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Decision 91-05-049 May 22, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of NCN Communications, Inc. for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services within California.	ORIGINAL Application 90-04-050 (Filed April 27, 1990)

Alexander, Millner & McGee, by Barbara Monty, Attorney at Law, for NCN Communications, Inc., applicant.
Marlyn Ano, for Ainsly Ano & Associates and herself, protestants.
Armour, Goodin, Schlotz & MacBride, by Thomas MacBride, Attorney at Law, for California Association of Long Distance Telephone Companies; and Thomas J. Long, Attorney at Law, for Toward Utility Rate Normalization; interested parties.
Eleanor Yung Szeto, for the Commission Advisory and Compliance Division.
Judith Lamson, Attorney at Law, for the Division of Ratepayer Advocates.

O P I N I O N

Statement of Facts

Background of NCN Communications, Inc.

The predecessor corporations to NCN Communications, Inc. (NCN) have been in business since late 1982, until 1987, principally as a regional company selling discounted long distance telephone service and acquiring and servicing customers in the Phoenix, Arizona area. The current ownership began in 1985 as ATS Communications, doing business as National Communications Network,

Inc. (National).[1] In 1987 a decision was made to operate on a national basis using a multi-level marketing network to acquire long distance customers, with the target market being the residential customer and the small business owner in equal access areas, whose monthly long distance bill is approximately $500 or less.

As NCN describes it, the long distance industry is one of giants and midgets, with few medium-sized competitors. AT&T, MCI, US Sprint, and ITT control 90% of the market. Most of the others operate on a regional basis by ownership or access through a costly switch mechanism by which they direct their customers' calls to the various telephone lines linking any part of the country. NCN, a "switchless reseller," without such major investment in equipment, would operate through a "relationship" with one or more of the major nationwide long distance carriers, thus instantly obtaining access to a nationwide market.[2] The major carrier services the

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1 ATS Communications more recently does business as an affiliate of NCN, with National reportedly having gone inactive on or about October 1, 1989.

2 Relations between National and MCI commenced in March of 1988, according to NCN, and a certain number of National customers were placed on the MCI network, although about ten times as many were submitted but never successfully placed on the MCI network. Accordingly, National sought a relationship with AT&T and in October of 1989 signed an agreement to become a Software Defined Network customer of AT&T. The promise of unlimited, swift customer hookups and no line charges didn't materialize, and AT&T could place only up to 400 customers a month with a monthly line charge. NCN got its advance payments and deposits of approximately $450,000 returned and in February 1990 terminated the relationship, and reestablished a relationship with MCI, successfully achieving some hookups. In June of 1990 MCI filed a revised tariff which allegedly discriminated against switchless resellers, and following a dispute presently in litigation, MCI ceased serving NCN customers for NCN's account September 14, 1990. Meanwhile in July 1990 NCN contracted with Allnet and Allnet has been expeditiously connecting NCN's customers.

calls of NCN's customers, then bills NCN directly, providing tremendous discounts because of the lower overhead costs involved. NCN then bills its customers at its own rates, as well as providing customer service, operating off the carrier discount.

The common denominator of the NCN multi-level marketing program is the Independent Distributor, an independent contractor whose function is not only to acquire personal customers, but also to recruit other Independent Distributors. NCN wants not only to acquire creditworthy customers who will use long distance, but also to sell its Data Processing Service and Training Packages (DPS-Training).[3] Each Independent Distributor is paid a commission on the net collected long distance usage of his personally recruited customers, as well as a commission on sales of DPS-Training Packages. Through both recruitment success and package sales, advancement may be made to higher levels such as Area Director and Regional Director. Customers are not required to become Independent Distributors, but if they do, in order to gain access to training sessions and qualify for further advancement they must first purchase a $230 DPS-Training Package. Similarly, the cost of the Area Director Material/Training Package is $350. And there are available at a price, a substantial variety of forms, brochures, manuals, visual sales aids, videos, and tapes. Franchises, consisting of one or two states, may also be purchased.

There are no setup fees although normally there is a small charge to the customers levied from the local service provider for the changeover to NCN. The Independent Distributor who acquires a new customer earns 4% of that customer's monthly

3 The data processing service provides a distributor an accounting function, automatically issuing weekly and/or monthly earned commission checks, while the training package provides training materials and access to classroom training conducted by a Certified Area Director.

long distance bill when paid, and upline distributors and sales managers earn the remaining 7%. In some cases, because of possible non-qualifying factors attributable to a distributor, less than 11% would be paid out to the distributors. In such instances NCN retains any remaining percentage.

By 1988 capital apparently was needed to finance expansion of National's mushrooming telecommunication reselling business. Accordingly, in March of 1988 by a private placement memorandum stressing the high risk, non-liquid, speculative nature of its offering, National offered a 100,000 - 500,000 total share common stock offering with the offer to be open no later than October 31, 1988. The offering material revealed that three officer-director members of the Gurr family owned 99.99% of National's 1,501,000 shares outstanding before the offering. The offering was made as an Arizona corporation. The stock was no par value; sold for $1 per share; minimum investment 7,000 shares.

In July of 1989 National in a confidential offering memorandum offered 800,000 common shares, again stressing the high risk, non-liquid speculative nature of its offering, and stating that the securities had not been placed with the Securities and Exchange Commission or approved by the securities regulatory authority of any state. The offering material revealed that then, before the offering, the 3 officer-director Gurr family members owned 58% of the 8,692,623 common shares outstanding, while another 4 officers or directors owned another 19.9%. The offering would serve to dilute the Gurr interest to 53.8%, it was stated. This offering was made as a Nevada corporation.[4] The stock was par

4 According to statements made in the offering memorandum, National had been acquired by Magnetic, Inc., a Nevada corporation, which in turn had been renamed "National Communications Network Inc.," same name as its predecessor.

value $0.001, selling for 50 cents a share, minimum investment 20,000 shares.

Several months later franchising was determined upon as another method to raise capital. Assertedly, rather than wait the time it would take to audit National, it was decided to form a new corporation, perform an audit of the new entity, and then franchise. The new entity, the NCN of the present application, was incorporated on September 21, 1989 back in Arizona, qualified in some states, and assertedly on or about October 1, 1989 purchased all of the assets of National, and either issued or stated it would issue NCN stock to National shareholders in the same proportion as National Stock was held.

Meanwhile, as early as 1989, and well before it sought authority from this Commission to operate as a reseller of telecommunication services in California, NCN began its aggressive recruiting and sign up of customers and a distributor network within California, and in a number of instances provided long distance services.

NCN's California Commission Application - A.90-04-050

On April 27, 1990, NCN filed Application (A.) 90-04-050 with this Commission under Public Utilities (PU) Code § 1001 for a certificate of public convenience and necessity to operate as a reseller of telephone services offered by communication common carriers providing telecommunication service in California. The application set forth that NCN proposed to start operations by providing 24-hour interLATA long distance service between origination points in California which were equal access and serviced by MCI Telecommunications Corporation.

The Ainsly-Ano Protest to A.90-04-050

On June 1, 1990, Marlyn Ano and Ainsly Ano & Associates filed a protest to NCN's application. Ano, identified in part as an NCN Area Distributor, made numerous allegations pertaining to

NCN's financial representations to the Commission, its mode of operation, inducements to the public, problems with long distance carriers, stock sales, and misrepresentations. However, on June 28, 1990, before any hearing was set, the protest was withdrawn by Ano.[5]

Ex Parte Certification

In the absence of further protest, the application processing continued ex parte and by Decision (D.) 90-07-026 issued July 6, 1990 NCN was granted a certificate of public convenience and necessity and authorized to offer and provide reseller services restricted to an interLATA basis with service to begin after submission and approval of its tariff schedules. On July 23, 1990 NCN's Vice President and General Counsel Jeffrey G. Williams filed NCN's acceptance of the certificate.

The Ainsly-Ano Petition for Rehearing

On August 8, 1990, Ano and Ainsly Ano & Associates filed a petition with the Commission seeking a rehearing of D.90-07-026. In the petition Ano alleged that the Commission had erred in relying upon her June 28, 1990 withdrawal of her initial protest, which she argues should reasonably have alerted the Commission to investigate further the activities of NCN and the truth or falseness of NCN's representations in its application. She asserted that the withdrawal was made in response to lawsuit threats against her which led to a settlement agreement induced by a monetary offer unilaterally abrogated by NCN after the protest was withdrawn. She repeats assertions that NCN's financial statements in its application are at variance with financial

5 The California Association of Long Distance Telephone Companies on May 22, 1990 had also filed a protest limited to a possibility that the Commission might determine that no certificate of public convenience and necessity would be required. Otherwise it had no objection.

information submitted to prospective stock purchasers. She alleges that NCN is carrying on a "supermarket of NCN products," and makes more money from sales of promotional materials than from long distance service, which raises questions of a possible "pyramid or scam" enterprise preying on innocent California residents. She asserts NCN misrepresents its long distance carrier as well as its actual legal identity.

D.90-10-048 Orders Rehearing

Upon review of the Petition for Rehearing, the Commission concluded that the NCN conduct complained of may have a bearing on whether or not the public interest is served by the issuance of a certificate to NCN, and also whether NCN has misrepresented its financial status. Accordingly, by D.90-10-048 issued October 12, 1990 the Commission granted rehearing, ordering applicant and all interested parties to attend a prehearing conference (PHC) to be scheduled.

The matter was assigned to Administrative Law Judge (ALJ) John B. Weiss. On November 22, 1990 NCN's General Counsel Williams telephoned the ALJ regarding scheduling, seeking delay. He was informed that the PHC would be scheduled late in November. Formal notice of the PHC set for November 30, 1990 was mailed to all parties on November 9, 1990.

On November 23, 1990 Attorney Barbara S. Monty of the San Francisco law firm of Alexander, Millner, & McGee, telephoned the ALJ to request a continuance, stating her firm had been retained only "yesterday" by NCN. Pointing out that NCN had had ample time to retain local counsel, that there were still seven days before the PHC, and noting the Commission's concern over the allegations, the ALJ denied the request.

The November 30, 1990 PHC

On November 30, 1990, the scheduled PHC took place in San Francisco with appearances by NCN, Ano, the California Association of Long Distance Telephone Companies, and Toward Utility Rate

Normalization. The Division of Ratepayer Advocates (DRA) had advised it would not participate. After the general parameters for the hearing were discussed, arrangements were made for an exchange of witness lists (deadline December 3, 1990),[6] exchange of prepared testimony (deadline December 17, 1990), with hearing set for January 10, 1991 (and January 11, 1991 in reserve). Deposition of Ano by NCN's attorney Monty was scheduled and noticed for December 21, 1990, and subpoenas were issued.

On December 20, 1990 the ALJ was informed that as of December 17, 1990, Monty's law firm of Alexander, Millner & McGee no longer represented NCN. The previously noticed deposition of Ano was thereupon cancelled. Nonetheless, concurrently, both the applicant and protestant parties exchanged prepared testimony for their intended and announced witnesses for the hearing. NCN's General Counsel Williams (from NCN's Gilbert, Arizona, office) sent prepared testimony for himself as well as proposed witnesses Splain and Manning, both California Distributors of NCN. Ano sent prepared testimony for herself as well as that for proposed witnesses Crisologo, Sansano, Newton, and Moran.

On December 18, 1990 the Commission's DRA filed notice of its participation in the proceeding.

The January 10, 1991 Hearing

The duly noticed public hearing was held in San Francisco before ALJ Weiss on January 10, 1991. At the outset NCN's attorney informed the ALJ that her law firm had been re-retained several days previous to the hearing, but that the NCN principals and witnesses were not able to make it to the hearing. She stated that NCN had been sold, that she had been retained to appear, state the new circumstances and request permission for a reapplication by

6 Ano did not comply until after the deadline and warning by the ALJ.

NCN, meanwhile allowing NCN to continue serving existing customers. Stating that her information was obtained from Detroit, Michigan, Attorney Mike McInerny, who she understood to be one of the four controlling interests in the new ownership. Monty stated that since the November 30, 1990 PHC the NCN situation had changed dramatically. She related that on December 10, 1990, after a 6-month study, the Gentry Group, a Michigan corporation, had purchased 71% of the outstanding common shares of NCN via "issuance of additional shares." Monty asserted that the Gentry Group was aware of NCN's many problems, past mistakes, and was working on them; that it had signed with Allnet as well as making an agreement with SPRINT to serve those NCN customers previously signed up but who were never hooked up. She asserted that the new NCN Board of Directors had long experience in management of multiple-level marketing and telecommunications, and were putting NCN's house in order.

