

Decision 12-03-033 March 22, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of First Communications, LLC (U6837C), Globalcom, Inc. (U6093C), Xtension Services, Inc. (U6508C) and Gores AC Holdings, LLC for Approval of Transfer of Control.

Application 11-09-023
(Filed September 28, 2011)

DECISION GRANTING AUTHORIZATION TO GORES AC HOLDINGS, LLC TO ACQUIRE CONTROL OF FIRST COMMUNICATIONS, INC.

Summary

First Communications, LLC (FCL), Globalcom, Inc. (Globalcom), Xtension Services, Inc. (Xtension), and Gores AC Holdings, LLC (Gores AC) (collectively, the Applicants) seek authorization for Gores AC, pursuant to Pub. Util. Code §§ 852 and 854, to acquire control of First Communications, Inc. (FCI), the parent company of FCL, Globalcom, and Xtension (Operating Companies), and indirectly to acquire control of the Operating Companies. The request is granted under Pub. Util. Code § 854(a). This proceeding is closed.

Jurisdiction

Pursuant to Pub. Util. Code § 852,¹ no public utility, and no subsidiary, affiliate of, or corporation holding a controlling interest in a public utility, shall purchase or acquire, take or hold, any part of the capital stock of any other public utility organized or existing under the laws of this state, without prior

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

Commission authorization. In addition, § 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 a public utility is consummated, to review the situation and take such action, as a condition of the transfer, as the public interest may require.²

Description of the Parties and Transaction

Gores AC Holdings, LLC (Gores AC) is a limited liability corporation with its principal office located at 10877 Wilshire Boulevard, Suite 1085, Los Angeles, California 90024. The Gores Group and its managing member, Alec E. Gores, have ultimate control of Gores AC. A limited partnership, Gores Capital Partners III, L.P., owns 95% or more of Gores AC. The Gores Group currently acts as the managing member of the general partner of the investment funds that together hold non-controlling ownership of 13.1% of the voting stock of First Communications, Inc. (FCI) through Gores FC. Applicants assert that the Gores Group is a private investment firm that focuses its investments on opportunities in the technology and telecommunications sectors. Gores Group’s private equity fund has combined capital commitments from institutional investors and its own principals. Thus, in addition to its own capital resources, through an established network of debt financing sources and investment partners, the Gores Group provides access to working capital for its portfolio companies on favorable terms and conditions that might not otherwise be available to those companies as stand-alone enterprises.

² See, *San Jose Water Co.* 10 CRC 56, 63 (May 10, 1916).

FCI is a Delaware corporation with its headquarters located at 33440 West Market Street, Akron, OH 44333. FCI, through its operating subsidiaries, First Communications, LLC (FCL), Globalcom, Inc. (Globalcom), Xtension Services, Inc. (Xtension), and First Telecom Services, LLC is authorized to provide local, private line, and/or long distance services to both business and residential customers in 49 states. Its services include, in addition to traditional local and long distance services, toll-free services, conference calling packages, calling cards, Internet access, and dedicated and private line services.

FCL, an Ohio Limited Liability company, is a wholly-owned subsidiary of FCI, and is authorized in California to provide facilities-based and resold local exchange and interexchange telecommunications services.³

Globalcom, an Illinois corporation, is also a wholly-owned subsidiary of FCI, and is authorized in California to provide resold interexchange and resold and facilities-based local exchange telecommunications services.⁴

Xtension, a Delaware corporation, is another wholly-owned subsidiary of FCI. Xtension is authorized in California to provide resold interexchange telecommunications services in accordance with D.01-03-006.⁵

Applicants contend that the proposed transaction will serve the public interest by providing FCL, Globalcom, and Xtension access to additional financial and operational resources that will help strengthen their positions in the

³ See, Decision (D.) 03-10-066 and D.07-03-030 issued on October 22, 2003 and March 15, 2007, respectively.

⁴ See, D.01-07-015, D.99-02-019, and D.98-12-002 granted on July 12, 2001, February 4, 1999 and December 1, 1998 respectively.

⁵ Issued in Application 01-01-045 on March 5, 2001.

telecommunications marketplace. Applicants anticipate that the proposed transaction will be entirely transparent to customers of FCL, Globalcom, and Xtension, since the deal will be completed at the holding company level. FCL, Globalcom, and Xtension do not foresee that the proposed transaction will have any effect on their rates, terms, or conditions of service. As a result, Applicants assert, the proposed transaction will not directly affect any end user customers of FCL, Globalcom, or Xtension or the services they currently receive.

