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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of MCI COMMUNICATIONS CORPORATION, XEROX CORPORATION, WUI, INC.; For Authorization of MCI COMMUNICATIONS CORPORATION'S Control of AIRSIGNAL OF CALIFORNIA, INC., through the Acquisition by MCI COMMUNICATIONS CORPORATION of the Stock of WUI, Inc., the Second Tier Parent Company of AIRSIGNAL OF CALIFORNIA, INC.	Application 82-03-86 (Filed March 25, 1982)

O P I N I O N

Introduction

This is an application of MCI Communications Corporation (MCI), XEROX Corporation (Xerox), Airsignal of California, Inc., (AC), Airsignal International Inc., (AI), and WUI, Inc., (WUI). The above-named corporations will be referred to collectively as "applicants" throughout this decision. Applicants request an ex parte grant of authority under Public Utilities (PU) Code Sections 851 et seq. for MCI to acquire control of AC through the acquisition by MCI from Xerox of all of the issued and outstanding shares of capital stock of WUI. Xerox is the sole owner of all of the outstanding shares of capital stock of WUI which is the sole owner of AI which, in turn, is the sole owner of AC. Thus, approval of the application will transfer ultimate control of AC, through its parents AI and WUI, from Xerox to MCI.

A timely "Protest and Request for Hearing" was filed by a group of radiotelephone utilities (RTUs). The protestants include Allied Telephone Companies Association (Allied), an association of

some 40 radiotelephone utilities, Fresno Mobile Radio Inc., GenCom Inc., Hendrix Electronics, dba Cal-Com Radiotelephone Service, Intrastate Radiotelephone, Inc. of San Francisco, Kidd's Communications Inc., Salinas Valley Radiotelephone Company, and United Business Service Inc. dba United Radiotelephone System. Allied subsequently withdrew from the protest. The remaining protestants will be referred to as the "RTU protestants."

The Pacific Telephone and Telegraph Company (Pacific) filed a motion requesting acceptance of its late-filed protest. On May 27, 1982 the administrative law judge (ALJ) issued a ruling granting Pacific's motion and accepting its protest for filing. On June 1, 1982 Pacific served notice of deposition re subpoena duces tecum on MCI. On July 6, 1982 MCI filed a motion for an order quashing the subpoena duces tecum. MCI, for applicants, filed separate pleadings in opposition and reply to the RTU protest and to the protest of Pacific.

I. Positions of the Parties

A. RTU Protestants

The RTU protestants oppose the application on the ground that it would be contrary to the public interest and the explicitly stated policy of this Commission as well as the Federal Communications Commission (FCC). RTU protestants allege that MCI is a provider of public landline message telephone service. They further allege that MCI now seeks authorization to acquire control of AC which offers one-way and two-way radiotelephone services on channels which are explicitly limited, by FCC policy, to communication common carriers "not also engaged in the business of providing a public landline message telephone service."

The RTU protestants maintain that under longstanding FCC policy, 47 C.F.R. Section 501, divides the frequencies available for common carrier Domestic Public Land Mobile Radio Service ("DPLMRS")

between two groups of potential competitors, i.e., one group of 23 frequencies is reserved for "communication common carriers engaged also in the business of affording public landline message telephone service" (47 C.F.R. Section 22.501(b)) and another group, covering 21 frequencies, is reserved for "communication common carriers not also engaged in the business of providing a public landline message telephone service." The stated policy for this "split allocation" is to permit the development of "competing systems, techniques and equipment" in the DPLMRS sector. (General Mobile Radio Service (1949) 13 FCC 1190.)

It is the RTU protestants' position that MCI, as a provider of public landline message telephone service, particularly through its "Execunet" service, is ineligible under the provisions of 47 C.F.R. Sections 25.501(c) and (h) to be licensed or to acquire control of the frequencies now used by AC. What MCI may not do directly, it may not achieve indirectly through the acquisition of AC.

RTU protestants further claim that this Commission has on various occasions endorsed and adopted as its own a policy favoring the development of competing systems, techniques and equipment by means, among others, of the "split allocation" of radio frequencies described above. They call attention to Sylvan B. Malis (Coast Mobilphone Service) v General Telephone Company of California (1961) 59 CPUC 110 in which the Commission approved the initiation by General Telephone Company of California of DPLMRS service without additional certification, but confirmed that DPLMRS service is a public utility telephone service within the definition of the PU Code.

In further support of its protest, RTU protestants argue that aside from FCC policy and the specific provisions of 47 C.F.R. Section 22.501, it would not be in the public interest for this Commission to permit landline telephone companies to acquire and control RTUs. Until now, landline telephone companies have not developed radiotelephone technology to the state of the art, and in many areas

of California have allowed the frequencies allocated to them to lie fallow and undeveloped. The RTUs, whose primary interest and investment has been in DPLMRS technology rather than in other telephone services, have succeeded collectively in attracting some 90% of the paging market and 50% of the two-way mobile telephone market in California. RTU services have generally been superior to those offered by the landline companies, whose primary interests lie elsewhere, and in the case of two-way mobile telephone service have often been vastly superior. RTU protestants maintain that all of this has been done on the limited frequency allocation made by Section 22.501 to common carriers not engaged in the provision of public message landline telephone service. Indeed, in most areas of California, further expansion has been prevented by a shortage of available spectrum--even while many of the frequencies allocated to landline telephone companies have remained idle and unexploited. RTU protestants conclude that to allow the landline telephone companies, including MCI, to compete for the limited, nonwireline allocation would exacerbate the problems faced by the RTUs in securing sufficient spectrum with which to expand and improve operations, and would in effect turn over additional quantities of spectrum to entities whose primary business is not the provision of DPLMRS services.

B. Pacific

Pacific protests the application of MCI et al. on grounds that acquisition of control of AC is contrary to the public interest and should not be approved without public hearings. Pacific asserts that MCI has demonstrated and continues to demonstrate willful disregard of the policies, rules, and regulations of this Commission and of the PU Code in that MCI, and at least one of its subsidiaries, provide a telephone service ("message telephone service") to the public generally on a call-by-call basis under which separate connections are made for each occasion of use and under which MCI bills separately for each occasion of use whether calls both originate and terminate in California.

Pacific further asserts that on or about October 3, 1978 MCI sought to file with the FCC tariffs covering, inter alia, message telephone service that both originates and terminates in the same state. MCI was advised by the common carrier bureau of the FCC that these tariffs would be rejected insofar as they propose to cover service originating and terminating in a single state. MCI subsequently amended its FCC tariffs to delete such intrastate services but continued and now continues to provide them without tariff. Pacific comments that the FCC in its decision on the MCI tariff filing noted that intrastate services could be rendered under state tariffs, not FCC tariffs. Pacific concludes that MCI's action providing such intrastate message telephone service in the absence of tariffs filed with the Commission is a violation of the PU Code. Pacific contends that the granting of MCI's application would allow MCI to expand its currently unlawful intrastate message telephone service and to bypass Pacific's network, all of which would be contrary to existing law and contrary to the best interests of Pacific's ratepayers.

Pacific also points to MCI's application where MCI alleges that it "intends through ownership and control of AC to maintain and improve its competitive position" and that approval of MCI's application "promises to enhance the quality of its future competition and innovation within the State of California." Pacific urges that MCI be required to explain the extent to which "its competitive position" is based upon its providing intrastate services in violation of the PU Code, how it proposes to enhance the "quality of its future competition innovation," and how AC's service will relate to MCI's apparent unauthorized intrastate services.

C. MCI

In support of the application, MCI states that consummation of the acquisition by MCI will effect no change in the facilities or

services provided by AC in California and will be beneficial to the public interest, convenience, and necessity. MCI will continue the high standards of management, operation, and system maintenance which have been established by AC and preserved under Xerox ownership. MCI notes that this Commission has previously determined that the public interest, convenience, and necessity were served by the issuance of the certificate held by AC. Upon consummation of the transfer of ownership and control proposed, facilities will continue to be dedicated to service in the public interest, and AC will continue as a public utility certified by this Commission. MCI alleges that all existing services will be maintained and there will be no diminution in technical personnel, maintenance, or repair facilities by AC. MCI further claims that the proposed transaction will not result in any changes in financial structure or accounting practices or reporting of AC before this Commission and will involve no transfer of AC accounts or liabilities. AC will continue to comply with the Commission policies, rules, and regulations and will continue to adhere to all of its contractual obligations. Thus, MCI maintains that the public interest benefits already flowing from the carrier's control of its existing license and certification will remain intact and will continue to be served after the acquisition by MCI.

In addition, MCI contends that the transfer of control of WUI and AC to MCI will serve the public interest by strengthening their ability to provide high quality innovative communications services. MCI states that it is well-known as a vigorous competitor in the domestic communications field. Approval of the transfer of control of AC promises, in MCI's view, to enhance the quality of its future competition and innovation within the State of California. MCI intends through ownership and control of AC to maintain and improve its competitive position. Therefore, MCI concludes that the acquisition will provide important procompetitive benefits.

In its reply to the protest of the RTUs, MCI argues that the protest principally raises issues which involve the rules and policies of the FCC. MCI suggests that those issues are now pending before the FCC and will be resolved by it in the matter of the application to the FCC by Xerox and MCI for approval of the transfer of control of WUI and its subsidiaries. MCI claims that this Commission is not responsible for the enforcement of the FCC's rules, and the question of whether MCI is or is not barred by FCC rules from owning and controlling a nonwireline telephone common carrier is an issue irrelevant to the application before this Commission. MCI urges that this Commission must and should defer to the FCC to resolve issues arising under the FCC's rules and policies.

In its reply to Pacific's protest to the application, MCI asserts that Pacific's pleading fails to allege any facts relevant and material to the subject application.

Concerning Pacific's comments regarding the allegedly illegal nature of MCI's communication activities in California, MCI replies that it is unable to prevent the use of its interstate system for any alleged unauthorized intrastate calls because of the refusal by Pacific to provide MCI with Automatic Number Identification. This contention is refuted by Pacific in an analysis of MCI's switching arrangement. MCI urges that approval of the application will not adversely affect the service which AC renders to the public but will rather enhance it. MCI asserts that the status of MCI's services in California has been discussed between MCI representatives and Commission staff (staff) over a period of years. Reference is made to recent correspondence between Paul Popenoe of the staff and Mr. Cox of MCI. MCI suggests that if Pacific or this Commission wish to make formal inquiry into MCI's California operations, there are several procedures available for that purpose and that it is not logical or appropriate to tie the issue of MCI intercity services with the application for transfer of control of AC.

II. Discussion

By Memorandum Opinion and Order, adopted June 23, 1982 and released June 28, 1982, the FCC approved the transfer of control of WUI and its subsidiaries, including AI and AC, from Xerox to MCI and the latter's wholly owned subsidiaries through purchase by MCI of all of WUI's stock.

The FCC, in approving the acquisition, found that transfer of control of AI to MCI would benefit the public interest, would not lessen competition in either the international or domestic telecommunication industry, and would provide resources to the involved firms to offer new services and improve performance. The FCC also concluded that MCI is a nonwireline carrier and, therefore, is not ineligible under the provisions of 47 C.F.R. Sections 25.50(c) and (h) to be licensed or to acquire control of the frequencies now used by AC.

The FCC decision is dispositive of the issues raised by the RTU protestants. We agree with MCI that the subject of spectrum allocation is a matter preempted by the federal government through Title III of the Communications Act of 1934, as amended. It is clearly the province of the FCC to determine how and to which different classes of common carrier users it will parcel out portions of the spectrum. The FCC has determined that MCI, as a nonwireline carrier, is not barred by its policies from acquiring control of AI and AC's frequencies.

With respect to the claim of RTU protestants that MCI's acquisition of AC will have a deleterious impact upon the provision of radiotelephone service in California, we have no reason to question the FCC's conclusion that the acquisition would not have competitive effects adverse to the public interest. Upon its review of the proposed transaction, the FCC found that the acquisition of AI and AC by MCI would benefit the public interest, would not lessen competition, and would provide resources enabling AI and AC to offer new services and improve

its performances. We will affirm those findings for the purpose of this application.

While Pacific's protest may contain allegations of conduct by MCI which warrant examination by this Commission, this application for acquisition of control by MCI of AC is not the proper occasion for their resolution. Consideration of MCI's allegedly unlawful intrastate message toll telephone service in California involves a separate and unrelated matter which is not germane to the subject matter involved in this transfer proceeding. If MCI is operating in violation of Commission rules and regulations, sufficient procedural vehicles, i.e. a complaint or an Order Instituting Investigation (OII), exist to protect the integrity of our processes. Pacific's allegation of wrongdoing by MCI in the separate and unrelated area involving intertwined interstate-intrastate traffic is insufficient to rebut the conclusion of the FCC that the acquisition is in the public interest. Therefore, we will grant MCI's motion to quash Pacific's subpoena duces tecum.

In view of the FCC's action in approving MCI's acquisition of AI and AC and given the options available to Pacific to pursue its claim of alleged wrongdoing by MCI in providing intrastate service without filed tariffs, we conclude that it is appropriate to grant applicants' request on an ex parte basis. The effect of acquisition by MCI of AC should have minimal impact upon the level and quality of service provided by AC in the immediate future. It is expected that the acquisition will eventually enhance the level of competition among providers of radiotelephone services in California.

Based upon all of the foregoing, we will grant, on an ex parte basis, applicants' request that MCI be authorized to acquire control of AC.

Findings of Fact

1. MCI is a nonwireline common carrier and is not barred by policies of the FCC from acquiring frequencies controlled by AC.

2. It is within the clear authority of the FCC to determine how and to which different classes of common carrier users it will parcel out portions of the radio spectrum.

3. Transfer of control of AC to MCI will benefit the public interest.

4. Transfer of control of AC to MCI will not lessen competition among providers of radiotelephone services in California.

5. Transfer of control of AC to MCI will provide resources to AC to offer improved service and performance.

6. Commission procedures are available if Pacific wishes to make formal inquiry into alleged wrongdoing by MCI in providing intrastate telephone services.

7. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

8. This authorization is not a finding of the value of the rights and properties to be transferred.

Conclusions of Law

1. This application should be granted on an ex parte basis.

2. Acquisition of control of AC by MCI should be granted since it will benefit the public interest.

3. Pacific's subpoena duces tecum should be quashed.

4. Since Commission approval of MCI's acquisition of AC is the final step in a larger transaction already approved by the FCC, this order should be effective immediately to allow final consummation of the entire transaction.

O R D E R

IT IS ORDERED that:

1. Application 82-03-86 is granted.

2. Xerox Corporation is authorized to transfer and MCI Communications Corporation to gain control of Airsignal of California, Inc.

through acquisition by MCI Communications Corporation of the stock of WUI, Inc., the second tier parent company of Airsignal of California, Inc.

3. MCI Communications Corporation is authorized to control Airsignal of California, Inc. through consummation of the transaction described in the Agreement of Purchase and Sale of Stock attached as Exhibit I, Attachment E to the application.

4. MCI Communications Corporation's motion to quash Pacific's subpoena duces tecum is granted.

This order becomes effective 30 days from today.

Dated September 8, 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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

Joseph E. Bodovitz, Executive Director

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Dated SEP 8 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners