

Decision 00-05-016 May 4, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of FOXTEL, INC. (U-5881-C)
And AMI TELECOMMUNICATIONS
ACQUISITION CORPORATION For Approval of
Stock Purchase Agreement.

Application 99-11-028
(Filed November 23, 1999)

O P I N I O N**1. Summary**

This application seeks approval under Section 854 of the Public Utilities Code of a transfer of control of Foxtel, Inc. (Foxtel or Applicant), a non-dominant telecommunications carrier. The application is unopposed. The application is granted.

2. Description of Applicant

Foxtel, a Nevada corporation with principal offices in Reno, Nevada, was authorized to provide resold intrastate interexchange services in California pursuant to Decision 97-10-038, issued on October 14, 1997. It is authorized to provide resold intrastate service in 11 states, including California. In addition, Foxtel is authorized by the Federal Communications Commission to provide interstate and international telecommunications services.

3. Nature of Application

Foxtel filed its application on November 23, 1999. It seeks approval of a change in corporate ownership whereby Foxtel will sell all of its stock to, and become a wholly owned subsidiary of, AMI Telecommunications Acquisition

Corporation (AMI Acquisition).¹ Foxtel is currently 100% owned by Vacation Technology Services, Inc. (Vacation Technology), whose sole owner is Morris Jacobs. Under the terms of the agreement between Foxtel and AMI Acquisition, the latter, a newly formed Delaware corporation with principal offices in Incline Village, Nevada, will acquire 100% of Foxtel's common stock from Vacation Technology. AMI Acquisition alleges it is not currently a provider of telecommunications services, and is not certificated in any state.

After AMI Acquisition acquires Foxtel, AMI Acquisition will be jointly owned by Morris Jacobs, Madison Investment Partners, II, L.P., Prairie Capital, MCG Credit Corporation, and additional, as yet undetermined stockholders among the management of AMI Acquisition. Applicant alleges that after the transaction, AMI Acquisition will provide valuable operating and growth-oriented capital that will enable Foxtel to achieve significant growth in the year 2000 and to expand rapidly from its current base.

Applicant states that after the transaction, AMI Acquisition will continue to market, brand and bill its services under the Foxtel name. Further, Applicant alleges that the transaction will occur in a seamless fashion that will be transparent to consumers. Applicant assures us that there will be no interruption in customers' service or change in management or operation of Foxtel. Only the underlying ownership of Foxtel will change.

4. Public Interest

Applicant states that the proposed transaction will improve operational efficiency, provide Foxtel with greater flexibility to obtain financing for future

¹ Notice of Foxtel's application appeared in the Commission's Daily Calendar on November 29, 1999.

expansion, and help Foxtel to secure its competitive position in the telecommunications marketplace. To that end, Applicant asserts, the stock transfer will strengthen Foxtel's financial position.

In the initial application, filed on November 23, 1999, Foxtel alleged that there were no outstanding complaints pending against it before this Commission. In response to a January 18, 2000, ruling of the Assigned Administrative Law Judge (ALJ), on February 7, 2000, Applicant furnished information identifying an informal complaint pending against Foxtel and a formal complaint pending against an entity Foxtel confusingly identified as "Foxtel's current owner," AMI Telecommunications Company of Nevada, Inc. (AMI Telecommunications).² Applicant described the complaints as follows:

- (1) Following is a summary of a complaint filed with the [CPUC] concerning Foxtel:

A letter from a Donald Bussey to the [CPUC], dated September 24, 1999 . . . , was brought to Foxtel's attention on January 12, 2000. Foxtel submitted its response on January 26, 2000. The customer was upset that the rates charged when calling from the timeshare resort were higher than those charged by AT&T when he made calls from his residence. Foxtel charged Mr. Bussey the rates approved in its tariff. No further action has been taken at this point. Foxtel is willing to coordinate with the Commission to attempt to appease the customer, should further action be deemed appropriate.

² Foxtel's February 7, 2000, description of AMI Telecommunications as its "current owner" is confusing because the application identifies Vacation Technology as the current owner. Moreover, two entities are relevant to this application: AMI Telecommunications Acquisition Corporation, the proposed new owner of Foxtel, and AMI Telecommunications Company of Nevada, Inc., Foxtel's "current owner." For clarity, we refer to Foxtel's proposed new owner as AMI Acquisition, and the "current owner" as AMI Telecommunications.

