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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Alliance Group Services, Inc.
(U-7028-C) and Jess P. DiPasquale for
authority to Transfer Control of Alliance
Group Services, Inc.

Application 07-09-006
(Filed September 13, 2007)

**DECISION GRANTING TRANSFER OF CONTROL ON A PROSPECTIVE
BASIS AND FINING ALLIANCE GROUP SERVICES, INC.,
FOR ITS FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT**

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DECISION GRANTING TRANSFER OF CONTROL ON A PROSPECTIVE BASIS AND FINING ALLIANCE GROUP SERVICES, INC., FOR ITS FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

1. Summary

This decision grants the application of Alliance Group Services Inc. (AGS) for an indirect transfer of control of AGS to Jess M. DiPasquale (DiPasquale), effective today, on a prospective basis only. We deny Applicants' request for retroactive approval of this transaction, on a *nunc pro tunc basis*,¹ because this transaction was previously consummated without prior Commission approval in violation of Section 854(a).² Based on the unique circumstances of this case, which involved DiPasquale's purchase of 85 shares of AGS' parent company at public auction, we impose no monetary penalty for this violation of Section 854(a), or for the previous unlawful indirect transfer of control of AGS to Chrysalis Group, Inc. (Chrysalis) by Mr. Thomas Coughlin (Coughlin), former chairperson of AGS, in violation of Section 854(a), without the knowledge or consent of AGS management.

We find that the transfer of control of AGS to DiPasquale fully divests Coughlin and the SMC 2001 Trust (Coughlin Family Trust) from their former controlling interest in AGS, as required by the settlement agreement approved in Decision (D.) 06-09-009 (the Settlement Agreement).

We also find that AGS violated the Settlement Agreement, by failing to file the status report due on September 7, 2007 until after Consumer Protection and

¹ The phrase "*nunc pro tunc*" meaning "now for then," refers to those acts which are allowed to be done at a later time "with the same effect as if regularly done." (Blacks Law Dictionary, 4th Revised Ed. (1968), p. 1,218.)

² All statutory references are to the Public Utilities Code, unless otherwise stated.

Safety Division (CPSD) protested this application and filed a data request asking for a list of AGS' carrier customers. The Settlement Agreement required AGS to file status reports with CPSD every six months in order to certify that any carrier-customers of AGS that have previously been identified by CPSD as unlicensed have either obtained valid certificates of public convenience and necessity (CPCNs) or have had their service terminated by AGS. We therefore impose a monetary penalty in the amount of \$2500 pursuant to Section 2107, based on AGS' late filing of this status report, because the late filing caused CPSD to expend its valuable time and resources on enforcement of this requirement. However, we find that AGS substantially complied with the Settlement Agreement's requirement for filing a status report by March 7, 2007, because the company justifiably relied on CPSD's prior statement that AGS had already met the requirement for filing a list of its carrier-customers.

This application is closed.

2. The Parties

Alliance Group Services Inc. (AGS) is a Delaware corporation with its principal place of business located in Westport, Connecticut. AGS provides service in California solely on a wholesale basis to other long distance companies pursuant to its CPCN authorizing the provision of limited facilities-based and resold interexchange services.³ AGS is a wholly-owned subsidiary of AGS Acquisition, Inc. (AGS Acquisition), which is also a privately held corporation.

³ The Commission granted this CPCN to AGS in D.07-04-037.

DiPasquale is the President and CEO of AGS. According to the application, DiPasquale has managed the operations of AGS since late 2004. As a result of the transactions described in this application and the amendment to the application, DiPasquale has a 100 percent ownership interest in AGS.

Before the transactions described in this order occurred, DiPasquale owned 15 percent of the stock of AGS Acquisition, the parent company of AGS. The other 85 percent of AGS Acquisition was owned by Alliance Group Holdings, Inc. (AGS Holdings). As a result of the transactions described in this order, DiPasquale now owns 100 percent of the stock of AGS Acquisition.

AGS Holdings is also a privately held company. The majority of the shares of AGS Holdings are owned by the Coughlin Family Trust, an irrevocable family trust of which Sharon Coughlin, the spouse of Coughlin, is trustee. The remaining shares of AGS holdings are owned by five individuals who are unrelated to the Coughlin family.

Coughlin was the Chief Executive Officer of Vista Group International, Inc., doing business in California as an inter-exchange carrier known as Vista Communications (Vista), and the Coughlin Family Trust was the majority stockholder of this company. In D.01-09-017, the Commission imposed sanctions against Vista in the amount of \$7 million for failing to adequately supervise its telemarketers, so that thousands of customers switched long distance providers after receiving misleading solicitations and inadequate information about rates and switching charges. To date, Vista's \$7 million fine remains unpaid and is uncollectible.

The Commission Consumer Protection and Safety Division represented the interests of utility consumers and the public in this proceeding.

3. Background

3.1. The Previous Settlement between AGS and CPSD in D. 06-09-009

In late 2004, a dispute arose between AGS and CPSD regarding whether AGS is required by Section 1001 to obtain a CPCN in order to provide wholesale telecommunications services in California. In order to resolve this dispute, on December 29, 2004, AGS filed an application for a CPCN, which was docketed as Application (A.) 04-12-029, and simultaneously moved for its dismissal on jurisdictional grounds.

CPSD filed a protest to the application on January 26, 2005, after discovering that Coughlin was one of the owners of AGS, on the grounds that Coughlin is unfit to operate a telecommunications business in this state because of his previous management role in Vista.

On September 7, 2006, in D.06-09-009, the Commission approved the Settlement Agreement between AGS and CPSD, which resolved the issues raised in CPSD's protest. The Settlement Agreement contains three key provisions relevant to this proceeding:

- **Divestiture of Coughlin Family Trust Interest in AGS.** The Settlement Agreement requires the Coughlin Family Trust to divest itself of the indirect control of AGS by transferring the control of AGS Holdings or causing the transfer of control of one of its subsidiaries to an unrelated third party, so that the Coughlin Family Trust will no longer hold a controlling interest (direct or indirect) in AGS. Under the Settlement Agreement, the Coughlin Family Trust was required to file an application for a transfer of control of AGS by no later than April 12, 2007, which is one year after the date of the Commission's approval of AGS' application for a CPCN. CPSD agreed to grant any reasonable good faith request for an extension of time for divestiture of the Coughlin Family Trust's interest in AGS. AGS agreed not sell or in any way transfer the ownership or control of AGS to any members of the Coughlin Family or Mr. Phillip Bethune, or any companies that they own or operate.

- **Non-Involvement of Coughlin in Management of AGS.** AGS also agreed that during the period between the Commission's approval of the Settlement Agreement and the date of the divestiture of the Coughlin Family Trust's interests in AGS, Coughlin would play no role in the management of the company, would not serve as an officer or director of the company, and would not receive any compensation as an employee. Coughlin would retain only an indirect passive interest in AGS, based on the interest of the Coughlin Family Trust in AGS Holdings. AGS agreed to provide copies of documentation, such as a termination agreement or severance letter, which eliminate Coughlin's role in the management of AGS.
- **AGS' Filing of Status Reports with CPSD.** Under the Settlement Agreement, AGS must submit to the Commission's jurisdiction and cooperate with CPSD in preventing non-certificated carriers from operating in California. The Settlement Agreement requires AGS to submit progress reports to CPSD, which: (a) list all of AGS' carrier customers, and (b) verify that each carrier-customer previously identified by CPSD as unlicensed has either (1) verified its certification or (2) had its service terminated by AGS. These status reports must be filed every six months until the divestiture of the Coughlin Family Trust's interests in AGS is completed.

3.2. The Failure of Coughlin to Comply with Divestiture Requirements of Settlement Agreement

As required by the Settlement Agreement, Coughlin formally resigned from his positions at AGS Acquisition. Several days after the Commission approved the Settlement Agreement, AGS forwarded to CPSD copies of (1) a letter from Coughlin resigning as an officer, director and employee of AGS Acquisition, and (2) a resolution by the shareholders of AGS Acquisition, accepting Coughlin's resignation. Coughlin was removed from the AGS payroll in September 2006.

However, Coughlin has not filed, on his own behalf or jointly with another party, an application for authorization to divest the indirect interest of the Coughlin Family Trust in AGS. According to the application, during 2007, it became clear to AGS that Coughlin had no intention of divesting his indirect control of AGS. In fact, according to the application and a subsequent verified informational filing by AGS, Coughlin claimed that he is not bound by the provisions of the Settlement Agreement and hired a series of counsel to advocate this position to AGS and CPSD.

Coughlin has also entered into unauthorized transactions affecting the control of AGS, without the knowledge or consent of the company, as described below.

3.3. Stipulated Facts⁴ Regarding Unauthorized Transaction by Coughlin Which Resulted in an Indirect Transfer of Control of AGS

In March 2005, Coughlin borrowed between \$900,000 and \$1 million from Chrysalis in order to finance his acquisition of a company known as SwissFone, a business venture unrelated to AGS. Without the knowledge of AGS management, Coughlin pledged the 85 shares of AGS Acquisition (which amounts to an 85 percent ownership interest in the company) held by the Coughlin Family Trust to Chrysalis as security for the loan. In January 2006, SwissFone ceased operations, and Chrysalis demanded payment of Coughlin's loan. Unfortunately, Coughlin was either unable or unwilling to pay this debt.

⁴ On January 16, 2008, after meeting and conferring as directed by the assigned ALJ, AGS and CPSD filed a Joint Stipulation of Facts (Stipulation). The Stipulation states that the parties have agreed to a set of stipulated facts which form the factual basis for the disputed legal issues in this proceeding.

Over a period of approximately one year, Chrysalis continued to demand payment, but Coughlin did not honor his debt. AGS and CPSD have stipulated that, in approximately January 2006, the shares in AGS Acquisition that were controlled by Coughlin were transferred to Chrysalis, without the knowledge of AGS management or prior Commission authorization, after Coughlin defaulted on his loan from Chrysalis.

Chrysalis then sought to liquidate the shares in AGS Acquisition which were acquired from Coughlin. In October 2007, Chrysalis placed the shares for sale at a public auction. A copy of the notice of the public auction appeared in the *New York Times* on October 4, 2007. The public auction was held on October 8, 2007. DiPasquale participated in the auction through a representative and, as the successful bidder, obtained the 85 shares of AGS Acquisition previously held by the Coughlin Family Trust. Since DiPasquale already held a 15 percent ownership interest in AGS Acquisition, he thereby acquired a 100 percent ownership interest in AGS Acquisition and complete indirect control of AGS.

Coughlin did not seek prior Commission authorization of his transfer of the Coughlin Family Trust's shares in AGS Acquisition to Chrysalis at any time. DiPasquale did not seek advance Commission approval under Section 851 for the transfer of control of AGS from Chrysalis to himself through his purchase of the 85 shares of AGS Acquisition at the auction. However, AGS filed an amendment of this application, which disclosed DiPasquale's purchase of the shares at the public auction, on October 25, 2007, approximately two weeks after

DiPasquale's purchase of the shares.⁵

⁵ According to the application, Coughlin also participated in two other unauthorized transactions without the knowledge of AGS, which affected the control of AGS. In at least one instance, Coughlin's actions appear to have resulted in the transfer of the control of AGS to a third party without prior Commission authorization, but the parties did not include these facts in the Stipulation. These transactions were described in the application, as follows:

A. Hogan and Hartson Transaction/Payment of AGS Debt by DiPasquale

In 2005, Coughlin retained Hogan and Hartson, a Washington D. C. law firm, to assist him with the acquisition of SwissFone, without the knowledge or authorization of AGS. Coughlin falsely represented to Hogan and Hartson that he was entering into the retainer agreement with the law firm on behalf of AGS. When Hogan and Hartson billed AGS for the legal services rendered to Coughlin, AGS challenged the invoices and advised Hogan and Hartson that Coughlin had incurred these bills for services unrelated to AGS. However, Coughlin did not pay his debt to the law firm, and Hogan and Hartson obtained an arbitration award against AGS for approximately \$600,000. AGS management asked Coughlin to pay the arbitration award, but Coughlin refused to do so.

Unfortunately, AGS was unable to pay the \$600,000 arbitration award. Hogan and Hartson then threatened to bring a creditor's action against AGS and to place liens on the accounts receivables associated with AGS' largest customers, which would have effectively rendered AGS without sufficient funds to operate.

According to the application, on approximately June 12, 2007, DiPasquale was notified that Hogan and Hartson was prepared to proceed against the customers' accounts receivables unless AGS made a satisfactory arrangement for immediate payment. AGS was in a distressed financial condition, because the company had no realistic basis for believing that it would have sufficient cash flow to continue operations even in the short term.

In order to protect the financial viability of AGS, on June 25, 2007, DiPasquale entered into a settlement agreement with Hogan and Hartson and paid \$600,000 to the law firm out of his personal funds. Hogan and Hartson then relinquished its claim against Coughlin by assigning it to DiPasquale.

In order to repay DiPasquale, AGS amended its Certificate of Incorporation to authorize the issuance of additional shares of stock and, on June 25, 2007, issued 1300 shares of its common stock to DiPasquale. As a result of this transaction, DiPasquale acquired a 61

Footnote continued on next page

3.4. Filing of Status Reports by AGS As Required by Settlement Agreement – Protest of CPSD

Under the Settlement Agreement, AGS was required to file two status reports, which were due on March 7, 2007 and September 7, 2007.

3.4.1. The March 7, 2007 Status Report

AGS contends that a series of communications with CPSD met the requirements for the March 7, 2007 status report. CPSD disagrees. AGS and CPSD have stipulated that the following communications took place between them:

On November 17, 2006, CPSD submitted Data Request No. Alliance 11172006 seeking a list of AGS' carrier customers.

percent interest in AGS. Since DiPasquale had obtained a majority interest in AGS, the issuance of stock to DiPasquale also effectively removed control of AGS from Coughlin. Neither AGS nor DiPasquale applied for prior Commission authorization, as required by Section 854, to transfer these shares in AGS to DiPasquale.

B. Possible Unverified Transfer of Shares of AGS Holdings to Sinking Ship LLC

According to the application, at some point, Coughlin may also have transferred the shares of AGS Holdings owned by the Coughlin Family Trust, to a company known as Sinking Ship, LLC., (Sinking Ship) without the knowledge of AGS. Neither Coughlin nor AGS sought prior Commission approval of this transaction. In an informational filing, AGS stated that in an arbitration held in connection with the Hogan and Hartson matter, Coughlin testified that he had caused 85 shares of AGS Acquisition to be transferred to Sinking Ship. However, Coughlin's testimony is the only evidence that the transfer of shares to Sinking Ship may have occurred, and Coughlin recanted this statement after a creditor threatened to assert that this transfer was fraudulent as to creditors and other shareholders in AGS Holdings. In addition, AGS management has never received any documentation to prove that the transfer of shares to Sinking Ship took place.

To date, AGS remains unable to verify whether the transfer of these shares in AGS Acquisition to Sinking Ship actually occurred or whether Sinking Ship still exists.

On December 8, 2006, AGS responded to CPSD's data request by e-mail and attached a spreadsheet of its carrier customers for the period from October 2006 to November 2006.

On January 29, 2007, CPSD advised AGS by letter that eight of its carrier-customers listed on the spreadsheet appeared not to have valid CPCNs authorizing their operation in California, and that under the Settlement Agreement, AGS was required to contact these carrier customers and advise them that unless they provide proof that they are properly certificated in this state or apply for a CPCN with the Commission within 30 days, AGS will terminate service. CPSD's letter also stated that by responding to the November 17, 2006 data request, AGS had met the requirement for providing a status report that includes a list of its carrier-customers, but that AGS must also provide documentation to CPSD by March 7, 2007 to show that each carrier-customer previously identified by CPSD as unlicensed has either verified that it has a current CPCN or has had its service terminated by AGS.

On February 1, 2007, AGS sent an e-mail to CPSD which stated that, based on a letter from CPSD, AGS understood that it was to contact carrier-customers identified by CPSD as non-certificated and to ask these carrier-customers to contact CPSD directly regarding their certifications status. AGS's e-mail expressed concern that CPSD had changed its approach so that AGS was required to get back to CPSD on behalf of these carrier-customers regarding the status of their certifications.

AGS asked CPSD to follow its previous direction and contact any carrier-customers identified as non-certificated itself.

On February 2, 2007, CPSD responded to AGS's e-mail dated February 1, 2007 by a letter which stated that under the Settlement Agreement,

AGS was responsible for contacting the eight carrier-customers identified by CPSD as unlicensed. This letter also stated that AGS's status report was due on March 7, 2007, but that under the circumstances, AGS was encouraged to submit the report as soon as possible.

On February 6, 2007, AGS sent an e-mail to CPSD, which stated that AGS had contacted the eight carrier-customers that CPSD had identified as non-certificated, and reported on the status of these eight companies.

CPSD responded to the above e-mail from AGS, and advised AGS that two of its carrier-customers appeared to be switchless resellers that must be certified in order to operate in California.

On February 8, 2007, AGS responded to the above e-mail from CPSD and provided clarifying information regarding one of its carrier-customers.

3.4.2. The September 7, 2007 Status Report

AGS admits in its opening brief that AGS simply forgot to file the September 7, 2007 status report.⁶ AGS states that by September 2007, it had heard nothing from CPSD for approximately six months, and it had been over a year since the Settlement Agreement was executed. On September 13, 2007, CPSD filed a protest to this application and attached, as Appendix A, a data request that asked for the current list of AGS' carrier-customers. AGS responded on October 18, 2007, over a month after the deadline for filing the status report. CPSD and AGS agree that the list of AGS carrier-customers submitted by AGS on October 18, 2007 met the requirements for a status report pursuant to the Settlement Agreement, except for the late submission of the report.

⁶ Applicant's Opening Brief, page 8.

4. Procedural History

AGS filed this application on September 13, 2007, seeking Commission approval on a *nunc pro tunc* basis of AGS' June 25, 2007 transfer of 1300 shares of AGS stock to DiPasquale, following DiPasquale's payment of \$600,000 from his personal funds to Hogan and Hartson, in order to prevent a creditor's action against AGS, based on the debt incurred by Coughlin and the subsequent arbitration award in favor of Hogan and Hartson against AGS.

CPSD filed a timely protest on October 12, 2007, which alleged that AGS failed to comply with the requirement stated in the Settlement Agreement approved in D.06-09-009 for the Coughlin Family Trust to be divested of any ownership interest in AGS, because after AGS's transfer of 1300 shares to DiPasquale in June 2007, Mr. DiPasquale held only a 61 percent interest in AGS, and the balance of the stock was controlled by AGS Holdings, which is ultimately controlled by the Coughlin Family Trust. The protest further alleged that AGS failed to file timely status reports regarding the licensure status of its carrier-customers as required by the Settlement Agreement. AGS filed a reply to the protest on October 29, 2007.

On October 25, 2007, AGS filed an amendment to the application, which sought Commission approval on a *nunc pro tunc* basis of DiPasquale's indirect acquisition of control of AGS, based on his purchase of the 85 shares in AGS Acquisition from Chrysalis at public auction, after Coughlin defaulted on his loan from Chrysalis Group. The amendment states that after this transaction, DiPasquale owned 100 percent of AGS Acquisition, and the Coughlin Family Trust held no ownership or controlling interest in AGS.

After a prehearing conference, pursuant to an order of the assigned Administrative Law Judge (ALJ), the parties met and conferred regarding the

disputed issues in this case.

On January 16, 2008, the parties filed a joint stipulation of facts (Stipulation). In the Stipulation, the parties agreed that the October 2007 transaction, in which DiPasquale obtained 100 percent of the shares of AGS Acquisition by purchasing the shares formerly controlled by Coughlin and subsequently by Chrysalis at public auction, after Coughlin defaulted on his loan from Chrysalis, satisfied the requirement in the Settlement Agreement for divesting the Coughlin Family Trust of control of AGS. The parties also stipulated that the facts relevant to the transfer of control for which authorization is sought in this application include: a) Coughlin's pledge of shares in AGS Acquisition which were controlled by Coughlin Family Trust to Chrysalis Group as security for a loan, b) Coughlin's subsequent default on the loan, which transferred the shares to Chrysalis in approximately January 2006, and c) DiPasquale's purchase of these shares in AGS Acquisition at a public auction in October 2006, after Coughlin defaulted on his loan to Chrysalis.

On February 25, 2009, the Assigned Commissioner and Assigned ALJ issued a Scoping Memo Ruling, which required AGS to file an update on Coughlin's involvement with AGS and the status of Sinking Ship, by no later than March 16, 2009.

On March 16, 2009, AGS filed a Response to the Scoping Memo, which stated that neither Coughlin nor Sinking Ship currently have any ownership interest in AGS, because DiPasquale owns 100 percent of the shares of both AGS and AGS Acquisition, and that the other facts remain the same.

5. Discussion

5.1. The Transfer of Control of AGS

The application should be approved on a prospective basis only. Based on the amendment to the application and the Stipulation, AGS is seeking Commission approval pursuant to Section 854 on a *nunc pro tunc* basis of DiPasquale's indirect acquisition of control of AGS, by purchasing the shares of AGS Acquisition formerly controlled by Coughlin at public auction in October 2007, after Coughlin defaulted on his loan from Chrysalis.

CPSD has withdrawn its opposition to the transfer of control of AGS to DiPasquale. However, CPSD urges the Commission to impose a fine of \$10,000 on AGS based on Coughlin's pledge of shares to Chrysalis in violation of Section 854 and \$5,000 for DiPasquale's purchase of the shares of AGS Acquisition at auction, because these transactions occurred without prior Commission approval as required by Section 854. CPSD points out that Coughlin was still chairman of AGS at the time of pledging the shares in AGS Acquisition to Chrysalis.

Advance Commission approval of the transfer of control of AGS is required under Section 854. Section 854 (a) states, in pertinent part:

No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control...any public utility organized and 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.

However, the first question in this case is when the transfer of control of AGS occurred. As argued by AGS in its reply brief, although Coughlin's pledge of his shares in AGS Acquisition to Chrysalis is the first in a series of events

which led up to the indirect transfer of control of AGS to DiPasquale, pledging the shares as collateral for a loan did not result in a transfer of the shares to Chrysalis, until Coughlin defaulted on his loan. The parties have stipulated that the transfer of Coughlin's shares in AGS Acquisition occurred in approximately January 2006,⁷ after Coughlin defaulted on his loan. At this point, Chrysalis acquired a controlling interest in AGS Acquisition, and thereby indirectly acquired control of AGS.

DiPasquale acquired indirect control of AGS, when he purchased the shares of AGS Acquisition formerly controlled by the Coughlin Family Trust at public auction from Chrysalis in October 2006.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to Section 854(a).⁸ 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.⁹ The Commission may also consider if the transaction will serve the public interest.¹⁰ When necessary and appropriate, the Commission

⁷ Stipulation, page 6.

⁸ D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

⁹ D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17; D.97-07-060, 73 CPUC 2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

¹⁰ D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p. 5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

may attach conditions to a transaction in order to protect and promote the public interest.¹¹

For the following reasons, we conclude that it is reasonable to grant this application to the extent it requests prospective authority under Section 854(a) for DiPasquale to acquire control of AGS. First, AGS' customers and the public will benefit from the transfer of control of AGS away from entities controlled by the Coughlin Family Trust and Chrysalis to DiPasquale. Coughlin's actions before and after the adoption of the Settlement Agreement clearly demonstrate that he is not fit to manage or control AGS, and the Settlement Agreement requires the Coughlin Family Trust to be divested of any controlling interest in AGS based on Coughlin's past actions. The application contains no evidence which shows whether or not Chrysalis has any experience in the management of telecommunications companies or meets Commission requirements for acquiring the control of a telecommunications company, such as AGS. Second, DiPasquale, as President and CEO of AGS, has managed the company since late 2004, and he has over 25 years of business management experience. The Commission has previously found that DiPasquale, along with the rest of AGS' management (other than Coughlin), has sufficient experience to manage the company,¹² and DiPasquale has met the Commission's financial requirements applicable to this transfer of control. DiPasquale has also demonstrated his commitment to AGS by spending his personal funds to purchase the shares in AGS Acquisition at

¹¹ D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

¹² D.07-04-037, Finding of Fact No. 8 at p. 13.

public auction, rather than allowing the shares to be purchased by a third party that may not have been qualified to operate a telecommunications company. Third, since DiPasquale will continue to manage the company, the transaction will be transparent to customers. Fourth, CPSD no longer objects to DiPasquale's continued management of AGS. For these reasons, we see no reason to withhold authority for the transfer of control on a prospective basis.

We deny this application to the extent it requests retroactive or *nunc pro tunc* authority under Section 854(a) for either Chrysalis or DiPasquale to acquire control of AGS. The purpose of Section 854(a) is to enable the Commission to review a proposed acquisition, *before it takes place*, in order to take such action as the public interest may require.¹³ Granting this application on a retroactive or *nunc pro tunc* basis would thwart the purpose of Section 854(a).

Since we will not grant retroactive authority, the acquisitions of control over AGS by both Chrysalis and DiPasquale are void under Section 854(a) for the period of time before the effective date of this decision. Applicants are at risk for any adverse consequences that may result from their having completed the transfer of control without Commission authority.

¹³ D.99-02-061, 1999 Cal. PUC LEXIS 56 *12; D.98-07-015, 1998 Cal. PUC LEXIS 526 *7; D.98-02-005, 1998 Cal. PUC LEXIS 320 *8; D.97-12-086, 1997 Cal. PUC LEXIS 1168 *8; and San Jose Water Co. (1916) 10 CRC 56, 63.

5.1.1. Whether AGS should be Fined for Coughlin's Violation of § 854(a) by Transferring Indirect Control of AGS to Chrysalis

As the former AGS chairman, Coughlin violated Section 854 by failing to obtain advance Commission authorization to transfer his shares in AGS Acquisition to Chrysalis. Violations of Section 854(a) 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.

Under Section 2108, each date on which a continuing violation remains in effect constitutes a separate violation.

CPSD argues that Coughlin's disregard of Section 854 by transferring the 85 shares in AGS Acquisition to Chrysalis without prior Commission authorization is a serious offense, which merits a \$10,000 fine. AGS argues that it did nothing wrong, because AGS had no knowledge that Coughlin had pledged his shares in AGS Acquisition as security for the loan from Chrysalis or had defaulted on his loan until the shares were placed for sale at public auction. AGS also contends that AGS was not a party to the transaction, because Coughlin pledged shares of AGS Acquisition, not AGS, to Chrysalis, and that, as the transferee, Chrysalis should be held responsible for the violation of Section 854. However, Chrysalis is not a party to this action.

We conclude that the AGS should not be fined for the violation of Section 854 resulting from Coughlin's indirect transfer of control of AGS to

Chrysalis. Although Coughlin was still chairman of AGS at the time that he pledged his shares in AGS Acquisition to Chrysalis and defaulted on his loan, the parties have stipulated that AGS management had no knowledge of these actions until Chrysalis placed the Coughlin's shares for sale at public auction in October 2007. By pledging his shares in AGS Acquisition to Chrysalis in return for a loan for a business venture unrelated to AGS, and failing to repay his loan, Coughlin was clearly not acting on behalf of AGS, but to promote his personal financial interests. Coughlin had also previously defrauded both AGS and Hogan and Hartson, by falsely representing to Hogan and Hartson that he was incurring legal expenses related to the acquisition of SwissFone on behalf of AGS. Coughlin has a record of previous violations of law and Commission orders, based on his role as a previous owner of Vista. Therefore, we find the stipulated facts credible and believe that Coughlin did not advise AGS' management that he had pledged his shares in AGS Acquisition as security for a loan from Chrysalis or was in danger of defaulting on his loan, so that AGS' management would have had an opportunity to attempt to prevent an unlawful transfer of control or to otherwise protect the company.

In contrast, AGS has cooperated with CPSD and the Commission by entering into the Settlement Agreement, securing Coughlin's resignation as an officer, and director and an employee of AGS, and unsuccessfully attempting to get Coughlin to divest himself of a controlling interest in AGS in an appropriate manner. These actions by AGS show that the company and its management did not condone, did not participate in, and clearly were not responsible for the unlawful acts of Coughlin, including his unauthorized transfer of 85 shares in AGS Acquisition to Chrysalis in violation of Section 854.

Under these circumstances, fining AGS based on the Coughlin's unauthorized indirect transfer of control of AGS Acquisition to Chrysalis would serve no useful purpose and would not deter future violations of Section 854. Since AGS had no knowledge of this transaction and was itself a victim of Coughlin's unauthorized acts which threatened the stability of the company, imposing a fine would only unjustly penalize AGS, which has made good faith efforts to comply with the divestiture requirements of the Settlement Agreement. Moreover, since Coughlin was not cooperating with AGS management, it appears that there was little that AGS could have done to prevent Coughlin from pledging the shares of its parent company as security for the loan from Chrysalis.

**5.1.2. Whether AGS Should Be Fined for Violation of § 854(a)
Based on DiPasquale's Acquisition of Control of AGS
Without Prior Commission Authorization**

Since DiPasquale's purchase of the shares of AGS Acquisition at public auction without prior Commission approval also violated Section 854, we must determine whether to impose a fine on AGS based on this transaction. AGS argues that the Commission should either impose no fine or a minimum fine, suspended, because DiPasquale's purchase of the shares furthered the intent of the Settlement Agreement by ensuring that Coughlin would be fully divested of control of AGS. AGS also states that since the Commission had already found DiPasquale fit to manage AGS in D.07-04-037, the transfer of control of the company to DiPasquale does not violate the legislative intent behind Section 854, which is to ensure that the Commission has had an opportunity to scrutinize a person or entity acquiring control of a regulated utility. In addition, AGS points out that since Chrysalis had placed the shares of AGS Acquisition for sale at public auction, time was of the essence, and DiPasquale had to act quickly to purchase the shares.

In contrast, CPSD argues that although DiPasquale's purchase of the AGS Acquisition shares at public auction is a less serious violation than Coughlin's previous transfer of the shares to Chrysalis, the Commission should impose a \$5,000 fine for this violation of Section 854, because the need for DiPasquale to act quickly was created by AGS, when Coughlin, acting as AGS chairman, pledged his shares to Chrysalis as security for a loan and then defaulted on his loan. CPSD also points out that under prior Commission decisions, the need of a party to act quickly for business reasons does not excuse non-compliance with Section 854.

We agree with CPSD that any violation of Section 854 is serious, and that under our previous decisions, the need of a party to act quickly to effectuate a transfer of control for business reasons does not excuse a violation of Section 854.¹⁴

However, this case involves highly unusual circumstances, because of the unauthorized and unlawful actions of Coughlin, which resulted in Chrysalis' decision to place the 85 shares of AGS Acquisition for sale at public auction. Based on the stipulated facts, there is no evidence that AGS or DiPasquale knew that Coughlin had defaulted on his loan or that Chrysalis planned to sell the shares in AGS Acquisition until Chrysalis placed the shares for sale at public auction in early October. AGS and DiPasquale then had to act quickly, apparently within a matter of a few days, in order to purchase the shares and to avoid a potential transfer of control of AGS to a third party which may not have been qualified to manage the company and might not have met Commission

¹⁴ See D.07-05-040 (Yak)

requirements for assuming control of a telecommunication company. The purchase of shares by DiPasquale also furthered the intent of the Settlement Agreement by ensuring that Coughlin could not regain control of AGS.

We note that, as pointed out by AGS, the Commission had previously approved the qualifications of DiPasquale to manage AGS in D.07-04-037, and the consumers and the public were not harmed by DiPasquale's acquisition of control of the company. Moreover, even if DiPasquale had been able to very quickly file an application for Commission authorization under Section 854 before purchasing the shares at public auction, as a practical matter, the Commission could not have acted on a Section 854 application before the public auction occurred, because of the requirements of the Commission Rules of Practice and Procedure (Rules), which permit the filing of protests to an application, and the Bagley-Keene Act (Govt. Code Sections 11120-11132), which, with some exceptions, requires the posting of a description of a proposed decision on the agenda of the Commission business meeting in advance of the Commission's consideration of the decision. Although, ideally, DiPasquale would have filed an application for authorization under Section 854 to acquire control of AGS before the public auction occurred in order to at least advise the Commission of the situation, we will not fine AGS for its failure to file an application within a short time after learning of the public auction, based on the unique facts of this case.

However, AGS will be subject to monetary penalties under Sections 2107 and 2108 for any future violations of Section 854.

We emphasize that the Commission does not condone the transfer of any regulated utility without our prior authorization as required by Section 854. The purpose of Section 854 is to ensure that the Commission has an opportunity to

review the transaction and the person or entity acquiring control of the utility, and to place conditions on the transfer, in order to ensure that customers and the public will not be harmed by the transfer of control. The Commission takes its responsibilities under Section 854 very seriously, and any transfer of control of a regulated utility without prior Commission authorization harms the regulatory process and places the public and customers at risk. We have not changed our policy in favor of imposing monetary penalties on parties that violate Section 854 in order to deter future violations, even in situations involving business reasons for carrying out a transfer of control quickly.

5.1.3. The Filing of Status Reports by AGS As Required by the Settlement Agreement

AGS characterizes itself as a “wholesale” company because it purchases telephone access from local exchange carriers (LECs) and sells that service to other long distance companies, which AGS refers to as its “carrier-customers”. In A.04-12-029, CPSD discovered that some of AGS’ carrier-customers were providing telephone service in California without having first acquired a CPCN, in violation of state law. The Settlement Agreement therefore includes the requirement for AGS to file status reports regarding its carrier-customers in order to assist CPSD in preventing non-certificated carriers from operating in California.

Paragraphs 18 and 19 of the Settlement Agreement require AGS to file status reports with CPSD regarding the status of its carrier-customers as follows:

18. Within six months of the Commission approval of this agreement, and continuing every six months until divestiture is complete, AGS will provide CPSD with a status report which (1) lists the of [sic] AGS’ carrier-customers, and (2) provides verification that each carrier-customer of AGS previously identified by CPSD to

AGS as unlicensed has either (a) verified its certification or (b) been terminated by AGS.

19. If CPSD advises AGS that a carrier-customer does not have valid operating authority, AGS will request verification of the certification from the carrier-customer. If CPSD is not satisfied that the subject carrier-customer is validly certified, the Director of CPSD will so inform AGS, and AGS will provide to the subject carrier-customer 30 days notice of termination.

The two status reports in question were due on March 7, 2007 and September 7, 2007. CPSD contends that AGS failed to meet the requirements for filing both status reports and asks the Commission to fine AGS \$5,000 for these violations.

5.1.4. The March 7, 2007 Status Report

CPSD argues that AGS failed to file this status report as required by the Settlement Agreement because the list of carrier-customers provided by AGS on December 8, 2006 was current as of November 2006, but not as of March 7, 2007, the deadline for filing the status report. AGS contends that it substantially complied with the requirement for filing this status report, and that CPSD had previously advised AGS by e-mail that the carrier-customer list provided on December 8, 2006 met the requirement for a customer list in the March 7, 2007 status report.

On December 8, 2006, AGS forwarded to CPSD by e-mail a list of its carrier-customers, including some carriers which were not operating in California. On January 29, 2007, CPSD responded to the letter, notifying AGS that some of its carrier-customers appeared not to be certificated in California and directing AGS to immediately contact these customers and advise them that

unless they either provide proof of their certification in California or apply for a CPCN within 30 days, AGS would terminate their service.

In addition, as pointed out by AGS, CPSD's January 29, 2007 letter states:

Finally, the Settlement Agreement (Section D. Termination of Service to AGS Carrier-Customers that Do Not Have Proper Operating Authority) states: "Within six months of the effective date of this order and continuing every six months until the completion of the Coughlin family interests in AGS, AGS will provide CPSD with a status report that: (1) lists AGS carrier-customers, and (2) provides certification for each carrier previously identified by CPSD as unlicensed has either verified that it has a valid CPCN or has had its service terminated by AGS. "AGS has complied with item (1) by responding to data request Alliance -11172006. Please provide the information specified in item (2) above no later than March 7, 2007. (Emphasis added.)

A series of e-mails and correspondence between the parties, which focused on whether AGS or CPSD should contact the carrier-customers that appeared not to be certificated in California and the status of certain carrier-customers, followed this letter. However, none of the subsequent letters or e-mails from CPSD notified AGS of the need to file an updated list of carrier-customers by March 7, 2007.

CPSD argues that in its February 2, 2007 letter to AGS, CPSD informed AGS of the need to file its status report by no later than March 7, 2007. However, this letter relates to the requirement under the Settlement Agreement for AGS to provide a status report which verifies that carrier-customers previously identified by CPSD as unlicensed had either verified that the company has a valid CPCN or has had its service terminated by AGS. This letter does not clarify CPSD's January 29, 2007 letter by directing AGS to file an updated

customer-carrier list by March 7, 2007.¹⁴ Subsequent e-mails and letters between CPSD and AGS related solely to the certification status of certain carrier-customers.

Based on these facts, we find that AGS substantially complied with the requirement to file a status report by March 7, 2007. Although a strict reading of the Settlement Agreement suggests that AGS should have provided a current list of customer-carriers as of March 7, 2007, AGS reasonably relied on CPSD's statement in its January 29, 2007 letter that AGS had already met this requirement by providing a list of carrier-customers on December 8, 2006. Although the language of CPSD's February 2, 2007 letter does state that AGS had not been relieved from compliance with the Settlement Agreement except for the

¹⁴ CPSD's February 2, 2007 letter to AGS states in pertinent part:

On February 7, 2007, I received an email (copy attached) from Ms. Carol Plofkin, Controller/Director of Finance for Alliance Group Services (AGS), stating my concerns related to my January 29, 2007 letter addressed to you. I'm afraid Ms. Plofkin may have misconstrued the content and intent of this letter. Nowhere in this letter do I indicate that the carriers are to respond only to me. In fact, I had specifically stated: Please **ALSO** advise the carriers to send a copy of their filing to me at the address posted below." Further, I provided a direct quote from the Settlement Agreement (SA), Decision (D.06-09-009) that states, in pertinent part: "AGS will provide CPSD with a status report that ... provides verification that each carrier-customer of AGS previously identified by CPSD as unlicensed has either verified that it has a valid CPCN or has had its service terminated by AGS". This is also stated, using essentially the same language, in paragraph 18 of the SA. With the exception of not requiring AGS to terminate service with these carrier-customers after 30 days notice, as specified in the SA, nowhere in this letter have I relieved AGS from performing to the specifications of the SA. This report is due, according to the terms of the SA, no later than March 7, 2007. However, under the present circumstances I would encourage AGS to provide this report as soon as possible. (Emphasis added.)

The remainder of this letter addresses the certification status of eight carrier-customers and CPSD's view that it was AGS' responsibility to contact the carrier-customers and notify them that they must either produce verification of registration or certification or have their service terminated by AGS.

requirement of terminating service to uncertified or unregistered carrier-customers within 30 days, this language is ambiguous in view of CPSD's previous statement that AGS had already met the requirement for submitting a list of carrier-customers. CPSD did not clearly direct AGS to file an updated list that was current as of March 7, 2007 in any of the correspondence or e-mails following CPSD's January 29, 2007 letter. Therefore, AGS had no notice that CPSD would later claim that AGS had failed to meet the requirements for the March 7, 2007 status report. Under these circumstances, we will not fine AGS for failing to file an updated customer-carrier list with CPSD by March 7, 2007, because CPSD never clearly requested one.

In the future, CPSD is advised to maintain clear and unambiguous communications with regulated utilities regarding requirements for compliance with the law and Commission orders.

5.1.5. The September 7, 2007 Status Report

AGS admits that it simply forgot to file this status report, which was due because the divestiture of Coughlin from any role in the management of AGS was not yet completed. After CPSD filed its protest, along with an attached data request asking for a current list of AGS' carrier-customers on October 12, 2007. AGS responded on October 18, 2007, over a month after the second status report was due. All of the carrier-customers on AGS' list were certificated. CPSD has stipulated that this list met the requirements of the Settlement Agreement.

CPSD argues that, although AGS' failure to timely file the second status report is not a serious offense, the Commission should impose a fine because AGS was responsible for complying with the Settlement Agreement and AGS's failure to file the status report on time caused CPSD to expend additional time on this matter, rather than focus on other priorities. AGS argues that, after

sending an e-mail regarding the status of one of its carrier-customers to CPSD on February 8, 2008, AGS had not heard from CPSD for many months. In addition, AGS points out that its failure to provide the customer-carrier list to CPSD on time did not deprive CPSD of useful information regarding non-certificated carriers, because all carrier-customers on the list were certificated.

We agree with CPSD that AGS violated the Settlement Agreement by filing the second status report late and only after CPSD requested it, and that AGS was responsible for filing the report, whether or not it had received recent communications from CPSD. We believe that a fine is appropriate because AGS caused an unnecessary consumption of CPSD's resources by failing to file the report on time and in order to deter future violations.

CPSD has asked the Commission to fine AGS \$5,000 based on its claim that AGS failed to file both status reports on time. However, since we found that AGS substantially complied with the requirement for filing the first status report, we will impose a smaller fine. In determining the size of the fine, we relied on the criteria adopted in D.98-12-075, as follows:

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:¹⁵

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

¹⁵ 1998 Cal. PUC LEXIS 1016, *71 - *73.

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 large number of consumers is a more severe offense than one that is limited in scope.

AGS' violation of the Settlement Agreement by the late filing of the second status report, while serious, did not cause any physical or economic harm to others. The record contains no evidence of other violations of the Settlement Agreement by AGS.¹⁶ However, AGS' failure to file the second status report on time harmed consumers and the regulatory process, by consuming CPSD's time in enforcing this requirement, which could have been spent on other matters important to the protection of consumers and the public interest. These factors must be weighed against the other factors in determining the amount of the fine.

¹⁶ We do not hold AGS responsible for Coughlin's failure to comply with the divestiture requirements of the Settlement Agreement in an orderly way for the previously stated reasons.

Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:¹⁷

The Utility's Actions to Prevent a Violation: Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utilities 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.

Although AGS failed to file the second status report until requested by CPSD, AGS has explained that it forgot to do so, and there is no evidence which suggests that AGS deliberately violated the Settlement Agreement. AGS has admitted the violation and promptly remedied it by filing the status report only six days after CPSD's data request for the customer-carrier list. However, AGS was responsible for carrying out its obligations under the Settlement Agreement and should have been tracking its own compliance, including the due dates for filing of status reports.

¹⁷ 1998 Cal. PUC LEXIS 1016, *73 - *75.

Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:¹⁸

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.

Based on AGS' financial statements, filed under seal in this proceeding, we believe that AGS can afford to pay a moderate fine.

We will weigh these factors 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. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:¹⁹

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.

¹⁸ 1998 Cal. PUC LEXIS 1016, *75 - *76.

¹⁹ 1998 Cal. PUC LEXIS 1016, *76.

The facts of this case indicate that the degree of wrongdoing, though not egregious, was sufficiently serious to warrant a fine. AGS was aware of the requirements of the Settlement Agreement and was responsible for filing this report. AGS has stated no valid reason that would excuse its delay in filing the status report. AGS' failure to file the report on time resulted in an unnecessary expenditure of CPSD's resources, which could have been spent on other issues affecting consumers and the public interest. In mitigation, AGS admitted the violation, promptly filed the report after CPSD's request, and, since all of AGS' carrier-customers listed in the second report were certificated, no consumers which receive service from these carrier-customers were harmed by Applicants' failure to file the report on time. These same facts also indicate that the public interest was not significantly harmed by AGS' late filing of the report.

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.²⁰ The parties have not cited to any analogous factual situations in prior Commission decisions imposing penalties.

We conclude based on the facts of this case that AGS should be fined \$2,500 based on its failure to file the second status report until after CPSD protested this application and filed a data request. The fine we impose today is meant to deter future violations by AGS and other parties. We emphasize that the size of the fine we impose today is tailored to the unique facts and

²⁰ 1998 Cal. PUC LEXIS 1016, *77.

circumstances before us in this proceeding. We may impose larger fines in other proceedings if the facts so warrant.

6. Conclusion

Based on the foregoing, we approve the transfer of control of AGS to DiPasquale on a prospective basis only and deny AGS' and DiPasquale's request for approval of this transaction on a *nunc pro tunc* basis. However, we impose no penalty on AGS based on this transfer or for Coughlin's previous transfer of control of AGS to Chrysalis, even though both transfers occurred without prior Commission approval as required by Section 854, based on the unique circumstances of this case. This order shall not be precedent in any other Commission proceeding involving an alleged violation of Section 854.

In addition, we find that AGS substantially complied with the Settlement Agreement in its filing of the March 7, 2007 status report. However, we find that AGS violated the Settlement Agreement by its late filing of the September 7, 2007 status report and impose a penalty of \$2,500.

7. Category and Need for Hearing

Based on the record, we find no need to alter the preliminary determinations as to categorization and the need for a hearing made in Resolution ALJ 176-3189, dated March 15, 2007.

8. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) 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. No Comments were filed.

9. Categorization and Need for Hearing

In ALJ Resolution 176-3199, adopted on September 20, 2007, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that no hearings are necessary. We affirm these preliminary determinations without change.

10. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. Alliance Group Services Inc. (AGS) is a Delaware corporation with its principal place of business located in Westport, Connecticut.
2. AGS provides service in California solely on a wholesale basis to other long distance companies, pursuant to its CPCN authorizing the provision of limited facilities-based and resold inter-exchange services.
3. AGS is a wholly-owned subsidiary of AGS Acquisition, which is also a privately held corporation.
4. AGS Holdings is a privately held company, which before the transactions described in this decision, held an 85 percent ownership interest in AGS Acquisition.
5. The majority of the shares of AGS Holdings are owned by the SMC 2001 Trust (Coughlin Family Trust), an irrevocable family trust of which Sharon Coughlin, the spouse of Thomas M. Coughlin, is trustee.
6. The remaining shares of AGS Holdings are owned by five individuals who are unrelated to the Coughlin family.
7. Thomas M. Coughlin is the former chairman of AGS.

8. Coughlin was the Chief Executive Officer of Vista Group International, Inc., doing business in California as an interexchange carrier known as Vista Communications (Vista), and the Coughlin Family Trust was the majority stockholder of this company.

9. In D.01-09-017, the Commission imposed sanctions against Vista in the amount of \$7 million for failing to adequately supervise its telemarketers, so that thousands of customers switched long distance providers after receiving misleading solicitations and inadequate information about rates and switching charges.

10. To date, Vista's \$7 million fine remains unpaid and is uncollectible.

11. DiPasquale is the President and CEO of AGS.

12. DiPasquale has managed the operations of AGS since late 2004.

13. Before the transactions described in this decision, DiPasquale held a 15 percent ownership interest in AGS Acquisition.

14. As a result of the transactions described in this decision, DiPasquale now owns 100 percent of the stock of AGS and AGS Acquisition.

15. The Commission has previously found AGS' current management, including DiPasquale, fit to manage AGS in D.07-04-037.

16. On December 29, 2004, AGS filed an application for a CPCN, which was docketed as Application (A.) 04-12-029, in order to resolve a dispute with CPSD regarding whether AGS is required to have a CPCN in order to do business in California.

17. CPSD filed a protest to A.04-12-029 on January 26, 2005, after discovering that Coughlin was one of the owners of AGS, on the grounds that Coughlin is unfit to operate a telecommunications business in this state because of his previous management role in Vista.

18. On September 7, 2006, in D.06-09-009, the Commission approved the Settlement Agreement between AGS and CPSD, which resolved the issues in CPSD's protest in A.04-12-029.

19. The Settlement Agreement requires the Coughlin Family Trust to divest itself of the indirect control of AGS by filing an application to transfer the control of AGS Holdings or causing the transfer of control of one of its subsidiaries to an unrelated third party, by no later than one year after the date of the Commission's approval of AGS' application for a CPCN (April 12, 2007).

20. As required by the Settlement Agreement, Coughlin formally resigned from his positions as an officer and director of AGS Acquisition.

21. As required by the Settlement Agreement, Coughlin was removed from the AGS payroll in September 2006.

22. To date, Coughlin has not filed, on his own behalf or jointly with another party, an application for Commission authorization pursuant to Section 854 to divest the indirect interest of the Coughlin Family Trust in AGS, as required by the Settlement Agreement.

23. In March 2005, while still chairman of AGS, Coughlin borrowed between \$900,000 and \$1 million from Chrysalis in order to finance his acquisition of a company known as SwissFone, a business venture unrelated to AGS.

24. Without the knowledge of AGS management, Coughlin pledged 85 shares of AGS Acquisition (which amounts to an 85 percent ownership interest in the company) held by the Coughlin Family Trust to Chrysalis as security for the loan.

25. In January 2006, SwissFone ceased operations, and Chrysalis demanded payment of Coughlin's loan.

26. Coughlin did not repay his debt to Chrysalis.

27. In approximately January 2006, the shares in AGS Acquisition that were previously owned by the Coughlin Family Trust were transferred to Chrysalis, after Coughlin defaulted on his loan from Chrysalis.

28. The January 2006 transfer of Coughlin's shares in AGS Acquisition indirectly transferred control of AGS to Chrysalis.

29. Neither Coughlin nor Chrysalis applied for Commission authorization under Section 854 before transferring Coughlin's shares in AGS Acquisition to Chrysalis.

30. In October 2007, Chrysalis placed the 85 shares in AGS Acquisition acquired from Coughlin for sale at a public auction.

31. A copy of the notice of the public auction appeared in the *New York Times* on October 4, 2007.

32. The public auction was held on October 8, 2007.

33. DiPasquale participated in the auction through a representative and, as the successful bidder, obtained the 85 shares of AGS Acquisition previously held by the Coughlin Family Trust.

34. By purchasing the 85 shares of AGS Acquisition at public auction in early October 2007, DiPasquale acquired a 100 percent ownership interest in AGS Acquisition and complete indirect control of AGS.

35. Neither AGS nor DiPasquale applied for advance Commission approval under Section 854 for the indirect transfer of control of AGS from Chrysalis to DiPasquale.

36. On October 25, 2007, approximately two weeks after DiPasquale's purchase of the 85 shares of AGS Acquisition at public auction, AGS filed an amendment of this application, which sought Commission approval of the

indirect transfer of control of AGS resulting from this transaction on a *nunc pro tunc* basis.

37. AGS management did not know that Coughlin had pledged his shares in AGS Acquisition as security for a loan from Chrysalis or that Coughlin had defaulted on his loan until shortly before Chrysalis placed the shares for sale at public auction.

38. By pledging his shares in AGS Acquisition as security for the loan from Chrysalis to further a business venture unrelated to AGS, Coughlin was acting to advance his own personal interests, not those of AGS.

39. Coughlin did not cooperate with AGS by complying with the divestiture requirements of the Settlement Agreement in an orderly way.

40. AGS attempted to cooperate with CPSD and the Commission by entering into the Settlement Agreement and attempting to secure the divestment of the controlling interest of the Coughlin Family Trust in AGS.

41. Based on the evidence in this case and Coughlin's previous record of violation of law and Commission orders, AGS management was not responsible for Coughlin's unauthorized transfer of control of the company to Chrysalis.

42. Based on the record, it appears that AGS learned that the 85 shares of AGS Acquisition formerly controlled by Coughlin were for sale within a very short time before the public auction occurred.

43. As a practical matter, even if AGS had been able to file an application for Commission authorization under Section 854 for DiPasquale to purchase the shares of AGS Acquisition before the public auction took place, there would not have been sufficient time for the Commission to act on the application before the public auction occurred.

44. DiPasquale's purchase of the shares of AGS Acquisition at public auction ensured that Coughlin would not regain control of AGS, as required by the Settlement Agreement.

45. DiPasquale's purchase of the shares of AGS Acquisition at public auction prevented the indirect transfer of control of AGS to a third party that may not have been qualified to manage AGS and may not have met Commission requirements for acquiring control of a telecommunications company.

46. Under the Settlement Agreement, AGS must submit progress reports to CPSD, which: a) list all of AGS' carrier-customers, and b) verify that each carrier-customer previously identified by CPSD as unlicensed has either a) verified its certification or b) had its service terminated by AGS. These status reports must be filed every six months until the divestiture of the Coughlin Family Trust's interests in AGS is completed.

47. Under the Settlement Agreement, AGS was required to file two status reports with CPSD, which were due on March 7, 2007 and September 7, 2007.

48. In a letter dated January 29, 2007, CPSD advised AGS that AGS' previous submittal of a list of carrier-customers in response to CPSD's data request satisfied the requirement for filing a list of carrier-customers as part of the March 7, 2007 status report.

49. CPSD's February 2, 2007 letter and subsequent correspondence with AGS did not direct AGS to file an updated list of carrier-customers that was current as of March 7, 2007.

50. Subsequent correspondence and e-mails between CPSD and AGS regarding the March 7, 2007 status report and the status of AGS' carrier-customers did not negate CPSD's statement in the January 29, 2007 letter that

AGS had already satisfied the requirement for filing a list of carrier-customers in the March 7, 2007 status report.

51. Based on the statements in CPSD's January 29, 2007 letter, AGS had no notice that CPSD would later claim that AGS had failed to file a satisfactory list of carrier-customers as part of the March 7, 2007 status report.

52. AGS justifiably relied on CPSD's statement in the January 12, 2007 letter that AGS had already satisfied the requirement for filing a list of carrier-customers as part of the March 7, 2007 status report.

53. AGS substantially complied with the requirement for filing the March 7, 2007 status report pursuant to the Settlement Agreement.

54. AGS admits that it forgot to file the September 7, 2007 status report.

55. AGS did not file the September 7, 2007 status report until after CPSD protested this application and filed a data request asking for a list of CPSD's carrier-customers, over a month after the status report was due.

56. AGS' second status report, which was due on September 7, 2007, was filed on October 18, 2007, six days after the filing of CPSD's protest and data request.

57. AGS' failure to file the second status report on time violated the Settlement Agreement.

58. AGS was responsible for filing the second status report as required by the Settlement Agreement, whether or not AGS had had recent contacts with CPSD.

59. In mitigation, AGS admitted the violation, filed the second status report six days after CPSD issued the data request asking for a list of AGS' customer-carriers, and since all of the carrier-customers on the list were certificated, AGS'

late filing of the status report did not deprive CPSD of information regarding non-certificated carriers.

60. AGS has adequate financial resources to pay a moderate fine.

61. The imposition of a fine of \$2,500 is appropriate in order to deter future violations by AGS and others that result in an unnecessary consumption of CPSD's and the Commission's resources.

Conclusions of Law

1. This is a ratesetting proceeding and no hearing is necessary.
2. Section 854(a) requires advance Commission authorization to transfer control of a public utility.
3. Under Section 854, in order to approve a transfer of control of a regulated utility, the Commission must find that the proposed transfer is in the public interest.
4. Section 854(a) does not authorize the Commission to approve transfer of control of public utilities retroactively or on a *nunc pro tunc* basis.
5. Any transfer of control of a public utility without prior Commission authorization is void under Section 854(a).
6. This application should be approved on a prospective basis because the transfer of AGS to DiPasquale is in the public interest and carries out the divestiture requirements of the Settlement Agreement.
7. This application should be denied to the extent it request retroactive or *nunc pro tunc* approval of the transfer of control of AGS to DiPasquale.
8. Since the Commission does not approve transfers of control on a *nunc pro tunc* basis, the indirect transfer of control of AGS to DiPasquale is void before the effective date of this decision.

9. Coughlin's transfer of control of AGS to Chrysalis without prior Commission authorization violates Section 854(a) and is void.

10. DiPasquale violated Section 854(a) by acquiring indirect control of AGS through his purchase of 85 shares of AGS Acquisition stock at public auction, without prior Commission authorization.

11. Section 2107 gives the Commission authority to impose a penalty of between \$500 and \$20,000 for violations of the Public Utilities Code or Commission Rules or orders by a public utility.

12. Under Section 2108, each day on which a violation of the Public Utilities Code or a Commission decision, rule or order continues to exist is a separate violation.

13. Under previous Commission decision, the need to effectuate a transfer quickly for business reasons does not excuse non-compliance with Section 854.

14. Under D.98-12-075, the Commission will consider the following criteria for determining the amount of a fine: (i) the severity of the offense, (ii) the conduct of the utility, (iii) the financial resources of the utility, (iv) the totality of the circumstances, and (v) the role of precedent.

15. Coughlin's previous transfer of control of AGS to Chrysalis in violation of Section 854 is a serious offense and harmed the public interest.

16. Under the unique circumstances of this case, AGS should not be fined based on Coughlin's violation of Section 854(a), based on his unlawful transfer of control of AGS to Chrysalis, because doing so would unjustly penalize AGS for the unauthorized actions of Coughlin over which AGS had no control; would serve no useful purpose; and would not deter future violations of Section 854(a).

17. The public and consumers were not harmed by DiPasquale's acquisition of indirect control of AGS without prior Commission authorization.

18. Based on the unique circumstances of this case, it would not serve the public interest or deter future violations of Section 854 to fine AGS based on DiPasquale's purchase of 85 shares of AGS Acquisition at public auction and his resulting acquisition of control of AGS without prior Commission authorization.

19. AGS' late filing of the second status report was not a serious violation, but harmed the public interest by requiring CPSD to expend its time and resources on enforcing this requirement, rather than on other matters important for the protection of consumers and the public interest.

20. AGS should be fined for its failure to file the second status report on time as required by the Settlement Agreement, because this violation of the Settlement Agreement, while not serious, harmed the public interest. The amount of the fine should be based on the criteria set forth in D.98-12-075.

21. The application of the criteria in D.98-12-075 to the facts of this case indicates that Applicants should pay a fine of \$2,500 for the late filing of the second status report in violation of the Settlement Agreement.

O R D E R

IT IS ORDERED that:

1. Application 07-09-006, for authority under Public Utilities Code Section 854(a), to transfer control of Alliance Group Services, Inc. to Jess M. DiPasquale, is granted to the extent it requests authority effective as of the date of this order.

2. A.07-09-006 is denied to the extent it requests retroactive or *nunc pro tunc* authority for the transfer of control of Alliance Group Services, Inc. to Jess M. Dipasquale.

3. The previous transfer of Alliance Group Services, Inc., to Chrysalis Group, Inc., by Thomas M. Coughlin without prior Commission approval as required by Public Utilities Code Section 854(a) is void.

4. The transfer of control of Alliance Group Services, Inc. to Jess M. DiPasquale, effective today, satisfies the requirement of the Settlement Agreement approved in Decision (D.) 06-09-009, for the divestiture of the indirect controlling interest formerly held by the SMC 2001 Trust (the Coughlin Family Trust) in Alliance Group Services, Inc.

5. Based on the unique circumstances of this case, Alliance Group Services, Inc. shall pay no fine based on the transfer of control of Alliance Group Services, Inc. to Jess M. DiPasquale without prior Commission approval, in violation of Section 854(a).

6. Based on the unique circumstances of this case, Alliance Group Services, Inc. shall pay no fine based on the previous transfer of control of Alliance Group Services, Inc. to Chrysalis Group Inc., by Thomas M. Coughlin, former chairman of Alliance Group Services, Inc., without prior Commission approval as required by Section 854(a).

7. Alliance Group Services, Inc., and Jess M. DiPasquale shall notify the Director of the Commission's Communications Division in writing of the transfer of control, as authorized herein, within 10 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.

8. Alliance Group Services, Inc., shall pay a fine in the amount of \$2,500 for failing to timely file the status report due on September 7, 2007, as required by the Settlement Agreement approved in D.06-09-009. Alliance Group Services, Inc., shall pay the fine within 30 days from the effective date of this order by tendering to the Fiscal Office of the California Public Utilities Commission a

check in the amount of \$2,500 made payable to the State of California General Fund. Alliance Group Services, Inc. shall file proof of payment at the Commission's Docket Office within 40 days of payment.

9. Alliance Group Services, Inc. and Jess M. DiPasquale shall obtain Commission authorization as required by Section 854(a) before consummating the transfer of control of Alliance Group Services, Inc., to any other entity, and shall be subject to fines for any future violations of Section 854(a).

10. This order shall not be precedent in other proceedings involved alleged violations of Section 854(a).

11. Application 07-09-006 is closed.

This order is effective today.

Dated September 10, 2009, at San Francisco, California.

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