

Decision 02-04-021 April 4, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

VarTec Telecom, Inc. (U 5384-C), VarTec Telecom Holding Company, Teleglobe Holdings (U.S.) Corporation, Excel Telecommunications, Inc. (U 5196-C), eMeritus Communications, Inc. (U 5526-C), and Long Distance Wholesale Club, Inc. (U 5653-C), for Authority for Transfers of Control.

Application 01-10-026
(Filed October 22, 2001)

OPINION GRANTING AUTHORITY FOR TRANSFER OF CONTROL

1. Summary

Through this application, VarTec Telecom, Inc. (VarTec), VarTec Telecom Holding Company (VarTec Holding), Teleglobe Holdings Corporation (Teleglobe Holdings), Excel Telecommunications, Inc. (Excel), eMeritus Communications, Inc. (eMeritus), and Long Distance Wholesale Club, Inc. (LDWC) (jointly Applicants) seek approval under Pub. Util. Code § 854 of a stock purchase agreement in which VarTec, through its wholly owned subsidiary VarTec Holding, will acquire control of Excel, eMeritus, and LDWC.

The Commission's Consumer Services Division (CSD) filed a protest to the application requesting consolidation of this matter with VarTec's currently pending request for a certificate of public convenience and necessity (CPCN) to offer local exchange service in Application (A.) 99-04-011 (CPCN application). Subsequently, CSD and VarTec filed a motion requesting adoption of a settlement between CSD and VarTec of disputed issues in the CPCN application

and requesting withdrawal of CSD's protest of this application. Given our action today in a companion order to approve the settlement in the CPCN application, we grant the joint motion for withdrawal of CSD's protest. The application is granted.

2. Description of Applicants

a. The VarTec Companies

VarTec, a Texas corporation, is currently authorized to resell interLATA and intraLATA¹ telecommunications services in California.² In addition, VarTec is authorized to provide interexchange services in 48 other states and competitive local exchange services in 7 states. VarTec Holding is a Delaware corporation that is a wholly owned subsidiary of VarTec and does not hold any authorization to provide service in California.

b. The Teleglobe Companies

Teleglobe Holdings is a wholly owned subsidiary of Teleglobe Inc., a Canadian corporation and subsidiary of BCE Inc. Teleglobe Inc. operates the Teleglobe Communications group and Excel Communications group. Teleglobe Holdings owns all of the authorized capital stock of Excel Communications Inc. which controls 100% of the equity of Excel, eMeritus, and LDWC.

¹ California is divided into 10 Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

² See Decision (D.) 94-05-053 and D.95-01-011.

Excel is a Texas corporation authorized to provide long distance service in California.³ eMeritus, formerly operating under the names of Teleglobe Business Solutions, Inc. and Telco Holdings, Inc. d/b/a Dial & Save, is a Texas corporation authorized to provide long distance and local exchange service in California.⁴ LDWC provides dial-around (1010-XXX) interexchange service in California.⁵

3. Nature of Application

Applicants request approval for VarTec, through its wholly owned subsidiary VarTec Holding, to acquire control of Excel Communications Inc., which owns Excel, eMeritus, and LDWC. Applicants executed a Stock Purchase Agreement dated August 26, 2001 through which VarTec Holding has agreed to acquire from Teleglobe Holdings all of the authorized capital stock of Excel Communications Inc. Essentially, the transaction will result in a change in the ultimate parent of Excel, eMeritus, and LDWC, which will become wholly owned subsidiaries of VarTec Holding. According to Applicants, the Stock Purchase Agreement sets a closing date for the transaction no later than June 30, 2002 and closing will not occur until after regulatory approvals have been obtained.

Applicants state that following the merger, Excel, eMeritus, and LDWC will continue to provide service to their current California customers under the

³ See D.90-02-028, D.97-05-023. In addition, Excel received authorization to provide local exchange service in California in D.97-08-031, but the certification was not exercised within the first 12 months and has lapsed.

⁴ See D.95-10-009 and D.96-02-072.

⁵ See D.96-08-019.

same corporate names and existing service arrangements, and pursuant to their existing California tariffs. Applicants maintain that the transfer of control will be transparent to all current customers of Excel, eMeritus, and LDWC and therefore will not be detrimental to the public interest. Further, the Applicants maintain that the transaction will serve the public interest by combining the financial resources and complementary operating, technical, and managerial strengths and experience of VarTec, Excel, eMeritus, and LDWC. According to Applicants, the transaction will enable VarTec, due to its strong financial position, to fully support the operation of Excel, eMeritus, and LDWC.

The application includes a description of the management teams of VarTec, Excel, eMeritus, and LDWC. The proposed key management has extensive experience and expertise in telecommunications. The application also includes a copy of the executed Stock Purchase Agreement, and VarTec's relevant financial information.

4. CSD's Protest

In its protest, CSD requests that the Commission consolidate this application with VarTec's CPCN application, which CSD has also protested. In the CPCN application, CSD alleged that VarTec violated Section 851 by acquiring and selling assets or controlling interests in other telecommunications carriers without obtaining prior Commission approval. CSD is concerned that VarTec may have violated Section 851 by consummating the Stock Purchase Agreement and transfer of control that is the subject of this application in advance of Commission approval and without proper customer notice.

In response, Applicants deny that they have closed this stock purchase transaction and effectuated the transfer of control in advance of Commission approval. They explain that the Stock Purchase Agreement requires that regulatory approvals be obtained prior to closing. Further, Applicants deny

CSD's allegation that they violated the Commission's customer notice provisions. Applicants contend that the transaction does not involve the sale of the customer base from Excel, eMeritus, and LDWC but instead involves solely the purchase of 100% of the stock of the corporate parent of these three carriers. According to D.02-01-038:

The mere substitution of a different holding or parent company, without other impact on the underlying utility providing service or the service provided, does not appear to be the sort of change for which prior notice to the utility's customers is contemplated under Section 2889.3. (D.02-01-038, mimeo at 19.)

Thus, we agree with Applicants that customer notice is not required for stock purchase transactions.

Moreover, Applicants object to consolidation of this case with VarTec's CPCN application. They explain that CSD has no evidence of any problem with the Stock Purchase Agreement, and this matter should not be held up while the Commission adjudicates CSD's protest to the CPCN application.

On March 1, 2002, assigned Commissioner Lynch issued a scoping ruling in this matter that denied CSD's request to consolidate this matter with VarTec's CPCN application. Nevertheless, the scoping ruling determined that a final order in this matter would not be issued in advance of the Commission's resolution of the CPCN application.

On March 8, 2002, Applicants and CSD filed a joint motion for Commission adoption of a settlement between CSD and VarTec. The motion was filed in both this docket and the CPCN application, and included a request to withdraw CSD's protest. On March 12, 2002, Applicants filed a motion requesting the Commission revise the schedule announced in the scoping ruling, waive certain process rules, and place a proposed order unconditionally granting the application on the Commission's agenda for March 21, 2002. In the

alternative, the motion requests an order conditionally granting the application under the same expedited time frame.

5. Discussion

Pub. Util. Code § 851 provides that no public utility may transfer its property that is necessary or useful in performing its duties to the public without first having secured the Commission's authorization. Pub. Util. Code § 854 requires Commission authorization before a company may "merge, acquire, or control...any public utility organized and doing business in this state...." The purpose of these and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such an action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRC 56.)

The proposed stock purchase and transfer of control will enable the three acquired entities, Excel, eMeritus, and LDWC to continue providing service to their California customers under the same terms and conditions that are currently in effect. VarTec has the financial qualifications and managerial background in telecommunications necessary to operate Excel, eMeritus, and LDWC.

The only remaining issue in this application is CSD's protest. Although CSD filed its protest in December 2001, CSD filed a motion on March 8, 2002 to withdraw its protest conditioned on approval of a settlement with VarTec in the CPCN application. In a companion order issued today, we have approved CSD's settlement with VarTec. Therefore, we herein grant CSD's request to withdraw its protest of this application.

The settlement of the CPCN application that we approve in a companion order today resolves the dispute between CSD and VarTec over whether VarTec should be granted a CPCN to serve the local exchange market. Given that

VarTec may now serve the competitive local exchange market along with its existing authority to serve the interLATA and intraLATA market, we see no reason to prevent VarTec from acquiring the three carriers involved in this transfer of control, two of whom are competitive local carriers in addition to being long distance carriers. Therefore, we find the Stock Purchase Agreement is not adverse to the public interest and we will approve it.

Finally, we will deny Applicants' March 12, 2002 motion requesting that we reverse the scoping ruling in this matter and issue an order in advance of the resolution of the CPCN application. We see no reason to reverse the determinations in the scoping ruling given the timely resolution of the CPCN application and our ability to act on this transfer of control application on the same agenda. We note that CSD's request to withdraw its protest was not filed until March 8, 2002 and today's action is occurring within a reasonable time frame from that request.

In Resolution ALJ 176-3075, dated November 8, 2001, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, we conclude that a public hearing is not necessary, nor is it necessary to alter the preliminary determinations.

