

Decision **DRAFT DECISION OF ALJ GALVIN** (Mailed 4/18/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Ex Parte Application of Innovative Telecom Corp. (CPUC Corp. ID No. U-5710-C) and Enhanced Global Convergence Services, Inc. for an Order Approving a Transfer of Assets.

Application 00-02-048
(Filed February 23, 2000)

O P I N I O N**I. Summary**

By this order we grant applicants Innovative Telecom Corp. (ITC) and Enhanced Global Convergence Services, Inc. (eGCS) authority to transfer all of ITC's assets to eGCS. This authority is effective upon the date of this order, and not nunc pro tunc¹ to August 5, 1999 as requested by applicants. This order also requires ITC and eGCS to pay a \$1,500 fine for their failure to obtain Commission authorization to transfer all of ITC's assets to eGCS prior to consummating the transfer.

II. Categorization

Applicants have requested that this matter be categorized as ratesetting and that no hearings are necessary. By Resolution ALJ 176-3035, dated March 16, 2000, the Commission preliminarily determined that this was a ratesetting proceeding, and determined that no hearings were expected. Notice

of this application appeared in the Commission's Daily Calendar of March 16, 2000.

With no filed protests, there is no reason to hold a public hearing and no reason to change the preliminary determinations made in Resolution ALJ 176-3035.

III. Jurisdiction

The application has been filed pursuant to Pub. Util. Code § 851²

That code section precludes a public utility from selling any part of its assets necessary or useful in the performance of its duties to the public without first securing authorization to do so from this Commission upon a finding that the transfer of its assets is in the public interest. Every such sale made other than in accordance with the order of the Commission authorizing it is void.

IV. The Parties

ITC, a Delaware corporation qualified to transact business in California, was granted a Certificate of Public Convenience and Necessity (CPCN) to operate as a reseller of inter- and intra-Local Access Transport Area (LATA) telecommunications service within California. This authority was granted pursuant to Decision (D.) 96-12-018, which assigned ITC its (U-5710-C) corporate identification number.

Applicant eGCS, a New Hampshire corporation, became qualified to transact business in California on November 4, 1999. Concurrent with the filing of this application, eGCS filed a registration statement to obtain its own CPCN

¹ Nunc pro tunc is the subsequent approval of an act with the same effect as if the act was approved upon occurrence.

² All statutory references are to the Public Utilities Code unless otherwise stated.

for authority to provide facilities-based interLATA and intraLATA toll service within California. On March 30, 2000, eGCS was granted its requested CPCN and was assigned U-6337-C as its corporate identification number, pursuant to D.00-03-067. Subsequently, by letter of April 4, 2000 applicants clarified that eGCS intends to operate utilizing its corporate identification number and that ITC will take the necessary steps to terminate its corporate identification number following approval of the asset transfer.³

V. The Transaction

ITC entered into an “Asset Purchase Agreement” to sell all of its assets to Innovative Enhanced Communications Services, Inc. now named eGCS. ITC and eGCS consummated the transfer of assets on August 5, 1999. The primary assets sold were computerized platforms for measuring calls and validating calling cards, and associated switching equipment.

VI. Discussion

In a situation where a company which has a CPCN desires to acquire the assets or control of a company which also has a CPCN, questions relating to public convenience and necessity are not relevant to the transfer of assets. This is because the fitness to provide telecommunications services was previously determined in the proceeding in which a CPCN was granted.⁴ ITC was granted its CPCN by D.96-12-018 and eGCS by D.00-03-067. Hence, the issue to be decided in this proceeding is whether the transfer of assets is in the public interest.

³ ITC's CPCN was cancelled in August 2001.

⁴ M. Lee (Radio Paging Co.), 65 CPUC 635, 637 (1966).

Because applicants completed the transfer of assets prior to the filing of this application, applicants failed to comply with, and therefore violated, the § 851 requirement that Commission authorization to sell assets be obtained prior to their sale. To alleviate their failure to comply with § 851, applicants seek Commission approval nunc pro tunc to August 5, 1999.

A. Nunc Pro Tunc

Applicants state that it was impossible to obtain Commission approval of the asset transfer in advance of consummation. However, because ITC and eGCS want to comply with all California statutes and regulations governing the provision of telecommunications service in California, applicants seek approval of the asset transfer on a nunc pro tunc basis.

Other than to explain that eGCS intended to focus on transaction processing⁵ on behalf of other carriers rather than providing public utility service at the time the asset transfer took place, applicants provided no reason for not seeking timely authority from the Commission to transfer the assets prior to the actual August 5, 1999 transfer date. Subsequent to consummation of the asset transfer, eGCS began to focus on the provision of toll services by resale in certain states, including California. Since consummation of this asset transfer took place, ITC has been carrying a small volume of interexchange traffic, its principal business being transaction processing for other carriers. eGCS has assisted ITC in providing telecommunications services under ITC's CPCN, to ensure a seamless transition.

⁵ Transaction processing included measuring calls and validating calling cards.

eGCS, a New Hampshire corporation, did not become qualified to transact business in California as a foreign corporation until November 4, 1999, four months after the asset transfer was completed. A copy of eGCS's Certificate of Status Foreign Corporation issued by California's Secretary of State is attached to the application as Exhibit 2(c). That certificate states, in pertinent part, that eGCS complied with the requirements of California law in effect on November 4, 1999 for the purpose of qualifying to transact intrastate business in California and that eGCS is entitled to transact intrastate business in California as of the date of the certificate.

Approval of this application on a nunc pro tunc basis would effectively provide eGCS with authority to transact business in California as a foreign corporation prior to it obtaining approval from the Secretary of State to transact business in California. Such approval could also relieve applicants of risk for consequences from activities and transactions completed prior to applicants requesting and receiving Commission approval to transfer the assets.

The Commission has no authority to authorize a foreign corporation, such as eGCS, to transact business in California prior to November 4, 1999. Section 2105 of the California Corporations Code precludes a foreign corporation, such as eGCS, from transacting business within California without having first obtained from the Secretary of State a certificate of qualification. Even if the Commission had such authority, it is not in the public interest to relieve applicants of risk for any consequences from activities and transactions completed prior to requesting and receiving Commission approval. Hence, any approval of this application should not be made on a retroactive basis.

Pursuant to § 853(b), the Commission may exempt a public utility from the requirements of § 851 if it finds that the application thereof with respect to

the public utility is not necessary in the public interest. However, such an exemption is not applicable to applicants' nunc pro tunc request because eGCS was not qualified to transact business in California at the time the transaction was completed.

Our denial of nunc pro tunc authority does not preclude us from authorizing prospective approval of the transfer of assets from when Commission authorization is obtained. We now address whether the transfer of assets is in the public interest.

B. Public Interest

Applicants contend that approval of the proposed transfer of assets is in the public interest because our approval will provide increased investment in the telecommunications marketplace and provide increased telecommunications choices for California customers. eGCS explained that it has assisted ITC in providing service under the ITC CPCN since the time of the transfer to ensure a seamless transition and is committed to serving ITC's customer base by honoring calling cards issued by ITC. In addition, the Commission's Consumer Service Division⁶ has not received any customer complaints against ITC up to the time its CPCN was cancelled or eGCS in the past two years. eGCS is ready, willing, and able to provide telecommunications services in California and is committed to honoring all prepaid calling cards issued by ITC. It is for all of these reasons that we find the transfer of assets to be in the public interest.

No new construction is being proposed. Accordingly, there is no possibility that the transfer of assets may have any significant impact on the

⁶ This Division is now the Consumer Protection and Safety Division.

environment. However, applicant's failure to comply with § 851 raises the issue of whether a monetary penalty is applicable in this instance.

C. Monetary Penalty

The purpose of § 851 is to protect the public interest by enabling the Commission, before any transfer of assets takes place, to review the proposed transfer of assets and take such action as the public interest may require. Hence, any violation of § 851, whether intentional or unintentional, is a serious offense that should be subject to fines. Such violation is 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.

D.98-12-075⁷ set forth five criteria to be considered in assessing a fine. Those criteria consists of an analysis of the severity of the offense, conduct, financial resources, totality of the circumstances, and the role of precedent.

The severity of an offense is measured by the extent of physical harm, economic harm, and harm to the regulatory process. We find applicants' violation of § 851 to be a serious offense. By filing their application after the date that the transfer of assets was consummated, the applicants did not even give the Commission an opportunity to approve the transfer prior to its purported

⁷ 1998 Cal. PUC LEXIS 1016, 71-77.

effective date. Moreover, by allowing eGCS to serve ITC's customer base before the Commission had approved the transfer of assets, the applicants have created potential confusion about whether eGCS has authority to serve customers. The public interest is harmed when the failure to seek timely authority under Section 851 yields uncertainty for consumers regarding whether their serving carrier was authorized to do so.

Applicants' conduct is measured by their actions to prevent, detect, and to disclose and rectify a violation. Applicants' violation of § 851 appears to be unintentional because eGCS intended to only focus on transaction processing on behalf of other carriers rather than providing public utility service and ITC continued its public utility service until such time that eGCS would take control of its operations. Applicants also attempted to disclose and rectify the violation of § 851 by filing their application with a candid acknowledgement of their mistake and a request for the necessary authority. This factor argues in favor of a mitigated fine.

The financial resources are considered to determine the size of a fine that would deter applicants from future violations without becoming excessive. The financial statements attached to the application as Exhibit 3 substantiates that applicants have minimal financial resources and that eGCS's businesses are not yet profitable. Accordingly, a modest fine could effectively deter future violations.

The totality of the circumstances is measured by the degree of wrongdoing and public interest. The facts of this application show that applicants' violation of § 851 was unintentional. In addition, the absence of complaints gives rise to an inference that customers did not experience a significant deterioration in service quality as a result of the unauthorized

transfer.⁸ On the other hand, as noted above, the unauthorized transfer of assets has created potential uncertainty and confusion about whether eGCS was serving customers without the required authorization.

Finally, the precedent that an assessment of a fine may have on other proceedings is considered. In recent years the Commission has been concerned about approvals involved transactions that has already occurred. The violations indicate that applicants may continue to ignore and violate § 851 unless such violations are subject to a fine. Hence, a fine is warranted and should be imposed. Based on our application of the criteria adopted by the Commission in D.98-12-075 to the facts in this application, a \$1,500 fine is warranted pursuant to § 2107.⁹ The size of the fine being imposed is based on the unique facts and circumstances of this application and should not be used as a precedent by other utilities for any violation of the Commission's rules.

In addition to this fine, applicants are at risk for any adverse consequences that may result from their having completed the transfer of control without Commission authority.

VII. Expedited Approval

Applicants have requested expedited approval of this application by the Executive Director. Ordering Paragraph 1 of D.87-10-035 provides in relevant part that the Executive Director may grant noncontroversial applications by

⁸ We do not suggest that the absence of complaints is conclusive evidence of the absence of service problems. Customers may have been inconvenienced, but not taken the time to register their complaints with this Commission.

⁹ In D.99-08-007 we imposed a larger fine (\$8,000) than the fine being imposed in this order for a violation of § 851. The larger fine was warranted primarily because of the greater financial resources available to those applicants compared to the financial resources available to applicants in this proceeding.

nondominant telecommunications carriers for authority to transfer assets or control under § 851.¹⁰ Although this application has not been protested, approval of this application may be controversial. That is because applicants sought nunc pro tunc authorization, that request is being denied and a penalty is being assessed.

VIII. Comments on Draft Decision

Applicants and interested parties should be afforded an opportunity to comment on this proposed decision. The 30-day period following the filing and service of a proposed decision before the Commission acts should not be reduced or waived.

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with § 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. There were no filed comments.

IX. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Michael J. Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Resolution ALJ 176-3035 determined that this was a ratesetting proceeding and determined that no hearings were expected.
2. Notice of this application appeared in the Commission's Daily Calendar of March 16, 2000.
3. No protests were filed.
4. This application has been filed pursuant to § 851.

¹⁰ CPUC2d 459 at 462 (1987).

5. Section 851 precludes a public utility from selling any part of its assets necessary or useful in the performance of its duties to the public without first securing authorization to do so from this Commission.

6. ITC possesses a CPCN to provide interexchange services within California under the U-5710-C corporate identification number.

7. eGCS possesses a CPCN to provide facilities-based inter and intraLATA toll services within California under the U-6337-C corporate identification number.

8. eGCS became qualified to transact business in California on November 4, 1999.

9. ITC and eGCS seek authority for eGCS to acquire all of the assets of ITC nunc pro tunc to August 5, 1999.

10. ITC had been carrying California interexchange traffic and eGCS has assisted ITC in providing such service under ITC's CPCN.

11. Applicants want to comply with all California statutes and regulations governing the provision of long distance resale services in California.

12. eGCS will honor ITC's calling cards.

13. Section 2105 of the California Corporation Code precludes a foreign corporation from transacting intrastate business without having first obtained a certificate of qualification.

14. No new construction is being proposed.

15. ITC and eGCS are non-dominant telecommunications carriers.

16. The Commission's Consumer Service Division has not received any customer complaints against ITC in the past two years.

17. eGCS will operate utilizing its own corporate identification number and ITC will take steps to terminate its corporate identification number following approval of the asset transfer.

18. Section 2107 provides the Commission with authority to impose a penalty of between \$500 and \$20,000 for violations of the Pub. Util. Code.

19. D.98-12-075 sets forth the criteria to be considered in assessing a fine.

20. The violation of § 851 affected only a small number of customers.

21. Applicants have modest financial resources.

22. Applicants attempted to disclose and rectify the violation of § 851 by the filing of their application with a candid explanation and request for the necessary approval.

Conclusions of Law

1. Since this transfer occurred prior to the filing of this application, the applicants have violated Section 851.

2. The proposed transfer of assets should not be granted nunc pro tunc.

3. The proposed transfer is not adverse to the public interest.

4. It is not in the public interest to relieve applicants of risk for any consequences from activities and transactions completed prior to requesting and receiving Commission approval.

5. It can be seen with certainty that the proposed transfer will not have an adverse impact on the environment.

6. This application should not be granted by the Executive Director or on a nunc pro tunc basis.

7. Applicants should be subject to the monetary penalties set forth in § 2107 for their violation of § 851.

8. The criteria set forth in D.98-12-075 for assessing a fine to the facts in this application indicates that applicants should be assessed a fine totaling \$1,500.

9. Public convenience and necessity require the granting of this application to be effective on the date signed.

10. Approval of this application is not a finding of value of the rights and property being transferred.

11. The application should be granted to the extent provided in the following order.

O R D E R

IT IS ORDERED that:

1. Innovative Telecom Corp. (ITC) and Enhanced Global Convergence Services, Inc. (eGCS) are authorized pursuant to Section 851 of the Public Utilities Code to transfer all of the public utility assets of ITC to eGCS, as more fully described in the application and its exhibits attached to the application. The authority granted in this ordering paragraph shall be prospective in application from the effective date of this order.

2. Applicants shall pay a \$1,500 total fine for violating Section 851 of the Public Utilities Code within 20 days from the effective date of this order. Applicants shall tender to the Fiscal Office of the California Public Utilities Commission a check in the amount of \$1,500 made payable to the State of California General Fund. Applicants shall also file proof of payment with the Commission's Docket Office within 40 days of payment.

3. Any failure of applicants to pay the \$1,500 fine within 20 days from the effective date of this order may result in proceedings to revoke ITC's and eGCS's Certificates of Public Convenience and Necessity.

4. The corporate identification number U-6337-C assigned to eGCS shall continue to be used by eGCS and shall be included in all original filings with the Commission and in the titles of other pleadings filed in existing cases.

5. The application is granted as set forth above and the authority granted shall expire if not exercised within one year after the effective date of this order.

6. Application 00-02-048 is closed.

This order is effective today.

Dated _____, at San Francisco, California.