STATE OF CALIFORNIA EDMUND G. overnor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

FILED
08-08-12
02:17 PM

August 8, 2012

Agenda ID #11505
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 11-10-017.

This is the proposed decision of Administrative Law Judge (ALJ) Robert Barnett, previously designated as the presiding officer in this proceeding. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Upon the request of any Commissioner, a Ratesetting Deliberative Meeting (RDM) may be held. If that occurs, the Commission will prepare and publish an agenda for the RDM 10 days beforehand. When the RDM is held, there is a related ex parte communications prohibition period. (See Rule 8.3(c)(4).)

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Robert Barnett at rab@cpuc.ca.gov and assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

Decision **PROPOSED DECISION OF ALJ BARNETT** (Mailed 8/8/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of UPH Holdings, Inc., UPH Acquisition Sub Inc., Pac-West Acquisition Company, LLC, and Pac-West Telecomm, Inc. (U5266C) for Consent to Transfer Control of a Company Holding a Certificate of Public Convenience and Necessity to Provide Local Exchange and Interexchange Service within the State of California.	Application 11-10-017 (Filed October 14, 2011)

DECISION AUTHORIZING TRANSFER OF OWNERSHIP AND CONTROL OF PAC-WEST TELECOMM, INC.

Summary

This decision grants, pursuant to Public Utilities Code Sections 852 and 854,[1] the application of UPH Holdings, Inc. (UPH), UPH Acquisition Sub, Inc., Pac-West Acquisition Company, LLC (PWAC), and Pac-West Telecomm, Inc. (Pac-West) (together Applicants) for approval of a transaction in which UPH will acquire 100% of the issued and outstanding shares of Pac-West in exchange for a 29% ownership interest that PWAC (the parent company of Pac-West) will obtain in UPH. Pac-West will retain its certificate of public convenience and necessity

[1] All subsequent Code references are to the Public Utilities Code, unless otherwise stated.

authorizing the provision of facilities-based and resold local exchange and interexchange services in California and will continue to serve customers under the same terms and conditions as before this transaction.

This decision concludes that the transaction underlying the transfer qualifies for an exemption from the California Environmental Quality Act, and accordingly, no additional environmental review is required, and that the transfer is in the public interest.

Parties to the Transaction

UPH Holdings, Inc. (UPH) is a Delaware corporation headquartered in Austin, Texas. UPH is a privately held, non-operating holding company with investments in the data and voice communications services. UPH does not currently hold any authorizations to provide telecommunications services. UPH has one indirect subsidiary, nWire Communications, LLC (nWire), which is certified as a non-dominant carrier in Texas, Arkansas, and Oklahoma.

UPH Acquisition Sub, Inc., (UPH-AS) is a California corporation located in Austin, Texas. UPH-AS is a wholly-owned subsidiary of UPH. UPH-AS was formed for Pac-West to merge into, with Pac-West emerging as the surviving entity. UPH-AS does not hold any authorizations to provide telecommunications service.

Pac-West Acquisition Company, LLC (PWAC) is a Washington limited liability company with its principal offices located in Vancouver, Washington. PWAC is a wholly-owned subsidiary of Columbia Ventures Corporation (CVC). PWAC does not hold any authorizations to provide telecommunications services.

Pac-West Telecomm, Inc. (Pac-West), a wholly-owned subsidiary of PWAC, is a publicly-traded California corporation with its principal business office located in Stockton, California. Pac-West currently holds a certificate of

public convenience and necessity (CPCN) authorizing the provision of facilities-based and resold local exchange services and interexchange services in California.[2] Pac-West is a certified non-dominant carrier authorized to provide telecommunications services in the following states in addition to California: Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Pac-West is also certified as a competitive carrier in the District of Columbia. Pac-West currently offers all forms of telecommunications including: local and long distance origination and termination; switched and special access; 8YY originating access and 8YY services; managed modem; and collocation services. Pac-West also has two wholly-owned subsidiaries that provide telecommunications services outside of California: Pac-West Telecom of Virginia, Inc., which provides local exchange and interexchange services in Virginia, and Tex-Link Communications, Inc., which provides local exchange and interexchange services within Texas.

Proposed Transaction

The provisions of an August 30, 2011 Reorganization Agreement of the applicants provide that the issued and outstanding capital stock of Pac-West will be exchanged for, and converted into, common stock of UPH. PWAC, the parent company of Pac-West will thereby obtain a 29% ownership interest in UPH. Pac-West will be merged into UPH-AS, a wholly-owned subsidiary of UPH, with

---

[2] *See* Decision (D.) 98-09-050.

Pac-West emerging as the surviving entity. Pac-West's wholly-owned subsidiaries, Pac-West Telecom of Virginia, Inc. and Tex-Link Communications, Inc., will continue to operate as wholly-owned subsidiaries of Pac-West. UPH's indirect subsidiary, nWire, will become a sister company to Pac-West when this transaction is completed.

Financial Qualifications and Technical Expertise

Under § 852, no public utility, and no subsidiary, affiliate of, or corporation holding a controlling interest in, a public utility, shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under the laws of this state, without prior Commission authorization. Pub. Util. Code § 854 requires Commission authorization before a company may "merge, acquire, or control any public utility organized and doing business in this state." The purpose of these and related sections is to enable the Commission, before any transfer of a public utility is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require.

Where 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 a CPCN. The Commission has established two major criteria for determining whether a CPCN should be granted, or transferred. First, an applicant who desires to operate as a provider of facilities-based local exchange and interexchange services must demonstrate that it has a minimum of $100,000 in cash or cash equivalent for operations of the company plus the costs of deposits to be paid to other carriers. (D.95-07-054, App. A, at 4.) Second, an

applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

Financial Qualifications

The instant application includes a copy of financial statements for UPH. These documents demonstrate that UPH has sufficient resources to meet the Commission's financial requirements.

With their application, the applicants filed a Motion for Leave to File Confidential Materials Exhibit C (Acquisition Agreement) and Exhibit F (UPH Financial Statements) Under Seal. Applicants assert that the information contained in Exhibit C is a non-public acquisition agreement and that Exhibit F contains private financial documentation of UPH. Applicants assert that public disclosure of this private, confidential information could subject them to potential unfair competitive disadvantage in connection with the business negotiations and dealings with vendors, customers, potential business partners, and others. That motion is granted.

Technical Expertise

In this case, Pac-West, which holds a CPCN in California, is being acquired by UPH. Both applicants have submitted information relative to the technical expertise of both companies. Applicants assert that UPH's management team includes individuals with substantive experience in successfully developing and operating telecommunications businesses, and therefore UPH has the adequate internal technical resources to support Pac-West's California operations. Applicants assert that this expertise in the telecommunications industry makes UPH's management team well-qualified to operate Pac-West in California. Applicants assert that they possess the level of technical expertise necessary to qualify for a CPCN in California. Nothing before us contradicts that assertion.

Applicant original application did not contain a verification that no one associated with or employed by applicant as an affiliate, officer, director, partner, or owner of more than 10% of applicant was previously associated with any telecommunication carrier that filed for bankruptcy, or was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule or order. Administrative Law Judge (ALJ) Richard Clark required the supplemental filing of the verification, and conducted a routine background check of the officers and directors. The background check raised questions for the ALJ regarding the veracity of the supplemental filing signed by the Applicant's CEO, J. Michael Holloway. The questions primarily focused on Applicant's Chief Financial Officer (CFO) Mr. Gary Egger. Egger's previous employment included approximately 14 years in various positions such as Vice President of Finance, Senior Vice President of Finance, CFO, and Executive Vice President of Vartec Telecom. Vartec filed Chapter 7 bankruptcy on November 1, 2004, just a few months after Egger left their employment in June of 2004. The assigned ALJ required further supplemental submissions and held an evidentiary hearing on March 28, 2012. Holloway and Egger both testified convincingly that, at the time Holloway provided the verification, they each believed the requirement to disclose an association with a bankrupt carrier applied to those who were employed by the carrier at the time the carrier filed for bankruptcy. Egger testified that he stepped down from all finance related positions in April of 2002 when he became Vice President of Billing, that the company was not having financial difficulties at that time, and that it didn't occur to him that a bankruptcy that occurred two and one half years after he stepped down as CFO, and over seven years ago would fall within the meaning of "previously associated with any telecommunication

