

Decision 03-08-079 August 22, 2003

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

Application for Exemption Pursuant to Public Utilities Code Section 853(b), or in the Alternative, Approval under Public Utilities Code Section 854(a) for the Transfer of Control of Metromedia Fiber Network Services, Inc., Debtor-In-Possession, (U-6030-C) from Metromedia Fiber Network, Inc., Debtor-In-Possession, to a Reorganized Metromedia Fiber Network, Inc.

Application 03-06-010  
(Filed June 10, 2003)

**OPINION GRANTING AUTHORIZATION TO TRANSFER CONTROL**

**Summary**

Metromedia Fiber Network Services, Inc. (MFNS) and Metromedia Fiber Network, Inc. (MFN) (jointly, the Applicants),<sup>1</sup> pursuant to § 853(b) of the Pub. Util. Code, seek an exemption from § 854 to permit the indirect transfer of control of MFNS from MFN to a newly reorganized Metromedia Fiber Network, Inc. (Reorganized MFN). Alternatively, they request approval of the transaction under Pub. Util. Code § 854(a). Applicants declare that the transaction is integral to a Plan of Reorganization (the Plan) that will enable MFNS to emerge from bankruptcy. They also assert that the transfer will restore MFNS' long-term viability and ability to continue providing service to its California customers. In accordance with § 854(a), the application is granted.

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<sup>1</sup> As noted in the caption, Applicants are Debtors-In-Possession.

## **Jurisdiction**

Applicants filed this matter pursuant to Pub. Util. Code § 853(b) and Rules 35 and 36 of the Commission's Rules of Practice and Procedure. Section 853(b) gives the Commission the discretion to exempt a public utility from §§ 851 through 855 of the Pub. Util. Code if it finds that an application under these provisions is not necessary to protect the public interest.

Applicants ask the Commission alternatively to consider this matter in accordance with § 854. Section 854 precludes any person or corporation from transferring control of any public utility organized and doing business in California without first securing authorization to do so from this Commission upon a finding that the transfer is in the public interest. The purpose of this and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action as the public interest may require. (San Jose Water Co. 10 CRC 56 (1916).)

Given the complexity of the proposed transaction, the public interest is best served through Commission review of the details of this application. Therefore, Applicants' request for an exemption is denied, and this matter is considered under § 854.

## **Description of the Parties**

MFNS is a Delaware corporation authorized to provide interLATA and intraLATA services as a non-dominant interexchange and competitive local carrier in California pursuant to Decisions (D.) 98-07-108 and D.01-05-023, respectively. MFNS also received authority to construct its San Francisco Bay and Los Angeles Area network facilities in accordance with a California Environmental Quality Act-compliant, route-specific mitigated negative declaration in D.00-09-039.<sup>2</sup> It primarily provides services in California to

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<sup>2</sup> Issued on September 7, 2000. On May 14, 2001, MFNS received further authorization to construct eighty modifications and customer connections to its network following

telecommunications carriers, large businesses and government agencies through long-term contracts.

MFN, the parent of MFNS, is a Delaware corporation and holding company for telecommunications operating subsidiaries here and throughout the United States.<sup>3</sup> On May 20, 2002, MFNS, as well as MFN and most of its domestic subsidiaries (collectively, the MFN Companies), filed voluntary petitions for reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York.<sup>4</sup> The MFN Companies have continued in the management and operation of their businesses and properties as Debtors-In-Possession under §§ 1107 and 1108 of the Bankruptcy Code; no trustee or examiner has been appointed.<sup>5</sup>

Both the Kluge Trust<sup>6</sup> and Mutual Shares Fund (Mutual)<sup>7</sup> are U.S. citizens whose principal businesses are investments. In the application, Applicants

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additional route-specific environmental review under California Environmental Quality Act in D.01-05-056.

<sup>3</sup> The majority of MFN's Board of Directors was elected by Metromedia Company, a U.S. holding company that maintains investments in a number of diverse business industries through its ownership of all the shares of MFN's Class B common stock. The John W. Kluge Virginia Trust (VA Trust) is a general partner of Metromedia. The VA Trust, whose sole beneficiary is John W. Kluge, is a trust established pursuant to a certain trust agreement, dated May 30, 1984, as amended and restated between John W. Kluge, David Finkelstein, and Stuart Subotnick as trustees.

<sup>4</sup> See *In re Metromedia Fiber Network, Inc., et al.*, Case No. 02-22736 (ASH) through 02-22742 (ASH); 02-22744 (ASH); 02-22751 (ASH) through 02-22754 (ASH) (Bankr.S.D.N.Y.), filed May 20, 2002 (Bankruptcy Case).

<sup>5</sup> On May 29, 2002, the Office of the United States Trustee appointed an eleven member official committee of unsecured creditors (Creditors' Committee).

