

APR 23 1997

Decision 97-04-058 April 23, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 Atlas Equity, Inc. d/b/a Performance)
 Telecom for a Certificate of Public)
 Convenience and Necessity to Operate)
 as a Reseller of Telecommunications)
 Services within the State of)
 California.)

ORIGINAL

Application 96-11-025
(Filed November 19, 1996)

O P I N I O N

Atlas Equity, Inc. d/b/a Performance Telecom (applicant), a California corporation, seeks a certificate of public convenience and necessity (CPCN) under Public Utilities (PU) Code § 1001 to permit it to resell interLATA telephone services in California and intraLATA telephone service.¹

By Decision (D.) 84-01-037 (14 CPUC2d 317 (1984)) and later decisions, we authorized 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. Subsequently, by D.94-09-065, we authorized competitive intraLATA services effective January 1, 1995, for carriers meeting specified criteria.

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 Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who is a switchless reseller² must demonstrate that it has a minimum of \$25,000 of cash or cash equivalent (as described in D.91-10-041, 41 CPUC2d 505 at 520 (1991)), reasonably liquid and readily available to meet the firm's start-up expenses. Such applicants shall also document any deposits required by local exchange carriers or interexchange carriers (IECs) and demonstrate that they have additional resources to cover all such deposits. (D.93-05-010, 49 CPUC2d 197 at 208 (1993).) In addition, an applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

As part of its application, applicant provided an unaudited balance sheet and income statement indicating that applicant has more than \$25,000 consisting of cash and accounts receivable. It satisfies our criteria for being reasonably liquid and readily available to meet the applicant's needs.

² D.93-05-010 defines a switchless reseller as a nondominant interexchange carrier (NDIEC) with the following characteristics: it uses the switch of another carrier; it usually, but not always, uses access circuits that the underlying carrier purchases from an LEC; it provides service in its own name, and its customers view it as their telephone company for interLATA and interstate calls. D.92-06-069 noted that it is possible to control, operate, or manage telephone lines without owning them. The decision also notes that resellers which do not own or directly operate their own telephone wires may still have plant which is owned, controlled, operated, and/or managed in order to facilitate communication by telephone.

Applicant filed a motion for a limited protective order for its financial statement citing that it contains confidential information and would do harm to applicant if revealed. No opposition to the motion has been filed. Such a protective order was issued on December 4, 1996 by the assigned administrative law judge (ALJ).

Applicant has provided information on its key managers/employees indicating their education, technical training, and experience. It can be summarized as follows:

Vincent B. Galewick is the President of Atlas Equity, Inc. Mr. Galewick has been successfully involved in the securities industry for over nine years, focusing on the investment banking aspects of the industry.

In connection with his securities work, Mr. Galewick has been instrumental in the selection, negotiation and acquisition of 58 individual consumer loan portfolios with face values in excess of \$985,000,000.00. Those loan portfolios are collectively owned and managed by Performance Asset Management Fund, Ltd., A California Limited Partnership; Performance Asset Management Fund II, Ltd., A California Limited Partnership; Performance Asset Management Fund III, Ltd., A California Limited Partnership; Performance Asset Management Fund IV, Ltd., A California Limited Partnership; and Performance Asset Management Fund V, Ltd., A California Limited Partnership.

Michael Cushing is the Chief Financial Officer of Performance Telecom. Mr. Cushing has been affiliated with Performance Telecom since 1991. Mr. Cushing graduated from the University of California at Santa Barbara with a Bachelor of Arts in Business Economics. Mr. Cushing became licensed as a Certified Public Accountant in the State of California while employed by the accounting firm of Coopers and Lybrand. His clients, while at Coopers and Lybrand, included real estate, manufacturing, banking, service, and retail businesses.

From January of 1989 to November of 1991, Mr. Cushing served as Vice President of Real Estate and corporate Secretary for the Bay Plaza Company, a master developer of a planned 1.4 million square foot, \$240 million downtown redevelopment project for the city of St. Petersburg, Florida ("Downtown Redevelopment Project"). This company also was Facility Manager of a 1/4 mile retail and entertainment pier complex with a 42,000 seat domed stadium, 8,500 seat arena and 2,000 seat fine arts theater for the city of St. Petersburg, Florida. Mr. Cushing was responsible for all aspects of real estate operations including asset and property management, investment analysis, financing, acquisitions, dispositions, planning, and risk management. As corporate Secretary, Mr. Cushing was responsible for the maintenance of the company's books and records.

From September of 1985 to January of 1989, Mr. Cushing was Senior Vice President of the Elcor Companies, a national commercial real estate company. This company served as an advisor and management company for Wespac Investors Trust, a publicly traded Over-The-Counter real estate investment trust (R.E.I.T.) with total assets in excess of \$160,000,000 and approximately 5,000 shareholders. In addition to servicing the R.E.I.T., the company acquired, owned, and managed properties for its own accounts as well as other third parties. The company also owned 50% of the Downtown Redevelopment Project. Mr. Cushing's responsibilities included overseeing all property and corporate operations; performing all aspects of the disposition of R.E.I.T. assets; placing, negotiating, and closing all property financing and workouts; and overseeing the recovery of assets by bankruptcy and foreclosure proceedings.

Michael D. Metcalf - From March 1996 to date, Mr. Metcalf has served as Vice President of Performance Telecom. He is responsible for technology development, business development and management of day-to-day operations including switching platform, sales, service, human resources and customer support. From

1989 to 1995, he served as president of Telwest Communications, Inc. where he was responsible for business development, and management of day-to-day operations including sales and service of telecommunications hardware, software and long-distance services. From 1986 to 1988, he was president of MZI Information Systems, Inc. where he was responsible for new business development, installation, sales and service of telecommunications hardware and network design. He was also responsible for system integration projects. From 1984 to 1986, Mr. Metcalf was sales manager of American General Communications, Inc. In that capacity, he created new telemarketing and direct-sales departments for telecommunications hardware and network design. He also directed marketing strategy and implementation, and was responsible for 3.5 million in annual sales.

Neither Mr. Galewick, Mr. Cushing nor Mr. Metcalf has been associated with any telecommunications entity that filed bankruptcy.

We will authorize the interLATA and intraLATA services that applicant seeks to provide.

Findings of Fact

1. Applicant served a copy of the application upon 201 telephone corporations with which it is likely to compete.
2. A notice of the filing of the application appeared in the Daily Calendar on November 21, 1996.
3. No protests have been filed.
4. No opposition to the motion for confidentiality of the applicant's financial documents has been filed and a protective order has been issued.
5. A hearing is not required.
6. By prior Commission decisions, we authorized competition in providing interLATA telecommunications service but generally barred those offering such service from holding out to the public the provision of intraLATA service.

7. By D.94-09-065, we authorized competitive intraLATA services effective January 1, 1995, for carriers meeting specified criteria.

8. Applicant has demonstrated that it has a minimum of \$25,000 of cash and cash equivalent, including accounts receivable, reasonably liquid and readily available to meet its start-up expenses.

9. Applicant has indicated that it is not required to file deposits with any local exchange carrier or interexchange carrier.

10. Applicant's technical experience consists of two employees with a combined experience of over eight years in telecommunications.

11. Applicant has submitted with its application a complete draft of applicant's initial tariff which complies with the requirements established by the Commission, including prohibitions on unreasonable deposit requirements.

12. Applicant has represented that no one associated with, or employed by, applicant was previously associated with a nondominant interexchange carrier that filed for bankruptcy or went out of business.

13. 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.

14. The Commission has routinely granted nondominant interexchange carriers, such as applicant, an exemption from Rule 18(b) to the extent that the rule requires applicant to serve a copy of its application on cities and counties in the proposed service area and to the extent that it requires applicant to provide a conformed copy of all exhibits attached to applicant's filed application to potential competitors.

15. 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.)

16. The transfer or encumbrance of property of nondominant carriers has been exempted from the requirements of PU Code § 851 whenever such transfer or encumbrance serves to secure debt. (See D.85-11-044.)

Conclusions of Law

1. Applicant has the financial ability to provide the proposed service.
2. Applicant has made a reasonable showing of technical expertise in telecommunications [or in a related business].
3. Public convenience and necessity require the interLATA and intraLATA services to be offered by applicant.
4. Applicant is subject to:
 - a. The current 3.2% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service (PU Code § 879; Resolution T-15799, November 21, 1995);
 - b. The current 0.36% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (PU Code § 2881; Resolution T-16017, April 9, 1997);
 - c. The user fee provided in PU Code §§ 431-435, which is 0.11% of gross intrastate revenue for the 1996-1997 fiscal year (Resolution M-4782);
 - d. The current surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (PU Code § 739.30; D.96-10-066, pp. 3-4, App. B, Rule 1.C.; set by Resolution T-15987 at 0.0% effective February 1, 1997);
 - e. The current 2.87% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by

D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F.); and

- f. The current 0.41% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G.).

5. Applicant should be exempted from Rule 18(b)'s requirement of service of the application on cities and counties in the proposed service area and service of all exhibits attached to this application on potential competitors.

6. Applicant should be exempted from PU Code §§ 816-830.

7. Applicant should be exempted from PU Code § 851 when the transfer or encumbrance serves to secure debt.

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

9. Because of the public interest in competitive interLATA and intraLATA services, the following order should be effective immediately.

ORDER

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Atlas Equity, Inc. d/b/a Performance Telecom (applicant) to operate as a reseller of interLocal Access and Transport Area interLATA and, to the extent authorized by Decision (D.) 94-09-065, intraLocal Access and Transport Area (intraLATA) telecommunication services offered by communication common carriers in California. Subject to the following conditions:

2. Applicant shall file a written acceptance of the certificate granted in this proceeding.

3. a. Applicant is authorized to file with this Commission tariff schedules for the provision of interLATA and intraLATA service. Applicant may not offer interLATA and/or intraLATA service until tariffs are on file. 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 one day after filing. Applicant shall comply with the provisions in its tariffs.

b. Applicant is a nondominant 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 (37 CPUC2d 130 at 158), as modified by D.91-12-013 (42 CPUC2d 220 at 231) and D.92-06-034 (44 CPUC2d 617 at 618):

"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 for interstate services in California public utilities 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.
- "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."

4. 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's Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which applicant is subject, as reflected in Conclusion of Law 4.

5. Applicant shall file as part of its initial tariff, after the effective date of this order and consistent with Ordering Paragraph 3, a service area map.

6. Prior to initiating service, applicant shall provide the Commission's Consumer Services Division with the applicant's designated contact person(s) for purposes of resolving consumer complaints, and the corresponding telephone number. This information shall be updated if the name or telephone number changes or at least annually.

7. Applicant shall notify this Commission in writing of the date interLATA service is first rendered to the public within five days after service begins and again within five days of when intraLATA service begins.

8. Applicant shall keep its books and records in accordance with the Uniform System of Accounts specified in Title 47, Code of Federal Regulations, Part 32.

9. 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 Commission Staff and contained in Attachment A.

10. Applicant shall ensure that its employees comply with the provisions of Public Utilities (PU) Code § 2889.5 regarding solicitation of customers.

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. The corporate identification number assigned to applicant is U-5750-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.

13. Within 60 days of the effective date of this order, applicant shall comply with PU Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.

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

15. Applicant is exempted from PU Code § 851 for the transfer or encumbrance of property, whenever such transfer or encumbrance serves to secure debt.

16. Applicant is exempted from Rule 18(b) of the Commission's Rules of Practice and Procedure to the extent that the rule requires applicant to serve a copy of its application on the cities and counties it proposes to operate in and to the extent that the rule requires applicant to serve a copy of all exhibits attached to its application on potential competitors.

17. If applicant is 90 days or more late in filing an annual report or in remitting the fees listed in Conclusion of Law 4, Telecommunications Division shall prepare for Commission consideration a resolution that revokes the applicant's certificate of public convenience and necessity, unless the applicants have received the written permission of Telecommunications Division to file or remit late.

18. Applicant's motion for a limited protective order was previously granted on December 4, 1996.

19. The application is granted, as set forth above.

20. Application 96-11-025 is closed.

This order is effective today.

Dated April 23, 1997, Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

A.96-11-025 ALJ/RLR/tcg

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)