

Decision **PROPOSED DECISION OF ALJ PRESTIDGE** (Mailed 3/20/2007)

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

In the Matter of Application of Yak  
Communications (America) Inc. (U-6578-C), Yak  
Communications Inc. and Yaktastic Inc. for  
Approval of a Transfer of Control of Yak  
Communications (America) Inc.

Application 06-10-031  
(Filed October 26, 2006)

**OPINION GRANTING TRANSFER OF CONTROL  
AND FINING APPLICANTS FOR VIOLATION OF SECTION 854(a)  
OF THE PUBLIC UTILITIES CODE**

**1. Summary**

This decision grants the unopposed application<sup>1</sup> of Yak Communications (America) Inc. (Yak America), Yak Communications, Inc. (Yak) and Yaktastic Inc. (Yaktastic) (together, Applicants) for a transfer of control of Yak America to Yaktastic effective today, on a prospective basis only. We deny Applicants' request for retroactive approval of this transaction, which was previously consummated without prior Commission approval, in violation of § 854(a).<sup>2</sup>

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<sup>1</sup> The application was filed on October 26, 2006. In Resolution ALJ 176-3182, dated November 9, 2006, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that no hearings are necessary. No protests to the application were filed.

<sup>2</sup> All statutory references are to the Public Utilities Code, unless otherwise stated.

This decision also requires Applicants to pay a fine of \$5,000 based on their failure to obtain Commission authorization for this transfer of control, as required by § 854(a), before the closing of the sale of Yak America to Yaktastic.

## **2. The Applicants**

Yak America is a Florida corporation with its principal place of business located in Ontario, Canada, and is a wholly-owned subsidiary of Yak. Yak America holds a certificate of public convenience and necessity (CPCN) authorizing the provision of resold interexchange services in this state.<sup>3</sup> The application states that Yak America is authorized to provide and provides resold interexchange telecommunications services in 48 states and the District of Columbia.

Yak is a publicly-held company and a Florida corporation with its principal offices also located in Ontario, Canada. According to the application, Charles Zwebner, a Canadian citizen, holds 25% of the stock of Yak and is the only shareholder with an interest in the company of 10% or greater.

Yaktastic is a recently formed Delaware corporation with its principal offices located in Tampa, Florida. According to the application, Yaktastic is 100% owned by Anthony Lopez, a U. S. citizen, whose principal business is investment. Yaktastic and Lopez do not hold any authorization to provide telecommunications services or a 10% or greater interest in any company that offers domestic or foreign telecommunications services. Yaktastic was formed for the purpose of acquiring Yak America.

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<sup>3</sup> See Decision (D.) 01-09-068.

### **3. The Application**

Applicants seek Commission authorization for Yaktastic to acquire control of Yak America through the acquisition of 100% of the issued and outstanding shares of capital stock of Yak America.

According to the application, on September 21, 2006, Yak's Board of Directors approved an offer by Globalive Communications Corp. (Globalive), a Novia Scotia limited liability company, to acquire all of the outstanding shares of Yak's common stock. Applicants state that since Yak America is subject to federal and state regulation, Globalive's acquisition of Yak would be simpler if Yak America were not one of the entities transferred to Globalive. Further, the owners of Yak had determined that their continued ownership of Yak America was no longer consistent with their investment objectives. Therefore, Yak wished to transfer Yak America to Yaktastic before consummating the sale of its common stock to Globalive.

Applicants state that the sale of Yak America to Yaktastic does not involve the transfer of any operating authority, assets or customers, and that Yak America will continue to offer the same services to customers at the same rates and under the same terms and conditions. Further, the transaction will not cause any changes to the current management or operations of Yak America and will be seamless and transparent to Yak America customers in California. The only change resulting from approval of the application is that Yak America will be owned by Yaktastic, rather than Yak. The application states that Yak America will continue to have access to financial resources necessary for its continued operation after the transfer.

#### **4. Amendments to the Application/Transfer of Yak America to Yaktastic without Prior Commission Approval**

In response to an inquiry from the assigned Administrative Law Judge (ALJ) requesting further information about the transaction, Applicants filed an amendment to the application, which included audited financial statements for Yaktastic, on December 29, 2006.

In response to further inquiries from the assigned ALJ regarding Yaktastic's financial statements, Applicants filed a second amendment to the application on February 14, 2007 (Second Amendment). In the Second Amendment, Applicants admitted that the sale of Yak America to Yaktastic had already closed on November 7, 2006 without prior Commission approval, shortly after the Federal Communications Commission (FCC) approved the transaction.