<sup>6</sup> The Kluge Trust means John W. Kluge, Chase Manhattan Bank and Stuart Subotnick, trustees under a trust agreement dated May 30, 1984, as amended and restated, between John W. Kluge as grantor and John W. Kluge and Manufacturers Hanover Trust Company as trustees. Mr. Kluge is the sole beneficiary of the trust.

<sup>7</sup> Mutual is a mutual fund operating under the aegis of Franklin Templeton Investments. None of Mutual's shareholders will hold a 10% or greater ownership interest in Reorganized MFN.

anticipated that only these two shareholders would hold 10% or more of the common stock of Reorganized MFN. However, subsequent to this filing, Mutual and other affiliated companies sold certain of their claims to a third party, Fiber, LLC (Fiber).<sup>8</sup> As a result, it appears that Fiber<sup>9</sup> will hold a non-controlling equity interest of between 10 and 19 percent (calculated on a fully diluted basis) in Reorganized MFN after emergence from bankruptcy and following the Rights Offering.<sup>10</sup>

### **The Transaction**

Overall, Applicants describe their proposal as a basic “reorganization to emerge from bankruptcy in which creditors are obtaining ownership interests but no single entity will obtain majority ownership or control.”

Upon implementation of the Plan, all then-current equity interests in MFN will be extinguished and deemed cancelled. The authorized capital stock of Reorganized MFN will consist of 30 million shares of new equity (New Common Stock).<sup>11</sup> The holders of New Common Stock will have one vote for each issued

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<sup>8</sup> On July 2, 2003, Applicants filed a Second Amended Plan of Reorganization and amended Disclosure Statement, and the Bankruptcy Court accepted the Disclosure Statement. Letter of Clarification from MFN Companies’ counsel to assigned Administrative Law Judge, dated July 17, 2003 (*Ltr. of Clarification*).

<sup>9</sup> Fiber is a limited liability company organized under the laws of the state of Washington. The primary business of Fiber is communications investments. The sole member of Fiber is COM Holdings, LLC (COM). COM is also a limited liability company, organized under the laws of Washington, whose primary business is communications investments. The sole member of COM is Craig O. McCaw, a U.S. citizen. The address of Fiber, COM, and Mr. McCaw is 2300 Carillon Point, Kirkland, WA 98033. *Ltr. of Clarification* at 3.

<sup>10</sup> The Rights Offering, as now amended, guarantees Fiber the right to purchase 417,303 shares, valued at 12.5 million, in the Rights Offering. MFNS notes that the amount of Fiber’s ownership interest in MFN may change going forward if Fiber purchases additional claims from other claimholders; however, Fiber seems to have no current plans to purchase ownership interests that would exceed 19 percent in the aggregate. *Id.*

<sup>11</sup> Par value will be \$0.01 per share.

and outstanding share with no cumulative voting rights. The Reorganized MFN board will have seven directors, of which one will be the Chief Executive Officer of the company, one will be appointed by the Kluge Trust, and five will be selected by the Creditors' Committee.

The Plan further provides that Reorganized MFN will issue New Common Stock to holders of certain pre-petition claims against MFN (MFN Unsecured Claims) and certain pre-petition claims against MFN subsidiary companies (Subsidiary Unsecured Claims). Holders of allowed MFN and Subsidiary Unsecured Claims will receive *pro rata* shares of New Common Stock issued under the Plan.<sup>12</sup> Holders of disputed MFN and Subsidiary Unsecured Claims will receive their *pro rata* shares of the New Common Stock issued for their respective classes of claims if and to the extent such holders resolve their disputes.

Shares of New Common Stock will also be issued to the holders of certain pre-petition partially secured claims. Holders of claims known as "Class 2" or "Schedule 1 Other Secured Claims" who vote for the plan will receive a holder-specific number of shares of New Common Stock.<sup>13</sup> In addition, the Kluge Trust will receive New Common Stock<sup>14</sup> in exchange for the conversion of certain secured claims (Kluge Trust Secured Claims) and the reinvestment in cash of certain prior distributions, including prior interest payments.

The New Common Stock issued to holders of MFN Unsecured Claims, Subsidiary Unsecured Claims, Schedule 1 - Other Secured Claims, and Kluge

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<sup>12</sup> 1,647,800 and 2,688,437 shares, respectively.

<sup>13</sup> A maximum of 3,469,026 shares in the aggregate will be given to the eight entities holding Schedule 1 Other Secured Claims. However, the number of aggregate shares will be reduced by the number of shares of New Common Stock attributable to any claim holder that rejects the Plan. Such holders that reject the Plan will receive compensation in another form as well as the right to recover as a Subsidiary Unsecured Claim holder in certain circumstances.

<sup>14</sup> 944,737 shares.