Monty asked that NCN be allowed to refile under the Gentry Group and be given opportunity to put forward current facts regarding the Board of Directors, who the shareholders are, the management situation, the financing and capitalization, operations, the technical consultants, and legal counsel in all the states. Meanwhile she asked to continue service while not signing any new customers during the interim.

The other participants in the hearing were opposed to any delay; noting that NCN had notice and should have been present ready to proceed. The Ano representative expressed concern based upon their knowledge that the Gurrs were still in the organization, stating that changing the management team and "reorganization" was a familiar practice at NCN. They noted that Regional Directors, Distributors, etc. were continuing to obtain money from Californians under misrepresentations and that unless NCN was stopped quickly there could be no effective remedies. DRA argued that there were serious unanswered questions regarding NCN's

fitness to serve the public, and that until there is a hearing NCN should not continue to serve, noting that if NCN were to be decertified, its customers would still be able to obtain long distance service, perhaps not as direct a dialing pattern, but their ability to access the long distance network need not be in jeopardy. DRA argued that NCN had had its opportunity to prepare for this hearing, but was not here so whether or not it has connected customers should not influence the proceeding. The attorney for the long distance telephone companies pointed up another issue raised by the Gentry Group's acquisition of NCN--that of apparent noncompliance with provisions of PU Code § 854 in the transfer of control by a stock transaction without prior Commission authorization.

After hearing argument the ALJ denied a continuance and ruled that he would proceed with the scheduled hearing, taking testimony and evidence from those witnesses present, allowing cross-examination, and taking any closing argument before submitting. ALJ Weiss observed that both NCN and the Gentry Group were aware of the hearing scheduled for January 10, 1991, and yet neither was "able to make it" despite the obvious stakes in the proceeding. He noted the pattern of conduct which can only be construed as one designed to delay or avoid Commission review despite the serious charges about NCN misrepresentations and conduct which go unanswered. He noted the continued confusion and frustrations of signed up but unconnected customers--customers with no recourse. The ALJ then proceeded to take evidence.

Protestant's Evidence

The protestant introduced testimony and exhibits through four witnesses:

Testimony of Marlyn Ano: It was Ano's testimony that she had been recruited in April of 1984 by NCN Regional Director and Trainer Sansano. At that time Ano paid $175 (today $230) to become a Distributor, and another $295 (today $350) to become an Area

Director which status was to entitle her to various commissions and overrides. In the approximate year of her association with NCN she developed her own downline of over 1,000 of these, however, only about 100 were ever hooked up. She testified of the complaints and confusion derived from NCN's inability to hook up, or deliver on its changing representations of long distance service through AT&T and MCI, and of NCN's failure to accept or respond to customer complaints or problems by telephone.[7] Meanwhile, NCN pressured for production on recruiting more distributors and customers and pushed sales of promotional materials,[8] some bearing names of outdated carriers (which materials NCN refused to replace or buy back). Ano testified that NCN never replied to telephone or written complaints for refunds.

Ano further testified that in July of 1989 she had been contacted by NCN Vice President Duane Robinson and offered participation in what was said to be NCN's initial stock offering. Urged to take 40,000 shares at 50 cents a share, she declined that number but agreed to join with her daughter Cora Lee Crisologo and invest $5,000. On July 24, 1989 her daughter executed the required subscription agreement sent her by Robinson, and returned it with $5,000.[9] On September 7, 1989 Crisologo was issued Certificate

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7 An allegation corroborated by the May 1990 issue of NCN's Communicator which contains a statement that NCN's Marketing Department would only accept telephone inquiries from regional directors, franchise holders, and field vice presidents.

8 From a shopping list of some 47 supplies and promotional items.

9 On July 17, 1989, Jerry Gurr, NCN's president, announced that NCN as of July 24, 1989 had become a public company, and that its stock sometime during the last week of July 1989 would be traded on the Over-the-Counter market. However, when Ano contacted the

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No. 1031, a 10,000 share certificate of National, identified on its face as an Arizona corporation. That certificate was signed by Jerry M. Gurr and Robert Gurr for the corporation.

Ano also testified that after NCN in August 1989 announced a franchising program, she had been contacted by telephone by Robinson and offered a franchise for $50,000. In November of 1989 she went to Phoenix, Arizona for a two-day meeting of prospective franchise buyers. Although she understood that $2.7 million in franchises were sold, she decided not to invest. Later, early in 1990, she again expressed interest, asking about California, and Robinson told her that California's franchise had been sold.

By April of 1990, when NCN filed its California application for authority to operate in the State, Ano had become disenchanted with NCN. Frustrated by customer complaints and NCN's facile unmet promises relating to its long distance carriers and failures to hook up customers, misrepresentations, and evasions concerning the status of the Crisologo stock shares, NCN's actual legal identity, disturbing news about NCN legal problems in different states and an adverse Arizona Better Business Bureau report on the enterprise,[10] NCN's refusal to replace or buy back

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three brokerage firms (respectively in San Antonio, New York, and Spokane) in which the shares allegedly were traded, she was informed they never traded the shares.

10 Ano followed up on these leads and incorporated as exhibits in her prepared testimony correspondence from dissatisfied business and other customers in Colorado and California demanding refunds and complaining of misrepresentation regarding promised AT&T service, use of the NCN "calling card," the "so-called" training

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forms and sales materials bearing outdated information, constant pressures to sell NCN's promotional products coupled with glowing commission promises which never materialized, and perceived substantial and material discrepancies between financial statements in its stock offering and those submitted to the California Commission, Ano determined to file, and did file her June 1, 1990 protest to the NCN application.

It was Ano's further testimony that about two weeks later NCN's Bill Walker (formerly National Sales Director, but after NCN's May 17, 1990 "reorganization," NCN's Senior Vice President) repeatedly telephoned her, admitting past NCN mistakes and asked her to withdraw her protest and give the "new management" another chance. About this same time Ano had engaged an attorney, Rosalinda W. Azarraga to try to get back her downline organization (then cancelled by NCN) and to resolve the Crisologo stock questions. The correspondence incorporated into Ano's prepared testimony indicates that Azarraga and California attorney Thayer C. Lendauer (who assertedly acts as legal counsel to NCN in marketing matters and California Public Utilities Commission (PUC) application hearings), about June 8, 1990, worked out a settlement under which Ano was to withdraw her PUC protest. However, for

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received and failures to provide any hookup of signed customers. She also included a copy of Order No. 90-1150 in Docket No. 89-643-C of the Public Service Commission of South Carolina dated December 3, 1990 denying NCN's Petition for Rehearing and Reconsideration of Order No. 90-988. In the latter the Commission had noted a lack of NCN control of its independent multi-level marketing force, its placement of more emphasis on sale of training material than the sale of telecommunication service, and concluded that NCN management lacked the experience and technical capability and support to effectively manage and operate a telecommunication resale service in that state.

unexplained reasons Azarraga ceased to represent Ano, and that settlement was not apparently accepted by Ano.

Ano then testified that NCN's new president Charles Bisbee joined Walker in further telephone efforts to persuade her to withdraw her protest. NCN's lawyer Lindauer also threatened legal action, on June 26, 1990 sending Ano an ultimatum letter. That letter, also incorporated into Ano's prepared testimony, offered her the choice of signing an enclosed withdrawal of her protest (to be delivered to then Chief ALJ Carlos at the PUC by 3 p.m. June 29, 1990) or facing an NCN civil action for damages (in excess of $15,000 and stated to represent NCN's costs that would be incurred in defending its PUC application plus lost interim revenues caused to NCN by Ano's failure to adhere to the Azarraga-Lindauer settlement, and by Ano's filing of a "spurious" protest). The letter also threatened to include Azarraga in the civil action and to also refer her conduct to the California Bar Association if discovery showed she lacked settlement authority in negotiating the June 8, 1990 settlement with Lindauer.

Ano next testified that at the "last minute we made an arrangement" that NCN would buy back the stock and pay the expenses Ano had incurred leading up to the protest. Ano testified she was to be paid $5,000 for expenses and $40,000 for the stock, and that her downline would be returned.[11] Ano testified that the telephone agreement was confirmed in writing by a June 28, 1990 letter from NCN's General Counsel Williams, a letter incorporated into her prepared testimony. This letter had enclosed 2 checks; one dated June 28, 1990 for $5,000, and another postdated July 28, 1990 for $40,000. Photocopy facsimiles showed both checks were

11 Ano said that Bisbee told her they didn't have cash at the moment, but would send $5,000 and a postdated check for $40,000, thereby allowing NCN 30 days to raise the money.

signed by Jerry W. Gurr. Neither check stated what its respective payment was for, stock or expenses. Inter alia, Williams' letter stated that by the settlement Ano agreed that:

> "Neither you nor any member of your 'group' shall mention, describe or allude to the terms or existence of this agreement to any person for any reason, except to state that the stock was bought back, the downline returned, you have withdrawn the protest and that your are satisfied." [sic]

The letter also stated Ano agreed she would not cash, deposit or otherwise negotiate the $40,000 check until July 28, 1990, and that within 30 days of June 28, 1990, Ano would deliver to NCN the Crisologo stock. The letter, however, also did not specify what each check applied to, whether stock or expenses.

Ano testified that the $5,000 check was good, but that on July 27, 1990, the day before the second check was due, Williams sent her a FAX letter stating NCN would not honor the $40,000 check. Ano stated that Williams' letter, couched in legal terms, contained false allegations and accused her of "economic extortion." Williams' letter, incorporated in Ano's prepared testimony and entitled "Further Memorialization and Modifications," inter alia, stated that NCN had sent $5,000 for the Crisologo stock, but had not yet received it. Williams stated:

> "Fortuitously, in my June 28, 1990 letter, I did not commit NCN to paying you a sum of money, but instead I committed NCN to '...send you two (2) checks,...one in the amount of $40,000.00.' I say fortuitously because I believe that you applied a kind of economic extortion or economic duress to obtain that $40,000.00, and it would be sad indeed if that transaction were allowed to stand. You gave no additional consideration for the $40,000.00; you were already committed to withdraw the Protest in return for changing the 'downline' structure, according to the terms of the June 8th agreement. The duress, or pressure in the nature of extortion, which you applied is evident and indisputable.

> "Notwithstanding that we view your action as a serious matter, we do not wish you ill or bear malice toward you. As you may be aware, there is presently a stop payment order in effect with respect to the $40,000.00 check. While we have no present intention to press criminal charges against you, it is also true that we have no present intention to remove the stop payment order that relates to the check."

Ano testified she immediately telephoned Walker who told her to write NCN demanding payment. She did on July 30, 1990. NCN did not pay the $40,000, and Ano did not return the stock certificate to NCN. After this incident, which she considered a breach of good faith, Ano determined that it would serve the best interest of California residents that NCN be confronted with the issues she found or encountered, and on August 8, 1990 filed the present application for rehearing with the Commission.

Ano also testified that after she filed her petition for rehearing, on approximately December 17, 1990, about the eve of the subpoenaed deposition date, a Norris Schulueter from St. Joseph, Illinois, telephoned. Scheleuter stated he was a franchise owner who had paid the Gurr interests $200,000 for his franchise; that he wanted to revitalize NCN and keep it in business, so he had put the Gurr interests together with the Gentry Group so that Gentry could buy NCN. He wanted to know if Ano would be willing to negotiate to withdraw her rehearing protest with the PUC. She stated she declined because as he conceded, the Gurrs still own part of NCN.

Testimony of Cora Lee Crisologo: Crisologo testified that she had joined NCN in April 1989 and became a Distributor/Area Director. She personally witnessed aggressive sales techniques by NCN national directors and officers pushing a defective product, resulting in endless customer complaints that were not answered. She stopped working with NCN around March of 1990. She testified she agreed with Ano's testimony regarding the lack of training provided and long distance carrier problems encountered with NCN.