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. As allowed by Section 311(g)(2), the parties agreed to a shortened comment period of one day. There were no comments on the draft decision.

6. Request for Confidentiality

Applicants request to file under seal Exhibits C and E containing a copy of the Stock Purchase Agreement and VarTec's financial statements. Applicants also request confidential treatment of a portion of their March 12, 2002 motion

for Proposed Order, Change of Schedule, and Waivers. Applicants contend that the information in both exhibits and the March 2002 motion contains information that would identify the business plans and financial positions of the Applicants. If revealed, these documents could result in substantial competitive harm to the Applicants. We have granted similar requests for confidential treatment in the past and will do so here.

Findings of Fact

1. Applicants seek approval pursuant to Pub. Util. Code § 854 of a stock purchase agreement that will result in the transfer of control of Excel, eMeritus, and LDWC to VarTec and Vartec Holding.
2. Excel and eMeritus provide long distance and local exchange service in California. LDWC provides interexchange service in California.
3. VarTec is a Texas corporation authorized to resell interLATA and intraLATA services in California. VarTec Holding is a wholly owned subsidiary of VarTec.
4. VarTec applied for a CPCN to serve the local exchange market in California which is approved today in a decision in Application (A.) 99-04-011.
5. There will be no change in the corporate names, current services or rates provided by Excel, eMeritus and LDWC to their current customers as a result of the transfer of control.
6. VarTec and VarTec Holding have the financial and managerial qualifications to support the operations of Excel, eMeritus, and LDWC.
7. CSD protested the application and subsequently requested to withdraw its protest conditioned on Commission approval of a settlement between CSD and VarTec of issues in A.99-04-011.
8. Applicants request that the Stock Purchase Agreement (Exhibit C) and VarTec's financial information (Exhibit E) included with the application be kept

under seal. Applicants also request confidential treatment of business information contained in their March 12, 2002 motion.

9. Public disclosure of the information contained in Exhibits C and E and the March 12, 2002 motion would place Applicants at an unfair business disadvantage.

Conclusions of Law

1. With the Commission's adoption of a settlement of VarTec's CPCN application, CSD's request to withdraw its protest of this application should be granted.

2. The proposed Stock Purchase Agreement and transfer of control is not adverse to the public interest.

3. This proceeding is designated a ratesetting proceeding and a hearing is not necessary.

4. The application should be approved subject to the terms and conditions set forth below.

5. Applicants' request to file Exhibits C and E and portions of their March 12, 2002 motion under seal should be granted for two years.

O R D E R

IT IS ORDERED that:

1. VarTec Telecom, Inc. (VarTec), VarTec Telecom Holding Company (VarTec Holding), Teleglobe Holdings Corporation, Excel Telecommunications, Inc. (Excel), eMeritus Communications, Inc. (eMeritus), and Long Distance Wholesale Club, Inc. (LDWC) are authorized pursuant to Pub. Util. Code §§ 851 through 854 to enter into a Stock Purchase Agreement, as more fully described in the application and its exhibits, by which VarTec Holding will acquire all of the

authorized capital stock of Excel Communications and thereby transfer control of Excel, eMeritus, and LDWC to VarTec and VarTec Holding.

2. VarTec, Excel, eMeritus and LDWC shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as authorized herein, within 10 days of the date of consummation of such transfer. A true copy of the instruments of transfer shall be attached to the notification.

3. VarTec, Excel, eMeritus, and LDWC shall file new tariffs incorporating any changes in name, rates, services, and management authorized in the transfer transaction.

4. VarTec, Excel, eMeritus, and LDWC shall make all books and records available for review and inspection upon Commission staff request.

5. VarTec shall comply with all conditions for operating authority previously set forth by the Commission for Excel, eMeritus, and LDWC.

6. The motion by the Consumer Services Division to withdraw its protest to this application is granted.

7. Applicants' March 12, 2002 motion requesting a change in schedule and waiver of Commission rules is denied.

8. The authority granted herein shall expire if not exercised within one year from the date of this order.

9. Applicants' request to have the Stock Purchase Agreement and financial information filed with this application in Exhibits C and E and the March 12, 2002 motion kept under seal is granted for two years from the effective date of this decision. During that period the information shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the

Assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

10. If the Applicants believe that further protection of the information kept under seal is needed, they may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as needed.

11. Application 01-10-026 is closed.

This order is effective today.

Dated April 4, 2002, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

CARL W. WOOD

GEOFFREY F. BROWN

MICHAEL R. PEEVEY

Commissioners