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**PROPOSED DECISION**

Agenda ID# 16614 (Rev. 1)  
Ratesetting

Decision PROPOSED DECISION OF ALJ KLINE (Mailed 6/20/2018)

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

In the Matter of the Application of  
Bandwidth.com CLEC, LLC (U7038C) for  
Approval to Transfer Control of  
Bandwidth.com CLEC, LLC to David A.  
Morken Pursuant to California Public  
Utilities Code Section 854(a).

Application 17-09-007

**DECISION DENYING TRANSFER OF CONTROL  
OF BANDWIDTH.COM CLEC, LLC TO DAVID A. MORKEN**

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**DECISION DENYING TRANSFER OF CONTROL  
OF BANDWIDTH.COM CLEC, LLC TO DAVID A. MORKEN**

**Summary**

This decision denies Bandwidth.com CLEC, LLC's (Bandwidth CLEC) request for transfer of control of Bandwidth CLEC to David A. Morken. The Commission revokes Bandwidth CLEC's Certificate of Public Convenience and Necessity (CPCN) (U7038C) for failure to operate within one year of the issuance of its CPCN pursuant to Decision 07-09-035. Bandwidth CLEC and Bandwidth Incorporated (formerly known as Bandwidth.com Incorporated) (Bandwidth) are jointly fined \$5,000 for failure to transfer control of Bandwidth CLEC to Bandwidth pursuant to Public Utilities Code Section 854(a). If Bandwidth applies for a CPCN to operate as a public utility providing telecommunications services in the State of California within ninety days of the date of this Decision, Bandwidth CLEC's CPCN (U-7038-C) will remain effective through the duration of Bandwidth's application. This proceeding is closed.

**1. Factual Background**

Bandwidth.com CLEC, LLC (Bandwidth CLEC) (U7038C) is a Delaware Limited Liability Company authorized to do business in California, and headquartered at 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606. On September 20, 2007, the Commission issued Decision (D.) 07-09-035, granting approval for Bandwidth CLEC to provide limited facilities-based and resold competitive local exchange and interexchange services.

Bandwidth Incorporated (Inc.) formerly known as (f/k/a) Bandwidth.com Inc.<sup>1</sup> (Bandwidth) is a corporation organized under the laws of Delaware, and headquartered at 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606. On May 20, 2015, the Commission's Communication Division granted Bandwidth a registration to provide Digital Voice Service (otherwise known as Voice over Internet Protocol (VoIP)) in California (U-1362-C). Bandwidth withdrew its registration as reseller of wireless services by advice letter, effective October 16, 2017.<sup>2</sup> Bandwidth CLEC is solely owned and managed by Bandwidth.

David A. Morken, an individual, is the co-founder, chief executive officer and chairman of Bandwidth. His business address is 900 Main Campus Drive, Suite 500, Raleigh, North Carolina 27606.

On August 16, 2017, Bandwidth filed a registration statement on Form S-1 with the Securities and Exchange Commission for the initial public offering (IPO) of Bandwidth, which will restructure Bandwidth's stock and thereby grant David A. Morken a majority of the voting power of the outstanding Bandwidth stock, through dilution of the voting power of shares and equity interests beneficially held by some current owners of Bandwidth.<sup>3</sup> Upon the completion of the IPO, David A. Morken will have a controlling share in Bandwidth, Bandwidth CLEC's

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<sup>1</sup> On September 15, 2017, Bandwidth.com Incorporated changed its legal name to Bandwidth, Incorporated. (Response to Administrative Law Judge (ALJ) Inquiry at 1.)

<sup>2</sup> Response to Administrative Law Judge Ruling (Apr. 19, 2018) at 5 fn. 17.

<sup>3</sup> Response to Administrative Law Judge Inquiry at 2-3.

parent company, and as a result, David A. Morken will have indirect control of Bandwidth CLEC, as shown on the figures in Appendix A.<sup>4</sup>

## **2. Procedural Background**

Bandwidth CLEC filed Application (A.) 17-09-007 on September 13, 2017, requesting authorization to transfer control of Bandwidth CLEC to David A. Morken pursuant to Public Utilities (Pub. Util.) Code § 854(a). No parties protested or responded to the Application. On October 16, 2017, the assigned Administrative Law Judge (ALJ) issued a ruling requiring joinder of David A. Morken, the individual, pursuant to Rule 3.6 of the Commission's Rules of Practice and Procedure, and requiring Bandwidth CLEC to submit additional information on Bandwidth CLEC's management structure (October Ruling). On October 23, 2017, David A. Morken filed a motion for party status. The assigned ALJ granted the motion by email ruling on October 23, 2017.

On October 30, 2017, the assigned ALJ held a telephonic prehearing conference (PHC) to determine parties; and to discuss the scope, the schedule and other procedural matters. Bandwidth CLEC and David A. Morken appeared at the PHC. On November 1, 2017, Bandwidth CLEC and David A. Morken submitted additional information in response to the October Ruling. In statements at the PHC and in its response to the ALJ Request for Additional Information, Bandwidth CLEC indicated that it has no officers or directors and operated through Bandwidth's management.<sup>5</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> Prehearing Conference RT 4:17-20.

