

FEB 27 1996

Decision 96-02-061 February 23, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application )  
of San Francisco Thermal, Limited )  
Partnership (U-908-H), Thermal )  
Ventures, Inc., NRG Energy, Inc. )  
and North American Thermal )  
Systems Limited Liability Company )  
for authority to transfer Thermal )  
Ventures, Inc.'s general partnership )  
interest in and control of San )  
Francisco Thermal, Limited Partnership )  
to North American Thermal Systems )  
Limited Liability Company, a company )  
which is owned equally by Thermal )  
Ventures, Inc. and NRG Energy, Inc. )

ORIGINAL

Application 95-11-045  
(Filed November 20, 1995)

OPINION

Summary

We will approve the transfer of control of San Francisco Thermal, Limited Partnership (Thermal) pursuant to Public Utilities (PU) Code Section 854 from Thermal Ventures, Inc. (TVI) to North American Thermal Systems Limited Liability Company (NATS), a new entity owned equally by TVI and NRG Energy, Inc. (NRG).

Procedural Background

Thermal, a Delaware limited partnership, is a public utility that provides heating to approximately 200 buildings in San Francisco, California. Thermal's general partner is TVI, a Delaware corporation, and its limited partners are Thermal Ventures Limited Partnership (TVLP), a Delaware limited partnership (of which TVI is also general partner), and NRG, a Delaware corporation. NRG owns a 48.9% interest in Thermal. NRG is a wholly owned subsidiary of Northern States Power Company, a Minnesota corporation (NSP). Elsewhere, NSP has proposed merging

with Wisconsin Energy Corporation to form a new utility holding company to be known as Primergy Corporation (Primergy).<sup>1</sup>

Thermal, TVI, NRG, and NATS, an Ohio limited liability company, filed an application on November 20, 1995 for approval of transfer of control of Thermal from its general partner, TVI, to NATS, which is controlled in equal parts by TVI and NRG. Notice of the application was given in the Daily Calendar on November 29, 1995. No protests were filed.

### Discussion

#### Applicability of PU Code Section 854

##### Control Applications Analyzed on Case-by-Case Basis

PU Code Section 854 of the PU Code prohibits any person or corporation from acquiring or controlling any California utility without prior Commission approval. The Commission has authority to establish by order or rule the definitions of what constitute acquisition or control activities that are subject to § 854.<sup>2</sup> We analyze control on a case-by-case basis.<sup>3</sup>

##### NATS Would Acquire Direct Control of Thermal

Applicants proposes that NATS replace TVI as the sole general partner of Thermal. Pursuant to the limited partnership agreement of Thermal, NATS would thus have the power to "conduct, manage, and control the conduct of the ordinary business of"

<sup>1</sup>See Quarterly Report on Form 10-Q of Northern States Power Company dated November 13, 1995 (<http://www.sec.gov/Archives/edgar/data/72903/0000072903-95-000018.txt>).

<sup>2</sup>PU Code § 854.

<sup>3</sup>In re Investigation on the Commission's own motion into the Pacific Telesis Group's "spin-off" proposal (1993) 51 CPUC2d 728, 746 (citing In re MIM Holdings, Inc. (Decision (D.) 89-12-056).

Thermal. This satisfies our traditional criterion of "actual or working control."<sup>4</sup>

TVI Would Indirectly Control Thermal

TVI, which now directly controls Thermal, will indirectly control Thermal by virtue of its control over NATS, which is controlled by its two members, who "acting unanimously, shall have the power to conduct, manage, control, and make all decisions affecting the business of" NATS. However, TVI is delegated the day-to-day management of the business and affairs of NATS and its operating subsidiaries. In addition, the operating agreement of NATS vests in TVI the overall management of Thermal on a day-to-day basis, including collecting payments owed, paying expenses, maintaining and repairing equipment, contracting for improvements and renovations, retaining employees and consultants, procuring materials, supplies and services, procuring and maintaining insurance, complying with applicable law, and keeping books and accounts.

Control by TVI Affiliates

TVI appears to be controlled by Lewis A. Mahoney and Carl E. Avers, whom the application states are the owners of TVLP. They are also officers of NATS. However, it is unnecessary to consider their role, or the role of TVLP, further because we do not apply PU Code Section 854 in circumstances in which there is no change in the management, operation or working

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<sup>4</sup>See WUI, Inc. v. Continental Tel. Corp. (1979) 1 CPUC2d 579, 586 (noting that PU Code § 854 "does not speak of power to control or potential to control but of control, which we interpret to mean actual or working control"). In that case, the parties were engaged in a corporate control contest. After defendant acquired 12.6% of complainant's outstanding shares, complainant alleged a violation of PU Code § 854, alleging that prior Commission approval was required. Even though complainant's previous single largest shareholder, which held between 6-10% of its outstanding stock, had been able to elect the majority of complainant's board of directors, we found that defendant had not exercised any actual control over complainant and to achieve actual control it would be required to engage in a proxy contest. Therefore, it had no present control.

control of the utility.<sup>5</sup> These affiliates of TVI may give up a degree of control in the proposed transaction, but they appear to gain no new control.

NRG Would Not Directly or Indirectly Control Thermal

By virtue of its equal control over NATS, NRG might be deemed indirectly to control Thermal, but it is not given the same degree of specific power to operate NATS and Thermal that TVI enjoys. Rather, NRG's control arises from its power under the NATS operating agreement to put TVI to an election to buy or sell control of NATS in certain events. This is not sufficient control over NATS that we should conclude NRG indirectly controls Thermal.<sup>6</sup> Since we conclude that NRG would not control Thermal, it is unnecessary to consider whether NSP or Primergy would be deemed to indirectly control Thermal.

Case-by-Case Development Should Continue

Even following the amendment of PU Code Section 854, we have sometimes suggested that we lack jurisdiction under the statute to consider particular situations in which formal ownership changed while the underlying operations and day-to-day management remained intact, and in such situations we would sometimes dismiss the application as unnecessary.<sup>7</sup> Because of the variety of arrangements which are possible, however, we now think it preferable to continue development of this area of our responsibility on a case-by-case basis. The particular facts in this case are specific enough to the situation of Thermal and its affiliates that they are unlikely to be exactly replicated in future applications. Thus, we will subject this application and future applications to a public interest inquiry to determine if

<sup>5</sup>See In re Paging Network of San Francisco, Inc. (D.93-08-008) (mimeo. at 5) (holding that when investment fund distributes shares to its constituent partners but remains the largest shareholder and no change in control occurs, no authorization under PU Code § 854 is required).

<sup>6</sup>WUI, Inc. v. Continental Tel. Corp. (1979) 1 CPUC2d 579, 586; see also Gale v. Teel (1977) 81 CPUC 817, 822 (holding that 50% owner of stock who had power to cause public utility operations to be abandoned had control by virtue of power to have receiver appointed under Corporations Code).

<sup>7</sup>See, e.g., In re Paging Network n.5, supra.

changes in control arrangements have any necessary effect on the public interest. We do this to assure that changes which have the potential to involve public policy implications are brought to our attention.<sup>8</sup> Adopting a rule that preserving intact existing management be considered no change in control might mask transactions in which the real substance has changed.

#### Public Interest Analysis under PU Code Section 854

Our standard for approving change in control applications under PU Code Section 854<sup>9</sup> is whether the entity to which control is to be transferred is capable of carrying out its utility duties and whether to permit it to do so is in the public interest.<sup>10</sup>

Because the control transferee, NATS, will have the existing general partner of Thermal as its member charged with the duties of operating Thermal, it can be readily seen that NATS is as capable of discharging the duties of general partner of Thermal as TVI. Nothing on the record suggests that TVI has been deficient in carrying out Thermal's utility duties. Therefore, we conclude that NATS is capable of carrying out the duties that TVI has been performing with respect to Thermal.

Nothing in the record suggests that permitting the transfer of control is adverse to the public interest, and we cannot see that the change in the status quo is of such a nature to require an affirmative showing that the public interest requires it for some reason. Accordingly, we conclude that the public interest leg of our PU Code Section 854 test is also satisfied.

<sup>8</sup>See Gale v. Teel (1977) 81 CPUC 817, 822.

<sup>9</sup>Assuming that the more detailed standards set forth in PU Code S 854(b) and (c) do not also apply.

<sup>10</sup>See In re Joint Application of Western Cellular Corp. (D.94-06-039).

Findings of Fact

1. Thermal, a Delaware limited partnership, is a public utility that provides heating to approximately 200 buildings in San Francisco, California.
2. Thermal is a public utility subject to the jurisdiction of the Commission.
3. Thermal's general partner is TVI, a Delaware corporation, and its limited partners are Thermal Ventures Limited Partnership, a Delaware limited partnership (of which TVI is also general partner), and NRG, a Delaware corporation.
4. NRG owns a 48.9% interest in Thermal. NRG is a wholly owned subsidiary of NSP.
5. NATS is an Ohio limited liability company in which TVI and NRG each own an equal economic interest.
6. TVI has rights and obligations in NATS with respect to Thermal that NRG does not share.
7. NRG's power to control Thermal through its ownership of NATS is narrowly limited.
8. TVI's affiliates may have less control over Thermal as a result of the substitution of NATS for TVI as the general partner of Thermal, but they will not have more control.

Conclusions of Law

1. TVI now has direct control over Thermal.
2. By transferring its general partnership interest in Thermal to NATS, TVI will relinquish direct control over Thermal.
3. TVI will have direct control over NATS with respect to matters affecting Thermal.
4. TVI will have indirect control over Thermal.
5. NRG will not have direct control over NATS with respect to matters affecting Thermal.

6. NRG will not have indirect control over Thermal.
7. NATS should be permitted to acquire control of Thermal directly.
8. To facilitate the completion of the transactions related to this application, this order should be made effective today.

ORDER

IT IS ORDERED that:

1. North American Thermal Systems Limited Liability Company may acquire the control of San Francisco Thermal, Limited Partnership (U-908-H).
2. The application is granted as set forth above and the authority granted shall expire if not exercised within one year of the effective date of this order.
3. Application 95-11-045 is closed.

This order is effective today.

Dated February 23, 1996, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, Jr.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners