

Decision 09-08-017 August 20, 2009

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

Application of NextG Networks of California, Inc. (U6745C) and Madison Dearborn Partners, LLC For Approval of an Indirect Transfer of Control of NextG Networks of California, Inc.

Application 09-05-023  
(Filed May 29, 2009)

**DECISION APPROVING INDIRECT TRANSFER OF CONTROL****Summary**

In this decision, we approve the unopposed request of the joint applicants, NextG Networks of California, Inc. (NextG) and Madison Dearborn Partners, LLC (MDP), for authorization pursuant to Pub. Util. Code § 854 to transfer indirect control of NextG to MDP. The change of control will be accomplished through a merger involving NextG's corporate parent, NextG Networks, Inc. (NextG Parent), and after the merger MDP will hold 61% of NextG Parent through various funds and partnerships that it manages.

**Description of NextG, NextG Parent and MDP**

NextG is a Delaware corporation that provides radio frequency transport and backhaul services for commercial mobile radio service (CMRS) providers throughout California by means of the Distributed Antenna System (DAS) networks that it builds. (Joint Application, p. 3.) As we pointed out in Decision (D.) 09-02-015, by providing these networks, NextG enables CMRS providers to amplify and extend their radio frequency signals and capacity in difficult coverage areas.

This Commission originally granted NextG a certificate of public convenience and necessity (CPCN) to provide limited facilities-based and resold local exchange, access and interexchange telecommunications services in D.03-01-061. Later, in D.07-04-045, NextG's authority was expanded to include full facilities-based local exchange services and expedited environmental review.<sup>1</sup> (*Id.* at 3-4.)

With respect to NextG Parent, the joint application states that it is an unregulated Delaware holding company whose operating subsidiaries, including NextG, "design, permit, build, own, operate and manage [DAS] networks." (*Id.* at 3.) The joint application notes that affiliates of NextG provide intrastate telecommunications services in 31 states as well as the District of Columbia and Puerto Rico, and that to the extent the laws of those other jurisdictions require it, authority for the merger is also being sought from them. In addition to the CPCNs referred to above, NextG also holds authority from the Federal Communications Commission (FCC) to provide interstate telecommunications services, and it has filed a Domestic 214 application with the FCC for transfer of control of that authority. (*Id.* at 4.)

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<sup>1</sup> In D.07-04-045, in addition to granting NextG expanded authority, the Commission directed that a separate proceeding be opened to determine whether NextG had violated the terms of its original CPCN by engaging in "ground-disturbing activity." In D.07-07-023, the Commission denied NextG's application for rehearing of this aspect of D.07-04-045.

After receiving a report from the Consumer Protection and Safety Division (CPSD) concluding that NextG had violated the terms of the CPCN granted in D.03-01-061, the Commission opened Investigation (I.) 08-07-012 to determine the extent of the violations and what penalty should be imposed. In D.09-02-015, the Commission approved a settlement between Next G and CPSD that disposed of all the issues raised in I.08-07-012.

As to MDP, the joint application states that it is a Delaware limited liability company that transacts no business in California; its role is restricted to owning investment interests in other businesses.<sup>2</sup> MDP is based in Chicago, and is “one of the most experienced and successful private equity investment firms in the United States.” According to the joint application, MDP’s principals manage funds with more than \$18 billion in equity commitments, and MDP has invested in more than 100 companies since its inception in 1992. (*Id.* at 4.)

The joint application states that upon completion of the proposed merger, MDP will hold a controlling interest in NextG Parent through six MDP limited partnership funds, which are as follows:

1. Madison Dearborn Capital Partners V-A, L.P.
2. Madison Dearborn Capital Partners V-C, L.P.
3. Madison Dearborn Capital Partners V Executive-A L.P.
4. Madison Dearborn Capital Partners VI-C, L.P.
5. Madison Dearborn Capital Partners VI-A, L.P.
6. Madison Dearborn Capital Partners VI Executive-A, L.P.

The joint application also states that Madison Dearborn Partners V A&C, L.P. is the general partner of the first three of these limited partnership funds, and that Madison Dearborn Partners VI A&C, L.P. is the general partner of the latter three. As general partners, these two entities manage and exercise control over the limited partnership funds that are under their respective umbrellas.<sup>3</sup>

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<sup>2</sup> As a result of this status, MDP is not required to have a Certificate of Good Standing from the California Secretary of State. (*Id.* at 4.)

<sup>3</sup> The application also states that no telecommunications services are currently provided directly by these funds, but that “portfolio companies of other MDP managed

*Footnote continued on next page*

### **The Form and Purpose of the Merger**

The joint application states that the vehicle for the proposed merger will be Nodes Merger Corporation (Nodes), a Delaware corporation that has been created by MDP, as well as other investors who will hold minority interests in NextG Parent. Nodes and NextG Parent have entered into a merger agreement dated May 15, 2009 that has been filed under seal, and pursuant to which (i) Nodes will merge into NextG Parent, with NextG Parent as the surviving corporation, and (ii) Nodes will contribute to the new venture an amount of money specified in the merger agreement. (*Id.* at 7.) As noted above, after the proposed merger, the six MDP investment funds identified above will collectively own approximately 61% of the outstanding capital stock of NextG Parent, “with the remaining 39% divided up among the existing [NextG] Parent stock holders and new investors.” (*Id.*)<sup>4</sup>

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funds do provide telecommunications services.” (*Id.* at 5.)

<sup>4</sup> In addition to obtaining new capital, one of the reasons for the proposed transfer appears to be simplification of the capital structure of NextG Parent, for which an eventual public offering of stock is contemplated.

As to the current capital structure, the joint application explains that NextG Parent was originally formed in 2001 by John Georges and David Cutrer. At the time of formation, these two men owned substantially all of NextG Parent’s stock. However, later in 2001, NextG Parent issued its Series A Preferred Stock, which was purchased mainly by two venture capital firms. After issuance of this stock, the venture capital firms owned approximately 40% of NextG Parent’s capital stock, and Messrs. Georges and Cutrer owned approximately 23% each (on a fully diluted, as-if converted to common stock basis). (Joint Application, pp. 5-6.)

In 2004, NextG Parent issued its Series B Preferred Stock. This stock was purchased primarily by an investment partnership. After completion of the Series B transaction, Messrs. Georges and Cutrer each owned approximately 16% of NextG Parent’s capital stock, the investment partnership owned about 28%, and the venture capital firms that had bought most of the Series A Preferred Stock owned about 28%. (*Id.* at 6.)

*Footnote continued on next page*

The joint application emphasizes that the proposed transaction will not result in any change in the rates that NextG charges or in the services it provides, but will instead give NextG and its affiliates access to much-needed expansion capital:

After the Transaction, NextG will provide the same products and services it does at present, at the same rates and on the same terms and conditions, pursuant to the same telecommunications authorizations, and without changes to any billing protocol. The Transaction should not result in any loss or impairment of service to NextG's customers and customers will use the same contact information for inquiries or other communications with NextG. Indeed, despite the change in ownership of [NextG] Parent, NextG does not currently anticipate any change in its management or operational personnel as a result of the Transaction, thus maintaining the managerial and technical expertise of NextG and [NextG] Parent. Therefore, the indirect transfer of control of NextG should be seamless and transparent to consumers in the State of California.<sup>5</sup> NextG submits that the Transactions will serve the

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In late 2007 and early 2008, NextG Parent issued a third series of preferred stock, Series C, which constituted about 10% of NextG Parent's available stock. The joint application states that the Series C stock was purchased by several investors, none of whom holds more than 5% of the total outstanding shares. As a result of the Series C transaction, Messrs. Georges and Cutrer now hold approximately 13.27% each of NextG Parent's capital stock, the investment partnership holds approximately 27%, and one of the venture capital firms holds approximately 15%. The remaining 30% of NextG Parent's stock "is now held by several other venture firms and individuals -- none of which owns more than 10%." (*Id.* at 6-7.)