Applicants claim that they needed to quickly complete the transfer of Yak America to Yaktastic before the sale of Yak to Globalive and now request approval of this application retroactively, on a *nunc pro tunc* basis.<sup>4</sup>

In addition, according to the Second Amendment, after the transfer, Yaktastic found it more difficult to operate Yak America's switching and billing functions than originally anticipated and began to question the continued availability of "casual calling" over the Yak America network. Yaktastic also became concerned that the financial performance of Yak America could not be sustained.

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<sup>4</sup> The phrase "*nunc pro tunc*" meaning "now for then," refers to those acts which are allowed to be done at a later time "with the same effect as if regularly done." (Black's Law dictionary (4<sup>th</sup> Revised ed. (1968), p. 1,218).)

However, one of the former principals of Yak, Jose Cadi, who had retained some non-financial interest in Yak America, recently formed Blackbird Corporation (Blackbird) to acquire Yak America from Yaktastic in order to serve the U. S. market. The second amendment states that the FCC has already approved the acquisition of Yak America by Blackbird, and that Yak America and Blackbird will also seek authorization from the Commission pursuant to § 854 in a separate application. On March 1, 2007, Yaktastic, Yak America and Blackbird filed Application (A.) 07-03-022, which seeks Commission approval of the transfer of control of Yak America to Blackbird on a *nunc pro tunc* basis.

## 5. Discussion

### a. The Application Should be Approved on a Prospective Basis Only

In this application, Applicants request authority under § 854 for Yaktastic to acquire control of Yak America through the purchase of 100% of its capital stock. Section 854(a) states, in pertinent part:

No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control...any public utility organized and doing business in this state without first securing authorization to do so from the commission...Any merger, acquisition, or control without that prior authorization shall be void and of no effect.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).<sup>5</sup> The primary standard used by the Commission to determine if a transaction should be authorized

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<sup>5</sup> D.95-10-045, 1995 Cal. PUC LEXIS 901, \*18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

under § 854(a) is whether the transaction will adversely affect the public interest.<sup>6</sup> The Commission may also consider if the transaction will serve the public interest.<sup>7</sup> Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>8</sup>

For the following reasons, we conclude that it is reasonable to grant this application to the extent it requests prospective authority under § 854(a) for Yaktastic to acquire control of Yak America. First, there will be no change to the rates, services, or operations of Yak America as a result of the transaction. Therefore, Yak America's customers and the public will not be harmed by the change in control of Yak America. Second, since the day-to-day management of Yak America will remain the same, we find that Yaktastic's management has the telecommunications experience and technical and managerial qualifications necessary to exercise control over Yak America.<sup>9</sup> Third, Yaktastic meets the Commission's financial requirements applicable to obtaining control of Yak

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<sup>6</sup> D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17; D.97-07-060, 73 CPUC 2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

<sup>7</sup> D.00-06-005, 2000 Cal. PUC LEXIS 281, \*4; D.99-04-066, p.5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 \*28 and COL 3; and D.8491, 19 CRC 199, 200.

<sup>8</sup> D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 \*5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 \*84-85 and COL 16; and D.3320, 10 CRC 56, 63.

<sup>9</sup> We make no finding as to whether Yaktastic would otherwise qualify to operate a telecommunications company in this state.

America.<sup>10</sup> Fourth, there is no opposition to this application. For these reasons, we see no reason to withhold authority for the transfer of control, on a prospective basis.

We deny this application to the extent it requests retroactive authority under § 854(a) for Yaktastic to acquire control of Yak America. The purpose of § 854(a) is to enable the Commission to review a proposed acquisition, *before it takes place*, in order to take such action as the public interest may require.<sup>11</sup> Granting this application on a retroactive basis would thwart the purpose of § 854(a). The Commission has enacted careful guidelines for scrutiny of the

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<sup>10</sup> In applications for the transfer of control of a telecommunications utility operating in this state, the Commission requires that the acquiring entity meet the financial requirements for the type of CPCN held by the telecommunications utility being acquired. Here, since Yak America holds a CPCN authorizing the provision of resold services only, Yaktastic must show that it has at least \$25,000 available for the operations of the company. The audited financial statements for Yaktastic show that although the company meets this requirement, Yaktastic is also subject to a note payable on demand in an amount that exceeds its assets. In the Second Amendment, Applicants state that the note results from advances made to Yaktastic by Globalive, in order to enable Yaktastic to pursue the acquisition of Yak America, and that Globalive lacked any practical means of compelling repayment in a way that would have disrupted Yak America's operations during the first 12 months after its acquisition by Yaktastic. Applicants also contend that the issue of Yaktastic's financial ability to operate Yak America is moot, because of the subsequent sale of Yak America to Blackbird.

