

Decision \_\_\_\_\_

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

In the Matter of the Joint Application of  
magicJack VocalTec Ltd., Transferor and  
B. Riley Financial, Inc., Transferee, To  
Authorize the Transfer of Control of YMax  
Communications Corp. (U6989C).

Application 17-12-016

**DECISION APPROVING TRANSFER OF CONTROL OF  
YMAX COMMUNICATIONS CORP. (U-6989-C)**

**Summary**

Pursuant to Public Utilities Code Section 854,<sup>1</sup> this decision grants the unopposed joint application of magicJack VocalTec Ltd. (Transferor or MJVT), and B. Riley Financial, Inc. (B.Riley or Transferee, and collectively with MJVT, the Applicants), regarding a merger transaction whereby B. Riley will acquire ultimate control of MJVT and its indirect wholly-owned subsidiary YMax Communications Corp. We also grant the motion of Applicants for authorization to file certain confidential information under seal. We conclude that approval of the proposed transfer of control is in conformance with applicable statutory law and Commission rules, and is in the public interest.

Application 17-12-016 is closed.

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<sup>1</sup> Subsequent statutory references, unless otherwise noted, are to the California Public Utilities Code.

**1. Factual Background****1.1. Entities Involved in the Transaction****magicJack VocalTec Ltd. (MJVT)**

MJVT is a publicly traded company that is incorporated under the laws of Israel. It is headquartered at 12 Haomanut Street, 2<sup>nd</sup> Floor, Poleg Industrial Zone, Netanya, Israel 4250445. MJVT and its subsidiaries are a vertically integrated group of companies that offer Voice-over-Internet-Protocol (VoIP) services and related equipment. MJVT is the inventor of the magicJack device, which plugs into the USB port on a computer or into a power adapter and high speed Internet source, and provides users with calling services for home, business and travel. MJVT also provides magicJack mobile apps, which are applications that allow users to make and receive telephone calls through their smartphones or devices.

**YMAX Communications Corp. (YMAX)**

YMax Communications Corp. (YMax) is a Delaware corporation and is owned by YMax Corp., a wholly-owned direct subsidiary of MJVT. YMax's headquarters are located at 560 Village Blvd., Suite 120, West Palm Beach, Florida 33409. YMax gives owners of the magicJack device the option of getting a phone number for the device to receive calls or porting their existing number. YMax also provides the option to purchase international minutes on a prepaid platform. YMax was authorized to provide limited facilities-based and resold local exchange telecommunications services as a competitive local carrier (CLC) in California in Decision (D.) 06-05-027 and assigned U-6989-C.<sup>2</sup>

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<sup>2</sup> YMax's wholly-owned subsidiaries Broadsmart Global, Inc. (Broadsmart) and magicJack SMG, Inc. (MJSMG) are interconnected VoIP services providers and are registered with the

*Footnote continued on next page*

**B. Riley Financial Inc. (B. Riley)**

B. Riley, is a publicly traded diversified financial services company. A Delaware corporation, B. Riley's headquarters are at 21255 Burbank Boulevard, Suite 400, Woodland Hills, California 91367. The firm has offices throughout the U.S. and employs over 900 people. It operates through several wholly-owned subsidiaries, including B. Riley Principal Investments, LLC, which is a Delaware limited liability company engaging in proprietary investments in other businesses. One such business, United Online, offers Internet access services to consumers under the NetZero and Juno brands, as well as e-mail, Internet security, web hosting services, and other communications-related services.

**1.2. Terms of the Transaction**

On November 9, 2017, MJVT, B. Riley, and B. Riley's wholly-owned indirect subsidiary, B. R. Acquisition Ltd. (Merger sub), entered into an Agreement and Plan of Merger (Agreement). Pursuant to the Agreement, Merger sub will merge with and into MJVT, with MJVT as the surviving corporation. At the time of the transaction, the currently issued and outstanding shares of MJVT will be cancelled and converted into the right of each shareholder to receive a cash payment. As a result of the transaction, MJVT will become a wholly-owned, direct subsidiary of a wholly-owned subsidiary of B. Riley, B. Riley Principal Investments, LLC (BRPI), and YMax will become a wholly-owned, indirect subsidiary of B. Riley through YMax Corp., MJVT, and

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Commission. Broadsmart's Utility Number is 1457 and MJSMG's Utility Number is 1429. The proposed transaction will not impact their operations or registration, and Broadsmart and MJSMG will continue to provide interconnected VoIP service post-closing.

