Decision 06-01-003 January 12, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Approval of a Transfer of Control of FreedomStarr Communications, Inc. to AmericanFone, LLC. U-5892-C	Application 03-10-048 (Filed October 22, 2003)

OPINION AUTHORIZING TRANSFER OF CONTROL AND IMPOSING A FINE

I. Summary

This decision grants the joint application of FreedomStarr Communications, Inc. (FreedomStarr) and AmericanFone, LLC (AmericanFone), collectively Applicants, for approval of the transfer of control of FreedomStarr to AmericanFone. The approval is prospective in nature. At Applicants' request, FreedomStarr's certificate of public convenience and necessity (CPCN) is limited to the provision of resold local exchange and interexchange telecommunications services. Also, we impose a fine of $500 for failure to obtain advance approval of the transfer.

II. Parties to the Transaction

FreedomStarr is a California corporation with its principal place of business located at 8730 Sunset Boulevard, West Hollywood, California 90069.[1]

[1] Its mailing address is 7985 Santa Monica Boulevard, #7, Los Angeles, California 90046.

By Decision (D.) 97-10-077, FreedomStarr was granted a CPCN to resell interexchange services. By D.03-08-026, it was authorized to provide limited facilities-based and resold local exchange telecommunications services.

AmericanFone is a California limited liability company. Its principal place of business is the same as FreedomStarr's. AmericanFone is not authorized to provide telecommunications services in California or any other jurisdiction.

III. The Transaction

On January 22, 2002, AmericanFone consummated an agreement whereby it acquired all of the issued and outstanding stock of FreedomStarr. As a result, FreedomStarr became a wholly-owned subsidiary of AmericanFone.

Applicants represent that there were no changes in rates, terms or conditions of service as a result of the transfer, and FreedomStarr continues to operate under the same name. They further represent that the long-term effect will be to enhance FreedomStarr's access to capital.

IV. Discussion

A. Whether to Approve the Application

Pub. Util. Code § 854(a) states that no person or corporation shall acquire control of any public utility organized and doing business in this state without first securing authorization to do so from the Commission, and any such acquisition without that prior authorization shall be void and of no effect.[2]

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).[3] The primary standard

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[2] All references are to the Public Utilities Code unless otherwise specified.

[3] D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC2d 159, 171.

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.[4] The Commission may also consider if the transaction will serve the public interest.[5] Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.[6]

In a situation where a company that does not possess a CPCN desires to acquire control of a company that does possess a CPCN, we apply the same requirements as in the case of an applicant seeking a CPCN to exercise the type of authority held by the company being acquired. Since FreedomStarr possesses a CPCN to provide limited facilities-based and resold local exchange services, and resold interexchange telecommunications services within California, we would normally apply the requirements for such authority to AmericanFone. However, Applicants represent that the services currently being provided by FreedomStarr are resale only. No services are currently being provided utilizing the limited facilities-based authority previously granted to Freedomstarr. In addition, Applicants state that FreedomStarr only plans to provide resale

[4] D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17; D.97-07-060, 73 CPUC2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

[5] D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p. 5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC2d 851, 861; D.95-10-045, 62 CPUC2d 160, 167; D.94-01-041, 53 CPUC2d 116, 119; D.93-04-019, 48 CPUC2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

[6] D.95-10-045, 62 CPUC2d 160, 167-68; D.94-01-041, 53 CPUC2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

services. Therefore, they request only resale authority. As a result, we will apply the requirements applicable to resale authority, and grant approval on that basis.

The Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who desires to resell local exchange services and/or interexchange services must demonstrate that it has a minimum of $25,000 in cash or cash equivalent, reasonably liquid and readily available to meet the firm's start-up costs. In addition, the applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

Applicants provided a copy of a statement from AmericanFone's bank that demonstrates that AmericanFone has sufficient resources to meet our financial requirements. Applicants also provided information on FreedomStarr's management that demonstrates that it satisfies our requirement for technical expertise.

