

Decision 12-03-040 March 22, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of West Corporation and HyperCube Telecom, LLC (U6592C), for Authority for West Corporation to Acquire Indirect Control of HyperCube Telecom, LLC.

Application 11-12-002
(Filed December 2, 2011)

DECISION APPROVING JOINT APPLICATION FOR WEST CORPORATION TO ACQUIRE INDIRECT CONTROL OF HYPERCUBE TELECOM, LLC.

Summary

This decision grants, pursuant to Public Utilities Code Section 854,¹ the joint application of West Corporation (West) and HyperCube Telecom, LLC (HyperCube) to undertake a transaction that will result in West acquiring indirect control of HyperCube.

This decision concludes that the transaction underlying the transfer qualifies for an exemption from the California Environmental Quality Act, and accordingly, no additional environmental review is required.

This decision concludes that the transfer is in the public interest.

1. Parties to the Transition

West Corporation (West) is a corporation organized under the laws of Delaware. The principal place of business of West is 11808 Miracle Hills Drive, Omaha, NE 68154. West is a provider of technology-driven voice and data solutions. West's subsidiaries collectively provide primarily non-regulated

service in the U.S. as well as in Europe, Asia, and other regions of North America. Through its subsidiaries, West provides a broad range of communications and network infrastructure solutions to business customers throughout the United States and globally. These services include conferencing and other meeting replacement services, alerts and notification services, emergency communications services, automated call processing, interconnected Voice over Internet Protocol (VoIP) services, and agent-based services such as inbound customer care, customer acquisition and retention, and collection of receivables. The voice and data solutions of West's subsidiaries are deployed in a variety of industries, including telecommunications, banking, retail, financial services, technology and healthcare. The vast majority of these services are information services or services other than communications services. West and the West subsidiaries do not own fiber, indefeasible rights of use, or other transmission facilities. Rather, they lease transmission lines (including access circuits) from other carriers. West itself does not conduct business in California, except through those of its subsidiaries that are qualified to conduct business in California. West does not hold any telecommunications regulatory authority.

West's majority owner is Thomas H. Lee (THL). THL holds an aggregate interest of approximately 60 percent in West. THL is a private equity firm, with principal offices at 100 Federal St., 35th Floor, Boston, MA 02110. Applicants assert that THL's investment strategy is to acquire substantial ownership positions in large growth-oriented companies where THL can contribute managerial and strategic expertise to create value. Applicants assert that, since

¹ All code references are to the Public Utilities Code, unless otherwise stated.

1974, THL has raised in the neighborhood of \$22 billion of equity capital and has invested in over 100 businesses with an aggregate purchase price of more than \$125 billion.

HyperCube Telecom, LLC (HyperCube) is a limited liability company organized under the laws of Delaware. Its principal place of business is 3200 W. Pleasant Run Road, Suite 300, Lancaster, TX 75146. HyperCube is a wholly-owned subsidiary of HyperCube, LLC (Parent). HyperCube provides wholesale local and national tandem switching and transport services, termination services, toll-free origination services, and Direct Inbound Dial services. HyperCube's customers are telecommunications and information service providers, including wireless carriers, wireline competitive local exchange carriers and interexchange carriers, cable telephony providers, and VoIP providers. HyperCube provides service to its customers using its nationwide optical backbone network that is both internet protocol and time division multiplexed based. While HyperCube owns and operates its own network equipment, it does not own fiber, indefeasibility rights of use, or other transmission facilities. Rather, HyperCube leases transmission lines (including access circuits) from other carriers. HyperCube's services are currently available in 43 states and the District of Columbia. HyperCube holds blanket domestic Section 214 authority as well as international Section 214 authority from the Federal Communications Commission. In addition, HyperCube holds certificates to provide local exchange and/or intrastate interexchange services in 43 states and the District of Columbia. In California, HyperCube is authorized to

provide local and interexchange service on a resale and limited facilities basis pursuant to Decision (D.) 01-11-049.²

Rubik Acquisition Company, LLC (Rubik) is a wholly-owned subsidiary of West, formed solely for the purpose of acquiring the indirect interests in HyperCube. The principal place of business of Rubik is located at 11808 Miracle Hills Drive, Omaha, NE 68154.

2. The Transaction

The transaction will be consummated through the non-applicant entities Parent and Rubik.

Parent, Rubik, West and certain individuals and entities holding direct or indirect membership interests in Parent have entered into an agreement pursuant to which Rubik will acquire all of the membership interests in Parent and, indirectly, in HyperCube (the Transaction). West anticipates that it will continue to hold HyperCube as a separate subsidiary of Rubik. Although the Transaction will result in a transfer of the ownership and control of HyperCube to Rubik, no assets or authorization to provide service will be transferred from HyperCube to Rubik or West. The Applicants assert that the Transaction will not result in any loss or impairment of service for any customers, that HyperCube's customers will continue to receive their existing services at the same rates, terms and conditions as at present, and that the transfer of control effectively will be transparent to HyperCube's customers.

