

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 29, 2000

File No.: A.00-02-014

TO: ALL PARTIES OF RECORD IN APPLICATION 00-02-014

Decision 00-12-053 is being mailed without the joint Dissent of President Loretta M. Lynch and Commissioner Carl Wood. The Dissent will be mailed separately.

Very truly yours,

/s/ LYNN T. CAREW

LYNN T. CAREW, Chief
Administrative Law Judge

LTC:abw

Mailed 12/22/2000

Decision 00-12-053 December 21, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of
NetMoves Corporation (U-5242-C), Certain
Shareholders of NetMoves Corporation, and
Mail.com Inc., for Approval of an Agreement and
Plan of Merger and Related Transactions.

Application 00-02-014
(Filed on February 10, 2000;
amended on April 14, 2000)

O P I N I O N

1. Summary

This decision grants Application (A.) 00-02-014 to the extent the application requests prospective authority under Pub. Util. Code § 854¹ for Mail.com, Inc. (Mail.com) to acquire NetMoves Corporation (NetMoves). This decision denies A.00-02-014 to the extent the application requests retroactive authority for the acquisition. Finally, this decision requires Mail.com and NetMoves to pay a fine of \$5,000.00 for their failure to comply with § 854.

2. Background

NetMoves is a Delaware corporation authorized to do business in California. In Decision (D.) 91-09-012, NetMoves was granted a certificate of

¹ All statutory references are to the Public Utilities Code unless otherwise indicated.

public convenience and necessity (CPCN) to provide resold interexchange telecommunications services within California.²

Mail.com is a Delaware corporation authorized to do business in California. Mail.com provides various e-mail services to the public, none of which is regulated by the Commission. The stock of Mail.com is traded on the Nasdaq stock exchange.

On February 8, 2000, Mail.com acquired NetMoves.³ On February 10, 2000, NetMoves and Mail.com (collectively, “the Applicants”) jointly filed A.00-02-014 for authority under § 854(a) for Mail.com to acquire NetMoves. Notice of A.00-02-014 appeared in the Commission’s Daily Calendar on February 14, 2000. There were no protests or responses to the application. On February 11, 2000, NetMoves changed its name to Mail.com Business Messaging Services, Inc. (Mail.com BMS). For the sake of clarity, this decision will often refer to Mail.com BMS as “NetMoves,” its name at the time A.00-02-014 was filed.

On March 17, 2000, assigned Administrative Law Judge (ALJ) Kenney issued a ruling that required the Applicants to amend A.00-02-014 to correct various deficiencies in the application. The amendment was filed on May 8, 2000. In their amendment, the Applicants requested, for the first time,

² When D.91-09-012 was issued, NetMoves was known as Digitran Corporation (Digitran). On February 28, 1996, Digitran changed its name to FaxSav Incorporated (FaxSav). On May 27, 1999, FaxSav changed its name to NetMoves.

³ The acquisition of NetMoves by Mail.com was effected by converting NetMoves common stock into Mail.com common stock. Following the conversion, the previous shareholders of NetMoves held less than 50% of the stock of Mail.com, resulting in the transfer of control of NetMoves from its previous shareholders to Mail.com.

retroactive, nunc pro tunc authority for Mail.com's acquisition of NetMoves.⁴

Notice of the amendment appeared in the Commission's Daily Calendar on May 22, 2000. There were no protests or responses to the amendment.

On May 17, 2000, the assigned ALJ instructed the Applicants by telephone to supplement A.00-02-014 with an amended certificate of qualification to transact business in California ("certificate") that reflected the current name for NetMoves.⁵ On October 20, 2000, the Applicants filed a supplement which contained evidence that NetMoves' certificate had been amended to reflect NetMoves' current name of "Mail.com Business Messaging Services, Inc."

On September 22, 2000, the assigned ALJ issued a ruling that required the Applicants to file a second amendment that contained the following information:

1. An explanation regarding why Mail.com acquired NetMoves without prior Commission authorization as required by § 854.
2. The steps the Applicants could take to remedy the apparent violation of § 854, such as unwinding the acquisition and seeking Commission approval for a new acquisition.
3. The amount of monetary penalty the Commission should levy in response to the violation of § 854 pursuant to the Commission's authority under § 2107 and the criteria set forth in D.98-12-075.

⁴ The phrase "nunc pro tunc," meaning "now for then," refers to those acts which are allowed to be done at a later time "with the same effect as if regularly done." (Blacks Law Dictionary (4th Revised ed. (1968), p. 1218.)

⁵ Rules 16 and 35 of the Commission's Rules of Practice and Procedure (Rules) require that applications for authority to acquire control of a public utility to include, if applicable, a current copy of each applicant's certificate.

The second amendment was filed on October 4, 2000. Notice of the amendment appeared in the Commission's Daily Calendar on October 6, 2000. There were no protests or responses to the amendment.

3. Requested Authority

The Applicants request retroactive authority under § 854(a) for Mail.com to acquire NetMoves. The Applicants state that retroactive approval of the transaction would not be adverse to the public interest because the transaction does not affect (1) the rates, terms, or conditions of existing services provided to NetMoves' customers; or (2) the management, facilities, and operations currently employed by NetMoves to provide service. The Applicants also state that retroactive approval would serve the public interest, since the transaction strengthens NetMoves as a competitor by providing NetMoves with access to Mail.com's technical and financial resources.

The Applicants recognize that § 854(a) renders void any acquisition of a public utility that is consummated without prior Commission approval. Because Mail.com's acquisition of NetMoves was consummated without prior Commission approval, the Applicants ask the Commission to exempt the acquisition from § 854(a) pursuant to the Commission's authority under § 853(b). Section 853(b) states, in relevant part, as follows:

The commission may . . . exempt any public utility or class of public utility from [§ 854(a)] if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest.

The Applicants argue that Mail.com's acquisition of NetMoves should be exempt from § 854(a) because (1) there were no protests to the Applicants' request for an exemption; and (2) it was the Commission's policy at the time

A.00-02-014 was filed to retroactively authorize previously consummated acquisitions so that such transactions would not be void under § 854(a).

The Applicants acknowledge that the Commission recently provided notice in D.00-09-035 that it might not grant applications for retroactive authority in the future.⁶ The Applicants contend that the Commission's new policy should only apply to applications that were filed after the policy was announced.

Finally, the Applicants state that it is not practical to unwind the acquisition, since the transaction involves a publicly traded company whose shares have traded since the acquisition. The Applicants also contend that it is unfair for the Commission to fine the Applicants for their failure to obtain prior Commission approval for the acquisition as required by § 854(a), since the Commission has seldom imposed fines for violations of § 854(a).

4. Discussion

A. Whether to Approve the Application

In A.00-02-014 the Applicants request authority under § 854(a) for Mail.com to acquire NetMoves. 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 and of no effect.

⁶ D.00-09-035, p. 5.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).⁷ 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.⁸ The Commission may also consider if the transaction will serve the public interest.⁹ Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.¹⁰

For the following reasons, we conclude that it is reasonable to grant A.00-02-014 to the extent the application requests prospective authority under § 854(a) for Mail.com to acquire NetMoves. First, there will be no change to rates, services, or operations of NetMoves as a result of the acquisition. Thus, NetMoves' customers and the public will not be harmed by the acquisition. Second, Mail.com, as a nationwide provider of e-mail services, has the technical, managerial, and financial qualifications necessary to successfully operate NetMoves. Third, the public may benefit from the acquisition to the extent the acquisition enhances NetMoves' ability to compete through lower rates and/or

⁷ D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

⁸ 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 CPUC 2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

⁹ 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 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

¹⁰ D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

new or improved services. Fourth, there were no protests to A.00-02-014. Finally, we have authorized acquisitions of public utilities many times in the past. Given our experience with acquisitions, we see no reason to withhold authority for the acquisition before us here.

We deny A.00-02-014 to the extent the application requests retroactive authority under § 854(a) for Mail.com to acquire NetMoves. 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 A.00-02-014 on a retroactive basis would thwart the purpose of § 854(a). Since we do not grant retroactive authority, Mail.com's acquisition of NetMoves 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 their having effected the acquisition without Commission authority.

We find no merit in the Applicants' argument that we should grant retroactive authority for Mail.com's acquisition of NetMoves because it was our policy to grant retroactive authority at the time A.00-02-014 was filed. There was no such policy in effect at the time A.00-02-014 was filed, since we never issued a decision that formally established such a policy. Furthermore, while we have from time to time issued decisions that granted retroactive authority for acquisitions pursuant to our authority under § 853(b), each of these decisions was based on unique facts and circumstances, not a general policy. In this

¹¹ 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.

proceeding, we find that the Applicants have failed to present an adequate justification for why we should grant retroactive authority here.

As we did in D.00-09-035, we provide notice that in the future we may not grant applications that seek retroactive authority for transactions that are subject to § 854(a). Instead, we may (1) grant such applications only to the extent they request authority on a prospective basis, (2) deny the applications to the extent they request retroactive authority, and (3) find that the applicants are at risk for any adverse consequences that may result from their having completed a transaction prior to obtaining Commission approval for the transaction as required by § 854(a). It is also possible that we may conclude that an application for retroactive authority should be denied in its entirety, and that the underlying transaction, if already consummated, should be deemed void and of no effect pursuant to § 854(a). Finally, we may impose a monetary penalty for failure to obtain prior Commission approval for a transaction that is subject to § 854(a).

**B. Whether to Penalize the Applicants for
Their Failure to Comply with Pub. Util.
Code §854(a)**

Applicants failed to comply with § 854(a) by Mail.com acquiring NetMoves without Commission authorization. Violations of § 854(a) are subject to monetary penalties under § 2107 which states as follows:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, 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 (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

For the following reasons, we conclude that the Applicants should be fined for their failure to comply with § 854(a). 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 the Applicants and others.

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

Criterion 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:¹²

Physical harm: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.

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.

Harm to the Regulatory Process: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

¹² 1998 Cal. PUC LEXIS 1016, *71 - *73.

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), while serious, was not an especially egregious offense. This is because the violation did not cause any physical or economic harm to others. In addition, there is no evidence that the Applicants significantly benefited from their unlawful conduct. Furthermore, there was only a single violation of § 854(a), and the violation affected few, if any, consumers. The only factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code. However, this factor must be weighed against the other factors which indicate that Applicants' failure to comply with § 854(a) was not an especially egregious offense.

Criterion 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:¹³

The Utility's Actions 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.

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

¹³ 1998 Cal. PUC LEXIS 1016, *73 - *75.

involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

The Utility's Actions to Disclose and Rectify a Violation:

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 disclose their violation of § 854(a) until asked by the assigned ALJ,¹⁴ which suggests that a large fine may be appropriate. However, this factor is offset by Applicants' other conduct which indicates that only a small fine is appropriate. First, there is no evidence that the Applicants have previously failed to comply with applicable statutes and regulations. Second, Applicants' failure to comply with § 854(a) appears to have been unintentional. Finally, the Applicants took appropriate steps to report and remedy the violation once it was discovered (i.e., requesting retroactive authority for the acquisition).

Criterion 3: Financial Resources of the Utility

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:¹⁵

Need for Deterrence: Fines should be set at a level that deters future violations. Effective deterrence requires that

¹⁴ On March 17, 2000, the assigned ALJ issued a ruling that instructed the Applicants to state if Mail.com had already acquired NetMoves. On May 5, 2000, the Applicants filed an amended application in which the Applicants (1) stated the acquisition had already occurred, and (2) requested retroactive authority for the acquisition.

¹⁵ 1998 Cal. PUC LEXIS 1016, *75 - *76.

the Commission recognize the financial resources of the utility in setting a fine.

Constitutional limitations on excessive fines: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

For the nine-month period ending September 30, 1999, the Applicants had total revenues of \$26.6 million and a net loss of \$76.2 million.¹⁶ Applicants' total equity on September 30, 1999, was \$247,017. Applicants' revenues regulated by the Commission ("regulated revenues") for the nine-month period ending December 1999 were only \$25,061.¹⁷ The Applicants' significant losses, depleted equity, and insignificant regulated revenues suggests that a relatively small fine could effectively deter the Applicants from future violations of the California Public Utilities Code.

Criterion 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:¹⁸

The degree of wrongdoing: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

¹⁶ Applicants' net loss, excluding amortization of goodwill and other non-cash costs, was approximately \$37 million for the nine-month period ending September 30, 2000.

¹⁷ Amendment filed on October 4, 2000, p. 2.

¹⁸ 1998 Cal. PUC LEXIS 1016, *76.

The public interest: In all cases, the harm will be evaluated from the perspective of the public interest.

The facts of this case indicate that the degree of wrongdoing, though serious, was not egregious. First, Applicants' violation of § 854(a) was apparently unintentional. Second, no one was harmed by Applicants' failure to comply with § 854(a). Finally, Applicants do not appear to have materially benefited from their unlawful conduct. These same facts also indicate that the public interest was not significantly harmed by Applicants' violation of § 854(a).

Criterion 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.¹⁹

The facts of this case are generally comparable to many Commission decisions that approved, without penalty, transactions that were effected without prior Commission authorization in violation of § 854(a).²⁰ However, in D.00-09-035 we held that our precedent of meting our 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

¹⁹ 1998 Cal. PUC LEXIS 1016, *77.

²⁰ The following Commission decisions approved, without penalty, transactions that had been consummated without Commission authorization in violation of § 854(a): D.00-09-033, D.00-04-014, D.99-12-039, D.99-11-010, D.99-10-007, D.99-06-016, D.99-03-030, D.97-12-072, D.97-09-097, D.96-05-067, D.95-07-051, D.95-05-009, D.94-12-062, D.94-05-030, D.93-07-009, D.89-06-024, D.89-02-004, D.87-03-048, D.86-02-005, D.85-10-017, D.84-07-077, D.84-06-087, D.83-05-018, and D.93673.

§ 854(a).²¹ Therefore, requiring the Applicants to pay a fine for violating § 854(a) would be consistent with D.00-09-035.

Conclusion: Setting the Fine

We previously concluded that the Applicants should be fined for their violation of § 854(a). The application of the criteria adopted by the Commission in D.98-12-075 to the facts of this case indicates that a small fine is warranted. First, Applicants' violation of § 854(a), though serious, was not a particularly severe offense. Second, Applicants' conduct was not egregious. Third, Applicants' financial resources are modest and declining. Fourth, the degree of wrongdoing was relatively minor. Finally, the public interest was not significantly harmed by the Applicants' violation of § 854(a).

We conclude based on the facts of this case that the Applicants should be fined \$5,000.00 for violating § 854(a). The fine we impose today is meant to deter future violations § 854(a) by the Applicants and other parties. We emphasize that 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 fines in other proceedings if the facts so warrant.

5. Environmental Review

The California Environmental Quality Act (CEQA) requires the Commission to consider the environmental consequences of projects that are subject to the Commission's review and approval.²² CEQA defines a "project" as

²¹ D.00-09-035, pp. 10-11. D.00-09-035 required the applicants in A.99-08-025 to pay a \$500 fine for violating § 854(a). Prior to today's decision, D.00-09-035 is the only time the Commission has imposed a fine for a violation of § 854(a).

²² Pub. Res. Code § 21080.

an activity that (i) involves the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies; and (ii) may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.²³

The Applicants' request for Commission authority under § 854(a) for Mail.com to acquire NetMoves qualifies as an "entitlement for use" under CEQA. Therefore, the acquisition meets the first test for determining if it is a "project" under CEQA. However, it can be seen with certainty that Mail.com's acquisition of NetMoves will not cause a direct or indirect physical change in the environment because (1) NetMoves is a switchless reseller with no facilities of its own, and (2) the acquisition will not result in any changes to the operations of NetMoves. Therefore, the acquisition does not meet the second test for determining if it is a "project" under CEQA. Accordingly, the Commission need not perform further CEQA review of the acquisition.²⁴

6. Category and Need for Hearing

In Resolution ALJ 176-3033, dated February 17, 2000, 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.²⁵

²³ Pub. Res. Code § 21065.

²⁴ NetMoves lacks authority under CEQA to build facilities. Therefore, if the Applicants were to build facilities in the future, a CEQA review would be required at that time.

²⁵ On November 8, 2000, the Applicants submitted a letter in which they expressly declined to request a hearing regarding the fine adopted by the ALJ's draft decision.

7. Pub. Util. Code § 311(g)

Section 311(g)(1) requires the ALJ's draft decision in this proceeding to be (i) served on all parties, and (ii) subject to at least 30 days of public review and comment prior to a vote of the Commission. Section 311(g)(2) allows the 30-day period to be reduced or waived upon the stipulation of all parties.

The ALJ's draft decision was mailed to the parties on November 7, 2000, in accordance with § 311(g)(1). On November 8, 2000, the Applicants, the only parties to this proceeding, submitted a written request to reduce the 30-day period for public review and comment so that this decision could be considered by the Commission at its meeting of November 21, 2000. The Applicants' request was granted pursuant to § 311(g)(2).

The Applicants filed comments regarding the ALJ's draft decision on November 15, 2000. These comments have been reflected, as appropriate, in the final decision adopted by the Commission.

Findings of Fact

1. NetMoves is a Delaware corporation authorized to do business in California. NetMoves was granted a CPCN by D.91-09-012 to resell interLATA telecommunications services within California.

2. Mail.com is a Delaware corporation authorized to do business in California. Mail.com provides e-mail services to the public. The stock of Mail.com is traded on the Nasdaq stock exchange.

3. Mail.com acquired NetMoves on February 8, 2000.

4. On February 10, 2000, NetMoves and Mail.com jointly filed A.00-02-014 for authority under § 854(a) for Mail.com to acquire NetMoves. There were no protests or responses to A.00-02-014.

5. On May 8, 2000, the Applicants filed an amendment to A.00-02-014 in which the Applicants requested retroactive authority for Mail.com's acquisition of NetMoves. There were no protests or responses to the amendment.

6. On October 4, 2000, the Applicants filed a second amendment in which they requested that the Commission (i) grant retroactive approval of Mail.com's acquisition of NetMoves pursuant to the Commission's authority under § 853(b), and (ii) forgo penalizing the Applicants for their failure to obtain Commission authorization for Mail.com's acquisition of NetMoves as required by § 854(a). There were no protests or responses to the second amendment.

7. Mail.com has the technical, managerial, and financial qualifications necessary to operate NetMoves.

8. The public interest is not harmed by Mail.com's acquisition of NetMoves.

9. The public interest may benefit from Mail.com's acquisition of NetMoves.

10. 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.

11. Pub. Util. Code § 2107 provides the Commission with authority to impose a fine of between \$500 and \$20,000 for violations of the Public Utilities Code.

12. In D.98-12-075, the Commission adopted the following criteria for determining the amount of a fine: (i) the severity of the offense, (ii) the conduct of the utility, (iii) the financial resources of the utility, (iv) the totality of the circumstances, and (v) the role of precedent.

13. Applicants' failure to comply with § 854(a) was inadvertent, did not harm others, and did not significantly benefit the Applicants.

14. There is no evidence that the Applicants have previously failed to comply with applicable statutes and regulations.

15. Applicants took steps to report and remedy their violation of § 854(a).
16. Applicants' financial resources are modest and declining.
17. Applicants' revenues regulated by the Commission are insignificant.
18. In at least 24 decisions the Commission has approved, without penalty, transactions that had been consummated without prior Commission authorization in violation of § 854(a).
19. The Commission's lenient treatment of parties that violate § 854(a) has not deterred subsequent violations of § 854(a) by other parties.
20. In Resolution ALJ 176-3033, the Commission preliminarily determined that this proceeding should be categorized as ratesetting, and that hearings were not necessary. There was no opposition to the Commission's preliminary determinations regarding category and need for hearings.

Conclusions of Law

1. This is a ratesetting proceeding.
2. No hearing is necessary.
3. For the following reasons, A.00-02-014, as amended, should be granted to the extent the application requests prospective authority for Mail.com to acquire NetMoves: (i) Mail.com has the technical, managerial, and financial qualifications necessary to operate NetMoves; (ii) the public interest will not be harmed by the acquisition; (iii) the public interest may benefit from the acquisition; (iv) there were nor protests to the application; and (v) the Commission has authorized similar acquisitions many times in the past.
4. The purpose of § 854(a) is to enable the Commission to review a proposed acquisition of a public utility, before it takes place, in order to take such action as the public interest may require.

5. Application 00-02-014, as amended, should be denied to the extent that it requests retroactive authority for Mail.com to acquire NetMoves, since granting retroactive authority would defeat the purpose of § 854(a).

6. Applicants violated § 854(a) by Mail.com acquiring NetMoves without Commission authorization.

7. Pursuant to § 2107, Applicants may be fined for violating § 854(a).

8. It is necessary and reasonable to fine Applicants for violating § 854(a) in order to deter future violations of § 854(a) by Applicants and others. The amount of the fine should be based on the criteria set forth in D.98-12-075.

9. Applicants' violation of § 854(a), though a serious matter, was not an especially egregious offense.

10. Although Applicants displayed seriously flawed conduct by violating § 854(a), their conduct was not egregious.

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

12. The application of the criteria in D.98-12-075 to the facts of this case indicates that it is reasonable to fine Applicants \$5,000.00 for violating § 854(a).

13. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pursuant to Pub. Util. Code § 854(a), Application (A.) 00-02-014, as amended, is granted to the extent A.00-02-014 requests authority effective as of the date of this order for Mail.com Inc. (Mail.com) to acquire Mail.com Business Messaging Services, Inc., formerly known as NetMoves Corporation (NetMoves). A.00-02-014, as amended, is denied to the extent A.00-02-014 requests retroactive authority for Mail.com to acquire NetMoves.
2. Mail.com and NetMoves (Applicants) shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control, as authorized herein, within 10 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.
3. Applicants shall pay a fine of \$5,000.00 for violating Pub. Util. Code § 854(a). Applicants shall pay the fine within 20 days from the effective date of this order by tendering to the Commission's Fiscal Office a check in the amount of \$5,000.00 made payable to the State of California General Fund.

4. Application 00-02-014 is closed.

This order is effective today.

Dated December 21, 2000, at San Francisco, California.

HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

We will file a joint dissent.

/s/ LORETTA M. LYNCH
President

/s/ CARL W. WOOD
Commissioner