Testimony of Alexander Sansano: Sansano testified that he had been acquainted with Bill Walker, National NCN Sales Director, and Tom Norfleet (after May 1990 reorganization the NCN Chairman of the Board) since 1987 while they were National Directors of another long distance company. He was invited to meet them in Los Angeles and met them at a seminar the two conducted for NCN late in 1988. Sansano testified that he was appointed Area Director and later the first Regional Director in Northern California, thereafter conducting training seminars for hundreds of people in different hotels and homes, recruiting customers and distributors. Unable to answer questions about NCN's failure to hook up customers, NCN's refusal to pay back deposits, or make refunds, he became embarrassed and resigned. He testified that he had concluded that NCN was more a marketing company ready to sell any product for profit, in the guise of a long distance service reseller. He found further support for his conclusion after hearing NCN Vice President Tom Williams announce in a meeting that a number of companies had contacted NCN to sell their products. He found that after several years of operating, NCN had been very successful selling memberships, franchises, supplies, and secondary products, but not long distance service.

DRA's Evidence

While DRA offered no witnesses, it did sponsor four exhibits to which exception was taken. The ALJ thereupon took official notice of the four submissions as follows:

1. A November 9, 1990 letter from the Vacaville Art League asking about NCN's operating practices, and enclosing copies of an NCN-nonprofit organization agreement and NCN literature offering long distance service to the organization's members at discount with an eight percent override of the collected usage for the sponsoring organization.

2. A September 13, 1990 letter from a California consumer asserting that NCN was

employing deceptive marketing practices representing that service would be through AT&T but furnishing it through MCI, and being unavailable and nonresponsive to complaints.

3. A copy of Order No. 23773 dated November 16, 1990 of the Florida Public Service Commission cancelling hearing that had been ordered following numerous consumer complaints, and in view of Commission adoption of a September 18, 1990 settlement offer from NCN and NCN agreement to adhere to numerous listed terms and conditions, as well as payment of a $20,000 fine, granting NCN a preliminary certificate--provided no protest is filed.

4. A copy of a September 25, 1990 order of the Minnesota Public Utilities Commission denying NCN a certificate of public convenience and necessity after concluding that NCN's marketing organization is not an acceptable means of selling regulated telecommunications service; that its distributors lack training and are not accountable, resulting in a system not beneficial to its distributors, customers, or the general public. The order also contained a cease and desist order requiring NCN to stop providing service in Minnesota, and requiring notice and refunds.

Applicant's Evidence

Applicant's attorney Monty stated that she represented both NCN and the Gentry Group, but was not prepared to present witnesses nor to address the issues, and was appearing solely to present the changed NCN circumstances and to request permission for the Gentry Group to reapply. However, Monty did cross-examine Ano with regard to the stock transaction and the circumstances surrounding Ano's withdrawal of her protest, and Crisologo as to when she ceased working with NCN. Monty also moved to admit copies of the prepared testimony of Williams (and attached exhibit

material), Manning and Splain,[12] although the sponsor witnesses had not appeared. The ALJ accepted these not as exhibits but as a form of admissions against interest.[13]

Closing Statements

In closing statements DRA argued that the Commission should either dismiss or deny the NCN application and require that NCN notify all California customers and distributors in its marketing chain of such a disposition, with a notarized verification of its compliance with the Commission's order to be filed within ten days after the order. DRA would also require NCN to refund to each customer $10 to cover the charges for switching both to and from NCN, and to furnish a California customer and distributor list to the Commission within three days of the order.

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12 The proposed "prepared testimony" of NCN General Counsel Williams of interest here contained a history of NCN stating it was an Arizona corporation engaged in the resale of long distance service, and became a subsidiary of the Gentry Group, a Michigan corporation, through sale of 71% of NCN's outstanding common stock via issuance of additional shares. Included is a brief statement regarding the Crisologo stock, its cancellation, and the fact that the certificate was not returned. There is also a brief history of NCN's carrier relationships, and descriptions of NCN's marketing plan and franchising results. Attached are three "exhibits": Exhibit A is stated to be the documents read and signed by Crisologo in purchasing NCN stock; Exhibit B is an NCN 4/5/90 financial statement and auditor's report; Exhibit C is copies of NCN-carriers correspondence; and Exhibit D is a 76-section concept statement of NCN and its marketing plans.

The proposed "prepared testimony" of Manning (Oakland) and Splain (Napa), NCN distributors and area directors, are identical statements on behalf of NCN and contain copies of 12/17/90 downline reports.

13 Adopting as a rationale that "admissions against interest" are statements made by a party or one in privity with or identified in legal interest with such party, and are admissible whether or not the declarant is available as a witness. The worth, weight, and credibility of these is for the ALJ and the Commission.

The protestants asked that the Commission immediately revoke the existing certificate to prevent NCN from continuing "setting up customers and selling their products in California." NCN argued that the testimony presented was of actions and from persons who have not been active in NCN since March of 1990; and yesterday's problems should not jeopardize the continuity of current customers' service until the Gentry Group can reapply and complete steps being taken to cure any of the former problems.

After closing statements the matter was submitted for decision.

Decision

The primary function of public utility regulation is to fairly control public utilities for the protection and welfare of the general public, and the granting or withholding of a certificate of public convenience and necessity is an exercise of the State's power to determine whether the rights and interests of the general public will be advanced by an applicant in providing the service proposed. The Commission represents the public interest and is charged with the protection of that interest (Hanlon v. Eshelman (1915) 169 C. 200, 202-203; Sale v. Railroad Commission (1940) 15 C. 2d 612, 617-618).

The Commission, in granting rehearing, was not reversing itself or ordering a new trial; it was only opening the door for the receipt of new or additional evidence or argument which it might consider in addition to the record theretofore made, for purposes of reconsidering matters that might have been mistakenly construed in the original decision or considering matters that might have been overlooked in the original decision, or determining the effect of new evidence on the original decision--all to the point of deciding whether or not that original decision should be affirmed, changed, or abrogated (Geo. F. Pearce (1964) 63 CPUC 587; Gen Tel. Corp. of Cal. (1967) 67 CPUC 393). Since D.90-07-026 was not suspended by the Commission, the authority to operate granted

by that decision remained in effect even though rehearing was ordered by D.90-10-048 (Pearce, supra at 588).

It must be remembered that in this instance the certificate was granted ex parte after Ano withdrew her initial protest. In retrospect it is now apparent that we should have been alerted by the contents of that initial Ano protest to the desirability of a formal hearing before granting the certificate. However, the certificate was granted.

When, after we granted the certificate, Ano returned with her second protest clothed as an application for rehearing, it received closer scrutiny. Technically, it failed to meet the PU Code § 1733 and Rule 85 time limit for a rehearing application. However, since PU Code § 1708 provides that the Commission may upon notice and after opportunity to be heard, rescind, alter, or amend any prior order or decision, and Rule 87 provides for deviations from our Rules of Practice and Procedure for good cause, in view of the seriousness of Ano's allegations and exhibits, we issued D.90-10-048 ordering a rehearing.

At the PHC NCN's attorney Monty stated that NCN's witness for the hearing would be NCN's General Counsel Williams. Subsequently, after Monty ceased as NCN's representative, Williams himself on December 17, 1990 submitted his prepared testimony and exhibits intended for the January 10, 1991 hearing. Note that this was after the December 10, 1990 sale to the Gentry Group of the controlling interest--a fact revealed as such only at the January 10, 1990 hearing, and noted in the Williams' prepared testimony as an anticipated event. But then Williams did not show up at the well-noticed January 10, 1991 hearing, nor did any of the Gentry Group appear, although as Monty acknowledged, both were aware of the scheduled hearing. Monty, reassociated for the hearing, had no witnesses to present for NCN or the Gentry Group.

While no party is bound to introduce witnesses or evidence in a rehearing, it is also not incumbent upon the

Commission staff to develop applicant's case. The Commission expects an applicant to make such an affirmative showing, and to rebut any protests, as will support its pleadings and warrant sustaining the prior grant of authority. And where a reopening is clearly bottomed in grievous allegations and evidence as those posed by Ano's application, and as were essentially at least in part conceded by NCN's attorney at the January 10, 1991 hearing, any failure to affirmatively support the grant of authority by presentation of competent testimony and evidence tends to imply an abandonment of the application itself (Donovan Transportation Co. (1928) 32 CRRC 163).

The testimony and evidence submitted to the Commission during the hearing presents a picture of a small, close-knit, and very aggressive marketing organization based in Arizona, representing itself to have contractual connections with a succession of national carriers (thereby assertedly being able to avoid the cost of owning or leasing its own lines or switches), and seeking nationwide to operate as a long distance reseller. Using a multiple-level or pyramid marketing scheme, it employs a hierarchy of independent contractor sales representatives called distributors. The distributors pay for the opportunity and are accountable to no one. Consistently and repeatedly, before it has finalized a carrier relationship, and while moving from carrier to carrier, it has continued to sign up customers while knowing it was unable to accomplish hookups for actual service. It had operated in California months before it applied for operating authority from this Commission, conducting sales seminars in Los Angeles late in 1988, as Sansano's testimony states, and signing up customers as corroborated by its downline report to Ano ending March 12, 1990 and Exhibit 3, its April 20, 1990 bill to Ano.

The evidence clearly shows that NCN's marketing scheme is artfully designed to put emphasis on pushing its independent distributors to purchase and sell NCN's DPS-Training Packages and

promote sales of its numerous marketing aids, while avoiding or adopting a nonresponsive stance to customer complaints. Indeed, the Income Statement submitted as Exhibit 3 to its April 27, 1990 application sets forth for the period ending December 31, 1989 long distance sales of $635,183 as compared to Distributor Sales of $1,822,000 and Supplier Sales of $196,042.[14] Further corroboration of this emphasis is readily apparent in NCN's downline report to Ano ending March 12, 1990 for 1081 customers showing $149.90 customer usage commissions vs. $950.00 in overrides and commissions for salary, DPS-Training Packages, and supplies. Also in Manning's downline report of December 17, 1990 covering 115 customers and showing $12.75 vs. $290, respectively, and in Splain's downline report of December 17, 1990 covering 368 customers and showing $56.24 vs. $340, respectively.

NCN's problems with its carriers led to misrepresentations in its sales promotions and failures to hook up most customers.[15] In turn, these led to numerous customer frustrations when they tried to complain or obtain refunds. Routinely, these complaints were ignored or stalled by NCN. This general practice is evidenced by copies of customer's complaint

14 These figures are corroborated in the 12 page audited financial statement dated December 31, 1989 included as Exhibit C to the "Prepared testimony" of NCN General Counsel Williams accepted as an admission against interest at the January 10, 1991 hearing after Williams failed to appear to testify. Attached to, but not part of the audit report, were two pages listing figures for undated months purporting to show a complete reversal of these revenues.

15 Clearly, NCN encountered problems in arranging binding agreements with its carriers. But these did not interfere with its aggressive sales promotion representations, with many customers complaining that they were led to sign up in the understanding they were getting AT&T etc., service, when they were connected to another carrier, or no carrier at all.

letters included as attachments to Ano's prepared testimony, and the May 13, 1990 letter to this Commission from Robert Dolan of Fremont, California. Corroborative testimony of these problems was provided by Ano, Sansano, and Crisologo at the January 10, 1991 hearing. Evidence that this problem of customers neglect or NCN indifference is reflective of NCN practice in other jurisdictions is provided in the respective decisions of the Florida Public Service Commission, the Minnesota Public Utilities Commission, and the Public Service Commission of South Carolina taken under official notice by our ALJ.[16] The better Business Bureau of Phoenix, Arizona, reports that it advises caution to prospective customers and distributors, and that NCN's record is unsatisfactory due to a pattern of mispresentation in marketing practices and failure to settle complaints and eliminate the underlying causes of complaints.

NCN's reorganizations, changes of corporate identity while retaining the same name, and inconsistent stock issues make it difficult at best to determine the actual entity or affix responsibility, although it appears that the Gurrs under the leadership of Jerry M. Gurr at all times controlled the entity. It's loose practice on stock sales, as evidenced by the Ano-Crisologo purchase, are not those of a responsible entity or of an applicant for California authority.

Ano introduced a photocopy of the "Confidential Offering Memorandum" (Exhibit K to her prepared testimony) which she testified Robinson sent to her after his later July 1989 telephone solicitation. The memo, dated July 14, 1989, offered shares in "National Communications Network, Inc. (NCN)", a Nevada corporation

16 It is also appears from these decisions and one from the North Dakota Public Service Commission that NCN has violated laws regarding certification before providing service in states other than California.

according to the memo, offered at $0.001 par value, for $0.50 per share, minimum investment 20,000 shares. The fine print stated that "National Communications Network Inc. (NCN)," the Arizona corporation predecessor, had been acquired by Magnetic, Inc., a Nevada corporation, which in turn had been renamed "National Communications Network, Inc. (Also NCN)." The memo set forth that the three Gurr family members, both before and after the offering, owned, and would continue to own, the controlling interest. The subscription agreement bearing Cora Lee S. Crisologo's signature and signed July 24, 1989, indicates in her handwriting that she was paying $5,000 (at 50 cents a share, this would represent 10,000 shares). The first paragraph of that signed subscription agreement states:

> "I hereby subscribe for the numbers of Shares of Common Stock ('Shares') set forth below, which are being offered in National Communications Network Inc. a Nevada corporation (the 'Corporation'), pursuant to a Confidential Offering Memorandum dated July 14, 1988 (the Memorandum)."[17]

On September 7, 1989, Crisologo was issued certificate No. 1031 for 10,000 common shares of stock in "National Communications Network, Inc.," stated on the face of the certificate to be an Arizona corporation.

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17 Note that the corporate name lacked the comma between the words "Network" and "Inc.," and that the offering memo referred to lists "1988" as the year the offer was being made. Although it is stated that a new entity, the NCN of the present application was incorporated on September 21, 1989 in Arizona, acquired the assets of the old NCN, and either issued nor would issue the new NCN stock to shareholders in the former NCN, it appears that Crisologo as a shareholder in the old NCN was never informed or afforded an opportunity to vote on the proposed changes, and was never issued replacement stock in the new NCN although she had become a shareholder on September 7, 1989.

Thus Crisologo was issued 10,000 shares to an Arizona corporation when she subscribed to buy shares in a Nevada corporation, and, furthermore, the purchase of 10,000 shares was contrary to the 20,000 share minimum set forth in the offering.

In addition, in the "Prepared Testimony" of NCN's General Counsel Williams, offered by NCN's counsel during the hearing, and accepted by the ALJ as an Admission Against Interest, Exhibit A thereto is stated by Williams to reflect the documents read and signed by Crisologo before she purchased the stock. But Williams obviously has shuffled the documents that make up his Exhibit. His exhibit includes a different offering memorandum with a copy of the subscription agreement Crisologo signed. William's Exhibit has a covering offering memorandum entitled "Private Placement Memorandum" dated March 25, 1988, offering no par shares for $1.00 per share, minimum investment 7,000 shares ($7,000) in the stock of National Communications Network Inc. (no comma between Network and Inc.), an Arizona corporation. The accompanying subscription agreement signed by Crisologo on July 24, 1989 refers to the Nevada corporation, and the "Confidential Offering Memorandum," not the "Private Placement Memorandum," and states the payment to be $0.50 per share. The purchase could not have been of the Arizona corporation stock.

This appears to be little doubt that NCN, under whatever name or legal entity at the moment, was, as the rumors reported by Ano indicate, desperate to raise funds, but either the controlling interests were incredibly careless with legal niceties, or artfully intent upon misleading and taking in potential investors. Clearly, the objective was to get the investor's money, in whatever amount, with little or no regard to terms of the formal offering memoranda.

NCN has seen fit, despite ample notice and opportunity to do so, not to contest or rebut the evidence presented at the January 10, 1991 hearing. Indeed, its attorney at that hearing tacitly conceded "past problems." Thus, the facts presented are

not really in dispute, and we can only conclude that NCN does not meet the public convenience and necessity standards we expect of a public utility reseller of telecommunication services in California. Its shifting management entity, practices, and operations are not beneficial to the general public, its customers, distributors, and investors. It has operated in California well before filing its A.90-04-050 in April of 1990; it has continued customer solicitations when knowingly it could not provide carrier service; its marketing scheme is designed to place more emphasis on sales of its marketing tools than upon provision of telecommunication service; it has deviously sought to avoid hearings on alleged transgressions, and it has misrepresented evidence it caused to be placed before the Commission.

For these reasons the Commission will revoke the certificate of public convenience and necessity it granted NCN by D.90-07-026 to offer and provide reseller telecommunications services in California.

Comments on the Proposed Decision of the Administrative Law Judge

As provided by PU Code § 311, the Proposed Decision of ALJ John B. Weiss was served on the parties to this proceeding. Only NCN submitted comment. DRA alone submitted reply comment.

In its comments, except with regard to implementation, NCN states it has no objection to the proposed order. With the stated objective of implementation in the best interest of the Commission and NCN's California customers, NCN asks for modification of paragraph 3 of the proposed order. By that proposed modification NCN essentially asks for 30 days in which to mail notice of service discontinuance, and another 30 days from customer receipt of such notice in which to accomplish such discontinuance.

DRA, in reply, states that its prevailing concern is that NCN be required to terminate its California operations at the

earliest possible date, but in a manner ensuring uninterrupted long distance customer service. DRA is also concerned that it be made clear to the customers that NCN is being required to cease California operations.

We have carefully considered NCN's comments and DRA's reply. We note that to some extent both have transgressed beyond the scope contemplated in Rules 77.3 and 77.5, respectively, of our Rules of Practice and Procedure which essentially limits both to focus on factual, legal, or technical errors. However, we believe the concerns of both with regard to customer access to other long distance carriers upon NCN's decertification are well taken. Accordingly, in order to ensure that NCN's customers in California may obtain alternative long distance telecommunications without interruption or inconvenience, we have revised the ALJ's third conclusion of law, and ordering paragraphs as set forth in our order which follows.