The assigned Commissioner issued a scoping memo and ruling (scoping memo) on November 17, 2017. The scoping memo determined the following issues to be within the scope of this proceeding:

1. Does the Application meet all Commission requirements such that the Commission should grant authorization to transfer control of Bandwidth CLEC from Bandwidth CLEC to Bandwidth, including compliance with Pub. Util. Code § 854 and Rule 3.6?
2. Does the Application meet all Commission requirements such that the Commission should grant authorization to transfer control of Bandwidth CLEC from Bandwidth to David A. Morken, including compliance with Pub. Util. Code § 854 and Rule 3.6?

The first issue posed by the scoping memo reflected the direct transfer of managerial authority of Bandwidth CLEC to Bandwidth (as indicated by Bandwidth CLEC's statement that Bandwidth CLEC had no officers and directors, and was solely managed by Bandwidth's officers and directors). The second issue reflected the indirect transfer of managerial control of Bandwidth to David A. Morken as proposed in the Application.

On January 12, 2018, the assigned ALJ issued the *ALJ's Ruling Requiring Joinder of Bandwidth Within 15 Days*. On January 16, 2018, Bandwidth filed a motion for party status. On January 16, 2018, the assigned ALJ granted Bandwidth's motion for party status by email ruling.<sup>6</sup>

On January 31, 2018, the assigned ALJ issued an Order to Show Cause directing applicants to explain why the Commission should not find 1) a rule 1 violation for Bandwidth CLEC's misrepresentation of its managerial

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<sup>6</sup> Parties to this proceeding include Bandwidth CLEC, Bandwidth and David A. Morken; hereinafter Joint Parties.

qualifications in A.07-03-020 where Bandwidth CLEC represented Bandwidth's management as its own and 2) Bandwidth's operation without a license for failure to request a transfer of control pursuant to Pub. Util. Code § 854(a).<sup>7</sup> The Order to Show Cause also required the Joint Applicants to amend their Application within 60 days to reflect the two transfers of authority set as issues in the scoping memo.<sup>8</sup> On February 27, 2018, the Joint Parties filed their *Response to the Order to Show Cause*, in which the Joint Parties objected to amending the application. In the *Response to the Order to Show Cause*, the Joint Parties provided evidence showing that Bandwidth also had operational control of Bandwidth CLEC from the company's inception, indicating that Bandwidth CLEC also failed to meet its obligation to operate within a year of the issuance of its Certificate of Public Convenience and Necessity (CPCN) pursuant to D.07-09-035.

On March 14, 2018, the assigned ALJ set a status conference for March 30, 2018 and suspended the Joint Parties' requirement to submit an amended Application by ruling.<sup>9</sup> On March 30, 2018, the Joint Parties and the assigned ALJ discussed options for the Joint Parties in the proceeding given that Bandwidth CLEC never operated or managed the telecommunications services provided pursuant to its CPCN. The options provided to the Joint Parties in order to allow Bandwidth to operate and manage the telecommunications services which had been provided under Bandwidth CLEC's CPCN included 1) revoking Bandwidth CLEC's CPCN and allowing the Joint Parties leave to

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<sup>7</sup> ALJ's Order to Show Cause and Ruling Requiring the Joint Applicants to Amend the Application.

<sup>8</sup> *Id.*

<sup>9</sup> ALJ's Ruling Setting Status Conference and Suspending Deadline to Amend Application at 2-3.

amend the Application to allow Bandwidth to apply for a CPCN within this proceeding and 2) revoking Bandwidth CLEC's CPCN in this proceeding and allowing Bandwidth to submit an application for a CPCN in a separate application. The Joint Parties offered to install officers and directors in Bandwidth CLEC as a third option in the proceeding.<sup>10</sup> The assigned ALJ considered the option and stated that a revised ruling would be issued which would provide more guidance on moving the proceeding forward if Bandwidth CLEC installed officers and directors.<sup>11</sup>

On April 13, 2018, the assigned ALJ issued the *ALJ Ruling* requiring Bandwidth to cease providing telecommunications services, in addition to installing officers and directors at Bandwidth CLEC, in order to cure CPCN violations under the third option proposed by both parties.<sup>12</sup> On April 19, 2018, the Joint Parties filed a response to the *ALJ Ruling*, wherein the Joint Parties stated they had installed officers and a director in Bandwidth CLEC, denied the operation of telecommunications services by Bandwidth, requested the Commission approve the proposed transfer of control in the Application by Commission decision at the May 31, 2018 Commission meeting, and requested review of any potential violations of the Commission's rules or orders in a second phase of the proceeding.<sup>13</sup> On June 4, 2018, the parties jointly requested the assigned ALJ schedule a status conference by motion.

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<sup>10</sup> Status Conference RT 21:8-17.

<sup>11</sup> Status Conference RT 21:19-24.

<sup>12</sup> ALJ Ruling.

<sup>13</sup> Response to ALJ Ruling.



### **3. Jurisdiction**

Pub. Util. Code § 216(a) defines the term “public utility” to include a “telephone corporation,” which in turn is defined in Pub. Util. Code § 234(a) as “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within the state.” Bandwidth CLEC is a telephone corporation and a public utility subject to our jurisdiction.

