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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of of Sharon Jane Lundgren relative to her acquisition of additional shares of Volcano Communications Company.	)))))	Application 89-10-014 (Filed October 6, 1989)

O P I N I O N

Sharon Jane Lundgren (applicant) requests authority to acquire 4,127.75 additional shares of Volcano Communications Company (VCC). In the alternative, applicant requests a finding that the acquisition of such shares does not require Commission approval under Public Utilities Code § 854.

This decision finds that applicant's proposed acquisition does not require the approval of the Commission under § 854. The application is dismissed.

Background

Notice of the filing of the application appeared on the Commission's Daily Calendar of October 24, 1989. A protest to the application was filed on November 20, 1989 by Telephone and Data Systems, Inc. (TDS), Volcano Telephone Company (Volcano) and VCC (protestants).

Volcano provides exchange and access service to approximately 7,300 access lines in Alpine, Amador, Calaveras, and El Dorado Counties. On November 2, 1983, we authorized a holding company, VCC, to acquire and control Volcano.

Applicant currently owns 963.75 shares of the common stock of VCC and 244 shares of the preferred stock of VCC. Each share of common and preferred stock constitutes a single vote.

Applicant's shares represent 10.91% of the issued and outstanding shares of VCC. Applicant seeks to purchase an additional 1,618.75 shares of VCC common stock and 2,511 shares of VCC preferred stock. Applicant seeks to acquire these shares under the terms of an agreement between shareholders. Applicant alleges that this agreement requires any selling shareholder first to offer the stock to other shareholders on identical terms. Applicant alleges that certain shareholders failed to honor the terms of the stock restriction agreement and instead transferred the shares to TDS. The issue of applicant's entitlement to purchase these shares is currently in arbitration. Assuming completion of this acquisition, applicant would own and control 5,337.50 voting shares of VCC, which represents 48.22% of the issued and outstanding voting shares of VCC.

Applicant's husband, Richard Lundgren, owns as his separate property 2.49% of VCC voting stock. Applicant's adult children, John M. Lundgren and Angela L. Lundgren, each own 212.50 shares of VCC common stock and 24 shares of VCC preferred stock, or 2.14% each of the issued and outstanding shares.

The application states that there is "an informal understanding among Applicant and her husband and children that following the acquisition of the additional shares by Applicant, they will consult with each other and seek a common course of conduct in voting the total shares that they will hold."

Protestants contend that the application should be denied for three reasons: (1) the application does not comply with Rule 35 in that all parties to the transaction have not signed the Lundgren application; (2) protestants Volcano and VCC do not consent to the transaction; and (3) if the Lundgren application is granted, protestants may be hampered in completing a transaction they have agreed to for the transfer of shares to TDS, as set forth in Application 89-10-045.

Discussion

We first consider the protest. Protestants assert that the application does not comply with Rule 35. Rule 35 requires that an application to acquire the stock of another company,

> "shall be signed by all parties to the proposed transaction, except the lender, vendor under a conditional sales contract, or trustee under a deed of trust, unless such party is a public utility."

This application is signed by the proposed purchaser of the stock, but is not signed by the sellers.

Applicant acknowledges that its application lacks the signatures of the parties from whom they propose to purchase the stock. Applicant requests, pursuant to Rule 87, that the Commission waive the rule requiring the sellers' signatures. Applicant states that no harm would come in the instant case from waiving the requirement, and that in particular cases the Commission has granted § 854 applications without requiring the signatures of the seller.

The Rule 35 requirement that certain applications shall be signed by all parties to the proposed transaction dates back to the earliest days of the Commission. The provision that an owner may not sell without the consent of the Commission implies that there must be an owner ready to sell and seeking authority so to do before the Commission is called upon to act. (Hanlon v. Eshleman (1915) 169 C 200, 202-03.)

While the general rule requiring the signature of both buyer and seller is clearly recognized, certain exceptions to the rule are similarly well settled. One such exception is expressly provided in Rule 35: An application to acquire control of a utility need not be signed by the vendor under a conditional sales contract. The rationale for this exception is that the contract itself is evidence of the seller's consent.

In the present case, applicant asserts that it has the right to acquire shares in VCC under a contract which requires shareholders of the corporation, before selling shares to another party, to first offer the subject stock to other shareholders on identical terms. Clearly, an agreement which requires that a stockholder intending to offer his stock for sale shall first offer such stock to other stockholders on identical terms is a form of a conditional sales contract. Therefore, the applicant is not required to include in her application the signatures of the sellers under this conditional sales agreement.

We do not decide whether this particular stock transfer agreement is valid. We simply find that where a party files an application to acquire control of a utility pursuant to a stock transfer agreement, Rule 35 does not require the signature of the sellers in order for the application to be accepted for filing.

We turn now to the substance of applicant's request. As we have stated in prior decisions, "PU Code § 854 requires that any individual who acquires sufficient stock to give him the voting power to elect officers who will direct the corporate affairs obtains control of that utility and must seek prior authorization from this Commission to do so." (Compton Heights Water Company (February 5, 1986) D.86-02-005, p. 3.)

Assuming applicant acquires 4,127.75 additional shares of VCC, applicant will hold 48.22% of the voting stock. While 48.22% is substantial, this share is less than a majority of the stock and does not provide applicant with the ability to control the election of officers or other matters put to a vote of shareholders. In the case of a closely held corporation, a 48.22% share of the voting

stock does not directly or indirectly control the corporation within the meaning of § 854.[1]

Although we find that applicant's individual 48.22% share would not constitute control of VCC, we must also consider whether the total shares of applicant and other members of her family constitute control within the meaning of § 854. Should applicant acquire additional shares, her 48.22% interest, together with the shares of her husband and two adult children would constitute approximately 55% of the voting shares. In similar circumstances, where the combined minority interests of husband and wife exceed 50% of the voting shares, we have not held either spouse to have control of the utility. (Compton Heights Water Company (February 5, 1986) D.86-02-005.) Applicant's children are both adults and applicant has not asserted that she is able to exercise control over these shares.

Applicant states, in her initial application, that there is "an informal understanding among Applicant and her husband and children that following the acquisition of the additional shares by Applicant, they will consult with each other and seek a common course of conduct in voting the total shares that they will hold." Informal "understandings" among shareholders to "consult" and "seek a common course of conduct" are common in many corporations. However, such an understanding is not sufficient to constitute control over the affairs of the utility. Such informal understandings to consult are unlikely to be binding or enforceable and do not constitute an exercise of actual voting power.

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1 In D.87478, the Commission found that acquisition of a 50% interest in a public utility constitutes control for purposes of § 854 because such an interest, where neither party held majority control, permitted transferee to cause the utility operations to be abandoned. (Gale v Teel (1977) 81 CPUC 817.) We find no case in which the Commission has held less than a 50% interest in a closely held corporation to consitute control under § 854.

On the other hand, we note that the "Opposition of the Applicant Sharon Jane Lundgren to Motion to Dismiss Application" refers to "the existence of an agreement within her immediate family to vote her shares plus the additional 7% of the voting shares in concert." While an informal understanding among shareholders to consult does not constitute control of a utility, a formal agreement among shareholders to vote a majority of the shares in concert may very well constitute control under § 854. Under such circumstances, control would exist among the shares jointly exercised, and all parties to such a joint arrangement, not just Sharon Jane Lundgren, would be required to seek confirmatory authorization form the Commission prior to exercising such joint control.

In conclusion, we find that the proposed acquisition of up to 48.22% of the voting shares of VCC does not constitute the acquisition of control within the meaning of § 854. The application of Sharon Lundgren is dismissed without prejudice.

Findings of Fact

1. Applicant currently owns 963.75 shares of the common stock of VCC and 244 shares of the preferred stock of VCC.

2. Applicant seeks to purchase an additional 1,618.75 shares of VCC common stock and 2,511 shares of VCC preferred stock.

3. Assuming completion of this acquisition, applicant would own and control 5,337.50 voting shares of VCC, which represents 48.22% of the issued and outstanding voting shares of VCC.

4. Applicant's husband, Richard Lundgren, owns as his separate property 2.49% of VCC voting stock.

5. Applicant's adult children, John M. Lundgren and Angela L. Lundgren, each own 212.50 shares of VCC common stock and 24 shares of VCC preferred stock, or 2.14% each of the issued and outstanding shares.

6. There is an informal understanding among applicant and her husband and children that following the acquisition of the

additional shares by applicant, they will consult with each other and seek a common course of conduct in voting the total shares that they will hold.

7. An agreement which requires that a stockholder intending to offer his stock for sale shall first offer such stock to other stockholders on identical terms is a form of a conditional sales contract.

8. Where a party files an application to acquire control of a utility pursuant to a stock transfer agreement, Rule 35 does not require the signature of the sellers in order for the application to be accepted for filing.

9. In the case of a closely held corporation, a 48.22% share of the voting stock does not directly or indirectly control the corporation within the meaning of § 854.

10. Informal understandings among shareholders to consult and seek a common course of conduct are common in many corporations, and such an understanding is not sufficient to constitute control over the affairs of the utility.

Conclusion of Law

Application 89-10-014 should be dismissed.

O R D E R

IT IS ORDERED that Application 89-10-014 is dismissed without prejudice.

This order is effective today.

Dated APR 11 1990, 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

NEAL J. SHULMAN, Executive Director
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