Although we have concerns regarding the ability of Yaktastic to continue to fund the operations of Yak America, we agree that the transfer of Yak America to Blackbird renders this issue moot. Under these limited circumstances, we find that the transfer of control of Yak America to Yaktastic meets Commission financial requirements.

<sup>11</sup> D.99-02-061, 1999 Cal. PUC LEXIS 56 \*12; D.98-07-015, 1998 Cal. PUC LEXIS 526 \*7; D.98-02-005, 1998 Cal. PUC LEXIS 320 \*8; D.97-12-086, 1997 Cal. PUC LEXIS 1168 \*8; and San Jose Water Co. (1916) 10 CRC 56, 63.

owners of telecommunications utilities, and we cannot condone the transfer of control of a telecommunications utility to an owner that has not passed through our approval process in advance.

Since we will not grant retroactive authority, Yaktastic's acquisition of control over Yak America is void under § 854(a) for the period of time before the effective date of this decision. Applicants are at risk for any adverse consequences that may result from their having completed the transfer of control without Commission authority.

**b. Applicants Should be Fined for Their Failure to Comply with Pub. Util. Code § 854(a)**

Applicants failed to comply with § 854(a) by transferring control of Yak America to Yaktastic without Commission authorization. Violations of § 854(a) are subject to monetary penalties under § 2107, which states as follows:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which 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 twenty thousand dollars (\$20,000) for each offense.

Under § 2108, each date on which a continuing violation remains in effect constitutes a separate violation.

For the following reasons, we conclude that the Applicants should be fined for their failure to comply with § 854(a). First, any violation of § 854(a), regardless of the circumstances, is a serious offense that should be subject to fines. Second, the imposition of a fine will help to deter future violations of § 854(a) by the Applicants and others.

To determine the size of the fine, we shall rely on the criteria adopted by the Commission in D.98-12-075. We address these criteria below.

### **Criterion 1: Severity of the Offense**

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors:<sup>12</sup>

**Physical harm:** The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.

**Economic harm:** The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

**Harm to the Regulatory Process:** A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

**The number and scope of the violations:** A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

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

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<sup>12</sup> 1998 Cal. PUC LEXIS 1016, \*71 - \*73.

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.

### **Criterion 2: Conduct of the Utility**

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:<sup>13</sup>

**The Utility's Actions to Prevent a Violation:** Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past record of compliance may be considered in assessing any penalty.

**The Utility's Actions to Detect a Violation:** Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

**The Utility's Actions to Disclose and Rectify a Violation:** Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

Although the transfer of Yak America to Yaktastic closed in November 2006, approximately 12 days after the filing of this application, Applicants did not disclose their violation of § 854(a) until the filing of the Second Amendment

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<sup>13</sup> 1998 Cal. PUC LEXIS 1016, \*73 - \*75.

on February 14, 2007, in response to inquiries from the assigned ALJ. Further, Applicants have not claimed that they violated Section 854(a) inadvertently or unintentionally. These factors suggest that a larger fine may be appropriate. However, we must balance these factors against Applicants' other conduct. First, there is no evidence that the Applicants have previously failed to comply with applicable statutes and regulations on other occasions. Second, the Applicants admitted the violation and took steps to remedy it by requesting Commission approval of the transaction on a *nunc pro tunc* basis.

### **Criterion 3: Financial Resources of the Utility**

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:<sup>14</sup>

**Need for Deterrence:** Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.

**Constitutional limitations on excessive fines:** The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

The audited financial statements for Yak and its subsidiaries show that as of June 30, 2006, the company had assets in the amount of \$49,526,000 and liabilities in the amount of \$14,929,000. Further, as of June 30, 2006, the company

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<sup>14</sup> 1998 Cal. PUC LEXIS 1016, \*75 - \*76.

had net revenues of \$92,397,000 and a net loss of \$365,000. The interim audited financial statements for Yaktastic for the period from September 22, 2006 to October 31, 2006 show that the company had assets of \$40,100 and liabilities in the amount of \$43,741. Although Yak and its subsidiaries incurred a financial loss in 2006, its financial statements indicate healthy amounts of equity. The financial position of Yaktastic, which was formed for the specific purpose of acquiring Yak America, is not strong. We will weigh these factors accordingly when setting the amount of the fine.

