Decision 02-07-028 July 17, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Ursus Telecom Corporation and Latin American Enterprises, Inc. For Nunc Pro Tunc Approval of Transfer of Control.	Application 00-07-016 (Filed July 3, 2000)

O P I N I O N

1. Summary

Ursus Telecom Corporation (Ursus) and Latin American Enterprises, Inc. (LAE) filed an application seeking nunc pro tunc approval of a transfer of control of LAE to a wholly-owned subsidiary of Ursus. Based on the information supplied by the applicants, we conclude that LAE was not and is not doing business in California as contemplated by Public Utilities Code § 854, and that the application should therefore be dismissed. LAE's certificate of public convenience and necessity (CPCN) was recently revoked in Resolution T-16657, dated June 27, 2002, for failing to file telephone surcharge forms or surcharges during calendar year 2001. We affirm that revocation in today's decision.

2. Background

On July 3, 2000, the joint application of Ursus and LAE was filed with this Commission. The application seeks Commission approval, on a nunc pro tunc basis, of a transaction in which Ursus acquired control of LAE and its telecommunications activities. According to the application, Ursus and LAE executed a merger agreement on June 6, 2000. In accordance with the agreement, LAE Acquisition Corp. (LAEAC), which is a Florida corporation and a wholly

owned subsidiary of Ursus, merged with and into LAE. LAEAC is the surviving corporation. According to the application, this merger was consummated on June 13, 2000. No protests or responses to the application were filed.

LAE is a Florida corporation that was authorized by the California Secretary of State to transact business in California as of July 15, 1997. In August 1997, LAE applied for a certificate of public convenience and necessity (CPCN) to provide inter- and intra- local access and transport area services in California as a non-dominant interexchange carrier (NDIEC). On September 29, 1997, the Commission granted LAE a CPCN in Decision (D.) 97-09-133. In a letter dated October 19, 1998 from LAE's consultant, who had prepared LAE's CPCN application, to the Commission's Docket Office, LAE stated in pertinent part:

> "Pursuant to the Commission's Order in Application No. 97-08-056, Decision 97-09-133, Latin American Enterprises, Inc. hereby notifies the Commission that it has begun offering service in the state effective immediately."

This letter was filed by the Docket Office on October 20, 1998 as a compliance filing accepting the CPCN as provided for in numbered paragraph 6 of Appendix A to D.97-09-133.

After reviewing the joint application to merge, the Administrative Law Judge (ALJ) assigned to this proceeding issued a ruling on October 4, 2000. The ruling directed the applicants to: (1) file a response explaining why the applicants failed to seek approval from this Commission before the merger was consummated; (2) provide a copy of the Merger Agreement; and (3) explain what specific actions would need to be taken to unwind the Merger Agreement. In addition, the ruling noted that the California Secretary of State records showed

that LAE's status as a foreign corporation authorized to transact business in California had been "forfeited," and that LAE had apparently never paid any of the fees to the Commission to which it is subject.

As a result of these two issues, the applicants were directed to explain: (1) when the forfeiture date occurred; (2) the reason(s) why LAE's foreign corporation status was forfeited; (3) whether LAE sought to reinstate its status; (4) what steps, if any, were taken to meet the statutory filing requirements; (5) whether LAE continue to operate in California during the time its corporate status in California was forfeited; (6) the amount of revenues derived in California from LAE's operations during the forfeiture period; (7) that if LAE is continuing to operate in California, provide proof that its revenues from its California operations were reported to the California Franchise Tax Board; (8) why the fees that LAE was subject to were never paid; (9) the amount of annual revenues generated from its operations in California from the time LAE was granted its CPCN; (10) why a resolution or decision should not issue revoking LAE's CPCN in accordance with numbered paragraph 18 of Appendix A of D.97-09-133; and (11) why an Order Instituting Investigation into the problems noted above should not issue.

Ursus and LAE, through its counsel, filed a response to the ALJ ruling on November 3, 2000. According to the response, which is explained in detail below, LAE never provided services under the CPCN or otherwise transacted business in California. As a result, the parties assert that the merger "will have no effect on California or California consumers." The applicants also contend that Ursus did not learn of LAE's California CPCN until the merger transaction was about to close, and that they promptly sought approval on a nunc pro tunc basis after the merger had been completed. The parties state that unwinding the

transaction is not warranted. If the Commission is unwilling to grant the application, the parties propose to: "(a) file a Notice of Withdrawal of their Joint Application and (b) cancel LAE's unused California certificate." The parties have also offered "to take such other reasonable actions as are necessary to remedy LAE's inadvertent failure to comply with applicable Commission filing requirements in California."

3. The Merger Application

A. Issue Presented

Public Utilities Code § 854 (a) provides in pertinent part:[1]

> "No person or corporation, whether or not organized under the laws of this states shall merge, acquire, or control either directly or indirectly 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. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section."

According to the application filed by the applicants, the merger of LAE into LAEAC occurred before the filing of the application on July 3, 2000. There are two issues raised by the application and the response to the ALJ ruling. The first issue is whether § 854 applies to this transaction since LAE allegedly was not doing business in California. The second issue is, if § 854 applies to this transaction, should the merger be approved on a nunc pro tunc basis, or should it be declared void since the applicants did not seek Commission approval before

[1] All code section references are to the Public Utilities Code.

the merger was consummated? If § 854 does not apply to this merger, then there is no need to address the second issue.

B. The Applicability of § 854 to This Transaction

Section 854 applies to this transaction if the public utility being acquired or merged is "organized and doing business in this state." (*See* 71 CPUC 206, 209.) The argument in favor of applying § 854 to this transaction is that by virtue of LAE applying for and receiving a CPCN from this Commission in 1997 as a NDIEC, that LAE was "organized and doing business in this state." This is further bolstered by the acceptance of the CPCN in October 1998 when LAE's consultant expressly stated that LAE "has begun offering service in the state effective immediately."

Another reason for finding that § 854 applies is found in the Form S-3 Registration Statement that Ursus filed with the Securities and Exchange Commission (SEC) on September 28, 1999. In that filing, Ursus acknowledged that the state Public Service Commissions regulate intrastate long distance service. Ursus also acknowledged that:[2]

> "The FCC [Federal Communications Commission] and certain state agencies must approve assignments and transfers of control. An assignment is a transaction in which an authorization is moved from one entity to another. A transfer of control is a transaction in which the authorization remains held by the same entity, but there is a change in the entities that control the authorized carrier. The approval requirements may delay, prevent or deter a change in control or an acquisition of another company."

[2] Similar statements can also be found in the Annual Report (Form 10-K) filed by Ursus with the SEC on June 29, 1999 for the fiscal year that ended on March 31, 1999.

Thus, Ursus knew in advance that the acquisition of LAE might require this Commission's approval.

The argument against applying § 854 to this transaction is contained in the applicants' November 3, 2000 response to the ALJ ruling. According to the response:

> "At the time it commenced operations, LAE's business plan contemplated that it would provide international prepaid calling card services both in Latin America and to the United States Spanish-speaking population. In furtherance of that plan, LAE obtained authorization as a reseller of international services from the FCC and as a reseller of intrastate interexchange services in various states, including California, that have large Latino populations.
>
> "Because of subsequent changes in the telecommunications industry and its business model, LAE increasingly focused on the provision of international services outside the United States. As a result, it has never fully developed its operations in the United States. LAE does provide limited international services under its FCC Section 214 authorization. However, in the majority of states in which it obtained resale authority, including California, LAE does not currently provide services and never has provided services." (Response, pp. 2-3.)

As for Ursus, the response describes its United States operations as "limited to the provision of services between the United states and international points," and that it "does not provide United States interstate or intrastate services." (Response, pp. 2-3.)

> "Since Ursus understood that LAE did not provide U.S. domestic services and because Ursus' business plan is not focused on the United States domestic telecommunications market, LAE's state certificates were not a factor in its decision to acquire LAE. In fact, it was

> not until immediately before the merger closed that Ursus discovered that LAE had been certificated in any state."

According to the response, LAE's authority to transact business in California was forfeited on June 1, 2000, and LAE never sought to reinstate its corporate status with the California Secretary of State. The response also states:

> "As noted above, LAE did not operate in California following the lapse of its authority to transact business and derived no revenues in California during that period. Therefore, the Parties do not believe that LAE had failed to file any required reports or to pay any required taxes, including franchise taxes, in California."

Since no revenues were generated from operations in California, the response states that "the Parties understand that no regulatory fees are currently owed or past due by LAE in California."

Section 5.17(a) of the merger agreement, which was attached to Ursus response to the ALJ ruling, represents that LAE filed all returns that it was required to file with any taxing authority.

According to recent filings that Ursus made with the SEC,[3] Ursus expanded its retail customer subscriber base by "purchasing a customer base from Justice Telecom Corporation" (JTC) on June 1, 2000. This purchase also

[3] See the June 29, 2000 SEC form 10-K and November 20, 2000 SEC form 10-Q of Ursus.

apparently included points of presence in Los Angeles, Nigeria, and Gibraltar. According to the SEC filings, the point of presence in Los Angeles provided Ursus with a "Los Angeles Switch operation."[4]

Ursus described its operations in those SEC filings as follows:

> "Ursus is a facilities-based provider of international telecommunications services and offers a broad range of discounted international and enhanced telecommunication services, including U.S. originated long distance service and direct-dial international service, Internet telephony and voice over the Internet protocol ('VOIP'), typically to small and medium-sized businesses and travelers. Our primary service is call reorigination; however, we have increasingly been migrating calls to direct access, VOIP and other methods of transmission. We also sell services to other carriers and resellers on a wholesale basis in the US as well as abroad. Our retail customer base, which includes corporations and individuals, is located in South Africa, Latin America, the Middle East (Lebanon and Egypt), Europe (Germany and Spain), New Zealand and other parts of the world. We operate a switched-based digital telecommunications network out of our primary switching hub located in Sunrise, Florida. …
>
> "We expanded our reach into Latin America and Spain through the acquisition of Latin America Enterprises (and several affiliated companies … on June 1, 2000. LAE is [a]

[4] Based on what appears to be international telecommunication activities on the part of both Ursus and JTC, it does not appear that the sale of the customer base and acquisition of the Los Angeles facilities was subject to this Commission's approval pursuant to § 851. The Commission's records do not show that JTC ever applied for a CPCN to offer telecommunication services in California. Should the Commission determine that JTC was offering intrastate telecommunication services in California prior to June 1, 2000, the Commission reserves the right to open an investigation into JTC's operating authority and the acquisition of JTC's customer base and point of presence in Los Angeles by Ursus.

> provider of international long distance telecommunication services, primarily through the sale of prepaid calling cards in airports, railroad stations and other highly visible locations in the United States, Latin America and Spain. The prepaid calling cards are distributed through manned kiosks and vending machines. LAE supports the marketing efforts through branch offices and affiliated companies located in 13 countries. LAE operated a switching facility in Miami, Florida, which has since been consolidated into our Sunrise, Florida hub."

Based upon the representations contained in the response to the ALJ ruling, it appears that LAE did not transact any business, or generate any revenues, in California, from the time that LAE was certificated by the Commission to be a NDIEC. Instead, it appears that LAE's base of operations was located in Florida, and that LAE marketed its prepaid calling cards in certain cities on the east coast, and in South America, the Dominican Republic, Puerto Rico, and Spain. All that LAE appears to have done in California was to apply for the CPCN and to accept it. Based on the information before us, LAE does not appear to have engaged in any intrastate telecommunication activities within California.

Although LAE had a CPCN issued by this Commission, we cannot conclude that LAE was "doing business in this state" as contemplated by § 854. Therefore, § 854 does not apply to the merger between LAE and Ursus because LAE was not doing business in this state. Thus, there is no need to address

whether the merger should be approved on a nunc pro tunc basis. The application should therefore be dismissed.[5]

4. Revocation of LAE's CPCN

In the response to the ALJ ruling, Ursus and LAE recommend that neither a resolution nor a decision revoking LAE's CPCN should issue. If the Commission does not approve the proposed transfer, Ursus and LAE request that they be permitted to "(a) file a Notice of Withdrawal of their Joint Application and (b) cancel LAE's unused California certificate."

We will treat the request of Ursus and LAE that they be allowed to withdraw the application and to cancel the CPCN, as a request to revoke LAE's CPCN that was granted in D.97-09-133. Although the applicants request that LAE's CPCN be cancelled, we have routinely revoked the CPCNs of telecommunication carriers and canceled the company's corporate identification number. (*See* Resolutions T-16426, 16431, 16488 and 16489.) We see no reason to depart from that practice.

The Telecommunications Division's Public Programs Branch has determined that LAE has never reported or remitted any telecommunications-related surcharges to the Commission.

In Resolution T-16657, the Commission adopted the Telecommunications Division's recommendation to revoke the CPCNs of 28 telephone companies and to cancel their Utility Identification Numbers. The

[5] Should the Commission learn that LAE was offering telecommunication services within California during this time period, the Commission reserves the right to open an investigation into this merger transaction and LAE's California activities.

revocation included the CPCN of LAE. We affirm the revocation of LAE's CPCN, and cancellation of LAE's Utility Identification Number, U-5878-C.

5. Comments on Draft Decision

Pursuant to Rule 77.7, the draft decision was mailed to the parties on June 17, 2002. No one filed any comments to the draft decision.

Findings of Fact

1. The joint application of Ursus and LAE seeking nunc pro tunc approval of a transfer of control was filed with the Commission on July 3, 2000.

2. Ursus and LAE executed a merger agreement on June 6, 2000, which was consummated on June 13, 2000.

3. No protests or responses to the application were filed.

4. LAE was authorized by the California Secretary of State to transact business in California as of July 15, 1997.

5. In August 1997, LAE applied for a CPCN to provide inter- and intra-local access and transport area services in California as a NDIEC.

6. On September 29, 1997, LAE was granted a CPCN in D.97-09-133.

7. LAE's letter accepting the CPCN was filed by the Commission's Docket Office on October 20, 1998.

8. An ALJ ruling was issued on October 4, 2000 directing the applicants to provide additional information.

9. The applicants filed a response to the ALJ ruling on November 3, 2000, which stated in part that LAE never provided services under the CPCN or otherwise transacted business in California.

10. The response states that if the Commission is unwilling to grant the application, the applicants propose to file a notice to withdraw their application, and to cancel LAE's unused CPCN.

11. The ALJ's draft decision was mailed to the parties on June 17, 2002.

12. The merger of LAE into LAEAC occurred before the application was filed with the Commission.

13. The applicants' November 3, 2000 response states that LAE provides limited international services, but in the majority of states in which it has obtained resale authority, including California, LAE does not currently provide services and never has provided services.

14. The applicants' November 3, 2000 response also states that Ursus' United States operations are limited to the provisioning of services between the United States and international points, and that it does not provide United States interstate or intrastate services.

15. LAE's authority to transact business in California was forfeited on June 1, 2000, and LAE never sought to reinstate its corporate status with the Secretary of State.

16. The applicants' response states that LAE did not operate in California following the lapse of its authority to transact business, and that it did not derive any revenues in California during that period.

17. The Public Programs Branch has determined that LAE never reported or remitted any telecommunication-related surcharges to the Commission.

18. In Resolution T-16657, the CPCN of LAE was revoked, and its Utility Identification Number was cancelled.

Conclusions of Law

1. Section 854 applies to this transaction if the public utility being acquired or merged is organized and doing business in this state.

2. Based upon the representations contained in the applicants' response to the ALJ ruling, it appears that LAE did not transact any business, or generate any revenues, in California from the time that LAE was certificated by the Commission to be a NDIEC, and that no intrastate telecommunication activities appear to have taken place within California.

3. We cannot conclude that LAE was doing business in this state as contemplated in Public Utilities Code § 854.

4. Section 854 does not apply to the merger between LAE and Ursus because LAE was not doing business in the state.

5. The application should be dismissed.

6. The request of the applicants that they be allowed to withdraw the application and to cancel the CPCN should be treated as a request to revoke LAE's CPCN.

7. The revocation of LAE's CPCN in Resolution T-16657, and the cancellation of its Utility Identification Number, U-5878-C, is affirmed.

O R D E R

IT IS ORDERED that:

1. The joint application of Ursus Telecom Corporation (Ursus) and Latin American Enterprises, Inc. (LAE) for the nunc pro tunc approval of the acquisition of control of LAE by Ursus' wholly owned subsidiary is dismissed.

2. The request of Ursus and LAE in their response to the Administrative Law Judge's ruling of October 4, 2000 that if the Commission is unwilling to grant the

application, that the applicants be allowed to file a notice of withdrawal of their application, and to cancel LAE's certificate of public convenience and necessity (CPCN), shall be treated as a request to revoke LAE's CPCN.

3. The CPCN which authorized LAE to provide inter- and intra- local access and transport area services in California as a non-dominant interexchange carrier, which was granted by the Commission in Decision 97-09-133, is revoked as a result of the adoption of Resolution T-16657 by the Commission on June 27, 2002, and the Utility Identification Number of U-5878-C is cancelled and shall not be reissued.

4. This proceeding is closed.

This order is effective today.

Dated July 17, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners