

Decision 90 03 047 MAR 19 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of American Network
Exchange, Inc. and its subsidiary,
Annex (California), Inc., to transfer,
and of Nycom Information Services,
Inc., to acquire control of a
certificate by merging American
Network Exchange, Inc. into Annex
Acquisition Corp., a subsidiary
of Nycom Information Services. Inc.

Application 90-01-006
(Filed January 5, 1990)

O P I N I O N

American Network Exchange, Inc. (AMNEX), its subsidiary Annex (California), Inc. and NYCOM Information Services, Inc. (NYCOM), seek authority to transfer control of AMNEX, a nondominant interexchange resale carrier certificated by the Commission, to NYCOM pursuant to a merger transaction.

Pursuant to an agreement and plan of merger between NYCOM and AMNEX, AMNEX and its subsidiaries will be combined with NYCOM's wholly owned subsidiary Annex Acquisition Corp. (AAC). The parties plan to close this transaction on or about March 31, 1990, and therefore request that the Commission consider the application on an expedited basis.

American Exchange Network, Inc.

AMNEX, formed in 1987, is a privately held Florida corporation with offices in Boca Raton, Florida. Annex (California), Inc. is a wholly owned subsidiary of Annex and is incorporated under the laws of the State of California. By Decision (D.) 87-09-064 Annex (California), Inc. is authorized to provide resold intrastate interexchange telecommunications services within California. Annex (California), Inc., provides high quality, competitively priced telecommunications services to

commercial users on a statewide basis pursuant to its tariff now on file with the Commission. Amnex (California), Inc., currently provides service by reselling capacity from underlying facilities-based carriers, such as MCI and US Sprint, using the switching and operator centers of its parent company, AMNEX, located in Orlando, Florida, and Los Angeles, California.

AMNEX and its subsidiaries are currently authorized by state regulatory agencies to provide resold interexchange and related intrastate telecommunications services in approximately 30 states located throughout the United States and to provide interstate service in all of those locations pursuant to Federal Communications Commission (FCC) authority.

Nycom Information Services, Inc., and Amnex Acquisition Corp.

NYCOM is a New York corporation which was organized on March 15, 1985. Amnex Acquisition Corp. (AAC), a recently formed Delaware corporation, is a wholly owned subsidiary of NYCOM. AAC was formed solely for the purpose of facilitating the proposed merger transaction. AAC is currently located at the same address as Nycom at Stamford, Connecticut.

NYCOM is authorized in New York, Massachusetts, and Maryland to provide resold intrastate interexchange telecommunications services and provides interstate and international services in those and several other locations pursuant to FCC authority. NYCOM provides high-quality, reliable telecommunications service at competitive prices to users in those states by reselling capacity of underlying facilities-based carriers such as MCI and US Sprint.

The Merger

In 1989, NYCOM and AMNEX determined that they could better serve their customers and compete more effectively in the intrastate long distance market by combining their businesses. Both NYCOM and AMNEX, currently serve contiguous but overlapping regions of the United States. Based on the companies'

complementary management and cross strengths, NYCOM and AMNEX anticipate that they will realize significant operational, financial, and marketing advantages by consolidating their businesses.

Accordingly, on December 5, 1989, NYCOM and AMNEX executed an agreement and plan of merger (agreement) whereby NYCOM will acquire control of AMNEX by: (1) merging AMNEX into NYCOM's wholly owned subsidiary company, ACC, and (2) converting each outstanding share of AMNEX common stock into 1.965 shares of NYCOM common stock. NYCOM does not currently own any stock in AMNEX or its subsidiaries. As a result of the merger transaction, AMNEX and its subsidiaries will cease to exist and all assets, properties, liabilities, and obligations of AMNEX and its subsidiaries will, by operation of law, become the assets, properties, liabilities, and obligations of AAC. By the terms of the agreement, all shareholders of AMNEX will cease to be holders of AMNEX stock and instead will become shareholders of NYCOM in the proportion noted above. The entity surviving the merger transaction (AAC/AMNEX) will remain a Delaware corporation and will be wholly owned by NYCOM. A diagram showing how the merger transaction will take place is attached as Appendix A.

AAC/AMNEX, subject to Commission approval, will assume effective ownership control of AMNEX's intrastate reseller authority granted by this Commission. Simultaneously with the merger, AAC/AMNEX will change its corporate name to American Network Exchange, Inc. in order to forestall any customer confusion that could arise as a result of the ownership change. Therefore, the merger will not result in any disruption of customer's service or customer's confusion. Indeed the transaction will be virtually transparent to customers in terms of the service they receive. AAC/AMNEX, as the entity surviving the merger, will continue to provide high quality, low-cost long distance, telecommunications services on a statewide basis to its customers

using the same facilities employed by AMNEX and pursuant to the rates, terms, and conditions set forth in AMNEX's existing tariff currently on file with the Commission. To ensure the continuity of high quality service, the surviving entity will draw its technical and managerial expertise from the principal officers of AMNEX and NYCOM, who will assume key managerial positions with the surviving entity.

The Proposed Transaction and the Public Interest

According to applicants, the acquisition of control of AMNEX by NYCOM will benefit both carriers by making available new network and other operating efficiencies, enhanced development, marketing resources, and greater financial resources. The acquisition of control by NYCOM will permit the surviving entity to generate higher revenues and improved profit margins with more control over major cost components, including network and hardware costs throughout the states served by AAC/AMNEX, including California. In particular, the parties anticipate that after consummation of the transaction, the parties will be able to distribute fixed costs over a larger subscriber base and achieve significant gains in operating and administrative efficiency as duplication of efforts is eliminated.

Applicants assert that, as a consolidated enterprise, AMNEX and NYCOM also will be able to market their long distance services more efficiently to an expanded customer basis. The transaction will permit the parties to devote their combined capital resources to engage in more effective, targeted marketing efforts. As a result of these financial advantages, the merged entity will be better able to maintain competitive prices for its services. In addition, the proposed acquisition of AMNEX furthers NYCOM's long-term business plan to expand operations into the other regions in the United States and to provide resold direct dial (1+) long distance services to its customer base.

NYCOM and AMNEX anticipate that the proposed acquisition of control will permit the merged entity, AAC/AMNEX, to compete more effectively in the long distance telecommunications market. As a stronger, more competitive company, the merged entity will be able to offer improved high quality, competitively priced long distance telecommunications service, and a variety of services to users in the State of California. California consumers will benefit from the increased availability of additional service options as the competitive strength of the merged entity invigorates the level of competition in California intrastate long distance service market. Given the numerous benefits to the parties and their customers that would result from the consummation of the proposed transaction, applicants assert that the public interest requires Commission approval of the proposed acquisition of control.

Request for Limited Waiver of Rules 36 and 17

Applicants observe that Rule 36(a) of the Rules of Practice and Procedure requires that applicants seeking consent for a merger submit an exhibit containing a "financial statement as outlined in Rule 17." Rule 17, in turn, requires an extensive disclosure of detailed financial and corporate information extending far beyond the balance sheet and income statement typically relied upon in the ordinary course of business.¹ The

1 "Wherever these rules provide that a financial statement shall be annexed to the application, such statement, unless otherwise provided herein, shall be prepared as of the latest available date, and shall show the following information:

- ' (a) Amount and kinds of stock authorized by articles of incorporation and amount outstanding.
- ' (b) Terms of preference of preferred stock, whether cumulative or participating, or on dividends, or assets, or otherwise.
- ' (c) Brief description of each security agreement, mortgage and deed of trust upon applicant's property, showing date of execution, debtor and secured party, mortgagor and mortgagee and trustor and beneficiary, amount of indebtedness authorized to be secured thereby, and amount of indebtedness actually secured, together with any sinking fund provisions.
- ' (d) Amount of bonds authorized and issued, giving name of the public utility which issued same, describing each class separately, and giving date of issue, par value, rate of interest, date of maturity and how secured, together with amount of interest paid thereon during the last fiscal year.

