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Decision 97-11-018 November 5, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
MTX Communications, Inc. (U-5479-C))
to Transfer Its Customer Base to)
ConnectOne Communications Corporation.)
(U-5780-C))

Application 97-07-004
(Filed July 8, 1997)

ORIGINAL

O P I N I O N

Summary

By application dated May 30, 1997 and filed July 8, 1997, MTX Communications, Inc. (MTX) and ConnectOne Communications Corporation (ConnectOne) jointly request Commission authority for MTX to transfer its customer base to ConnectOne, following which MTX will cease operations in the State of California. No protests or other opposition have been filed, no hearing is necessary, and we grant the application with certain restrictions.

The Parties

MTX (U-5479-C), which has its principal place of business at 170 East Post Road, White Plains, New York, is a privately held New York corporation authorized to do business in California, and is the holder of a certificate of public convenience and necessity (CPCN) to act as a switchless reseller of interLATA and intraLATA telecommunications services in California.¹ Pursuant to that

¹ California is divided into 10 Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes telecommunications originating in one LATA and terminating in another. "IntraLATA" describes telecommunications originating and terminating within a single LATA.

authority, MTX is engaged in the business of purchasing and reselling long distance telecommunications services.

ConnectOne (U-5780-C), formerly known as PC Telecommunications, Inc. (PC Tel), which has its principal place of business at 170 East Post Road, White Plains, New York, is a wholly owned subsidiary of PriCellular Corporation (PriCellular). ConnectOne is a Delaware corporation authorized to do business in California. It provides telecommunications services in 17 states, including California, and has other applications pending. Pursuant to a CPCN issued by this Commission, ConnectOne has been given authority (Decision 97-05-079, Application 97-01-030) to provide interLATA and intraLATA telecommunications services within California.

The Transaction and Property Involved

The proposed transaction does not involve the sale of any switching equipment.

A redacted copy of the Asset Purchase Agreement (Agreement) between MTX and PC Tel (ConnectOne's former name) dated November 13, 1996, is attached as Exhibit C to the application. An unredacted copy was submitted under seal as Appendix 1 to the applicants' Motion for a Limited Protective Order dated July 8, 1997. By Ruling dated July 17, 1997, the assigned Administrative Law Judge granted applicants' motion and issued a limited protective order.

Under the terms of the Agreement, MTX will transfer to PC Tel [ConnectOne] all of its "Acquired Assets," which are defined in the agreement as:

- "(i) all of [MTX's] active long-distance customers as of the closing date;
- "(ii) all of [MTX's] books, records, files, journals, ledgers, computer files and data, and other information with respect to, or derived from or used in the servicing, billing or payment of (as applicable), the Active Long-Distance

Customers including, without limitation, all customer lists, supplier lists, price lists, telephone numbers and listings, advertising materials and marketing plans, regulatory files and approvals, business plans, financial data, operations manuals, and all data related to sales or accounts receivables;

- "(iii) to the extent transferable and as required and necessary to maintain uninterrupted service as determined by [PC Tel], all permits, licenses, orders, consents and approvals of any Regulatory Agency related to the Active Long-Distance Customers and the providing of LTD Services and Other Services thereto:
- "(iv) [the right to use the name MTX Communications for a period of time on certain conditions...]
- "(v) [reservation and exclusion of claims and/or causes of action that MTX might have against third parties, etc]

From a review of the above, it is evident that assets other than simply MTX's customer list are being transferred. The Agreement specifically provides (Article II, Section 2.02) that the buyer (PC Tel or ConnectOne) is purchasing the Acquired Assets only, and, notwithstanding anything to the contrary contained in the Agreement, is not assuming any liabilities of the seller (MTX) of any nature whatsoever.

Discussion

Commission consideration of an application for customer based transfers between certificated utilities is no longer standard practice. Neither Decision (D.) 94-05-051 nor D.97-06-096 require it, and most such transfers are, in the absence of protest, routinely handled by advice letter filing. Here, however, because of the provision in the agreement between the parties that

ConnectOne will acquire the assets of MTX but none of its liabilities, and after the acquisition of its assets MTX will cease operations in California, we find it necessary to provide some method of protecting customers of MTX by providing them a forum to pursue claims arising out of actions by MTX for a reasonable period of time following the acquisition of MTX's customer base, should they find such a course of action necessary. For that reason, this application was processed under our formal procedure, requiring resolution by formal decision of the Commission.

When evaluating an application for the acquisition and transfer of assets of the holder of a CPCN, the Commission must be satisfied that the purchaser or acquiring party possesses the same financial assets and technical expertise required of an original applicant for a CPCN for the type of service being acquired. If the purchaser is presently the holder of a CPCN authorizing the same type of service, it must demonstrate that the acquisition will not cause harm to either the purchaser's original customer base or to the customer base being acquired. If the buyer's CPCN authorizes a level of service different than that sought to be acquired (switchless versus facilities-based, or vice versa), the purchaser must possess the financial resources and technical expertise required of an applicant for a CPCN to provide the level of service authorized by the CPCN being acquired.

Here, MTX and ConnectOne each holds a CPCN to resell interLATA and intraLATA telecommunications services in California as a non-dominant interexchange carrier (NDIEC). This being the case, ConnectOne must demonstrate that its service to both its present customers and the customers to be acquired will not suffer as a result of the acquisition. In addition, ConnectOne must show that it has the financial resources and technical expertise to continue the level of service that was formerly provided by MTX to MTX's customers.

As part of the application, the applicants have provided, under seal, certain financial information concerning ConnectOne (Appendix 2) and MTX (Appendix 3). According to this information, ConnectOne has financial resources far in excess of the level required by the Commission for the issuance of a CPCN to provide resold non-facilities-based telecommunications services in California. In addition, ConnectOne has furnished (Exhibit E to the application) biographical information concerning Joseph A. Gregori, ConnectOne's President; Steven Price, a senior vice president; and Stuart Rosenstein, a senior vice president. Each of these individuals has several years of experience in accounting or law, as well as experience in various aspects of the telecommunications industry. We find that ConnectOne possesses the technical expertise necessary to provide the management required by the acquisition.

Status of MTX's CPCN

In the application, MTX indicated that upon approval of the transaction, it would surrender its CPCN and would no longer do business in California. This creates a problem. Under the Agreement for which approval is sought, ConnectOne specifically does not assume any of MTX's debts or liabilities. Because of that condition, California creditors or a party having a cause of action against MTX arising out of its activities in this state might be unable to obtain jurisdiction over MTX in the event it desired to proceed against it before the Commission. In view of our obligation to protect California consumers, we will therefore not cancel MTX's CPCN at this time, but will suspend all authority granted by that CPCN for a period of one year from the date of this decision, during which period we will retain jurisdiction over MTX. At the expiration of that one-year period, MTX's CPCN shall be considered voluntarily surrendered and canceled.

Findings of Fact

1. By application filed July 8, 1997, MTX seeks Commission permission to transfer its customer base to ConnectOne.

2. By agreement, MTX will transfer its "Acquired Assets" (customer base and related assets) to ConnectOne; however, ConnectOne will not acquire any of MTX's debts or liabilities.

3. MTX and ConnectOne each holds a CPCN issued by the Commission authorizing it to provide resold interLATA and intraLATA telecommunications services within California.

4. Under the application, upon approval, MTX will cease to do business in California and will surrender its CPCN.

5. According to financial information contained in the application, ConnectOne has sufficient assets to provide service to MTX's customers without degradation of quality of service to either its present customers or MTX's customers.

6. Applicant has furnished information concerning the training and experience of ConnectOne's president and two senior vice presidents. Each has several years of experience in accounting or law, as well as considerable experience in the telecommunications industry.

7. If MTX's CPCN is canceled, the Commission would lose jurisdiction over MTX, possibly to the detriment of California creditors.

8. The Commission's concern for consumer protection requires the Commission to retain jurisdiction over MTX.

Conclusions of Law

1. No protests to the application were filed and no hearing is required.

2. ConnectOne possesses the necessary financial resources and technical expertise required by the Commission to undertake the obligations of the agreement between MTX and ConnectOne.

3. In order to protect California creditors and consumers who may wish to seek redress before the Commission, the Commission

should retain jurisdiction over MTX for at least one year from the date of this decision.

4. To retain jurisdiction over MTX, MTX's CPCN should be suspended for a period of one year, at the conclusion of which period MTX's CPCN should be considered voluntarily surrendered and canceled.

5. Subject to the condition regarding suspension of MTX's CPCN, the application should be approved and made effective immediately.

O R D E R

IT IS HEREBY ORDERED that:

1. The application for ConnectOne Communications Corporation to acquire the MTX Communications, Inc. (MTX) customer base on the terms and conditions set forth in the Asset Purchase Agreement contained in the application is approved subject to the conditions which follow.

2. In order to allow creditors or others desiring to proceed against MTX before this Commission, the certificate of public convenience and necessity (CPCN) currently held by MTX is hereby suspended for a period of one year from the date of this decision and order, at the expiration of which period the CPCN will be considered voluntarily surrendered and canceled.

This order is effective today.

Dated November 5, 1997, at San Francisco, California.

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