carrier that filed for bankruptcy." The testimony of Holloway and Egger was credible. At the hearing, the applicant requested, and received, permission to file an amended verification. The ALJ's concerns were fully addressed in the supplemental filings, the evidentiary hearing, and the amended verification.

Discussion

Applicants represent that this change in ownership will have no effect on public interest considerations because the entity currently providing service will not change, and there will be no change to the rates, terms, and conditions of the services it provides. Pac-West will continue to hold its CPCN authorizing the company to provide telecommunications service in California. UPH will not offer service itself. Pac-West will continue to operate and offer telecommunications service including: local and long distance origination and termination, switched and special access, 8YY originating access and 8YY services, managed modem, and collocation services. The entity offering service to customers, Pac-West, will not change, and there will be no change to the rates, terms, and conditions of the service it provides. Applicants assert that Pac-West and its subsidiaries will continue to be managed by persons with significant experience in the telecommunications industry, and that this transaction may provide Pac-West and its subsidiaries with additional capital to support and expand its operations. The transaction will not result in any modifications to Pac-West's existing tariffs.

There is no evidence that the merger sought in this application will reduce competition and harm consumers.

For the above reasons, the transaction is in the public interest and we will grant the application pursuant to §§ 852 and 854.

California Environmental Quality Act (CEQA)

CEQA requires the Commission act as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. The nature of the transaction, combined with assertions of the applicant, assure us that "the transaction does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." We conclude that the proposed project qualifies for an exemption from CEQA pursuant to § 15061(b)(3) of the CEQA guidelines, inasmuch as it can be seen with certainty that the project will have no significant impact upon the environment. Accordingly, the Commission need perform no further environmental review for this application. Applicant must file for additional authority, and submit to any necessary CEQA review, before it can construct facilities.

Conclusion

We therefore grant the application for a transfer of control of Pac-West to UPH pursuant to §§ 852 and 854, effective today.

Categorization and Need for Hearings

In Resolution ALJ 176-3283 dated October 20, 2011, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. The assigned ALJ determined that evidentiary hearings were necessary in order to examine whether officers and directors of UPH Holdings, Inc. were previously associated with a telecommunications carrier who had filed for bankruptcy.

No protests have been received. The application should be granted.

Comments on Proposed Decision

The proposed decision of ALJ Barnett 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. Comments were filed on ____, and reply comments were filed on ____ by ____.

Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Robert Barnett is the assigned ALJ in this proceeding.

Findings of Fact

1. UPH, a Delaware corporation headquartered in Austin, Texas, is a privately held, non-operating holding company with investments in the data and voice communications service.

2. UPH-AS, a California corporation located in Austin, Texas, is a wholly-owned subsidiary of UPH that was formed for Pac-West to merge into, with Pac-West emerging as the surviving entity.

3. PWAC, a Washington limited liability company with its principal offices located in Vancouver, Washington, is a wholly-owned subsidiary of CVC.

4. Pac-West, a wholly-owned subsidiary of PWAC, is a publicly-traded California corporation with its principal business office located in Stockton, California.

5. Pac-West currently holds a CPCN authorizing the provision of facilities-based and resold local exchange service and interexchange service in California. Pac-West will retain its authority to provide facilities-based and resold local exchange and interexchange service previously granted in D.95-12-057.

6. Pac-West is a certified non-dominant carrier authorized to provide telecommunications service in the following states in addition to California: Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Pac-West is also certified as a competitive carrier in the District of Columbia.

7. Pac-West has two wholly-owned subsidiaries that provide telecommunications service outside of California: Pac-West Telecom of Virginia, Inc., which provides local exchange and interexchange service in Virginia, and Tex-Link Communications, Inc., which provides local exchange and interexchange service within Texas.

8. UPH does not currently hold any authorizations to provide telecommunications service. UPH has one indirect subsidiary, nWire, which is certified as a non-dominant carrier in Texas, Arkansas, and Oklahoma. After the transaction, nWire will be a sister company.

9. PWAC does not hold any authorization to provide telecommunication service.

10. As a result of the proposed transaction, the issued and outstanding capital stock of Pac-West will be exchanged for, and converted into, common stock of UPH. PWAC, the parent company of Pac-West will thereby obtain a 29% ownership interest in UPH. Pac-West will be merged into UPH-AS, a wholly-owned subsidiary of UPH, with Pac-West emerging as the surviving entity.

11. Pac-West customers will continue to receive service under the same rates, terms, and conditions after the transaction.

12. UPH has sufficient financial resources to meet the Commission's requirements to provide facilities-based and resold local exchange and interexchange services.

13. Pac-West may, as a result of this transaction, realize additional infusion of capital to support further expansion of Pac-West's current operation.

14. UPH and Pac-West have met the requirements for technical and managerial expertise to provide telecommunications service.

15. Pursuant to Rule 11.4, applicants filed a motion for leave to file confidential materials under seal, including Exhibits C and F to the application.

16. There were no protests to this application.

Conclusions of Law

1. 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 a CPCN.

2. UPH will be the ultimate owner of Pac-West. The proposed transfer of control of Pac-West will have no adverse impact on its customers. Pac-West's customers will continue to receive their existing service at the same rates, terms, and conditions that they have prior to the transfer and any future changes in the rates, terms, and conditions of service will be made consistent with Commission requirements. Pac-West will be managed by personnel with significant experience in the telecommunications industry and may realize additional infusion of capital to support further expansion of Pac-West's current operations.

3. This transaction meets the Commission's requirements for approval.

4. This transaction is in the public interest.

5. Applicants' motion to file their Exhibits C and F to the supplement to the application under seal should be granted for two years.

O R D E R

IT IS ORDERED that:

1. Pursuant to Pub. Util. Code § 854, the Joint Application of UPH Holdings Inc., UPH Acquisition Sub, Inc., Pac-West Acquisition Company, LLC, and Pac-West Telecomm, Inc. for approval of a transaction in which UPH Holdings, Inc. will acquire control of Pac-West Telecomm, Inc. is approved.

2. Within five days of the closing of the transaction, the surviving entities shall notify the Communications Division, by letter, of the consummation of the transaction.

3. The joint motion of UPH Holdings Inc., UPH Acquisition Sub, Inc., Pac-West Acquisition Company, LLC, and Pac-West Telecomm, Inc. for approval of a transaction in which UPH Holdings, Inc. will acquire control of Pac-West Telecomm, Inc. to file their Exhibits C and F under seal is granted. The information will remain under seal for a period of two years after the date of issuance of this order. During this two-year period, this information will remain under seal and may not be viewed by any person outside the Commission, except as agreed to in writing by applicants or their successors in interest, or as ordered by a court of competent jurisdiction. If UPH Holdings, Inc. or Pac-West Telecomm, Inc. or either of their successors in interest, believe that it is necessary for this information to remain under seal for longer than two years, UPH Holdings, Inc. or Pac-West Telecomm, Inc., or their successors in interest may file

a new motion at least 30 days before the expiration of this limited protective order.

4. Application 11-10-017 is closed.

   This order is effective today.

   Dated _____, at San Francisco, California.