

ALJ/TOM/avs

DRAFT



Decision \_\_\_\_\_

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

Joint Application of Warburg Pincus Private Equity IX, L.P., Warburg Pincus Private Equity X, L. P. and Electric Lightwave, LLC (U5377C), Eschelon Telecom, Inc. (U6864C), and Advanced Telcom, Inc. (U6083C) for Approval of an Indirect Transfer of Control of Electric Lightwave LLC, Eschelon Telecom, Inc. and Advanced Telecom, Inc.

Application 07-09-012  
(Filed September 18, 2007)

**DECISION AUTHORIZING TRANSFER OF OWNERSHIP  
AND CONTROL ON A PROSPECTIVE BASIS ONLY**

**Table of Content**

<b>Title</b>	<b>Page</b>
DECISION AUTHORIZING TRANSFER OF OWNERSHIP AND CONTROL ON A PROSPECTIVE BASIS ONLY .....	2
1. Summary .....	2
2. Parties to the Transaction .....	2
2.1. Factual Background and Procedural History .....	4
3. Discussion .....	6
3.1. The Motion to Dismiss is Denied .....	6
3.2. The Application is Approved on a Prospective Basis Only .....	12
3.3. Applicants Should Not be Fined for their Failure to Comply with Pub. Util. Code § 854(a), Based on the Unique Circumstances of this Case .....	14
4. Conclusion .....	17
5. Category and Need for Hearing .....	18
6. Comments on Proposed Decision .....	18
7. Assignment of Proceeding .....	18
Findings of Fact .....	18
Conclusions of Law .....	22
ORDER .....	24

**DECISION AUTHORIZING TRANSFER OF OWNERSHIP  
AND CONTROL ON A PROSPECTIVE BASIS ONLY**

**1. Summary**

This decision grants the application of Warburg Pincus Private Equity IX, L. P. (WP IX), Warburg Pincus Private Equity X, L.P. (WP X), Electric Lightwave, LLC (ELI), Eschelon Telecom, Inc. (Eschelon) and Advanced Telecom, Inc. (Advanced Telecom), (together, Applicants), for approval of a transaction in which WP X has acquired indirect control of ELI, Eschelon Telecom, Inc. and Advanced Telecom Inc., (d/b/a Eschelon Telecom Inc)., all of which are certificated carriers in this state, pursuant to Sections 852 and 854 on a prospective basis only.<sup>1</sup> We deny Applicant's request for approval of the transaction on a retroactive or *nunc pro tunc* basis.

Although we believe that this transaction represents a close call as to whether Section 854 applies, we find that a transfer of control has occurred and deny Applicant's motion for dismissal of the application.

We note that this transaction was finalized before Applicants received Commission approval, but impose no penalty due to the unusual circumstances of this case. However, we decline to approve the transfer of control on a retroactive or *nunc pro tunc* basis and caution Applicants that future violations of Section 854 will result in our imposition of fines or other sanctions.

**2. Parties to the Transaction**

WP IX and WP X are limited partnerships with principal offices located at 466 Lexington Avenue, New York, New York 10017. WP IX and WP X transact no business in California other than ownership of investment interests in other

---

<sup>1</sup> All Code references are to the Public Utilities Code, unless otherwise stated.

businesses. Neither WP IX nor WP X holds a certificate of public convenience and necessity (CPCN) authorizing the provision of telecommunications services in California.

Both WP IX and WP X are affiliates of, and are controlled by, Warburg Pincus & Co. (WP), a global private equity firm. According to the application, WP has over \$20 billion of assets under management and has substantial experience in the information and communications technology sectors.

ELI is a limited liability company organized under the laws of Delaware, with its principal place of business located at 2101 NE Lloyd Blvd., Suite 500, Portland Oregon 97232. ELI's sole owner is Integra Holdings, Inc<sup>2</sup>. (Integra Holdings), which is in turn a wholly-owned subsidiary of Integra Telecom, Inc. (Integra). ELI holds a certificate of public convenience authorizing the company to provide resold and limited facilities-based intraLATA and interLATA telecommunications services (high-speed private lines services),<sup>3</sup> low-speed private line services and switched toll services,<sup>4</sup> facilities-based, local exchange services,<sup>5</sup> and resold local exchange services<sup>6</sup> in California.

