

UUL-19 1995

Decision 95-07-032 July 19, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Switch Services Communications, L.L.C.)
for a Certificate of Public Convenience)
and Necessity to Provide Resale)
Telecommunications Services Within)
California.)

Application 95-03-037
(Filed March 10, 1995)

ORIGINAL

O P I N I O N

Switch Services Communications, L.L.C. (SSC), a Texas limited liability corporation qualified to do business in California, filed an application on March 10, 1995, pursuant to Public Utilities (PU) Code Section 1001, for a certificate of public convenience and necessity (CPCN) to permit it to resell interLocal Access and Transport Area (LATA) and intraLATA telephone services in California.

As described in the application, SCC will own five switches, one of which will be located in Palmdale, California. SCC describes the network used to operate the switches as "private line network." The network will be leased from IXC Carrier Group, a wholly owned subsidiary of IXC Communications.

SCC indicates that it will operate as the carrier for only two customers in California, IXC Long Distance, Inc. and Excel Telecommunications, Inc. In the application SCC indicates that Excel Telecommunications, Inc. owns a 49% equity interest in SCC. By correspondence clarifying materials in the application, SCC notes that IXC Long Distance, Inc. owns a 51% equity interest in SCC. This conforms with Exhibit E to the application, the draft tariff, which in the "Definition" section defines customer as "IXC Long Distance, Inc. or Excel Telecommunications, Inc., the parties that have entered into Service Agreements with Carrier and are therefore responsible for the payment of charges due and for

compliance with Carrier's tariff regulations." SCC has further represented that no resale beyond these two customers will occur to anyone within California.

Thus, it is clear that SCC is proposing to only provide telecommunications services to two entities, which between them own SCC, and will not provide intrastate telecommunications services to the public or any portion of the public.

While SCC meets the statutory definition of a "telephone corporation" as including "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state" (PU Code § 234), it does not meet the definition of a public utility. Section 216 of the Public Utilities Code defines a public utility as including "(a) ... every ... telephone corporation...where the service is performed for, or the commodity is delivered to, the public or any portion thereof" and noting:

"(b) Whenever any ... telephone corporation... performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that common carrier ... telephone corporation ... is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

In interpreting these provisions it has been held that the key element is not the number of customers which an entity may have but whether the property involved in the rendering of the service has been dedicated to public use. (Richfield Oil Corp. v. Public Utilities Commission, 54 C.2d 419, 6 Cal. Rptr. 548, 354 P.2d 4, cert. den. 364 U.S. 900 (1960), Unocal California Pipeline Co. v. Conway, 23 Cal. App. 4th 331 (1994).) Here, based on the facts presented, it appears clear that the only communications services SCC is providing within California are to the two entities

which comprise its equity ownership. SCC represents that it will have no other customers within California.

As long as SCC continues to operate in this fashion, providing telecommunications services only to the two designated entities, which comprise its equity ownership, it is not a public utility subject to the jurisdiction of the Public Utilities Commission. Therefore, SCC does not need a CPCN to provide this limited service and this application should be dismissed.

SCC is placed on notice, however, that if it at any time proposes to change the nature of its service and hold out the provision of telecommunications services between points within California to the public or any portion of it, it will become subject to the jurisdiction of this Commission. At that time it must comply with all applicable requirements of the Public Utilities Code and the Rules and Regulations of this Commission in advance of offering such service.

Findings of Fact

1. Notice of the filing of this application appeared in the Daily Calendar on April 4, 1995. No protests have been filed.

2. SCC will operate telecommunications plant within California.

3. SCC will only have two customers within California, IXC Long Distance, Inc., and Excel Telecommunications, Inc. Excel Telecommunications, Inc. owns a 49% equity interest in SCC; IXC Long Distance, Inc. owns a 51% equity interest in SCC.

4. SCC will not hold out intrastate telecommunications service within California to the public or to any portion of the public.

Conclusions of Law

1. SCC is a telephone corporation as defined in § 234 of the PU Code.

2. Based on the facts presented in the application and supplemental information, SCC is not a public utility subject to the jurisdiction of this Commission.

ORDER

IT IS ORDERED that the application of Switch Services Communications, L.L.C. for a certificate of public convenience and necessity to provide intrastate telecommunications services within California is dismissed.

This order is effective today.

Dated July 19, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

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

Wealey Franklin
Acting Executive Director