

Decision **DRAFT DECISION OF ALJ GALVIN** (Mailed 6/27/2005)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Ex Parte Application of NTI of California, LLC  
(f/k/a Highspeed Communications of California,  
LLC) (U-6102-C) pursuant to Public Utilities  
Code Section 854 for Approval of a Transfer of  
Control to Northwest Telephone, Inc.

Application 05-02-028  
(Filed February 25, 2005)

**OPINION AUTHORIZING TRANSFER OF CONTROL  
SUBJECT TO A FINE****1. Summary**

This decision authorizes Highspeed Communications of California, LLC (Highspeed or Applicant), now known as NTI of California, LLC (NTIC), to transfer control of Highspeed to Northwest Telephone, Inc. (Northwest). This authority is on a prospective basis only and conditioned upon the parties paying a \$5,000 fine within 30 days after the effective date of this decision for violating Public Utility Code Section 854 (a).<sup>1</sup>

**2. The Parties**

Highspeed, a California limited liability company, was authorized by the Commission to provide resold and facilities-based competitive local exchange carrier (CLEC), interLATA, and intraLATA services within California. This authority was granted on December 17, 1998 pursuant to Decision (D.) 98-12-083,

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise stated.

which assigned Highspeed its corporate identification number U-6102-C. Highspeed filed its tariffs on July 29, 1999 to provide residential and business telecommunications services within California pursuant to the authority granted by D.98-12-083. The tariffs became effective on December 8, 1999.

Highspeed, under the name of NTIC, provides only wireless internet services, a telecommunications service not currently regulated by this Commission, to 120 customers located primarily in and around Bakersfield, Kern County, California.

Northwest, a Washington corporation, provides rural telecommunications services in the Pacific Northwest within the states of Washington, Idaho, and Oregon as a facilities-based CLEC. It connects telecommunications services from metros to rural areas and between rural areas. It primarily serves as a carrier access provider targeting underserved markets which larger carriers abandon due to financial costs.

NTIC, a California limited liability company, came into existence upon its filing of a limited liability company restated articles of organization with the California Secretary of State's office on July 16, 2004 seeking to change the name of Highspeed to NTIC. The California Secretary of State approved the name change and issued a certificate of good standing to NTIC as a California Limited Liability Company on July 20, 2004. NTIC is a wholly owned subsidiary of Northwest.

### **3. The Application**

NTIC seeks Commission authority to transfer control of NTIC to Northwest with NTIC becoming a wholly owned subsidiary of Northwest.

By way of background, Highspeed along with its owner Robert C. Greene who owed 49% of the outstanding stock of Highspeed and Broadband

Microwave Company, LLC which owned the remaining 51% of outstanding stock, entered into a purchase and sale agreement with Northwest on February 11, 2004.

Northwest agreed to purchase Highspeed for \$450,000 subject to closing adjustments. The payment consisted of \$112,500 in cash and \$337,500 in the form of a promissory note secured by the customers of Highspeed, state and federal operating and frequency licenses of Highspeed, and other assets including leases and collocation facilities of Highspeed within the State of California.

The requested transfer of control was consummated on February 12, 2004, approximately 12 months prior to the filing of this application. On July 20, 2004, five months after the transfer of control was consummated, the California Secretary of State approved the parties request to change the name of Highspeed to NTIC.

#### **4. Supplement to the Application**

A May 11, 2005 supplement to the application was filed in response to an April 18, 2005 Administrative Law Judge (ALJ) ruling seeking additional information. Requested information included an explanation on why Highspeed was sold without seeking Commission authority, why Applicant did not request authority to change the name of Highspeed to NTIC, why tariffs for Highspeed have not been updated, why Highspeed was not current with its user fee reports and payments, and why this application should be granted.

NTIC explained in its amendment to the application that it and its parent company, a small CLEC with an exemplary record of regulatory compliance in the states of Washington and Idaho, relied primarily on the representation of the prior owner of Highspeed and were unaware that authority was necessary prior

to acquisition or any name change. As to notification of a name change, it was unaware that the Commission required prior notification.”<sup>2</sup>

NTIC explained that it has not updated the tariffs of Highspeed to reflect the name change, current user fee rates, regulated services it intends to provide, or to comply with Commission Resolution T-16901, dated December 2, 2004 because it was unaware of Commission regulatory requirements and “to date have been unable to locate Highspeed’s original tariffs.”<sup>3</sup> Almost a year after Northwest acquired and began operating under the authority granted to Highspeed, Northwest recently hired additional staff and retained the services of a company to assist it in all of its California regulatory operations. Northwest expects that the tariffs of NTIC will be updated and comply with Resolution T-16901 by May 31, 2005.<sup>4</sup>

As to delinquent user fee reports and payments, NTIC explained that a signed “Combined California Telephone Surcharge Transmittal form” was provided to the Commission on January 26, 2004 evidencing payment of the annual fees for 2003, a copy of which was attached to the supplement to the application. Although its 2004 report and payments are delinquent and its 2005 reports and payments are due, Northwest expects to have these reports completed and filed by May 31, 2005. It does not expect its total fees, including late filing penalties, will exceed \$12,000.

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<sup>2</sup> Supplement to the Application, response to question #2.

<sup>3</sup> Id., response to question #5.

<sup>4</sup> This resolution required all certificated telecommunication carriers to file tariffs to become effective no later than January 1, 2005 to concur with the Pacific Bell tariffs on the Commission’s Public Program surcharges and the Reimbursement Fee.

Northwest clarified that although NTIC currently provides only wireless internet services in and around Bakersfield, Kern County, that it needs a California Certificate of Public Convenience and Necessity to provide CLEC services so that it may gain access to UNE-L circuits, interoffice transport and interconnecting trunking of the California local exchange companies' central office infrastructure. Absent this CLEC authority, it does not believe that it would be able to provide competition to the traditional LEC monopoly in California's most underserved markets.

## **5. Discussion**

NTIC seeks approval of the proposed transfer of control pursuant to Section 854(a) which states, in relevant part, as follows:

No person or corporation...shall merge, acquire, or control...any public utility...doing business in this state without first securing authorization to do so from the commission...Any merger, acquisition, or control without that prior authorization shall be void and of no effect.

The Commission has broad discretion to determine if a transaction should be authorized pursuant to Section 854(a). The primary standard used by the Commission is whether the transaction will adversely affect the public interest. The Commission may also consider if the transaction will serve the public interest. Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>5</sup>

Northwest represents that the transfer of control is in the public interest and should be approved because it will ensure that NTIC has access to the

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<sup>5</sup> D.04-04-017, *mimeo*, p. 3.

additional resources and cash it needs to continue to provide telecommunications service to its customers. Financial statements of Northwest at December 31, 2004 showed that Northwest had approximately \$208,000 in cash, a one to one current asset to current liability ratio,<sup>6</sup> and approximately \$27,000 in equity.

With regard to management of NTIC (Highspeed), NTIC shares the executive management team of Northwest. That management team is comprised of a chief executive officer and chief operations officer with prior Cellular-One experience in the North Central Washington area, and a chief financial officer with over twenty years corporate finance experience. NTIC does not currently employ any individuals. Under that management team, Northwest represents it has demonstrated an exemplary record of regulatory compliance in the states of Washington and Idaho. Northwest intends to facilitate the commencement of intraLATA and interLATA service to rural California.

For the following reasons, we conclude that it is reasonable to grant the requested transfer of control to the extent it requests prospective authority for the reorganization under Section 854(a). First, there is no opposition to the Application. Second, Northwest has taken appropriate steps to update the tariffs of Highspeed and to provide timely user fee reports and payments, as detailed in the supplement to the application. Third, no informal or formal complaints have been filed against Highspeed during the past year. Fourth, it does not appear that the public will be harmed by the transaction. Fifth, the public may benefit

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<sup>6</sup> A current asset to current liability ratio demonstrates an entity's ability to pay its current debts.

from the transfer of control to the extent the transaction enhances Highspeed's ability to provide intraLATA and interLATA service to rural California. Finally, California derives enormous benefits from the services provided by public utilities. Thus it is in the public interest to foster a business climate in California that is hospitable to utilities. Accordingly, ordinary business transactions that are subject to Section 854(a), like the one before us here, should be approved to the extent it does not adversely affect the public interest. No such reason has been alleged or shown in the instant proceeding.

The purpose of Section 854(a) is to enable the Commission to review a proposed transaction, before it takes place, in order to take such action as the public interest may require.<sup>7</sup> Granting this application on a retroactive basis would thwart the purpose of Section 854(a). We deny Application 05-02-028 to the extent it requests retroactive authority for the reorganization under Section 854(a). Since we do not grant retroactive authority, the transfer of control is void under Section 854(a) for the period of time prior to the effective date of today's decision. The parties are at risk for any adverse consequences that may result from their having consummated the transfer of control without Commission authorization.

## **6. Penalty for Violating Section 854(a)**

The purpose of Section 854(a) is to protect the public interest by enabling the Commission, before any transfer of control takes place, to review the proposed transfer of control and take such action as the public interest may require. Hence, any violation of Section 854(a) whether intentional or

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<sup>7</sup> D.04-04-017, *mimeo*, p. 5.

unintentional, is a serious offense that should be subject to fines. Such violations are subject to monetary penalties under Section 2107, which states as follows:

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

For the following reasons, we conclude that Applicant should be fined for its failure to comply with Section 854(a). First, any violation of Section 854(a), regardless of the circumstances, is a serious offense that should be subject to fines.<sup>8</sup> Second, the imposition of a fine will help to deter future violations of Section 854(a) by the Applicant and others.

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

#### **Criterion 1: Severity of the Offense**

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors:<sup>9</sup>

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<sup>8</sup> It is vital that utilities comply with Section 854(a) so that the Commission may protect the public from harmful transactions.

<sup>9</sup> 1998 Cal. PUC LEXIS 1016, \*71 - \*73.



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

**Economic harm:** The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

**Harm to the Regulatory Process:** A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

**The number and scope of the violations:** A single violation is less severe than multiple offenses. A widespread violation that affects a many consumers is a more severe offense than one that is limited in scope.

The Applicant's violation of Section 854(a), while serious, was not an especially egregious offense. This is because the violation did not cause, or threaten to cause, any physical or economic harm to others. In addition, there is no evidence that Applicant significantly benefited from its unlawful conduct. The beneficiaries of this transaction appear to have been the prior owners of Highspeed. The only 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, including tariff and user fee violations.

**Criterion 2: Conduct of the Offender**

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the offender. When assessing conduct, the Commission stated that it would consider the following factors:<sup>10</sup>

**The Utility's Actions to Prevent a Violation:** Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past record of compliance may be considered in assessing any penalty.

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

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

Several aspects of the Applicant's conduct suggest that a larger fine is appropriate. First, Northwest, with CLEC telecommunications experience in other states with regulation similar to that of California,<sup>11</sup> relied on the

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<sup>10</sup> 1998 Cal. PUC LEXIS 1016, \*73 - \*75.

<sup>11</sup> See for example, Title 80 of the Revised Code of Washington (RCW), of which official notice is taken. RCW is a compilation of all permanent laws in force in the state of Washington. Specifically, RCW 80.12.020 provides that no public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever,

*Footnote continued on next page*

representation of the sellers of Highspeed that California Commission authority to transfer control of Highspeed was not necessary. Second, Northwest changed the name of Highspeed approximately six months after taking control of it. Third, NTIC and Northwest were unaware of Highspeed's existing tariffs. Fourth, NTIC and Northwest were delinquent in filing user fee reports and fees.

### **Criterion 3: Financial Resources of the Offender**

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the offender. The Commission also stated that it would consider the following factors when assessing financial resources:<sup>12</sup>

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

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

NTIC provided the most recent unaudited financial statements of itself and of Northwest for the year ended December 31, 2004. These financial statements indicate that NTIC has current assets of approximately \$118,000 and operating revenue of approximately \$446,000. Northwest has current assets of approximately \$1,125,000 and operating revenue of approximately \$5,255,000.

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directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do.

<sup>12</sup> 1998 Cal. PUC LEXIS 1016, \*75 - \*76.

The financial statements also indicated that NTIC and Northwest have incurred a net loss for the same reporting period.

Section 8 of the terms of the purchase and sale agreement entered into by the parties provide a 36-month indemnification period after the February, 2004 closing period. Hence, Northwest may seek recourse to recover any penalty assessed against it for violating Section 854(a) against the sellers for incorrect representations made by the sellers.

We conclude from this information that Applicant, or its parent company, has the financial resources to pay a fine in the range normally applied by the Commission for violations of Section 854 (a). We will weigh this information accordingly when setting the amount of the fine.