Trust Secured Claims is subject to immediate dilution through a “Rights Offering.” Reorganized MFN will offer New Common Stock (the Rights Shares)<sup>15</sup> to holders of MFN and Subsidiary Unsecured Claims for an aggregate of \$50 million in additional cash.

Applicants anticipate the Rights Offering to begin at or shortly after the Plan closing, subject to the receipt of any required approvals. Holders of MFN Unsecured Claims and Subsidiary Unsecured Claims will have the opportunity to exercise rights to subscribe to a *pro rata* portion of the Rights Shares.<sup>16</sup> Thereafter, if any outstanding rights have not been exercised, the Plan requires the Kluge Trust to purchase them.<sup>17</sup>

The Plan also provides for the issuance of Five and Seven Year Warrants to MFN Unsecured Claims Holders to enable them to purchase specified amounts of New Common Stock at a premium.<sup>18</sup> Finally, the Plan allows for the adoption of an incentive stock option and restricted stock grant plan, which would give Reorganized MFN’s Board of Directors the opportunity to offer such to its management and employees and those of its subsidiaries.

Applicants contend that the proposed transaction is in the public interest because it will improve the financial condition of MFNS, and will maintain the quality of the management as well as the service provided to customers. They further assert that the proposal is fair and reasonable to all MFNS employees because implementation of the Plan will strengthen the company and ensure its

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<sup>15</sup> 1,669,242 shares.

<sup>16</sup> For approximately 30 days after the commencement of the Rights Offering. These rights are not transferable.

<sup>17</sup> The exercise price will be \$29.95 per share, for an amount not to exceed 834,621 Rights Shares for \$25 million.

<sup>18</sup> Specifically, the Five Year Warrants will enable MFN Unsecured Claims Holders to purchase a *pro rata* share of 656,250 shares of New Common Stock with an exercise price of \$20 per share, with the Seven Year Warrants enabling a *pro rata* share purchase of 656,250 shares at \$24 per share.

viability, thereby benefiting the employees. By enhancing MFNS' financial condition and ability to compete, the Plan's implementation will also be fair and reasonable to all shareholders and beneficial to the California and U.S. economies. Upon emergence from bankruptcy, Reorganized MFN will change its name to AboveNet, Inc. Applicants further seek leave to change MFNS' corporate name to AboveNet Communications, Inc.

### **Discussion**

Where an acquiring company does not possess a certificate of public convenience and necessity (CPCN), the Commission applies the same requirements as to an applicant seeking a CPCN to exercise the type of authority held by the company being acquired: a minimum of \$100,000 in cash or cash equivalent, and technical expertise in telecommunications or a related business. Applicants state that the Reorganized MFN not only will obtain the assets and operations of MFNS, but also will retain the current management with its substantial knowledge and expertise in maintaining and operating telecommunications networks and providing telecommunications services. They do not expect significant changes in MFNS' current management as a result of the restructuring, and anticipate that current management will continue to oversee the operating subsidiaries' day-to-day operations. Accordingly, the Commission finds that the Reorganized MFN possesses the technical expertise required.

To demonstrate the Reorganized MFN's financial qualifications once it emerges from bankruptcy, Applicants note that the company will benefit from a major reduction in its current debt as well as additional funding through the Rights Offering. It also submits projected statements of operations and cash flow<sup>19</sup> for a five-year period. Analyzed together, it appears that the Reorganized MFN will have sufficient resources to meet Commission requirements.

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<sup>19</sup> Attached as Exhibit D. Applicants point out that these projections are not directly

Applicants also contend that to the best of their knowledge no affiliate, officer, director, partner, or owner of more than 10% of the Reorganized MFN, or any person acting in that capacity, has been sanctioned by the Federal Communications Commission or any state regulatory commission for failure to comply with any regulatory statute, rule or order; and no such person has been found criminally or civilly liable for a violation of § 17000 et seq. of the California Business and Professions Code or for any actions that involved misrepresentations to consumers, or is currently under investigation for similar violations.

Applicants state that the direct shareholding of MFNS will not change; the company will have the same relationship with the Reorganized MFN as it has had with MFN. Since the proposal before the Bankruptcy Court involves a complex financing transaction which continues the existing affiliates and retains a number, if not all, of the current officers, directors and partners of MFN, Applicants are unable to declare that none of the aforementioned has held similar positions with a bankrupt telecommunications carrier.<sup>20</sup> However, it is significant that these entities and persons will be working to revive and financially strengthen MFNS and the other related businesses as they emerge from bankruptcy. MFNS further appears to be current on its payment of required regulatory fees to the Commission. Thus, Applicants satisfy Commission requirements on these factors.

In sum, it appears that MFNS will gain an improved capital structure that should enable it to compete effectively in California. Its customers will continue to be served by qualified consumer service representatives and receive telecommunications services at the same rates, terms and conditions that they have had. Additionally, the Commission has no objection to MFNS' changing its

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derived from historical results, and are subject to significant economic and competitive uncertainties.

