

Decision 06-05-009 May 11, 2006

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

In the Matter of the Application of MobilePro Corp. and American Fiber Network, Inc. to Complete a Transfer of Control of American Fiber Network, Inc. (A 00-06-026) an Authorized Carrier, and Related Transactions.

Application 05-08-015  
(Filed August 10, 2005)

**OPINION GRANTING APPLICATION FOR TRANSFER  
OF CONTROL OF AMERICAN FIBER NETWORK, INC.  
TO MOBILEPRO CORP.**

**Summary**

This decision grants the application of Mobilepro Corp. (Mobilepro) and American Fiber Network, Inc. (AFN) (U 6343 C) for a transfer of control of AFN to Mobilepro pursuant to Pub. Util. Code § 854.<sup>1</sup>

**Description of the Applicants  
and the Proposed Transaction**

Mobilepro and AFN seek Commission authorization pursuant to § 854 to transfer control of AFN to Mobilepro. Mobilepro has entered into an agreement with AFN through which AFN will merge into AFN Acquisition Corp. (AFNAC), a newly created, wholly-owned subsidiary of Mobilepro. AFNAC will simultaneously change its name to American Fiber Network, Inc., which

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<sup>1</sup> All subsequent Code references are to the Public Utilities Code, unless otherwise stated.

would be the surviving corporation. As a result of this transaction, AFN will become a wholly-owned subsidiary of Mobilepro.

Mobilepro is a Delaware corporation with offices located in Bethesda, Maryland. Mobilepro is a widely-held publicly traded corporation that offers telecommunications services through 3 wholly-owned subsidiaries: CloseCall America Inc. (CloseCall), Affinity Telecom, Inc. (Affinity), and Davel Communications, Inc. (Davel). According to the application, CloseCall provides resold local and interexchange telecommunications services in approximately 9 states, Affinity provides local and interexchange telecommunications services in Michigan and Ohio, and Davel provides payphone services in 45 states.<sup>2</sup> Mobilepro does not offer any telecommunications services itself.

AFN is a Delaware corporation with offices located in Kansas. AFN is wholly-owned by Douglas Bethell. According to the application, AFN currently provides resold and facilities-based local exchange service, resold and facilities-based long distance operator services, voicemail and other standard voice features, and DSL services. The application states that AFN is authorized to provide competitive local exchange services and interexchange services in a

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<sup>2</sup> The application states that Mobilepro's subsidiaries, CloseCall, Affinity, and Davel are authorized to provide telecommunications services as follows:

CloseCall is authorized to provide competitive local exchange services in Delaware, Florida, Illinois, Indiana, Maryland, Michigan, Ohio, Pennsylvania, and Wisconsin, and interexchange services in Florida, Illinois, Indiana, Maryland, Michigan, Ohio, Pennsylvania, and Wisconsin.

Affinity is authorized to provide competitive local exchange and interexchange services in Michigan and Ohio.

number of states, including California<sup>3</sup> and also interexchange services only in Arizona, New Jersey and Wyoming. AFN has applications for authorization to provide competitive local exchange services pending in Kentucky and Tennessee. A review of our records shows that this Commission granted AFN a CPCN authorizing the provision of resold local exchange and interexchange services in California in Decision (D.) 00-06-026.

The application states that this transaction will benefit California consumers, because AFN will have access to the highly qualified and experienced management and financial resources that will be provided by Mobilepro. Applicants also contend that the operations of Mobilepro and AFN are complementary, because Mobilepro, through its subsidiaries, offers local and intrastate long distance services and has extensive experience in payphone and internet services, while AFN has a substantially wider coverage area for local

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<sup>3</sup> The application states that AFN provides competitive local exchange and interexchange services in the following states, in addition to California: Alabama, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Washington, and Wisconsin.

and long distance services and extensive experience in serving residential and commercial customers. Applicants state that this transaction will not change the terms, conditions, and rates under which California customers receive service from AFN. The existing management of AFN would continue to oversee the daily operations of AFN.

## Discussion

Under § 854, in determining whether to grant this application, the Commission must consider whether to approve the proposed transfer of control of AFN to Mobilepro is in the public interest.

Section 854 states in pertinent part:

No person or corporation...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.

The purpose of § 854 is to enable the Commission to review a proposed transaction, before it takes place, in order to take such action as the public interest may require. The Commission has broad discretion under § 854 to approve or reject a proposed transaction. Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>4</sup>

The Commission uses several criteria to decide whether to approve a proposed transaction that will result in an entity without a certificate of public convenience and necessity (CPCN) acquiring a telecommunications utility that has a CPCN to provide resold telecommunications services.<sup>5</sup>

First, the acquiring entity must have at least \$25,000 of cash or cash equivalent. Here, Applicants provided audited financial statements under seal, which show that although Mobilepro has cash and cash equivalents that exceed

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<sup>4</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*24.

<sup>5</sup> D.03-06-079, *mimeo.*, pp. 7 – 8.

\$25,000, the company was operating at a loss as of the years ended on March 31, 2004 and March 31, 2005. However, Mobilepro's revenues grew from \$311,000 to approximately \$46 million from the end of fiscal year 2004 to the end of fiscal year 2005, as the result of a series of transactions. Mobilepro intends to reduce its operating expenses, particularly professional fees, in order to further improve its financial situation. Since Mobilepro has at least \$25,000 available for the operations of AFN and is no longer operating at a loss, it appears that Mobilepro has met this requirement. Based on this information, we find that the first criterion has been satisfied.

Second, the acquiring entity must be able to operate the acquired utility competently. The Applicants represent that Mobilepro has extensive experience in managing telecommunications companies through the activities of its subsidiaries, Davel, Affinity, and CloseCall. Based on this information, we find that the second criterion has been satisfied.

Third, the Commission considers if any affiliate, officer, director, partner, or owner of more than 10% of the acquiring entity, or any person acting in that capacity, has (1) filed for bankruptcy; (2) been sanctioned by the Federal Communications Commission or state utility regulatory commissions for failure to comply with any statute, rule or order; or (3) been found civilly liable for a violation of § 1700 *et seq.* of the California Business and Professions Code or for any actions that involved misrepresentations to consumers, or is currently under investigation for similar violations. The Applicants represent that there is no such person or entity with respect to Items 1 and 3. Our search of Lexis did not find anything that contradicts the Applicants' representation.

We remind the Applicants that they must comply with all applicable California regulatory statutes, rules, and orders, and that the Commission may impose fines and other sanctions if they fail to do so.

In conclusion, we find that Mobilepro should be authorized to acquire AFN pursuant to § 854 for the following reasons. First, the transaction satisfies the applicable criteria as described previously. Second, there will be no changes to AFN's rates or services as a result of the transaction. Therefore, the public will not be harmed by the transaction. Third, the public may benefit from the transaction to the extent it enhances AFN's ability to compete in California. Fourth, there is no opposition to this application.

### **California Environmental Quality Act**

This application does not propose, and this decision does not grant, authority for new construction. Accordingly, there is no possibility that granting this application will have a significant impact on the environment.

### **Procedural Background**

Application (A.) 05-08-015 was filed on August 10, 2005. Notice of the filing of the application appeared in the Daily Calendar on August 11, 2005. There were no protests or other responses to the application. A supplement to the application was filed on October 12, 2005, pursuant to instructions from the assigned Administrative Law Judge (ALJ).

### **Categorization and Need for Hearing**

In Resolution ALJ 176-3157, dated August 25, 2005, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a ratesetting proceeding and that hearings are not necessary.

### **Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

### **Comments on the Draft Decision**

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 § 311(g)(2).

### **Findings of Fact**

1. Application 05-08-015 requests authority under § 854 for the transfer of control of AFN to Mobilepro.
2. There were no protests or other responses to this application.
3. As set forth in the body of this decision, the proposed transaction satisfies the Commission's requirements for a transfer of control.
4. The Applicants took reasonable steps to comply with § 854.
5. This application does not request, and this decision does not grant, authority to construct any buildings or other facilities.

### **Conclusions of Law**

1. This is a ratesetting proceeding.
2. No hearing is necessary.
3. It is in the public interest to approve this application pursuant to § 854.
4. It can be seen with certainty that approving this application will not have any adverse impact on the environment.
5. Since this application is uncontested and noncontroversial, the following Order should be effective on the date it is signed.



**O R D E R**

**IT IS ORDERED** that:

1. Application 05-08-015 for authority under California Pub. Util. Code § 854 to transfer control of American Fiber Network, Inc. to Mobilepro Corp. is granted pursuant to Pub. Util. Code § 854.
2. Application 05-08-015 is closed.

This order is effective today.

Dated May 11, 2006, at San Francisco, California.

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

Commissioner John A. Bohn, being  
necessarily absent, did not participate.