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Decision 95-12-031 December 18, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Orbit Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide InterLATA & IntraLATA Telecommunications Services within the State of California.	Application 95-03-002 (Filed March 3, 1995)

ORIGINAL

O P I N I O N

Orbit Communications, Inc. (Orbit), a Delaware corporation qualified to do business in California, seeks a certificate of public convenience and necessity (CPCN) to resell interLocal Access and Transport Area (LATA) long distance services between points in California.[1] The application was supplemented by Orbit and its telecommunications consultant at the request of the administrative law judge (ALJ), but because it still does not adequately demonstrate that the applicant satisfies the criteria for obtaining reseller authority, we deny Orbit's request.

Background

Orbit's application was filed on March 3, 1995. It contains a description of the applicant and the proposed services, a series of exhibits asserted to be in compliance with the Commission's requirements, and a brief argument in support of the application. The name, address and telephone number of Orbit's regulatory consultant is provided, with a request that "all correspondence and other communications with [Orbit] concerning this Application be directed to its regulatory consultant." The

1 Although Orbit requested only interLATA authority in the conclusion of the application, other portions of the application suggest that Orbit also seeks authority to resell intraLATA telecommunications services. Because of the result we reach today, these inconsistencies are immaterial.

application is signed by Loren R. Kott, who is identified as "Consultant to Kidane Z. Haile, President and CEO [of Orbit]," and includes a notarized verification by Ms. Kott dated November 29, 1994, which authorizes her to execute the application on behalf of Orbit.

It was apparent to the ALJ upon initial review that the content of the application did not satisfy the Commission's requirements in several respects, and that the applicant's qualifications did not appear adequate. Of particular concern were the financial statements, which failed to demonstrate the availability of $25,000 in cash or equivalent reasonably liquid resources, and the absence of a disclosure statement relating to the solvency of previous telecommunications businesses with which the applicant's key personnel were associated. On March 16 the ALJ contacted Loren Kott in Florida by telephone to discuss these deficiencies. Ms. Kott responded that she would speak to her client, and would promptly file and serve an amended application.

No protests were received, and no further activity occurred in relation to the application until July 24, when Mr. Haile telephoned the ALJ to inform him that he had prepared the amended application and would soon be filing it, but wanted to discuss some "problems" with it. The ALJ responded that Mr. Haile should file the amended application so that it would be in the record before seeking to discuss its content.

No amended application was ever filed, but on August 3 Cynthia D. Kott of Telecomm Tariff Consultants, Inc. forwarded to the ALJ copies of what her cover letter characterized as "1. Currently audited financial statements"; "2. Management Background in proper order"; and "3. Letter of Guarantee from Kennedy Sutherland Investment Group." The original and four copies of these documents had also been forwarded to the Commission's Docket Office, where they were filed on August 7.

The financial statements were prepared and signed by a certified public accountant, but were not audited as Ms. Kott had represented in her letter. The balance sheet, dated as of December 31, 1994, shows cash in the bank amounting to $1,331, and no other current assets with any apparent degree of liquidity. The income statement shows losses for the year of $21,467, and a retained deficit of $23,377 at year end.

The accountant's cover letter, dated June 5, 1995, states that the statements were compiled in accordance with standards established by the American Institute of Certified Public Accountants (in contrast to those originally filed with the application), but contains the following disclaimer:

> "A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.
>
> "Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the company's financial position. Accordingly, these financial statements are not designed for those who are not informed about such matters."

The financial statements leave a number of unanswered questions about the applicant's financial picture, which could have been addressed by comprehensive financial disclosures.

Discussion

The continuing enlargement of competitive access following the American Telephone and Telegraph (AT&T) divestiture and concomitant relaxation of regulation of nondominant interexchange carriers (NDIECs) by this Commission has resulted in a flood of requests for authority to go into the business of telecommunications resellers. This is a class of carriers that essentially purchase telecommunications services from underlying carriers at wholesale rates, and resell them to customers at higher retail rates. By far the largest category of aspiring resellers is that of so-called switchless resellers, who usually go into business with a relatively small investment because they are not facilities-based.

Our paramount duty as utility regulators is to further the public interest by assuring the protection of utility customers. Consequently, our task in reviewing applications of aspiring resellers is to protect the public from unreliable service or financial loss occasioned by business failures or poor management by companies that are not fit to perform public utility service. We have therefore set certain standards that we have found appropriate for those who aspire to enter the field, and we review each application for compliance with these standards.

Increasingly, reseller applications are often incomplete or substantively inadequate, resulting in slower processing and an inability to perform our essential function in an efficient manner. In light of the relative simplicity of reseller application proceedings, we cannot permit this situation to continue. Consequently, we are taking this opportunity to review the current financial requirements for switchless reseller applications and the reasons for those requirements in the hope that we can ameliorate the difficulties we are now experiencing while, at the same time, articulating the basis for our decision today.

Following a succession of decisions which considered the level of liquid assets a new-entrant reseller must have in order to be presumed fit to discharge its financial obligations during its startup period, the Commission fixed the minimum at $25,000 in cash or equivalent (plus the amount of any deposits) for switchless resellers. (D.93-05-010, 49 CPUC2d 197 (1993).) The manner in which an applicant must make this financial showing has evolved from D.90-08-032, 37 CPUC2d 130 (1990). D.91-10-041, 41 CPUC2d 505 (1991), added a new Ordering Paragraph 5.1 to that decision specifying the financial instruments which will satisfy the Commission's unencumbered cash requirement. If cash or cash equivalent (including cashier's check, sight draft, performance bond proceeds, or traveler's checks) in the minimum amount of $25,000 is not available to the applicant, certain exceptions and substitutions are allowed, but they must be consistent with the consumer protection objectives of the rule.

The demonstration of financial fitness in the present application does not meet the cash or equivalent requirement. The amount of available cash, $1,331, is greatly inadequate on its face, and the document offered to cure this deficiency falls far short of our requirements for making up the difference. Although a guarantee in proper form from a third party corporation is acceptable as a substitute for cash, it must at very least be irrevocable for a period of 12 months beyond certification of the applicant. (41 CPUC2d 520.) Common sense further dictates that, if the Commission is expected to rely upon the financial strength of a third-party guarantor, an adequate demonstration of that strength must be included in the application.

The Letter of Guarantee submitted by the applicant lacks any explanation or supporting financial documentation to demonstrate that the guarantor is in a position to make good on its guarantee. It is addressed "TO WHOM IT MAY CONCERN" by the third party guarantor, and in material part states:

> "Dear Gentlepersons:
>
> "This letter shall serve as a guarantee of indebtedness of Orbit Communications, Inc. by the Public Utilities Commission [sic] for a period of one year following the certification of Orbit Communications, Inc. as a switchless reseller to operate in California."

It contains no other reassurances nor, significantly, any provision which would make it irrevocable. It is a vacuous document, devoid of substance, and can be accorded no weight by the Commission.

The Commission's grant of a certificate to engage in the public utility business, which inherently carries with it the burden of furnishing reliable service to the public, confers a valuable right upon the grantee, indeed, one that can be transferred for consideration with the consent of this Commission. It is a privilege that should not be taken lightly, nor regarded as a perfunctory step on the road to an open marketplace; even under modern regulation, an applicant under our jurisdiction invariably seeks to perform a service affected with a public interest, no matter how wide we open the doors to entry. In order to carry out that public interest, we have established minimum standards which every applicant must satisfy in order to enter the utility field.

We do not believe it is unreasonable to expect a reseller applicant to demonstrate that it satisfies our financial fitness requirement with the same care as though it were seeking to borrow an equivalent sum from a lending institution. Even though rapid changes in the telecommunications field may make it difficult for an applicant to keep abreast of the current status of Commission requirements, it remains the applicant's obligation to do so. Our staff generally accords a reseller applicant whose application is questionable the courtesy of a letter or telephone call to point out deficiencies and provide an opportunity to cure. The ALJ did so in this instance. But our staff does not have the resources to contact an applicant repeatedly until an application is sufficient, and we will not do so here. The outcome is particularly disappointing in this instance, because the applicant had retained the services of a professional telecommunications consultant to prepare the necessary documentation.

In view of the circumstance that the problems with this application are not susceptible of easy resolution, we are denying the applicant's request. However, we do so without prejudice to the applicant's right to reapply no sooner than 90 days from the effective date of this order, by means of an unambiguous and properly supported application, prepared with a clear recognition of the reason behind our rule.

Findings of Fact

1. Applicant Orbit filed an application for a CPCN to resell long distance services in California as a switchless reseller.

2. Orbit's application was filed by the Commission on March 3, 1995.

3. Orbit's application does not clearly specify whether Orbit seeks authority to resell interLATA or intraLATA communications services in California, or both.

4. Orbit's application, as originally filed, failed to demonstrate the availability of $25,000 in cash or equivalent reasonably liquid resources to satisfy Orbit's initial expenses.

5. Orbit's application, as originally filed, did not include a statement disclosing whether anyone associated with or employed by Orbit had previously been associated with an NDIEC that filed for bankruptcy or went out of business.

6. The resumes of key personnel furnished as part of Orbit's application indicated that several of those persons had previously been associated with various NDIECs.

7. On March 16, 1995, the assigned ALJ contacted Orbit's authorized representative to advise her of the deficiencies in the pending application. The representative, a professional telecommunications consultant, responded that she would speak to her client about the deficiencies, and would promptly file and serve an amended application.

8. No amended application was thereafter filed at any time.

9. On August 3, Orbit's designated representative forwarded to the ALJ, with duplicates to the Commission's Docket Office, several documents under cover of a letter which indicated that these items were "pursuant to [the ALJ's] request," and that Orbit's application was "now in complete form."

10. Orbit's application, as supplemented with the materials forwarded on August 3, does not demonstrate that Orbit meets the Commission's requirement for a demonstration of financial fitness which must be made by an applicant that seeks authority to resell telecommunications services in California.

<u>Conclusion of Law</u>

Orbit's application should be denied without prejudice to file an unambiguous and properly supported application after a reasonable waiting period.

O R D E R

IT IS ORDERED that:

1. Orbit Communications, Inc.'s (Orbit) application for a certificate of public convenience and necessity to resell long distance services in California is denied.

2. Denial of the application herein is without prejudice, and Orbit may file a new application for the authority requested herein, not sooner than the ninetieth day following the effective date of this order.

3. This proceeding is closed.

This order is effective today.

Dated December 18, 1995, at San Francisco, California.

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