Findings of Fact

1. NCN, variously styled and incorporated in other states at the time of the captioned application, was represented in that application to be an Arizona corporation operating on a national basis in selling discounted long distance telephone service targeted to residential customers and small business owners.

2. Without investment in proprietary switch equipment, NCN asserts to prospective customers that it offers its discounted long distance service by means of "relationships" with major communication carriers; however, in practice these claimed relationships have very frequently failed to deliver the promised service, or were aborted or otherwise not finalized during contract negotiations, very frequently leaving the signed up customers without the promised service and with an NCN coldly nonresponsive to complaints.

3. NCN employs a multi-level marketing network scheme, primarily using independent contractor distributors, aggressively

recruited, to pursue customers; these distributors receive at best fragmentary training before commencing marketing activities for NCN.

4. Distributors earn commissions and overrides by recruiting new distributors and customers and from sales of NCN's DPS Training Packages and sales materials.

5. The primary emphasis in NCN's marketing scheme and its practices, both in California and other states, appears concentrated on sale of its training packages and materials, and to recruit additional distributors, with minimal concern for service issues.

6. As a result of NCN's switches in carriers, distributors are often left to absorb the cost of obsolete sales materials and forms sold to them by NCN, thus forcing them to purchase new materials to continue with NCN.

7. NCN frequently "reorganizes" or realigns, although the three Gurr family principals always emerge in de facto control of the new entity.

8. NCN's stock offering practices are grossly improper if not fraudulent: in its quest for quick cash it has disregarded the terms of its own memorandum offerings to accept payment and issue shares in less than stated minimum amounts, but in another corporate entity bearing perceptibly the same name, but an entity incorporated in another state, and then refusing to answer inquiries about that stock.

9. When its application before the Commission was protested by one of its distributors who raised serious allegations and questions concerning NCN's mode of operation, integrity, and financial representations, NCN bought off the protestant by artifice and questionable practice.-

10. Relying upon the face of the petition, the Commission by D.90-07-026 granted NCN a certificate of public convenience and necessity to operate in California.

11. Once certified, NCN soon parted company with its distributor, leading the latter to orchestrate a renewed set of allegations and disclosures and to file for rehearing.

12. Pursuant to PU Code §1700, the Commission by D.90-10-048 determined to review the matters alleged which bore on NCN's fitness to be a reseller of telecommunication services in California, and ordered rehearing of NCN's application.

13. Although NCN repeatedly sought delay, and associated, disassociated, and reassociated local counsel, a PHC on November 30, 1990 scheduled a hearing date and ordered exchange of prepared testimony, which exchange was made substantially as scheduled prior to hearing date.

14. NCN's local counsel, re-engaged, appeared for the January 10, 1991 hearing, but without witnesses who assertedly were not "able to make it," and again NCN sought delay, stating that a controlling interest had been sold by means of a stock transaction on December 10, 1991 to the Gentry Group, a Michigan corporation.

15. The reported December 10, 1991 sale of control was consummated without Commission authority and not in compliance with provisions of PU Code § 854.

16. In view of the ample notice provided both counsel and principals of NCN of the January 10, 1991 hearing, the inability of NCN witnesses to be "able to make it" despite the evident serious nature of the allegations and indicated evidence to be introduced, illustrates the disdainful attitude held by NCN principals to the regulatory authority and jurisdiction of this Commission.

17. At the January 10, 1991 hearing, NCN's attorney readily conceded "past problems," and these past problems have been demonstrative of the fact that NCN has failed to show a high degree of responsibility and lacks the satisfactory fitness to provide communication reseller services to the benefit of the general public its customers, or investors.

Conclusions of Law

1. NCN has amply demonstrated by its actions and conduct that it does not meet the public convenience and necessity standards expected of a public utility reseller of telecommunications services in California.

2. The Certificate of public convenience and necessity granted NCN by D.90-07-026 to offer and provide reseller telecommunications services in California should be revoked.

3. Because of the serious nature of NCN's deficiencies in trust, performance, and reliability, and to prevent further activities, this revocation should be made effective immediately, and NCN's operations in California should cease as soon as practicable in a manner that will allow for adequate notice to existing NCN customers.

O R D E R

IT IS ORDERED that:

1. The certificate of public convenience and necessity granted to NCN Communications, Inc. (NCN) to operate as a reseller of telecommunications services within California is revoked in accordance with the ordering paragraphs which follow.

2. NCN shall immediately cease all California operations, including, but not limited to, soliciting or connecting new customers or distributors. NCN may continue to provide long distance service to customers connected prior to the effective date of this order until 30 days from that effective date, at which time all NCN long distance service in California must cease.

3. Within 10 days of the effective date of this order, NCN shall mail to each of its California customers, distributors, and other participants in its California marketing network notice of this revocation of its operating authority in California and of this order that it cease operations in this state.

4. In addition to the information required in Ordering Paragraph 3, such notice shall include statements that, 30 days from the effective date of this order, NCN will no longer provide long distance service in California and that customers should contact a long distance carrier of their choice or contact their local exchange company to arrange for a new long distance carrier. Such notice shall not include the names of any alternative long distance providers and shall not solicit any further business with NCN or its affiliates.

5. Within 15 days of the effective date of this order NCN shall provide the Executive Director of this Commission a notarized verification signed by its Chief Executive Officer of its conformance with the provisions of Ordering Paragraphs 3 and 4 herein, together with a copy of the notice sent its customers and others as provided in said paragraphs, and a list of the customers, distributors, and others to whom the notice was sent.

6. Within 45 days of the effective date of this order NCN shall provide the Executive Director of this Commission a notarized verification signed by its Chief Executive Officer of its conformance with all the provisions of this order.

7. NCN may continue to assist customers to ensure uninterrupted service and completion of final billings. NCN and its representatives shall not provide any referrals for long distance carriers.

8. NCN is placed on notice that failure to comply fully with each of the provisions of this order may result in imposition of penalties pursuant to PU Code § 2107 for each violation or failure to comply.

This order is effective today.

Dated May 22, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

Commissioner John B. Ohanian, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director