

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

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March 25, 2014

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Ratesetting

TO PARTIES OF RECORD IN APPLICATION 12-07-021.

This is the proposed decision of Administrative Law Judge Richard Clark. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's May 1, 2014 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ TIMOTHY J. SULLIVAN

Timothy J. Sullivan, Chief

Administrative Law Judge (Acting)

TJS:lil

Attachment

Decision PROPOSED DECISION OF ALJ CLARK (Mailed 3/25/2014)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Cebridge Telecom CA, LLC (U6996C), Cequel Communications Holdings, LLC and Nespresso Acquisition Corporation for Expedited Approval of Indirect Transfer of Control of Cebridge Telecom CA, LLC, Pursuant to California Public Utilities Code Section 854(a).

Application 12-07-021
(Filed July 25, 2012)

**DECISION IMPOSING PENALTY FOR VIOLATION OF
PUBLIC UTILITIES CODE SECTION 854(a)**

1. Summary

On July 25, 2012, Cebridge Telecom CA, LLC (Cebridge), Cequel Communications Holdings, LLC and Nespresso Acquisition Corporation (Nespresso) filed their Joint Application for the Expedited Approval of Indirect Transfer of Control of Cebridge. On November 29, 2012, in Decision 12-11-037, the Commission approved the transfer of control sought in the application, but kept the proceeding open in order to determine whether the Commission should impose penalties for alleged violations of Public Utilities Code Section 854(a).¹ This decision requires Applicants to pay a fine of \$130,000 based on their willful and knowing failure to obtain Commission authorization for this transfer of control as required by Section 854(a).

¹ Ordering Paragraph 3 at 10.

2. Background

On July 25, 2012, Cebridge Telecom CA, LLC (Cebridge), Cequel Communications Holdings, LLC (Cequel) and Nespresso Acquisition Corporation (Nespresso) filed Application (A.) 12-07-021, their Joint Application for the Expedited Approval of Indirect Transfer of Control of Cebridge, pursuant to California Public Utilities Code Section (Pub. Util. Code §) 854(a) (Application or Joint Application).

On August 2, 2012, Resolution ALJ 176-3298 preliminarily determined that this proceeding was ratesetting and that hearings would not be necessary.

On November 29, 2012, in Decision (D.) 12-11-037, the Commission approved the transfer of control sought in the application, but kept the proceeding open in order to determine whether the Commission should impose penalties for alleged violations of Pub. Util. Code § 854(a).²

On March 20, 2013, the Administrative Law Judge (ALJ) issued a Ruling Setting Prehearing Conference (PHC) in this, the penalty phase of the proceeding.

On April 12, 2013, Cebridge and Cequel submitted a Motion for Leave to file a PHC Statement.

On April 16, 2013, a PHC took place in San Francisco to establish the service list, discuss the scope, and develop a procedural timetable for the penalty phase of this proceeding. During the PHC the ALJ granted the Joint Applicants' April 12, 2013 motion and the PHC statement was admitted to the record. Cebridge and Cequel also asserted that evidentiary hearings were not required,

² Ordering Paragraph 3 at 10.

and that the remaining issues could be addressed through stipulated facts and one round of briefing.

On June 19, 2013, the assigned Commissioner issued the penalty phase scoping memo which:

1. Imposed an ex-parte ban pursuant to Rule 8.3(b),
2. Identified the scope of the proceeding as:
 - a. Whether the Joint Parties violated Pub. Util. Code § 854(a) when control of Cebridge was transferred prior to the Commission's November 29, 2012 approval of the transfer,
 - b. Whether the Commission should impose a penalty upon the Joint parties for violation of Pub. Util. Code § 854(a), and
 - c. The appropriate amount of the penalty, if any, that should be imposed upon the Joint Parties for violation of Pub. Util. Code § 854(a).
3. Directed the Joint Applicants to file a stipulation and/or brief that:
 - a. addressed **all** of the factors that the Commission considers in establishing whether a penalty should be assessed, and if so, the amount of the penalty;
 - b. A full and accurate description of the rulings issued by the ALJ in order to elicit information not included in the original application;
 - c. The specific reasons that the transaction needed to close on November 15, 2012; and
 - d. The costs, in dollars, that were avoided by closing the transaction on November 15th rather than November 29th.