Discussion

Where a company acquiring control of a certificated telecommunications carrier does not possess a Certificate of Public Convenience and Necessity (CPCN), the Commission applies the same requirements as to an applicant seeking a CPCN to exercise the type of authority held by the company being acquired: a minimum of \$100,000 in cash or cash equivalent, and technical expertise in telecommunications or a related business. Here, Gores AC seeks to have the right to assume *de facto* control of FCI, the parent of three certificated carriers. Review of the financial documents submitted in support of Gores AC's financial qualifications indicate that it will have more than sufficient resources to meet Commission requirements. Applicants also state that they expect that the proposed transaction will not result in any change to FCL's, Globalcom's, and Xtension's day-to-day operations.

With their application, the Applicants filed a Motion for Leave to File Confidential Materials Exhibit B (Financial Statements) Under Seal pursuant to Public Utilities Code section 583 and General Order 66-C (2.2)(b). Applicants assert that the information contained in Exhibit B is non-public financial information that is critical, commercially sensitive, and competitively significant data. Applicants believe that disclosure of this information would place them at

a significant competitive advantage, impede full and fair competition, and undermine its business plans in California. That motion is granted.

In the submitted documents, Applicants indicate that FCL, Globalcom, and Xtension will continue to operate in California and to pay any applicable regulatory fees. It appears that no affiliate, officer, director, partner, or owner of more than 10% of any of the applicants, or any person acting in that capacity, has filed for bankruptcy or been sanctioned by the Federal Communications Commission (FCC) or any state regulatory commission for failure to comply with any regulatory statute, rule, or order; and no such person has been found criminally or civilly liable for a violation of § 17000 et seq. of the California Business and Professions Code or for any actions that involved misrepresentations to consumers, or is currently under investigation for similar violations. Thus, applicants satisfy the Commission's requirements on these factors.

It must be noted, however, our due diligence efforts in reviewing this application revealed that, on March 30, 2010 the FCC issued a Notice of Apparent Liability (NAL) against Globalcom in the amount of \$800,700 for alleged "repeated failures to satisfy its obligations to the Universal Service Fund (USF), spanning more than a year's time and amounting to a delinquency of more than \$960,000 to the fund."⁶ In its December 7, 2011 and December 13, 2011 responses to the assigned Administrative Law Judge's (ALJ) supplemental requests, Applicants have represented that they "did not disclose this FCC NAL proceeding in their Application because Globalcom has paid its federal USF

⁶ See, *In the Matter of Globalcom, Inc. Apparent Liability for Forfeiture*, FCC File Number EB-09-IH-1176 (2010)

obligations, and as of this date, no penalties or sanctions have been imposed by the FCC against Globalcom.”⁷ We are dismayed by Applicants’ narrow reading of the current reporting requirements in our CPCN application process. Such a narrow reading does not serve the Commission’s interest in open and transparent interactions with those we regulate. We are hopeful that the new rules we are considering in Rulemaking (R.) 11-11-006 will serve to require the reporting of such NALs in the future.⁸

⁷ *See*, December 7, 2011 Response to Administrative Law Judge Request at 2 and December 13, 2011 Response at 1.

⁸ *See*, R.11-11-006 entitled Order Instituting Rulemaking to Revise the Certification Process for Telephone Corporations and the Registration Process for Wireless Carriers where we consider (among other issues) whether we should require a standardized applicant fitness checklist for Certificate of Public Convenience and Necessity applicants just as we do for those who register as Non-dominant Interexchange Carriers (NDIEC). In R.11-11-006, at 5, we observe that “All new NDIEC registration licensees must submit as part of the application process, resumes of all key officers and owners of 10% or more of outstanding shares that indicate sufficient managerial and technical experiences; disclose prior or current known investigations by any governmental agency, and any settlements with any regulatory agency over its business conduct or practices, disclose voluntary payments made by an applicant or its principals to resolve action by regulatory agencies, attorneys general, or courts, or any other type of monetary forfeitures.”

In all, the proposed transaction will serve the public interest by providing FCL, Globalcom, and Xtension access to additional financial and operational resources that will help to strengthen their positions in the telecommunications marketplace. Access to additional financial resources will also allow FCL, Globalcom, and Xtension to implement their business strategies while continuing to provide high quality services to existing consumers.

Environmental Review

Under the California Environmental Quality Act (CEQA), the Commission must consider the environmental consequences of projects, as defined, that are subject to its discretionary approval. (Public Resources Code § 21080.) While transfers of utility assets are generally projects subject to CEQA review by the Commission, the facts of this case indicate that this transfer, while a project, is not subject to CEQA. Based upon the record, this transaction does not have the potential for causing a significant effect on the environment; and accordingly, the Commission need not perform further CEQA review. (CEQA Guideline 15061(b)(3).)

Thus, any approval granted herein under § 854 for the transfer of control of FCI to Gores AC does not authorize Applicants to construct facilities. In addition, Applicants must follow all applicable environmental regulations should they wish to construct any facilities.

Categorization and Need for Hearings

In Resolution ALJ-176-3283, dated October 20, 2011, 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; thus, the preliminary determinations in ALJ-176-3283 will not be altered.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

Assignment of Proceeding

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

Findings of Fact

1. Resolution ALJ 176-3283 determined that this was a ratesetting proceeding and that hearings were not necessary.
2. Notice of this application appeared in the Commission's Daily Calendar of October 7, 2011.
3. No protests were filed.
4. Applicants sought review under Pub. Util. Code §§ 851-854.
5. Review of the financial documents submitted in support of Gores AC's financial qualifications indicate that it will have sufficient resources to meet Commission requirements.
6. Since Applicants expect the proposed transaction will not change FCL's, Globalcom's, and Xtension's day-to-day operations, Gores AC will possess the necessary technical expertise required by the Commission.
7. It appears that no affiliate, officer, director, partner, or owner of more than 10% of any of the applicants, or any person acting in that capacity, has filed for bankruptcy during their association or tenure with the company.
8. None of the applicants has complaints (alleging fraud or significant wrongdoing) pending against it before this Commission, the FCC, or any other state Commission.

9. The Commission encourages applicants to fully divulge information of a sanctioning nature regarding their interaction with the FCC or other state regulatory authorities.

10. The Commission is the Lead Agency for this project under CEQA.

11. Pursuant to Rule 11.4, Applicants filed a motion for leave to file confidential materials under seal, including Exhibit B to the application.

Conclusions of Law

1. The proposed transfer of control of FCI to Gores AC is not adverse to the public interest.

2. This proceeding is designated as a ratesetting proceeding; no protests have been received; no hearing is necessary.

3. It can be seen with certainty that the proposed transfer will not have any significant adverse impact on the environment.

4. Gores AC meets the Commission's requirements for a company acquiring authorized providers of local exchange and interexchange telecommunications services.

5. The application should be approved pursuant to Pub. Util. Code § 854(a); since the matter is uncontested, the decision should be effective on the date it is signed.

6. Applicants' motion to file their Exhibit B to the application under seal should be granted, and the information will remain under seal for a period of three years after the date of issuance of this order.

O R D E R

IT IS ORDERED that:

1. First Communications, Inc. (FCI), the parent company of First Communications, LLC (FCL), Globalcom, Inc. (Globalcom), and Xtension Services, Inc. (Xtension), and Gores AC Holdings, LLC (Gores AC) are authorized, pursuant to Pub. Util. Code § 854(a), to consummate a transaction whereby Gores AC will acquire control of FCI, the parent company of FCL, Globalcom, and Xtension (Operating Companies), and indirectly acquire control of the Operating Companies.

2. First Communications, Inc. and Gores AC Holdings, LLC shall notify the Director of the Commission's Communications Division in writing of the transfer of control authorized herein, within 10 days or no later than either the date of consummation of such transfer, or the date of the signing of this order.

3. The application is granted as set forth above and the authority granted shall expire if not exercised within one year after the effective date of this order.

4. The motion of Gores AC Holdings, LLC (Gores AC), First Communications, LLC (FCL), Globalcom, Inc. (Globalcom), and Xtension Services, Inc. (Xtension) to file their Exhibit B to the application under seal is granted. The information will remain under seal for a period of three years after the date of issuance of this order. During this three-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 Gores AC, FCL, Globalcom, and Xtension or their successors in interest, or as ordered by a court of competent jurisdiction. If Gores AC, FCL, Globalcom and Xtension, or their successors in interest, believe that it is necessary for this information to remain under seal for

longer than three years, Gores AC, FCL, Globalcom, and Xtension, or their successors in interest may file a new motion at least 30 days before the expiration of this limited protective order.

5. Application 11-09-023 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