Pub. Util. Code § 854 (a) provides that a “No ... corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.” Bandwidth is the sole owner and manager of Bandwidth CLEC. Therefore, the Commission has jurisdiction over Bandwidth for actions taken in violation of Pub. Util. Code § 854(a) as a corporation holding a controlling interest in Bandwidth CLEC. The Commission has no jurisdiction over Bandwidth as a public utility or as a provider of VoIP services.

### **4. Discussion**

Pub. Util. Code § 854(a) requires the Commission’s approval prior to the transfer of control of a public utility subject to its jurisdiction. Section 854(a) provides:

No 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 the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section. Any merger, acquisition, or control without that prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.

The Commission evaluates whether a transaction that results in a transfer of control requires prior approval under Pub. Util. Code § 854 on a case-by-case basis, based on the relevant facts and circumstances.<sup>14</sup> In past decisions, the Commission considered factors such as:

1. whether the acquiring entity's equity interest in the utility or its parent will be greater than 50%;<sup>15</sup>
2. whether the acquiring entity has the power to appoint a majority of the members of the board of directors or to direct management of the utility or its parent entity;<sup>16</sup> and
3. whether the acquiring entity has actual or working control of the day-to-day business of the utility.<sup>17</sup>

Past Commission decisions do not establish a "bright line" test for determining when a transfer of control subject to our review under Pub. Util. Code § 854 occurred.<sup>18</sup> The Commission has not promulgated regulations to define "control" in terms of clearly identifiable characteristics applicable to all cases.<sup>19</sup> Instead, the Commission has relied on a fact-specific, case-by-case analysis.<sup>20</sup> While some Commission decisions refer to a transfer of "actual or working control" as the threshold for Commission review pursuant to Pub. Util.

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<sup>14</sup> D.08-12-021 *citing* D.07-10-001.

<sup>15</sup> D.08-12-021, *citing* D.86-02-059 (*In Re Pacific Telesis Group*), D.86-12-090 (BellSouth Corp. and Mobile Communications Corp.), D.98-12-056 (MM Holdings Corp.), and 0.96-02-061 (San Francisco Thermal.)

<sup>16</sup> D.08-12-021, *citing* D.93-11-063 (*In Re Paging Network of San Francisco*), 0.96-02-061 (San Francisco Thermal).

<sup>17</sup> D.08-12-021, *citing* 0.94-01-025 (*In Re San Jose Water Company*), D.90363 (*WUI Inc. v. Continental Tel. Corp.*)

<sup>18</sup> D.08-12-021, *citing* D.03-06-099.

<sup>19</sup> *Ibid.*

<sup>20</sup> D.08-12-021, *citing* D.07-05-061.

Code § 854,<sup>21</sup> other decisions focus on whether the acquiring entity, directly or indirectly, will possess the power to direct or cause the direction of the management and policies of the utility, or has the ability to exercise this control.<sup>22</sup>

In order to assess the request for transfer of control from Bandwidth CLEC to David A. Morken upon the planned restructuring of stock due to Bandwidth's IPO, the Commission must understand any changes to Bandwidth CLEC's direct control of day-to-day operations as well as changes to its indirect management control. Bandwidth CLEC's day-to-day operations are as follows:

Bandwidth.com CLEC, LLC has entered into interconnection agreements (ICAs) with incumbent local exchange carriers (ILECS) that are approved by the State public utilities commissions in all continental states. Bandwidth.com, CLEC also obtains telephone numbering resources from the North American Numbering Authority based on its CLEC status and the ability to enable traffic exchange in rate centers in the [Public Switched Telephone Network] in accordance with its ICAs. Bandwidth Inc. acts as a customer of Bandwidth.com CLEC, LLC's local exchange telecommunications services to support Bandwidth Inc.'s suite of services that utilize NANP telephone number for the exchange of VoIP Traffic on Bandwidth's all [Internet Protocol (IP)]-enabled interstate network on behalf of Bandwidth's customers and their customers.<sup>23</sup>

Bandwidth has direct operational control of Bandwidth CLEC, as explained below:

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<sup>21</sup> D.08-12-021, *citing* D.90363 (*WUI, Inc. v. Continental Tel. Corp (1979)*), 1294-01-025 (*San Jose Water Company and SJW Corp.*).

<sup>22</sup> D.08-12-021, *citing* D.07-05-061 at fn. 28.

<sup>23</sup> Response to Order to Show Cause, Exhibit 1 at 2.

My name is Scott Mullen. I am currently employed by Bandwidth Inc. (Bandwidth) as its Chief Technology officer (CTO). I have been employed at Bandwidth since 2007 in various positions related to Bandwidth's network design and management. As the CTO and in prior positions before becoming CTO I have responsibility for the overall design, performance and stability of Bandwidth's networks and service offerings. Among other responsibilities, as CTO *I lead a team of engineers that build and operate Bandwidth.com CLEC LLC's nationwide CLEC network* as well as the all-IP VOIP infrastructure of Bandwidth, Inc., which serves thousands of IP-enabled customers all over the country.<sup>24</sup>

The proposed transfer from Bandwidth CLEC to David A. Morken would not change the direct operational control of Bandwidth CLEC by Bandwidth.

Bandwidth also has managerial control of Bandwidth CLEC, which had no officers or directors of its own from 2007-2018,<sup>25</sup> when Bandwidth was the sole owner and manager of Bandwidth. The proposed transfer of control in the Application would grant David A. Morken a controlling share of Bandwidth, and indirectly of Bandwidth CLEC as its subsidiary.