BRPI.<sup>3</sup> YMax will continue to hold its existing Certificate of Public Convenience and Necessity (CPCN) and will continue to provide communications services to its customers without interruption. The completion of the transaction is conditioned on obtaining required federal and state regulatory approvals, among other things. Organization charts illustrating the current and post-closing corporate structure of YMax were provided as Exhibit F to the application and a copy of the Agreement was provided as Exhibit G to the application. The purchase price, which is subject to certain adjustments, is described in Section 2.07 of the Agreement.

**1.3. Financial Statements (Rule 3.6 (e) and (g), Rule 2.3)**

The Commission requires that a company that intends to acquire control of a certificated company must either have at least an equivalent certificate or demonstrate that it meets the same requirements as an applicant seeking a certificate to exercise the type of authority held by the company being acquired. Because YMax has limited facilities-based authority, Transferee (B. Riley) must demonstrate that it possesses, at minimum, access to \$100,000 cash or a cash equivalent, plus sufficient reserves to meet any carrier deposits of YMax. YMax, however, has no carrier deposits for its ongoing operations, and it does not expect to be required to provide any such deposits in the future. Financial information that satisfies the \$100,000 requirement is provided as Exhibit H-1 to

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<sup>3</sup> Immediately upon closing, B. Riley may undertake an internal corporate reorganization pursuant to which YMax Corp. would become a wholly-owned direct subsidiary of BRPI (instead of remaining a wholly-owned direct subsidiary of MJVT). YMax would continue to be a wholly-owned, indirect subsidiary of B. Riley and BRPI through YMax Corp., without any intervening ownerships by MJVT. MJVT would continue as a separate, wholly-owned subsidiary of BRPI. This reorganization is illustrated in Exhibit F to the application.

the application. This is a transfer of control application. Consistent with Rule 3.6(e), applicants have provided an income statement as of the last year MJVT submitted an annual report (attached as Exhibit H-2 to the application) and a balance sheet as of the latest available date (attached as Exhibit H-3 to the application).

#### **1.4 Procedural Background**

The application was jointly filed on December 13, 2017, and duly noticed in the Commission's Daily Calendar on December 28, 2017. A telephonic prehearing conference was held on February 28, 2018. The assigned Commissioner issued a scoping memo on March 9, 2018, in which the matter was submitted. The Commission in Resolution ALJ 176-3411 preliminarily determined that hearings were required. The Assigned Commissioner's Scoping Memo changed this preliminary determination and found that hearings were not needed. This application is uncontested. The instant decision has been prepared based upon the record submitted in this proceeding.

#### **2. Jurisdiction**

Public Utilities Code Section 854 provides broad Commission authority to approve transfers of control which involve public utilities operating within California, as is requested in this proceeding. More specifically, Section 854(a) specifies that "[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from this Commission. The Commission may establish by order or rule the definitions of what constitute merger, acquisition, or control

activities that are subject to this section of the statute.”<sup>4</sup> After the transfer of control is completed, the Commission will retain the same regulatory authority over the Applicants, including YMax, holder of the CPCN, that it currently possesses.

### 3. Standard of Review

Applicants seek approval of the transaction pursuant to Section 854(a) which requires Commission authorization before a public utility company may “merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state...” The purpose of this code section is to enable the Commission, before any transfer of public utility authority is consummated, to review the proposal and to take such action, either to grant, deny or condition the transfer, as the public interest may require.<sup>5</sup> Absent prior Commission approval, Section 854(a) provides that the transaction is “void and of no effect.”

The Commission has broad discretion under Section 854 to approve or reject a proposed transaction. If necessary and appropriate, the Commission may attach conditions to approval of a transaction to protect and promote the public interest.<sup>6</sup> The primary question in a transfer of control proceeding under Section 854(a) is whether the transaction will be “adverse to the public interest.”<sup>7</sup>

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<sup>4</sup> Pub. Util. Code § 854(a).

<sup>5</sup> See San Jose Water Co. (1916) 10 CRC 56.

<sup>6</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*24 (approving with conditions the transfer of control of telephone exchanges from GTE California and GTE West Coast to Citizens Telecommunications Company).

<sup>7</sup> See, Quest Communications Corp., D.00-06-079, 2000 CalPUC LEXIS 645.