Eschelon, founded in 1996, is a Delaware corporation with its principal place of business located at 730 Second Avenue South, Suite 900, Minneapolis,

---

<sup>2</sup> According to the application, Integra Holdings' various operating subsidiaries are authorized to provide telecommunications services in a number of states and are also authorized by the Federal Communications Commission to provide interstate and international telecommunications.

<sup>3</sup> See D.94-03-07.

<sup>4</sup> See D.95-09-115.

<sup>5</sup> See D.95-12-057.

<sup>6</sup> See D.96-02-072.

Minnesota 55402, and is also owned by Integra Holdings and ultimately, Integra.<sup>7</sup> Eschelon holds a CPCN authorizing the provision of limited facilities-based and resold local exchange and resold interexchange services in California.

Advanced Telecom Inc. (d/b/a Eschelon Telecom Inc.) is a Delaware company and a subsidiary of Eschelon. Advanced Telecom, Inc. holds a CPCN authorizing the provision of facilities-based interexchange services in California.

### **2.1. Factual Background and Procedural History**

According to the application, on August 13, 2007, Integra entered into an agreement and plan of merger, which provided that Integra Recap. Co., an Oregon corporation, would be merged into Integra Telecom, with Integra Telecom to be the surviving corporation after the merger. The application states that since Integra's Board of Directors (Board) believed that it would be in Integra's best interests to recapitalize its capital stock through this transaction, either WP IX or WP X would invest at least \$245 million in order to obtain an equity stake in Integra as a part of the transaction. Certain current stockholders in Integra would then relinquish their ownership interests in the company by selling their holdings to WP IX or WP X. The application states that as a result of this transaction, either WP IX or WP X would acquire an equity interest in Integra of between 35% and 70%. Applicants acknowledged that under previous Commission decisions, if the merger were to result in a transfer of a 50% or

---

<sup>7</sup> According to the application, in Advice Letter Nos. 2 (Eschelon) and 59 (Advanced Telecom), filed on April 16, 2007, Eschelon advised the Commission of a transaction in which Integra Holdings acquired all of the outstanding equity interests of Eschelon. As a result of this transaction, Eschelon became a wholly owned direct subsidiary of Integra Holdings, and Advanced Telecom became an indirect subsidiary of Integra Holdings.

greater interest in Integra, advance Commission approval of the transaction would be required.

In subsequent filings, Applicants reported that WP X, rather than WP IX, would be the entity involved in the transaction and that on December 5, 2007, the parties consummated the transaction and closed the merger. According to Applicants, as a result of this merger, WP X acquired a 45.5% equity interest in Integra, when this interest is calculated on a fully diluted basis.<sup>8</sup> However, if the options and warrants for common stock held by third parties were to be excluded from consideration in determining WP X's ownership interest, WP X's ownership interest in Integra immediately after the merger would have been 49.5%.

Applicants also reported that immediately after the closing of the transaction, WP X separately purchased warrants from certain other equity holders, which had wanted to participate in the transaction but had missed the deadline, and WP immediately exercised these options. After giving effect to the shares purchased in the transaction and the subsequent purchase of warrants, WP X's equity ownership interest in Integra increased to 48.6% when calculated on a fully diluted basis. If the options and warrants for common stock held by third parties were to be excluded from consideration in calculating WP X's ownership interest in Integra following the merger and purchase of warrants, WP X would then hold a 51.2% ownership interest in Integra, the ultimate parent company of three California carriers, ELI, Eschelon, and Advanced Telecom, Inc.

---

<sup>8</sup> A 'fully diluted' basis means that in calculating the percentage of ownership interest, equity interests held in the form of options and warrants, most of which may be exercised for common stock at a nominal cost, are included.

On January 4, 2008, Applicants filed a Motion to Dismiss this application, which advised the Commission that the merger was consummated on December 5, 2007, but argued that the above transaction is not a transfer of control for which Commission approval is required under Section 854. In the alternative, the Motion to Dismiss asked the Commission to authorize any transfer of control resulting from this transaction.

### **3. Discussion**

#### **3.1. The Motion to Dismiss is Denied**

Applicants request dismissal of this application, because neither the merger nor WP X's subsequent acquisition of options and additional shares of Integra common stock result in a transfer of control for which advance Commission approval is required under Section 854.