On July 19, 2013, Cebridge submitted its brief, with an accompanying declaration of facts.

On August 13, 2013, the ALJ issued an electronic ruling directing the Joint Applicants to file a supplement to their application containing:

1. A copy of their application to the Federal Communications Commission (FCC) for transfer of control, and
2. An explanation relative to their decision to characterize their CPUC application as an indirect transfer of control, their decision not to disclose the role of and provide identifying information relative to numerous parties to the transfer of equity ownership, and an analysis of whether the non-submission of that information was a violation of our Rule 1.1.

On September 9, 2013, the Joint Applicants filed their Response to the ALJ's August 13th Ruling.

3. Analysis and Application of D.98-12-075 Penalty Factors to the Evidence

We have concluded, based upon the application of the criteria adopted by the Commission in D.98-12-075 to the facts of this case, that the Applicants should be fined for their violation of § 854(a).

Applicants failed to comply with § 854(a) by knowingly and willfully transferring control of Cebridge to Nespresso without Commission authorization. Violations of § 854(a) are subject to monetary penalties under § 2107.

In their April 12, 2013 PHC Statement, Cebridge and Cequel stated that "Joint Applicants do not dispute that the transfer of control of Cebridge Telecom CA occurred shortly before the Commission's approval of this application on November 29, 2012." Cebridge and Cequel also stipulated "to the record that the consummation of the transaction resulted in a technical violation of Pub. Util. Code § 854(a)" and thereby effectively narrowed the issues of this proceeding to "whether the Commission should impose a penalty for the violation and, if so, the appropriate amount of that penalty." In their July 19, 2013 brief, Joint

Applicants have asserted that “circumstances mitigate any penalties here, so the Commission should impose a penalty of no greater than \$5,000, if any.”³

Therefore, it is clear that Applicants violated § 854(a) by transferring control of Cebridge prior to Commission approval and the remaining issue is whether a penalty should be imposed and of what magnitude.

3.1. Severity of the Offense

The size of a fine should be proportionate to the severity of the offense, based on the level of physical harm, economic harm, harm to the regulatory process, and the number and scope of violations.⁴ Applicants’ violation of § 854(a) did not cause any physical or economic harm to others. Further, the violation of § 854(a) affected few, if any, consumers. The primary factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code. This factor must be weighed against the other factors in determining the amount of the fine.

3.2. The Application’s Insufficient Content, Given the Nature and Complexity of the Transaction

The Application did not reveal the complexity of the transaction and the identities of all of the parties to the transaction who were acquiring control over Cebridge. Joint Applicants attempted to obtain our expedited approval of a complex undertaking that was, in very significant ways, not sufficiently revealed, explained or documented. The Joint Applicants’ decision to narrow the

³ July 19, 2013 Brief at 3.

⁴ See D.98-12-075, 1998 Cal. PUC LEXIS 1016, *71 - *73.

scope of their initial submission had the unfortunate effect of delaying the processing of the Application. This application is not simply about the indirect transfer of control of Cebridge to Nespresso acting as a holding company for the equity of Cequel.⁵ This Application is also about the acquisition of control of Cebridge's operation by a group of multinational equity investors⁶ via the formation of Nespresso.⁷ The size and complexity of the transfer of control and the identity of all of the parties involved in the transfer are material considerations in this proceeding, and should have been revealed and explained to us in the original application in much the same way that their true nature and complexity were revealed in Cequel and Nespresso's July 20, 2012 application to the FCC.

