

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C) for Authority Pursuant to Public Utilities Code Section 851 to Lease 428 Square Feet of Space to Cross Country Wireless, Inc.

Application 97-12-021
(Filed December 10, 1997;
amended April 8, 1998)

OPINION

1. Summary

Pacific Bell seeks Commission approval, pursuant to Public Utilities (PU) Code § 851, to lease unused space in its Mount Wilson, California, facility to its affiliate Cross Country Wireless, Inc. (CCW). Pacific Bell also requests approval to lease the same space to CCW, in the event that CCW is sold. Pacific Bell states that both lease arrangements comply with affiliate transaction rules of this Commission and of the federal government. The application is unopposed. Pacific Bell's request is approved.

2. Background

In Application (A.) 95-10-019, filed on October 4, 1995, Pacific Bell asked the Commission to grant Section 851 authority for a number of space use arrangements with both non-affiliated parties and affiliated parties.

In Decision (D.) 96-04-045, an interim decision, the Commission approved several of the agreements that the utility has with non-affiliated parties but, at the urging of staff investigators, the Commission required additional information on the agreements with affiliates. Among other things, Pacific Bell was required to make a further showing that its charges to affiliates and other parties were proper and that the arrangements met affiliate transaction rules intended to prevent anticompetitive dealings. Pacific Bell filed the additional information

requested and, in D.96-09-069, the Commission approved the space use arrangements between Pacific Bell and its affiliates.

In this application, Pacific Bell originally sought authority to lease 428 square feet of unused space at its Mount Wilson, California, location to CCW. Pacific Bell also sought approval to lease the same space to a third-party purchaser of CCW, in the event CCW is sold.

On April 8, 1998, Pacific Bell amended its application. Pacific Bell now seeks authorization to lease the space to CCW in the event CCW is sold rather than to a third party. Instead of the blank lease included in the original filing, Pacific Bell seeks approval of an executed agreement.

3. Nature of Application

In accordance with the Commission's direction in D.96-04-045, Pacific Bell has attached exhibits to its application with further details of the proposed leases as follows.

- Exhibit A Matrix of Affiliate Leased Location
- Exhibit B Property Management Billing Process
- Exhibit C Transfer Pricing Manuals 16.01FC and 16.01CO
- Exhibit D Affiliate Transactions:
Policies, Guidelines and Reporting Requirements
- Exhibit E Corporate Principles 80
- Exhibit F Cross Country Wireless Lease Documents
General Administrative Services Agreement
Property Management Transfer Pricing Schedule
- Exhibit G Example of a "Third Party" Lease Agreement
(not required by D.96-04-045)
- Exhibit H Pacific Bell's Balance Sheet and Income Statement

Pacific Bell, by its amendment, included an executed communications site lease agreement.

4. Affiliate Transaction Rules

Pacific Bell states that when it leases space to affiliates, it will do so under affiliate transaction agreements that comply with Commission and Federal Communications Commission affiliate transaction rules. (See, e.g., D.86-01-026, 20 CPUC2d 237 (1986); D.87-12-067, 27 CPUC2d 1 (1987); 47 CFR §§ 64.209, 32.27.) Under the Commission's rules, each affiliate pays Pacific Bell the higher of the fully distributed cost plus 10%, or the market rate.

5. Reasons for the Leases

Pacific Bell states that the space to be leased is currently not necessary for Pacific Bell's operations. Pacific Bell further states that the leases will not interfere with existing operations. The company states that, because the affiliate lease complies with the affiliate transaction rules, the affiliate will not be subsidized by Pacific Bell and the arrangement will not create anticompetitive effects.

6. Continuation of the Lease if CCW is Sold

Pacific Bell requests authority to continue the use of the space, covered by the proposed lease, by CCW in the event CCW is sold. Pacific Bell included with its amended application a copy of the lease agreement which covers the terms and conditions for continued use of the property by CCW.