#### **Criterion 4: Totality of the Circumstances**

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. In order to do so, the Commission indicated that the following factors should be considered:<sup>13</sup>

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

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

Some of the facts of this case indicate that the degree of wrongdoing, though serious, was not egregious. In particular, there is no evidence that anyone was seriously harmed by the Applicant's violation of Section 854(a) or

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<sup>13</sup> 1998 Cal. PUC LEXIS 1016, \*76.

that Applicant materially benefited from their unlawful conduct. These same facts also indicate that the public interest was not seriously harmed by the Applicant's unlawful conduct. However, competitive telecommunications carriers and their customers were adversely impacted by Applicant's failure to report and pay its fair share of user fees.

### **Criterion 5: The Role of Precedent**

In D.98-12-075, the Commission held that any decision which imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.<sup>14</sup>

In D.00-09-035, we held that our precedent of meting out lenient treatment to those who violate Section 854(a) had failed to deter additional violations; and we indicated that henceforth we would impose fines in order to deter future violations of Section 854(a). The facts of this proceeding, except for Applicant's failure to report and pay user fees, are reasonably comparable to prior Commission decisions that imposed fines of \$5,000 for violations of Section 854(a).<sup>15</sup> This suggests that it would be appropriate to impose a similar fine.

We conclude that although the instant proceeding is factually distinguishable from Commission precedent in one respect (failure to report and pay user fees), the imposition of a \$5,000 fine in the current proceeding is generally consistent with precedent.

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<sup>14</sup> 1998 Cal. PUC LEXIS 1016, \*77.

<sup>15</sup> The Commission imposed a fine of \$5,000 for violating Section 854(a) in the following decisions: D.04-04-017, D.04-04-016, D.03-08-058, D.03-05-033, and D.00-12-053.

**Conclusion: Setting the Fine**

We conclude based on the facts of this case that the Applicant should be fined \$5,000 for violating Section 854(a). The fine we impose today is meant to deter future violations Section 854(a) by the Applicant and others. 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.

**7. California Environmental Quality Act (CEQA)**

CEQA applies to discretionary projects carried out or approved by public agencies. A basic purpose of CEQA is to inform governmental decision makers and the public about potential significant environmental effects of proposed activities so that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible.

CEQA applies to this application because the approval of the Application is subject to the Commission's discretion. Therefore, when considering whether to grant this application, we must determine if the activity proposed in the Application requires environmental review. NTIC represented that the transfer of control proposed in this proceeding will not result in any new construction or changes in use of existing property or facilities. Based on this representation, we conclude that granting this application will have no adverse effects on the environment. Accordingly, no environmental review is necessary.

**8. Category and Need for Hearing**

In Resolution ALJ 176-3149 dated March 17, 2005 the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings would not be necessary. Based on the record, we affirm that this is a ratesetting proceeding and that hearings are not necessary.

**9. Ex Parte Approval**

NTIC requested ex parte approval of this application without any hearing. Although this application has not been protested, approval of this application may be controversial. This is because NTIC has requested approval of a transfer of control which took place approximately one year prior to the filing of this application. NTIC, Northwest, and interested parties should be afforded an opportunity to comment on this proposed decision. The 30-day period following the filing and service of a proposed decision before the Commission acts should not be reduced or waived.

**10. Comments on Draft Decision**

The draft decision of the assigned ALJ in this matter was mailed to the parties in accordance with Section 311(g) (1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. No comments were received.

**11. Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Michael J. Galvin is the assigned ALJ in this proceeding.

**Findings of Fact**

1. Highspeed has been authorized to provide resold and facilities-based competitive local exchange, interLATA, and non-local exchange intraLATA services within California since December 1998.
2. Highspeed filed residential and business telecommunications service tariffs with the Commission to be effective December 8, 1999.
3. NTIC seeks authority under Section 854 to transfer control of NTIC to Northwest.

4. The transaction for which authority is sought in A.05-02-028 was consummated approximately twelve months before the application was filed and without prior approval from the Commission.

5. The name of Highspeed was changed to NTIC, effective July 20, 2004.

6. There has been no request to this Commission to change the name of Highspeed to NTIC.

7. Applicant has taken appropriate steps to update its tariffs and to report and pay past due user fees estimated to be less than \$12,000.

8. There is no opposition to A.05-02-028.

9. The public may benefit from the transfer of control described in this application to the extent that the transaction enhances Applicant's ability to maintain, improve, and/or expand its services in California.

