



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Joint Application of TeleCommunication
Systems, Inc. d/b/a Maryland
Telecommunications Systems, Inc. (U7083C)
and Comtech Telecommunications Corp. and
Typhoon Acquisition Corp., a wholly owned
Subsidiary of Comtech for Approval of the
Transfer of Control of TeleCommunication
Systems, Inc.

Application 16-02-011

**BRIEF OF TELECOMMUNICATION SYSTEMS, INC. D/B/A MARYLAND
TELECOMMUNICATIONS SYSTEMS, INC. (“TCS”), AND COMTECH
TELECOMMUNICATIONS CORP. AND TYPHOON ACQUISITION CORP., A
WHOLLY OWNED SUBSIDIARY OF COMTECH**

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Dated: September 22, 2016

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Pursuant to the September 1, 2016 Scoping Memo¹ in the above captioned proceeding, TeleCommunication Systems, Inc. d/b/a Maryland Telecommunications Systems, Inc. (“TCS”), and Comtech Telecommunications Corp. and Typhoon Acquisition Corp.², a wholly owned subsidiary of Comtech (collectively, “Joint Applicants”) respectfully submit this brief addressing the issues set forth by the Assigned Commissioner and Administrative Law Judge.

I. SUMMARY AND INTRODUCTION

The Scoping Memo established the following issues to be included within the scope of this phase of the proceeding:

- a. Is imposition of a penalty under Section 2107 appropriate under criteria set forth in D.98-12-075;
- b. Are the applicants exempt from penalty if the acquired company (TCS) does not offer regulated services in California, or is harm to the regulatory process to be considered; and
- c. Are there any mitigating facts in this case that would warrant consideration of a reduced penalty or no penalty?

¹ *Joint Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge Setting Scope of Phase Two Penalty Proceeding* (Sept. 1, 2016) (“Scoping Memo”).

² Comtech and TCS entered into an Agreement and Plan of Merger whereby Comtech agreed to purchase all outstanding shares of capital stock of TCS (the “Agreement”). Subsequent to the closing of the Agreement, Typhoon Acquisition Corp. merged into TCS and TCS survived the merger and is now a direct subsidiary of Comtech.

As described below and in the Affidavits of Mr. Scovill and Mr. Rowland, the Joint Applicants exhibited good faith by consulting with members of the CPUC Staff in order to submit an appropriate filing with respect to the Agreement. An unintended delay resulted from discussions with the Staff regarding the unique factual circumstances surrounding the Agreement in which the Joint Applicants and the Staff originally determined the Commission's Advice Letter process was appropriate, but later determined that an Application was required. Those good faith discussions in conjunction with the nature of the unregulated managed services and the crucial public interest aspects of the Joint Applicants' offerings serve as mitigating factors and support a conclusion that a penalty under Section 2107 of the Act is unwarranted.

II. DISCUSSION

A. Pursuant to the factors developed in D.98-12-075, the Commission should determine that the imposition of a penalty under Section 2107 of the Act is unwarranted given the unique circumstances of this case.

With respect to Subpart 'a' of the Scoping Memo, the Joint Applicants respectfully argue that, given the facts of this case as applied to the Commission's existing precedent, the Commission should decline to assess a penalty, or impose only the minimum amount, in this matter. Consistent with the established criteria that the Commission set forth in D.98-12-075 for determining penalties, the Commission should also consider a number of mitigating factors.

1. Severity of the Offense

The Commission has indicated that it looks to three factors to measure severity: economic harm, physical harm, and harm to the integrity of the regulatory process. Violations that caused physical harm are generally considered to be the most severe.³ Here, while there was an inadvertent technical violation, there was no physical or even economic harm to anyone. This

³ D.98-12-075 at p. 15.

Commission has previously held such an offense to be non-egregious.⁴ TCS does not provide any service directly to end-user customers. With respect to regulatory integrity, TCS has exhibited deference to both the spirit and operation of that process by seeking advance clarification of the Commission's rules on multiple occasions.⁵ The Joint Applicants did not benefit by the timing of the Agreement, and the violation was a single occurrence. While the Company is certificated as a competitive local carrier ("CLC"), the services TCS currently provides in California are non-regulated, managed services that fall squarely within the public's interest to encourage access to E9-1-1. TCS consulted with the Staff and filed a comprehensive Application with exhibits that thoroughly presented the entire scope of the Agreement. The Joint Applicants respectfully argue that the technical violation should be mitigated by these and other factors.⁶

2. Conduct of the Utility

As to the subject entity's conduct, the Commission looks at three factors: the utility's actions to prevent a violation; the utility's actions to detect a violation; and the utility's actions to disclose and rectify a violation. The violation was unintentional. Specifically, given the information the Joint Applicants had at the time, the Joint Applicants attempted to fully comply with Section 854 of the California Public Utilities Code.⁷ Once the Joint Applicants were advised that a formal application was required, the Joint Applicants sought accelerated review and filed a comprehensive application.⁸ The Joint Applicants notified the Commission that the

⁴ D.00-12-053 at p. 19.

⁵ Rowland Affidavit ¶3.

⁶ See D.10-03-008 at p. 9 ("Applicants' violation of § 854(a), while serious, did not cause any physical or economic harm to others. Further, the violation of § 854(a) affected few, if any, consumers, and is a single offense. The only factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code. However, this factor must be weighed against the other factors in determining the amount of the fine.")

⁷ Rowland Affidavit at ¶ 3 & 4.

⁸ To the extent that a transfer application involves a single certificated entity, as opposed to two certificated entities, this should not result in a more complex analysis or delayed decision as it would create a logical inconsistency for prospective applicants. This policy technicality apparently resulted in some confusion for the Staff as evidenced by the delay in providing process advice

Agreement was scheduled to close on February 23, 2016.⁹ Joint Applicants have not previously been found to have violated or failed to comply with the Commission's rules or laws. Finally, neither of the Joint Applicants are rate-regulated and/or incumbent telephone corporations, over which the Commission typically applies greater scrutiny.

3. Financial Resources of the Utility

With respect to a potential penalty, the Commission must balance the need for deterrence with the constitutional limitations on excessive fines.¹⁰ The Joint Applicants respectfully submit that the need for deterrence is lessened by the specific facts of this case, particularly the fact that the delay in filing the Application resulted from good faith discussions with the Staff that initially resulted in a mistaken belief that the Commission's Advice Letter rules applied.¹¹

The Commission has looked to regulated revenues in determining the amount of penalty.¹² The Commission has previously determined that insignificant regulated revenues was a factor that suggested that a "relatively small fine could effectively deter the Applicants from future violations of the California Public Utilities Code."¹³ With respect to that factor, TCS has **never** received regulated revenue in California for the provisioning of regulated services.

4. Totality of the Circumstances in Furtherance of the Public Interest

Next, the Commission will look to facts that mitigate or exacerbate the degree of wrongdoing, evaluated from the perspective of the public interest.¹⁴ The Joint Applicants consulted in good faith with members of the CPUC in order to determine the correct notice

to TCS. This delay should not be counted against the good faith efforts of Staff to remain consistent with prior Commission decisions, nor should it likewise penalize TCS.

⁹ Joint Application, p. 7. Counsel for the Joint Applicants also conveyed this fact with CPUC Staff prior to the filing of the Joint Application.

¹⁰ D.98-12-075 at p. 17.

¹¹ Rowland Affidavit at ¶¶ 4 and 6.

¹² See D.00-12-053 at p. 12.

¹³ D.00-12-053 at p. 12.

¹⁴ D.98-12-075 at p. 17.

requirements for a complex multi-jurisdictional Agreement.¹⁵ The violation was unintentional and no harm was caused to any customers. The Joint Applicants did not benefit from the violation. Finally, the public interest was not harmed. To the contrary, as a provider of non-regulated managed services that assist companies that provide 9-1-1 services to the citizens of California, TCS performs a service that is vital to the public interest for access to E9-1-1, and a penalty in this matter could countermand that interest.

5. The Role of Precedent

The Joint Applicants are not aware of any precedent where the Commission assessed a penalty on a company that solely offers non-regulated services. In most cases involving Public Utility telecommunications carriers, the Commission has imposed penalties of \$5,000 or less for unauthorized transfers of control of a competitive local carrier.¹⁶ In D.10-03-008 which involved the transfer of a competitive telecommunications company that occurred approximately one month after the applicants had filed their Section 854 application, the Commission imposed a penalty, noting that, while serious, the violation “was not a particularly severe offense” and the Applicant’s conduct “was not egregious.”¹⁷ In assessing a fine, the Commission stated: “Applicants’ violation of § 854(a), while serious, did not cause any physical or economic harm to others. Further, the violation of § 854(a) affected few, if any, consumers, and is a single offense.”¹⁸

In D.14-06-004, the Commission assessed a penalty of \$130,000.00 on a Public Utility telecommunications carrier; however, that carrier was found to have willfully and knowingly

¹⁵ As noted above, TCS believes the Staff operated with complete integrity, in good faith, and exercised reasonable judgment when suggesting the abbreviated review process. It is TCS’s position that this should be a mitigating factor when weighing the merits of its mitigation arguments.

¹⁶ See, e.g., D.10-03-008; D.05-08-006; D04-04-017.

¹⁷ D.10-03-008 at p. 10-11.

¹⁸ Id. at p. 9; See also D.03-05-033 (Where the Commission imposed a \$5,000 penalty, where a transfer of control occurred six days after filing an application for Section 854(a) approval for an indirect transfer of control of a competitive local exchange carrier and where the parties did not notify the Commission that such transfer had occurred).

failed to acquire authorization and misrepresented the nature and complexity of the proposed transaction. In part, compared to their CPUC filing, the Applicants provided “substantially more information about the nature and complexity of the transaction when they described it to the FCC.”¹⁹ Further, the Applicants *disclosed their intention* (emphasis added) to violate § 854(a) in a letter of notification to the ALJ.²⁰ The Applicants consummated the transaction even though the ALJ informed the Applicants of the consequences of their impending action.²¹

None of those facts are present here. TCS filed its Application with twelve exhibits that thoroughly presented the entire scope of the Agreement, the management teams, financials and the pre and post corporate organizations. The Company consulted with the Commission Staff, received and followed instructions in good faith, and initially expected to provide the requisite notice via an Advice Letter. Given the scope of the Agreement, the Company proceeded as quickly as it could once it received instructions that the Commission required an Application.

B. TCS does not provide regulated services in California.

Subpart ‘b’ of the Scoping Memo queried whether the Joint Applicants are exempt from a penalty if they do not provide regulated services in California. Although the Joint Applicants are not aware of any rule or case law that dictates how TCS should be classified when it offers only unregulated services in California, TCS does not believe that it should be regulated as a public utility merely to create a nexus for the inadvertent violation, in which case TCS would otherwise be exempt from a penalty. Pursuant to Section 2107 of the California Public Utilities Code:

Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise

¹⁹ D.14-06-004 at p. 7.

²⁰ Id. at p. 11.

²¹ Id. at p. 8.

been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.

TCS is a VoIP Positioning Center (“VPC”) provider that provides managed services that assist interconnected VoIP providers to deliver 911 calls to the appropriate public safety answering point (PSAP).²² Thus, the determinant factor becomes whether a VPC is regulated as a public utility in California.²³

Pursuant to the Staff’s request, on August 1, 2016 representatives of the Joint Applicants and the Commission Staff participated in a conference call (“Conference Call”).²⁴ As the parties discussed during the Conference Call, TCS does not transport voice calls as might be contemplated by California regulations. In fact, if a 911 voice call were made during a period when TCS’s services were unavailable, the 911 voice call would still be completed.²⁵

TCS holds certification as a CLC pursuant to Federal Communications Commission (“FCC”) rules only for the purpose of acquiring pseudo Automatic Number Identifier (“p-ANI”)²⁶ numbering resources necessary to operate as a VPC.²⁷ TCS currently provides the following non-regulated services in California: text to 911 services to California PSAPs; routing

²² See *In the Matter of Numbering Policies for Modern Communications; IP-Enabled Services; Telephone Number Requirements for IP-Enabled Services Providers; Telephone Number Portability; Developing a Unified Intercarrier Compensation Regime; Connect America Fund; Numbering Resource Optimization*, 30 FCC Rcd 6839, 6841 (June 22, 2015) (“p-ANI Order”).

²³ Section 234 of the Public Utilities Code states that a Telephone Corporation “includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.” In turn, Section 233 states that a Telephone Line “includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.

²⁴ Scovill Affidavit at ¶5.

²⁵ *Id.*

²⁶ “A p-ANI is a number, consisting of the same number of digits as an Automatic Number Identification (ANI), that is not a NANP telephone directory number and may be used in place of an ANI to convey special meaning to the selective router, PSAP, and other elements of the 911 system.” See *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, 10252-53, para. 17 (2005) (*VoIP 911 Order*); 47 C.F.R. § 9.3.

²⁷ Until recently, VPCs required certification from state Public Utility Commissions (“PUCs”) in order to obtain p-ANI numbering resources. The FCC recently revised its rules to allow VPCs to directly secure p-ANI codes in those states where VPC providers cannot obtain PUC certification as a VPC. *p-ANI Order*, 30 FCC Rcd at 6881-82.

of wireless and VoIP calls; and 9-1-1 caller location services.²⁸ In California, TCS does not offer any regulated services such as transport, long distance voice toll services, or local exchange voice dial tone services to residential or business customers.²⁹ The CPUC currently does not separately regulate VPCs.

C. The unintentional delay in filing the Application was the result of good faith discussions with the Staff and had a *de minimis* effect on regulatory integrity

The Joint Applicants respectfully submit that the fact that the Company does not offer regulated services in California should – at a minimum – be a mitigating factor concerning any perceived harm to the Commission’s regulatory process. During discussions with the Staff, the regulatory status of Comtech and TCS created confusion regarding the correct filing requirements concerning the Agreement. As is discussed below and in the Affidavit of Thomas H. Rowland, the Staff initially stated that an Advice Letter was the proper vehicle. Later, during case research and follow-up discussions, the Staff indicated that an Application was the necessary vehicle pursuant to CPUC rules.³⁰

D. There are several mitigating facts that warrant no penalty or the smallest requisite penalty consistent with Commission precedent for similar factual situations.

With respect to Subpart ‘c’ of the Scoping Memo, the Commission should consider several relevant factors that mitigate the technical violation that is the subject of this proceeding and warrant a reduced penalty or no penalty.

²⁸ On August 1, 2016 members of TCS and the CPUC Staff participated in a conference call in order to discuss the services provided by TCS in California. See Scovill Affidavit at ¶5.

²⁹ In its Joint Application, TCS stated that it “aggregates and transports emergency local, VoIP, telemetric, PBX, and mobile E9-1-1 traffic”. Joint Application at p. 3. This was a generalization. The Company should have noted that it provides transport service in other states, but it does not do so in California.

³⁰ Rowland Affidavit at ¶5.

1. The Joint Applicants used best efforts to coordinate a proper filing with the Commission.

The Joint Applicants voluntarily came before the Commission to seek counsel on the proper filing method for the Agreement. Upon consultation with the CPUC Staff the Joint Applicants initially developed a good faith, but ultimately incorrect, belief that notice of the Agreement could be achieved by the submission of an advice letter. Once it was determined that an Application was required, the Joint Applicants promptly compiled and submitted a comprehensive Application.³¹

2. TCS has not received any regulated revenue in California.

TCS does not offer regulated services such as transport, long distance voice toll services, or local exchange voice dial tone services to residential or business customers.³² The Commission has previously looked to regulated revenues as a mitigating factor in determining the amount of a penalty.³³ Specifically, the Commission determined that insignificant regulated revenues was a factor suggesting that a “relatively small fine could effectively deter the Applicants from future violations of the California Public Utilities Code.”³⁴ As described in the Affidavit of Mr. Scovill, in California TCS provides non-regulated managed services to interconnected VoIP carriers that assist such companies to deliver 9-1-1 calls to PSAPs.³⁵ TCS has reported \$0.00 gross intrastate revenue in California for each year on its Annual User Fee Statement.³⁶

³¹ Rowland Affidavit at ¶7.

³² In its Joint Application, TCS stated that it “aggregates and transports emergency local, VoIP, telemetric, PBX, and mobile E9-1-1 traffic” in California. Joint Application at p. 3. This was a generalization. The Company should have noted that it provides transport service in other states, but it does not do so in California.

³³ See D.00-12-053 at p. 12. See also, D.04-12-058 at p. 18 (comparing Cingular’s total revenue to its revenue derived from its California customer base).

³⁴ D.00-12-053 at p. 12.

³⁵ Scovill Affidavit at ¶4

³⁶ Scovill Affidavit at ¶9. See also Attachment 1 to the Joint Applicants’ August 10, 2016 Brief.

3. TCS provides non-regulated managed services that are essential to the public interest.

With respect to the imposition of penalties, this Commission has stated that it “will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.”³⁷ The Commission has long been a steadfast supporter of California's 9-1-1 system and been committed to promotion of that 9-1-1 system in the sea of ever changing technological advances to provide critical public safety protection to California's telecommunications consumers.³⁸

As noted above, the Agreement did not adversely impact the public interest in any manner. On the contrary, the Agreement positively impacted the crucial public interest goal by allowing the Joint Applicants to better provide an array of services to allow VoIP providers to provide E9-1-1 to their customers. Pursuant to the Agreement, TCS is able to continue to provide high-quality cellular network computing services that include public safety solutions for 9-1-1 call delivery. Comtech is able to continue to develop the technologies and services currently provided by TCS, which benefit the existing customers that rely on TCS for the array of wireless communications products and services it provides.

III. CONCLUSION

For the foregoing reasons, Joint Applicants respectfully submit that the Commission should find that the delay in acquiring regulatory approval was caused by good faith discussions in a unique circumstance and had a *de minimis* effect on regulatory integrity. The Commission should therefore defer a penalty or impose the smallest requisite penalty consistent with its precedent for similar factual situations.

³⁷ D.98-12-075 at p. 17.

³⁸ D.13-07-019 at p. 6.

Respectfully submitted, this 22nd day of September 2016

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