#### **Criterion 4: 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:<sup>15</sup>

**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.

**The public interest:** In all cases, the harm will be evaluated from the perspective of the public interest.

The facts of this case indicate that the degree of wrongdoing, though serious, was not egregious. First, although Applicant did not file this application sufficiently in advance to obtain prior Commission approval of the transfer of Yak America to Yaktastic, Applicants took steps to report and remedy their violation of § 854(a). Second, no one was harmed by Applicants' failure to

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<sup>15</sup> 1998 Cal. PUC LEXIS 1016, \*76.

comply with § 854(a). These same facts also indicate that the public interest was not significantly harmed by Applicants' violation of § 854(a).

**Criterion 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>16</sup>

In D.00-09-035 and D.00-12-053, we stated that although the Commission had in some past instances approved applications for transfer of control on a *nunc pro tunc* basis, the Commission does not have a policy in favor of *nunc pro tunc* approvals.<sup>17</sup> We also announced that in the future, we may deny such applications and may impose penalties for failure to obtain advance Commission authorization as required by § 854(a).<sup>18</sup> In recent years, we have generally declined to grant *nunc pro tunc* approvals of applications for the transfer of control of a public utility. Applicants and other public utilities have therefore been given notice that the Commission will require compliance with the requirements of § 854(a) and may impose penalties for violations.

Here, Applicants have presented no circumstances which justify approval of the application on a *nunc pro tunc* basis. Despite their business need to proceed swiftly, Applicants still have a duty to comply with § 854(a).

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<sup>16</sup> 1998 Cal. PUC LEXIS 1016, \*77.

<sup>17</sup> We noted that we based our past *nunc pro tunc* approval of certain transactions on the unique facts of each case.

<sup>18</sup> *Id.*

Moreover, Applicants could have avoided the violation by filing this application earlier and requesting expedited Commission approval.

Although in the past, the Commission has not always imposed sanctions for violations of § 854, in D.00-09-035, we held that our precedent of meeting out lenient treatment to those who violate § 854(a) had failed to deter additional violations. We therefore stated a policy of imposing fines for violations of § 854(a) in order to deter future violations.<sup>19</sup> Therefore, requiring the Applicants to pay a fine for violating § 854(a) would be consistent with D.00-09-035.

### **Conclusion: Setting the Fine**

We previously concluded that the Applicants should be fined for their violation of § 854(a). The application of the criteria adopted by the Commission in D.98-12-075 to the facts of this case indicates that a relatively small fine is warranted. First, Applicants' violation of § 854(a), though serious, was not a particularly severe offense. Second, Applicants' conduct was not egregious. Third, while Applicants have incurred losses during 2006, they appear to have sufficient resources to pay a relatively small fine. Fourth, the degree of wrongdoing was relatively minor. Finally, the public interest was not significantly harmed by the Applicants' violation of § 854(a).

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<sup>19</sup> D.00-09-035, pp. 10-11. D.00-09-035 required the applicants in that proceeding to pay a \$500 fine for violating § 854(a). In D.00-12-053, the Commission imposed a fine of \$5,000 for a similar violation of § 854(a).

We note that the Commission has imposed fines of \$5,000 in other cases which involve similar transfers of control of telecommunications entities without our prior authorization, in violation of Section 854(a).<sup>20</sup>

We conclude based on the facts of this case that the Applicants should be fined \$5,000.00 for violating § 854(a). The fine we impose today is meant to deter future violations § 854(a) by the Applicants and other parties. We emphasize that the size of the fine we impose today is tailored to the unique facts and circumstances before us in this proceeding. We may impose larger fines in other proceedings if the facts so warrant, or if Applicants again violate § 854(a).

## **6. Category and Need for Hearing**

Based on the record, we find no need to alter the preliminary determinations made as to categorization and the need for a hearing made in Resolution ALJ 176-3182, dated November 9, 2006.

## **7. Comments on Proposed Decision**

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed by Applicants on April 6, 2007.

In their comments, Applicants contend that the decision should be modified to reflect that control of Yak America has now been transferred to Blackbird, and that Yak America, Yaktastic and Blackbird have filed A.07-03-022 to seek Commission approval of this transaction on a retroactive basis.

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<sup>20</sup> For example, see D.03-05-033, D.04-09-023 and D.05-08-066.

Applicants also contend that the proposed decision fails to explain the reasons for the Commission's decision not to approve the transfer of Yak America to Yaktastic retroactively, on a *nunc pro tunc* basis, and does not specify the Commission's policy on applications for *nunc pro tunc* approval of a transfer of control of a public utility.

We have made minor changes to the proposed decision in response to these comments.

On April 9, 2007, Yaktastic filed separate comments, which state that Yaktastic does not oppose the imposition of the fine and plans to pay it after the Commission has issued this order.