10. It is in the public interest for the Commission to foster a business environment that is hospitable to utilities.

11. In D.98-12-075, the Commission adopted the following criteria for determining the amount of a fine: (i) the severity of the offense, (ii) the conduct of the offender, (iii) the financial resources of the offender, (iv) the totality of the circumstances, and (v) the role of precedent.

12. Applicant's failure to comply with Section 854(a) did not (i) result in actual or threatened harm to others, or (ii) significantly benefit Applicant.

13. With the exception of not reporting and paying user fees, the facts of this proceeding are reasonably comparable to those in previous decisions wherein the Commission imposed fines of \$5,000 for violations of Section 854(a).

14. Applicant hired additional staff and retained the services of a company to assist it in all of its California regulatory operations. Applicant expects that the



tariffs of NTIC will be updated and comply with Resolution T-16901 by May 31, 2005.

15. Applicant expects to have its past due user reports completed and filed, and past due user fees paid by May 31, 2005. It does not expect its total fees, including late filing penalties, to exceed \$12,000.

16. Applicant represented that granting A.05-02-028 will not result in any new construction or changes in use of existing property or facilities.

17. It can be seen with certainty that granting A.05-02-028 will not have an adverse impact on the environment.

### **Conclusions of Law**

1. This is a ratesetting proceeding.
2. No hearing is necessary.
3. Section 854(a) requires Commission authorization to transfer control of a public utility. Any transfer of control without Commission authorization is void under the statute.
4. The transfer of control described in this application is subject to Section 854(a).
5. The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to Section 854(a).
6. The primary standard used by the Commission to determine if a transaction should be authorized under Section 854(a) is whether the transaction will adversely affect the public interest.
7. Applicant has financial and technical expertise in telecommunications or a related business.
8. This application should be granted pursuant to Section 854(a) for the reasons set forth in the body of this decision.

9. The authority granted by today's decision pursuant to Section 854(a) should apply prospectively. Retroactive authority should not be granted.

10. Applicant violated Section 854(a) by consummating the transfer of control described in this application without Commission authorization.

11. Section 2107 provides the Commission with authority to impose a fine of between \$500 and \$20,000 for violations of the Public Utilities Code.

12. Applicant should be fined for violating Section 854(a). The amount of the fine should be based on the criteria set forth in D.98-12-075.

13. Applying the criteria in D.98-12-075 to the facts of this case, which are identified in the body of this decision and Findings of Fact, indicates that Applicant should be fined \$5,000 for violating Section 854(a).

14. Applicant should submit a compliance filing within 40 days after the date of this decision that demonstrates it has updated its filed tariffs with this Commission and has filed the appropriate past due user fee reports and paid its past due user fees. Failure to make such a compliance filing may result in a revocation of its certificate of public convenience and necessity to provide telecommunications services within California.

15. It is not necessary to conduct an environmental review of the transfer of control described in A.05-02-028.

16. The following order should be effective immediately.

## **O R D E R**

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

1. Highspeed Communications of California, LLC (U-6102-C) is authorized to change its name to NTI of California, LLC (NTIC).

2. Northwest, Inc. (Northwest) is authorized to acquire control of NTIC pursuant to Section 851 of the Public Utilities Code , as more fully described in the application and its exhibits attached to the application. The authority granted in this ordering paragraph shall be prospective only from the effective date of this order.

3. NTIC and/or Northwest shall pay a \$5,000 total fine for violating Section 851 of the Public Utilities Code within 30 days from the effective date of this order. The parties shall tender to the Fiscal Office of the California Public Utilities Commission at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, a check in the amount of \$5,000 payable to the State of California General Fund. The number of this Decision shall appear on the face of the check.

4. NTIC shall submit a compliance filing to the Director of the Telecommunications Division within 40 days after the date of this decision that demonstrates it has updated its filed tariffs with this Commission, has filed the appropriate past due user fee reports, paid its past due user fees, and provide proof of payment of the \$5,000 penalty assessed for its violation of Public Utilities Code Section 854(a). Failure to make such a compliance filing may result in proceedings to revoke its certificate of public convenience and necessity to provide telecommunications services within California.

5. The corporate identification number U-6102-C assigned to Highspeed shall continue to be used by NTIC in all original filings with the Commission and in the titles of other pleadings filed in existing cases.

6. Application 05-02-028 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.