

Decision \_\_\_\_\_

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

In the Matter of the Application of Pac-West  
Telecomm, Inc. (U-5266-C) and Pac-West  
Acquisition Company LLC for Approval of  
Transfer of Control of Pac-West Telecomm, Inc.

Application 06-12-006  
(Filed December 6, 2006)

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

**Summary**

This decision grants the application of Pac-West Telecomm, Inc. (Pac-West) and Pac-West Acquisition Company, LLC (PWAC), (together "Applicants") for approval of a transaction in which PWAC will acquire 95% of the ownership of Pac-West, pursuant to Pub. Util. Code § 852 and 854.<sup>1</sup> Pac-West will retain its CPCN 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.

We also find that Applicants violated Section 852 because PWAC acquired non-voting stock of Pac-West without first obtaining Commission authorization. However, since this situation is complex and ratepayers and the public were not harmed, we impose no penalty in this case. Applicants are cautioned to be

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

mindful of the requirements of Section 852 in future transactions in order to avoid penalties.

### **Parties to the Transaction**

Pac-West 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.<sup>2</sup>

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 was formed for the sole purpose of making the proposed investment in Pac-West for CVC and will be a holding company for Pac-West following completion of the transaction.

CVC is an investment company that owns and operates a portfolio of telecommunications companies and a small number of manufacturing companies around the world. According to the application, CVC is authorized to provide domestic interstate and international telecommunications services pursuant to Section 214 authorization from the Federal Communications Commission (FCC), but does not directly provide telecommunications services to customers. However, according to the application, CVC owns a 50% interest in One Communications Corp. (One Communications), a holding company that owns a number of telecommunications providers that offer services to business customers in the Northeast, Mid-Atlantic, and upper Mid-West regions. At least

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<sup>2</sup> See D.98-09-050.

one of the telecommunications providers owned by One Communications, CTC Communications Corp., holds a CPCN authorizing the provision of services in this state.<sup>3</sup> The application further states that CVC also owns five companies that operate under the Hibernia Atlantic names and collectively own a trans-Atlantic fiber-optic network linking Boston, Massachusetts with Halifax, Canada, Dublin, Ireland, and London, United Kingdom; Magnet Networks Ltd. (a Dublin, Ireland-based communications company that provides telephone, internet and video services), Columbia Fiber Solutions (the owner and operator of a 300-mile dark fiber-optic network in the Spokane Washington/Coer d'Alene, Idaho area), and certain other small telecommunications companies.

**Proposed Transaction**

As a result of the proposed transaction, PWAC will acquire approximately 95% of the common stock of Pac-West. Pac-West will therefore become a direct subsidiary of PWAC and an indirect subsidiary of CVC.

Pac-West will continue to hold its CPCN authorizing the company to provide telecommunications services in California. Applicants represent that this change in ownership will benefit Pac-West and its customers, because it will give Pac-West access to the financial resources and the telecommunications and management experience of PWAC and CVC. According to the application, without the acquisition of Pac-West by PWAC, Pac-West would have been faced with the decision to immediately file for bankruptcy, which would have

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<sup>3</sup> D.95-11-038 and D.97-01-012, granted CTC Communications, under its former name, Computer Telephone Corp., authority to provide resold interexchange and local exchange services. See also D.06-05-035.

adversely affected investors and employees and resulted in interrupted services for customers.

The application states that on November 15, 2006, Pac-West and PWAC entered in to the Preferred Stock Purchase Agreement (Stock Purchase Agreement). According to the application, Pac-West issued the Series B-1 Preferred Stock on November 15, 2006, and will issue the Series B-2 Preferred Stock after receiving the requisite approval of Pac-West's shareholders. Pursuant to this agreement, PWAC purchased, in aggregate, 48,158 shares of newly designated non-voting and convertible Series B-1 Pac-West Preferred Stock, with a par value of \$0.001 per share, and newly designated non-voting and convertible Series B-2 Preferred Stock.

Further, according to the application, concurrently with the execution of the Stock Purchase Agreement, another newly created subsidiary of CVC, Pac-West Funding Company, purchased all of Comerica Bank's rights, title and interest in an existing Loan and Security Agreement with Pac-West, in order to permit Pac-West to continue its operations.

The application states that no transfer of control of Pac-West resulted from Pac-West's issuance and sale of the preferred stock.

Applicants represent that the proposed transfer of control of Pac-West to PWAC will be transparent to customers. There will be no change in the name or day-to-day management of Pac-West because the transaction will affect only the corporate structure of the company. Customers will continue to receive service from Pac-West under the same rates, terms, and conditions after the transaction is approved.

