

Decision 89 12 056 DEC 20 1989.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Contingent)
Application of MMM Holdings, Inc.)
for Authorization to Acquire or to)
Control Los Angeles Cellular)
Telephone Company (U-3009-C))
through the Acquisition of a)
Majority of the Stock of LIN)
Broadcasting Corporation.)

Application 89-08-020
(Filed August 11, 1989)

ORIGINAL

OPINION

Statement of Facts

Los Angeles Cellular Telephone Company (LACTC) is a California partnership certificated to provide cellular telephone service in Los Angeles. It is owned by Los Angeles Cellular Corporation (65% equity, 50% voting rights) and LIN Cellular Communications Corporation (LIN Cellular) (35% equity, 50% voting rights). LIN Cellular is a subsidiary of LIN Broadcasting Corporation (LIN), a Delaware corporation with interests in broadcasting, cellular telephone, and specialty printing.

MMM Holdings, Inc. (applicant) was especially formed by McCaw Cellular Communications, Inc. (MCCI), a Delaware corporation, to acquire LIN, in order to acquire LIN Cellular's partnership interest in LACTC. Applicant sought and obtained Federal Communications Commission authorization. The New York Public Service Commission concluded it lacked jurisdiction.

Believing that the California Commission also lacked jurisdiction over the acquisition, but "out of an abundance of caution", applicant filed this Contingent Application for authorization to acquire LIN and, through that acquisition, LIN Cellular's interest in LACTC, as well as an alternative motion to

dismiss. LIN filed its "opposition" and formal protest. Later LIN, LIN Cellular, and BellSouth Corporation (BellSouth) filed an application whereby LIN and BellSouth sought authorization to realign their operations, resulting in other changes, among them LIN's becoming the ultimate holder of 95% equity and 100% voting rights in LACTC. A bitter shareholder bidding war was thus launched. However, LIN and McCaw are no longer at odds. LIN is no longer opposed to the acquisition at issue, and has withdrawn its application for authority to merge with BellSouth.

Discussion

LIN Cellular, with 35% equity and 50% voting rights, argues that it does not have actual or voting control of LACTC. In *WUI, Inc. v Cont. Tel. Corp.* (1979) 1 CPUC 2d 579, we stated that Public Utilities (PU) Code § 854 speaks "not of power to control or potential to control, but of 'control,' which we interpret to mean actual or working control." In that case, we found that a 12.6% block of stock did not constitute actual control even though it was the largest single block of voting shares, when the block could not be used without a protracted and expensive proxy fight. 1 CPUC 2d at 583-586.

In the case before us, LIN holds 50% of the voting stock. We have held that the acquisition of a 50 percent interest in a public utility constitutes control either directly or indirectly for purposes of Section 854. (*Lee Gale v. Kenneth Teel, et al.*, (1977) 81 CPUC 817). We hold that there is a factual question in each case as to what constitutes "control" under the circumstances surrounding it, and we consider it necessary to examine each case on its particular facts.

PU Code § 852 prohibits unauthorized purchases or acquisitions, takings, or holdings of any part of the capital stock of any public utility organized or existing under or by virtue of the laws of California. But applicant, MCCI, and LIN are not "public utilities" as defined in PU Code § 216(a), as modified by

PU Code §§ 234 and 233. None is a "telephone corporation" owning, controlling, operating, or managing "any telephone line for compensation within this state."

LIN initially requested disregard of the corporate identity to find MCCI the alter ego of applicant; that we find MCCI to be a "public utility" because it is the corporate entity through which subsidiaries, in turn, own stock or partnership interests in California cellular and paging utilities. But ownership of capital stock does not create identity of corporate interest, nor render the shareholder the owner of the property of its subsidiaries. Further, the identity of officers does not establish identity of corporations (*Northwestern Pacific RR v. State Bd of Equalization* (1943) 21 C 2d 524, 530-31). And in *Investigation of Key System Transit Lines & Railway Eqpt. and Realty Co. Ltd.* (1955) 54 CPUC 62 (D.51154), we concluded that it was a parent corporation's ownership of the "property" used in the public utility operation, not ownership of the corporation, that was the distinguishing feature.

As we analyzed it in *Gale*, Corporations Code Section 160 defines "control" as follows:

"(a) Except as provided in subdivision (b), 'control' means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.

"(b) 'Control' in Sections 181, 1001, and 1200 means the ownership directly or indirectly of shares possessing more than 50 percent of the voting power."

Sections 181, 1001, and 1200 are not applicable. Thus, subsection (a) applies.

81 CPUC 817 at 822. The acquiring entity in the *WUI* case did not effectively possess the power referred to in subdivision (a). However, that power exists with respect to the current applicant.

In *Gale*, as in the case before us, our primary concern was with the public interest. We said then:

If the Commission were to decline jurisdiction over transfers of a 50-percent interest, we would be unable to deal adequately with transactions intended to dissolve the subject corporation and abandon the public utility obligation. ... The public interest in continued service requires the exercise of Commission jurisdiction.

Ibid.

Looking at the facts before us now, we do not see that service to the public will be affected by the transfer at issue. There has been no objection to the application on factual grounds, only on the grounds of legal precedent. We believe that the public interest will be fully safeguarded by our current investigation into the regulation of the cellular radiotelephone industry (I.88-11-040).

For the above reasons, the Commission concludes that we possess jurisdiction to review the proposed acquisition of LIN by applicant under § 854 and should deny the motion to dismiss, and grant the application because the public interest is not adversely affected by this application. A public hearing is not necessary.

Findings of Fact

1. There is a factual question in each case as to what constitutes "control" within the meaning of Public Utilities Code § 854.
2. Applicant, MCCI, and LIN are not "public utilities" as defined in PU Code § 216(a) as modified by PU Code §§ 234 and 233.
3. Under the factual matrix of this proceeding, application of the doctrine of alter ego would not be appropriate or warranted.

7. Approval of the application is warranted as no protestant has demonstrated any risk to the public interest by virtue of applicant's acquisition of LIN Cellular's interest in LACTC.

Conclusions of Law

1. Questions of "control" under § 854 should be decided on a case-by-case basis.

2. Approval of the Commission is required in this case by the provisions of § 854, and such approval should be granted.

3. The motion by applicant to dismiss the Contingent Application should be denied.

ORDER

IT IS ORDERED that the Motion to Dismiss Contingent Application 89-08-020 is denied, and the application is hereby granted.

This order is effective today.

Dated December 20, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director

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Believing that the California Commission also lacked jurisdiction over the acquisition, but "out of an abundance of caution", applicant filed this Contingent Application for authorization to acquire LIN and, through that acquisition, LIN Cellular's interest in LACTC, as well as an alternative motion to

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Discussion

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Senate Bill 53 amends PU Code § 852, but is not effective until January of 1990. And, as amended, it applies to acquisitions of utility stock, while LACTC is a partnership and has only partnership interests to be acquired.

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Ibid.

Looking at the facts before us now, we do not see that service to the public will be affected by the transfer at issue. There has been no objection to the application on factual grounds, only on the grounds of legal precedent. We believe that the public interest will be fully safeguarded by our current investigation into the regulation of the cellular radiotelephone industry (I.88-11-040).

For the above reasons, the Commission concludes that we possess jurisdiction to review the proposed acquisition of LIN by applicant under § 854 and should deny the motion to dismiss, and grant the application because the public interest is not adversely affected by this application. A public hearing is not necessary.

Findings of Fact

1. There is a factual question in each case as to what constitutes "control" within the meaning of Public Utilities Code § 854.
2. Applicant, MCCI, and LIN are not "public utilities" as defined in PU Code § 216(a) as modified by PU Code §§ 234 and 233.
3. Under the factual matrix of this proceeding, application of the doctrine of alter ego would not be appropriate or warranted.

4. The evidence does not support a finding that the application of PU Code § 852 to applicant's purchases of LIN stock is necessary in the public interest.

5. A public hearing is unnecessary.

6. By obtaining 35% equity and 50% voting rights in LACTC, applicant would possess control of LACTC within the definition of that term as it applies in Section 854.

7. Approval of the application is warranted as no protestant has demonstrated any risk to the public interest by virtue of applicant's acquisition of LIN Cellular's interest in LACTC.

Conclusion of Law

1. Questions of "control" under § 854 should be decided on a case-by-case basis.

2. The motion by applicant to dismiss the Contingent Application should be denied.

SB
3. Approval of the Commission is required in this case by the provisions of Public Utilities Code 854, and such approval should be granted.

ORDER

IT IS ORDERED that the Motion to Dismiss Contingent Application 89-08-020 is denied, and the application is hereby granted.

This order is effective today.

Dated DEC 20 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
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