- (2) Following is a summary of a complaint filed with the [CPUC] involving *AMI Telecommunications Company of Nevada, Inc., the current owner of Foxtel, Inc.*³:

Case No. 93-10-023 was opened when an individual named Otis Cranford, of Coachella Valley Communications, Inc. ("Coachella") filed a complaint against AMI [Telecommunications], Foxtel's current parent, alleging that AMI [Telecommunications] was acting as an uncertificated reseller. At that time LDDS was the underlying long distance carrier handling operator assisted long distance calls made by the guests at the time share resorts for which AMI [Telecommunications] installed toll restriction equipment. LDDS, a certificated carrier, carried the traffic and billed the calls. Coachella was a competitor in the timeshare resort market.

Hearings were held in 1995. Throughout the proceeding, AMI [Telecommunications] asserted that the complaint was initiated by a competitor either to force AMI [Telecommunications] to incur significant legal costs or to offer a cash settlement. . . .

According to the [CPUC's] Docket Office, the last action taken in the case was a ruling issued October 12, 1995 by the Administrative Law Judge rescinding the briefing schedule, and submitting the case for decision. No decision has been rendered to date pending completion on non-related matters by the Administrative Law Judge. . . .

The applicants are not aware of any other complaints filed with the [CPUC] involving themselves, related entities or individuals.⁴

In accordance with Commission Rule 36, Foxtel supplied a copy of its latest income statement with its application, along with a Motion for Confidential Treatment, which we discuss in Section 7, below.

³ As noted above, Foxtel's statement identifying AMI Telecommunications Company of Nevada, Inc. as Foxtel's "current owner" contradicts the statement in the application that Foxtel's current owner is Vacation Technology.

⁴ Applicant's letter is attached as Exh. A to this decision.

5. Discussion

a. Requirements of Public Utilities Code Section 854

Public Utilities Code Section 854 requires Commission authorization before a company may "merge, acquire, or control . . . any public utility organized and doing business in this state. . . ." The purpose of this and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. *San Jose Water Co.*, 10 CRC 56 (1916).

The reorganization here promises improved services for California consumers. Although the proposed transaction results in a change in the ultimate ownership of Foxtel, it does not involve a change in the name under which the company operates, or a change in the manner in which it provides service in California. No party has protested Foxtel's application.⁵

b. Existing Complaints Against Applicants

Foxtel and AMI Telecommunications (Foxtel's "current owner" according to its own submission) are named in pending Commission complaints.⁶ We address here the complaints' relevance to Foxtel's application. The first matter, an informal complaint against Foxtel, challenges Foxtel's rates. Without judging the merits of the complaint, the complaint does not suggest

⁵ In order to ensure that the public had adequate notice of the application, the ALJ required Foxtel to serve a Notice of Availability of the application on the other California interexchange carriers. Foxtel complied on February 7, 2000. No party protested the application.

⁶ See Exh. A hereto.

systematic abuses by Foxtel such that the public interest might suffer from our allowing a new owner to purchase Foxtel.

The second complaint (Case (C.) 93-10-023) is more troubling, but does not in itself cause us to change our decision to grant the application. Foxtel did not disclose the complaint in its application, even though the complaint has been pending since 1993. Moreover, reference to C.93-10-023 is contained in documents accompanying the application but filed under seal.⁷ Clearly, therefore, Applicant knew or should have known of the pendency of C.93-10-023 and disclosed it in the body of the application.

At the very least, Applicant should have qualified its statement in the application that "AMI [Acquisitions] is *not* a provider of telecommunications services, and is not certificated in any state" and disclosed the existence of C.93-10-023. As noted above, the chief allegation of C.93-10-023 is that AMI Telecommunications provides telecommunications service in California without the requisite Certificate of Public Convenience and Necessity (CPCN). On the other hand, the complaint concerns the entity Foxtel identifies as its *current* owner, AMI Telecommunications, rather than the proposed *new* owner, AMI Acquisition. Nonetheless, even though AMI Acquisition and AMI Telecommunications are not the same entity, they are sufficiently related that Foxtel should have mentioned C.93-10-023 in the application.

Our concern is less with the substance of the complaint than with Applicant's failure to disclose the complaint up front, especially in light of the

⁷ Application, Exh. 3, Schedule 3.13 (Stock Purchase Agreement between Foxtel and AMI Acquisition, also referred to as Asset Transfer Agreement). We rule on Applicant's pending Motion for Confidential Treatment of the Stock Purchase Agreement in Section 7 of this decision.

application's affirmative statement that "AMI is *not* a provider of telecommunications services." We take official notice of the fact that the formal file for C.93-10-023 already numbers three volumes. Thus, Applicant must have been aware of the complaint when it filed its application here, and should have disclosed it in its application.

On balance, however, the existence of C.93-10-023 does not lead us to deny the application. That complaint is still pending, so there has been no adjudication against AMI Telecommunications. Moreover, if AMI Telecommunications is found to have violated state law and Commission rules by not obtaining a CPCN, the Commission will, by virtue of that very decision, have jurisdiction over AMI Telecommunications. Thus, granting the instant application should have no effect on the Commission's ability to take action against AMI Telecommunications should we find the latter liable in C.93-10-023.

