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AUG 13 1992

Decision 92-08-043 August 11, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Economy Telephone, Inc., a California)
corporation, for a certificate of)
public convenience and necessity)
to provide interLATA telecommunica-)
tions services within the State of)
California.)

ORIGINAL

Application 91-10-036
(Filed October 15, 1991)

O P I N I O N

Summary

We grant a certificate of public convenience and necessity (CPCN) to Economy Telephone, Inc. (Economy or applicant) to permit it to resell interLATA telephone services in California.¹ Economy is incorporated under the laws of the state of California. Its principal place of business is 6869 Convoy Court, San Diego, California, 92111. Applicant intends to provide switched interstate interLATA telecommunications services between points in California. Service will be provided 24 hours a day, 7 days a week. The proposed service area is the entire state of California although applicant intends to expand to handle interstate and possibly international calls.

Chronology

On October 15, 1991, Economy applied for a CPCN pursuant to PU Code § 1001 et seq. Applicant requests authority to provide interLATA long distance telephone services between points within

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.

the State of California over facilities it will both lease and own. On November 7, 1991, applicant filed a motion for partial waiver of the service of its application to cities and counties required by Rule 18(b) of the Commission's Rules of Practice and Procedure. The service requirement was partially waived by D.92-03-056, by CPUC executive order. Applicant served 60 competitors on its application and two amendments to its application, in accordance with Commission rules. Applicant filed two amendments and submitted two letters in response to rulings and inquiries by the assigned administrative law judge (ALJ). Notice of the second amendment was published in the Commission's Daily Calendar on April 14, 1992 and the application was served on all 60 competitors. No protests were filed.

Standards For A CPCN

In Decision (D.) 90-08-032, as modified in D.91-10-041 and D.91-12-013, the Commission established two major criteria for determining whether to grant a CPCN for nondominant interexchange carriers (NDIECs): Financial fitness and technical expertise. Under Commission rules governing such applications, Economy must possess technical expertise and at least \$420,000 in financial reserves in order to qualify for a CPCN, (D.90-08-032.) Applicant meets both standards, subject to one condition. Applicant advertised and collected advances from 16 prospective customers before it received authorization for a CPCN, which is contrary to CPUC policy and violates Code Sections 451 and 489. Applicant has refunded all advances with payments of 7% interest, with the exception of refunds to 5 customers made between October 1991 and January 1992 which did not include interest payments. This CPCN is granted conditioned upon the remaining 5 customers receiving interest payments at a 7% annual interest rate for customer monies held by Economy. These refunds must be completed within 60 days of the date of this order, and must be verified

through a declaration of Economy sent to the Commission's Division of Advisory and Compliance (CACD).

Technical Experience and Ability

Economy's application identified three individuals, Mr. Daniel O'Halloran, Mr. Richard Newman, and Mr. Richard Ayersman, who will be employed by Economy pursuant to the granting of Economy's CPCN and who share an abundance of expertise in the telecommunications and computer fields. Mr. O'Halloran will accept full time employment from Economy as a service technician. Mr. O'Halloran has worked for Team Austin, Inc. for over seven years in telecommunications systems planning and on related computer hardware. Mr. Newman and Mr. Ayersman will consult to Economy on an as-needed basis. Mr Newman worked for 10 years in electronics and computer systems and for 5 years (1984-1989) for a Nevada long distance carrier. In 1989, Mr. Newman began working for Digital, a switch manufacturer, where he worked on a variety of telecommunications products and applications. Digital will lease to Economy a switch for intrastate interLATA connections, and will also provide technical support for the switching equipment. Mr. Newman is currently president of Digital, in which capacity he also plans to offer consulting services to a number of clients, including Economy. Mr. Ayersman has worked for telephone companies including Hawaiian Telephone and General Telephone for the past 23 years. He plans to join Mr. Newman in his consulting practice.

Minimum Financial Requirement

Economy's initial application supplied a projected twelve month cash flow analysis, in lieu of identifying financial reserves of \$420,000. In D.91-10-041, approximately one week after Economy filed its application at the CPUC, the Commission rejected cash flow analyses as insufficient evidence of financial fitness for NDIECs. Accordingly on November 4, 1991 ALJ Mattson issued a ruling requesting further evidence of financial fitness as well as

a more complete tariff filing than the sample filed with Economy's initial application.

On December 19, 1991, Economy filed an amendment to its original application in response to the ALJ's November 4 ruling. Economy acquired a United States Government Treasury Bill with a face value of \$450,000 to comply with D.91-10-041's financial fitness requirement. Economy stated its intention to retain this Treasury Bill for one year to meet any cash requirements during that period.

Applicant also submitted a more complete draft tariff in response to the November 4 ruling. The draft tariff proposes a one time activation fee of \$200, a monthly usage rate of \$295, various installation fees, and various equipment rental charges.

On February 26, ALJ Mattson requested further information regarding Economy's technical staffing, whether there existed any liens on the Treasury bill, how funds were raised for the Treasury Bill, and the status of any held customer money. On April 10, Economy filed a second amended application affirming that no liens existed against the Treasury bill. Economy attached the broker's certificate from Shearson Lehman Brothers substantiating this statement and clarified that, pursuant to the ALJ's November 4, 1991, ruling which requested additional financial support, Economy had solicited and received additional shareholder funds to purchase the Treasury bill.

Economy's Advertisement For Presubscription of Service

Before and during the pendency of Economy's CPCN application, Economy placed advertisements in the San Diego Union for telephone service. Economy did not activate service at any time, but did solicit and hold money from customers in anticipation of future service, after informing customers that service could not commence until the CPUC authorized a CPCN. On January 7, 1992, the Commission's Outreach Officer advised the ALJ that applicant had collected money from a potential customer. By letter dated

January 8, 1992, applicant was asked by the ALJ to provide information on alleged solicitation and collection of rates. In response, applicant indicated it collected from the customer in question an activation fee of \$200 and a monthly usage payment of \$228.69. Applicant attached to its response a copy of Economy's advertisement. Applicant documented a total collection of \$7,352.01 from 16 persons between October, 1991 and the first week of January, 1992. Applicant advised potential customers that it expected a CPCN in January of 1992, basing its estimates on the average length of time CPCN applications require at the CPUC. During that same time period when it appeared that Economy's CPCN application would be delayed, 5 customers requested and were issued refunds totaling \$2,572.14. These funds were not returned with interest. Economy stated in their January 13 response to the ALJ's January 8 letter that they understood that the amounts returned were not deposits, but credits against future service, and therefore did not require payment of interest under Commission rules. Applicant stated it would modify its business practices if the Commission's interpretation differed.

Economy's second amended application filed pursuant to the ALJ's February 26 ruling included a lengthy discussion of the advertisement placed by the applicant, and the nature of applicant's marketing activities from October to January. Economy states:

"First, Economy's marketing techniques did not constitute inappropriate business conduct. In D.90-08-032 the CACD suggests that the Commission discourage the entry of 'dishonest individuals,' i.e., those seeking to use unfair business practices, into the interLATA market by reviewing the NDIEC's 'marketing technique prior to entry.' (D.90-08-032 at pp. 31-32.) Economy's marketing technique consisted of advertisements stating its rate for long distance telephone service and providing Economy's telephone number. Persons interested in learning more about Economy's service would call this telephone number and speak with an

Economy representative who would fully disclose the terms of service. Economy's marketing practices sought to completely and fully disclose the terms of service to potential customers. For these reasons, Economy's activities cannot be characterized as improper business practices.

"Second, it is hardly clear that Economy Telephone's precertification activities were either prohibited by the Public Utilities Code or the Commission's Rules or regulations. In fact, the Commission's discussion in D.90-08-032 suggesting that it will apply increased scrutiny to the marketing techniques of CPCN applicants impliedly recognizes the legitimacy of precertification advertisement by stating that the Commission should review 'NDIECs' marketing techniques prior to entry.' (D.90-08-032 at p. 32.) The Commission has never stated that it should deny certification to an NDIEC simply because an NDIEC engaged in precertification marketing."

Next, applicant was asked several questions regarding Thomas Benzing, after a San Diego Union article raised allegations of possible criminal conduct. Mr. Benzing was named on applicant's proposed tariff sheets as manager of regulatory affairs. In response to the ALJ's query, applicant responded that Mr. Benzing is not the manager of the regulatory affairs. Rather, applicant states that Mr. Benzing's name was placed on the draft tariff only as a temporary measure until the position could be assigned to an individual on a permanent basis following certification. Applicant included Mr. Benzing's resume and a rebuttal to the newspaper account of Mr. Benzing's past in the second amended filing. Applicant affirmed that Mr. Benzing did not hold either a management position or a technical position with the company. In response to further inquiry, applicant stated that Mr. Benzing would work in sales, and that once a CPCN was granted Economy would assess the need to hire a full time regulatory affairs manager. In the absence of a CPCN, applicant stated in the amended application

that filling the regulatory affairs position was a low priority and a potential drain on cash flow.

Precertification Business Activity

The CPUC does not permit marketing activities prior to receipt of a CPCN.

PU Code § 451 states:

"all charges demanded or received by any public utility...for...any service...to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such...service is unlawful."

A charge is not determined to be just and reasonable until it is approved by the Commission and contained in an effective tariff. All charges received by Economy for any service to be rendered are, therefore, unjust and unreasonable when collected without benefit of an effective tariff. PU Code § 489 provides that public utilities must file tariffs with the Commission. The Commission may determine the form of the tariffs. One element of our tariff form is that the tariff must contain an implementation date and does not become effective until approved by the Commission. No company seeking to become a public utility enjoys rules any less strict than those required of a public utility. Economy violates PU Code § 489 by assessing and collecting charges before it has an effective tariff on file.

Economy was therefore apprised in June of 1992 that any money Economy still held from customers in anticipation of future service was held pursuant to a tariff which was not yet approved by the Commission. In addition, the assigned Commissioner's office informed Economy that the company should refund all outstanding customer money with 7% interest. On July 16, 1992, Economy issued full refund checks to all its remaining potential customers. On July 28th, 1992, Sebastian D'Amico, Economy's Vice President, filed a Declaration with the CPUC substantiating that all outstanding refunds had been returned with interest.

Refunds

Between the beginning of October 1991 and the first week of January 1992, applicant collected \$7,352.73 from 16 customers for items specified in its proposed tariff (e.g., activation fee; monthly usage rate). Applicant refunded \$2,587.14 without interest to five customers between November 1, 1991 and January 8, 1992. On July 28, 1992 applicant declared that all remaining customers were issued a full refund with 7% interest.

An NDIEC applicant cannot know if and when it will be awarded a CPCN. To collect any monies in advance of its CPCN is to collect a deposit by any other name. We would have directed applicant to refund the residual advance payment balance of \$4,765.59 to the 11 remaining potential customers, with interest at a 7% annual rate from the date collected to the date paid, if applicant had not voluntarily done so. Even though the amounts are small, we remain concerned that applicant did not pay interest with the 5 initial refunds. We direct applicant to pay interest at a 7% annual rate from the date collected to the date refunded on the 5 initial refunds. Applicant shall submit a verified statement to the Commission's Advisory and Compliance Division within 60 days of the effective date of this order confirming that all interest amounts have been paid.

Conclusion

Once all respondents to Economy's pre-certification marketing have received refunds with interest, there remains no deficiency to Economy's application. Economy exceeds the financial fitness requirements of D.90-08-032, D.91-10-041, and D.91-12-013. Economy possesses on staff or through consulting contracts the requisite technical expertise to provide service in California. Therefore it is in the public interest to certify Economy, and is in keeping with Commission policy to enhance competition among long distance service providers and to enhance customer choice. We

therefore find it in the public interest to grant Economy's CPCN, subject to the conditions described above.

Findings of Fact

1. Applicant requests authority under PU Code § 1001 to provide interLATA long distance telephone services within California.

2. Applicant has served a copy of its initial application on 60 competitors, according to Commission rules.

3. Applicant's final filing was noticed in the Commission's April 10 Daily Calendar.

4. No protests have been filed.

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 filed earlier.

9. Applicant has a minimum of \$420,000 in uncommitted case reserves in the form of an unattached United States Treasury Bill, which constitutes cash reserves or their equivalent as specified in D.90-08-042 and D.91-10-041.

10. Applicant has made a reasonable showing of technical expertise including a complete draft of applicant's initial tariff.

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

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.

15. The review of NDIEC marketing techniques prior to entry to detect unfair business practices enables the Commission to determine whether the marketing practices to be used once certified are reasonable and fair.

16. Tariff rates, charges, fees, or assessments may not be collected until the tariff is effective.

17. Tariffs are not effective before we award a CPCN.

18. Applicant collected \$7,352.73 from 16 customers for fees and rates specified in its proposed tariff.

19. Applicant refunded \$2,587.14 without interest to five customers on or before January 8, 1992, and refunded with interest at 7% all remaining advance payments.

20. To collect any monies in advance of being awarded a CPCN is to collect a deposit by any other name.

Conclusions of Law

1. Applicant's request for a CPCN should be granted, subject to certification that a full refund with 7% interest is completed

to all respondents to Economy's precertification advertising. Applicant should pay interest at a 7% annual rate on the five refunds already returned without interest.

2. Applicant is a telephone corporation operating as a telecommunications service supplier.

3. Applicant is subject to:

- a. The current 4.0% surcharge applicable to service rates of intraLATA toll and intrastate interLATA toll (PU Code § 879; Resolution T-14960);
- b. The current 0.3% surcharge on gross intrastate interLATA revenues to fund Telecommunications Devices for the Deaf (PU Code § 2881; Resolution T-13061)
- c. The user fee provided in PU Code § 431-435, which is 0.1% of gross intrastate revenue for the 1991-1992 fiscal year (Resolution M-4760).

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

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

ORDER

IT IS ORDERED that:

1. The application of Economy Telephone, Inc. (applicant) for a certificate of public convenience and necessity (CPCN) to provide interLATA long distance services within California is approved, subject to a verified statement sent to the Commission's Advisory and Compliance Division made within 60 days which verifies that all respondents to Economy's precertification advertising who placed money in advance of service with Economy receive refunds with a payment of 7% annual interest.

2. Subject to the receipt by CACD by of the verified statement described in Ordering Paragraph 1, a certificate of public convenience and necessity is granted to Economy Telephone Inc., 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 offer 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 (LEC).

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

4. Within 60 days after this order is effective, applicant shall file a written acceptance of the certificate granted in this proceeding.

5. 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 modified by D.91-12-013 and D.92-06-034, 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, except for minor rate increases, for existing services shall become effective on thirty (30) days' notice, and shall require bill inserts, a message on the bill itself or first class mail notice to customers of the pending increased rates, and
- 'd. Uniform minor rate increases, as defined in D.90-11-029 for existing services shall become effective on not less than five (5) working days' notice. Customer notification is not required for such minor rate increases.
- 'e. Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days' notice.
- 'f. Advice letter filings merely revising the text or location of text material which do not cause an increase in any rate or charge shall become effective

on not less than five (5) days' notice.'"

6. Applicant may deviate from the following provisions of GO 96A: (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 3.

7. Applicant shall file as part of its individual tariff, after the effective date of this order, 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 60 days from today.

13. The corporate identification number assigned to applicant is U-5291-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 the Telecommunications Branch in writing of its compliance.

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

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

Dated August 11, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
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
JB

A.91-10-036 ALJ/NDS/ppg

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) 703-1961.

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)