Neither Sections 854(b) nor 854(c) is applicable to this transaction. Section 854(b) applies to transactions where one of the utilities has gross annual California revenues exceeding \$500 million. Section 854(c) applies to transactions where any of the parties to the transaction have gross annual California revenues exceeding \$500 million. No party to this transaction exceeds the \$500 million threshold. Thus, Section 854(b) and Section 854(c) are not applicable to this transaction.

When a company that does not possess a CPCN desires to acquire control of a company or companies that do possess a CPCN, the Commission will apply the same requirements to the acquiring company as would be applied to an initial applicant seeking the type of CPCN held by the company being acquired. An applicant who desires to operate as a provider of limited facilities-based and resold local exchange telecommunications services as a competitive local carrier in California must demonstrate that it has access to \$100,000 cash or cash equivalent. As discussed above, Applicant Transferee has shown financial information satisfying the requirement in Exhibit H-1 to the application. In addition, the applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business. In this case, applicants have shown in Exhibit I to the application that YMax will continue to be operated by the same management team it now has, and in addition may benefit from the experienced management team running B. Riley.

#### **4. Request to File Documents Under Seal**

Pursuant to Rule 11.4, Applicants filed a motion dated February 20, 2018, for leave to file supplementary information to Exhibit J, requested by the Administrative Law Judge (ALJ), as confidential materials under seal. Applicants represent that the information is sensitive, concerning nonpublic

investigations of certain matters by the Federal Communications Commission (FCC) and disclosure could interfere with enforcement proceedings. We grant this motion based on 5 U.S.C. Section 552(b)(7)(A) and California Government Code Section 6254(k) (exempting from disclosure “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal ...law”).

## **5. Key Requirements**

### **5.1. CEQA Requirements**

The proposed transfer of control does not constitute a “project” under the California Environmental Quality Act (CEQA), California Public Resources Code, Section 21000, et seq. CEQA applies only to “projects,” defined as any “activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”<sup>8</sup> The CEQA Guidelines provide for an exemption “[w]here it can be seen with certainty that there is no possibility that the proposed activity in question may have a significant effect on the environment.”<sup>9</sup>

We have concluded on numerous occasions that a transaction which simply involves the transfer of equity interests does not require CEQA review because granting such an application would have no adverse impact or effect on the environment. The application at issue here proposes no new construction and thus, there is no possibility that the transaction will have a significant adverse impact on the environment pursuant to 14 California Code of

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<sup>8</sup> See Cal. Pub. Res. Code § 21065.

<sup>9</sup> CEQA Guidelines, § 15061(b)(3).

Regulations Section 15061(b)(3). Thus, the Application, being entirely a paper transaction, is exempt from review under CEQA.<sup>10</sup>

## **5.2. Certificate of Public Convenience and Necessity (CPCN) Requirements**

The next question is whether Applicants have satisfied the applicable requirements relating to certificates of public convenience and necessity. We note YMax is already certificated by the Commission, operating in California and is the subject of this transfer of control application.

D.13-05-035 requires a telephone corporation seeking to transfer control to include with its application a broad certification that neither applicant nor any of its affiliates, officers, directors, partners, agents, or owners (directly or indirectly) of more than 10% of applicant, or anyone acting in a management capacity has, among other items, held a position with a company that filed for bankruptcy, been found liable for misrepresentations to consumers, or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general.

D.13-05-035 provides, however, that if an applicant cannot make this certification, it shall attach relevant documentation. The fact that applicant has prior bankruptcies or has been the subject of a regulatory agency's investigation does not mean that the Commission must deny an application for transfer of control, so long as the Commission is satisfied with applicant's fitness following explanation. For example, a previous bankruptcy is not necessarily grounds for

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<sup>10</sup> See, e.g., Decision Granting Conditional Approval of the Acquisition of PacifiCorp by Mid-American Energy Holdings Co., D.06-02-033, where the Commission observed that a change in ownership without any concomitant changes to operations, new construction or changes in use of assets or facilities would qualify as exempt from CEQA. D.06-02-033.

denying the application, if the Applicants now meet our financial requirements, all obligations have been fully discharged in bankruptcy, and the applicant has adequately explained both the circumstances of the bankruptcy and what steps it has taken to avoid bankruptcies in the future. In the Commission's view, it is far more serious if the applicant fails to disclose instances that are of the nature detailed in D.13-05-035.

Applicants have disclosed on Exhibit J to the application that applicant's officer, Bryant Riley, was involved in two bankruptcies, one as a director of a nonrelated company and one that was a subsidiary of B. Riley.

In response to a request for additional information from the assigned ALJ, counsel for B. Riley explained at the prehearing conference held on February 28, 2018, the circumstances for the 2015 bankruptcy of Great American Group Energy Equipment, LLC, a wholly-owned indirect subsidiary of B. Riley Financial, Inc. First, all obligations were met in the bankruptcy proceeding. With regard to what steps the company will take to avoid bankruptcy in the future, counsel explained that in this specific case, a drop in oil prices was a factor in the bankruptcy. While it is difficult to predict such factors, counsel stated that the company tries to learn from experience and avoid adverse future impacts. Finally, counsel pointed out that in 2015, Great American Group Energy Equipment represented only about 5% of the assets of B. Riley.<sup>11</sup>

With regard to the bankruptcy of Country Coach, LLC, of Oregon, counsel explained Mr. Riley's role as a director of the company, in which Mr. Riley attempted to assist the original founder of the company in taking back the

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<sup>11</sup> TR: 7-8.

company from the purchaser in an attempt to turn it around and make it profitable. This occurred in the 2006-07 timeframe, followed by the national recession of 2008. Country Coach was in the business of selling high-end mobile homes and this type of product was among those most seriously affected by the recession. Counsel explained that it became clear that it would not be possible to make the business profitable and so the Chapter 11 bankruptcy proceeding was switched to Chapter 7, wherein all obligations of Country Coach were discharged.<sup>12</sup>

First, Country Coach was not a subsidiary of B. Riley (Transferee) and its bankruptcy occurred almost ten years ago. Further, counsel's explanation of Mr. Riley's role shows his willingness to try to help turn a troubled company around, which may have succeeded if not for the economic downturn of 2008. Counsel further explained, however, that B. Riley is not in the business of buying and turning around distressed companies as some financial firms are.

The Commission is satisfied that these two instances of bankruptcies involving Mr. Riley are both unusual and unlikely to be repeated in the future for either Mr. Riley or for B. Riley as the Transferee, absent the type of industry downturns or recessions that were factors in these two bankruptcies and that are difficult or impossible to predict.

As to the three Letters of Inquiry from the FCC involving MJVT and YMax noted on Exhibit J, the Commission has reviewed the supplemental confidential information provided by applicant on February 20, 2018. We first note that we have confirmed that the first two Letters of Inquiry were closed following FCC

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<sup>12</sup> TR: 8-9.

staff level investigations. We have confirmed that issues raised by the third Letter of Inquiry, which was opened in 2015, are similar to those raised in the two closed Letters of Inquiry. Further, the Commission is satisfied that the FCC staff inquiries do not raise issues as to YMax's fitness to provide the services it is certificated to provide in California but go to whether MJVT and YMax are in compliance with the FCC's technical requirements. Finally, without formal action by the FCC resulting in monetary forfeiture, we do not have the basis to find the lack of fitness identified in D.13-05-035.

Because YMax will continue to offer services to its customers after consummation of the transaction, and there will be no customer transfers, no notice of transfer is required.

## **6. Approval of the Transaction**

Based on the record, we conclude that the proposed transaction should be approved consistent with the terms and conditions of the Agreement. The relevant issue is whether the transfer of control of YMax is not adverse to the public interest. Since the number of customers will not increase due to this transfer of control, it does not pose any of the competitive risks that have been raised when considering mergers among larger service providers. Consumers will face no disruption and will receive the same services as before the transaction.

Further, as discussed above, Transferee B. Riley is managed by an experienced management team whose qualifications are described in Exhibit I to the application. Further, following the closing, YMax will continue to be operated by the same experienced personnel responsible for its current operations.

For the reasons discussed above, we find that approval of the proposed transaction is not adverse to the public interest.

#### **7. Categorization and Need for Hearings**

In Resolution ALJ 176-3411, dated January 11, 2018, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were necessary. Based on the record, we affirm that this is a ratesetting proceeding and affirm the scoping memo's conclusion that hearings are not necessary.

#### **8. Waiver of Comment Period**

This is an uncontested matter in which the decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is waived pursuant to § 311(g)(2).

#### **9. Assignment of Proceeding**

Carla J. Peterman is the assigned Commissioner and Mary McKenzie is the assigned ALJ. The designated presiding officer is Mary McKenzie.