(Footnote continues on next page)

applicants have submitted, as exhibits to their application, financial information in lieu of that required by Rule 17. Exhibit D to the application contains financial information concerning American Network Exchange, Inc. Exhibit G to the application contains financial information concerning NYCOM Information Services, Inc. Applicants request a limited waiver of Rules 36 and 17 to the extent necessary, based on the following arguments.

(Footnote continued from previous page)

- '(e) Each note outstanding, giving date of issue, amount, date of maturity, rate of interest, in whose favor, together with amount of interest paid thereon during the last fiscal year.
- '(f) Other indebtedness, giving same by classes and describing security, if any, with a brief statement of the devolution or assumption of any portion of such indebtedness upon or by any person or corporation if the original liability has been transferred, together with amount of interest paid thereon during the last fiscal year.
- '(g) Rate and amount of dividends paid during the five previous fiscal years, and the amount of capital stock on which dividends were paid each year.
- '(h) A balance sheet as of the latest available date, together with an income statement covering period from close of last year for which an annual report has been filed with the Commission to the date of the balance sheet attached to the application.'"

Certain subparts of Rule 17 require information not normally maintained in the form requested in the ordinary course of business of either AMNEX or NYCOM. In particular, Rule 17 calls for financial information in a form that would require the parties to undertake unduly burdensome, time-consuming, and excessively expensive procedures to prepare. Moreover, all of the information required by Rule 17 relates to stock and security transactions (governed by Public Utilities (PU) Code §§ 816-830) and transfers and encumbrances of utility property (governed by PU Code §§ 851-854). In D.86-08-057, however, the Commission concluded that, based on the Commission's policy determination that regulation of nondominant interexchange carriers should be limited, nondominant carriers were exempted from the burden of complying with the requirements concerning stocks and security transactions set forth in PU Code §§ 816-830. The Commission also exempted nondominant resellers from the provision of PU Code §§ 851-854 concerning encumbrances of assets employed to secure debt issued pursuant to PU Code §§ 816-830. The applicants therefore submit that the Commission should grant the limited waiver of Rule 17 because it requires certain information that relates primarily to stock and securities transactions - transactions which the Commission has expressly declined to regulate for nondominant resellers - rather than merger transactions covered by PU Code §§ 851-854.

Therefore, in lieu of the information required by Rule 17, but consistent with its purposes, AMNEX and NYCOM submit the detailed information contained in Exhibits D and G to their application, including consolidated financial statements, cash-flow statements, balance sheets, and other financial information found in filings made with the Securities and Exchange Commission. According to applicants, the information included in Exhibits D and G provides an accurate and complete financial description of the applicants which will enable the Commission to assess public interest considerations in granting this application.

Accordingly, based on the extensive financial data submitted in the application and the excessive burden of submitting other information specified by Rule 17, the applicants seek a limited waiver of Rule 17's requirements to the extent necessary. Such a limited waiver would be in accordance with the Commission's express policy, articulated in D.86-08-057 and elsewhere, to adopt streamlined procedures for the processing of the applications made on behalf of nondominant interexchange carriers.

We have examined the financial information found in Exhibits D and G to the application. It sufficiently shows the financial condition of the applicants and supports the proposed merger. It clearly shows that both parties will benefit from the economies of scale anticipated to accrue to the merged entity after the merger is consummated. Since there are no protests to the application and no objections stated to the substitution of the financial information contained in Exhibit D and G for that required by Rule 17, we will grant the limited waiver sought by applicants.

Qualification to Transact Intrastate Business

By letter dated February 14, 1990, counsel for American Network Exchange, Inc., NYCOM Information Services, Inc., and its wholly owned subsidiary AMNEX Acquisition Corporation, forwarded to the Administrative Law Judge a certificate of qualification bearing corporation number 1657697 issued by the Secretary of State of California, showing that as of February 2, 1990, AMNEX Acquisition Corporation, a Delaware corporation, has complied with the requirements of California law and is qualified to transact intrastate business in the State of California.

Findings of Fact

1. Notice of the filing of the application appeared on the Commission's Daily Calendar of January 9, 1990. No protests have been filed.

