

Decision **PROPOSED DECISION OF ALJ PRESTIDGE (Mailed 4/19/2007)****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 Public Utilities Code Sections 852 and 854.¹ Pac-West will retain its Certificate of Public Convenience and Necessity (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 § 852 because PWAC acquired non-voting stock of Pac-West without first obtaining Commission authorization. We therefore impose a penalty of \$2,500 in this case. Applicants are cautioned to

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

be mindful of the requirements of § 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 CPCN authorizing the provision of facilities-based and resold local exchange services and interexchange services in California.²

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 § 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 one of the telecommunications providers owned by One Communications, CTC

² See D.98-09-050.

Communications Corp., holds a CPCN authorizing the provision of services in this state.³ 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 adversely affected investors and employees and resulted in interrupted services for customers.

³ 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.

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 § 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.⁴

This case involves three primary issues: A) Pac-West’s transfer of the preferred stock to PWAC pursuant to the Stock Purchase Agreement; B) whether to impose a penalty for Pac-West’s violation of Section 852 by transferring preferred stock to PWAC without first obtaining Commission authorization; and C) 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

Section 852 states, in pertinent 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 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.

⁴ San Jose Water Co. (1916) 10 CRC 56.

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.^{5 6} Therefore, it appears that PWAC has violated § 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.

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, but we do not approve this transaction retroactively. Under § 852, Applicants' 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. Penalty for Applicant's Violation of Section 852

Applicants failed to comply with § 852 by transferring the preferred stock of Pac-West to PWAC without first obtaining Commission authorization.

⁵ 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.

⁶ 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 we 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.

Violations of § 852 are subject to monetary penalties under § 2107, which states as follows:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars, (\$20,000) for each offense.

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

For the following reasons, we conclude that the Applicants should be fined for their failure to comply with § 852. First, any violation of § 852, regardless of the circumstances, is a serious offense that should be subject to fines. Second, the imposition of a fine will help to deter future violations of § 852 by the Applicants and others.

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

Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors:⁷

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

⁷ 1998 Cal. PUC LEXIS 1016, *71 - *73.

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 directive, including violations of reporting or compliance requirements.

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

Applicants' violation of § 852, while serious, did not cause any physical or economic harm to others. The violation of § 852 affected few, if any, consumers. However, our general policy is to accord a high level of severity to any violation of the Public Utilities Code. Moreover, Applicant's transfer of preferred stock in violation of § 852 also interfered with the Commission's regulatory process. This factor must be weighed against other factors in determining the amount of the fine.

Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:⁸

The Utility's Actions to Prevent a Violation: Utilities are expected to take reasonable steps to ensure compliance with applicable laws

⁸ 1998 Cal. PUC LEXIS 1016, *73 - *75.

and regulations. The utility's past record of compliance may be considered in assessing any penalty.

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

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

Here, Applicants could have prevented this violation by obtaining Commission approval before transferring the non-voting stock of Pac-West to PWAC. However, Applicants clearly acknowledged that the stock transfer had occurred in the application and did not attempt to conceal the violation. There is no evidence that Applicants have previously violated § 852. Further, applicants did not transfer any voting stock or the control of Pac-West to PWAC before obtaining the Commission's approval of this application. We shall consider these factors accordingly in determining the amount of the fine.

Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:⁹

⁹ 1998 Cal. PUC LEXIS 1016, *75 - *76.

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

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

According to the application, Pac-West has recently been facing serious financial difficulties, which nearly resulted in bankruptcy. PWAC is relying on the resources of its parent company, CVC, to fund its operations. According to the audited financial statements filed by Applicants, CVC had assets in the amount of \$484,708,000 in fiscal year 2005. Although CVC's audited financial statements show a loss of \$25,543,000 for fiscal year 2005, we believe that the company's financial statements reflect a healthy amount of equity. We shall consider these factors in determining the amount of the fine.

Criterion 4: Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:¹⁰

The Degree of Wrongdoing: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

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

The facts of this case indicate that the degree of wrongdoing, though serious, was not egregious. Applicants did not file this application sufficiently in

¹⁰ 1998 Cal. PUC LEXIS 1016, *76.

advance to obtain prior Commission approval, as required by § 852, which interfered with the Commission's regulatory process.

However, in mitigation, Applicants did not transfer any voting stock or interest in Pac-West to PWAC before obtaining Commission authorization. Further, no consumers were harmed by Applicants' failure to comply with § 852. These same facts also indicate that the public interest was not significantly harmed by Applicants' violation of § 852.

Criterion 5: The Role of Precedent

In D.98-12-075, the Commission held that any decision which imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.¹¹

Although in the past, the Commission has not always imposed sanctions for violations of the Public Utilities Code, in D.00-09-035 we held that our precedent of meting out lenient treatment to those who violate § 854(a), regarding transfers of control of utilities, had failed to deter additional violations. We therefore stated a policy of imposing fines for violations of § 854(a) in order to deter future violations.¹² We believe that the same policy should apply to violations of § 852. Therefore, requiring the applicants to pay a fine for violating § 852 is consistent with Commission precedent.

¹¹ 1998 Cal. PUC LEXIS 1016, *77.

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

Conclusion: Setting the Fine

We previously concluded that the applicants should be fined for their violation of § 852. The application of the criteria adopted by the Commission in D.98-12-075 to the facts of this case indicates that a relatively small fine is warranted. Applicants' violation of § 852, though not egregious, was serious, because it interfered with the Commission's regulatory process. Although Pac-West has recently faced financial problems and CVC has incurred some financial losses, applicants appear to have sufficient resources to pay a reasonable fine. However, Applicants did not transfer any voting stock or the control of Pac-West without prior Commission authorization. In addition, the public interest, and the interests of consumers, were not significantly harmed by the Applicants' violation of § 852.

We conclude based on the facts of this case, that the Applicants should be fined \$2,500 for this violation of § 852. The fine we impose today is meant to deter future violations of § 852 by the Applicants and other parties. We emphasize that the size of the fine we impose today is tailored to the unique facts and circumstances before us in this proceeding. We may impose larger fines in other proceedings if the facts so warrant. If Applicants again violate § 852, we shall impose more serious sanctions.

C. 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 § 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.¹³ 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.¹⁴ 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

¹³ 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.

¹⁴ 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.

transparent to customers. Therefore, the proposed transaction is in the public interest.

Conclusion

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.

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. Pursuant to Rule 14.6(b), applicants agreed to a shortened comment. No comments were filed.

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.

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 in violation of § 852 interfered with the Commission's regulatory process.

17. The transfer of non-voting stock of Pac-West to PWAC without prior Commission approval did not harm ratepayers or the public.

18. Applicants have the financial resources to pay a reasonable fine.

19. Under the circumstances of this case, it is reasonable to impose a fine of \$2,500 based on Applicant's violation of § 852.

20. There will be no change in the name or day-to-day management of Pac-West as a result of the transaction.

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

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

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

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

25. 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.

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

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

7. Under § 2108, each day on which a violation of the Public Utilities Code, or a Commission decision, rule or order continues to exist is a separate violation.

8. Under D98-12-075, the Commission will consider the following criteria for determining the amount of a fine: (1) the severity of the offense, (ii) the conduct

of the utility, (iii) the financial resources of the utility, (iv) the totality of the circumstances, and (v) the role of precedent.

9. Applicant's violation of § 852 is subject to monetary penalties under § 2107.

10. Applicants should be fined for violating § 852. The amount of the fine should be based on the criteria stated in D.98-12-075.

11. Applicant's violation of § 852, though a serious matter, was not an especially severe offense.

12. The public interest was not significantly harmed by Applicant's violation of § 852.

13. The application of the criteria in D.98-12-075 to the facts of this case indicate that Applicants should pay a fine of \$2,500 for violating § 852.

14. It is appropriate to fine Applicants for violating § 852 in order to deter future violations of § 852 by Applicants and others.

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

16. The proposed transfer of control and the stock of Pac-West to PWAC, on a prospective basis, is in the public interest.

17. 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) (together, Applicants) 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. Applicants shall pay a fine of \$2,500 based on their transfer of non-voting stock of Pac-West to PWAC without first obtaining Commission authorization in violation of § 852. Applicants shall pay the fine within 30 days from the effective date of this order by tendering to the Fiscal Office of the California Public Utilities Commission a check in the amount of \$2,500 made payable to the State of California General Fund. Applicants shall file proof of payment at the Commission's Docket Office within 40 days of payment.

5. Application 06-12-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.