7. Motion to Seal

Pacific Bell moves for leave to file under seal the unredacted version of its amendment to the application. The redacted material is very brief and pertains to current negotiations for a potential sale of CCW to a third party. Pacific Bell asserts that information about the negotiations is confidential and proprietary.

Pacific Bell has stated grounds, under General Order 66-C and authority there cited, for the relief requested. The motion, which is unopposed, will be granted.

8. Comments to Application and Pacific Bell's Response

The Commission's Office of Ratepayer Advocates (ORA) filed comments on this application on January 16, 1998. ORA pointed out several errors in the caption to the application, and sought clarification of the authority requested by Pacific Bell. In addition, ORA pointed out that CCW has been using the space which is the subject of this application since October 1, 1995 without Commission approval. ORA proposed that Pacific Bell be required to refile or amend its application to correct the errors, clarify its request and explain why it has not previously sought approval for the lease to CCW.

In its comments ORA also stated that the current lease agreement between Pacific Bell and CCW appears to satisfy the applicable affiliate transaction rules. However, ORA offered no opinion as to the appropriateness of the proposed lease to a third-party purchaser of CCW.

On January 26, 1998, Pacific Bell filed errata to its application, and a response to ORA's comments. The errata corrected the errors noted by ORA. The response noted the corrections made by the errata. It explained that the requested authority is for approval of the current lease with CCW, and the draft lease with a third-party purchaser of CCW. It also explained that it inadvertently omitted the agreement with CCW in A.97-09-010 which was approved by D.97-10-047. However, this does not explain why approval was not sought in 1995 as it should have been.

9. Administrative Law Judge's Rulings and Pacific Bell's Response

On January 26, 1998 and February 2, 1998 the assigned Administrative Law Judge (ALJ) issued rulings directing Pacific Bell to check that there are no other similar leases to affiliates or other entities that require Commission approval for which approval has not been requested or received, and to report the results. Pacific Bell was also directed to explain why it should not be fined under Public

Utilities (PU) Code §§ 2107 and 2108 for failure to secure approval of the lease to CCW.

On March 2, 1998, Pacific Bell responded to the ALJ rulings. Pacific Bell performed a search of all of its leases and an inventory of its real property. Pacific Bell found one lease that had not received § 851 approval, and a few situations where the affiliate occupied more than the authorized space. Pacific Bell also found several instances where it anticipates it will need to seek modification of its § 851 authority or, additional authority, due to transfer of administrative support functions as approved by D.97-12-087 in A.97-09-027. Pacific Bell represented that it will be taking immediate action to comply with § 851.

Pacific Bell also responded that it would be inappropriate to penalize Pacific Bell under §§ 2107 and 2108 for its violations of § 851 because its violations were very minor inadvertent oversights.

We find that Pacific Bell has made a satisfactory response to the ALJ rulings. We will not penalize Pacific Bell but will require it to notify the Director of our Telecommunications Division when it has completed all of the tasks required for full compliance with § 851 as indicated in its response.

10. Discussion

PU Code § 851 requires Commission authorization before a utility may "sell, lease, assign, mortgage, or otherwise dispose of or encumber" utility property. The purpose of the section is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRRC 56.)

Another purpose of the Commission's review is to ensure that any revenue from the transaction is accounted for properly, and that the utility's rate base,

depreciation, and other accounts correctly reflect the transaction. Under the New Regulatory Framework (NRF), these items do not have the same significance as they did under traditional regulation, but they continue to be an integral part of the calculation of rate of return, which serves as a check on the results of NRF. For this reason, the Commission reviews the accounting of the transaction for conformance with its requirements.

When, as here, the transactions are with a corporate affiliate, the Commission's review also includes consideration of whether the transaction may have anticompetitive effects or result in cross-subsidization of nonregulated entities. (Re Pacific Bell (1992) 45 CPUC2d 109, 125.)