#### **4.1. Options for the Transfer of Control from Bandwidth CLEC to David A. Morken**

The operational and managerial control of Bandwidth CLEC by a legally distinct entity, Bandwidth, is a transfer of control under Pub. Util. Code § 854(a). Since Bandwidth CLEC never applied for a transfer of control under Pub. Util. Code § 854(a), the Commission would ordinarily view the transfer as unauthorized, subject to penalty for operation without a license during the

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<sup>24</sup> Response to Order to Show Cause, Exhibit 1 at 1 (emphasis added).

<sup>25</sup> Response to ALJ Ruling at 1.

period of noncompliance, but prospectively curable.<sup>26</sup> Thereby, the transfer of control from Bandwidth CLEC to David A. Morken, would necessitate two transfers of authority; 1) The first transfer of control would transfer Bandwidth CLEC to Bandwidth based on the transfer of direct operational control as well as direct management control of Bandwidth CLEC; 2) the second transfer of control would transfer indirect managerial control of Bandwidth CLEC from Bandwidth to David A. Morken as a result of the transfer of stock due to the impending IPO.<sup>27</sup>

There is substantial precedent for approving unauthorized transfers of authority on a prospective basis;<sup>28</sup> however, the instant Application is novel as Bandwidth CLEC never operated or managed Bandwidth CLEC, which it was required to do within one year of the issuance of the Commission's CPCN.

D.07-09-035 Ordering Paragraph (OP) 4 created an affirmative obligation for Bandwidth CLEC to render service under the CPCN, as stated below:

The certificate granted, and the authority to render service under the rates, charges and rules authorized, will expire if not exercised within 12 months after the effective date of this order.

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<sup>26</sup> See, e.g., D.05-08-005.

<sup>27</sup> Initially, the assigned ALJ offered to cure Bandwidth CLEC's failure to transfer direct managerial control of Bandwidth CLEC to Bandwidth and subsequently to David A. Morken through two transfers, as reflected in the scoping memo and the Order to Show Cause. Only upon more information obtained from the Response to the Order to Show Cause did it become evident that the two transfers were not available as a cure in this proceeding.

<sup>28</sup> See, e.g., D.15-05-007, D.15-05-002, D.14-06-004, D.10-03-008, D.09-06-024, D.05-08-006, D.05-06-012, D.05-08-006, and D.04-09-023.

The Commission's grant of a CPCN imposed obligations for compliance on Bandwidth CLEC,<sup>29</sup> not Bandwidth, under D.07-09-035, OP 1:

A CPCN is granted to Bandwidth.com CLEC, LLC (Applicant) to operate as a limited-facilities based and resale provider of competitive local exchange services, and interexchange services, subject to the terms and conditions set below.

Accordingly, Bandwidth's CLEC's CPCN is void as of a year from the date of authorization for failure to satisfy D.07-09-35 OP 4. Therefore, Bandwidth CLEC cannot transfer its authority to operate under the CPCN to either Bandwidth or David A. Morken.

Through issuance of an order to show cause, the Joint Applicants were notified that Bandwidth may be operating without a license,<sup>30</sup> and were provided an opportunity to respond to the order to show cause.<sup>31</sup> In addition, during a status conference on March 30, 2018 and by a subsequent ALJ ruling,<sup>32</sup> Joint Applicants were offered three options for restoring the Joint Applicants' ability to provide telecommunications services under a CPCN, consisting of the following:

1. The Commission could revoke Bandwidth CLEC's CPCN and allow the Applicants leave to amend the Application so Bandwidth could apply for a CPCN.

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<sup>29</sup> D.07-09-035, Order Paragraph 1 ("A certificate of public convenience and necessity is granted to Bandwidth.com CLEC, LLC (Applicant) to operate as a limited-facilities based and resale provider of competitive local exchange services, and interexchange services, subject to the terms and conditions set below.")

<sup>30</sup> ALJ's Order to Show Cause and Ruling Requiring the Joint Applicants to Amend the Application at 4.

<sup>31</sup> Response to Order to Show Cause.

<sup>32</sup> ALJ Ruling at 2-3.

2. The Commission could revoke Bandwidth CLEC's CPCN and the Applicants could file a new Application for Bandwidth to request authority to provide telecommunications services under a CPCN.
3. Bandwidth CLEC could install officers and directors, and begin operating under its CPCN; Bandwidth would have to cease operating Bandwidth CLEC as well as providing telecommunications services under Bandwidth CLEC's CPCN.

With all three options, the cure would be prospective, and the Commission would assess the appropriate penalties for prior noncompliance.

In response to the three options, the Applicants installed officers and a director, but objected to ceasing operations of Bandwidth. Throughout the proceeding, Bandwidth consistently opposed the suggestion that Bandwidth is providing telecommunications services,<sup>33</sup> and consistently opposed Commission jurisdiction for Bandwidth's operations,<sup>34</sup> while providing no evidence of either operational or managerial control of Bandwidth CLEC by any Bandwidth CLEC employees or officers.

Bandwidth's management and control of Bandwidth CLEC falls squarely within the definition of a "telephone corporation," defined in Pub. Util. Code § 234 as "includ[ing] every corporation or person owning, controlling, operating,

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<sup>33</sup> Response to ALJ Ruling at 5, ("[] Bandwidth reiterates that it does not and has not provided intrastate wireline telecommunications services in the state of California without a CPCN. Nor does Bandwidth Inc. 'operate [] [Bandwidth CLEC's] telecommunications services.' Therefore, Bandwidth Inc. need take no action to 'cease' providing intrastate wireline telecommunications services in the state of California.")

<sup>34</sup> Response to ALJ Ruling at 5, ("As stated in the OSC Response, Bandwidth CLEC and Bandwidth Inc. are separate and distinguishable legal entities that offer different services . . . Bandwidth Inc. provides interconnected VoIP and other information services in California as a registered VoIP provider (U-1362) and does not provide intrastate wireline telecommunications services.")

or managing any telephone line for compensation within this state.” Since Bandwidth expressed a continued desire to avoid direct Commission jurisdiction throughout the course of this proceeding, it is impossible for the Commission to satisfy itself that it would have sufficient ability to control Bandwidth’s behavior through the Commission’s ability to levy fines or otherwise require compliance with our rules. Therefore, the Commission cannot satisfy itself that Applicants meet the requirements of the third option, which would allow Bandwidth CLEC to operate on a prospective basis. This is consistent with Commission precedent wherein the management team’s prior deference to Commission jurisdiction was a consideration of CPCN application review.<sup>35</sup>

The Joint Applicants declined to amend the application when asked to do so in the *ALJ Ruling*. Therefore, the Commission is unable to consider a grant of authority to Bandwidth under the first option.

Consequently, the Commission revokes Bandwidth CLEC’s CPCN as void for failure to operate within one year of its CPCN. As discussed with the Joint Applicants under the second option during the March 30, 2018 status conference and subsequent *ALJ Ruling*, Bandwidth may apply for a CPCN to provide telecommunications services in California by a future Application.

If Bandwidth applies for a CPCN within 90 days of the date of this decision, the CPCN granted to Bandwidth CLEC in Decision 07-09-035 will remain in effect during the pendency of Bandwidth’s application. In this case, a separate application for a transfer of control is not required.

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<sup>35</sup> See D.04-05-033 (Denying the CPCN application for management team’s prior failure to pay a fine imposed by the Pennsylvania Public Utilities Commission).



#### **4.2. Lack of Candor in Application 07-03-020**

To be granted authority to provide local exchange and interexchange services, an *applicant* must make a reasonable showing of managerial and technical expertise in telecommunications or a related business.<sup>36</sup> The requirements are “explicitly” for the applicant and the applicant has a duty of candor pursuant to Rule 1.1 to explain the managerial expertise of the Applicant. In this case, the managerial expertise of Bandwidth CLEC was none, as there were no officers or directors of Bandwidth CLEC.

However, review of the Application shows that Bandwidth CLEC was not candid with regard to the officers and directors in its Application, which listed Bandwidth’s officers and directors as Bandwidth CLEC’s.

Application (A.07-03-020), stated:

Applicant’s management team possesses extensive managerial, financial, and technical experience in the telecommunications industry. The senior officers and management directors responsible for Applicant’s California operations are:

Officers: []

Directors: []

All Officers and Directors may be contacted at the Applicant’s offices at:[]

Resumes of [Bandwidth CLEC]’s<sup>37</sup> key personnel are attached as Exhibit 4.<sup>38</sup>

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<sup>36</sup> D.95-12-056 at Appendix C, Rule 4.A.

<sup>37</sup> A.07-03-020 at 1. (Bandwidth CLEC LLC identified itself as “Bandwidth” in the Application.)

<sup>38</sup> A.07-03-020 at 7-8.

The Commission relied on Bandwidth CLEC's representations to authorize the CPCN. Under Technical Qualifications, D.07-09-035 states that "Applicant submitted biographical information on its officers that demonstrates that it possesses sufficient experience and knowledge to operate as a telecommunications provider."<sup>39</sup>

In response, the Joint Applicants state that their representation of Bandwidth's officers and directors as those of Bandwidth CLEC is a commonly accepted practice, that Bandwidth's corporate structure is a generally accepted form for CPCN holders,<sup>40</sup> and that corporate officers and directors are not required for CPCN holders.<sup>41</sup>

Corporate officers, however, are required to fulfill Bandwidth CLEC's obligations under the grant of a CPCN in D.07-09-035. For example, all annual affiliate transaction reports must be signed by a corporate officer of the utility under penalty of perjury.<sup>42</sup> The Commission's requirements under D.07-09-035, and other orders approving individual CPCNs, are consistent with D.95-12-056, wherein the Commission required applicants to "possesses the requisite managerial qualification, financial resources, and technical competence to provide local exchange telecommunications services." The Commission reaffirmed the requirement for CPCN holders to have officers by requiring

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<sup>39</sup> D.07-09-035 at 3.

<sup>40</sup> Status Conference, RT 15:10-17:19.

<sup>41</sup> Response to ALJ Ruling at 3-4.