## **8. Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

## **Findings of Fact**

1. Yak America is a Florida corporation that holds a CPCN authorizing the provision of resold interexchange services in California.
2. Yak America is a wholly-owned subsidiary of Yak, a publicly-held Florida corporation.
3. Yaktastic is a recently formed Delaware corporation, which was organized for the purpose of acquiring Yak America.
4. On October 26, 2006, Applicants filed this application seeking Commission authorization to transfer the control of Yak America to Yaktastic, through Yaktastic's acquisition of 100% of the issued and outstanding shares of the capital stock of Yak America.

5. In the Second Amendment, Applicants admit that the transfer of Yak America to Yaktastic closed on approximately November 7, 2006, without prior Commission approval.

6. Applicants state that they needed to complete the transfer of Yak America to Yaktastic quickly in order to facilitate the transfer of Yak to Globalive.

7. Yaktastic has the technical, managerial, and financial qualifications necessary to exercise control of Yak America.

8. Applicants state that there will be no change in the day-to-day management or operations of Yak America as a result of its transfer to Yaktastic.

9. Applicants' failure to comply with § 854(a) did not harm the public, including customers.

10. There is no evidence that Applicants have previously failed to comply with applicable statutes and regulations.

11. Applicants took steps to report and remedy their violation of § 854(a) in the Second Amendment.

12. Applicants have adequate financial resources to pay a relatively small fine.

13. Applicants and other utilities were given notice in D.00-09-035 and D.00-12-050 that the Commission may not approve future applications for *nunc pro tunc* approval of transfers of public utilities and may impose fines for violations of § 854(a).

14. Applicants could have avoided the violation of § 854(a) by filing the application earlier and requesting expedited Commission approval.

15. The Commission's lenient treatment of parties that violate § 854(a) has not deterred subsequent violations of § 854(a) by other parties.

16. Applicants state that one of the former principals of Yak has recently formed Blackbird, in order to acquire Yak America in order to serve the U. S. market.

17. According to the application, the FCC has approved the acquisition of Yak America from Yaktastic by Blackbird.

### **Conclusions of Law**

1. This is a ratesetting proceeding and no hearing is necessary.
2. Section 854(a) requires Commission authorization to transfer control of a public utility.
3. Any transfer of control of a public utility without prior Commission authorization is void under § 854(a).
4. Section 854(a) does not authorize the Commission to approve transfers of control of public utilities retroactively.
5. The Commission does not have a policy in favor of *nunc pro tunc* approvals of transfers of control of public utilities.
6. Section 2107 gives the Commission authority to impose a penalty of between \$500 and \$20,000 for violations of the Public Utilities Code.
7. Under § 2108, each day on which a violation of the Public Utilities Code or a Commission decision, rule or order continues to exist is a separate violation.
8. In 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.
9. This application should be approved on a prospective basis because the transfer of Yak America to Yaktastic is not adverse to the public interest.

10. This application should be denied to the extent it requests retroactive or *nunc pro tunc* approval of the transfer of control of Yak America to Yaktastic.

11. Applicants violated § 854(a) by transferring control of Yak America to Yaktastic before receiving Commission authorization.

12. Applicants' violation of § 854(a) is subject to monetary penalties under § 2107.

13. Applicants should be fined for violating § 854(a). The amount of the fine should be based on the criteria set forth in D.98-12-075.

14. Applicants' violation of § 854(a), though a serious matter, was not an especially severe offense.

15. The public interest was not significantly harmed by Applicants' violation of § 854(a).

16. The application of the criteria in D.98-12-075 to the facts of this case indicates that Applicants should pay a fine of \$5,000.00 for violating § 854(a).

17. It is appropriate to fine Applicants for violating § 854(a) in order to deter future violations of § 854(a) by Applicants and others.

**O R D E R**

**IT IS ORDERED** that:

1. Application (A.) 06-10-031, as amended, for authority under Pub. Util. Code § 854(a) to transfer control of Yak Communications (America) Inc. (Yak America) to Yaktastic Inc. (Yaktastic) is granted to the extent it requests authority effective as of the date of this order.

2. A.06-10-031, as amended, is denied to the extent it requests retroactive or *nunc pro tunc* authority for the transfer of control of Yak America to Yaktastic.

3. Yaktastic and Yak America shall notify the Director of the Commission's Communications Division in writing of the transfer of control, as authorized herein, within 10 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.

4. Yak Communications Inc., Yak America and Yaktastic shall pay a fine in the amount of \$5,000.00 for violating Pub. Util. Code § 854(a). Applicants 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 \$5,000.00 made payable to the State of California General Fund. Applicants shall file proof of payment at the Commission's Docket Office within 40 days of payment.

5. Application 06-10-031 is closed.

This order is effective today.

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