2. A public hearing is not necessary.

3. Amnex (California), Inc., is a nondominant interexchange telecommunications carrier (NDIEC), as defined in Finding of Fact 1 of D.85-11-044.

4. In D.86-08-057 the Commission authorized and directed the Executive Director to grant noncontroversial applications by NDIECs for authority to transfer assets or control under PU Code §§ 851-855.

5. The merger of AMNEX and Amnex (California) into ACC is in the public interest.

Conclusions of Law

1. The request of applicants for a waiver of the provisions of Rule 17 and for the substitution of the financial information in Exhibits D and G for the information required by Rule 17 should be granted.

2. The application should be granted.

3. Since the application is not controversial, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. American Network Exchange, Inc., (AMNEX), its subsidiary Amnex (California), Inc., and NYCOM Information Services, Inc. (NYCOM) (applicants) may effectuate the merger agreement attached to the application. Applicants may merge AMNEX and Amnex (California) into Amnex Acquisition Corporation (ACC), a wholly owned subsidiary of NYCOM. After the merger is accomplished ACC may exercise the operating authority granted to Amnex (California) in Decision (D.) 87-09-064 (September 23, 1987) and may provide resold intrastate interexchange telecommunications services within the State of California, subject to the conditions specified in D.87-09-064, which we reiterate in Appendix B.

2. After the merger ACC shall use the former corporate identification number of Amnex (California), No. U-5138-C, in connection with the exercise of the operating authority acquired through the merger. The number shall appear in the caption of all original pleadings and in the title of pleadings filed in existing cases with this Commission.

3. Until it files another tariff, ACC shall operate pursuant to the tariff now on file for Amnex (California), Inc.

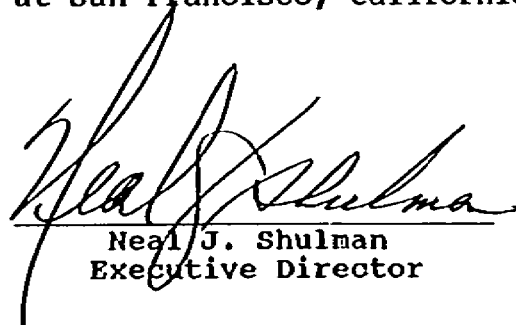
4. For this application only applicants may substitute the documents in Exhibits D and G to the application for those required by Rule 17.

5. ACC shall notify the Commission Advisory and Compliance Division in writing of the effective date of the merger within 10 days thereafter.

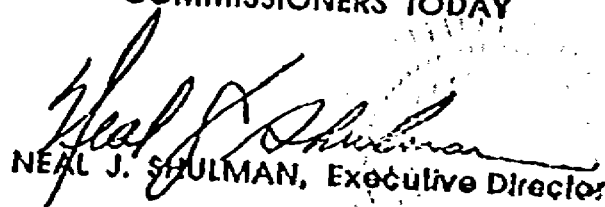
6. The application is granted.

This order is effective today.

Dated MAR 19 1990, at San Francisco, California.