² The Certificate granted in D.01-11-049 was originally granted in the name of KMC Data, LLC. Upon completion of the acquisition of KMC Data, LLC by Parent, *see* D.06-04-069, KMC Data, LLC's name was changed to HyperCube Telecom, LLC. *See* Advice Letter No. 6 - Name Change of KMC Data, LLC to Hypercube Telecom, LLC - Utility No. U-6592-C (dated Sept. 12, 2008).

3. Financial Qualifications and Technical Expertise

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 this and related sections is to enable the Commission, before any transfer of a public utility is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRC 56.)

Where a company that does not possess a Certificate of Public Convenience and Necessity (CPCN) desires to acquire control of a company or companies that do possess a CPCN, the Commission will apply the same requirements to the acquiring company as would be applied to an initial applicant seeking a CPCN. The Commission has established two major criteria for determining whether a CPCN should be granted, or transferred. First, an applicant who desires to operate as a provider of facilities-based local exchange and interexchange services must demonstrate that it has a minimum of \$100,000 in cash or cash equivalent for operations of the company plus the costs of deposits to be paid to other carriers. Second, an applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

3.1. Financial Qualifications

The instant application includes a copy of financial statements for both Parent and West. These documents demonstrate that each has sufficient resources to meet the Commission’s financial requirements.

With their application, the Applicants filed a Motion for Leave to File Confidential Materials Exhibit F (Acquisition Agreement) and Exhibit H (Parent Consolidated Financial Statements) Under Seal pursuant to Pub. Util.

Code § 583 and General Order 66-C (2.2)(b). Applicants assert that the information contained in Exhibit F is a non-public acquisition agreement and that Exhibits H contains private financial documentation of Hypercube. Joint Applicants assert that public disclosure of this private, confidential information could subject them to potential fraud and unfair competitive disadvantage in connection with the business negotiations and dealings with vendors, customers, potential business partners and others. That motion is granted.

3.2. Technical Expertise

In this case, HyperCube, which holds a CPCN in California, is being indirectly acquired by West. Both Applicants have submitted significant information relative to the technical expertise of both companies, both in the original filing on December 2, 2011 and in a filing in compliance with a January 11, 2012 ruling of the assigned Administrative Law Judge (ALJ). The Applicants assert that they possess the level of technical expertise necessary to qualify for a CPCN in California. Nothing before us contradicts that assertion.

Exhibit J to the application contains the Applicants' disclosures relative to "Regulatory and Financial History of Joint Applicants, Officers, Directors and Major Shareholders." Most of the 12 entries involve minor and relatively minor regulatory actions related to West subsidiaries involved in debt collection activities. One debt collection related regulatory action, however, is quite serious and must be noted by this Commission in this Decision. Applicants reveal that the Federal Trade Commission conducted a non-public inquiry into the 2005 through 2007 debt collection practices of West Asset Management and ultimately alleged that West had violated the federal Fair Debt Collection Practices Act. Applicants further reveal that on March 15, 2011, "without admitting liability, West agreed to settle the case and pay \$2,800,000 to avoid the costs of defense

and the negative publicity.” We trust that the settlement of this matter between the FTC and West has resulted in West making the necessary consumer protection changes needed in its debt collection practices.

Applicants also reveal, in Exhibit J, that the CEO of Parent and Hypercube, Ronald Beaumont, was the Chief Operating Officer of WorldCom at the time WorldCom filed for Chapter 11 bankruptcy in 2002, and that Clay Myers, the Executive Vice President and CFO of Parent served as Senior Vice President of Finance at Allegiance Telecom when it filed a petition for Chapter 11 bankruptcy in May of 2003.

Applicants assert that Mr. Beaumont was investigated by a variety of government agencies relative to the WorldCom bankruptcy. In a January 13, 2012 filing in compliance with a ruling from the ALJ, applicants assert that Mr. Beaumont has over 30 years experience in different aspects of telecommunications and management, is one of the founders and CEO of Parent, plays an active role within the CLEC industry, and serves on the Comptel Board of Directors and its CEO Council.

Applicants assert that Mr. Myers was Senior Vice President for Finance at Allegiance Telecom from 1999 through 2004, that Allegiance filed a plan of reorganization in June 2004, emerged from Chapter 11 that same month and was acquired by XO Communications later that year.

Applicant represents that no other persons associated with or employed by Applicant as an affiliate, officer, director, partner, or owner of more than 10% of Applicant was previously associated with any telecommunication carrier that filed for bankruptcy, or was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule or order. Nothing before us contradicts that assertion.

4. Discussion

Joint applicants assert that the indirect acquisition of HyperCube by West will serve the best interests of the public. Joint Applicants assert that HyperCube is a leader in the market for competitive tandem service, enabling telecommunications and information service providers to route their traffic over an alternative network that offers more efficiency and reliability at a lower cost than traditional networks. Joint Applicants further assert that West is an established provider of high-quality voice and data solutions, through its subsidiaries, to enterprise customers in critical industries and that the financial, technical, and managerial resources that West will bring to HyperCube will further enhance HyperCube's ability to compete in the telecommunications and information services marketplace and to provide cost-effective alternatives to legacy carriers' service offerings.

