

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC JOINT APPLICATION OF RED)
FIBER PARENT LLC, RF MERGER SUB, INC.,)
CINCINNATI BELL, INC., AND CINCINNATI)
BELL TELEPHONE COMPANY LLC FOR (1))
APPROVAL OF THE PROPOSED INDIRECT)
TRANSFER OF CONTROL OF CINCINNATI)
BELL TELEPHONE COMPANY LLC TO RED)
FIBER PARENT LLC PURSUANT TO KRS)
278.020(6) AND KRS 278.020(7), OR)
ALTERNATIVELY, PURSUANT TO KRS)
278.020(6) AND A DECLARATION THAT)
APPROVAL UNDER KRS 278.020(7) IS NOT)
REQUIRED; (2) NOTICE OF THE PROPOSED)
INDIRECT TRANSFER OF CONTROL OF)
CINCINNATI BELL EXTENDED TERRITORIES)
LLC AND CBTS TECHNOLOGY SERVICES,)
LLC TO RED FIBER PARENT LLC; AND, (3))
ALL OTHER REQUIRED APPROVALS AND)
RELIEF)

CASE NO.
2020-00259

ORDER

On August 10, 2020, Red Fiber Parent LLC (Red Fiber Parent), RF Merger Sub, Inc. (Merger Sub), Cincinnati Bell, Inc. (Cincinnati Bell), and Cincinnati Bell Telephone Company LLC (CBT) (collectively, Joint Applicants) filed an application requesting approval of a proposed indirect transfer of control of CBT to Red Fiber Parent pursuant to KRS 278.020(6) and KRS 278.020(7), or alternatively, requesting approval pursuant to KRS 278.020(6) and a declaration that approval under KRS 278.020(7) is not required. On August 20, 2020, the Commission issued an order continuing the application for an additional 60 days pursuant to KRS 278.020(7) and establishing a procedural schedule

for review of the application. On August 28, 2020, Time Warner Cable Information Services (Kentucky), LLC, moved to intervene in this matter, but its motion to intervene was denied. On September 14, 2020, Joint Applicants responded to Commission Staff's First Request for Information. Joint Applicants have now requested that this case be submitted on the record for a decision on the merits.

BACKGROUND

Parties

Cincinnati Bell is a publically traded Ohio corporation with its principal office in Cincinnati, Ohio. Cincinnati Bell does not provide telecommunications services itself but does so through its various subsidiaries, which provide high-speed data, video and voice solutions to consumers and businesses over an expanding fiber network and legacy copper network.¹

CBT is an Incumbent Local Exchange Carrier (ILEC) and Eligible Telecommunications Carrier (ETC) under federal law that provides telecommunication services in Kentucky, Indiana, and Ohio.² CBT is a wholly owned subsidiary of Cincinnati Bell.³ Cincinnati Bell also owns two competitive local exchange carriers (CLEC), CBTS Technology Solutions LLC (CBTS), and Cincinnati Bell Extended Territories LLC (CBET) that operate in Kentucky, among other entities that operate in other states.⁴

¹ Application at paragraph 12.

² Application at paragraph 13.

³ Application at paragraph 12.

⁴ Application at paragraph 12–15.

Red Fiber Parent is a Delaware limited liability company that was established as an acquisition vehicle for the proposed transfer transaction.⁵ Once the transactions at issue are complete, Red Fiber Parent will be owned indirectly through MIP V RF Partners L.P. (MIP V Member), a Delaware limited partnership, by MIP V (FCC) AIV, L.P. (MIP V), another Delaware limited partnership, which is an investment fund managed by a member of Macquarie Infrastructure and Real Assets, Inc. (MIRA).⁶ MIRA's ultimate parent is Macquarie Group Limited, a publicly traded company incorporated in Australia.⁷ Certain alternative investment vehicles managed by the Private Equity Group of Ares Management Corporation (Ares), a global alternative investment manager with \$149 billion under management in March 2020, and Retail Employees Superannuation Trust (REST), an Australian public offer pension fund managing \$36 billion, will also own a minority stake in Red Fiber Parent when the merger is complete.⁸ Passive investors who hold indirect interests in Red Fiber Parent through MIP V Member, MIP V, the Ares alternative investment vehicles, and REST will have no voting or control rights regarding Red Fiber Parent, Cincinnati Bell, or CBT.⁹

Merger Sub is an Ohio corporation in good standing. It is a direct, wholly owned subsidiary of Red Fiber Parent and was also established as an acquisition vehicle for purposes of the transfer at issue.¹⁰ The proposed transfer will be accomplished through

⁵ Application at paragraph 5.

⁶ Direct Testimony of Anton Moldan (Moldan Testimony) at page 4, lines 17–20.

⁷ Application at paragraph 7.

⁸ Moldan Testimony at page 5, lines 11–17.

⁹ Moldan Testimony at page 5, line 18, through page 6, line 4.

a merger between Cincinnati Bell and Merger Sub that will ultimately result in the dissolution of Merger Sub as it becomes part of Cincinnati Bell.

Transaction

The proposed transaction is a holding company transaction in which Red Fiber Parent will become the parent of Cincinnati Bell and the indirect parent of CBT, CBTS and CBET. Pursuant to the Agreement and Plan of Merger, Merger Sub will merge with and into Cincinnati Bell, and as a result, Red Fiber Parent will acquire all of the outstanding shares of common stock of Cincinnati Bell, which shares will be converted into the right to receive \$15.50 in cash at closing of the transaction.

After closing of the transaction, Cincinnati Bell will remain the parent company of CBT, CBTS, and CBET, and Red Fiber Parent, rather than Cincinnati Bell's current shareholders, will own the entire Cincinnati Bell enterprise. The Commission authorizations currently held by CBT, CBTS, and CBET will continue to be held by those same entities. CBT will continue to provide service in Kentucky as it did before the transaction, and no tariffs will need to be amended or adopted.¹¹

Joint Applicants indicate that Cincinnati Bell and CBT are not expected to utilize any consulting services or other services provided by Joint Applicants or their parents or subsidiaries following the proposed transfer.¹² Rather, they state that the management team for Cincinnati Bell, which collectively has over 120 years of combined telecommunications industry experience, is largely expected to remain intact following the

¹⁰ Application at paragraph 6.

¹¹ Application at paragraph 22; see *also* Response to Commission Staff's First Request for Information (Response to Staff Request) (filed Sept. 14, 2020), Item 9.

¹² Response to Staff's Request (filed Sept. 14, 2020), Item 12.

transaction.¹³ Joint Applicants state that CBT, in turn, will continue to be managed and controlled by Cincinnati Bell directly and, therefore, “will continue to provide high-quality telecommunications services.”¹⁴

Joint Applicants assert that CBT will continue to have the financial capability to provide utility service through Cincinnati Bell to raise capital without reliance on outside capital. Joint Applicants note that Cincinnati Bell does not currently rely on outside equity capital to run its business and that it does not expect that to change.¹⁵ Joint Applicants indicated that the proposed transfer will not result in a default or accelerated payment obligation for any of CBT’s or Cincinnati Bell’s current debt.¹⁶ Joint Applicants further indicated that the proposed transfer is not expected to have any effect on Cincinnati Bell’s credit ratings.¹⁷ Joint Applicants also indicate that CBT will have additional resources available to it through Red Fiber Parent.¹⁸

More specifically, Joint Applicants explain that MIRA has substantial experience investing in the communications infrastructure industry over the past 20 years and that, as of the end of the first quarter of 2020, MIRA had \$136.95 billion in assets under management, of which \$107.90 billion were invested in infrastructure assets. Joint Applicants claim that MIRA’s substantial infrastructure management experience and deep

¹⁴ Moldan Testimony at page 5, lines 8–17.

¹⁵ *Id.* at page 5, line 22, through page 6, line 11.

¹⁶ Response to Staff’s Request (filed Sept. 14, 2020), Item 10.

¹⁷ *Id.*, Item 11.

¹⁸ Application at paragraph 33.

financial capabilities will place Cincinnati Bell in a better position to further expand infrastructure to meet demand for next generation, integrated communications services.¹⁹

Joint Applicants also stated that following the transaction CBT will maintain the same technical capabilities to provide adequate service that CBT possesses today. Joint Applicants' witness testified that "[a]ll equipment, buildings, systems, software licenses and other assets owned and used by CBT in the provision of its services will remain its assets after closing."²⁰ Joint Applicants also indicated that they do not expect CBT to transfer any physical assets used to provide telecommunication services following the merger.²¹

Notably, the Macquarie Group, through a subsidiary, Open Fiber Kentucky Company, LLC (Open Fiber Kentucky), is a partner with the Commonwealth of Kentucky in the KentuckyWired project.²² Joint Applicants state that internal controls are in place to ensure that certain companies, like Open Fiber Kentucky, currently affiliated with Red Fiber Parent or its parent companies that could obtain services from CBT will not obtain an unfair advantage. For instance, Joint Applicants state that Open Fiber Kentucky is owned by Macquarie Capital, an operating group entirely separate from the operating group within which MIRA sits, and that "MIRA operates behind a physical and electronic

¹⁹ Response to Staff's Request (filed Sept. 14, 2020), Item 8.