The application was filed on July 25, 2012 and asked for the Commission's expedited final decision granting the transfer within sixty days. The Commission's final decision (D.12-11-037) was issued on November 29, 2012, which was one hundred twenty seven days after the application was filed. A review of Applicants' submission relative to the ALJ's efforts to obtain relevant information⁸ reveals that twenty eight of the one hundred twenty seven days required to process this application was the direct result of the ALJ's need to obtain relevant information not submitted with the application, and to instruct Cebridge to pay its past due User Fees. We can therefore reasonably conclude

⁵ Application at 4.

⁶ *Ibid.* at 5 - 6.

⁷ *Ibid.* at 9.

⁸ Declaration of Craig L. Rosentahl, Attachment A to July 19, 2013 Brief of Joint Applicants.

that a sufficient submission by Joint Applicants would have resulted in a date of approval of the application within approximately 99 days from the date of application.

Commission meeting number 3303 was held on October 25, 2012, 90 days after the filing of the application. On October 25, 2012 Joint Applicants secured \$500 million bond financing for closing the transaction.⁹ Beginning on October 25 Joint Applicants incurred approximately \$90,000 in interest per day.¹⁰

On November 1, 2012, the Joint Applicants received approval from the FCC, after the federal Department of Justice completed its review of the transaction.¹¹

Commission meeting number 3304 was held on November 11, 2012, 107 days after the filing of the application, and 5 days before Joint Applicants' decision to violate § 854(a).

By November 12, 2012, the Joint Applicants had incurred over \$1.5 million in interest related to bond financing for the transaction while the new owners had not yet acquired ownership of Cequel. Joint Applicants continued to incur approximately \$90,000 in additional interest every day thereafter.

On November 15, 2012, Joint Applicants informed the ALJ, via e-mail with an attached letter, that they were closing the transaction on November 16, 2012 due to the costs of financing the undertaking and significant business uncertainties and distractions, which Joint Applicants desired to minimize as

⁹ *Ibid.* at 3.

¹⁰ *Ibid.*

¹¹ *Ibid.* at 4.

much as possible.¹² Waiting to close the transaction until receiving California Public Utilities Commission (CPUC) approval would have cost the Joint Applicants another \$1.17 million in interest (\$90,000 x 13). The ALJ responded via e-mail on November 15th and informed Joint Applicants' legal counsel that:

PU Code section 854(a) provides that any transfer of control undertaken without prior Commission approval is void and of no effect. Moreover, a violation of section 854(a) is subject to penalties, pursuant to section 2107, or \$500 to \$50,000 per violation. You are hereby directed to immediately inform me if this transaction closes prior to Commission approval so that I may make the requisite revisions to the proposed decision necessary for the Commission to consider undertaking a penalty phase in this proceeding.

Joint Applicants initial submission of a full and complete application would likely have resulted in the Commission's approval of the Application at either its meeting on October 25, 2012, or November 11, 2012. Commission approval of A.12-07-021 at its October 25, 2012, meeting would have avoided the business uncertainties, distractions and interest charges attendant to Joint Applicants' bonding around the transaction on October 25, 2012. Commission approval of A.12-07-021 at its November 11, 2012, meeting would have obviated the need for the Joint Applicants' to decide whether or not to violate § 854(a) on November 16, 2013.

3.3. Harm to the Regulatory Process

The Commission has enacted careful guidelines for scrutiny of the owners of telecommunications utilities, and we cannot condone the transfer of control of

¹² July 19, 2013 Brief at 5.

a telecommunications utility to an owner that has not passed through our approval process in advance.¹³

In the Application, Nespresso, a holding company that had previously had no ownership interest at all in Cequel or Cebridge, acquired, directly and via Intermediate LLC's, a 100% interest in Cequel and Cebridge. Two entities, CPP Limited Partnership (CPP) and BC Partners Limited Partnerships (BCP), the new owners of Nespresso, and therefore integral parties in the transaction, were not included as Joint Applicants, and the role of CPP and BCP in the acquisition of Cequel and Cebridge was not explained or documented in the application. A reference was made in a post transaction schematic diagram attached to the Application as Exhibit H, but no other information was provided in the Application relative to CPP and BCP, the new owners of Nespresso, Cequel and Cebridge.