**Discussion**

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>4</sup>

This case involves two primary issues, Pac-West’s transfer of the preferred stock to PWAC pursuant to the Stock Purchase Agreement and the transfer of the ownership and control of Pac-West to PWAC. We address each of these issues below.

**A. Pac-West’s Issuance of Preferred Stock to PWAC Without Prior Commission Approval**

Section 852 states, impertinent part:

No public utility, and no subsidiary or affiliate of, or a 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 or by virtue of the laws of this state, without having been first authorized to do so by the commission . . . Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or

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<sup>4</sup> San Jose Water Co. (1916) 10 CRC 56.

corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility.

Here, PWAC is not a public utility, and also is not a subsidiary of a public utility, because its parent company, CVC, is not a public utility. However, since PWAC and CTC Communications share the same ultimate parent company, CVC, they are affiliates.<sup>5 6</sup> Therefore, it appears that PWAC has violated Section 852 by acquiring the non-voting stock of Pac-West without prior Commission authorization, because PWAC is an affiliate of a public utility operating in this state, CTC Communications.

Despite Applicant's apparent violation of Section 852, we impose no penalty in this case. We note that this situation is complex, and that neither ratepayers nor the public were harmed by the transfer of Pac-West non-voting preferred stock to PWAC. However, we counsel Applicants to be mindful of the requirements of Section 852 in future transactions in order to avoid penalties.

We approve the transfer of Pac-West stock to PWAC upon the terms described in the application, effective on the date of the issuance of this decision,

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<sup>5</sup> Since CVC owns a controlling interest (50%) in One Communications, which owns 100% of CTC Communications, a telecommunications utility operating in California, CVC ultimately has ownership of CTC Communications. We note that, according to Applicants, no other owner of One Communications holds greater than a 12% ownership interest.

<sup>6</sup> See D.05-02-044, in which we stated that Pacific Pipeline System LLC and Pacific Terminals, LLC were affiliates because they shared common ownership; D.97-09-104, in which stated that the transfer of the ownership of Worldcom Technologies (Worldcom) from MFS Network Technologies (Technologies) to MFS Communications Company, the parent company of MFS Network Technologies, would make Worldcom and Technologies affiliates, because they would then share the same parent company.

but we do not approve this transaction retroactively. Under Section 852, Applicant's previous transfer of Pac-West stock to PWAC without our prior authorization is void. Applicants remain at risk for any consequences of the previous transfer of stock without Commission authorization.

**B. The Transfer of Control of Pac-West to PWAC**

We must next evaluate whether the other aspects of the proposed transfer of control of Pac-West to PWAC are in the public interest, pursuant to Section 854.

In a situation in which a person or company that does not possess a CPCN desires to acquire control of a company that does possess a CPCN, we apply the same requirements as in the case of an applicant seeking a CPCN to exercise the type of authority held by the company being acquired. Therefore, since PWAC does not hold a CPCN to provide telecommunications services in California, it must meet the requirements for issuance of a CPCN because it is acquiring control of Pac-West.

The Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who desires to operate as a provider of facilities-based and resold local exchange and interexchange services must demonstrate that it has a minimum of \$100,000 in cash or cash equivalent, reasonably liquid and readily available to meet the firm's start-up costs. In addition, the applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

The application includes financial documents and other evidence that demonstrates that CVC has sufficient resources to meet our financial

requirements for a CPCN authorizing the provision of resold local exchange and interexchange services in this state.<sup>7</sup> Since Pac-West is expected to continue to operate under the same day-to-day management, we find that our requirement for technical expertise is satisfied, for the purposes of this transaction only.<sup>8</sup> The transaction will give Pac-West access to additional financial resources necessary for its continued operations and to the telecommunications and management experience of CVC's management team. In addition, this transaction will be transparent to customers. Therefore, the proposed transaction is in the public interest.

We therefore grant the application for a transfer of control of Pac-West to PWAC pursuant to §§ 852 and 854, effective today. We do not approve the previous transfer of Pac-West non-voting stock to PWAC without our prior authorization on a retroactive basis.

### **Categorization and Need for Hearings**

In Resolution ALJ 176-3184 dated December 14, 2006, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

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<sup>7</sup> Applicant provided audited financial statements for CVC, PWAC's parent company, because, according to the application, PWAC was recently formed in November 2006 and has no audited financial statements.

**Comments on Proposed Decision**

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 14.3 of the Rules of Practice and Procedure. Comments were received from \_\_\_\_\_ on \_\_\_\_\_, 2007.

**Assignment of Proceeding**

Dian M. Grueneich is the assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. Pac-West is a California corporation with principal business offices located in Stockton, California.
2. PWAC is a Washington limited liability company with principal business offices located in Vancouver, Washington.
3. CVC is an investment company which, among other things, owns and operates telecommunications companies pursuant to FCC authority.
4. PWAC is a wholly-owned subsidiary of CVC and was formed for the sole purpose of acquiring control of Pac-West pursuant to this transaction.
5. CVC owns a 50% interest in One Communications, which owns a number of telecommunications entities, including CTC Communications, a public utility operating in this state.
6. None of the other owners of One Communications hold greater than a 12% interest in the company.

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<sup>8</sup> We made no determination that PWAC or CVC would otherwise meet the technical and managerial requirements for authorization to provide telecommunications services in this state.

7. CVC holds a controlling interest in One Communications.
8. In previous decisions, we granted Pac-West a CPCN to provide facilities-based and resold local exchange and interexchange services in California.
9. Pac-West wishes to retain its authority to provide facilities-based and resold local exchange and interexchange services previously granted in D.95-12-057, D.96-02-072, and D.97-09-115.
10. As a result of the proposed transaction, PWAC will acquire a 95% ownership interest in Pac-West and will therefore have ultimate control of Pac-West.
11. Previously, Pac-West transferred preferred stock to Pac-West pursuant to the Stock Purchase Agreement without prior Commission approval.
12. Neither PWAC nor CVC hold a CPCN authorizing the provision of telecommunications services in California.
13. Neither PWAC nor CVC are public utilities operating in this state.
14. PWAC is not a subsidiary of, and does not hold a controlling interest in, a public utility operating in this state.
15. PWAC and CTC Communications are affiliates, within the meaning of Section 852, because CVC ultimately holds ownership of both companies.
16. The transfer of non-voting stock of Pac-West to PWAC without prior Commission approval did not harm ratepayers or the public.
17. Our decision not to impose a penalty for the violation of Section 852 in this case is appropriate, because the situation is complex and ratepayers and the public were not harmed by the transfer of Pac-West non-voting preferred stock without our prior approval.
18. There will be no change in the name or day-to-day management of Pac-West as a result of the transaction.

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

20. PWAC and CVC have sufficient financial resources to meet the Commission's requirements to provide facilities-based and resold local exchange and interexchange services.

21. This transaction will give Pac-West access to additional financial resources necessary for its continued operations.

22. This transaction will give Pac-West access to the management and telecommunications experience of CVC's management team.

23. Since Pac-West's day-to-day management will remain the same, PWAC and CVC have met the requirements for technical and managerial expertise to provide telecommunications services, for the purposes of this transaction only.

24. Notice of this application appeared on the Commission's Daily Calendar on December 15, 2006. There were no protests to this application.

25. No hearings are necessary.

### **Conclusions of Law**

1. The Commission will apply the same requirements to a request for approval of an agreement to acquire control of a facilities-based and resale provider of local exchange and interexchange telecommunications services within California as it does to an applicant for authority to provide such services.

2. PWAC and CVC meet the Commission's requirements for the issuance of a CPCN to provide resold local exchange and interexchange telecommunications services, for the purposes of this transaction only.

3. Under Section 852, no public utility, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, may purchase or

acquire any stock of a public utility organized and existing under the laws of California, without first obtaining Commission approval.

4. Applicants violated Section 852 by transferring the non-voting stock of PacWest to PWAC without first obtaining our authorization, because PWAC is an affiliate of a public utility operating in this state, CTC Communications.

5. Under Section 852, the transfer of the stock of a public utility without our prior authorization is void.

6. As an NDIEC and CLEC, Pac-West is not subject to the requirements of Sections 816-830, which require advice Commission approval of the issuance of utility stock.

7. The proposed transfer of control and the stock of Pac-West to PWAC is in the public interest.

8. In order to avoid delaying this transaction, the approval of the application, should be made effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. Pursuant to Public Utilities Code Sections 852 and 854, the application of Pac-West Telecomm, Inc. (U-5266-C) (Pac-West) and Pac-West Acquisition Company LLC (PWAC) for approval of the transfer of 95% of the ownership of Pac-West to PWAC is approved, effective today.

2. Pac-West shall retain its authority to provide facilities-based and resold local exchange and interexchange services in this state.

3. Pac-West's previous transfer of non-voting preferred stock to PWAC without prior Commission approval is not approved retroactively.

4. Application 06-12-006 is closed.

This order is effective today.

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