<sup>42</sup> D.07-09-035, Appendix D at 2.

applicants, and not to their subsidiaries or parent corporations, to provide resumes of its key management and technical personnel in D.13-05-035.<sup>43</sup>

The corporate structure and identity of management are material considerations when granting a CPCN or an authorization for transfer of control. This Decision highlights the need and duty of Applicants for candor in all dealings before the Commission pursuant to Rule 1.1. The regulatory compact necessitates full and complete disclosure to this Commission so that it may render both informed and uniform decisions.<sup>44</sup>

## **5. Imposition of Fine Pursuant to Section 2107**

Under Pub. Util. Code § 2107,

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 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.

Bandwidth failed to be forthcoming with regard to its management structure in A.07-03-020, and operated and managed Bandwidth CLEC's operations without the transfer of control required under Pub. Util. Code

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<sup>43</sup> The *applicant* seeking authority to provide local exchange must demonstrate that it has the technical and managerial qualifications necessary to provide the proposed services in its service territory. The applicant should provide the following information, but not limited to: the *applicant's* key management and technical personnel, resumes and biographies of the key management and technical person that reflects that the applicant possess significant technical and managerial expertise for operating a telecommunications company, consistent with Commission Requirements. D.13-05-035, Attachment A at 7 (emphasis added).

<sup>44</sup> D.93-03-073, 48 CPUC2d 543 (Admonishment in response to party's "oblique and ambiguously worded" reference).

§ 854(a). Therefore, it is appropriate to impose a fine pursuant to Pub. Util. Code § 2107. D.98-12-075 sets forth the criteria to be considered when imposing a fine upon a utility, including 1) the severity of the offense, 2) the conduct of the utility, 3) totality of the circumstances, 4) financial resources of the utility and 5) the role precedent.<sup>45</sup>

### **5.1. Severity of the Offense**

The size of the fine should be proportionate to the severity of the offense, based on the level of physical harm, economic harm, harm to the regulatory process, and the number and scope of violations.<sup>46</sup> It is also appropriate to consider the size of the utility and experience before the Commission.

Bandwidth CLEC's violations did not result in physical or economic harm to its customers, or customers generally. However, compliance is absolutely necessary for the proper functioning of the regulatory process. The Commission imposes a fine here to express disapproval of Bandwidth CLEC's failure to candidly disclose the management of Bandwidth CLEC and for failure to request a transfer of control, pursuant to Pub. Util. Code § 854(a), when transferring operational and managerial control of Bandwidth CLEC to Bandwidth.

### **5.2. Conduct of the Utility**

When contemplating a fine, the Commission will consider the conduct of the utility; i.e. the Commission will consider the utility's actions to prevent a violation, its actions to detect a violation and its actions to rectify a violation.<sup>47</sup>

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<sup>45</sup> See D.98-12-075.

<sup>46</sup> D.98-12-075.

<sup>47</sup> *Id.*

As discussed above, Bandwidth CLEC's prior conduct with regard to its representation of its management qualifications was not candid. Bandwidth CLEC and Bandwidth, however, were candid regarding their management and operations during the course of this proceeding. Bandwidth CLEC also took steps to rectify its prior noncompliance with management qualifications by installing officers and a director, but opposed operating the CPCN under Bandwidth CLEC. Since it is very difficult and unnecessarily complicated for the Commission to confirm that Bandwidth CLEC was operating telecommunications services without the Joint Applicants' affirmative intent and a show of willingness to do so, the Joint Applicant's steps were not sufficient to merit approval of the transfer of control requested in this Application.

Despite any effort to rectify future conduct, the Commission's prior precedent prohibiting retroactive, or *nunc pro tunc*, transfers of authority for violations prohibit us from authorizing Bandwidth CLEC's transfer of control on a retroactive basis because it thwarts the purpose of Pub. Util. Code § 854(a).<sup>48</sup> Therefore, the Commission must consider Bandwidth's CLEC prior noncompliance for the purposes of this Decision. Accordingly, the Commission imposes this penalty to encourage future Applicants to employ very careful analysis before misrepresenting, or failing to comply with, provisions of future orders, decisions, rulings, or requirements of this Commission.

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<sup>48</sup> See D.10-03-008 at 8; D.09-06-024 at 8-9; D.07-05-003 at 6; D.05-08-006 at 7; and D.04-09-023 at 6.

### **5.3. Totality of the Circumstances**

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:

1. The degree of wrongdoing – The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
2. The public interest – In all cases, the harm will be evaluated from the perspective of the public interest.

The facts in this case indicate that the degree of wrongdoing, though serious, was not egregious. Bandwidth CLEC's conduct was serious because Bandwidth, while benefitting from the authority under the CPCN, operated in a manner that evaded the Commission's jurisdiction. Also, the ultimate violation was done intentionally.

The public interest was harmed by Bandwidth CLEC's failure to transfer authority, and thereby Bandwidth's operation of a CPCN without a license and properly under the Commission's jurisdiction, in contravention of the Commission's Public Policy Goals for CPCNs. "It is the policy of the Commission that all telecommunications providers shall be subject to appropriate regulation designed to safeguard against anti-competitive conduct."<sup>49</sup> Anti-competitive conduct is indicated in this case because granting Bandwidth the ability to operate under Bandwidth CLEC's CPCN allows Bandwidth to provide telecommunications service while avoiding Commission jurisdiction.

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<sup>49</sup> D.95-07-054, Appendix A, Public Policy Objective D.

While the public interest is harmed by the violations, Bandwidth CLEC does not appear to have materially benefitted from its unlawful conduct. The Commission will balance the degree of wrongdoing against the harm to the public interest from this violation.

#### **5.4. Financial Resources of the Utility**

The fine should reflect the financial resources of the utility, and should be set at a level that deters future violations, without becoming excessive, based on each utility's financial resources.<sup>50</sup>

Bandwidth CLEC provided financial information for Bandwidth in its Application and no financial information on Bandwidth CLEC. From the financial information, there is no indication that Bandwidth CLEC is in bankruptcy or is in any way limited in paying a fine typical for a regulated entity subject to fine pursuant to a violation of Pub. Util. Code § 854(a).

#### **5.5. The Role of Precedent**

In D.98-12-075, the Commission held that any decision which imposes a fine should 1) address previous decisions that involve reasonably comparable factual circumstances, and 2) explain any substantial differences in outcome.<sup>51</sup>

The facts in this case are generally comparable to many Commission decisions that considered transactions that were effected without prior authorization in violation of Pub. Util. Code § 854(a), for companies that otherwise operated without incident. In earlier Decisions, the Commission approved many transactions in violation of Pub. Util. Code § 854(a) without

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<sup>50</sup> D.98-12-075.

<sup>51</sup> D.98-12-075.

penalty.<sup>52</sup> However, in D.00-09-035, the Commission held that its precedent of meting out lenient treatment to those that violate Pub. Util. Code § 854(a), failed to deter additional violations of Pub. Util. Code § 854(a). In subsequent Decisions -- including D.00-12-053, D.03-05-033, D.03-08-058, D.04-09-023, D.07-05-040, D.10-03-008, D.14-06-004 -- the Commission fined telecommunications carriers \$5,000 for similar violations of Pub. Util. Code § 854(a). Commission Decisions where minimum fines were imposed tended to involve extenuating circumstances such as involuntary transfer of control due to bankruptcy<sup>53</sup> or inheritance,<sup>54</sup> or proof of assets far below the value of other entities fined.<sup>55</sup> Commission Decisions where fines exceed the average \$5,000 fine amount often indicate prior penalties or egregious conduct.<sup>56</sup> Extenuating circumstances are not indicated in this proceeding. Therefore, it is consistent with Commission precedent to impose the same fine in this case as with other cases of unauthorized transfer of control in Commission decisions subsequent to D.00-12-053 which indicate no extenuating circumstances.

### **5.6. Amount of Fine under Section 2107**

The Commission concludes, based on the facts of this case, that Bandwidth CLEC and Bandwidth should jointly be fined \$5,000 for violating Pub. Util. Code

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<sup>52</sup> D.03-08-058 *citing* D.00-09-033, D.00-04-014, D.99-12-039, D.99-11-010, D.99-10-007, D.99-06-016, D.99-03-030, D.97-12-072, D.97-09-097, D.96-05-067, D.95-07-051, D.95-05-009, D.94-12-062, D.94-05-030, D.93-07-009, D.89-06-024, D.89-02-004, D.87-03-048, D.86-02-005, D.85-10-017, D.84-07-077, D.84-06-087, D.83-05-018, and D.93673.

<sup>53</sup> D.05-06-012.

<sup>54</sup> D.16-05-002.

<sup>55</sup> D.06-01-023, D.16-12-002.

<sup>56</sup> D.16-04-018.



§ 854(a). While the Commission may assess a separate fine for Bandwidth CLEC's Rule 1 violation for misrepresenting its managerial qualifications in A.07-03-020, the Commission recognizes that revoking Bandwidth CLEC's license through this Decision is a significant penalty sufficient, in the absence of information to the contrary, to deter future violations of this nature.

## **6. Comments on Proposed Decision**

The proposed decision of ALJ Kline in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. On July 23, 2018 by Bandwidth CLEC, David A. Morken and Bandwidth jointly filed comments on the proposed decision. No reply comments were filed.

We have reviewed the comments. Some of the arguments in the comments essentially reiterate arguments considered and rejected in the proposed decision, and we accord them no weight. However, the comments point out that in several instances, the proposed decision refers to "transfer of authority," when the language should more appropriately refer to a "transfer of control." The proposed decision has been updated to reflect this change.

The comments also argue that this decision violates Section 1708 because parties were not afforded adequate due process. However, the parties were provided adequate notice by an order to show cause, which was subsequently discussed during a status conference, and in a subsequent ruling. Both at the status conference and in the ALJ Ruling, parties were notified that Bandwidth CLEC's license may be revoked. There were no issues of material fact in dispute requiring an evidentiary hearing. Parties were afforded an opportunity to be

heard by filing responses to the order to show cause, through the discussion at the status conference and by filing responses to the ALJ Ruling.

Finally, in comments the parties argue in various ways that the Commission should approve Bandwidth CLEC's application to transfer control to David A. Morken, and that Bandwidth CLEC's license should not be revoked. The record shows Bandwidth operated Bandwidth CLEC's wholesale telecommunications services as well as Bandwidth's VoIP services. Bandwidth should be allowed to operate in California if it obtains a CPCN. The proposed decision is revised to allow Bandwidth to continue to operate in California if it applies for a CPCN within 90 days of the date of this decision.