Cequel and Nespresso provided substantially more information about the nature and complexity of the transaction when they described it to the FCC in their July 20, 2012 application seeking approval of the transfer of control of Cequel's domestic and international Section 214 authorizations to Nespresso, filed just five days before they filed their joint application before this Commission. In the FCC application, after providing significant amounts of information about CPP and BCP,¹⁴ Joint Applicants stated that "The transaction simply substitutes Cequel's existing equity investors with new equity investors (the largest of which are the BCP Funds and the CPP LP)."

¹³ D.10-03-008 at 8.

¹⁴ FCC Application at 5, 6.

Pub. Util. Code § 854(a) requires persons or corporations obtain Commission authorization before they merge, acquire or assume control, whether direct or indirect, of any public utility organized and doing business in this state. We stated in D.10-03-008 that , “an indirect transfer of control occurs when a parent company is reorganized or if there is a partial change in the level of investment of various entities in the parent. A transfer of control occurs when there is a complete change of ownership in either the utility or its parent.”¹⁵ Here there was a complete change of ownership of Cequel, the parent of Cebridge. Cequel was acquired by Nespresso, which is owned by CPP and BCP. The transaction gave CPP and BCP control over Cebridge. Therefore, CPP and BCP required our scrutiny before we could authorize them to acquire control of Cebridge through Nespresso. Our obligation is to review all of the entities who acquire or assume either direct or indirect control over Cequel because, by acquiring control over Cequel, each of those entities are also acquiring either direct or indirect control over Cebridge.

3.4. Conduct of the Utility – Utility’s Actions to Prevent, Detect, Disclose or Rectify a Violation

The size of a fine should also reflect the conduct of the utility. When assessing the conduct of the utility, the Commission considers the utility’s actions to prevent a violation, its actions to detect a violation, and its actions to detect and rectify a violation.¹⁶ The Joint Applicants could, at the outset, have prevented their violation of § 854(a) with the submission of an Application that

¹⁵ D.10-03-008 at 6.

¹⁶ See D.98-12-075, 1998 Cal. PUC LEXIS 1016, *73 - *75.

fully informed us of the size, nature and complexity of the transfer of Cebridge's authority to Nespresso and thereby, to their new owners, CPP and BCP. Joint Applicants chose instead to initially provide us with a narrow view of the transfer of ownership, and to provide a narrowed subset of the information we require concerning the regulatory compliance histories of those persons associated with or employed by it as an affiliate, officer, director, partner, or owner of more than 10%.

The Applicants chose to knowingly and willfully ignore the provisions of § 854(a). Applicants disclosed their intention to violate § 854(a) in their November 15, 2013 letter of notification to the ALJ. The ALJ informed the Joint Applicants of the consequences of their impending action, but Joint Applicants willfully and knowingly violated § 854(a) because "Specifically, on October 25, Joint Applicants secured \$500 million bond financing for closing the transaction and beginning October 25 Joint Applicants incurred approximately \$90,000 in interest per day. The pending transfer also created significant business uncertainties and distractions, which Joint Applicants desired to minimize as much as possible.¹⁷

3.5. Financial Resources of the Utility

The financial resources of a utility are also considered when determining the size of a fine, based on the need for deterrence of future violations and constitutional limitations on excessive fines.¹⁸ Joint Applicants' ability to secure \$500 million in bond financing, and the equity commitment letter attached to

¹⁷ July 19, 2013 Brief of Cebridge and Cequel at 4.

¹⁸ See D.98-12-075, 1998 Cal. PUC LEXIS 1016, *75 - *76.

their Application as Exhibit E, shows that it has sufficient funds to pay a reasonable fine for violating Public Utilities Code.

3.6. Totality of the Circumstances in Furtherance of the Public Interest

A fine should also be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission considers the degree of wrongdoing and the public interest.¹⁹ The facts of this case indicate that the degree of wrongdoing was serious. The applicants were represented by very experienced legal counsel. The applicants did not file this application sufficiently in advance to obtain prior Commission approval of the transfer and did not reveal all the information we require relative to the nature of the transaction and the identity of those acquiring control of Cebridge. The applicants ignored the ALJ's November 15, 2013, warning and proceeded to knowingly and willfully violate § 854(a). The applicants' decision to violate the statute was based upon their impermissible weighing of their economic interest against compliance with California law. These facts indicate that the applicants' violation of § 854(a) has significantly harmed the public interest by being calculated and deliberate.

3.7. Role of Precedent

The Commission must also address previous decisions that involve reasonably comparable factual circumstances and explain any substantial differences in outcome in a decision that imposes a fine.²⁰ Applicants and other public utilities have been given notice that the Commission will require

¹⁹ See D.98-12-075, 1998 Cal. PUC LEXIS 1016, *76.

compliance with the requirements of § 854(a) and may impose penalties for violations. Applicants had a duty to comply with § 854(a), but chose to knowingly and willfully ignore that duty. In D.00-12-053, the Commission held that its precedent of meting out lenient treatment to those who violate § 854(a) had failed to deter additional violations, and stated a policy of imposing fines for violations of § 854(a) in order to deter future violations.²¹ Therefore, assessment of a fine on applicants for violating § 854(a) is consistent with D.00-12-053.

3.8. Setting the Fine

We have concluded that the Applicants should be fined for their violation of § 854(a). The application of the criteria adopted by the Commission in D.98-12-075 to the facts of this case indicates that a fine is warranted. First, Applicants' violation of § 854(a) was a knowing, willful and serious offense. Second, Applicants' conduct in attempting to obtain expedited approval of an incomplete application was egregious. Third, Joint Applicants appear to have sufficient resources to pay a relatively small fine. Fourth, the degree of wrongdoing was significant. Finally, the public interest was significantly harmed by the Applicants' violation of § 854(a).

We note that the Commission has imposed fines of \$5,000 in other cases which involve transfers of control of telecommunications entities without our prior authorization, in violation of § 854(a),²² when those violations were significantly less serious than this violation.

²⁰ See D.98-12-075, 1998 Cal. PUC LEXIS 1016, *77.

²¹ See D.00-12-053 at 13-14.

²² See D.00-12-053 at 14 and D.04-09-023 at 14.

The amount of time required to process this application is directly attributable to the fact that the Application lacked the completeness and specificity required by this Commission. The applicants chose not to include a complete description of the transfer of control when they filed their application. The transfer of control did not occur simply at the holding company level as the application stated. The transfer of control was a component of the wholesale transfer of ownership of Cebridge. The transfer occurred at the intermediate LLC level, at the holding company level, and at the ownership level.

The purpose of § 854(a) is to protect the public interest by enabling the Commission, before any transfer of control takes place, to review the proposed transfer and take such action as the public interest may require.²³ The Commission has a strong regulatory and consumer protection interest in knowing the true owners and managers of all telecommunications carriers who seek authority to operate in California, and their history of regulatory compliance. The applicants caused significant harm to the regulatory process by causing us to unnecessarily expend our limited resources and by circumventing our regulatory authority in order to trim the cost of completing the financial transaction necessary to complete the transfer of ownership. Joint Applicants' knowingly and willfully unlawful conduct is thereby significantly distinguishable from other applicants who have violated § 854(a) in the past.

We conclude based on the facts of this case that the Applicants should be fined \$10,000 per day for each of the 13 days that they violated § 854(a). The \$130,000 fine we impose today is meant to deter future violations § 854(a) by the

²³ San Jose Water Company (1916) 10 CRC 56.

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, or if Applicants again violate § 854(a).

4. Categorization and Need for Hearing

The Commission preliminarily categorized this Application as ratesetting as defined in Rule 1.3(a) and anticipated that this proceeding would not require evidentiary hearings. The parties did not oppose the Commission's original preliminary categorization. The scoping ruling affirmed the preliminary categorization, adopted an ex-parte prohibition as set forth in Rule 8.3(b) for the penalty phase of the proceeding, and acknowledged the Joint Applicants' April 12, 2013 assertion that hearings were not required.²⁴ This decision affirms the categorization of this proceeding as ratesetting, and does not change the preliminary determination that hearings are not required.

5. Comments on Proposed Decision

The proposed decision of ALJ Clark in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure: Comments were filed on _____, and reply comments were filed on _____ by _____.

6. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Richard W. Clark is the assigned ALJ in this proceeding.

²⁴ Scoping Memo at 2.

Findings of Fact

1. The initial Joint Application A.12-07-021 for the Expedited Approval of Indirect Transfer of Control of Cebridge, pursuant to California Pub. Util. Code § 854(a), (the Joint Application), submitted by Cebridge, Cequel and Nespresso on July 25, 2012, was insufficient to allow us to fulfill our statutory obligation to review the proposed transfer.

2. In the Application, Nespresso, a holding company that had previously had no ownership interest at all in Cequel or Cebridge, acquired, directly and via Intermediate LLC's, a 100% interest in Cequel and Cebridge.

3. Two entities, CPP and BCP, the new owners of approximately 96% of the equity in Nespresso, and therefore integral parties in the transaction, were not included as Joint Applicants.

4. The role of CPP and BCP in the acquisition of Cequel and Cebridge was not revealed, explained or documented in the application except as a reference made in a post transaction schematic diagram attached to the Application as Exhibit H.

5. CPP and BCP required our scrutiny before we could authorize them to acquire control of Cebridge through Nespresso.

6. By November 12, 2012, the Joint Applicants had incurred \$1.5 million in interest related to bond financing for the transaction, and were incurring approximately \$90,000 in additional interest every day thereafter until the transaction was closed.

7. Joint Applicants transferred control of Cebridge to Nespresso on November 16, 2012, 13 days prior to receiving Commission authorization to do so on November 29, 2012, in D.12-11-037.

8. The November 16, 2012, transfer effectuated a complete transfer of control of both the utility (Cebridge) and its parent (Cequel) to Nespresso, CPP and BCP.

9. Joint Applicants' initial submission of a full and complete application would likely have resulted in the Commission's approval of the Application, at its meeting on either October 25, 2012, or November 11, 2012.

10. Submission of an application sufficient to obtain Commission approval of A.12-07-021 at the Commission's October 25, 2012, meeting would have avoided the business uncertainties, distractions and interest charges attendant to Joint Applicants' bonding around the transaction.

11. Submission of an application sufficient to obtain Commission approval of A.12-07-021 at the Commission's November 11, 2012 meeting would have obviated the need for the Joint Applicants' to decide whether or not to trim their business losses by closing the transaction without Commission approval and violating § 854(a) on November 16, 2013.

12. Joint Applicants knowingly and willfully violated § 854(a).

13. Joint Applicants failed to prevent their violation of § 854(a).

14. The primary factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code.

15. The facts of this case, and in particular the harm to the regulatory process and to the public interest caused by the Joint Applicants' willful and knowing failure to prevent a violation of § 854(a), distinguishes this matter from other, less serious violations of § 854(a).

Conclusions of Law

1. Joint Applicants knowingly and willfully violated § 854(a) by transferring control of Cebridge to Nespresso without Commission authorization.

2. Violations of § 854(a) are subject to monetary penalties under § 2107.

3. The facts of this case, and in particular the harm to the regulatory process and to the public interest caused by the Joint Applicants' failure to prevent a violation of § 854(a) necessitates a penalty of \$10,000 per violation for each of the 13 days that Joint Applicants violated § 854(a).

O R D E R

IT IS ORDERED that:

1. Joint Applicants Cebridge Telecom CA, Cequel Communications Holdings, LLC and Nespresso Acquisition Corporation must pay a fine of \$130,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision _____."

2. Hearings are not needed in this proceeding.

3. This proceeding is closed.

This order is effective today.

Dated _____, at Los Angeles, California.