

Decision 90 06 068 JUN 20 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of Proto-Col for a Certificate)
of Convenience and Necessity)
to Operate as a Reseller of)
Telecommunications Services)
Within California.)

ORIGINAL
Application 90-04-058
(Filed April 30, 1990)

O P I N I O N

ATW Corporation will do business in California as Proto-Col Long Distance Telephone Company (applicant). Applicant seeks a certificate of public convenience and necessity under Public Utilities (PU) Code § 1001 to permit it to operate as a reseller of telephone service offered by communication common carriers providing telecommunication service in California.

On May 31, 1990 Call USA, Inc. (protestant) filed a timely protest to the application. Protestant is an interexchange carrier providing intrastate interLATA service in California. Its principal place of business is in Victorville. Protestant objects to the granting of this application and requests a public hearing.

Protestant alleges that applicant has failed to include its articles of incorporation and certificate of qualification to do business in California in its application and, more importantly, that applicant is unfit to be granted a certificate of public convenience and necessity because it failed to apply for and receive a certificate from this Commission before beginning operations.

Protestant points out that applicant appeared on CONTEL of California, Inc.'s (CONTEL) (the local exchange carrier) equal access ballot in protestant's service area as one of several interexchange carriers.

CONTEL has adopted the intrastate access tariff of Pacific Bell which requires that only "ICs" are to appear on the equal access presubscription ballot. "ICs" are defined as an entity "authorized by the California Public Utilities Commission to provide inter-LATA telecommunications services for its own use or for the use of its customers." Accordingly, applicant should not have appeared on the ballot since it is not yet certificated. When protestant contacted CONTEL asking why an uncertificated carrier was appearing on the equal access ballot, CONTEL responded that it was because applicant had been doing business in California for over two years.

Protestant asserts that it would be the wrong signal for the Commission to simply certificate the applicant. Protestant stresses that its protest is not filed to stifle market entry but to ensure that all carriers in the service area operate under the same set of rules, including (1) obtaining certification from this Commission; (2) contributing to the Universal Lifeline Telephone Surcharge and other gross revenue taxes designed to support local telephone service, the Commission, provision of telecommunications equipment to the deaf, and provision of 911 service; and (3) being certificated before appearing on equal access presubscription ballots.

Protestant asks that applicant be required to notify each of its customers that it does not have authority to provide intrastate interLATA telecommunication service and to cease and desist from doing so until certification is obtained. It urges that applicant be required to notify each local exchange carrier from whom it obtains originating access service that it is ineligible to be included on equal access ballots and not authorized to provide intrastate interLATA service at all. After that, applicant should file a new application to receive authority it should have sought and obtained two years ago.

Applicant filed a response on June 14, 1990. It points out that its articles of incorporation and certificate of qualification to do business in California were included with the original of the application contained in the formal file of A.90-04-058.

The response further asserts that Proto-Col has operated as a long distance telephone reseller in Arizona for more than seven years and that when CONTEL sent out its solicitation (in November, 1989) for equal access ballot, Proto-Col immediately began preparation to secure a certificate of public convenience and necessity to operate in California. The response asserts that but for unexpected delays, it would have had operating authority prior to June 8, 1990, the equal access cut-over date for CONTEL's Victorville area. The delays occurred in the California Secretary of State's office, which could not issue a certificate to do business in California for more than 60 days due to confusion over a similar name, and in the Commission's Docket Office, which could not accept the application from a foreign corporation without the required certificate to do business in California. Proto-Col emphasizes that it has at all times acted in good faith to timely secure operating authority in California.

Proto-Col requests that a certificate be granted as soon as possible and that it be made effective nunc pro tunc based on Proto-Col's good faith efforts to comply with Commission requirements.

We have examined the formal file in this matter and find that it does contain a certificate to do business in California (dated April 20, 1990) and articles of incorporation. Thus, we find the first issue of the protest to be without merit.

The charge of operating without authority is somewhat more troubling. However, when we examine the protest carefully, we do not see any facts alleged which would cause us to go to hearing over applicant's fitness. Instead, we have only protestant's

assertion that CONTEL included applicant on its ballot "apparently" because applicant had been doing business in California for more than two years. This is not a statement of fact, it is remote hearsay, and in the absence of any supporting facts, we find it insufficient. Rule 8.4(b) requires that protest contain "the facts the protestant would develop at a public hearing which could result in the denial of the application or petition for modification, in whole or in part." The protest does not allege any such facts. The response contains CONTEL's solicitation letter, which is addressed to applicant in Arizona, not California. The application contains a page from the Victorville Telephone Directory which shows entities offering telecommunications services in the area. Proto-Col is not listed. Given CONTEL's changing accounts of how applicant came to be on the ballot which are set forth in the protest, the inclusion of applicant on the ballot may well have been CONTEL's error. We see no reason to penalize applicant by delaying or withholding certification under these circumstances. We will grant the application.

We do note that the response does not expressly deny that applicant has conducted operations in California without a certificate. Indeed, it contains some troubling inferences that this Commission has countenanced such illegal operations. Parties should be very clear that this is not the case. A certificate of public convenience and necessity is required in all cases before offering service in California. If protestant continues to believe that applicant has operated without proper authority, it may file a complaint with us to this effect. We will not hesitate to take appropriate action if, after hearing, it has been demonstrated that this applicant, or any other person has operated in violation of the law. Such action may include fines under PU Code §§ 2110 or 2111 or suspension or revocation of operating authority for lack of fitness.

On June 29, 1983, the Commission issued Order Instituting Investigation (OII) 83-06-01 to determine whether competition should be allowed in the provision of telecommunication transmission service within the state. Many applications to provide competitive service were consolidated with OII 83-06-01. By interim Decision (D.) 84-01-037 and later decisions we granted those applications, limiting the authority conferred to interLATA service and subjecting the applicants to the condition that they not hold themselves out to the public to provide intraLATA service, pending our decision in OII 83-06-01.

On June 13, 1984 we issued D.84-06-113 in OII 83-06-01, denying the applications to the extent not previously granted. We also directed persons not authorized to provide intraLATA telecommunication service to refrain from holding out the availability of such service; we required them to advise their subscribers that intraLATA calls should be placed over the facilities of the local exchange company.

There is no basis for treating this applicant differently than those that filed earlier. Therefore, we will authorize interLATA service; but to the extent that the application seeks authority to provide intraLATA service, we will deny it.

Findings of Fact

1. Call USA has filed a timely protest alleging failure to comply with the Rules of Practice and unfitness of the applicant.
2. Applicant has responded demonstrating that it had complied with the Rules of Practice and stating that it had made every attempt to obtain certification from this Commission prior to the cut-over to equal access in the Victorville area.
3. Call USA did not allege any facts to support its assertion that applicant was operating as a public utility in California contrary to law.

4. CONTEL's solicitation letter for inclusion on its equal access ballot was sent to applicant in Arizona where applicant has provided public utility service for seven years.

5. The page from the Victorville Telephone Directory included in the application does not list Proto-Col as a provider of telecommunications service.

6. The pleadings (application, protest, and response) taken as a whole contain no facts indicating that applicant has operated unlawfully prior to certification.

7. Call USA may file a complaint before us if it believes applicant is or has operated contrary to law.

8. By D.84-01-037 the Commission authorized interLATA entry generally. ✓

9. By D.84-06-113 the Commission denied applications to provide competitive intraLATA telecommunication service and required persons not authorized to provide intraLATA telecommunication service to refrain from holding out the availability of such service and to advise their subscribers that intraLATA calls should be placed over the facilities of the local exchange company. ✓

10. There is no basis for treating this applicant differently than those that filed earlier. ✓

11. Applicant will provide telecommunication service using the leased facilities of other interexchange carriers. It has no plans to construct telecommunication routes of its own. ✓

12. It can be seen with certainty that there is no possibility that granting this application may have a significant effect on the environment. ✓

13. As a telephone corporation operating as a telecommunication service supplier, applicant is subject to:
(a) the current 2.5% surcharge applicable to service rates of intraLATA toll and intrastate interLATA toll (PU Code § 879),
(b) the current 0.3% surcharge on gross intrastate interLATA ✓

revenues to fund Telecommunications Devices for the Deaf (PU Code § 2881; Resolution T-13061), and (c) the user fee provided in PU Code §§ 431-435, which is 0.1% of gross intrastate revenue for the 1989-90 fiscal year.

Conclusions of Law

1. Protestant has not alleged facts concerning applicant's fitness sufficient to require public hearing. ✓
2. Applicant has submitted its articles of incorporation and a certificate of qualification to do business in California.
3. Based on the pleadings applicant is a fit and proper corporation to do business in California.
4. This application should be granted to the extent set forth below.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to ATW Corporation, doing business in California as Proto-Col Long Distance Telephone Company (applicant), to operate as a reseller of the interLATA telecommunication service offered by communication common carriers in California, subject to the following conditions:
 - a. Applicant shall offer and provide its services only on an interLATA basis;
 - b. Applicant shall not provide intraLATA services;
 - c. Applicant shall not hold out to the public that it has authority to provide, or that it does provide, intraLATA services; and
 - d. Applicant shall advise its subscribers that they should place their intraLATA calls over the facilities of the local exchange company.

2. To the extent that applicant requests authority to provide intraLATA telecommunication service, it is denied.

3. Within 30 days after this order is effective, applicant shall file a written acceptance of the certificate granted in this proceeding.

4. 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.

5. Applicant may deviate from the following provisions of GO 96-A: (a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers, and (b) paragraph II.C.(4), which requires 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 Commission Advisory and Compliance Division's (CACD) Telecommunications Branch. Tariff filings shall reflect all surcharges to which applicant is subject, as reflected in Finding of Fact 6.

6. The requirements of GO 96-A relative to the effectiveness of tariffs after filing are waived to the extent 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 shall file as part of its individual tariff, after the effective date of this order and consistent with Ordering Paragraph 4, a service area map.

8. Applicant shall notify this Commission in writing of the date service is first rendered to the public within 5 days after service begins.

9. Applicant shall keep its books and records in accordance with the Uniform System of Accounts specified in Part 32 of the FCC rules.

10. Applicant shall file an annual report, in compliance with GO 104-A, on a calendar-year basis using the information request form developed by the CACD Auditing and Compliance Branch and contained in Attachment A.

11. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

12. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from today.

13. The corporate identification number assigned to applicant is U-5209-C which shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

A.90-04-058 ALJ/MCC/jt

TO: ALL INTEREXCHANGE TELEPHONE UTILITIES

Article 5 of the Public Utilities Code grants authority to the California Public Utilities Commission to require all public utilities doing business in California to file reports as specified by the Commission on the utilities' California operations.

A specific annual report form has not yet been prescribed for the California interexchange telephone utilities. However, you are hereby directed to submit an original and two copies of the information requested in Attachment A no later than March 31st of the year following the calendar year for which the annual report is submitted.

Address your report to:

California Public Utilities Commission
Auditing and Compliance Branch, Room 3251
505 Van Ness Avenue
San Francisco, CA 94102-3298

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

If you have any question concerning this matter, please call (415) 557-2484.

ATTACHMENT A

Information Requested of California Interexchange Telephone Utilities.

To be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3251, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

1. Exact legal name and U # of reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).
If incorporated, specify:
 - a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Commission decision number granting operating authority and the date of that decision.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. A list of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

(END OF ATTACHMENT A)

14. Within 60 days of the effective date of this order, applicant shall comply with PU Code § 708, Employee Identification Cards, and notify the Chief of CACD's Telecommunications Branch in writing of its compliance.

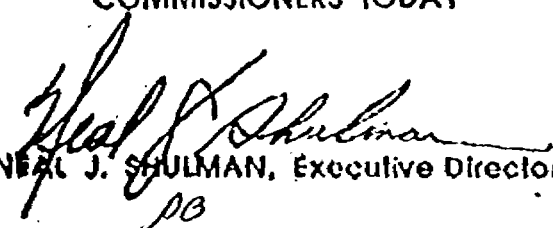
This order is effective today.

Dated JUN 20 1990, at San Francisco, California.

FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

President G. Mitchell Wilk,
being necessarily absent, did
not participate.

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


NEAL J. SHULMAN, Executive Director
PB