Review of the information provided shows no reason to believe that the current and proposed lease will impair Pacific Bell's ability to serve the public. The company's accounting for the revenue appears to be in order. No evidence has been submitted which reveals any anticompetitive effects or cross-subsidization of a nonregulated entity from the current lease. Accordingly, Pacific Bell has met the requirements for authorization, under PU Code § 851, of the current lease to its affiliate, CCW, and the proposed lease to CCW if CCW is sold.

Findings of Fact

1. Pacific Bell seeks Commission approval, pursuant to PU Code § 851, of a lease agreement with its affiliate CCW.
2. Notice of this application appeared on the Commission's Calendar on December 17, 1997. Notice of Pacific Bell's April 8, 1998 amendment appeared on April 20, 1998.
3. ORA filed a protest on January 16, 1998. No other protests have been received.

4. On April 8, 1998 Pacific Bell filed an amendment to its application and a motion to file under seal the unredacted version of the amendment asserting that the information pertains to negotiations for a potential sale, and is therefore confidential and proprietary.

5. CCW will pay Pacific Bell the higher of fully distributed costs plus 10%, or market rate, for the leased space.

6. Pacific Bell has supplied the information required by the Commission for review of the lease agreements with CCW.

7. Pacific Bell by its amendment of April 8, 1998 seeks Commission approval to continue the use of the space covered by the proposed lease to CCW if CCW is sold.

8. The ORA has reviewed the application and has raised no objection to its approval.

9. By ALJ rulings dated January 26, 1998 and February 2, 1998, Pacific Bell was ordered to check that it has no leases requiring Commission approval for which approval has not been requested or granted. Pacific Bell was also directed to explain why it should not be fined under PU Code §§ 2107 and 2108 for failure to seek PU Code § 851 approval of the current lease to CCW.

10. On March 2, 1998 Pacific Bell responded to the ruling stating that it was in substantial compliance with PU Code § 851 and should not be penalized. It also indicated what additional approval will be sought to be in complete compliance.

Conclusions of Law

1. Pacific Bell's proposed leases of space to CCW as an affiliate, and after it is sold, will not impair Pacific Bell's ability to serve the public.

2. Pacific Bell's accounting for the revenue from the leases to CCW is in order.

3. There is no evidence of anticompetitive effects or cross-subsidization of non-regulated entities from the affiliate lease to CCW.

4. Pacific Bell's leases with CCW as an affiliate and after it is sold should be approved.

5. Pacific Bell should be ordered to report to the Director of the Telecommunications Division when it has completed the tasks required for full compliance with PU Code § 851 as indicated in its response to the ALJ rulings.

6. No hearings are necessary.

7. This order should be made effective immediately in order that the lease with CCW can be implemented promptly.

ORDER

IT IS ORDERED that:

1. Pacific Bell is authorized, pursuant to Public Utilities Code § 851, to lease unused space in its Mount Wilson, California, facility to its affiliate Cross Country Wireless, Inc. (CCW), and to CCW if CCW is sold, on the terms and conditions set forth in this application.

2. Pacific Bell shall notify the Director of the Telecommunications Division, in writing, when it has completed all of the tasks required for full compliance with Public Utilities Code § 851 as indicated in its March 2, 1998 response to the Administrative Law Judge's rulings of January 26, 1998 and February 2, 1998.

3. Pacific Bell's motion to file under seal the unredacted version of its amendment to this application is granted as follows. The unredacted version, submitted under seal together with Pacific Bell's motion, shall remain under seal for a period of one year from the effective date of today's decision, and during that period shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the

A.97-12-021 ALJ/JPO/bwg

ALJ then designated as Law and Motion Judge. If Pacific Bell believes that further protection of the information redacted from the public version is needed after one year, it may file a motion stating the justification for further withholding the unredacted version from public inspection, or for such other relief as the Commission rules may then provide. Such motion shall be filed no later than 30 days before the expiration of this protective order.

4. This proceeding is closed.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

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