

Decision 06-04-017 April 13, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Joint Application of EarthLink, Inc., and New Edge Holding Company for Expedited Ex Parte Approval of the Indirect Transfer of Control of New Edge Network, Inc. (U-6226-C).

Application 06-01-011
(Filed January 19, 2006)

OPINION GRANTING TRANSFER OF CONTROL

I. Summary

This decision authorizes the transfer of control of New Edge Holding Company (New Edge Holding) and its subsidiary New Edge Networks, Inc. (New Edge), a competitive Local Exchange Carrier, to EarthLink, Inc. (EarthLink). The application is unopposed. This proceeding is closed.

II. The Application

New Edge Holding, on behalf of itself and its subsidiary New Edge, along with EarthLink, jointly referred to as Applicants, filed this application pursuant to Section 854(a) of the Public Utilities Code. Applicants request approval of the transfer of control of New Edge Holding and its subsidiary New Edge, to EarthLink.

III. The Proposed Transaction

On December 12, 2005, New Edge Holding, New Edge Merger Corporation (MergerCo), and EarthLink executed an agreement and Plan of Merger (Agreement). Pursuant to the Agreement, MergerCo, a wholly-owned subsidiary of EarthLink, will merge with New Edge Holding, the parent of New Edge, with New Edge Holding continuing as the surviving corporation. After

the proposed transaction is effected, New Edge will remain a separate company and a wholly-owned subsidiary of New Edge Holding, which in turn will be a wholly-owned subsidiary of EarthLink. New Edge will continue to operate as a separate company under its current name as a wholly-owned indirect subsidiary of EarthLink, in substantially the same manner as it has in the past. Upon completion of the merger, EarthLink will control New Edge through the ownership of 100 percent of the outstanding common stock of new Edge Holding. Thus, after the proposed transaction, New Edge will have a different capital structure and a new controlling stockholder. The structure of the proposed transaction is shown in the diagram in Exhibit 3 to the application.

IV. The Parties

A. New Edge Holding Company

New Edge Holding is a privately held Delaware Corporation, and the parent of New Edge Networks, Inc. New Edge Holding will merge with and into New Edge Merger Corporation, a subsidiary of EarthLink, Inc. upon the consummation of the proposed transaction, with New Edge Holding as the surviving corporation.

B. New Edge Networks, Inc.

New Edge is a national provider of secure multi-site managed data networks and dedicated Internet access. It has one of the nation's largest network footprints, with more than 850 carrier-class switches and Internet routers. As part of this network, New Edge has collocated multi-service switches in more than 580 incumbent local exchange carrier (ILEC) central offices, and in many independent "carrier hotels," throughout the United States.

New Edge was authorized to provide interLATA and intraLATA telecommunications service in California as a facilities-based carrier in August 1999 and was authorized as a competitive local exchange carrier to offer resold

local exchange services within the territories of PacBell, GTEC, Roseville Telco and Citizens Telco in December 1999 (D.99-12-048). New Edge does not serve residential customers in California, and has 94 collocated facilities in the state.

C. New Edge Merger Corporation

MergerCo is a wholly-owned subsidiary of EarthLink, created to effectuate the proposed transaction. MergerCo will be merged with New Edge Holding upon the consummation of the proposed transaction, with New Edge Holding as the surviving corporation.

D. EarthLink, Inc.

EarthLink is a publicly traded Delaware corporation. EarthLink's principal office is 1375 Peachtree Street, Level A, Atlanta, GA 30309. A copy of its certificate of good standing to do business in California is attached as Exhibit 1 to the application. EarthLink's organizational documents are attached as Exhibit 2 to the application. It is primarily an Internet service provider, providing nationwide Internet access and related value-added services to individual and small business customers. EarthLink does not own telecommunications network facilities and does not hold an authorization to provide telecommunications services in California or any other state.

V. EarthLink's Qualifications

EarthLink has the technical managerial, and financial qualifications to acquire control of New Edge. EarthLink is operated by a highly qualified management team, all of whom have extensive backgrounds in providing nationwide Internet access and related value-added services to individual and business customers, and many of whom also have extensive experience in managing telecommunications businesses. Information concerning the technical and managerial qualifications of EarthLink's management team is attached as Exhibit 4 to the application.

VI. Financial Showing

In 2004, EarthLink had revenues of approximately \$1.38 billion. EarthLink's 2004 financial statements and third-quarter 2005 financial statements, as contained in its most recent SEC Forms 10-K and 10-Q, are attached as Exhibit 5 to the application.

VII. Public Interest Considerations

Applicants believe the proposed transaction will serve the public interest in promoting competition among the telecommunications carriers in California. According to Applicants, the acquisition of New Edge by EarthLink will result in significant benefits for California consumers, and will advance important state public policy goals. Most importantly, it will promote much-needed competition in the broadband marketplace in California, a longstanding policy goal of the Commission.¹

Applicants state that the proposed transaction will not have any negative effect on the California Customers of New Edge, to whom it will be essentially transparent. After consummation of the proposed transaction, New Edge will continue to provide the same services to those customers at the same pricing, terms and conditions as at present. Similarly, the proposed transaction will not require any revisions to New Edge's tariffs on file with the Commission. The operations of New Edge will continue to be supervised by the same management, technical and customer service supervisors as at present. All services will continue to be provided to New Edge's customers without interruption; the proposed transaction will not result in discontinuance of the service of any customer in California.

¹ See Broadband Deployment in California, D.05-05-013, issued May 5, 2005.

Further, Applicants state that because it is a stock transaction proposed at the holding company level, the transfer of control of New Edge will not result in a change of carrier for any of New Edge's customers in California. There will be no negative impact on service to California customers. Nonetheless, Applicants will provide notice to New Edge's California customers, consistent with the requirements of D.97-06-090 and D.98-07-038.

VIII. 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).² 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.³ The Commission may also consider if the transaction will serve the public interest.⁴

For the following reasons, we conclude that it is reasonable to grant this application. First, New Edge will continue to operate as it has in the past, using the same name and operating authority. Second, the public may benefit from the

² D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19.

³ D.00-06-079, p. 13.

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

transfer of control to the extent the transaction enhances the ability of New Edge to 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.

IX. Categorization and Need for Hearing

In Resolution ALJ 176-3166, dated January 26, 2006, 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 176-3166.

X. 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.

XI. Assignment of Proceeding

Rachelle B. Chong is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. New Edge was authorized to provide interLATA and intraLATA telecommunications service in California as a facilities-based carrier in August 1999, and was authorized as a competitive local exchange carrier to offer resold local exchange services within the territories of PacBell, GTEC, Roseville Telco and Citizens Telco in December 1999 (D.99-12-048).

2. 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.

3. New Edge has sufficient cash and cash equivalence to provide the necessary funding for daily operations.
4. New Edge will continue offering its current services and use the same name and authority after the transfer of control.
5. New Edge is current on transmitting the user fees applicable to its California operations through 2001. To avoid revocation of its certification, New Edge should file remittance reports with the Commission for 2003 through 2005, even if it has no revenues to report.
6. Upon completion of the transaction, New Edge will continue to be operated by the same existing management team.
7. 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 the ability of New Edge 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. Pursuant to §§ 851-854 of the Public Utilities Code, EarthLink, Inc. is authorized to assume control of New Edge Holding Company and its subsidiary New Edge Networks, Inc. (New Edge) through the ownership of 100 percent of the outstanding stock of New Edge Holding Company.

2. New Edge shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control, as authorized herein, within 60 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.

3. New Edge is current on transmitting the user fees applicable to its California operations through 2001. To avoid revocation of its certification, New Edge shall file remittance reports with the Commission for 2003 through 2005, even if it has no revenues to report. The reports shall be filed no later than 30 days of the date of this decision.

4. Application 06-01-011 is closed.

This order is effective today.

Dated April 13, 2006, at San Francisco, California.

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