Finally, the Stock Purchase Agreement, attached as Exhibit 3 to the application contains a provision in which AMI Telecommunications (Foxtel's "current owner") must indemnify AMI Acquisition (Foxtel's proposed new owner) for the preexisting acts of AMI Telecommunications.⁸ Thus, if the Commission finds AMI Telecommunications liable for the acts set forth in C.93-10-023, the new Foxtel owner, AMI Acquisition, will be indemnified against liability.

Thus, even though Applicant should have been more candid in its application, the Commission nonetheless finds that the transfer of Foxtel ownership is in the public interest.

⁸ A redacted version of Exhibit 3 containing the Indemnification provision accompanies Applicant's Supplement to Application filed March 6, 2000.

6. Category and Need for Hearings

In Resolution ALJ 176-3028, dated December 2, 1999, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. No party has protested the application, and, as we discuss further above, the pending complaints against Foxtel and AMI do not materially affect our decision. Thus, there is no need to alter the preliminary determinations made in Resolution ALJ 176-3028.

7. Motion for Confidential Treatment

Concurrently with the application, Applicant sought a protective order as to certain documents relevant to AMI Acquisition's proposed acquisition of Foxtel. In a document entitled "Motion for Confidential Treatment" filed on November 23, 1999, Applicant sought a protective order as to Exhibits 3, 5, and 6 to the application. These Exhibits consist of the Foxtel-AMI Acquisition Stock Purchase Agreement (Exh. 3), Foxtel's Financial Statements (Exh. 5), and AMI Acquisition's financial statements (Exh. 6). Applicant attached none of these Exhibits, even in redacted form, to the public version of the Application. In a subsequent filing on March 6, 2000, in response to a January 18, 2000, ALJ ruling, Foxtel provided a redacted version of Exhibit 3 for the public record. Foxtel asserted that confidential treatment of the unredacted documents was necessary to protect Foxtel's competitive and financial interests.

We grant the motion, except with regard to the following document. This document is essential to our decision on this application, and must be contained in the public record:

- Application, Exh. 3, Schedule 3.13 (containing a description of the pending formal complaint case against AMI Telecommunications).

8. Conclusion

The application is granted, subject to the terms and conditions set forth below.

9. Section 311(g)(2)—Uncontested Decision Grants Relief Requested

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Notice of this application appeared in the Commission's Daily Calendar of November 29, 1999.

2. Applicant seeks approval pursuant to Pub. Util. Code § 854 of a change in the ownership of Foxtel.

3. Foxtel is a reseller of telecommunications services in California, and is authorized to provide resold intrastate telecommunications services in 11 other states.

4. There will be no change in name, current services or rates provided by Foxtel as a result of the transfer of control.

5. Foxtel and AMI Telecommunications currently have complaints pending against them before this Commission.

Conclusions of Law

1. The proposed transfer of control is not adverse to the public interest.

2. This proceeding is designated a ratesetting proceeding; no protests have been received; no hearing is necessary.

3. The new Foxtel should be authorized to operate under the CPCN, U-5881-C.

4. While Foxtel should have disclosed to the Commission the pending complaints discussed in this decision, the complaints do not warrant denial of the application.

5. The application should be approved.

6. Foxtel has shown entitlement to confidential treatment for the documents accompanying its Motion for Confidential Treatment filed on November 23, 1999, and the Supplement to Application filed on March 6, 2000, with the exception of the following document:

- Application, Exh. 3, Schedule 3.13 (containing a description of the pending formal complaint case against AMI Telecommunications).

O R D E R

IT IS ORDERED that:

1. Foxtel, Inc. (Foxtel) and AMI Telecommunications Acquisition Corporation (AMI Acquisition) are authorized pursuant to Section 854 of the Public Utilities Code to enter into the transaction, as more fully described in the application and its exhibits, by which AMI Acquisition will acquire control of Foxtel.

2. Foxtel shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as authorized herein, within 10 days of the date of this order. A true copy of the instruments of transfer shall be attached to the notification.

3. Foxtel shall file new tariffs incorporating any changes in name, rates, services and management authorized in the transfer transaction.

4. Foxtel and AMI Acquisition shall make all books and records available for review and inspection upon Commission staff request.

5. The certificate of public convenience and necessity granted to Foxtel in Decision 97-10-038 is transferred to the newly restructured Foxtel entity, which is authorized to continue use of the utility identification number U-5881-C.

6. Foxtel's Motion for Confidential Treatment is granted except with regard to the following document, which shall remain a part of the public record of this proceeding:

- Application, Exh. 3, Schedule 3.13 (containing a description of the pending formal complaint case against AMI Telecommunications).

7. With the exception of the document identified in the previous paragraph, the financial and business information referred to in the application as Exhibits 3, 5, and 6, which exhibits have been filed under seal as an attachment to Foxtel's Motion for Confidential Treatment, shall remain under seal for a period of two years from the date of this decision, and during that period shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the Assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. The portion of Exhibit 3 that Applicant made public in its March 6, 2000, Supplement to Application shall not be sealed.

8. If Foxtel believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

A.99-11-028 ALJ/SRT/hkr

9. Application 99-11-028 is closed.

This order is effective today.

Dated May 4, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners



Exhibit A
(Page 1 of 2)

210 N. Park Ave.
Winter Park, FL
32789

February 7, 2000
Via Overnight Delivery

P.O. Drawer 200
Winter Park, FL
32790-0200

Docket Office
California Public Utilities Commission
505 Van Ness Avenue, Room 2001
San Francisco, CA 94102

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**RE: Application 99-11-028
Joint Application of Foxtel, Inc. (U-5881-C) and
AMI Telecommunications Acquisition Corporation
For Approval of Stock Purchase Agreement**

Dear Sir/Madam:

Enclosed for filing is the original and four (4) copies of Foxtel, Inc.'s response to ordering paragraphs 4 of the Administrative Law Judge's Ruling Requiring Additional Service of Application and Extending Protest Period in the above-entitled proceeding.

Responses to ordering paragraphs 1-3 were filed by letter dated February 1, 2000.

Please acknowledge receipt of this filing by date-stamping the extra copy of this cover letter and returning it to me in the self-addressed, stamped envelope provided for this purpose.

Any questions about this filing or the original Application may be directed to my attention at (407) 740-8575.

Sincerely,

Robin Norton
Consultant to Foxtel

Enclosure

cc: Jessica Williams - Foxtel

file: Foxtel - CA
trns: CAo9908f

**Response of Foxtel, Inc. to Item 4 of
Administrative Law Judge's Ruling
Requiring Additional Service of Application and Extending Protest Period
Dated January 18, 2000**

Application 99-11-028

The above referenced ruling requires that a list be provided of all complaints, formal or informal, filed with the California Public Utilities Commission against the applicants or any related entities or individuals in this proceeding.

- 1) Following is a summary of a complaint filed with the California Public Utilities Commission concerning Foxtel:

A letter from a Donald Bussey to the California Public Utilities Commission, dated September 24, 1999 (Case No. 9-03-1074), was brought to Foxtel's attention on January 12, 2000. Foxtel submitted its response on January 26, 2000. The customer was upset that the rates charged when calling from the timeshare resort were higher than those charged by AT&T when he made calls from his residence. Foxtel charged Mr. Bussey the rates approved in its tariff. No further action has been taken at this point. Foxtel is willing to coordinate with the Commission to attempt to appease the customer, should further action be deemed appropriate. A copy of Foxtel's response to the Commission's inquiry is included as Attachment 1.

- 2) Following is a summary of a complaint filed with the California Public Utilities Commission involving AMI Telecommunications Company of Nevada, Inc., the current owner of Foxtel, Inc.:

Case No. 93-10-023 was opened when an individual named Otis Cranford, of Coachella Valley Communications, Inc. ("Coachella") filed a complaint against AMI, Foxtel's current parent, alleging that AMI was acting as an uncertificated reseller. At that time, LDDS was the underlying long distance carrier handling operator assisted long distance calls made by the guests at the time share resorts for which AMI installed toll restriction equipment. LDDS, a certificated carrier, carried the traffic and billed the calls. Coachella was a competitor in the timeshare resort market.

Hearings were held in 1995. Throughout the proceeding, AMI asserted that the complaint was initiated by a competitor either to force AMI to incur significant legal costs or to offer a cash settlement. Based on information received, it is believed that the Commission is aware that the representative of Coachella, a Mr. Sunde, was arrested and indicted on charges of mail fraud and extortion, and that he made references to Case no. C93-10-023 as part of his efforts to secure payments from other companies.

According to the CA PUC's Docket Office, the last action taken in the case was a ruling issued October 12, 1995 by the Administrative Law Judge rescinding the briefing schedule, and submitting the case for decision. No decision has been rendered to date pending completion of non-related matters by the Administrative Law Judge. A copy of the ALJ's October 12, 1995 ruling is included as Attachment 2.

The applicants are not aware of any other complaints filed with the CA Public Utilities Commission involving themselves, related entities or individuals.

(End of Exhibit A)