Under Section 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. Section 854 further 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."<sup>9</sup>

The Commission evaluates whether a transaction that results in a transfer of control, requires prior approval under Section 854 on a case-by-case

---

<sup>9</sup> *San Jose Water Co. (1916) 10 CRC 56.*

basis, based on the relevant facts and circumstances. Applicants acknowledge that in past decisions the Commission has considered factors such as:

- 1) whether the acquiring entity's equity interest in the utility or its parent will be greater than 50%;<sup>10</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>11</sup> and
- 3) whether the acquiring entity has actual or working control of the day-to-day business of the utility.<sup>12</sup>

Under our previous decisions, the acquisition of a 50% or greater ownership interest in a public utility constitutes "control directly or indirectly" for the purposes of Section 854.<sup>13</sup> Here, WP X acquires a 51.2% ownership interest in Integra following the merger and purchase of warrants, if the options and warrants for common stock held by third parties are excluded from consideration in calculating WP X's ownership interest. If the options and warrants are considered to be exercised, however, Applicants argue, WP X would have only a 48.6% interest in Integra.

Our previous decisions do not specifically state whether we should consider the ownership interest acquired by WP X on a fully diluted basis or

---

<sup>10</sup> 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 D. 96-02-061 (*San Francisco Thermal.*)

<sup>11</sup> See D.93-11-063 (*In Re Paging Network of San Francisco*), D.96-02-061 (*San Francisco Thermal.*)

<sup>12</sup> See D.94-01-025 (*In Re San Jose Water Company*), D.90363 (*WUI Inc. v. Continental Tel. Corp.*)

<sup>13</sup> D.87478 (*In Complaint of Lee G. Gale v. Kenneth Teel, et al.*); D.03-06-069 (*Wild Goose.*)



otherwise.<sup>14</sup> In the absence of clear precedent or guidance from prior decisions, on the issue of whether to consider the acquisition on a “fully diluted basis,” we consider all factors of this case. Since the percentage of the interest acquired by WP X is only one factor to be considered typically in determining whether a transfer of control under Section 854 has occurred, we address other relevant factors below.

Applicants argue that no transfer of control has occurred because Integra’s shareholders, including WP X, have only limited power to control the corporation, through their ability to appoint directors and their statutory and contractual rights to approve certain transactions, and that the day-to-day business of Integra is managed by its officers and managers.

Integra’s Board consists of nine members. As a result of this transaction, WP X has the right to appoint three, and under some circumstances, four members of the Board.<sup>15</sup> Two of three other substantial shareholders in Integra, Boston Ventures and Banc of America Capital Investors (Banc of America), remain shareholders of Integra after the merger. Boston Ventures may appoint two Board members. Banc of America may appoint one Board member, unless Banc of America’s ownership interest falls below five%. The remaining two Board members are to be selected by the Board as a whole (at large

---

<sup>14</sup> D.03-08-079, cited by Applicants, does not directly state that the Commission should determine whether a transfer of control has occurred because of consideration of the ownership interest transferred on a fully diluted basis.

<sup>15</sup> According to Applicants, WP X could appoint a fourth member to Integra’s Board only if Banc of America’s ownership interest on a fully diluted voting shares basis were to fall below 5%. In this case, Banc of America would not appoint a member of the Board.

members). According to the application, the Chief Executive Officer of Integra, Dudley R. Slater, will hold an additional seat on the Board. Therefore, WP X does not have the power to directly appoint a majority of the members of the Board.

However, Banc of America's shares were to fall below 5%, WP X has power to appoint four members. If WP X were to appoint four members of the Board, WP X would then have sufficient votes on the Board to control the selection of the two at-large members, and could thereby indirectly control the Board.<sup>16</sup>

Applicants also argue that WP X has not acquired control of Integra's Board, because certain major corporate transactions, such as a sale or merger, the payment of dividends, the issuance of equity securities, material changes in Integra's business, the replacement of certain senior executive officers, and amendment of the Shareholder's Agreement, require approval by either a 66 2/3 or a 60% supermajority of the Board, and WP X does not have 66 2/3 or 60% of the votes on the Board. However, if WP X were to appoint four Board members, WP X would have the votes to effectively block a supermajority decision to undertake a certain transaction and therefore could control the action of the Board in these situations.

---

<sup>16</sup> In this situation, WP X would have appointed four members, Boston Ventures would have appointed two members, Bank of America would appoint no members, and Slater, the Chief Executive Officer of Integra, would hold the remaining seat on the Board. WP X, Boston Ventures, and Slater would then vote to select the remaining two at-large members. Since WP X would have four votes, and Boston Ventures and Slater would only have three votes, WP IX could effectively control the selection of the two large members and thereby gain indirect control of the Board.

In addition, WP X argues that a transfer of control requiring our prior approval under Section 854 has not occurred because WP IX will not have actual or working control of the day-to-day operations of Integra and its subsidiaries. Applicants state that the day-to-day business of Integra is managed by the officers of Integra, subject to the oversight of the Board, and that since WP X does not have the power to appoint a majority of Integra's Board or its senior officers, WP X does not control day-to-day operations of Integra or its subsidiaries.

Although some of our older decisions refer to a transfer of "actual or working control" as the threshold for Commission review under Section 854,<sup>17</sup> in D.03-06-069, we determined that a merger at the holding company level, which involved the ultimate parent company of Wild Goose Storage, Inc. (Wild Goose), resulted in the indirect transfer of control of Wild Goose and required our advance approval under Section 854. We found that a transfer of control had occurred because "as a result of the merger, the reality is that the parent company now has the ability to control its subsidiaries."<sup>18</sup> We also reasoned that:

"...were we to accept Wild Goose's argument that jurisdiction over this matter could be reduced to a simplistic, structural assessment to establish whether an actual versus potential change of control has occurred, we would be creating the wrong standard, which could only too easily be misused by those who might seek to similarly structure a transaction to immunize it from Commission review. Therefore, we reiterate the need for case-by-case

---

<sup>17</sup> For example, see D.90363 (*WUI, Inc. v. Continental Tel. Corp (1979)*), D.94-01-025 (San Jose Water Company and SJW Corp.).

<sup>18</sup> D.03-06-069 at p. 10.

review of mergers that fit the structural pattern exemplified by this one.”<sup>19</sup>

Similarly, here, as a practical matter, the merger involving Integra affects the control of Integra Holdings, the direct parent of ELI, Eschelon, and Advanced Telcom Inc., and under certain circumstances, could result in an indirect transfer of control of these three carriers. Moreover, under circumstances in which WP X appoints four Board members, WP X’s ability to block major corporate decisions that require a supermajority vote of Integra’s Board, such as a sale or merger of the company, replacement of senior executive officers, and material changes in the company’s business, may affect the day-to-day operations of Integra, Integra Holdings, and ELI, Eschelon, and Advanced Telcom, Inc.<sup>20</sup>

This transaction is a close case as to whether a transfer of control has occurred.<sup>21</sup> The Commission has not previously addressed a common transaction of this type before, nor do prior Commission decisions provide guidance on whether to consider transactions on a “fully diluted” basis for purposes of Section 854. However, on balance, considering that WPX appears to have the ability to control the majority of the Board, if Banc of America’s shares fall below 5%, and given the Commission’s goals of ensuring that qualified entities acquire or control public utilities, we find that Section 854 applies to this

---

<sup>19</sup> *Id.* at p. 9.

<sup>20</sup> Given the foregoing, WPX may have power to control the Board and day-to-day operations contingent on an event that would not necessarily trigger Commission review.

<sup>21</sup> If Banc of America’s shares fell below 5%, this event may not require Commission’s review or approval, but would result in WPX’s ability to appoint four Board members.

transaction. Based on the above, we find that this transaction resulted in an indirect transfer of control of three California certificated carriers, ELI, Eschelon, and Advanced Telecom, Inc., to WPX and that Applicants were required to obtain our advance approval under Section 854. We note that the public policy behind Section 854's requirement for advance Commission approval of transfers of control of public utilities is to protect consumers and the public, and therefore we wish to exercise our jurisdiction to review this transaction under Section 854.

### **3.2. The Application is Approved on a Prospective Basis Only**

In this application, Applicants request authority under Section 854 for WP X to acquire indirect control of ELI, Eschelon, and Advanced Telcom Inc., through the previously described merger. 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 Section 854(a).<sup>22</sup> The primary standard used by the Commission to determine if a transaction should be authorized under Section 854(a) is whether the transaction will adversely affect the public interest.<sup>23</sup> The Commission may also consider if the transaction will

---

<sup>22</sup> D.95-10-045, 1995 Cal. PUC LEXIS 901, \*18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

<sup>23</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.

serve the public interest.<sup>24</sup> Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>25</sup>

For the following reasons, we conclude that it is reasonable to grant this application to the extent it requests prospective authority under Section 854(a) for WP X to acquire control of Integra and indirect control of ELI, Eschelon, and Advanced Telecom, Inc. First, there will be no change to the rates, services, or operations of ELI, Eschelon, and Advanced Telecom, Inc., as a result of the transaction. Therefore, customers and the public will not be harmed by the change in control of these companies. Second, since the day-to-day management of the utilities will remain the same, we find that WP X has the telecommunications experience and technical and managerial qualifications necessary to exercise control over Integra, ELI, Eschelon, and Advanced Telecom Inc.<sup>26</sup> Third, WP X meets the Commission's financial requirements applicable to obtaining control of ELI, Eschelon, and Advanced Telecom, Inc. Fourth, as a result of this transaction, Integra, Integra Holdings, ELI, Eschelon, and Advanced Telecom, Inc. will gain access to the financial resources of WP X and WP, in order to enhance their operations. Fifth, there is no opposition to this application. For

---

<sup>24</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>25</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>26</sup> We make no finding as to whether WP X would otherwise qualify to operate a telecommunications company in this state.

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 or *nunc pro tunc* authority under § 854(a) for WP X to acquire indirect control of ELI, Eschelon, and Advanced Telcom, Inc. The purpose of Section 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>27</sup> Granting this application on a retroactive basis would thwart the purpose of Section 854(a). The Commission has enacted careful guidelines for scrutiny of the 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, ELI's acquisition of indirect control over ELI, Eschelon, and Advanced Telcom Inc., is void under Section 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.

**3.3. Applicants Should Not be Fined for their Failure to Comply with Pub. Util. Code § 854(a), Based on the Unique Circumstances of this Case**

Applicants failed to comply with Section 854(a) by transferring indirect control of ELI, Eschelon, and Advanced Telcom, Inc. to WP X without prior

---

<sup>27</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.

Commission authorization. Violations of Section 854(a) are subject to monetary penalties under Section 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.

To determine the severity of a violation, the Commission generally considers the following factors:<sup>28</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.

---

<sup>28</sup> 1998 Cal. PUC LEXIS 1016, \*71 - \*73.



**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.

Here, although Applicants completed a transfer prior to obtaining Commission approval pursuant to Section 854(a), the transfer did not cause any physical or economic harm to others. Further, the violation of Section 854(a) affected few, if any, consumers, and is a single offense. The only factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code. However, this factor must be weighed against the other factors in determining the amount of the fine.

Although any violation of Section 854(a), regardless of the circumstances, is a serious offense, we will not impose a fine based on the unique circumstances of this case. Applicants complied with Section 854 in by filing this application, but stated that they would seek dismissal of the application if WP X were to end up holding less than a 50% interest in Integra, based on their good faith belief that this transaction did not result in a transfer of control which required our advance approval. Although we find that a transfer of control requiring our advance approval has occurred, we believe that this transaction represents a very close call as to whether Section 854 applies. We also note that Applicants voluntarily notified the Commission that the transaction had been finalized without our prior approval approximately one month after the consummation of the transaction.

However, Applicants are cautioned that any future violation of Section 854 will result in the imposition of fines or other regulatory sanctions.

We note that the Commission does not have a policy in favor of *nunc pro tunc* or retroactive approvals of transfers of control of public utilities and may deny such applications in the future.<sup>29</sup> We affirm the Commission's existing general policy of imposing fines under Sections 2107 and 2108 for transfers of control of public utilities without our prior approval in order to deter this type of activity in the future.<sup>30</sup>

#### 4. Conclusion

Based on the foregoing, we approve the application on a prospective basis only, and deny Applicant's request for approval of the application on a retroactive or *nunc pro tunc* basis. However, since this transaction represents a very close call as to whether a transfer of control requiring our advance approval has occurred, we impose no fines based on Applicant's violation of Section 854 in this case. Applicants are advised to seek prior Commission approval of any future transfers of control as required by Section 854 in order to avoid fines or other regulatory sanctions.

---

<sup>29</sup> See D.00-09-035, D.00-12-053.

<sup>30</sup> In D.00-09-035 and D.00-12-053, we stated that although the Commission had in some 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. 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 Section 854(a). Further, in D.00-09-035 we held that our precedent of meting out lenient treatment to those who violate Section 854(a) had failed to deter additional violations. We therefore stated a policy of imposing fines for violations of Section 854(a) in order to deter future violations. Therefore, Applicants and other public utilities have been given notice that the Commission will require compliance with the requirements of Section 854(a) and may impose penalties for future violations.

## **5. 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 176-3200, dated October 4, 2007.

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

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

## **7. 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. ELI is a Delaware limited liability company and is owned by Integra Holdings, which in turn is owned by Integra.
2. ELI holds a CPCN authorizing the provision of resold and facilities-based local exchange services, and resold and limited-facilities based intraLATA and interLATA telecommunications services (high speed private lines services), low speed private line services and switched toll services in California.
3. Eschelon is a Delaware corporation and is a direct subsidiary of Integra Holdings, which is in turn owned by Integra.
4. Eschelon holds a CPCN authorizing the provision of limited facilities-based and resold local exchange and resold interexchange services in California.
5. Advanced Telecom, Inc. is a Delaware corporation and is a direct subsidiary of Eschelon and an indirect subsidiary of Integra Holdings, which is in turn owned by Integra.

6. Advanced Telecom, Inc. holds a CPCN authorizing the provision of facilities-based interexchange services in California.

7. ELI, Eschelon, and Advanced Telecom are all subsidiaries of Integra Holdings.

8. Integra Holdings is owned by Integra, which is the ultimate parent company of ELI, Eschelon, and Advanced Telecom.

9. WP IX and WP X are limited partnerships with their principal offices located in New York, New York, and are affiliates of, and are controlled by WP, a global private equity firm.

10. WP IX and WP X do not transact business in California other than holding ownership interests in other businesses.

11. On September 18, 2007, Applicants filed this application seeking Commission authorization to transfer the indirect control of ELI, Eschelon, and Advanced Telecom Inc., to WP IX or WP X, through WP IX's or WP X's acquisition of between 35 and 70% of the issued and outstanding shares of the capital stock of Integra.

12. In a subsequent filing, Applicants advised the Commission that WP X, rather than WP IX, would be participating in this transaction.

13. On January 4, 2008, Applicants notified the Commission that WP X and Integra had consummated this transaction on December 5, 2007, without prior Commission approval.

14. According to Applicants, as a result of this merger, WP X acquired a 45.5% equity interest in Integra, when this interest is calculated on a fully diluted basis.

15. Applicants state that if the options and warrants for common stock held by third parties were to be excluded from consideration in determining WP X's

ownership interest, WP X's ownership interest in Integra immediately after the merger would have been 49.5%.

16. Immediately after the closing of the transaction, WP X separately purchased warrants from certain other equity holders, which had wanted to participate in the transaction but had missed the deadline, and WP immediately exercised these options.

17. According to Applicants, after giving effect to the shares purchased in the transaction and the subsequent purchase of warrants, WP's equity ownership interest in Integra increased to 48.6% when calculated on a fully diluted basis.

18. According to Applicants, if the options and warrants for common stock held by third parties were to be excluded from consideration in calculating WP X's ownership interest in Integra following the merger and purchase of warrants, WP X would then hold a 51.2% ownership interest in Integra.

19. On January 4, 2008, Applicants filed a motion to dismiss, on the grounds that this transaction does not result in a transfer of control which requires Commission approval under Section 854.

20. Our previous decisions do not clearly state whether in determining whether a particular transaction requires our prior approval under Section 854, the ownership interest of the acquiring entity should be calculated on a fully diluted basis or otherwise.

21. This transaction results in an indirect transfer of control of ELI, Eschelon, and Advanced Telecom Inc. to WP X that requires our prior approval under Section 854 for the following reasons: a) WP X has acquired a substantial ownership interest in Integra; b) under circumstances in which WP X appoints four members to the nine-member Board of Directors, WP X can control the selection of the two at large Board members, thereby indirectly controlling the

Board; c) under circumstances in which WP X appoints four members to the nine-member Board of Directors, WP X can block Board decisions on major issues affecting the day to day operations of ELI, Eschelon, and Advanced Telecom Inc., which require a supermajority vote of the Board; d) as a practical matter, by acquiring control of Integra, the ultimate parent company of ELI, Eschelon, and Advanced Telecom, Inc., WP X has acquired indirect control of these three California certificated carriers.

22. Applicants state that there will be no change in the name, day-to-day management or operations of ELI, Eschelon, and Advanced Telecom, Inc. as a result of the indirect transfer of control to WP X.

23. The customers of ELI, Eschelon, and Advanced Telecom, Inc. will continue to receive service under the same rates, terms, and conditions after the transaction.

24. WP X has access to sufficient financial resources to meet the Commission's requirements to provide facilities-based, limited facilities-based, and resold local exchange and interexchange services.

25. This transaction will give Integra, the ultimate parent company of ELI, Eschelon, and Advanced Telecom, Inc. access to increased capital from WP X, in order to enhance the operations of ELI, Eschelon, and Advanced Telecom, Inc.

26. WP X does not hold a CPCN authorizing the provision of telecommunications services in this state.

27. Since the day-to-day management of ELI, Eschelon, and Advanced Telecom, Inc. will remain the same, WP X has met the requirements for technical and managerial expertise to provide telecommunications services, for the purposes of this transaction only.

28. WP X has the financial qualifications necessary to exercise control of ELI, Eschelon, and Advanced Telecom, Inc.

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

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

31. Applicants took steps to report their violation of Section 854(a) approximately one month after the transaction was consummated.

32. 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 Section 854(a).

33. This transaction represents a very close call as to whether a transfer of control for which Section 854 requires our advance authorization has occurred.

34. Although we will not impose fines based on the unusual circumstances of this case, Applicants are subject to fines and other regulatory sanctions if they commit future violations of Section 854.

35. Notice of this application appeared on the Commission's Daily Calendar on September 26, 2007. There were no protests to this application.

36. No hearings are necessary.

### **Conclusions of Law**

1. This is a ratesetting proceeding.
2. Section 854(a) requires Commission authorization to transfer control of a public utility.

3. The Commission will apply the same requirements to a request for approval of an agreement to acquire control of a telecommunications carrier as it does to an applicant for authority to provide such services.

4. Any transfer of control of a public utility without prior Commission authorization is void under Section 854(a).

5. Section 854(a) does not authorize the Commission to retroactively approve transfers of control of public utilities.

6. The Commission does not have a policy in favor of *nunc pro tunc* approvals of transfers of control of public utilities.

7. This application should be approved on a prospective basis because the indirect transfer of control of ELI, Eschelon, and Advanced Telecommunications, Inc. to WP X is not adverse to the public interest.

8. This application should be denied to the extent it requests retroactive or *nunc pro tunc* approval of the indirect transfer of control of ELI, Eschelon, and Advanced Telecom, Inc. to WP X.

9. Applicants violated Section 854(a) by transferring indirect control of ELI, Eschelon, and Advanced Telecom, Inc. to WP X before receiving Commission authorization.

10. Section 2107 gives the Commission authority to impose a penalty of between \$500 and \$20,000 for violations of the Public Utilities Code.

11. Under Section 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.

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



13. The Commission has a policy of imposing monetary penalties for violations of Section 854 in order to deter additional violations in the future.

14. Applicants' violation of Section 854(a) did not cause physical or economic harm to others.

15. The public interest and customers were not significantly harmed by Applicants' violation of Section 854(a).

16. Since this transaction represents a close call as to whether a transfer of control requiring our advance authorization under Section 854 has occurred, we find it appropriate to not impose fines based on Applicant's violation of Section 854, based on the unusual circumstances of this case.

17. In D.98-12-075 the Commission determined it 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.

18. WP X meets the requirements for issuance of a CPCN authorizing the provision of facilities-based, limited facilities-based and resold local exchange and interexchange services, for the purposes of this application only.

19. The approval of this application on a prospective basis only is in the public interest.

## **O R D E R**

**IT IS ORDERED** that:

1. Application (A.) 07-09-012 for authority under Pub. Util. Code Section 854(a) to transfer the indirect control of Electric Lightwave, LLC (ELI), Eschelon Telecom, Inc. (Eschelon, and Advanced Telecom, Inc. (Advanced

Telecom) to Warburg Pincus Private Equity X, LP (WP X) is granted to the extent it requests authority effective as of the date of this order.

2. A.07-09-0912 is denied to the extent it requests retroactive or *nunc pro tunc* authority for the indirect transfer of control of ELI, Eschelon, and Advanced Telecom, to WP X.

3. WP X 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. Although we impose no fines based on Applicant's violation of Section 854 because of the unusual circumstances of this case, Applicants shall comply with Section 854 in the future and are subject to fines and other regulatory sanctions if future violations occur.

5. Application 07-09-012 is closed.

This order is effective today.

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