<sup>20</sup> Specifically, a carrier that entered into bankruptcy during their association or tenure.

corporate name following emergence from bankruptcy; the request appears reasonable.

This application proposes no new construction. Accordingly, there is no possibility that the Proposed Transaction contemplated herein may have any significant impact on the environment. There are no protests to this application. Applicants' request is granted.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to § 311(g)(2) of the Pub. Util. Code, the otherwise applicable 30-day period for public review and comment is being waived. Pursuant to §§ 851-854, the Executive Director may grant noncontroversial applications by nondominant telecommunications carriers to transfer assets or control.<sup>21</sup>

### **Categorization**

In Resolution ALJ-176-3115, dated on June 19, 2003, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, the Commission concludes that a public hearing is not necessary; thus, the preliminary determinations in ALJ-176-3115 will not be altered.

### **Assignment of Proceeding**

The Assigned Commissioner in this matter is President Michael Peevey and the assigned Administrative Law Judge is Jacqueline A. Reed.

### **Findings of Fact**

1. Resolution ALJ 176-3115 determined that this was a ratesetting proceeding and that hearings were not necessary.

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<sup>21</sup> *Re Crico Telecommunications of San Jose*, D.87-10-035, 1987 Cal. PUC LEXIS 283; *Re California Associations of Long Distance Telephone Companies*, D.86-08-057, 1986 Cal. PUC LEXIS 786.

2. Notice of this application appeared in the Commission's Daily Calendar of June 20, 2003.

3. No protests were filed.

4. Applicants requested an exemption from §§ 851 through 855 of the Code; alternatively, they sought review under § 854.

5. Pub. Util. Code § 854(b) and (c) are not applicable in this instance because neither of the applicants has more than \$ 500 million in gross annual California revenues.

6. Reorganized MFN will have sufficient financial resources to meet the Commission's requirements to provide facilities-based and resold local exchange and interexchange telecommunications services.

7. Given Applicants' stated intention to make few changes in the day-to-day operations or management of MFNS, Reorganized MFN will possess the necessary technical expertise required by the Commission.

8. It is possible that one or more of the affiliates, directors, officers or partners of the reorganized holding company has been associated with a telecommunications carrier that entered bankruptcy during their association or tenure.

9. No new construction is being proposed in this application.

10. Reorganized MFN has no complaints (alleging fraud or significant wrongdoing) pending against it before this Commission, the Federal Communications Commission or any other state commission.

### **Conclusions of Law**

1. Applicants request for an exemption from §§ 851 through 855 of the Pub. Util. Code is denied so that the details of the complex transaction proposed may be reviewed.

2. The proposed transfer of control of MFNS to Reorganized MFN is not adverse to the public interest.

3. Applicants' request to change the corporate name of MFNS after it emerges from bankruptcy is reasonable.

4. Although one or more of the newly-obtained affiliates, directors, officers or partners of Reorganized MFN may have been associated with a telecommunications carrier that became bankrupt during their association or tenure, these entities and persons will be working to revive and strengthen MFNS and the other related businesses as they emerge from bankruptcy.

5. This proceeding is designated as a ratesetting proceeding; no protests have been received; no hearing is necessary.

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

7. Reorganized MFN meets the Commission's requirements for an acquiring company of authorized providers of facilities-based and resold local exchange and interexchange telecommunications services.

8. The application should be approved; since the matter is uncontested, the decision should be effective on the date it is signed.

9. The application is noncontroversial and should be granted by the Executive Director pursuant to authority delegated by the Commission.

## **O R D E R**

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

1. Metromedia Fiber Network, Inc. (MFN) and Reorganized Metromedia Fiber Network, Inc. (Reorganized MFN) are authorized, pursuant to Pub. Util. Code § 854(a), to transfer control of Metromedia Fiber Network Services, Inc. (MFNS) from MFN to Reorganized MFN, as set forth in Application (A.) 03-06-010.

2. MFN and Reorganized MFN shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as

authorized herein, within 10 days of the later of either the date of consummation of such transfer, or the date of the signing of this order.

3. If MFNS changes its corporate name after its emergence from bankruptcy, it shall file copies with the Commission of its: (1) amended Articles of Incorporation; (2) qualifying document to transact business in California as a foreign corporation reflecting the new name; (3) amended tariff; and (4) Advice Letter seeking approval of the name change.

4. The corporate identification numbers assigned to MFNS shall continue to be used by it or under its new corporate name, and shall be included in all original filings with this Commission and in the titles of other pleadings filed in existing cases.

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

6. A.03-06-010 is closed.

This order is effective today.

Dated August 22, 2003, at San Francisco, California.

/s/ WILLIAM AHERN

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WILLIAM AHERN  
Executive Director