Decision 03-12-033 December 15, 2003

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Joint Application of Columbia Ventures Broadband LLC and CTC Communications Corp. d/b/a/ CT Communications Inc. (U-5532-C) for a Grant of Authority Pursuant to Public Utilities Code Sections 851 and 854 Necessary to Consummate a Transfer of Control. | Application 03-09-011 (Filed September 8, 2003) |

# OPINION AUTHORIZING TRANSFER OF CONTROL

## Summary

This decision authorizes Columbia Ventures Broadband LLC (CVB) and CTC Communications Corp. d/b/a/ CT Communications, Inc. (CTC) to execute a series of transactions under Pub. Util. Code §§ 851 and 854(a) whereby CTC will emerge from bankruptcy and become a wholly owed subsidiary of CVB.

## Description of the Parties

CTC is authorized to provide resold interLATA and intraLATA services in California pursuant to Decisions (D.) 95-11-038 and D.97-01-012.[1] CTC is a Massachusetts corporation qualified to do business in California[2] and is wholly owned by CTC Communications Group, Inc. (CTC Group). CTC Group is a publicly held Delaware corporation with principal offices in Waltham, MA. CTC

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[1] CTC was formerly known as Computer Telephone Corp.

[2] Documents demonstrating CTC's authority to transact business in California were filed at the Commission's Docket Office on November 13, 2003.

and CTC Group. have been operating under the protection of the United States Bankruptcy Code since October 2002.

CVB is a Washington limited liability company with principal offices in Vancouver, WA. CVB is a wholly owned subsidiary of Columbia Ventures Corporation (CV Corp.), a Washington corporation located in Vancouver, WA. The owner and Chief Executive Officer (CEO) of CV Corp. is Kenneth Peterson. Mr. Peterson is also the Manager and President of CVB.

Peterson is presently a member of the Board of Directors of the following telecommunications enterprises: Globalstar Australia, a provider of satellite telephony and data services in Australia; PocketiNet Communications, Inc., a provider of fixed wireless internet services in the Pacific Northwest; Og Vodafone, a publicly traded competitive telecommunications company in Iceland; and Hibernia Atlantic, which owns a fiber cable between North America and Europe. In addition, Peterson is the Manager of Fiberlink, LLC, which owns a dark fiber network in and between Spokane, WA, and Coeur D'Alene, Idaho. Peterson also serves on the Board of Directors of American Capital Strategies, Inc., a NASDAQ-listed company, and the Washington Policy Center, a non-profit think-tank supporting free-markets.

Prior to expanding into telecommunications, Peterson served as the CEO, President, or General Manager of businesses involved in the smelting, extrusion, finishing, and fabrication of aluminum, including: Columbia Aluminum Corp. (1987-1996); Columbia Pacific Aluminum Corp., City of Industry (1989-2000); Modesto (1989-2000); Watsonville (1993-2000); Columbia Aluminum Products, Inc. (1989-2000); and Columbia Extrusion Corp. (1988 – present). During 1997-1998, Peterson's firm, CV Corp., built Nordural hf, an aluminum smelter in

Iceland. Peterson currently serves on the Board of Directors of Nordural hf and was the General Manager in 1998-1999 as the smelter was starting up.

**Requested Authority**

CCTC and CVB (collectively, "Applicants") request authority to execute a series of transactions (referred to hereafter as the "Proposed Transactions") whereby CVB will acquire control of CTC Group. The Proposed Transactions are set forth in an Investment Agreement dated August 6, 2003 ("the Agreement").[3] The Agreement provides that CTC Group will file and execute a Plan of Reorganization whereby the outstanding stock of CTC Group will be cancelled, the debts and obligations of CTC Group and CTC to existing creditors will be discharged, and CTC Group will issue new shares of common stock to CVB in return for $32 million. After the Proposed Transactions are complete, CTC Group and CTC will emerge from bankruptcy and become wholly owned subsidiaries of CVB. An organization chart illustrating the organizational control of CTC before and after the Proposed Transactions is attached to today's decision.

The Proposed Transactions will be completed at the holding company level and will not result in any transfer of CTC's operating authority or customers. CTC will retain its current name and will continue to operate in substantially the same manner as before the Proposed Transactions. Additionally, CTC's customers will continue to receive service under the same rates, terms, and conditions that currently apply to CTC's services.

Applicants assert that CVB has the requisite managerial and technical qualifications to assume control of CTC. CVB is 100% owned and operated by Kenneth Peterson. As described previously, Peterson is an accomplished manager of telecommunications enterprises and other businesses. CVB will also utilize the managerial and technical abilities of existing CTC executives, who have extensive experience in the telecommunications industry. These executives include:

> **John D. Pittenger, Executive Vice President, Chief Financial Officer:** Pittenger has served as Chief Financial Officer (CFO), Treasurer, and Clerk of CTC since 1989. Prior to 1989, Pittenger was CFO of Comm-Tract Corp., a company that installs and services voice and data communications systems.
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> **Anthony D. Vermette, Vice President, Sales**: Vermette joined CTC in 1987 and was appointed Vice President, Sales in 1995. Prior to 1995, Vermette held a variety of positions with CTC, including Branch Manager, Director of Market Development, and Vice President Sales and Marketing for New England.
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> **Russell B. Oliver, Vice President, Network Operations**: Oliver joined CTC in 1999 as Vice President, Network Operations. Prior to joining CTC, Oliver was the Vice President of Network Systems Integration for Williams Communications, where he participated in the acquisition and integration of other companies.

Applicants represent that CVB is financially qualified to assume control of CTC. Pursuant to Section 5.3 of the Agreement, CV Corp. acts as a guarantor of CVB's performance of its obligations, financial and otherwise, under the Agreement. Applicants also provided copies of CV Corp.'s financial statements, which show that CV Corp. has sufficient financial resources to guarantee CVB's obligations under the Agreement.[4]

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[3] A copy of the Agreement was attached to the application as Exhibit B.

[4] CV Corp.'s financial statements were provided to the Commission under seal.

After CTC Group emerges from bankruptcy under CVB's control, there is no plan for CV Corp. to provide financial support to CVB, CTC Group, or CTC. Applicants represent that CTC Group and its subsidiaries generated $324,000,000 in revenue during the 12-month period ending December 31, 2002, and are presently cash flow positive. Thus, CVB will not need to rely on its parent, CV Corp., in order to finance the operations of CTC Group and its subsidiaries (including CTC) because CTC Group is and will be financially self-sufficient.

To demonstrate CTC Group's ability to support itself financially after it emerges from bankruptcy, the Applicants provided financial projections for a reorganized CTC Group and subsidiaries. The financial projections included (1) pro-forma balance sheets for January 1, 2004, December 31, 2004, and December 31, 2005, reflecting estimated reorganization and fresh-start adjustments; (2) projected income statements for 2004 and 2005; and (3) projected statements of cash flow for 2004 and 2005.[5] The financial projections show that CTC Group will generate positive income and cash flow in 2004 and 2005.

Applicants state that the Proposed Transactions are in the public interest because the Transactions will enable CTC to emerge from bankruptcy and thereby enhance CTC's ability to compete in the California telecommunications market. Additionally, the Proposed Transactions will ensure that existing customers continue to receive service from CTC without disruption. Thus, the Proposed Transactions will be transparent to existing customers.

Notice of Application (A.) 03-09-011 appeared in the Daily Calendar on September 9, 2003. There were no protests or other responses to A.03-09-011.

[5] The projected financial statements were filed at the Docket Office on November 6, 2003.

## Discussion

The issue before us is whether CVB should be authorized to acquire control of CTC pursuant to Pub. Util. Code §§ 851 and 854(a)[6] which state, in relevant part, as follows:

> **§ 851:** No public utility...shall...sell...any part of its...property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so.
>
> **§ 854(a):** No person or corporation...shall...acquire... any public utility…doing business in this state without first securing authorization to do so from the commission.…

The Commission has broad discretion to determine if a transaction should be authorized pursuant to §§ 851 and 854(a). The primary standard used by the Commission is whether the transaction will adversely affect the public interest. The Commission may also consider if the transaction will serve the public interest. Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.[7]

In general, the Commission uses the following criteria to decide if an entity without a certificate of public convenience and necessity should be authorized to acquire control of a certificated, nondominant telecommunications carrier[8]:

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[6] Pursuant to D.98-07-094, nondominant carriers providing interexchange and/or local exchange service may file an advice letter to obtain authority to transfer assets and/or control pursuant to § 851 et seq., except in instances where, as is the case here, the acquiring entity is not authorized to provide service in California. Thus, the advice letter process cannot be used for the purpose of market entry. (D.98-07-094, 81 CPUC 2d 378, 393.)

[7] D.01-06-007, *mimeo.*, p. 15.

[8] D.03-06-079, *mimeo.*, pp. 7-8.

- Whether the acquirer has sufficient financial resources to operate the acquired carrier.
- Whether the acquirer has sufficient managerial and technical expertise to operate the acquired carrier.
- Whether any officer, director, partner, or owner of more than 10% of the acquirer or acquired carrier was: (1) previously associated with a carrier that or was sanctioned by the Federal Communications Commission (FCC) or any state agency for failure to comply with any regulatory statute, rule, or order; (2) found criminally or civilly liable for a violation of California Business and Professions Code § 17000 et seq., or for any actions that involved misrepresentations to consumers, or is currently under investigation for such violations; or (3) previously associated with a carrier that filed for bankruptcy or went out of business.

We find that the proposed acquisition of CTC by CVB satisfies all of the above criteria. In particular, CVB is financially qualified to acquire CTC as demonstrated by (1) the substantial reduction in the debt of CTC' parent company, CTC Group, that will occur if the acquisition is consummated, and (2) CVB's infusion of $32 million of equity capital into CTC Group. Moreover, Applicants represent that CTC and its operating subsidiaries, including CTC, are presently cash flow positive. Applicants also provided projected financial statements for CTC Group and its subsidiaries that indicate these companies will have positive net income and cash flow in 2004 and 2005.

CVB also possesses sufficient managerial and technical expertise to operate CTC. The owner and manager of CVB, Kenneth Peterson, has extensive experience in managing telecommunications companies and other business enterprises. CVB will also retain many of the CTC's senior executives who have extensive experience in providing telecommunications services.

The Applicants state that to the best of their knowledge no affiliate, officer, director, partner, or owner of more than 10% of CVB or CTC has been (1) sanctioned by the FCC or any state agency for failure to comply with any regulatory statute, rule or order, or (2) been found criminally or civilly liable for a violation of California Business and Professions Code § 17000 et seq., or for any actions that involved misrepresentations to consumers, or is currently under investigation for such violations.[9]

Although much of CTC's senior management was associated with the bankruptcy of CTC and will remain in place after CVB's acquisition of CTC is complete, there is no evidence in this proceeding that the bankruptcy of CTC was caused by the incompetence or malfeasance of its current management. Rather, the record indicates that CTC's management has strived to revive CTC financially while continuing to provide service to its customers. These circumstances lead us to conclude that CVB's acquisition of CTC should not be rejected just because CTC's senior management was associated with the bankruptcy of CTC.

In conclusion, we find that CVB should be authorized to acquire CTC pursuant to §§ 851 and 854(a) for the following reasons. First, there will be no changes to rates, services, or operations of CTC as a result of the transaction. Thus, CTC's customers and the public will not be harmed by the transaction. Second, Applicants have demonstrated that CVB is qualified to assume control of CTC. Third, the public may benefit from the transaction to the extent it enhances CTC's ability to compete and to maintain its services and operations in California. Finally, there was no opposition to A.03-09-011.

[9] Supplement to A.03-09-011 filed at the Commission's Docket Office on October 15, 2003.

## Compliance with Public Program Requirements

CTC is required to collect, remit, and report surcharges for the following public programs: California High Cost Fund-A (CHCF-A), CHCF-B, California Teleconnect Fund, Deaf and Disabled Telecommunications Program, and the Universal Lifeline Telephone Service Program. The assigned Administrative Law Judge directed the Applicants to state whether CTC had remitted and reported all surcharges. The Applicants replied that CTC had not. CTC then submitted all past due surcharges and reports. The amount of past due surcharges was less than $10,000.

We remind the Applicants that CTC is required to collect, remit, and report public program surcharges in accordance with the Commission's rules. These rules can be found at http://www.cpuc.ca.gov/static/industry/telco. The Commission may impose financial penalties and other sanctions if the Applicants fail to comply with these rules.

## California Environmental Quality Act

Application 03-09-011 proposes no new construction. Accordingly, there is no possibility that granting A.03-09-011 will have a significant impact on the environment.

## Categorization

In Resolution ALJ-176-3119, dated September 18, 2003, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record of this proceeding, we affirm the preliminary determinations in ALJ-176-3119.

## Pub. Util. Code § 311

This is an uncontested matter in which the decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is waived pursuant to Pub. Util. Code § 311(g)(2).

## Executive Director Approval

Because A.03-09-011 is uncontested and noncontroversial, the Executive Director may grant A.03-09-011 under authority delegated by the Commission pursuant to § 851 *et seq*.[10]

## Assignment of Proceeding

The assigned Commissioner in this matter is Susan P. Kennedy. The assigned Administrative Law Judge is Timothy Kenney.

## Findings of Fact

1. A.03-09-011 requests authority for the Proposed Transactions under Pub. Util. Code §§ 851 and 854(a).
2. A.03-09-011 is uncontested and noncontroversial.
3. CVB is qualified to acquire CTC.
4. Most or all of CTC's current senior management was associated with the Bankruptcy of CTC and will remain in place after CVB's acquisition of CTC.
5. There is no evidence in this proceeding that the bankruptcy of CTC was caused by the incompetence or malfeasance of CTC's current management.
6. CTC's current management has strived to revive CTC financially while continuing to provide service to CTC's customers.
7. No new construction is proposed in A.03-09-011.

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[10] D.86-08-057 authorized the Executive Director to grant non-controversial applications by nondominant interexchange carriers to transfer assets or control. In D.98-07-094, the Commission determined that the Executive Director may grant non-controversial applications by nondominant local exchange carriers to transfer assets or control (81 CPUC 2d 388). Since then, it has become the Commission's *de facto* practice for the Executive Director to grant these types of applications. (See, e.g., D.03-10-026, D.03-08-079, D.03-01-045, D.01-12-029, D.00-12-071, D.00-12-070, D.00-05-031, D.00-04-043, D.00-02-029, and D.98-07-044.)

## Conclusions of Law

1. This proceeding is properly categorized as ratesetting. No hearing is necessary.

2. CVB's acquisition of CTC is not adverse to the public interest.

3. It can be seen with certainty that the proposed acquisition of CTC by CVB will not have any adverse impact on the environment.

4. CTC is required to collect, report, and remit public program surcharges in accordance with the Commission's rules. The Commission may impose monetary fines and other sanctions for failure to comply with these rules.

5. The application should be approved.

6. Because A.03-09-011 is noncontroversial, it may be granted by the Executive Director pursuant to authority delegated by the Commission.

7. Because A.03-09-011 is noncontroversial and uncontested, the following order should be effective on the date it is signed.

## O R D E R

**IT IS ORDERED** that:

1. Columbia Ventures Broadband LLC (CVB) is authorized pursuant to Pub. Util. Code §§ 851 and 854(a) to acquire CTC Communications d/b/a/ CT Communications, Inc. (CTC), as set forth in Application 03-09-011.

2. CVB and CTC shall notify the Director of the Commission's Telecommunications Division in writing of CVB's acquisition of CTC no later than 10 days after the date the acquisition is consummated.

3. The corporate identification numbers assigned to CTC shall continue to be used by it and included in all original filings with this Commission and in the titles of other pleadings filed in existing cases.

4. CTC shall comply with all Commission rules regarding the collection, remittance, and reporting of public program surcharges. Failure to comply with these rules may result in financial penalties and other sanctions.

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

6. This proceeding is closed.

This order is effective today.

Dated December 15, 2003, at San Francisco, California.

/s/ WESLEY M. FRANKLIN
for
WILLIAM AHERN

WILLIAM AHERN
Executive Director

# CV Broadband/CTC Communications
# Illustrative Chart

## Pre-Transaction

## Post-Transaction