#### **Findings of Fact**

1. MJVT is a publicly traded company that is incorporated under the laws of Israel. It is headquartered at 12 Haomanut Street, 2<sup>nd</sup> Floor, Poleg Industrial Zone, Netanya, Israel 4250445. MJVT and its subsidiaries are a vertically integrated group of companies that offer VoIP services and related equipment.

2. YMax is a Delaware corporation and wholly-owned indirect subsidiary of MJVT. YMax's headquarters are located at 560 Village Blvd., Suite 120, West Palm Beach, Florida 33409. YMax gives owners of the magicJack device the option of getting a phone number for the device to receive calls or porting their existing number. YMax also provides the option to purchase international

minutes on a prepaid platform. YMax was authorized to provide limited facilities-based and resold local exchange telecommunications services as a CLC in California in D.06-05-027 and assigned U-6989-C.

3. B. Riley, is a publicly traded diversified financial services company. A Delaware corporation, B. Riley's headquarters are at 21255 Burbank Boulevard, Suite 400, Woodland Hills, California 91367.

4. Under the terms of the proposed transfer of control, B. Riley will acquire indirect control of YMax. The transaction, however, will not cause any change in the direct ownership or legal structure of YMax, nor will it affect the daily management or operations of YMax.

5. Because the proposed transfer of control will be effected by a merger whereby YMax will end up as a subsidiary of B. Riley, (a) retail customers will experience no changes in day-to-day operations of the regulated entity that operate in California; (b) the transaction will be transparent to customers of YMax; and (c) the Commission will retain the same regulatory authority over YMax as existed prior to the transaction.

6. The acquiring company, B. Riley, has sufficient managerial and technical expertise and sufficient financial resources to operate the acquired carrier.

7. The application at issue here proposes no new construction and thus, pursuant to CEQA, there is no possibility that the transaction will have a significant adverse impact on the environment.

8. The combined revenues of Joint Applicants in this proceeding are less than the \$500 million threshold that applies for purposes of Section 854(b) or (c).

9. Because YMax will continue to offer services to its customers after consummation of the transaction, and there will be no customer transfers, no notice of transfer is required.

10. Exhibit J to the application lists FCC Letters of Inquiry to MJVT and YMax and two bankruptcies involving Bryant Riley, Chief Executive Officer of B. Riley.

11. The Letters of Inquiry are informal FCC staff investigations that are nonpublic and did not result in a monetary forfeiture, which is the criterion for finding lack of fitness outlined in D.13-05-035.

12. The obligations of the two bankrupt companies listed on Exhibit J were fully discharged in bankruptcy.

13. Both bankruptcies can be explained by downturns in the economy and do not indicate management failures or a company built on buying distressed companies and attempting to turn them around for a profit.

14. The bankruptcies were unusual and that it is unlikely B. Riley will experience future bankruptcies, except in the hard-to-predict cases of another widespread recession or particular sector downturn.

15. Applicant Transferee meets the Commission's financial requirements.

### **Conclusions of Law**

1. Under Public Utilities Code Section 854, any Commission approval of a transfer of control of a regulated utility must ensure that the transfer is not adverse to the public interest and is not adverse to the interests of customers interested in receiving service.

2. The Commission will apply the same requirements to a request for approval of an agreement for the transfer of control of a provider of telecommunications services within California as it does to an initial applicant for authority to provide such services.

3. Applicants have met the Commission's requirements for approval of a transfer of control applicable to this proposed transaction.

4. The proposed transaction as set forth in the application is not adverse to the public interest.

5. Applicants' motion received by the Commission on February 20, 2018 to file the supplemental information designated as confidential materials to Exhibit J of the Joint Application under seal should be granted for five years.

6. This decision should be effective on the date it is signed.

**O R D E R**

**IT IS ORDERED** that:

1. Application 17-12-016, jointly filed pursuant to Section 854(a) by magicJack Vocal Tec Ltd., its wholly-owned subsidiary YMax Communications Corp. (YMax), and B. Riley Financial Inc., is hereby approved for authority for the indirect transfer of control of YMax, a certificated limited facilities-based and resold telecommunications service provider, to B. Riley Financial Inc., via the merger transaction outlined in the application.

2. The motion of Joint Applicants, received by the Commission on February 20, 2018, to file under seal the supplemental materials designated as confidential materials to Exhibit J of the Joint Application is granted.

3. Applicants' motion to file under seal its supplemental information is granted for a period of five years after the date of this decision. During this five-year period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Applicants believe that it is necessary for this information to remain under seal for longer than five years, Applicants may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

4. Application 17-12-016 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.