

KD

ORIGINAL

Decision No. 90363 JUN 5 - 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WUI, INC., AIRSIGNAL INTERNATIONAL,)
INC., and AIRSIGNAL OF CALIFORNIA,)
INC.,)

Complainants,)

vs.)

CONTINENTAL TELEPHONE CORPORATION,)
and CONTINENTAL TELEPHONE OF)
CALIFORNIA,)

Defendants.)

Case No. 10714
(Filed January 25, 1979)

Loughran & Hegarty, by Thomas M. Loughran, Attorney at Law, for Airsignal International, Inc., Airsignal of California, Inc., and WUI, Inc.; Patrick J. O'Shea, Attorney at Law (New York), for Airsignal of California, Inc.; Robert Michelson, Attorney at Law (New York and New Jersey), for WUI, Inc.; complainants.
Orrick, Herrington, Rowley & Sutcliffe, by James F. Crafts, Jr., and James Belford Brown, Attorneys at Law, for Continental Telephone Corporation and Continental Telephone Company of California, defendants.

O P I N I O N

Airsignal of California, Inc. (Airsignal) is a California corporation providing local and wide-area two-way and one-way radio-telephone utility (RTU) service in, about, and between certain California cities pursuant to certificates of public convenience and necessity issued by the Commission.

Airsignal International, Inc. (AI) is a Delaware corporation. Airsignal is a wholly owned subsidiary of AI.

AI is a wholly owned subsidiary of WUI, Inc. (WUI), a Delaware corporation, whose stock is traded on the New York and Pacific Stock Exchanges. WUI's only voting securities are its shares of common capital stock, of which 5,522,300 were issued and outstanding on September 30, 1978.

Continental Telephone Corporation (Continental), a Delaware corporation, is a telephone holding company which owns several operating telephone company subsidiaries among which is Continental Telephone Company of California (CTC).

On September 29, 1978, Continental began purchasing a beneficial interest in WUI's common capital stock, on a daily basis, in multiples of 100 shares, purchasing, at times, in excess of 15,000 shares in a single transaction. By January 17, 1979, Continental had acquired beneficial ownership of approximately 690,000 shares of such stock, or 12.6 percent of WUI's authorized and outstanding shares.

On January 25, 1979, WUI, AI, and Airsignal (complainants) filed their complaint against Continental and CTC alleging that the purchases of shares by Continental violated Sections 852 and 854 of the Public Utilities Code^{1/} and that since the Commission has not authorized the purchases of stock, such transactions are void, pursuant to Sections 852 and 854 of the Public Utilities Code. The complaint seeks a cease and desist order to prevent future purchases of WUI stock; a direction to the Commission's Legal Division to seek a temporary restraining order in the Superior Court; a declaration that the acquisitions are void; an order directing Continental to divest itself of the unlawfully acquired shares; and a declaration that the merger or consolidation of Airsignal and CTC properties by Continental's acquisition of WUI stock is unlawful and not in the public interest.

^{1/} All references hereafter to code sections are to the Public Utilities Code.

A public hearing was held February 21, 1979, before Administrative Law Judge Robert T. Baer, and the matter was submitted subject to the filing of concurrent opening briefs on March 2, 1979, and concurrent closing briefs on March 9, 1979. The briefs are on file and the matter is ready for decision.

Discussion

The basic issues to be decided in this proceeding are, simply stated:

1. Has Continental, by purchasing WUI stock, violated Section 852?
2. Has Continental, by purchasing WUI stock, acquired or controlled Airsignal without securing authority from the Commission in violation of Section 854?

In order to reach a correct result as to the first issue it is necessary to analyze the provisions of Sections 852 and 853 and to address complainants' argument that Continental and CTC are alter egos of each other.

The relevant part of Section 852 is as follows:
"No public utility shall purchase...any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the commission. . . ."

Thus, in order to show a violation by Continental of Section 852, complainants must show that both WUI and Continental are public utilities for purposes of Section 852. Neither Continental nor WUI transacts a public utility business in this State or is certificated by the Commission, other than through their respective corporate subsidiaries, CTC and Airsignal. WUI is not a California public utility but merely claims to be the alter ego of a California public utility, i.e., its subsidiary, twice removed, Airsignal. Complainants presented evidence for the proposition that WUI is the alter ego of Airsignal and for the proposition that Continental is the alter ego of CTC. It is, however, unnecessary to make findings on these issues, since the matter can be decided on other grounds, as will appear below.

The relevant parts of Section 853 are as follows:
"The provisions of Section[]...852 shall not apply to any...corporation which transacts no business subject to regulation under this part, except performing services...for...public utilities... but shall nevertheless apply to any public utility if the commission finds, in a proceeding to which the public utility is or may become a party, that the application thereof is required by the public interest. . . ."

Thus, even if WUI and Continental were found to be public utilities for purposes of Section 852, it would then be necessary for the Commission to find that the application of the provisions of Section 852 to them is necessary in the public interest. On the evidence presented we cannot make such a finding.

Complainants presented evidence on two points that relate to the public interest. First, complainants directed the Commission's attention to Continental's Schedule 13D filed with the Securities and Exchange Commission on December 26, 1978 (Exhibit 6), wherein it is stated:

"As a condition to its approval of Continental's acquiring control of the Issuer, the FCC may possibly require the disposition of radio businesses operated by the Issuer's subsidiary Airsignal International, Inc."

Complainants' witness testified that WUI provides capital support for the Airsignal companies; that the RTU business is capital intensive; that a small company like AI does not have the necessary cash flow to finance the capital expenditures of its operating subsidiaries; that WUI lends to AI the funds that it needs for capital expansion purposes; and that, if the Airsignal companies were spun off from WUI, it would be very difficult for the Airsignal companies to continue improving and expanding their facilities.

It can be seen that the result predicted by this scenario depends on a number of assumptions: (1) that Continental gains control of WUI; (2) that the FCC requires, as a condition of such control, that the Airsignal companies be spun off; and (3) that the Airsignal companies, after being spun off, drift in the universe of corporate entities without a financially sustaining connection to a larger body. These speculative assumptions will not support the finding required by Section 853.

The second area of evidence relating to the public interest pertains to the lessening of competition between Airsignal and CTC that might result if Continental controlled WUI. Complainants' evidence shows that CTC's radiotelephone service areas overlap those of Airsignal's in the Fresno, Visalia, Bakersfield, Modesto, and Stockton areas. It also shows that Airsignal on November 8, 1977, filed an application in FCC File No. 20224-CD-P-3-78 seeking authority to use in the Fresno area 3 of 12 UHF frequencies allocated by the FCC for primary use by the wireline companies. Although these frequencies have been available for development by wireline companies for at least 10 years, no wireline company has applied for their use in the Fresno area. Under normal circumstances it is not permissible for RTU carriers to use these frequencies, but it is possible to obtain a waiver from the FCC. The application of Airsignal for a waiver was protested by CTC, which represented that it plans to use these frequencies in the indefinite future. Airsignal uses four VHF frequencies, which are at present saturated by its 700 customers in the Fresno area. It cannot put any more subscribers on these four VHF frequencies, even though there are customers waiting to get on the system.

Complainants argue that if Continental controlled WUI, it could require the dismissal of the FCC application, which would in turn inhibit Airsignal's ability to expand its facilities and provide the additional needed service to users in the Fresno area.

This argument again depends upon our acceptance of certain assumptions: (1) that Continental has or will gain control of WUI; (2) that the FCC does not require divestiture of the Airsignal companies as a condition to Continental's control of WUI; and (3) that Continental would require the dismissal of the FCC application. We cannot now view these assumptions about the future as more than speculation.

The core issue in this proceeding is control - that is, the control Continental has or has not gained over WUI and its subsidiaries by the purchases of stock made to date. If it cannot be found that Continental controls WUI and Airsignal for purposes of Section 854, then it cannot be found that the application of Section 852 is necessary in the public interest.

The relevant parts of Section 854 are as follows:

"No...corporation, whether or not organized under the laws of this State, shall...acquire or control either directly or indirectly any public utility organized and doing business in this State without first securing authorization to do so from the commission. . . ."

Section 854 is patently applicable to the facts of this case. Continental is purchasing stock of WUI, which may result in control of that corporation and thus indirectly in the control of the subsidiary public utility, Airsignal. The only issue remaining is whether Continental has "control" as that term is used in Section 854.

Complainants introduced evidence on the issue of control of WUI. WUI's assistant treasurer testified that American Securities Corporation, an investment banking company, and members of that firm hold between 6 and 10 percent of WUI common stock and have held that amount of stock for a period of approximately 5 years. During that period of time five members of WUI's nine-member board of directors have been members of that firm. Until recently the shareholders associated with American Securities Corporation held the largest

single block of WUI stock. Now, the purchases by Continental place it in the position as the owner of the largest single block of WUI shares, approximately 12.6 percent as of January 19, 1979.

Counterpoised against complainants' evidence - which suggests that if American Securities Corporation controls WUI with 6-10 percent of the shares, then Continental must now control WUI with 12.6 percent of the shares - is other evidence which suggests the contrary result. In Continental's Schedule 13D filed with the Securities and Exchange Commission on December 26, 1978 (Exhibit 6) Continental states its intentions with respect to its acquisition of WUI shares:

"Item 4. Purpose of Transaction.

"Approval of the Federal Communications Commission (the 'FCC') is required to obtain 'control' of the Issuer within the meaning of the Federal Communications Act. Continental's present intention is to seek to acquire approximately 20% of the outstanding capital stock of the Issuer in order to permit Continental to account for its holding of such stock on an equity basis. Continental proposes to review with the FCC whether a holding of up to 20% of the capital stock of the Issuer would constitute 'control' and, if so, to file with the FCC an application for permission to do so. Pending a decision by the FCC on such application, Continental's present intention is to seek to acquire additional Common Stock of the Issuer and to hold such Common Stock in such a manner (which may include a voting trust), that Continental does not have 'control' of the Issuer within the meaning of the Federal Communications Act. . . . Continental reserves the right to change its intention with respect to the Issuer. Continental has had a discussion in the past with the management of the Issuer with respect to a possible acquisition of the Issuer by Continental. . . .

"Except as described above, Continental does not have any present intention which relates to or would result in: (a) the acquisition by any person of additional securities of the Issuer, or the disposition of securities of the Issuer; (b) an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the Issuer or any of its subsidiaries; (c) a sale or transfer of a material amount of assets of the Issuer or any of its subsidiaries; (d) any change in the present board of directors or management of the Issuer, including any plans or proposals to change the number or terms of directors or to fill any existing vacancies on the board; (e) any material change in the present capitalization or dividend policy of the Issuer; (f) any other material change in the Issuer's business or corporate structure; (g) changes in the Issuer's charter, bylaws or instruments corresponding thereto or other actions which may impede the acquisition of control of the Issuer by any person; (h) causing a class of securities of the Issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; (i) a class of equity securities of the Issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934; or (j) any action similar to any of those enumerated above. Continental, however, reserves the right to change its intention with respect to any of the foregoing."

Continental has filed three amendments to its Schedule 13D, the last of which was filed on January 23, 1979.^{2/} (See Exhibits 7, 8, and 9.) Continental's stated intentions with regard to control of WUI were not changed by the amendments.

^{2/} The third amendment was filed to report events, principally the purchase of additional shares, occurring between January 15 and 19, 1979.

On the night of January 18, 1979, Xerox Corp. announced its bid to acquire WUI. The offering price for WUI was \$207 million in Xerox Corp.'s stock. On January 19, 1979, Continental's chairman said that the company was considering several scenarios with respect to WUI and expected to decide on its strategy by next week. He did not rule out the possibility that Continental might attempt to gain control of WUI by outbidding Xerox Corp. (Exhibits 5 and 12.)

The ownership of 12.6 percent of WUI is not by definition a controlling interest in WUI. The Commission has issued no regulations defining what percentage of stock ownership would constitute control for purposes of Section 854. Other than purchasing shares of WUI's capital stock, Continental has taken no affirmative action which would indicate that it controls WUI in any way. Continental has stated its intention not to take any such action until it has the appropriate regulatory authorizations.

It is obvious that Continental has exercised no actual control over WUI. That this proceeding is still contested is evidence that Continental does not in fact control WUI. If Continental were in control of WUI, Continental would require WUI to request dismissal of this complaint. Moreover, Application No. 58686^{3/} would not have been filed on February 16, 1979, if Continental were in control of WUI at that time. Finally, WUI itself characterizes Continental's alleged control of WUI only as a "substantial potential to directly control the affairs of WUI and its California subsidiary, Airsignal - California." (Opening Brief of WUI, p. 16.)

3/ Application No. 58686 of Xerox Corp., WUI, AI, and Airsignal for authorization of Xerox Corp.'s control of Airsignal by merger of WUI into Xerox Corp. was granted by Decision No. 90204, dated April 24, 1979.

In its opening brief at page 19, WUI argues that "[i]t is the power to control which is decisive in determining whether Section 854 has been violated, not the dominant interest's whimsical forbearance to exercise control". We do not agree. First, we do not believe that Continental's forbearance to exercise control is motivated by whimsy, but rather by the knowledge that control of the Board of Directors of WUI could only be gained by a proxy contest with the present controlling shareholders and the majority of WUI's Board which they have elected. Counsel for Continental has so argued and our understanding of the workings of corporations whose stock is widely held and publicly traded would not suggest the contrary. Second, and of primary importance, is the language of Section 854. It does not speak of power to control or potential to control but of control, which we interpret to mean actual or working control.

The Commission concludes that Continental does not possess actual or working control of WUI and that therefore no violation of Section 854 has been demonstrated.

Findings

1. The evidence does not support a finding that the application of Section 852 to Continental's purchases of WUI stock is necessary in the public interest.
2. Continental does not control WUI.

Conclusions

1. The application of the provisions of Section 852 to Continental's purchases of WUI stock is not necessary in the public interest.

C.10714 kd

2. By reason of the inapplicability of Section 852 to the facts of this case it is unnecessary to decide the alter ego issue raised by complainants.

3. Section 854 governs the facts of this case.

4. "Control" as it is used in Section 854 means actual or working control.

5. No violation of Section 854 has been proven.

6. The complaint should be denied.

O R D E R

IT IS ORDERED that the complaint is denied.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 5th day of JUNE, 1979.

John E. Burns
President
Thomas L. Sturgeon
Charles D. Howell
Clayton J. Medvedy
Frederick J. ...
Commissioners