The joint application also notes that NextG did not seek Commission approval for issuance of the Series B and C Preferred Stock because those issuances did not result in a transfer of control, and that issuance of the Series A Preferred Stock occurred before NextG filed its original application for a CPCN from this Commission. (*Id.* at 6, fn. 3.)

<sup>5</sup> Despite this alleged seamlessness and transparency, the joint application states that NextG will provide notice of the proposed transaction to all its customers in California. (*Id.*, at 8, n. 5.)

public interest.

Under new ownership, however, NextG, through [NextG] Parent, will gain critically important access to the additional resources of the new investors which should permit NextG to continue to grow and expand its business. This indirect transfer of control, therefore, should give NextG the ability to become a stronger competitor in California and nationwide. MDP entered into the transaction because it views [NextG] Parent (and its subsidiaries) as a prudent investment with significant growth potential. Because NextG will not change its services or management, the only change will be that the ultimate ownership of [NextG] Parent will transfer and control will now reside with MDP. (*Id.* at 7-8; footnotes omitted.)

### **Compliance with California Environmental Quality Act (CEQA)**

The joint application contends that the indirect change of control of NextG contemplated by the proposed merger is not a “project” within the meaning of CEQA, and thus this application is exempt from CEQA review. Citing CEQA Guidelines 15060(c)(2) and 15061(b)(3), the application asserts:

CEQA does not apply where the proposed “activity will not result in any direct or reasonably foreseeable indirect physical change in the environment” or where “it can be seen with certainty that there is no possibility that the proposed activity in question may have a significant effect on the environment.”

The Transaction involves only an indirect change in control of NextG. It will not result in any change in the management or operation of NextG’s facilities or in any additional construction in California. (*Id.* at 8-9; footnotes omitted.)

The joint application also points out that in a number of recent decisions involving changes of control under Pub. Util. Code § 854, the Commission has agreed that the transaction is exempt from CEQA review. *See* D.06-02-033 at 44, 52 (transfer of control of Pacificorp from Scottish Power to MidAmerican Energy Holdings Company held exempt from review pursuant to CEQA Guideline

§ 15061(b)(3)); D.05-12-007 at 15 (transfer of 50% interest in gas storage company held exempt from CEQA review under CEQA Guideline § 15061(b)(3)); D.03-02-071 at 20, 27 (same).

## **Discussion**

As noted above, the application has been filed pursuant to Pub. Util. Code § 854, which requires authorization by the Commission before a company may “merge, acquire, or control . . . any public utility organized and doing business in this state.” The purpose of § 854 and related statutes is to enable the Commission, before any transfer of public utility authority is consummated, to review the situation and to take such action (as a condition of approving the transfer) as the public interest may require. *See* D.05-12-007 at 6; *San Jose Water Co.*, 10 CRC 56 (1916).

We have concluded that this application should be granted because it meets the public interest standard in § 854. Even in situations where applications to transfer control have been protested and approved only after the imposition of conditions, we have noted the public interest in ensuring that utilities subject to our jurisdiction have adequate access to the capital they need for expansion or continued operation. *See, e.g.*, D.03-02-071 at 15 (approving transfer of 50% interest in gas storage company where new investor was well-capitalized and could help prevent a default); D.08-01-018 at 25 (approving settlement conditions on transfer of 100% interest in gas storage company where doing so would provide the company with long-term financial stability and capital for expansion). In this case, the application is unopposed, and granting authority for the indirect transfer of control that the joint applicants are seeking will help to ensure that NextG and its affiliates have the capital they need to offer expanded DAS networks.

It is also clear that this transaction is exempt from CEQA review pursuant to § 15061(b)(3) of the CEQA Guidelines. Although in some cases a change of ownership or control can alter an approved project, result in a new project, or change facility operations in ways having an environmental impact, that is not the case here. As the joint application states, the indirect change of control proposed here “will not result in any change in the management or operation of NextG’s facilities or in any additional construction in California.” (*Id.* at 9.)<sup>6</sup>

### **Request to File Merger Agreement and Financial Statements Under Seal**

The joint applicants have asserted that the financial statements for NextG Parent and its subsidiaries (which were filed as Exhibit D to the joint application), and the May 15, 2009 Merger Agreement and Plan between NextG Parent and Nodes (the full version of which was filed on June 22, 2009)<sup>7</sup> contain competitively-sensitive information and so should be kept confidential pursuant to Pub. Util. Code § 583 and General Order GO 66-C.

We have granted similar requests for confidential treatment of financial data and related agreements in many other decisions, some of which – as in this

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<sup>6</sup> It is also appropriate to point out that in D.07-04-045, the decision granting NextG authority to operate as a full facilities-based provider of local exchange services, the Commission granted NextG authority to construct the facilities addressed in that decision only after compliance with detailed requirements concerning CEQA or any claimed exemption therefrom. *See* D.07-04-045 at 15-17 (Ordering Paragraphs 2-6).

<sup>7</sup> A redacted version of the Merger Agreement and Plan was filed under seal as Exhibit E to the application on May 29, 2009. On June 19, 2009, the assigned Administrative Law Judge (ALJ) issued a ruling directing the joint applicants to file the full, unredacted version of the Merger Agreement and Plan within five days. The joint applicants filed the full, unredacted version of the Merger Agreement and Plan under seal on June 22, 2009.

case – have involved keeping an entire agreement confidential. *See, e.g.,* D.00-05-046, 6 CPUC3d at 203-04; D.00-11-041 at 9-10 (citing cases and granting confidential treatment for entire settlement agreement); D.02-06-074 at 6-7. We see no reason to depart from that well-established approach here, and so will grant the joint applicants’ request that the financial statements of NextG Parent and the Merger Agreement between NextG Parent and Nodes be filed under seal and kept confidential.

### **Miscellaneous Procedural Matters**

Notice of this application appeared in the Commission’s Daily Calendar on June 3, 2009. As noted above, no protests have been received.

In Resolution ALJ 176-3235, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. By this decision, we hereby confirm those determinations.

### **Waiver of Comments**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2) and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

### **Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner, and A. Kirk McKenzie is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The joint application is unopposed.
2. Joint applicant NextG is a Delaware corporation that provides radio frequency transport and backhaul services to CMRS providers in California by means of the DAS networks that it builds.

3. NextG received CPCNs from this Commission in D.03-01-061 and D.07-04-045.

4. In addition to being a party to the joint application here, NextG has filed a Domestic 214 application with the FCC to transfer the authority to provide interstate telecommunications services that it has been granted by the FCC.

5. NextG's corporate parent is NextG Parent, a Delaware corporation that is an unregulated holding company. In addition to NextG, NextG Parent has subsidiaries in 30 other states as well as the District of Columbia and Puerto Rico that design, build, own, operate and manage DAS systems.

6. NextG Parent was founded by John Georges and David Cutrer. Georges and Cutrer originally owned all of the capital stock of NextG Parent, but after the issuance of three series of preferred stock between 2001 and 2008, they now own 13.27% each of the capital stock of NextG Parent.

7. Joint applicant MDP is a Delaware limited liability company headquartered in Chicago that is an experienced private equity investment firm.

8. Nodes is a Delaware corporation created by MDP, as well as other investors who will hold minority interests in NextG Parent after the merger described in the joint application.

9. On May 15, 2009, NextG Parent entered into a Merger Agreement and Plan with Nodes (Merger Agreement) whereby (a) Nodes will merge into NextG Parent, with the latter as the surviving corporation, and (b) Nodes will contribute an amount of money to the new venture specified in the Merger Agreement.

10. After consummation of the proposed merger, six limited partnership funds controlled and managed by MDP will collectively own 61% of the capital stock of NextG Parent.

11. These six limited partnership funds are (a) Madison Dearborn Capital Partners V-A, L.P., (b) Madison Dearborn Capital Partners V-C, L.P., (c) Madison Dearborn Capital Partners V Executive-A L.P., (d) Madison Dearborn Capital Partners VI-C, L.P., (e) Madison Dearborn Capital Partners VI-A, L.P., and (f) Madison Dearborn Capital Partners VI Executive-A, L.P.

12. Although the proposed merger will result in an indirect change of control of NextG, it will not result in any change in the products or services that NextG provides, which will continue to be offered at the same rates and on the same terms and conditions as at present.

13. NextG will continue to be bound by the terms and conditions set forth in D.03-01-061, which granted NextG a CPCN to offer limited facilities-based and resold local exchange, access and interexchange telecommunications services, and by D.07-04-045, which granted NextG a CPCN to offer full facilities-based local exchange services.

14. NextG does not currently anticipate any change in its management or operational personnel.

15. The proposed merger will have no significant effect upon the environment, because no additional construction by NextG will occur in California as a result of the merger, nor will there be any change in the management or operation of NextG's facilities.

16. No hearing is necessary.

### **Conclusions of Law**

1. The joint application should be granted, subject to the conditions set forth in this decision.

2. Subject to the conditions set forth herein, granting the joint application is in the public interest.

3. Following consummation of the proposed merger, NextG will continue to be bound by the terms and conditions set forth in D.03-01-061, which granted it a CPCN to offer limited facilities-based and resold local exchange, access and interexchange telecommunications services, and by the terms and conditions of D.07-04-045, which granted NextG a CPCN to offer full facilities-based local exchange services.

4. The proposed transaction qualifies for an exemption from CEQA pursuant to CEQA Guideline § 15061(b)(3), so additional environmental review is not required.

5. The joint applicants' motion to file under seal, pursuant to Pub. Util. Code § 583, the financial statements of NextG Parent and its subsidiaries for calendar year 2008 and for the period January 1 to March 31, 2009, which motion is dated May 29, 2009, should be granted.

6. The joint applicants' motion to file under seal, pursuant to Pub. Util. Code § 583, the full, unredacted version of the Merger Agreement, which motion is dated June 22, 2009, should be granted.

7. This order should be effective immediately.

## **O R D E R**

### **IT IS ORDERED** that:

1. The joint application of NextG Networks of California, Inc. and Madison Dearborn Partners, LLC for authorization to transfer indirect control of NextG Networks of California, Inc. to Madison Dearborn Partners, LLC by means of a merger of Nodes Merger Corporation into NextG Networks, Inc., is approved pursuant to Pub. Util. Code § 854, subject to the terms and conditions set forth in the following Ordering Paragraphs.

2. NextG Networks of California, Inc. shall continue to be bound by all of the terms and conditions of the certificates of public convenience and necessity granted to NextG Networks of California, Inc. by Decision 03-01-061 and Decision 07-04-045.

3. The indirect change of control approved herein qualifies for an exemption from the California Environmental Quality Act (CEQA) pursuant to CEQA Guideline § 15061(b)(3), so additional environmental review is not required.

4. The May 29, 2009 motion of NextG Networks of California, Inc. and Madison Dearborn Partners, LLC to file under seal the financial statements of NextG Networks, Inc. and its subsidiaries for calendar year 2008 and for the period January 1 to March 31, 2009, and the June 22, 2009 motion of NextG Networks of California, Inc. and Madison Dearborn Partners, LLC to file under seal the full, unredacted version of the May 15, 2009 Merger Agreement and Plan between Nodes Merger Corporation and NextG Networks, Inc., should be granted. The aforesaid materials are placed under seal for a period of two years from the effective date of this decision through and including August 20, 2011, and during that period the material so protected shall not be made accessible or disclosed to anyone other than Commission staff except upon the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If either NextG Networks of California, Inc. or Madison Dearborn Partners, LLC believes that further protection of the aforesaid materials is needed after August 20, 2011, then either of them may file a motion stating the justification for further withholding of these materials from public inspection, or for such other relief as the Commission's rules may then provide. Such a motion shall explain with specificity why the designated materials still need protection

in light of the passage of time involved, and shall attach a clearly identified copy of the ordering paragraphs of this decision to the motion. Such a motion shall be filed at least 30 days before expiration of the protective order set forth in this paragraph.

This order is effective today.

Dated August 20, 2009, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners