

Decision 05-12-039 December 15, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Telecom Consultants, Inc. (U-6829-C) and John Toepfer, an individual, for approval of Change in Control.

Application 05-09-024
(Filed September 19, 2005)

OPINION GRANTING TRANSFER OF CONTROL

I. Summary

This decision grants the request of Telecom Consultants, Inc. (TCI) and John Toepfer, jointly referred to as Applicants, for approval of the acquisition by Toepfer of control over TCI. Toepfer, who currently holds a 20% equity interest, will acquire additional shares to provide him a 81% equity interest and, thereby, direct control over TCI. The transaction will not affect the operation of TCI. The matter is uncontested. This proceeding is closed.

II. Applicant's Request

Pursuant to Section 854 of the Pub. Util. Code and Rule 35 of the Commission's Rules of Practice and Procedure, TCI and Toepfer request approval of the acquisition by Toepfer of direct control over TCI. Toepfer currently is the chief executive officer of the company, having succeeded to that position following the retirement of the company's co-founder and former chief executive officer, Jack Burk. Upon approval of this application, Toepfer, who currently holds a 20% equity interest in TCI, will acquire additional shares to provide him a total equity interest of 81% and, thereby, direct control.

Applicants state that Toepfer's acquisition of control will not produce any immediate changes to TCI's operations, will not result in any changes in rates, terms, or conditions of service, and will otherwise be completely transparent to its customers. The proposed change of control will be carried out pursuant to an informal agreement between Toepfer and Alice Burk, a co-founder of TCI and its majority shareholder. Under the agreement, Alice Burk will retain a 10% interest, and both she and Jack Burk, her husband, will receive a lifetime retirement package from the company. No actual payment of funds by Toepfer is contemplated.

III. The Parties

A. TCI

TCI is a California corporation, authorized by Decision (D.) 04-01-039 to operate as a nondominant reseller of interexchange service statewide and local exchange service within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), SureWest Telephone (SureWest), and Citizens Telecommunications of California (CTC). Its principal place of business is 745 E. Locust, Suite 109, Fresno, CA 93720. Telephone: 559-436-8266.

B. John Toepfer

Toepfer currently is TCI's chief executive officer and has been managing the company's operations for approximately the past year. Toepfer has been involved in the telecommunications industry since 1996, when he joined Integrated TeleServices, Inc. (ITS) as a sales representative. In 1996, Toepfer was promoted to Regional Sales Manager of ITS. In 2003, Toepfer joined TCI as its Director of Sales and Secretary/Treasurer. Since then Toepfer became increasingly involved in TCI's general management and is now well-experienced in all aspect of its operations, including its relations with customers and key

vendors. For a period of time, TCI's co-founder, Jack Burk, will provide technical assistance to the company on the management of its billing system and will provide other guidance to the Board, as requested.

In accordance with the Commission's requirements, the Applicants confirm that, except as specified below:

- (i) Toepfer has not been sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order; and
- (ii) Toepfer has not held a position as an officer, director, partner, or person owning more than 10% of, or acted in such capacity whether or not formally appointed with, a telecommunications carrier that filed for bankruptcy, or has been found either criminally or civilly liable by a court of appropriate jurisdiction for violation of § 17000 et seq. of the California Business and Professions Code, or for any actions which involved misrepresentations to consumers, or is currently under investigation for similar violations.

According to Applicants, as is explained in D.04-01-039, TCI, under the direction of Jack Burk, prematurely commenced limited interexchange operations prior to the issuance of the certificate of public convenience and necessity issued by that decision. The Commission determined that TCI's violation was inadvertent, but that TCI should be charged with knowledge that its operation was unlawful and, on that basis, imposed a fine of \$500.

Applicants state that, as D.04-01-039 also explains, ITS, with which Toepfer was formerly associated, was sanctioned for slamming violations by the Florida Commission in 1998 and filed for bankruptcy under Chapter 11 in 2000. However, Toepfer was neither an officer nor shareholder of ITS at that time or at any time, and was not responsible for the violations that resulted in the Florida

sanctions. Accordingly, the Applicants submit that these factors should not be deemed to have any bearing on Toepfer's qualifications to manage and acquire control of TCI.

IV. Financial Showing

Applicants have submitted under seal as Exhibit A to this application, the latest available balance sheet and income statement of TCI. These financials are unaudited. Also, Applicants have submitted under seal as Exhibit B a savings account statement showing deposits in the amount of \$25,000 and a copy of an on-line account summary from TCI's bank showing total checking and savings account deposits in the total amount of \$57,471.53. Included in Exhibit B is a verification by Toepfer that the \$25,000 cash deposit shown in the savings account is uncommitted and represents funds that are and will remain available to TCI to meet its working capital requirements while this application is pending and during the first year of operations following the change in control.

As is shown on TCI's balance sheet, TCI also has paid a \$15,000 deposit for underlying wholesale carrier services. TCI will not be required to pay any further deposits to underlying carriers as the result of the change in control.

V. Public Interest Considerations

The sole issues in this proceeding are whether, upon the acquisition of control by Toepfer, TCI will continue to have requisite managerial, financial, and technical qualifications to provide service and whether granting this application is otherwise consistent with the public interest. Applicants point out that the proposed acquisition of control by Toepfer will provide him with substantial ownership of the company that he is now charged with operating. Toepfer views his acquisition of TCI as an excellent investment opportunity. From TCI's standpoint and that of its minority shareholders, Toepfer's investment will

provide a strong incentive for his continued leadership in producing growth and on-going success for the company. Therefore, Applicants believe the proposed transaction will serve the public interest.

VI. Discussion

Applicants seek approval of the proposed transfer of control pursuant to Pub. Util. Code § 854. Section 854(a) states, in relevant part, as follows:

No person or corporation . . . shall merge, acquire, or control . . . 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 of no effect.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).¹ The primary standard used by the Commission to determine if a transaction should be authorized under § 854(a) is whether the transaction will adversely affect the public interest.² The Commission may also consider if the transaction will serve the public interest.³ Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.⁴

For the following reasons, we conclude that it is reasonable to grant this § 854(a) application. First, TCI will continue to operate as it has in the past, using the same name and operating authority. Second, the public may benefit from the transfer of control to the extent the transaction enhances the ability of TCI to

¹ D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19.

² D.00-06-079, p. 13.

³ D.00-06-005, 2000 Cal. PUC LEXIS 281, *4.

⁴ D.95-10-045, 62 CPUC 2d 160, 167-68.

maintain and expand its services and operations in California. Third, there is no opposition to this application. For these reasons, we see no reason to withhold authority for the transfer of control before us here.

VII. Categorization and Need for Hearing

In Resolution ALJ 176-3159, dated September 22, 2005, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-3159.

VIII. Waiver of Comment Period

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

IX. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. TCI possesses a CPCN to provide resold local exchange telecommunications services within the territories of Pacific, Verizon, SureWest and CTC and statewide interexchange services within California under the U 6829-C corporate identification number.

2. Applicants seek authority for John Toepfer to acquire control of TCI. Toepfer currently owns 20% of the voting stock of TCI and proposes to purchase additional stock from Alice Burk, a co-founder of TCI and its majority shareholder. Upon completion of the transaction Toepfer will own 81% of the voting stock of TCI and will have direct control over TCI.

3. Pub. Util. Code § 854(a) requires Commission authorization to transfer control of a public utility. Any transfer of control without Commission authorization is void under the statute.

4. TCI has sufficient cash and cash equivalence to provide the necessary funding for daily operations.

5. TCI will continue offering its current services and use the same name and authority after the transfer of control.

6. TCI is current on reporting and transmitting the user fees applicable to its California operations.

7. Upon completion of the transaction, TCI will continue to be operated by the same existing management team.

8. Toepfer is qualified to own and operate TCI.

9. There is no opposition to this application.

Conclusions of Law

1. This is a ratesetting proceeding and no hearing is necessary.

2. This application should be approved and become effective immediately because it is not adverse to the public interest and the public may benefit from ability of TCI to maintain and expand its services and operations in California.

3. Approval of this application is not a finding of value of the rights and property being transferred.

O R D E R

IT IS ORDERED that:

1. John Toepfer is authorized pursuant to §§ 851-844 of the Public Utilities Code to acquire 81% of the ownership interests of Telecom Consultants, Inc.,

(TCI) as more fully described in the application and exhibits attached to the application.

2. TCI shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control, as authorized herein, within 30 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.

3. Application 05-09-024 is closed.

This order is effective today.

Dated December 15, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners