

Decision 98-07-094 July 23, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

O P I N I O N

Summary

This decision authorizes competitive local carriers (CLCs) to use the advice letter process previously established in Decision (D.) 94-05-051 for uncontroversial requests for authorization to transfer or encumber assets or control pursuant to Public Utilities (PU) Code §§ 851 to 854.

Background

On October 10, 1997, Brooks Fiber Properties, Inc. (Brooks) and WorldCom, Inc. (WorldCom) filed an application seeking Commission authorization to transfer control of Brooks to WorldCom. Both of the applicants are authorized to provide a variety of telecommunications services within the State of California, including competitive local exchange service.

That application was made pursuant to PU Code §§ 851-854, which requires that a public utility obtain Commission approval of a transfer of assets or control. Since the application was uncontroversial, and no protests were filed, it was proper for the Executive Director to issue an order approving the transfer. (See Decision (D.) 86-08-057, 21 CPUC2d 549 (1986).)

In *California Association of Long Distance Telephone Companies*, 54 CPUC2d 520 (1994) (D.94-05-051), the Commission established an advice letter process for consideration of transactions under PU Code §§ 851-854 for nondominant interexchange carriers. But for the fact that Brooks and WorldCom were also certificated providers of competitive local exchange services, they would have been able to use the simpler advice letter process. The purpose of this decision is to enlarge the applicability of D.94-05-051 to include CLCs in the advice letter process.

An Administrative Law Judge ruling was issued on December 29, 1997, soliciting parties' comments regarding the question of whether a CLC should be permitted to use the advice letter process applicable to nondominant interexchange carrier (NDIEC) for requests for authorization to transfer assets or control.

Comments were filed on January 16, 1998, by various parties representing CLCs, by GTE California, Inc. (GTEC) and Citizens Telecommunications Company (Citizens), representing incumbent local exchange carriers (ILECs), and by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), representing consumer interests.

Parties' Positions

The parties representing CLCs, as well as ORA, generally support adoption of a Commission policy extending the applicability of the NDIEC advice letter process to CLCs. Certain CLC parties believe that the ILECs should not be included in this streamlined treatment at this time, since ILECs continue to possess market power that warrants closer scrutiny in the event of a transfer of assets or control.

Parties representing the interests of ILECs argue that the advice letter approved process should be extended not only to CLCs, but to ILECs as well.

GTEC argues that CLCs, including in their ranks WorldCom, MCI, and TCG, are formidable competitors of the ILECs and that parity dictates that CLCs should not be singled out for more advantageous regulatory treatment than is afforded ILECs with whom they compete. GTEC argues that regulatory symmetry provides the incentive for the most efficient and economical outcome on an aggregate basis. GTEC therefore believes it is not appropriate to limit the scope of the advice letter process to CLCs only as a single discrete class of service provider, since non-dominant CLCs compete for customers in the same market with dominant carriers.

Citizens argues that, given the relatively short period during which CLCs have been operating, let alone transferring assets or control, there may not be adequate experience to conclude that such transfers are always uncontested and routine, particularly in the case of facilities-based CLCs that qualify as carriers of last resort. When the Commission made the advice letter process applicable to NDIECs in 1994, in D.94-05-051, it was several years after the interexchange market was opened to competition. Citizens states that a more cautious relaxation of regulatory requirements may be warranted here as well, particularly with respect to facilities-based CLCs that qualify as carriers of last resort. Citizens believes that facilities-based CLCs that are carriers of last resort should be treated the same as ILECs with respect to regulatory approval of transfer of assets or control. Citizens also argues, however, that with the advent of local competition the advice letter process is appropriate for CLCs as well as for ILECs relating to the transfer of assets.

TURN opposes the proposal to extend to CLCs the NDIEC rules for transferring control or assets. TURN argues that CLC mergers are far more likely than NDIEC mergers to raise serious competitive and other public interest concerns. Most NDIEC mergers involve a combination of two among hundreds

of resellers that provide statewide service and have little or no impact on investment or employment in California. In contrast, TURN argues, many CLC mergers are apt to combine the only two challengers to the ILECs in a given geographic area, which may affect significant amounts of planned investment.

TURN further argues that it is much more difficult to analyze the effect of CLC mergers on competition than NDIEC mergers because the local exchange market is still in its infancy. By comparison, the long distance market had been open to competition for ten years when the decision, D.94-05-051, authorizing that NDIEC mergers be proposed by advice letter and approved thereof, was issued.

TURN does not believe the limited disclosures required for NDIEC transactions are sufficient to allow interested parties to assess the relevant issues associated with CLC mergers. The NDIEC procedures require only a statement of "the general terms of the transaction" and unspecified "financial statements" for any applicant which will continue operations after the transaction has been completed." (D.94-05-051, Appendix A.)

TURN further argues that the NDIEC procedure would not provide a sufficient time period for parties to analyze transactions in order to assess their effect on the public interest. Under the NDIEC procedures, interested parties have only 20 days after the *date of filing* of the advice letter to submit protests. In contrast, with applications, interested parties have 30 days from the *date of appearance in the Daily Calendar*. TURN is particularly concerned that, if notice of advice letters in the Daily Calendar is delayed, such delay could further impede parties' opportunity to protest such advice letters. If the Commission chooses to apply the NDIEC advice letter procedure to CLCs notwithstanding TURN's opposition, TURN requests that parties be allowed to request notice of advice letters involving transfers of control or of assets.

Discussion

In D.94-05-051, the Commission noted that nondominant interexchange carriers are not providers of monopoly services such that customers have a choice of carrier from which they may purchase services. In recognition of this fact, the Commission modified certain procedures applicable to these carriers to allow the Commission to expedite regulatory review of matters which do not usually raise concerns regarding the protection of consumer interests or the interests of other market participants. Among those types of matters for which Commission procedures have been simplified are: stock and security transactions, PU Code §§ 816-830 and requests for authority to encumber or transfer utility property or control, PU Code §§ 851-854.

In D.97-06-096, (Application (A.) 96-02-004),¹ the Commission added additional requirements in the case of NDIECs that file an advice letter seeking authority to transfer or acquire customer base,² requiring that the NDIEC include the Commission's Consumer Services Division in its service list and send a notice to all customers of the impending transfer which meets the following minimum standards:

1. The notice must be in writing.

¹ See A. 96-02-004. In the Matter of the Application of the Safety and Enforcement Division for an Emergency Order to Declare Void the Authority "granted" through the Advice Letter Process to MIDCOM Communications, Inc. and Cherry Communications to Purchase a Portion of the California Customer Base of Cherry Communications, Inc.

² As defined in D.97-01-021, a customer base transfer is the sale from one NDIEC to another of the contractual rights it has to serve its existing customers. The contractual rights are best described as a requirements contract, subject to termination at any time. That is, until the customer cancels the contract, subject to termination at any time. That is, until the customer cancels the contract, the NDIEC is obligated to provide service and the customer is obligated to pay the tariffed prices for any calls the customer may make. *MIDCOM and Cherry Communications*, D.97-01-021, mimeo. at 9.

2. The carrier must provide it to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free phone number for questions; and,
4. The notice and the carrier's description of service to customers must be included in the advice letter.

At the time the Commission issued D.94-05-051, CLCs were not authorized by the Commission to offer service. Based on our review of parties' comments referenced above, we conclude that the analysis which the Commission used to simplify regulation of the NDIECs is equally applicable to CLCs. CLCs are not monopoly service providers, but bear all risk associated with their financial decisions. Simplifying regulation by adopting the advice letter process would not compromise the public interest. The applications filed by CLCs to transfer assets or control, such as the one from Brooks and WorldCom, are generally uncontested and routine. The current procedures, however, require CLCs to file formal applications for authority to transfer assets and liabilities. The time required to process the application may delay commercial transactions for several months, with no benefit to the public. The advice letter process adopted for NDIECs in D.94-05-051 would shorten the period to 40 days but would retain the requirement of public notice and the opportunity to protest. The advice letter process, with notice and possibility of hearings for controversial transactions, has been in place for several years for NDIECs. In the few instances where protection of the public requires a more extensive review, the Commission could impose a more elaborate process.

We disagree with TURN that CLCs, generally, should be denied the benefits of the streamlined approval advice letter process which we have

previously extended to NDIECs. Even if local exchange competition is limited in certain areas, the lack of competition is not because of any market power exercised by CLCs. In D.96-03-020, we have previously concluded that CLCs generally lack market power, and should therefore not be subject to the same degree of regulatory scrutiny as are the ILECs. We find no compelling reason to continue to impose on CLCs the same application filing requirement for transfers of assets and liabilities as is required for the ILECs.

We realize that there may be certain transactions involving CLCs which may be contested, or require more extensive scrutiny. The advice letter process adopted in D.94-05-051 specifically excludes transactions of large utilities covered under PU Code § 854(b) and (c) which have gross annual California revenues exceeding \$500 million. We shall likewise apply this same exclusion to CLCs. For smaller CLCs, the advice letter process still preserves the necessary flexibility to undertake such measures where warranted by allowing the advice letter to be converted to an application in the event a protest is filed. In addition, the Commission's Telecommunications Division, upon review of advice letters filed by CLCs under this procedure, may also ascertain that due to the size or complexity of a proposed transaction, it should be converted into an application. In such cases, the Telecommunications Division shall promptly advise the Commission, and where deemed appropriate, the advice letter shall be converted into a formal application.

Nevertheless, we do agree with TURN that the local exchange market is in a much earlier stage of competition than the NDIEC market, reflecting the ILECs continued market power. Although ILECs are nominally in competition with the CLCs for local exchange customers, there remains many areas and market sectors where local exchange competition is still minimal or nonexistent. The ILECs remain the only local carrier for many customers. Therefore, the mere fact that

the market has been opened to local competition by regulators does not automatically imply that traditional concerns regarding transfers of assets by ILECs have been eliminated. While our policy is to treat all carriers in a nondiscriminatory manner, we have also recognized that ILECs must continue to be regulated as dominant carriers until we have convincing evidence to the contrary. For this reason, we shall not at this time extend the advice letter approval process to the ILECs, as proposed by GTEC and Citizens. Likewise, we shall not extend the advice letter approval process to those CLCs which are owned by, or affiliated with, an ILEC.

TURN has raised a concern regarding the need for timely notice of advice letters to permit enough time for interested parties to file protests, if desired. In order to assure adequate opportunity to protest CLC advice letter filings, we shall require that the 20 days for filing protests shall be counted from the date of appearance in the Daily Calendar for those advice letters of CLCs involving transfers or control or of assets.

For these reasons, the advice letter process as established for NDIECs in D.94-05-051, and as modified in D.97-06-096, is hereby extended to all CLCs except for those CLCs which are owned by or affiliated with an ILEC.

Findings of Fact

1. CLCs are competitive providers of telecommunications services in an open, rather than monopoly, market.
2. The Commission has the authority to change or eliminate the procedure for reviewing transfers of control or assets which are subjects of PU Code §§ 851-854.
3. The advice letter procedure used by NDIECs as adopted in D.94-05-051 would substantially shorten the period between a CLC's request for authority to transfer control or assets and the date the Commission grants that authority.

4. The advice letter process retains the Commission's authority to initiate a thorough review of the proposed transaction.

5. No public purpose is served by the procedure which requires all CLCs in all cases to obtain Commission authorization via the application process.

6. The mere fact that the markets have been opened to local competition by regulators does not automatically imply that traditional concerns regarding transfers of assets by ILECs have been eliminated.

7. The rationale for extending the D.94-05-051 advice letter approval process to CLCs does not apply to ILECs and their affiliated CLCs because ILECs are the only carrier for many customer sectors and retain significant market power.

8. The advice letter approval process adopted in D.94-05-051 was modified by D.97-06-096 to add the requirement that all NDIECs that file an advice letter seeking to transfer or acquire another carrier's customer base shall include the Commission's Consumer Services Division in its service list and shall send a notice to all its customers of the impending transfer, which meets prescribed minimum standards for customer notice.

Conclusions of Law

1. The Commission should extend the advice letter process as adopted in D.94-05-051 and as subsequently modified by D.97-06-096, for requests for authorization pursuant to PU Code §§ 851-854 to apply to CLCs, except as noted in Conclusion of Law 2.

2. The existing requirements applicable to ILECs and their affiliated CLCs for the filing of applications for authority to transfer of control or of assets should continue in force.

3. Parties should be permitted to file protests to advice letters involving CLC transfers of control or of assets within 20 days after the date that notice appears in the Commission's Daily Calendar.

4. Any CLC advice letter filing made pursuant to this decision may be subject to conversion to a formal application, if deemed appropriate by the Commission in response to a formal protest, or upon recommendation by the Director of the Telecommunications Division.

O R D E R

Therefore, IT IS ORDERED that:

1. The procedure for competitive local carriers (CLCs) seeking authority to transfer control or assets pursuant to Public Utilities Code §§ 851 to 854 shall be modified to be consistent with the procedure previously adopted for nondominant interexchange carriers set out in Appendix A of Decision 94-05-051, as attached hereto, and also consistent with the notice requirements of D.97-06-096 except that the procedure will not apply to CLCs owned by or affiliated with incumbent local exchange carriers.

2. Pursuant to the notice requirements for NDIECs adopted in Decision 97-06-096, CLCs that file an advice letter seeking authority to transfer or acquire customer base, shall include the Commission's Consumer Services Division in its service list and send a notice to all customers of the impending transfer which meets the following minimum standards:

- a) The notice must be in writing.
- b) The carrier must provide it to customers no later than 30 days before the proposed transfer;
- c) The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free phone number for questions; and,

d) The notice and the carrier's description of service to customers must be included in the advice letter.

3. The 20-day period for the filing of protests, if any, to CLC advice letter filings seeking to transfer control or assets shall begin to run from the date that notice of the filing first appears in the Daily Calendar.

4. The Executive Director shall cause a copy of this order to be served on all CLCs certificated in California.

This order is effective today.

Dated July 23, 1998, at San Francisco, California.

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

APPENDIX A
of D.94-05-051

Procedures for NDIECs Seeking Authority for
Transfers of Control or Assets

1. An NDIEC certified by the Commission that seeks transfer of control or assets shall file an advice letter which shall be effective 40 days after filing absent Commission action to suspend the advice letter. The advice letter shall (1) advise the Commission that the filing NDIEC is a party pending acquisition, reorganization, merger, or asset purchase and (2) provide the general terms of the transaction. The advice letter shall be served on those persons to whom the entity is already required to serve tariff charges under General Order 96-A. The advice letter shall be accompanied by financial statements for any applicant which will continue operations after the transaction has been completed. Financial statements may be filed under seal, but doing so is subject to protest. The text of the advice letter shall describe the terms of the transaction and indicate how any surviving Commission certified entities will modify their tariffs if at all.
2. Unless suspended by the Commission at the request of Commission Advisory and Compliance Division, either because of a protest within a 20-day protest period, or *sua sponte*, the advice letter shall take effect and the transaction shall be deemed approved. If the Commission believes that the matter warrants more comprehensive review, the Commission may suspend the advice letter and direct that the parties proceed by application.
3. This process shall not be employed where an entity acquiring assets or control entity is not either an already certified entity or the parent of a presently certified entity. In other words, the advice letter process described above should not be employed for purposes of market entry.
4. This procedure shall not be applied to instructions that are subject to the requirements of PU Code §§ 854 (b) and (c).

(END OF APPENDIX A)