²⁰ Moldan Testimony at page 6, lines 22–23.

²¹ Response to Staff's Request (filed Sept. 14, 2020), Item 13.

²² Application at paragraph 8.

information barrier that separates it from all other Macquarie Group businesses, including Macquarie Capital.”²³

In filings with the Federal Communication Commission (FCC), Joint Applicants also indicate that MIRA owns other telecommunications companies that provide transport and internet services to wholesale and enterprise customers in Kentucky, among other states. However, Joint Applicants indicate that those companies, Missouri Network Alliance, LLC d/b/a Bluebird Network (MNA) and Illinois Network Alliance, LLC (INA), do not provide service in any counties that are part of or adjacent to Cincinnati Bell’s ILEC territory.²⁴ For that reason, Joint Applicants assert that MNA and INA’s service territories are complimentary as opposed to competitive such that affiliated ownership under MIRA will not negatively affect competition.²⁵

DISCUSSION

KRS 278.020(6) provides that:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.020(7) similarly provides that no entity “shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained

²³ Response to Staff’s Request (filed Sept. 14 2020), Item 1; *see also* Moldan Testimony at page 12, line 5 through page 13, line 13 (discussing measures to separate MIRA and Red Fiber Parent from Open Fiber Kentucky and other Marquarie Group businesses).

²⁴ Response to Staff’s Request (filed Sept. 14, 2020), Item 6, Attachment at 29–30 (FCC Approval Application).

²⁵ *Id.*; *see also* Moldan Testimony at page 11, line 20, through page 12, line 4.

the approval of the commission.” That statute further provides that that the Commission “shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest.”²⁶

Commission approval, pursuant to KRS 278.020(6) and (7), for the proposed transaction is only required for the ILEC and CBT.²⁷ Further, the Commission’s jurisdiction over CBT’s provision of service is more constrained than that of other utility types.²⁸ The Commission’s traditional jurisdiction over the reasonableness of retail rates and adequacy of retail service is primarily limited to the provision of basic local exchange service and, therefore, does not extend to the pricing for retail customers in most instances.²⁹ Additionally, regardless of the ownership of CBT, it is still subject to federal law regarding wholesale service and interconnection pursuant to the Federal Telecommunication Act of 1996.³⁰ Thus, the Commission’s review of any transfer of ownership of CBT is necessarily focused upon the areas over which the Commission has jurisdiction, such as pole attachments, limited instances of provision of basic local

²⁶ KRS 278.020(7).

²⁷ See Administrative Case No. 370, *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers* (Ky. PSC Jan. 8, 1998).

²⁸ See KRS 278.541-544; KRS 278.54611; KRS 278.5435.

²⁹ See Case No. 2019-00047, *Associates in Dermatology, PLLC v. Bellsouth Telecommunications, LLC dba AT&T Kentucky* (Ky. PSC Dec. 3, 2019), Order (“KRS 278.544 essentially eliminates the Commission’s traditional authority to establish reasonable rates and adequate service standards for nonbasic telephone services. However, the Commission retained jurisdiction over nonbasic services ‘as specifically stated in KRS 278.541 to 278.544,’ and it retained its existing jurisdiction over basic local exchange service.”).

³⁰ Pub. L. No. 104-104, 110 Stat. 56 (1996).

exchange service, interconnection with competitors and the effect on competition (under the aegis of federal law), and accuracy for billing.³¹

With regard to the areas over which the Commission has jurisdiction, the proposed transfer does not appear to affect CBT's ability to provide those services or comport with the various requirements therein. As noted above, the transaction proposed in the merger agreement, which is attached as Exhibit 1 to the application, will simply result in Red Fiber Parent becoming the owner of Cincinnati Bell as opposed to Cincinnati Bell's current shareholders. Upon closing of the transaction, CBT will continue to own all assets it owned prior to the merger, CBT will continue to operate under its existing tariffs, and Cincinnati Bell's management is expected to remain largely intact. The evidence also indicates that CBT, through Cincinnati Bell, raised capital internally, and the Commission finds that CBT's ability to do so is likely to be unaffected by the proposed merger. Moreover, to the extent additional capital is necessary, it appears that the ultimate owners of Red Fiber Parent will have access to or be able to raise such capital. Thus, the Commission finds that CBT will maintain the same financial, technical, and managerial ability to continue to provide the same or better quality of telecommunications services as they do today and, therefore, that Joint Applicants' request for approval pursuant to KRS 278.020(6) should be granted.

The Commission observes that Joint Applicants argue that approval of the transaction pursuant to KRS 278.020(7) is not required due to the exception in

³¹ See Case No. 2020-00179, *Electronic Application of Windstream Holdings, Inc., et al., for an Order Approving the Acquisition of Common Stock by Elliot Management Corporation, Pacific Investment Management Company, LLC, Oaktree Capital Group, HBK Capital Management, and Franklin Resources, Inc.* (Ky. PSC Aug. 25, 2020), Order; see also KRS 278.541 through KRS 278.544 (discussing the jurisdiction retained by the Commission).

KRS 278.020 (8). That exception states, in relevant part, that KRS 278.020 (7) shall not apply to any acquisition of control of any utility if the utility:

[D]erives a greater percentage of its gross revenue from business in another jurisdiction than from business in this state [and] the commission determines that the other jurisdiction has statutes or rules which are applicable and are being applied and which afford protection to ratepayers in this state substantially equal to that afforded such ratepayers by subsection (7) of this section.³²

Joint Applicants point out that Cincinnati Bell earns a greater percentage of its revenue from interstate transactions subject to the jurisdiction of the FCC and from operations in Ohio and that either the FCC or, in the event the FCC declines to exercise jurisdiction, the Public Utilities Commission of Ohio (PUC Ohio) will review the proposed transaction.³³

Given the Commission's limited jurisdiction over telephone utilities, there is a strong argument that a review by the FCC would satisfy the exception in KRS 278.020(8)(b) thereby making approval pursuant to KRS 278.020(7) unnecessary.³⁴ However, it is currently unclear whether the FCC will exercise its jurisdiction to review the application, and Joint Applicants indicated that action by the FCC is not expected on the application until sometime in the first half of 2021.³⁵ Further, while PUC Ohio will review the application if the FCC declines to do so and there are similarities between the Ohio

³² KRS 278.020(8)(b).

³³ Application at paragraph 28; see also Ohio Rev. Code § 4905.402(H)(1); 47 U.S.C. § 214; and 47 C.F.R. § 63.09.

³⁴ The standard under which the FCC reviews indirect transfers would appear to provide similar protections to the standard applied pursuant to KRS 278.020(7) for telephone utilities given the Commission's very limited jurisdiction over those utilities. See Application at paragraph 28, footnote 13 (discussing the federal standard). Though, for the reasons discussed, it is not necessary to make such a determination here.

³⁵ Response to Staff's Request (filed Sept. 14, 2020), Item 5.

and Kentucky standards, the record does not establish that PUC Ohio will consider, much less adequately consider, the public interest of Kentucky customers. Thus, the Commission finds that Joint Applicants have failed to establish that the exception applies in this case.

Joint Applicants argued in the alternative that the transaction should be approved pursuant to KRS 278.020(7). As noted above, that statute states, in relevant part, that the Commission “shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest.”³⁶ Because of the Commission’s limited jurisdiction over telephone utilities, the high level nature of the transfer of equity from numerous shareholders to a handful of investors, and the lack of anticompetitive concerns, the Commission finds that the transaction comports with each of these requirements and, therefore, that Joint Applicants’ request for approval pursuant to KRS 278.020(7) should be granted.

IT IS THEREFORE ORDERED that:

1. Joint Applicants motion to submit the application on the record is granted.
2. The transaction as proposed in the Joint Applicants’ application is approved pursuant to KRS 278.020(6) and (7).
3. Joint Applicants request for request for a declaratory order that the exception in KRS 278.020(8)(b) applies in this case is denied.
4. Joint Applicants shall notify the Commission in writing of the closing of the transaction within ten days of the closing.

³⁶ KRS 278.020(7).

5. If the transaction does not close within 180 days of the date of this Order, Joint Applicants shall file with the Commission a report on the status of transaction.

6. Any material revision to the proposed transaction shall be approved by the Commission.

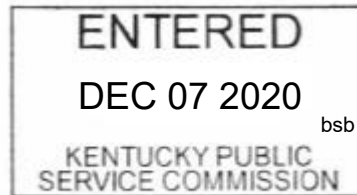
7. Any documents filed pursuant to ordering paragraphs 4, 5, and 6 shall reference this case number and shall be retained in the post-case correspondence file.

8. The Executive Director is delegated authority to grant reasonable extensions of time for the filing of any documents required by this Order upon a showing of good cause for such an extension.

9. This case is closed and removed from the Commission's docket.

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By the Commission



ATTEST:

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Deputy Executive Director

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