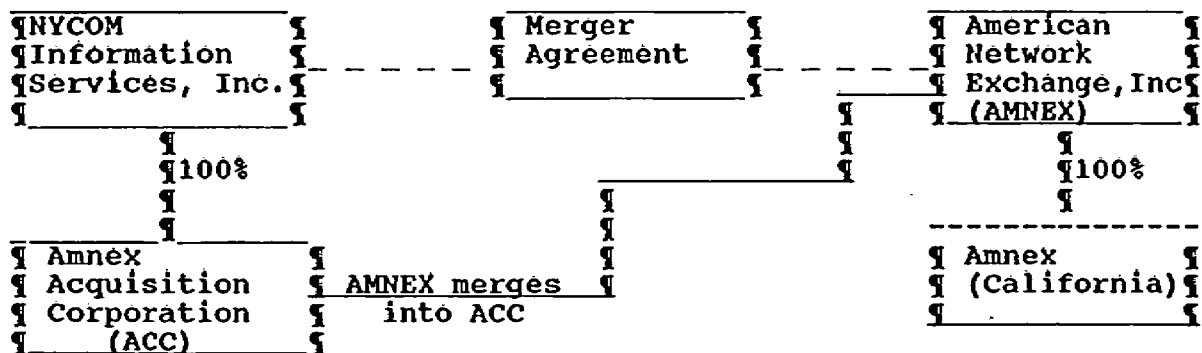

Neal J. Shulman
Executive Director

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

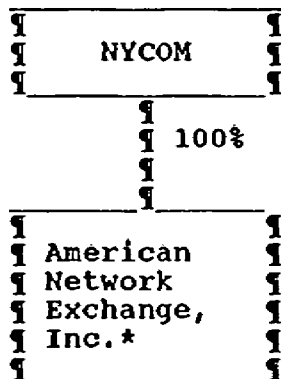

NEAL J. SHULMAN, Executive Director

APPENDIX A

DIAGRAM OF MERGER TRANSACTION



**DIAGRAM OF CORPORATE ENTITIES
AFTER THE MERGER**



* After the merger ACC changes its name to American Network Exchange, Inc. AMNEX and Amnex (California) have disappeared as corporate entities.

(END OF APPENDIX A)

6. Applicant should be subject to the user fee as a percentage of gross intrastate revenue pursuant to PU Code §§ 431-435. The fee is currently .1% for the 1987-88 fiscal year.

Conclusion of Law

This application should be granted in part to the extent set forth below.

O R D E R

IT IS ORDERED that:

1. The application of Amnex (California), Inc., is granted to the limited extent of providing the requested service on an interLATA basis, subject to the condition that applicant refrain from holding out to the public the provision of intraLATA service and subject to the requirement that it advise its subscribers that intraLATA communications should be placed over the facilities of the local exchange company.

2. To the extent that the application requested authorization to provide intraLATA telecommunications services, the application is denied.

3. Applicant is authorized to file with this Commission, 5 days after the effective date of this order, tariff schedules for the provision of interLATA service. Applicant may not offer service until tariffs are on file. If applicant has an effective FCC-approved tariff, it may file a notice adopting such FCC tariff with a copy of the FCC tariff included in the filing. Such adoption notice shall specifically exclude the provision of intraLATA service. If applicant has no effective FCC tariffs, or wishes to file tariffs applicable only to California intrastate interLATA service, it is authorized to do so, including rates, rules, regulations, and other provisions necessary to offer service to the public. Such filing shall be made in accordance with

General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than 1 day after filing.

4. Applicant is authorized to deviate on an ongoing basis from the requirements of GO 96-A in the following manner: (a) to deviate from the pagination requirements set forth in paragraph II.C.(1)(b) which requires consecutive sheet numbering and prohibits the reuse of sheet numbers, and (b) to deviate from the requirements set forth in paragraph II.C.(4) that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Evaluation and Compliance Division's Telecommunications Branch. Tariff filings shall reflect the 4% interim surcharge noticed in Ordering Paragraph 7.

5. If applicant fails to file tariffs within 30 days of the effective date of this order, applicant's certificate may be suspended or revoked.

6. The requirements of GO 96-A relative to the effectiveness of tariffs after filing are waived in order that changes in FCC tariffs may become effective on the same date for California interLATA service for those companies that adopt the FCC tariffs.

7. Applicant is subject to the 4% interim surcharge applicable to the gross revenues of intrastate interLATA services as outlined in D.87-07-090 in Order Instituting Investigation 83-11-05 dated July 29, 1987. The 4% interim surcharge collected shall be retained in an interest bearing account pending further order of the Commission.

8. Applicant is subject to the user fee as a percentage of gross intrastate revenue pursuant to PU Code §§ 431-435.

9. The corporate identification number assigned to Amnex (California), Inc. is U-4052-C which should be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

10. The application is granted in part and denied in part as set forth forth above.

This order is effective today.

Dated September 23, 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

- 5 -

Certified as a True Copy
of the Original
Leon D. Miller
6637, EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

(END OF APPENDIX B)