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Decision 91-12-056 December 18, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION OF AFFINITY FUND,)
INC. TO OPERATE AS A RESELLER OF)
INTEREXCHANGE TELECOMMUNICATIONS)
SERVICES AND OPERATOR SERVICES)
WITHIN THE STATE OF CALIFORNIA.)

ORIGINAL
Application 90-11-044
(Filed November 27, 1990;
amendment filed
July 24, 1991)

OPINION

Affinity Fund, Inc. (applicant), a Florida corporation, qualified to do business in California, seeks a certificate of public convenience and necessity under Public Utilities (PU) Code § 1001 to permit it to resell interLATA telephone services in California.¹ In the original application, applicant also sought authority to provide operator services. However, applicant asserts in the amendment to the application that it does not intend to offer operator services at this time.

Protest

On December 28, 1990, Affinity Network Incorporated (ANI) filed a protest to the application alleging:

1. That the similarity of the names and businesses of applicant and protestant will confuse the public and that protestant has a prior right to the trademark, Affinity.

1 California is divided into ten Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

2. That applicant does not meet the requirement of Decision (D.) 90-08-032 that it have \$400,000 (now \$420,000) of unencumbered cash.

3. That the application states that applicant is a Wisconsin corporation, whereas the exhibits to the application show that it is a Florida corporation.

Item 1 is of no great moment. The question of similar corporate names is primarily for the Secretary of State or the courts to address. Also, applicant points out in an attachment to its amendment that protestant has changed its corporate name to ANI, which will obviate any confusion.

Item 3 involves a typographical or clerical error. The exhibits to both the original application and the amendment clearly show that applicant is a Florida corporation. The error in the body of the original application probably resulted from the facts that both applicant's president and the attorney who drafted the articles of incorporation reside in Wisconsin.

Item 2 is the central issue in this proceeding, together with the issue of technical qualifications, both of which arise out of the requirements of D.90-08-032. We will first address the issue of technical qualifications.

Technical Qualifications

The application describes only in general terms the nature of the experience of Maurice E. Daigneau, President of Affinity, as follows:

"Mr. Daigneau's career includes 15 years of entrepreneurial business experience with the development of successful retail and wholesale enterprises...[after] an athletic career as a college and professional football quarterback."

D.90-08-032, on the other hand, requires that:

"A reasonable showing of technical expertise in telecommunications or related businesses should also be required of each new applicant. Part of the technical showing can and should be made by attaching to the application a complete

draft of applicant's initial tariff schedule."
(D.90-08-032, pp. 34, 52, and 57.)

By letter of December 7, 1990, the administrative law judge advised applicant of this requirement, enclosing copies of the pages of D.90-08-032 cited above. In the amendment to the application filed July 24, 1991, applicant alleges that it has been certificated and is operating as a long distance reseller in North Carolina, New York, Florida, Idaho, Iowa, Oregon, and Illinois. This allegation, together with the draft copy of applicant's proposed tariff, attached to the amendment, constitutes a minimum showing of the technical expertise required by D.90-08-032.

Financial Qualifications

D.90-08-032 also requires that an applicant demonstrate its financial ability to provide telecommunications services by showing that it has a minimum of \$420,000 in uncommitted cash or equivalent financial resources. An irrevocable letter of credit from a well-respected bank guaranteeing in excess of the minimum requirement of credit on behalf of applicant is an example of an equivalent financial resource. (Id., p. 34.)

Applicant's showing to fulfill this requirement consists of:

1. A balance sheet dated April 30, 1991, reflecting "total unencumbered assets of \$465,319".
2. An allegation that applicant will have an additional \$50,000 available to it as of August 1, 1991.
3. An allegation that applicant will have an additional \$100,000 to \$150,000 "projected" to be available to it by October 1, 1991.

Items 2 and 3 are insufficient, as they do not specify the source of such funds, do not recite whether they constitute debt or equity, do not allege whether they are sums anticipated from net revenues, and are not supported by any written agreements

or commitments to provide the funds. Such allegations are entirely too vague and speculative to support applicant's showing of financial ability.

Applicant's balance sheet, Exhibit D to its amendment, is dated April 30, 1991, and it is unaudited. It shows total assets of \$465,319 and liabilities and stockholder's equity of \$465,319. The stockholder's account shows:

Common Stock	\$112,000
Retained Earnings	[75,453]
Total Stockholder's Equity	\$36,547

Since retained earnings is a negative figure, equity is only \$36,547. Even if we were to consider \$335,528 of loans from stockholders to be equity capital, the total equity in the company would not approach \$400,000. Since Accounts Payable are \$93,244, applicant has insufficient assets to support the Commission's requirement of \$420,000 of unencumbered cash or equivalent financial resources.

On February 15, 1991, a petition to modify D.90-08-032 was filed in R.85-08-042. On October 23, 1991, the Commission issued D.91-10-041 in which it determined that a lower financial requirement (\$75,000) is appropriate for a new class of telecommunications reseller, "switchless reseller". The Commission agreed with the petitioner that such an applicant "has no investment in switching equipment or leased physical telephone plant" and "does not construct, operate, or lease utility property and accordingly it does not switch telephone lines." (Id., p. 13.) Thus, a reduced financial requirement was appropriate for such an applicant.

Although neither the application nor the amendment thereto affirmatively alleges that applicant is a "switchless reseller", this is understandable, since the application was filed before the category was created by the Commission. By letter of November 20, 1991, counsel for applicant asserts that applicant

"will operate as a switchless reseller." Moreover, the Commission Advisory and Compliance Division (CACD) believes that an exhibit to the application supports the inference that applicant is a switchless reseller. It is clear that applicant is providing services through AT&T and U.S. Sprint, to whom applicant's customers should look for relief from service problems.

While the application, as amended, does not support even the new financial requirement for switchless resellers, counsel for applicant has submitted a copy of a letter of credit in the amount of \$250,000 issued to applicant by Barnett Bank of Jacksonville, Florida. The document was issued November 21, 1990, and expires November 21, 1991. The beneficiary is U.S. Sprint Communications Company Ltd. Partnership, which may draw on the letter of credit to pay monthly charges owed by applicant that have not been paid within 30 days of invoice date.

CACD had, by letter of September 24, 1991, requested information about this letter of credit, as follows:

"Please provide a copy of the letter of credit (LOC) deposited with a Florida Bank since the LOC represents 73 percent of the current assets as of April 30, 1991. The LOC will soon expire. Does the company plan to extend it? If so, provide support for and details of the extension."

In response to CACD's September 24, 1991 letter, applicant's Chief Financial Officer asserts in his letter of October 28, 1991:

"In response to your request regarding the renewal of our letter of credit (LOC) on deposit with Barnett Banks of Florida, Inc., this letter serves as notice of our intent to renew the \$250,000 LOC as requested by U.S. Sprint.

"The LOC is automatically renewed at U.S. Sprint's option and they have informed us of their intent to exercise this option. Accordingly, Affinity Fund, Inc has committed to honoring this request and will leave the necessary funds on deposit with our Florida

Bank. This insures our continued good relationship with U.S. Sprint and guarantees payment of any past due invoices in the event we fail to honor our contractual obligations with U.S. Sprint and precludes any action against our customers by U.S. Sprint."

As of December 4, 1991, applicant had not submitted any document evidencing a renewed letter of credit. However, on that date counsel for applicant submitted a statement under the logo of Barnett Bank, showing funds of \$250,000 on deposit to the credit of Affinity Fund, Inc. The statement purports to be a "Money Market Investment Account Summary [for] 11-20-91 thru 11-22-91". The two day record shows:

BALANCE LAST STATEMENT	.00
1 DEPOSITS AND CREDITS	250,000.00
0 CHECKS AND DEBITS TOTALING	.00
INTEREST THIS PERIOD	55.76
SERVICE CHARGE	.00
AVERAGE COLLECTED BALANCE	166,666.66
CURRENT BALANCE	250,055.76

We infer from this statement and from other documents, the contents of which are recited above, that on November 21, 1991, when the letter of credit expired, applicant changed the form of its deposit with Barnett Bank and created the money market account, as noted above. We assume that this action was designed to earn a greater rate of interest than obtained when the funds were held to secure the letter of credit. In any event, the documents submitted by applicant show that it has a minimum of \$75,000 of cash on hand and that it meets the current requirements of the Commission for switchless resellers. Accordingly, we will grant the application for a certificate of public convenience and necessity to construct telephone lines in California. (PU Code § 1001.) We will authorize the interLATA service that applicant seeks to provide; but to the extent that the application seeks authority to provide intraLATA service, we will deny it.

Findings of Fact

1. Applicant served a copy of the application upon telephone corporations with which it is likely to compete.

2. A notice of the filing of the application appeared in the Daily Calendar.

3. The protest of ANI is not well taken.

4. A hearing is not required.

5. 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.

6. By interim Decision (D.) 84-01-037, and later decisions, we granted those applications, authorizing interLATA entry generally. However, we limited the authority conferred to interLATA service; and we subjected the applicants to the condition that they not hold themselves out to the public to provide intraLATA service, pending our final decision in OII 83-06-01.

7. By D.84-06-113 we denied the applications to the extent that they sought authority to provide competitive intraLATA telecommunications service. We also directed those persons or corporations not authorized to provide intraLATA telecommunication service to refrain from holding out the availability of such service; and we required them to advise their subscribers that intraLATA calls should be placed over the facilities of the local exchange company.

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

9. Applicant has a minimum of \$75,000 in uncommitted cash or equivalent financial resources, as required by D.90-08-032, as modified by D.91-10-041.

10. Applicant has made a reasonable showing of technical expertise in telecommunications, as required by D.90-08-032,

pp. 34-35, 52, 57, in R.85-08-042. This showing includes a complete draft of applicant's initial tariff. (Id., p. 34.)

11. Applicant is technically and financially able to provide the proposed services.

12. Since no facilities are to be constructed, it can be seen with certainty that the proposed operation will not have a significant effect upon the environment.

13. Exemption from the provisions of PU Code §§ 816-830 has been granted to other resellers. (See, e.g. D.86-10-007 and D.88-12-076.)

14. Public convenience and necessity require the service to be offered by applicant.

Conclusions of Law

1. Applicant is a telephone corporation operating as a telecommunication service supplier.

2. Applicant is subject to:

- a. The current 3.0% surcharge applicable to service rates of intraLATA toll and intrastate interLATA toll (PU Code § 879; Resolution T-14400);
- 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 1991-92 fiscal year (Resolution M-4757).

3. The application should be granted to the extent set forth below.

4. Because of the public interest in competitive interLATA service, the following order should be effective immediately.

The State may grant any number of operative rights and may cancel or modify the monopoly feature of those rights at any time.

ORDER

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Affinity Fund Inc. (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. a. 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. Applicant's initial 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.

b. Applicant is a non-dominant interexchange carrier (NDIEC). The effectiveness of its future tariffs is subject to the schedules set forth in Ordering Paragraph 5 of D.90-08-032, as follows:

"5. All NDIECs are hereby placed on notice that their California tariff filings will be processed in accordance with the following effectiveness schedule:

"a. Inclusion of FCC-approved rates in California Public Utilities [Commission] tariff schedules shall become effective on one (1) day's notice,

"b. Uniform rate reductions for existing services shall become effective on five (5) days' notice,

"c. Uniform rate increases for existing services shall become effective on thirty (30) days' notice, and shall require bill inserts or first class mail notice to customers of the pending increased rates, and

"d. Advice letter filings for new services and for all other types of tariff revisions shall become effective on forty (40) days' notice."

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 fees and surcharges to which applicant is subject, as reflected in Conclusion of Law 2.

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-5249-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.

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.

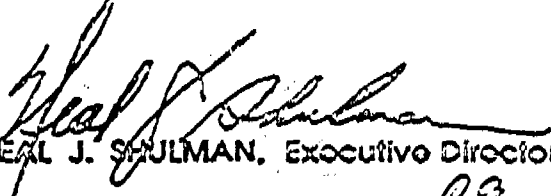
15. Applicant is exempted from the provisions of PU Code §§ 816-830.

16. The application is granted, as set forth above.
This order is effective today.

Dated December 18, 1991, at San Francisco, California.

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

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners


NEAL J. SHULMAN, Executive Director

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