#### **7. Request to File Under Seal**

Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, Bandwidth CLEC filed a motion for leave to file Exhibit C to the application as confidential materials under seal. Bandwidth CLEC represents that the information is sensitive, and disclosure could place Bandwidth CLEC at an unfair business disadvantage. We have granted similar requests in the past and do so here.

#### **8. Assignment of Proceeding**

Liane M. Randolph is the assigned Commissioner and Zita Kline is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. Bandwidth CLEC represented Bandwidth's officers and directors as officers and directors of Bandwidth CLEC in A.07-03-020.
2. Bandwidth CLEC failed to exercise operational control of its telecommunications services within one year of the grant of authority to operate under a CPCN pursuant to D.07-09-035.

3. Bandwidth CLEC failed to exercise managerial control of its telecommunications services within one year of the grant of authority to operate under a CPCN pursuant to D.07-09-035.

4. Bandwidth exercised managerial and operational control of telecommunications services under Bandwidth CLEC's CPCN from 2007 to the present.

5. The Joint Parties provided sufficient evidence of intent to create managerial control of Bandwidth CLEC by its own management, but did not provide sufficient evidence of intent to cease operational control of telecommunications services by Bandwidth, to support a grant of authority for Bandwidth CLEC to operate under its CPCN on a prospective basis.

6. Bandwidth CLEC's management qualifications are required to determine Bandwidth CLEC's qualifications to operate as a public utility providing telecommunications services in the state of California.

7. The failure to seek prior authorization for the transfer of control of Bandwidth CLEC to Bandwidth meets the criteria for imposition of a fine under Pub. Util. Code § 2107.

8. The failure of Bandwidth CLEC to be candid with regard to its management meets the criteria for imposition of a fine under Pub. Util. Code § 2107.

9. Pursuant to Rule 11.4, Bandwidth CLEC filed a motion for leave to file confidential materials under seal, including audited financial information for Bandwidth.

### **Conclusions of Law**

1. Pub. Util. Code § 854(a) requires Commission authorization of any transfer of control of a public utility.

2. Any transfer of control of a public utility without prior Commission authorization is void under Pub. Util. Code § 854(a).
3. The Commission has a policy disfavoring *nunc pro tunc* approvals of the transfer of control of a public utility. Joint Applicants have not shown sufficient reason to depart from the policy.
4. The public interest will not be served by a transfer of control from Bandwidth CLEC to David A. Morken.
5. Bandwidth CLEC violated Pub. Util. Code § 854(a) by failing to seek prior authorization from the Commission before allowing Bandwidth direct operational and managerial control of Bandwidth CLEC.
6. Bandwidth CLEC violated Rule 1.1 of the Commission's Rules of Practice and Procedure by failing to be candid with regard to its management of Bandwidth CLEC in A.07-03-020.
7. Under D.98-12-075, the Commission will consider the following criteria for determining the amount of a fine: (i) the severity of the offense; (ii) the conduct of the utility; (iii) the financial resources of the utility, (iv) the totality of the circumstances; and (v) the role of precedent.
8. Pub. Util. Code § 2107 requires the Commission to impose a penalty for the violation of Pub. Util. Code § 854(a) and the violation of Rule 1.1, and the penalty of \$5,000 meets the criteria under D.98-12-075 for imposition of a penalty.
9. Bandwidth CLEC's CPCN failed to meet the requirements under the Commission's grant of authority to operate a CPCN pursuant to D.07-09-035.
10. Bandwidth CLEC's motion to file under seal its Exhibit C to the application, should be granted for three years.
11. This proceeding should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. Application 17-09-007 requesting transfer of control from Bandwidth.com CLEC, LLC to David A. Morken is denied for failure of Bandwidth.com CLEC, LLC to meet the requirements of Decision 07-09-035.

2. Bandwidth.com CLEC, LLC's certificate of public convenience and necessity (CPCN) (U-7038C) shall be revoked, effective as of ninety days of the date of this order. If Bandwidth, Incorporated applies for a CPCN to operate in a substantially similar manner as the CPCN granted to Bandwidth.com CLEC, LLC in Decision 07-09-035, then Bandwidth.com CLEC, LLC's CPCN (U-7038-C) shall remain effective during the pendency of Bandwidth Incorporated's application.

3. Bandwidth.com CLEC, LLC and Bandwidth Incorporated shall jointly pay a fine in the amount of \$5,000 for violating Public Utilities Code Section 854(a). Bandwidth.com CLEC, LLC and Bandwidth Incorporated shall pay the fine within 30 days from the effective date of this order by tendering to the Fiscal Office of the California Public Utilities Commission a check in the amount of the \$5,000 made payable to the State of California General Fund; and shall file proof of payment at the Commission's Docket Office within 40 days of payment.

4. The pending motion, dated June 4, 2018, to hold a status conference is denied.

5. Bandwidth.com CLEC, LLC's motion to file under seal its Exhibit C is granted for a period of three years after the date of this decision. During this three-year period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Bandwidth.com CLEC, LLC believes that it is necessary for this information to

remain under seal for longer than three years, Bandwidth.com CLEC, LLC may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

6. Application 17-09-007 is closed.

This order is effective today.

Dated \_\_\_\_\_, at Fresno, California.