In addition to satisfying the above requirements, there were no changes to FreedomStarr's rates, terms or conditions of service as a result of the transaction. Thus, FreedomStarr's customers and the public were not harmed by the transfer of control. The public may benefit from the transfer of control to the extent the transaction enhances FreedomStarr's ability to compete due to increased access to capital. Also, there were no protests to the application. For all of the above reasons, we find that the transaction is not adverse to the public interest, and conclude that it is reasonable to grant the application to the extent it requests prospective authority under § 854(a) for the transfer of control of FreedomStarr.

The purpose of § 854(a) is to enable the Commission to review a proposed acquisition before it takes place in order to take such action as the public interest may require.[7] Granting the application on a retroactive basis would thwart the purpose of § 854(a). Therefore, we deny it to the extent it requests retroactive authority under § 854(a) for the transfer of control. Since we do not grant retroactive authority, the transfer of control is void under § 854(a) for the period of time prior to the effective date of this decision. The applicants are at risk for any adverse consequences that may result from having implemented the transfer of control without Commission authority.

B. Whether to Impose a Fine for Violation of Section 854(a)

Applicants failed to comply with § 854(a) by effectuating the transfer of control without Commission authorization. Violations of § 854(a) are subject to monetary penalties under § 2107 which states that any public utility which violates or fails to comply with any provision of the Constitution of this state, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars, nor more than twenty thousand dollars for each offense.

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[7] D.99-02-061, 1999 Cal. PUC LEXIS 56 *12; D.98-07-015, 1998 Cal. PUC LEXIS 526 *7; D.98-02-005, 1998 Cal. PUC LEXIS 320 *8; D.97-12-086, 1997 Cal. PUC LEXIS 1168 *8; and San Jose Water Co. (1916) 10 CRC 56, 63.

For the following reasons, we conclude that FreedomStarr should be fined for its failure to comply with § 854(a).[8] First, any violation of § 854(a), regardless of the circumstances, is a serious offense that should be subject to fines. Second, the imposition of a fine will help to deter future violations of § 854(a) by FreedomStarr and others.

To determine the size of the fine, we shall rely on the criteria adopted by the Commission in D.98-12-075 as discussed below.

1. Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors:[9]

> **Physical harm:** The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.
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> **Economic harm**: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.
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> **Harm to the Regulatory Process:** A high level of severity will be accorded to violations of statutory or Commission

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[8] Since FreedomStarr is the regulated entity, and a wholely-owned subsidiary of AmericanFone, the fine will be imposed on FreedomStarr.

[9] 1998 Cal. PUC LEXIS 1016, *71 - *73.

> directives, including violations of reporting or compliance requirements.
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> **The number and scope of the violations:** A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

Applicants' violation of § 854(a) did not cause any physical or economic harm to others. In addition, there is no evidence that Applicants significantly benefited from their unlawful conduct, or that their actions adversely affected consumers. The only factor that indicates the violation should be considered a serious offense is our general policy of according a high level of severity to any violation of the Pub. Util. Code. However, this factor must be weighed against the other factors indicating that Applicants' failure to comply with § 854(a) was not an egregious offense.

2. Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:[10]

> **The Utility's Action to Prevent a Violation:** Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past record of compliance may be considered in assessing any penalty.
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> **The Utility's Actions to Detect a Violation:** Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's

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[10] 1998 Cal. PUC LEXIS 1016, *73 - *75.

> involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.
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> **<u>The Utility's Actions to Disclose and Rectify a Violation</u>:** Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

Applicants did not take reasonable steps to comply with § 854(a) because they did not file this application before the transaction took effect. They did not allow for the customary 30-day comment period on the application, or for any comments on a draft order before the transfer of control took effect. Applicants should have given the Commission prior notice by filing the application prior to implementation of the transaction. This would have allowed the Commission to consider the transaction on an expedited basis prior to its execution. Applicants represent that they did not intend to violate § 854(a), and that the violation was the result of inaccurate information and poor legal advice. This provides some mitigation, and since the application was ultimately filed, the violation is not an especially egregious offense. This suggests a smaller fine is appropriate.

3. Financial Resources Available to FreedomStarr

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:[11]

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[11] 1998 Cal. PUC LEXIS 1016, *75 - *76.

> **<u>Need for Deterrence</u>**: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.
>
> **<u>Constitutional limitations on excessive fines</u>**: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

Applicants provided financial information for AmericanFone and FreedomStarr under seal. We will weigh this information when setting the amount of the fine.

4. Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:[12]

> **<u>The degree of wrongdoing</u>**: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
>
> **<u>The public interest</u>**: In all cases, the harm will be evaluated from the perspective of the public interest.

Applicants represent that AmericanFone needed to implement the transaction in a short period of time, but admit that they should have exercised better judgment and filed the application in a timely manner to allow the Commission adequate time to review the transaction before it took effect. No one was harmed by the failure to comply with § 854(a) and Applicants do not

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[12] 1998 Cal. PUC LEXIS 1016, *76.

appear to have materially benefited from their unlawful conduct. These facts indicate that the public interest was not significantly harmed by the violation of § 854(a). In setting the fine, we will consider the relatively small harm to the public interest from this violation.

5. The Role of Precedent

In D.98-12-075, the Commission held that any decision which imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.[13]

In D.00-09-035, we held that our precedent of meeting out lenient treatment to those who violate § 854(a) had failed to deter additional violations; and we indicated that henceforth we would impose fines in order to deter future violations of § 854(a). In both D.00-12-053 and D.03-05-033, the Commission fined telecommunications carriers $5,000 for failure to obtain advance approval under § 854(a) for transfers of control. In this proceeding, Applicants' balance sheets and profit and loss statements show that their combined revenues, assets and equities are far below those of the of the applicants in above cases. Therefore, we will impose a fine of $500.

6. Conclusion

We conclude, based on the facts of this case, that FreedomStarr should be fined $500 for violating § 854(a). The fine is meant to deter future violations of § 854(a) by Applicants and others. The size of the fine we impose today is tailored to the unique facts and circumstances before us in this proceeding. We may impose larger or smaller fines in other proceedings if the facts so warrant.

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13 1998 Cal. PUC LEXIS 1016, *77.

V. Request to File Under Seal

Applicants request that the information filed with the application, and on February 10, 2004, November 18, 2004, and March 14, 2005, be kept under seal. The information consists of financial statements, bank statements, FreedomStarr's customer base and complaint history, and other financial information on FreedomStarr. Applicants represent that the information is proprietary and sensitive. The information, if revealed, would place Applicants at an unfair business disadvantage, and/or reveal information about specific customers. We have granted similar requests in the past and will do so here.

VI. Comments on Draft Decision

The draft decision in this matter was mailed to the parties in accordance with § 311(g)(1), and Rule 77.7 of the Commission's Rules of Practice and Procedure. No comments were filed.

VII. Categorization and Need for Hearings

In Resolution ALJ 176-3122 dated October 30, 2003, 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.

VIII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Jeffrey P. O'Donnell is the assigned administrative law judge in this proceeding.

Findings of Fact

1. By D.97-10-077, FreedomStarr, a California Corporation, was granted a CPCN to resell interexchange services.

2. By D.03-08-026, FreedomStarr was authorized to provide limited facilities-based and resold local exchange telecommunications services.

3. There were no changes in FreedomStarr's rates, terms or conditions of service as a result of the transfer of the ownership.

4. The transfer will enhance FreedomStarr's access to capital.

5. AmericanFone satisfies the Commission's financial and technical requirements.

6. The public may benefit from FreedomStarr's acquisition by AmericanFone to the extent the transaction enhances its ability to compete due to increased access to capital.

7. There were no protests to the application.

8. The imposition of a fine will help to deter future violations of § 854(a) by the Applicants and others.

9. Applicants' violation of § 854(a) did not cause any physical or economic harm to others, and there is no evidence that Applicants significantly benefited from their unlawful conduct or that their actions adversely affected consumers.

10. Applicants did not file the application before the transaction took place.

11. In both D.00-12-053 and D.03-05-033, the Commission fined telecommunications carriers $5,000 for failure to obtain advance approval under § 854(a) for transfers of control.

12. Applicants' balance sheets and profit and loss statements show that their combined revenues, assets and equities are far below those of the applicants fined in D.00-12-053 and D.03-05-033.

13. Public disclosure of the information filed under seal would place Applicants at an unfair business disadvantage or reveal information about specific customers.

14. Notice of this application appeared on the Commission's Daily Calendar on October 27, 2003.

15. There were no protests to this application.

16. No hearings are necessary.

Conclusions of Law

1. Section 854(a) states that no person or corporation shall acquire control of any public utility organized and doing business in this state without first securing authorization to do so from the Commission, and any such acquisition without that prior authorization shall be void and of no effect.

2. The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).

3. 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.

4. In a situation where a company that does not possess a CPCN desires to acquire control of a company that does possess a CPCN, the Commission applies the same requirements as in the case of an applicant seeking a CPCN to exercise the type of authority held by the company being acquired.

5. The certificate of public convenience and necessity granted to FreedomStarr in Decision 03-08-026 should be revoked, at the Applicants' request, only to the extent that it includes limited facilities-based authority.

6. An applicant who desires to provide resold local exchange services must demonstrate that it has a minimum of $25,000 in cash or cash equivalent, reasonably liquid and readily available to meet the firm's start-up costs.

7. An applicant who desires to provide resold local exchange services is required to make a reasonable showing of technical expertise in telecommunications or a related business.

8. FreedomStarr's acquisition by AmericanFone is not adverse to the public interest.

9. It is reasonable to grant the application to the extent it requests prospective authority under § 854(a) for the transfer of control.

10. The purpose of § 854(a) is to enable the Commission to review a proposed acquisition before it takes place in order to take such action as the public interest may require.

11. Granting the application on a retroactive basis would thwart the purpose of § 854(a).

12. The application should be denied to the extent it requests retroactive authority under § 854(a) for FreedomStarr's acquisition by AmericanFone.

13. Since the Commission's approval of the application is prospective only, FreedomStarr's acquisition by AmericanFone is void under § 854(a) for the period of time prior to the effective date of this decision, and FreedomStarr and AmericanFone are at risk for any adverse consequences that may result from having implemented the transfer of control without Commission authority.

14. Applicants failed to comply with § 854(a) by effectuating the transfer of control without Commission authorization.

15. Violations of § 854(a) are subject to monetary penalties under § 2107 of not less than five hundred dollars, nor more than twenty thousand dollars for each offense.

16. Any violation of § 854(a), regardless of the circumstances, is a serious offense that should be subject to fines.

17. In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense.

18. In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility.

19. Since Applicants' violation of § 854(a) was inadvertent, and the application was ultimately filed, the violation is not an especially egregious offense.

20. In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility.

21. In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case.

22. The public interest was not significantly harmed by Applicants' violation of § 854(a).

23. In D.98-12-075, the Commission held that any decision which imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.

24. Applicants' should be fined $500 for violating § 854(a).

25. The application should be granted to the extent set forth herein.

26. Applicants' request to file information under seal should be granted for two years from the effective date of this order.

27. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Application 03-10-048, filed by FreedomStarr Communications, Inc. (FreedomStarr) and AmericanFone, LLC (AmericanFone) for authority under

Pub. Util. Code § 854 for a transfer control of FreedomStarr to AmericanFone is granted to the extent it requests authority effective as of the date of this order.

2. Application 03-10-048 is denied to the extent that it requests retroactive authority for the transfer of control.

3. FreedomStarr shall pay a fine in the amount of $500 for violating Pub. Util. Code § 854(a). FreedomStarr shall pay the fine within 20 days from the effective date of this order by tendering to the Fiscal Office of the California Public Utilities Commission a check in the amount of $500 made payable to the State of California General Fund.

4. The certificate of public convenience and necessity granted to FreedomStarr in Decision 03-08-026 is revoked only to the extent that it included limited facilities-based authority. The resale authority granted therein is unchanged.

5. Applicants' request to have the information filed with the application, and on February 10, 2004, November 18, 2004, and March 14, 2005, kept under seal is granted for two years from the effective date of this decision. During that period the information shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

6. If Applicants believe that further protection of the information kept under seal is needed, they may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission's rules may then provide. This motion shall be filed no later than one month before the expiration date.

7. Application 03-10-048 is closed.

This order is effective today.

Dated January 12, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners