has understood both our intent and the expected result of our decision with respect to the distribution of ratepayer benefits, we acknowledge that we should clarify the pertinent sections of our decision. In addition, we find that observations of TURN and ORA with respect to Commission oversight of the spending of the \$34 million portion of the ratepayer benefit through the Community Technology Fund, raise reasonable concerns which we address in modifying our decision, as described more fully in the ordering paragraphs of this decision.⁵

We note, furthermore, that TURN in fact does not object to the application of the Community Technology Fund in calculating the share of ratepayer benefits, but instead seeks to remove the influence of Pacific Bell and SBC from the disbursement

⁵ TURN also contends that the agreement gives Pacific Bell unlawful control over the disposition of Pacific Bell's ratepayers' money. The petition of ORA makes essentially the same argument, and characterizes the CPC as a charitable contribution commitment which should be funded by Pacific Bell's shareholders. This characterization may apply to some of the CPC funding, but it does not apply to the telecommunication projects to be funded through the Community Technology Fund any more than our other orders for expanding telecommunications access and for universal service rely on charitable contributions.

responsibility of the fund and safeguard ratepayers' interest with respect to the disposition of the money.

TURN states:

"The purpose of this application for rehearing is not to challenge the Decision's use of a portion of the 'ratepayer share' to fund the CPC monetary obligations. However, the CPUC must recognize that the use of ratepayer money to fund the CPC triggers a responsibility to ensure that the money is used to promote only the interests of ratepayers and not the interest of the utility that was required to relinquish money." (TURN, Application for Rehearing, pp. 3-4

We agree, therefore, that our initial decision should be clarified so that there is no question that this Commission intends that ratepayers realize the maximum benefit from the CTF. Although the modifications to our decision and orders may not be precisely as requested by TURN or ORA, they will clarify our rationale and assure the Commission's oversight of expenditures made through the Community Technology Fund will reach the intended beneficiaries of the fund. Accordingly, we shall order the Telecommunications Division to oversee the formation of an independent committee for the purpose of disbursing CTF funds to qualified community groups that promote the goals of the CTF as articulated in the CPC and modified in our initial decision and this order.

Other modifications to the decision are in the nature of edits to clarify our intent and orders. We are correcting the inadvertent misuse of the word "refund" in describing that portion of the merger's economic benefits that is to be allocated to ratepayers. No reimbursement or rebate of money is involved here; hence the sums we have identified for allocation to ratepayers are not excess rates that had been paid by ratepayers and therefore must be refunded.

Finally, the most significant modification, which we think reflects not only our statutory mandate, but also the interests of all the parties, and the stated intentions of Pacific Bell, Telesis, and SBC, will require Pacific Bell to file an advice letter for our review and monitoring setting forth an accounting and description of the expenditure of the money committed to Community Technology Fund on specific telecommunications projects and programs on annual basis. These projects, as described in the CPC, should effect a broad base of telecommunications end-users and should be quantifiable in terms of costs incurred. The expenditure of the funds each year is to be an ongoing obligation of Pacific Bell until the \$50 million (net present value of \$34 million) has been appropriately expended within ten years. However, should Pacific Telesis act on the clause of the CPC which permits them to withdraw their commitments to the various funds, and they do not make the expenditures we have described with respect to the Community Technology Fund, then the entire balance of the \$248 million shall flow through to ratepayers as a billing surcredit and the adjustment to rates set out in Table 1 of D.97-03-067 shall be appropriately modified.

While we have not made all the modifications requested by TURN and ORA, we have provided by the advice letter filing requirement the safeguard that we believe underlies those requests. Just as the Commission will have ongoing oversight through an advice letter filing over the billing credits to be made to ratepayers for a period of five years, the Commission will also have oversight over the amount of money spent through the Community Technology Fund to provide telecommunications services to the widespread, diverse population of California over the life of the CTF.

IT IS THEREFORE ORDERED that:

1. The application of The Utility Reform Network for rehearing of Decision 97-03-063 and the Petition of the Office Of Ratepayer Advocates to Modify decision 97-03-063 are denied in all other respects except with respect to the modifications ordered by the ordering paragraphs of this decision as described below.

2. The following modifications be made to D.97-03-067:

A. Page 2. The second paragraph on page 2 of the decision, beginning with "As a condition..." shall be deleted and the following paragraph shall be inserted in its place:

"As a condition of our approval, we require Pacific Bell (Pacific Bell) to credit to ratepayers the short-term and long-term economic benefits of the merger in the amount of \$248 million. The \$248 million will be distributed in the form of surcredits in the total amount of \$213 million over a period of five years, as set forth in Table 1, and in telecommunications network and access projects funded by Pacific Bell, and/or Telesis and SBC, in the net present value amount of \$34 million under the Community Technology Fund of the Community Partnership Commitment. The \$34 million shall be expended in prorated amounts over a period of ten years."

B. Pages 38-39. The last paragraph on page 38, and the first paragraph on page 39, starting respectively with "We will direct..." and "Pacific Bell shall file..." shall be deleted and shall be replaced by the following six paragraphs:

"We shall direct Pacific Bell, Telesis, and SBC to allocate \$248 million to ratepayers. We will require Pacific Bell, and any successor to Pacific Bell, to effectuate the allocation by reducing customer rates for a period of five years by a total net-present-value of \$213 million (the yearly amounts described in Table 1, determined at a 10% discount rate) and by funding the Community Technology Fund of the CPC to enhance and expand the telecommunications infrastructure and customer access in the amount of \$34 million (net present value) of \$50 million over ten years in prorated amounts."

"Pacific Bell shall file an advice letter for the Commission's review, no later than October 1 of each year beginning with the year in which the merger is consummated, to adjust the rates for basic monopoly and non-flexibly priced Category II services by the amount described in Table 1."

"Pacific Bell shall also file an advice letter for the Commission's review, no later than October 1 of each year, beginning with the year in which the merger is consummated,

setting forth an accounting of the expenditures made and projects achieved through the Community Technology Fund of the CPC."

"We believe that Pacific Bell can comply with these conditions regarding the spending of Community Technology Fund money and at the same time honor its commitments, as expressed in the CPC, to the people of California who are represented by the numerous groups, organizations, and governmental agencies that have signed the CPC and those that may apply for funding benefits provided through the Community Technology Fund."

"However, should Telesis or Pacific Bell withdraw their commitment to the CPC or to the Community Technology Fund pursuant to terms of the CPC, then the Commission shall order the entire ratepayer benefit of \$248 million be distributed through billing surcredits."

C. Page 86. The fourth "bullet" item under the Discussion heading on page 86, starting with "The formation of ..." shall be deleted and replaced with the following:

"The formation of the Community Technology Fund to provide access to advanced telecommunications services in underserved communities with funding by Pacific Bell over 10 years of up to \$5 million a year, totaling a net present value of \$34 million (using a 10% discount rate)."

D. Page 86. The sixth "bullet" item on page 86, starting with "A 'challenge' grant ..." shall be deleted and replaced with the following:

"A 'challenge' grant under which Telesis will contribute up to an additional \$3 million annually for nine years after the merger in amounts equal to those offered by other telecommunications providers;"

E. Page 87. The second paragraph on page 87, beginning with "Although the Applicants do not seek..." shall be deleted. In its place, the following paragraph shall be added:

"In addition, the CPC contains a provision, at page 9, which permits Telesis and Pacific Bell to withdraw their monetary

commitments if the Commission does not accept these commitments as completely satisfying the requirements of Section 854(b) for the allocation of merger benefits to ratepayers. There does not appear to be a clause, however, which would preclude making this provision severable from the rest of the CPC provisions so that Pacific Bell, Telesis, and SBC can comply with the conditions we have established for approval of the merger.”

F. Page 87. The last paragraph on page 87, starting with "Notwithstanding the above, ..." shall be corrected by deleting the reference to "\$10 million per year over ten years" in the third sentence, and replacing it with "\$5 million per year over ten years."

G. Page 88. The following sentence on page 88, starting on the sixth line of the page, shall be deleted: "The benefits of the CPC will go beyond the benefits arising from a simple refund to ratepayers." In its place, the following sentence will be inserted:

"The benefits of the entire CPC will be in addition to those economic benefits to be allocated to ratepayers through the billing surcredits and the telecommunications projects funded through the Community Technology Fund, which is one part of the CPC."

H. Page 88. The second paragraph on page 88 beginning with "Second, we fully expect..." shall be deleted, and the following paragraph shall be inserted in its place:

"Second, we fully expect that the CPC will, in the time periods forecasted, distribute funds equal to or greater than the funding level committed. However, if funds are not fully distributed within the stated time period, the surplus funds, if any, shall be reported to the Commission with a recommendation for distribution to entities/funds that promote our universal service goals for underserved communities throughout the State."

I. Page 102. Finding of Fact No. 61 on page 102 shall be deleted and replaced with the following finding:

"The Community Technology Fund within the Community Partnership Commitment provides funding by Pacific Bell to

expand and improve access to modern telecommunications services to all segments of California's diverse population."

J. Page 103. Conclusion of Law No. 5 on page 103 shall be deleted and replaced with the following:

"Section 854(b)(2) requires that the Commission allocate at least 50% of the forecasted economic benefits of the proposed merger of Telesis and SBC to California's ratepayers."

K. Page 103. Conclusion of Law No 9 on page 103 shall be deleted and replaced with the following:

"As a condition of the approval of the proposed merger of Telesis and SBC, ratepayers of Pacific Bell shall receive the economic benefits of \$248 million, representing half of the forecasted economic benefits of the merger. Of that amount, \$213 million shall be applied as a billing surcredit over five years. The remaining amount, \$34 million (the net present value of \$50 million) shall be received by ratepayers over a period of ten years through the implementation of the Community Technology Fund of the Community Partnership Commitment, as we have described in this decision."

L. Page 106. Ordering Paragraph 1(b) starting on page 106 shall be deleted and replaced with the following:

"Pacific Bell shall implement the funding of the Community Technology Fund of the Community Partnership Commitment to provide a net present value of \$34 million over ten years. The funding is to expand and extend access to advanced telecommunications and meet the goal of universal service to the underserved communities of California.

(a) We direct Pacific Bell and the signatories to the CPC to establish an independent disbursement committee under the oversight responsibility of the Commission's Telecommunication Division. The selection of members of the disbursement committee shall be open to and include all community and ratepayer interest representative groups.

- (b) No utility shall be permitted to participate in the selection of members of the committee or be represented in it.
- (c) Pacific Bell shall file an advice letter to account for the disbursement of funds earmarked for CTF, detailing the expenditure of funds on an annual basis to be submitted to the Telecommunications Division by the first of October of each year the program is conducted. The Telecommunications Division shall review these advice letters and report to the Commission on the disbursement of CTF fund.
- (d) The recipients of the CTF grant shall be free to use the money to accomplish the purposes of the grant as described in the Community Partnership Commitment; that is, to advance universal service principles and to provide underserved communities with access to and education about emerging and advanced telecommunications, and not merely to subsidize the internal operations of the recipient organizations. The recipient's spending under the Community Technology Fund, however, shall be without restrictions imposed by any signatory to the CPC whose interests may be different from that of the recipient. Should funds remain undistributed at the end of the ten year period, the surplus funds, if any, shall be reported to the Commission with a recommendation for distribution to entities/funds that promote our universal service goals for underserved communities throughout the State."
- (e) Should Pacific Bell, or Telesis, withdraw its financial commitment to the Community Technology Fund, the balance of \$34 million shall be distributed through a billing surcredit over five years in addition to the \$213 million surcredits we have also ordered.

3. The decision having been so amended, the application for rehearing of TURN, and the petition for modification filed by ORA, are hereby denied.

This decision is effective today.

Dated November 5, 1997, at San Francisco California.

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