

Decision 10-08-010 August 12, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of InSite
Connect LLC for Authority to Transfer, and
of G Clark Smith for Authority to Acquire,
Control of Western States Teleport, Inc.
(U6457C)

Application 10-05-003
(Filed May 3, 2010)

DECISION GRANTING TRANSFER OF CONTROL

1. Summary

InSite Connect LLC and G. Clark Smith filed an application for approval of a transfer of control of Western States Teleport, Inc. By this decision, we authorize the transfer of ownership of Western States Teleport, Inc. on the terms and conditions set forth in the ordering paragraphs.

2. Background

2.1. Procedural

On May 3, 2010, InSite Connect LLC (InSite) and G. Clark Smith (Applicants) filed this application for authorization of the transfer of Western States Teleport, Inc. (WST) to G. Clark Smith (Smith). Notice of Application (A.) 10-05-003 appeared on the Commission's Daily Calendar on May 6, 2010. On June 14, 2010, the assigned Administrative Law Judge (ALJ) issued a ruling, requesting further information. On June 22, 2010, Applicants filed a response to the ruling (Response). InSite's principal place of business is located at 301 N. Fairfax Street, Suite 101, Alexandria, Virginia 22314. Smith's and WST's

principal place of business is located at 160 Franklin Street, Suite 203, Oakland, California 94607.

WST currently holds a Certificate of Public Convenience and Necessity (CPCN) to provide limited facilities-based and resold local and interexchange telecommunications services in California.¹ Transfer of control of WST from Smith to InSite was authorized in D.07-04-040.²

InSite is a Delaware limited liability company that holds a Certificate of Status as a Foreign Corporation with the State of California. InSite is wholly owned by InSite Wireless Group LLC (IWG), which is a Delaware limited liability company that holds a Certificate of Status as a Foreign Corporation with the State of California. WST is a California Corporation. Currently, InSite owns an 80% share of WST and Smith owns a 20% share of WST. Smith is currently the WST vice-president of operations.

2.2. Authority Sought by Applicants

Applicants seek Commission authorization for the transfer of control of WST through the acquisition by Smith of 100% of the issued and outstanding shares of capital stock of InSite. Applicants also seek confidential treatment of Exhibits B, C, D, and E to the application and Exhibit H to the Response which they state contains confidential and proprietary information, which is discussed in detail in Section 4 of this decision.

¹ See Decision (D.) 01-03-023.

² See D.06-06-072.

Pursuant to a Stock Purchase Agreement³ (Agreement) between IWG and Smith dated April 26, 2010, Smith would purchase 100% of the shares of InSite. Even though the Agreement shows a closing date of June 1, 2010 for the transaction, Applicants state in the Response that the transfer of ownership has not yet occurred and will not occur until they receive the requisite authority from the Commission.

Applicants state that the transfer of control of WST to Smith will not affect the current operations, services, rates, charges and facilities of WST. Smith, who has been the operating manager of WST will continue to operate the utility. The only change resulting from approval of the application is that WST will be owned by Smith rather than by IWG (through InSite).

Applicants filed Ownership Disclosure Filings with the Federal Communications Commission (FCC) on June 11, 2010, the status of which are all complete.⁴

3. Discussion

3.1. Smith's Fitness to Provide Telecommunications Services

Since Smith does not currently hold a CPCN to provide telecommunications services in California, it is necessary to perform the same review of Smith as if he were requesting authorization for a new CPCN.

³ Exhibit B to the application.

⁴ FCC File Numbers 0004279543, 0004279545, and 0004279547, which can be found at <http://wireless2.fcc.gov/UlsApp/ownershipSearch/query.jsp>.

3.1.1. Financial Qualifications

Pursuant to Rule 4.B of D.95-12-056, an Applicant for a CPCN for authority to provide limited facilities-based local exchange and interexchange service must demonstrate that it has \$100,000 cash or cash equivalent to meet the firm's start-up expenses. Applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by other telecommunications carriers in order to provide service in California.

In Exhibit E to the application and Exhibit H to the Response, Applicants provide a letter from Smith's bank as well as a recent bank statement, demonstrating that WST has access to over \$100,000 cash or cash equivalent, an amount sufficient to cover start-up expenses and deposits that is reasonably liquid and available.

3.1.2. Managerial and Technical Qualifications

To be granted a CPCN for authority to provide local exchange and interexchange service, an Applicant must make a reasonable showing of managerial and technical expertise in telecommunications or a related business.⁵ Applicants supplied biographical information of its management in its application and Response. This information supports the conclusion that WST will have sufficient expertise and training to operate under its new ownership.

Applicants also verified that no one associated with or employed by it as an affiliate, officer, director, partner, or owner of more than 10% of WST was previously associated with a telecommunications carrier that filed for bankruptcy; was sanctioned by the FCC or any state regulatory agency for failure

⁵ D.95-12-056 at Appendix C, Rule 4.A.

to comply with any regulatory statute, rule, or order; was previously associated with any telecommunication carrier that filed for bankruptcy; has been found either civilly or criminally liable by a court of appropriate jurisdiction for a violation of §§ 17000, et seq. of the California Business and Professions Code or for any actions which involved misrepresentations to consumers; or is currently under investigation for similar violations. We therefore find that WST satisfies the requirements of Rule 4.A of the Initial Rules for Local Exchange Service Competition in California.⁶

3.2. Tariffs

Through WST, Smith intends to provide resold IntraLATA and InterLATA services throughout the state. WST must file a revised tariff reflecting its new ownership.

4. Request to File Under Seal

Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, WST has filed a motion for leave to file Exhibits B, C, D, and E to the application and Exhibit H to the Response under seal. Applicants represent that the information is proprietary and confidential. WST states that the information, if revealed, would place it at an unfair business disadvantage. We have granted similar requests in the past and do so here regarding Exhibits B, C, D, and E to the application filed May 3, 2010 and Exhibit H to the Response filed June 22, 2010.

⁶ D.95-12-056 at Appendix C.

5. Category and Need for Hearing

In Resolution ALJ 176-3253, dated May 6, 2010, 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, as revised herein. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

6. Waiver of Comment Period

No protests were filed in this proceeding. Therefore, this is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

7. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of this application appeared on the Daily Calendar on May 6, 2010. No protests have been filed. A hearing is not required.
2. WST currently holds a CPCN to provide limited facilities-based and resold local and interexchange telecommunications services in California.
3. Transfer of control of WST from Smith to InSite was authorized in D.07-04-040.
4. InSite is a Delaware limited liability company that holds a Certificate of Status as a Foreign Corporation with the State of California.

5. InSite is wholly owned by IWG, which is a Delaware limited liability company that holds a Certificate of Status as a Foreign Corporation with the State of California.

6. WST is a California Corporation.

7. Currently, InSite owns an 80% share of WST and Smith owns a 20% share of WST.

8. Smith is currently the WST vice-president of operations.

9. Through his acquisition of 100% of InSite, Smith will own 100% of WST.

10. WST's post-transfer management has the technical, managerial, and financial qualifications necessary to exercise control of WST.

11. Applicants state that the transfer of control of WST to Smith will not affect the provision of telecommunications services to customers. WST will continue to offer the same services to customers at the same rates.

12. Applicants filed Ownership Disclosure Filings with the FCC on June 11, 2010, the status of which are all complete.

13. Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, WST filed a motion for leave to file confidential materials under seal, including Exhibits B, C, D, and E to the application and Exhibit H to the Response. Applicants represent that the information is proprietary and if made public would place it at an unfair business disadvantage.

Conclusions of Law

1. This application should be approved.

2. WST should continue to be subject to the applicable Commission's rules, decisions, General Orders, and statutes that pertain to California public utilities.

3. WST should file revised tariffs reflecting its new ownership within 30 days of the date of this decision.

4. WST's motion to file under seal its Exhibits B, C, D, and E to the application and Exhibit H to the Response should be granted for 2 years.

O R D E R

IT IS ORDERED that:

1. Application 10-05-003 for authority under Public Utilities Code Section 854 to transfer control of Western States Teleport, Inc. to G. Clark Smith is granted, effective as of the date of this order.

2. Western States Teleport, Inc. must file revised tariffs reflecting its new ownership within 30 days of the date of this decision.

3. Western States Teleport, Inc. and G. Clark Smith must notify the Director of the Commission's Communications Division in writing of the transfer of control, as authorized herein, within 20 days of this order. A true copy of the instrument(s) of transfer must be attached to the notification.

4. In addition to all the requirements applicable to non-dominant interexchange carriers included in Attachments A, B, and C to this decision, Western States Teleport, Inc. continues to be subject to all applicable Commission's rules, decisions, General Orders, and statutes that pertain to California public utilities.

5. Western States Teleport, Inc. must continue to comply with the Consumer Protection Rules contained in General Order 168.

6. Western States Teleport, Inc. must continue to annually pay the user fee and public purpose surcharges specified in Attachment A. Per the instructions in Exhibit E to Decision 00-10-028, the Combined California Public Utilities Commission Telephone Surcharge Transmittal Form must be submitted even if the amount due is \$0. Under Public Utilities Code Section 405, carriers that are in

default of reporting and submitting user fees for a period of 30 days or more will be subject to penalties including suspension or revocation of their authority to operate in California. Therefore, carriers must report user fees even if the amount due is \$0.

7. Western States Teleport, Inc. must provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information must be updated if the name or telephone number changes, or at least annually.

8. Western States Teleport, Inc. must continue to file an annual report with the Director of the Communications Division, in compliance with General Order 104-A, on a calendar-year basis with the information contained in Attachment B to this decision.

9. Western States Teleport, Inc. must continue to file an affiliate transaction report with the Director of the Communications Division, in compliance with Decision 93-02-019, on a calendar-year basis using the form contained in Attachment C.

10. Western States Teleport, Inc.'s motion to file Exhibits B, C, D, and E to its application and Exhibit H to the Response under seal is granted. The information will remain under seal for a period of two years after the date of this order. During this two-year period, this information may not be viewed by any person other than the assigned Commissioner, the assigned Administrative Law Judge, the Assistant Chief Administrative Law Judge, or the Chief Administrative Law Judge, except as agreed to in writing by Western States Teleport, Inc. or as ordered by a court of competent jurisdiction. If Western States Teleport, Inc. believes that it is necessary for this information to remain

under seal for longer than two years, Western States Teleport, Inc. may file a new motion at least 30 days before the expiration of this limited protective order.

11. Application 10-05-003 is closed.

This order is effective today.

Dated August 12, 2010, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners

ATTACHMENT A

REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS AND INTEREXCHANGE CARRIERS

1. Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

2. Applicant is subject to the following fees and surcharges that must be regularly remitted. Per the instructions in Exhibit E to Decision (D.) 00-10-028, the Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is \$0.

- a. The current 1.15% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-17071, dated March 1, 2007, effective April 1, 2007);
- b. The current 0.20% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-17127, dated December 20, 2007, effective January 1, 2008);
- c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.18% of gross intrastate revenue (Resolution M-4819), dated June 7, 2007, effective July 1, 2007;
- d. The current 0.110% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-17259, dated April 8, 2010, effective May 1, 2010);
- e. The current 0.45% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as

modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F., D.07-12-054); Resolution T-17215, dated October 15, 2009 effective December 1, 2009;

- f. The current 0.00% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Advanced Services Fund (D.07-12-054); and
- g. The current 0.079% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G, Resolution T-17142, dated April 24, 2008, effective June 1, 2008).

Note: These fees change periodically. In compliance with Resolution T-16901, December 2, 2004, Applicant should check the joint tariff for surcharges and fees filed by Pacific Bell Telephone Company (d/b/a AT&T California) and apply the current surcharge and fee amounts in that joint tariff on end-user bills until further revised.

3. Applicant is a competitive local exchange carrier. The effectiveness of its future tariffs is subject to the requirements of General Order 96-B and the Telecommunications Industry Rules (D.07-09-019).

4. Applicant is a nondominant interexchange carrier (NDIEC). The effectiveness of its future NDIEC tariffs is subject to the requirements of General Order 96-B and the Telecommunications Industry D.07-09-019).

5. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in #2 above.

6. Applicant shall file a service area map as part of its initial tariff.

7. Prior to initiating service, Applicant shall provide the Commission's Consumer Affairs Branch with the name and address of its designated contact

person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.

8. Applicant shall notify the Director of the Communications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

9. Applicant shall notify the Director of the Communications Division in writing of the date local service is first rendered to the public within five days after service begins.

10. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

11. In the event Applicant's books and records are required for inspection by the Commission or its staff, it shall either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

12. Applicant shall file an annual report with the Director of the Communications Division, in compliance with General Order 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

13. Applicant shall file an affiliate transaction report with the Director of the Communications Division, in compliance with D.93-02-019, on a calendar-year basis using the form contained in Attachment D.

14. Applicant shall ensure that its employees comply with the provisions of Pub. Util. Code § 2889.5 regarding solicitation of customers.

15. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Communications Division in writing of its compliance.

16. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in #2 above, and has not received written permission from the Communications Division to file or remit late, the Communications Division must prepare for Commission consideration a resolution that revokes Applicant's Certificate of Public and Convenience and Necessity.

17. Applicant is exempt from Rule 3.1(b) of the Commission's Rules of Practice and Procedure 3.1(b).

18. Applicant is exempt from Pub. Util. Code §§ 816 - 830.

19. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.

20. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Communications Division's Bankruptcy Coordinator.

21. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT A)

ATTACHMENT B

ANNUAL REPORT

An original and a machine readable, copy using Microsoft Word or compatible format shall be filed with the California Public Utilities Commission, State Office Building, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Pub. Util. Code.

Required information:

1. Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (*e.g.*, corporation, partnership, sole proprietorship, etc.).

If incorporated, specify:

- a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Number and date of the Commission decision granting the Certificate of Public Convenience and Necessity.
 7. Date operations were begun.
 8. Description of other business activities in which the utility is engaged.

9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.
12. Cash Flow statement as of December 31st of the calendar year for which information is submitted, for California operations only.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT B)

ATTACHMENT C

CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction report.

- Form of organization (*e.g.*, corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (*e.g.*, controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership);
- Voting rights held by the utility and percent; and
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (*e.g.*, a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as “controlling corporations” of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public

utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariff services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the Commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT C)