

Decision 90 04 027 APR 11 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 TELEPHONE AND DATA SYSTEMS, INC.,)
 VOLCANO COMMUNICATIONS COMPANY, and)
 VOLCANO TELEPHONE COMPANY (U-1019-C))
 to Authorize the Acquisition of a)
 Controlling Interest in VOLCANO)
 TELEPHONE COMPANY by TELEPHONE AND)
 DATA SYSTEMS, INC.)

Application 89-10-045
(Filed October 27, 1989)

O P I N I O N

Telephone and Data Systems, Inc. (TDS or applicant), an Iowa corporation, requests authority under Public Utilities (PU) Code § 854 to control Volcano Telephone Company (Volcano) by acquiring for cash a majority of the issued and outstanding shares of Volcano Communications Company (VCC), the holding company of Volcano.

The application is granted.

The Lundgren Protest

A protest to the application was filed by Sharon Jane Lundgren. Protestant alleges that the purported acquisition of certain shares by TDS is invalid. Protestant asserts that the underlying dispute between applicant and protestant over the ownership of certain shares of VCC is the subject of a pending arbitration proceeding. Protestant requests that the Commission not act on the application until the arbitration is concluded. Thereafter, protestant offers to present evidence of TDS's allegedly invalid stock acquisition.

Applicant has moved to dismiss the protest on the basis that the protest raises no issue about which the Commission should exercise subject matter jurisdiction.

In opposition to the motion by TDS to dismiss the protest, protestant argues that if the Commission approves TDS's

application prior to completion of the arbitration, TDS would be permitted to take control of VCC and Volcano before the validity of the acquisition can be judged in arbitration. According to protestant,

"It is not in the public interest for the Commission to sanction conduct by TDS in attempting to gain control of VCC and Volcano Telephone Company by means which may ultimately be determined at law to be an illegal interference with the contractual rights of existing shareholders."

Rule 8.1 of the Commission's Rules of Practice and Procedure requires that a protest provide an offer of evidence which the protestant would sponsor or elicit at a public hearing. In the instant case, the only evidence which protestant proposes to offer concerns a dispute among shareholders regarding the ownership of particular shares. This dispute is not relevant to the application. In a 1915 case decided by the Supreme Court, Hanlon v. Eshleman (1915) 169 C 200, the owner of a water utility allegedly reneged on his contract to sell the utility to Hanlon. Instead, the owner sought authorization to sell the utility to the City of Los Angeles. The Commission declined to pass upon the application to consummate the sale to Hanlon pursuant to the contract between them. The Court upheld the Commission's decision:

"The commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. . . . With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. If the owner does not desire to sell, the commission cannot compel him to do so. If, having contracted to sell,

he refuses to comply with his contract, the commission is not empowered to determine that he should carry out his bargain." (Id. at 202-03.)

Over the past 75 years since the Hanlon decision, the Commission has consistently avoided the exercise of jurisdiction over disputes between shareholders.

"While the Public Utilities Commission has jurisdiction over the relationship between a utility and its customers, the Superior Court has jurisdiction to handle problems arising between a corporation and its shareholders." (Park-Woods Mutual Water Company, Inc. (June 10, 1975) D.84520, pp. 4-5.)

See also, Decision (D.) 86770 (Alan and Allan Corporation-The Gray Line, Inc. (1976) 81 CPUC 24) in which we declined to consider an application by would-be buyers Gray Line when the sellers allegedly withdrew from the contract and the buyers filed suit.

Protestant suggests that the Commission's failure to consider evidence regarding the dispute between Lundgren and TDS "sanctions" TDS's conduct. Protestant is incorrect. We make no judgement at all regarding the dispute between the shareholders or the eventual outcome of arbitration.

The Proposed Acquisition

Volcano was incorporated in California on April 17, 1952. 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. After formation of the holding company, the control and management of Volcano remained unchanged.

TDS states that it currently owns 49% of the voting shares of VCC. TDS has entered into an agreement with four of VCC's other shareholders to acquire an additional 33.49% of the

voting shares of VCC for cash, which could give it ownership of 82.32% of voting control.

TDS is a diversified communications company. TDS operates 76 telephone companies in 25 states. In D.89-10-045 (Telephone and Data Systems, Inc. et al. (October 26, 1989)), we authorized TDS to acquire control of National Telephone and Telegraph Company, which is the parent company of Happy Valley Telephone Company, Hornitos Telephone Company, and Winterhaven Telephone Company. As in D.89-10-045, we have reviewed TDS's financial statements and find that TDS is financially qualified to acquire and manage Volcano.

No changes in the operations of Volcano are proposed as a result of the acquisition. TDS intends to maintain local management of Volcano by its current managers. We conclude that the proposed acquisition of control of Volcano by TDS is not adverse to the public interest. The application is granted.

Findings of Fact

1. TDS is an Iowa corporation which is qualified to do business in California. It is a diversified communications distribution company. TDS operates 76 telephone companies in 25 states.
2. TDS purports to own 49% of the voting shares of VCC. TDS's ownership interest in a portion of these shares is disputed by another shareholder. The dispute is in arbitration.
3. TDS and four of VCC's shareholders have entered into a stock sale and purchase agreement under which the four shareholders will sell 33.49% of the voting shares to TDS for cash.
4. No changes in the operation of Volcano are proposed as part of the transaction or is currently planned by TDS.
5. As of December 31, 1988, the original cost, less depreciation of Volcano's plant, was \$10,529,081.

6. As of December 31, 1988, TDS and its subsidiaries had depreciated plant of \$421,182,330. It had operating revenues of \$196,259,631 for the 12 months ending on December 31, 1988.

7. TDS has the ability, including financial ability, to acquire control of Volcano and to continue Volcano's operations.

8. The proposed transfer of control of Volcano to TDS is not adverse to the public interest.

Conclusion of Law ✓

The application should be granted.

This authorization is not a finding of the value of the rights and properties over which control is to be acquired.

ORDER

IT IS ORDERED that:

1. On or after the effective date of this order, Telephone and Data Systems, Inc. (TDS) may acquire control of Volcano Telephone Company (Volcano) by acquiring for cash a majority of the issued and outstanding shares of Volcano Communications Company.

2. Within 10 days after acquisition of control, TDS shall write the Commission stating date of the transfer of control. A copy of the documents effectuating the transfer of control shall be attached.

3. The corporate identification number previously assigned to Volcano should be retained by that company and included in the caption of all original filings with this Commission.

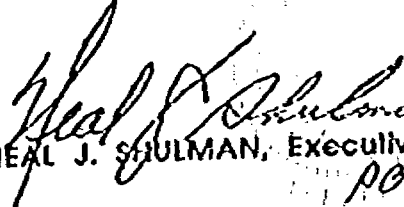
4. The authority granted in Ordering Paragraph 1 shall expire unless it is exercised before March 31, 1991.

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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