 Mailed 2/9/2001

Decision 01-02-005 February 8, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of State Communications, Inc. (U-6079-C), TriVergent Communications, Inc., Gabriel Communications, Inc., and Triangle Acquisition, Inc. for Approval of a Transfer of Control.	Application 00-07-050 (Filed July 27, 2000)

O P I N I O N

1. Summary

This decision grants State Communications, Inc. (SCI), TriVergent Communications, Inc. (TVCI), Gabriel Communications, Inc. (Gabriel), and Triangle Acquisition, Inc. (Triangle) (collectively, Applicants) approval pursuant to Public Utilities Code Section 852 and 854[1] of a proposed merger agreement.[2] If we approve the merger, SCI and its subsidiaries will combine with Gabriel and its subsidiaries to form a much larger telecommunications company. Gabriel will control the merged entity. The application is unopposed.

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[1] As we discuss below, Applicants only seek Section 852 authorization; in our view, they should also have sought authorization pursuant to Section 854. Because the public interest test in both sections is the same, we deem Applicants to have invoked both sections of the statute in their application.

[2] The application was filed on July 27, 2000 and appeared in the Commission's Daily Calendar on August 3, 2000. On August 29, 2000, Applicants supplemented their application with a compliance filing in response to a ruling of the assigned Administrative Law Judge (Compliance Filing).

2. Description of Applicants and Nature of Transaction

We authorized SCI to provide resold local exchange service in California in Decision (D.) 98-11-047, and switchless interexchange service in D.99-03-069. The Commission's database reflects a name change from SCI to TVCI effective in August 2000.[3] Applicants furnished with the application a copy of SCI's articles of incorporation and corresponding amendment to reflect the name change from SCI to TVCI. TVCI's (formerly SCI's) Commission identification number is U-6079-C. TVCI is a South Carolina corporation authorized by the California Secretary of State to transact business in California. For clarity, hereafter we refer to TVCI and SCI interchangeably as TVCI/SCI, since the TVCI entity operating in California is the same as SCI, but with a name change.

The merger is complicated on paper, but according to Applicants should have no adverse effect on customers. Applicants describe the transaction as follows[4]:

> Step One: Gabriel will form a new wholly-owned subsidiary, Triangle. SCI will transfer all of its telecommunications authorizations to TVCI or another subsidiary. (SCI has already done so in California, and TVCI is now the holder of SCI's certificate.[5])
>
> Step Two: SCI will merge into Triangle; Triangle will be the surviving entity and SCI will cease to have any separate existence. By virtue of the merger, TVCI and any other subsidiaries of SCI will become wholly-owned subsidiaries of Triangle, which will function as a holding company.

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[3] http://telsql1.cpuc.ca.gov/carriers/CarrierInfoDetail.asp?CarrierID=4522.

[4] We do not repeat Applicants' descriptions verbatim.

[5] See n. 3 and accompanying text above.

> Step Three: The present shareholders of SCI will exchange their shares of stock in SCI for shares of Gabriel. These SCI shareholders will then own approximately 46% of Gabriel. Their SCI shares will be cancelled.
>
> Step Four: Triangle will change its name to TVCI.

Upon completion of the merger, Gabriel will be the ultimate parent of two groups of telecommunications companies: 1) the original Gabriel entities and 2) the TVCI entities. TVCI/SCI will be the only entity providing telecommunications services in California, and is the only corporation among Applicants authorized to do business in California. Gabriel and Triangle are both Delaware Corporations; neither is authorized by the California Secretary of State to transact business in California. Applicants allege that Gabriel and Triangle need not be so authorized since they will serve only as holding companies. We discuss Applicants' request that Gabriel and Triangle be excused from Commission Rule 16(a)'s requirement that they supply a copy of their certificates of qualification to do business in this state in Section 4C below.

SCI/TVCI currently offer business customers a bundled product package that includes high-speed Internet access, such as digital subscriber line (DSL), and local and long distance telecommunications service, as well as web design and web hosting. SCI/TVCI have raised $137 million in private equity and preferred financing, $120 million from a senior secured credit facility, and $45 million under a credit facility with Nortel. SCI/TVCI provide local and long distance services primarily to certain markets in the Southeast (Florida, Georgia and the Carolinas), but plan to expand to other markets. SCI/TVCI are authorized to provide telecommunications services in 13 states, and also have Federal Communications Commission (FCC) authorization to provide interstate and international long distance services.

Gabriel is a facilities-based provider. It packages dedicated high speed Internet access and traditional local and long distance telephone service with voice, e-mail and fax messaging and other advanced data services. Gabriel has broadband telecommunications networks in operation or under development in Arkansas, Illinois, Kansas, Kentucky, Missouri, Ohio, Oklahoma, and Tennessee. Gabriel also has FCC authorization to provide interstate and international long distance services.

3. Public Interest

Applicants allege that the merger is in the public interest. They assert that the transaction will result in a telecommunications company that is much larger in geographic scope, expertise, personnel and revenue and that will have greater access to financial resources. They allege the transaction will be transparent to and have no adverse impact on customers.

Gabriel has raised approximately $187 million in capital investment. Gabriel's preferred stockholders include various large institutional investors. Gabriel had cash and cash equivalents on hand of approximately $63 million as of December 31, 1999. The combined company plans to develop networks in over 40 markets in 16 Midwestern and Southeastern states. Applicants allege that the merger will make the companies more competitive by allowing them to benefit from greater economies of scale.

Applicants further allege that Gabriel is led by a highly-qualified team of management personnel, all of whom have extensive backgrounds in telecommunications. (Applicants attached biographical statements concerning Gabriel's senior management.) Gabriel's management consists primarily of former officers of Brooks Fiber.

After the merger, Gabriel's operating subsidiaries, such as TVCI and SCI, will continue to operate under their same names, rates and tariffs. Applicants allege that the merger will be essentially transparent to customers. Gabriel-owned TVCI will use the same toll free customer service numbers as did SCI prior to the name change.

In response to an August 16, 2000 ruling of the assigned ALJ, Applicants under oath furnished information indicating that there are no significant telecommunications complaints or litigation pending against them. TVCI/SCI have five pending customer complaints: three at the FCC and two at other state commissions. They are, according to Applicants, "typical consumer complaints normally received by companies and are resolved in the ordinary course of business." We have examined the list and detail furnished by Applicant's counsel (Appendix A hereto) and agree that the complaints do not preclude a finding that the merger is in the public interest.

TVCI also disclosed, under seal,[6] a list of pending litigation. The litigation consists of employment matters over which we have no jurisdiction, and a business complaint that the plaintiff has since dismissed with prejudice. This litigation does not militate against a finding that the merger is in the public interest.

Perhaps more significantly, Gabriel – the acquiring entity – and Triangle have no pending complaints against them at this Commission, the FCC or in

[6] See discussion of Applicants' motion for protective order in Section 4B below.

court relating to their telecommunications services.[7] No Applicant has a complaint pending against it at this Commission or in the California courts.

4. Discussion

A. Requirement of Pub. Util. Code 852 and 854

As a preliminary matter, we note that Applicants styled their application as one pursuant to Pub. Util. Code § 852 rather than § 854. Because Section 852 relates only to public utility to public utility transactions, and we do not know the extent to which all acquiring companies are public utilities, we will deem the application to also seek approval pursuant to § 854. Both provisions require Commission authorization for transfers of stock or control affecting Commission-certificated telecommunications companies. Section 852 requires such approval when a public utility proposes to acquire stock of another public utility. Section 854 requires Commission approval before a company, whether or not incorporated in California, may "merge, acquire, or control . . . any public utility organized and doing business in this state. . . ."

The purpose of these sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require.[8] Because the public interest test applies to both Sections 852 and 854, and we find Applicants meet this test, we will not require Applicants to amend

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[7] Affidavits of Hamilton Russell, III, Senior Vice President of Legal and Regulatory Affairs for TVCI and SCI, and of Edward J. Cadieux, Director, Regulatory and Public Affairs for Gabriel and Triangle, attached as Appendix C to Applicants' August 29, 2000 Compliance Filing.

[8] *San Jose Water Co.*, 10 CRC 56 (1916).

their application to refer to the latter section. Rather, we will deem the application to seek approval pursuant to both statutes.

We are satisfied that the proposed merger will benefit TVCI/SCI's California customers. Applicants represent that the combined company will have total invested and committed capital of $800 million, far more than TVCI/SCI have individually. TVCI/SCI will benefit from new management as a result of the combined Gabriel/TVCI/SCI management team that will be created as a consequence of the merger. Nor does the merger appear to have adverse consequences for TVCI/SCI's California customers. To these customers, the change will be transparent. Customers may use the same toll-free number to obtain service and report complaints, and may procure the same products and services. We are not granting TVCI/SCI authority to provide any new services in addition to those it already offers.

B. Motion for Protective Order

Applicants seek a protective order as to the following documents identified in two motions, filed on July 27, 2000 and August 29, 2000:

1. Agreement and Plan of Merger by and Among Gabriel Communications, Inc., Triangle Acquisition, Inc. and State Communications, Inc. dated as of June 9, 2000 (Application, Attachment E);
2. Gabriel Communications, Inc. and Subsidiaries Audited Financial Statements, December 31, 1999 and 1988 (Application, Attachment G); and
3. Schedules 2.7 and 3.7 to Agreement and Plan of Merger, disclosing pending TVCI and Gabriel litigation (Compliance Filing, Appendix D).

Applicants allege that the documents contain information about Applicants' finances and business plans that, if made public, likely would result in direct and immediate harm to them. They assert they will compete for customers with other telecommunications companies operating within California. Disclosure of the proprietary financial and marketing information would provide Applicants' competitors with valuable information relating to Applicants' financial condition and business plans. Applicants allege they have kept the documents secret and that because they are not publicly traded companies, the documents are not publicly available. On the basis of Applicants' allegations, we grant the motion.

C. Motion for Exemption from Rule 16(a)

Applicants seek exemption for Gabriel and Triangle from Commission Rule 16(a)'s requirements that applicants that are not domestic corporations shall file a copy of their certificate to transact business in California certified by the California Secretary of State. They allege that because Gabriel and Triangle are mere holding companies, with TVCI/SCI the only entity doing business in this state, they need not comply as to Gabriel and Triangle. In D.94-12-062, we granted a similar waiver to a holding company.[9] We do have TVCI's certificate of qualification to do business in California. Nonetheless, we will require Gabriel and Triangle to file a statement, within 30 days of mailing of this decision, certifying, under oath, the following:

1. That they will not contest this Commission's jurisdiction to consider any matter relating to TVCI/SCI, their parents, holding companies, successors or subsidiaries by virtue of Gabriel and Triangle's lack of qualification to do business in California, and
2. That Gabriel and Triangle will be responsible for the actions of TVCI/SCI and their successors to the same

[9] 1994 Cal. PUC Lexis 1126 at *3 n.2.

> extent as they would be had they complied with Section 16(a) and not received a waiver of that rule.

Provided Gabriel and Triangle timely make the foregoing filing, we will waive the Section 16(a) requirement as to them. If they fail to make the filing, Gabriel and Triangle shall, within 60 days of mailing of this order, comply with Rule 16(a).

D. Category and Need for Hearings

In Resolution ALJ 176-3044, dated August 3, 2000, the Commission preliminarily categorized this proceeding as ratesetting, and determined that hearings were not necessary. We uphold these preliminary determinations.

The application is granted, subject to the terms and conditions set forth below.

5. Comments on Draft Decision

The draft decision of ALJ Sarah Thomas in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Gabriel and Triangle made a compliance filing on February 2, 2001 certifying, under oath, that they will meet the requirements of Section 4(C) above. Thus, we waive the requirements of Rule 16(a) as to Gabriel and Triangle for purposes of this application.

Findings of Fact

1. Notice of this application appeared in the Commission's Daily Calendar of August 3, 2000.

2. We will deem the application to seek approval pursuant to both Pub. Util. Code §§ 852 and 854 of a merger agreement affecting a California certificated carrier now known as TVCI, formerly known as SCI, and holding carrier identification number U-6079-C.

3. SCI is authorized by this Commission to provide resold local exchange service and switchless interexchange service in California. Commission records reflect a name change from SCI to TVCI in August 2000.

4. There will be no change in services or rates provided by TVCI as a result of the transfer of control. This decision authorizes no change in the services or rates TVCI now offers in California.

5. No Applicant currently has a complaint pending against it before this Commission or litigation pending against it in the California courts.

6. The complaints pending against Applicants before other Commissions and in other states do not materially affect our decision that the merger is consistent with the public interest.

Conclusions of Law

1. The proposed merger is in the public interest.

2. This proceeding is designated a ratesetting proceeding; no protests have been received; no hearing is necessary.

3. Because both Sections 852 and 854 of the Public Utilities Code require Commission approval of transactions affecting ownership of California-certificated telecommunications companies on a public interest showing, we deem the application to seek authorization under both statutes.

4. TVCI should be authorized to operate under the CPCN, U-6709-C.

5. Applicants have shown entitlement to confidential treatment for the documents accompanying their motions for protective order filed on July 27, 2000 and August 29, 2000.

6. The Commission should waive as to Gabriel and Triangle the requirement in Commission Rule 16(a) that those entities be certified by the California Secretary of

State to do business in California, provided Applicants comply with the conditions set forth in this decision.

7. The application should be approved.

O R D E R

IT IS ORDERED that:

1. State Communications, Inc. (SCI) (U-6079-C), TriVergent Communications, Inc. (TVCI), Gabriel Communications, Inc. (Gabriel), and Triangle Acquisition, Inc. (Triangle) (collectively, Applicants) are authorized pursuant to Sections 852 854 of the Public Utilities Code to enter into the transaction, as more fully described in the application and its exhibits, by which Gabriel will acquire control of TVCI, the entity operating in California.

2. Applicants shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as authorized herein, within 10 days of the date of this order. A true copy of the instruments of transfer shall be attached to the notification.

3. Applicants shall file new tariffs incorporating any changes in name, rates, services and management authorized in the transfer transaction.

4. Applicants shall make all books and records available for review and inspection upon Commission staff request.

5. The certificate of public convenience and necessity granted to SCI in Decision (D.) 98-11-047 and D.99-03-069 is transferred to the newly restructured TVCI, which is authorized to continue use of the utility identification number U-6709-C.

6. Applicants' motions for protective order are granted. The following documents Applicants filed under seal shall remain under seal for a period of

two years from the date of this decision, and during that period shall not be made accessible or disclosed to anyone other than 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:

- Agreement and Plan of Merger by and Among Gabriel Communications, Inc., Triangle Acquisition, Inc. and Communications, Inc. dated as June 9, 2000 (Application, Attachment E);
- Gabriel Communications, Inc. and Subsidiaries Audited Financial Statements, December 31, 1999 and 1998 (Application, Attachment G); and
- Schedules 2.7 and 3.7 to Agreement and Plan of Merger, disclosing pending TVCI and Gabriel litigation (Compliance Filing, Appendix D).

7. If Applicants believe that further protection of these documents is needed after two years, they may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

8. We will waive the requirement of Commission Rule 16(a) as to Gabriel and Triangle provided that they file a statement, within 30 days of mailing of this decision, certifying, under oath the following:

- That they will not contest this Commission's jurisdiction to consider any matter relating to TVCI/SCI, their parents, holding companies, successors or subsidiaries by virtue of Gabriel and Triangle's lack of qualification to do business in California, and
- That Gabriel and Triangle will be responsible for the actions of TVCI/SCI and their successors to the same extent as they would be had they complied with

Commission Rule 16(a) and not received a waiver of that rule.

On February 2, 2001, Gabriel and Triangle complied with this requirement. Thus, we waive Commission Rule 16(a) as to them for purposes of this application.

9. Nothing in this decision shall be construed to allow any Applicant to offer products or services not already authorized.

10. Application 00-07-050 is closed.

This order is effective today.

Dated February 8, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

APPENDIX A

-Original Message-----
From: Smith, Melissa [mailto:MSmith@KelleyDrye.com]
Sent: Tuesday, October 24, 2000 2:00 PM
To: 'ALJ Sarah Thomas'
Cc: Freeman, James J.; Jenkins, Eric
Subject: State Communications, Inc., et al. for Approval of Transfer of Control - A.00-07-050
Importance: High

<<(DC01-129757-v1) trivergent california complaint detail.DOC>>

ALJ Thomas:

Per our phone conversation today, attached please find a document listing the detail of the FCC/PUC complaints as you requested. The additional detail for the litigation item is as follows:

Business Telecom, Inc. v. James P. Dunn and TriVergent
Type of Claim: Tortious Interference with Contract; Violations of the North Carolina Unfair Trade Practices Act.
Responsible Attorney: Matthew Keene - Ogletree Deakins Nash Smoak & Stewart
Status: Company's investigation completed May 15, 2000 and Answer of Company filed May 24, 2000. BTI agreed to a voluntary dismissal with prejudice following receipt of correspondence from Charlie Houser and a voluntary dismissal of Mr. Dunn's counterclaim. Accordingly, upon motion by BTI, the case has been dismissed with prejudice.

Please do not hesitate to contact me if you require anything further. And, please advise as to the next step for this transfer of control application.
Thanks!

INFORMATION ON COMPLAINTS

Bret R. Chase

Case Number:	00-N17741
Jurisdiction:	FCC
Allegations:	Mr. Chase alleged that he was overbilled by MCI for calls that should have been local calls according to his service plan.
Applicants' Response:	Mr. Chase was overcharged by MCI for some of his local calls that were mistakenly classified as long distance calls by MCI. TriVergent Communications (formerly State Communications) did not bill him for these calls. This is a matter that should be addressed with MCI.
Expected Outcome:	Favorable for TriVergent Communications. MCI should be responsible for charges. Response sent to FCC from TriVergent Communications on 9/1/00.

Nancy Mogenson

Case Number:	00-N19584
Jurisdiction:	FCC
Allegations:	Ms. Mogenson alleged that she was billed for calls to her toll-free number after her service was changed from TriVergent Communications to BellSouth. Ms. Mogenson also alleges that TriVergent Communications promised to pay transfer fees for her switching her service from TriVergent to BellSouth.

Applicants' Response:	After researching this matter, it was found that Ms. Mogenson was charged for calls to her toll-free number after she switched her service to BellSouth. TriVergent issued her a credit of $4.83 for these calls. In regards to her claim that TriVergent would pay for her transfer fees when switching to BellSouth, the account information that Ms. Mogenson received when she became a TriVergent customer states that no cancellation fees would be charged if she switched to another carriers. It does not state that transfer charges would be provided to her.
Expected Outcome:	Favorable for TriVergent. A credit was given to the customer. Response sent to FCC on 9/14/00.

H.J. Bosworth:

Case Number:	00-N20221
Jurisdiction:	FCC
Allegations:	Mr. Bosworth alleged that he was billed for services that he did not request.
Applicants' Response:	Mr. Bosworth was credited his entire balance and his account was cancelled per the customers' instructions.
Expected Outcome:	Favorable for TriVergent. Customer was credited entire balance. Response sent to FCC on 9/14/00.

Dana Smith (Prime Business Insurance Agency):

Case Number:	100023529
Jurisdiction:	Georgia Public Service Commission

Allegations:	Mr. Smith ordered a bundled package from TriVergent Communications, which included DSL Internet, local and long distance service. After placing his order, Mr. Smith decided that he wanted to switch back to BellSouth. His service had already been switched to TriVergent when he made the request to switch back to BellSouth.
Applicants' Response:	TriVergent informed the Georgia Public Service Commission that Mr. Smith must contact BellSouth so that BellSouth can place an order to have his service switched from TriVergent to BellSouth.
Expected Outcome:	Mr. Smith switched his service to BellSouth successfully.

Janice Allen:

Case Number:	None
Jurisdiction:	South Carolina Public Service Commission
Allegations:	Ms. Allen requested credits for various charges on her August 2000 bill.
Applicants' Response:	After reviewing her bill. Ms. Allen was credited $42.02 for various disputed charges in regards to features charges and long distance billing.
Expected Outcome:	TriVergent was cleared in regards to this informal complaint by the SC PSC.