Joint Applicants assert that, following the transfer of control, HyperCube's customers will continue to receive their existing services at the same rates, terms, and conditions that currently apply. Accordingly, the transaction will not result in any modifications to HyperCube's existing tariffs.

There is no evidence that the merger sought in this application will reduce competition and harm consumers.

For the above reasons, the transaction is in the public interest and we will grant the application pursuant to § 854.

5. California Environmental Quality Act (CEQA)

The CEQA requires the Commission act as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. The nature of the transaction,

combined with assertions of the Joint Applicants at 12, assure us that “the transaction does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.” We conclude that under these circumstances, the proposed project qualifies for an exemption from CEQA pursuant to § 15061(b)(3) of the CEQA guidelines, inasmuch as it can be seen with certainty that the project will have no significant impact upon the environment. Accordingly, the Commission need perform no further environmental review for this application. Applicant must file for additional authority, and submit to any necessary CEQA review, before it can construct facilities.

6. Categorization and Need for Hearing

In Resolution ALJ 176-3286, dated December 15, 2011, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

7. Waiver of Comment

No protests were filed in this proceeding. Therefore, this is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to § 311(g)(2) and Rule 14.6(c)(2) of the Commission’s Rules of Practice and Procedure (Rules), the otherwise applicable 30-day period for public review and comment is being waived.

8. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Richard W. Clark is the assigned ALJ in this proceeding.

Findings of Fact

1. West Corporation (West) is a corporation organized under the laws of Delaware.
2. West's majority owner is THL, a private equity firm. THL holds an aggregate interest of approximately 60 percent in West.
3. HyperCube Telecom, LLC (HyperCube) is a limited liability company organized under the laws of the state of Delaware.
4. HyperCube is a wholly-owned subsidiary of Parent a Delaware limited liability company and holding company.
5. Rubik is a wholly-owned subsidiary of West, formed solely for the purpose of acquiring HyperCube.
6. The transaction will be consummated through the non-applicant entities Parent and Rubik.
7. Parent, Rubik, West and certain individuals and entities holding direct or indirect membership interests in Parent have entered into an agreement pursuant to which Rubik will acquire all of the membership interests in Parent and, indirectly, in HyperCube (the Transaction).
8. Although the Transaction will result in a transfer of the ownership and control of HyperCube to Rubik, no assets or authorization to provide service will be transferred from HyperCube to Rubik or West.
9. In California, HyperCube is authorized to provide local and interexchange service on a resale and limited facilities basis pursuant to D.01-11-049.
10. HyperCube currently provides telecommunications services in California and there will be sufficient experience and expertise for its continued operations, post transfer of control.

11. Applicants have provided financial statements that demonstrate that both West and Parent have access to well over \$100,000 in cash or cash equivalent, which is reasonably liquid and available and which is sufficient to cover operating expenses and any deposits third-party carriers may require.

12. Pursuant to Rule 11.4, Applicants filed a motion for leave to file confidential materials under seal, including Exhibits F and H to the application.

13. Notice of this application appeared on the Commission's Daily Calendar on December 7, 2011. There were no protests to this application.

14. No hearings are necessary.

Conclusions of Law

1. Where a company that does not possess a CPCN desires to acquire control of a company or companies that do possess a CPCN, the Commission will apply the same requirements, to the acquiring company, as would be applied to an initial applicant seeking a CPCN.

2. West Corporation will be the ultimate owner of HyperCube, LLC and its subsidiaries, but no transfer of certificates, assets or customers will occur; the management of the companies will remain essentially the same; and each company will have the financial resources required; as a result, this transaction meets the Commission's requirements for approval of this transaction.

3. This transaction is in the public interest.

4. Applicants' motion to file their Exhibits F and H to the supplement to the application under seal should be granted for two years.

5. Since this matter is uncontested, the decision should be effective on the date it is signed.

O R D E R

IT IS ORDERED that:

1. Pursuant to Public Utilities Code § 854, the application of West Corporation and HyperCube Telecom, LLC (HyperCube) for approval of a transaction in which West will acquire indirect control of HyperCube is approved.
2. Within five days of the closing of the transaction, the surviving entities shall notify the Communications Division, by letter, of the consummation of the transaction.
3. Applicants' motion to file their Exhibits F and H under seal is granted. The information will remain under seal for a period of two years after the date of issuance of this order. During this two-year period, this information will remain under seal and may not be viewed by any person outside the Commission, except as agreed to in writing by Applicants or their successors in interest, or as ordered by a court of competent jurisdiction. If West Corporation (West) or Hypercube Telecom, LLC (HyperCube), or either of their successors in interest, believe that it is necessary for this information to remain under seal for longer than two years, West or HyperCube, or their successors in interest may file a new motion at least 30 days before the expiration of this limited protective order.

4. Application 11-12-002 is closed.

This order is effective today.

Dated March 22, 2012, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners