

Decision 99-12-031 December 16, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GMS Com, Inc. for a certificate of public convenience and necessity to operate as a switchless reseller of interexchange services.

Application 99-01-038
(Filed January 28, 1999)

OPINION

This decision denies the request of GMS Com, Inc. (applicant) for a certificate of public convenience and necessity to provide inter-Local Access and Transport Area (LATA) and intraLATA telephone service in California.¹

Procedural Background

This matter was initially tendered to the Commission's Docket Office on December 21, 1997, for filing as an application for registration as an interexchange carrier telephone corporation pursuant to the procedures adopted by the Commission in Decision (D.) 97-06-107. The applicant was advised by the Docket Office that the application contained a deficiency.

The deficiency was the absence of information to support the requirement that the applicant possess a minimum of "\$25,000 ... reasonably liquid and available to meet the firm's first year expenses, including deposits required by local exchange carriers or interexchange carriers or ... has profitable interstate operations to generate the required cash flow." (Form of Application for

¹ California is divided into ten 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.

Registration at page 2.) The notes attached to the Form of Application have the following requirement for completing this portion of the Form of Application:

"7. Attach applicant's audited balance sheet for the most recent fiscal year, an unaudited balance sheet as of the most recent fiscal quarter, a bank statement as of the month prior to the date of the application, or a third-party undertaking to provide the required amounts on behalf of applicant. If the balance sheet shows current liabilities in excess of current assets or negative equity, explain how applicant will be able to maintain sufficient liquidity for its first year of operations." (Id. at page 4.)

The applicant did not provide the required information and the tendered application was not filed. The review at that stage does not evaluate the accuracy or veracity of the information provided, but merely its physical presence. It is a review for filing completeness.

Following a large number of telephone conversations between George Melkonians, an officer and director of applicant, and several members of the Commission staff and facsimile transmissions by Mr. Melkonians to various staff members, it was determined that the best way to resolve this application was to allow it to be filed as a regular application for authority to provide interexchange service as a switchless reseller and allow an administrative law judge (ALJ) to address any remaining deficiencies.

The "registration" process, in actuality a simplified application process for a certificate of public convenience and necessity, was established to allow prospective interexchange carriers who meet certain specific criteria to obtain their authority quickly and without significant effort. However, in order to accomplish this, the registration process is ministerial in nature and discretion in meeting filing requirements is not available. If an applicant meets the requirements, approval will be expeditiously granted. If an applicant does not, but still wants to have their request for authority considered, the regular

application process allows for a specific review of filing compliance and consideration of the waiver or modification of requirements where circumstances warrant.

Therefore, on January 28, 1999, this matter was accepted for filing as a regular application. For the convenience of the applicant, we continued to use the registration application form rather than requiring a new filing.

Pursuant to Resolution ALJ 176-3009 the application was categorized as ratesetting and it was preliminarily determined that no hearings would likely be necessary. No protests were filed and no prehearing conference has been held. Because the application fails to meet the basic filing requirements for the authority requested, there is no need for a hearing.

Discussion

The Commission has established two major criteria for determining whether a certificate of public convenience and necessity should be granted. An applicant who is a switchless reseller must demonstrate that it has a minimum of \$25,000 of cash or cash equivalent (as described in D. 91-10-041, 41 CPUC 2d 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 companies or interexchange carriers and demonstrate that they have additional resources to cover all such deposits. (D. 93-05-010, 49 CPUC 2d 197 at 208 (1993).) Further, an applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

Mr. Melkonians took two different approaches to satisfying the financial fitness requirement.² The first approach involved submitting recent payroll check

² It might be noted that in spite of the both the existence of Commission rules regarding the filing of materials related to applications and specific requests to make such

Footnote continued on next page

stubs and a Internal Revenue Service Form W-2 to show the current income of Armen Melkonians, also an officer and director of the applicant. While this arguably demonstrated income, it does not demonstrate reasonable cash liquidity absent additional information on expenses and obligations to which such income is committed. The second approach was to submit by facsimile transmission a copy of a letter providing notice of the approval of an equity line of credit to Armen Melkonians, dated March 20, 1997. The assigned ALJ informed Mr. George Melkonians that while a line of credit would be an acceptable means to demonstrate the required cash liquidity, a current bank statement was required to demonstrate that at least \$25,000 of the line of credit remained available and unencumbered. The applicant has not provided either this information or an explicit commitment by Armen Melkonians to commit such unencumbered credit to the applicant for at least one year.

By a February 11, 1999 ALJ Ruling, the applicant was advised of the deficiencies noted and directed to provide the required information or the ALJ would recommend dismissal of the application.

Mr. George Melkonians subsequently inquired of the assigned ALJ as to whether a performance bond would be acceptable to demonstrate the required financial fitness. The ALJ issued a ruling on February 17, 1999, that indicated a performance bond would be acceptable if it met specified criteria. Those criteria were the following:

1. It is issued by a surety firm meeting all requirements for transacting such business within the State of California.
2. It is for at least \$25,000.

submittals by formal filings, the applicant tendered all of these supplemental materials by facsimile transmission.

3. It is irrevocable for at least 12 months beyond the date on which applicant's certificate of public convenience and necessity is effective.
4. It will cover any and all business expenses of the applicant, including but not limited to: the repayment of customer deposits; the payment of any charges or fees owed to other telecommunications carriers; the payment of any and all fees and taxes owed to any public agency or unit of government; and on-going business expenses of applicant including costs of office space, vehicles, office equipment, salaries and utility bills.
5. It is established to cover only the business expenses of applicant and for no other purpose.
6. It has no preconditions for such payment other than default by the applicant.

However, the applicant was cautioned that a performance bond appeared to be one of the most expensive and complex means of satisfying this requirement. (Administrative Law Judge's Ruling of February 17, 1999.)

This application as tendered and now filed has been pending before this Commission for more than one year. During the entirety of that time, virtually the only question that has remained is the applicant's demonstration of compliance with the financial fitness requirement. The applicant has been aware of this deficiency since at least April 20, 1998, as a result of a letter from the Docket Office noting the deficiency. Since then several members of the Commission staff have discussed this requirement and other matters with George Melkonians, representing the applicant.

This requirement exists to protect the public and other entities providing necessary services to the applicant by ensuring that the applicant has sufficient financial resources to meet its cash flow obligations during its initial period of operation. (See, e.g., D. 93-05-010, 49 CPUC 2d 197 (1993).)

While the registration form of application listed some of the means by which financial fitness can be demonstrated, the Commission decision in which this requirement was initially imposed provided a more comprehensive list of

means by which to show financial fitness and applicant was explicitly advised of these means by the ruling of February 11, 1999. (See D. 91-10-041, 41 CPUC 2d 505 at 520.)

The applicant also failed to comply with one other explicit request. In the Registration Form of Application originally tendered, the applicant indicated in response to Question 8 that the applicant was eligible for an exemption from tariffing requirements, as set out in D. 96-12-033, and was seeking such an exemption. In order to qualify for such a tariffing exemption, an applicant must comply with the Consumer Protection Rules adopted in D. 96-09-098. By an ALJ's ruling dated February 11, 1999, the applicant was requested to explicitly note in an application addendum its understanding and acceptance of this requirement. In the alternative, the applicant was directed to provide draft tariffs as part of its addendum filing. The applicant was advised that absent an explicit statement on tariff exemption or the inclusion of appropriate draft tariffs in the addendum, the ALJ would recommend dismissal of the application. The applicant failed to address the tariff issue in either manner. Compliance with the tariff requirements is often one of the principal methods for a new applicant to demonstrate technical expertise in telecommunications.

Because applicant has failed to demonstrate the required financial fitness and through its failure to respond in an appropriate manner to information requests has called into question its technical expertise, we will deny the inter- and intraLATA service which applicant seeks to provide.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the applicant in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. No comments were received.

Findings of Fact

1. This matter was initially tendered to the Commission's Docket Office on December 21, 1997, for filing as an application for registration pursuant to D. 97-06-107 as an interLATA and intraLATA carrier within California.
2. Applicant was advised by the Commission's Docket Office that the application contained a deficiency since it lacked information to support the financial fitness requirement of having \$25,000 reasonably liquid and available to meet the firm's first year expenses as defined.
3. The registration process is a ministerial process that does not allow the reviewers discretion with respect to filing requirements.
4. On January 28, 1999, this matter was accepted for filing as a regular application, categorized as ratesetting by Resolution ALJ 176-3009 and a preliminary determination made that no hearings were necessary.
5. Applicant's submittal of payroll stubs and a Internal Revenue Service form W-2 for one of its officers and directors was insufficient to demonstrate the \$25,000 of cash or cash equivalence since it at best showed income but, absent corresponding information on expenses or other obligations to which it was committed, did not show that the funds were "reasonably liquid and readily available."
6. Applicant's submittal of a notice of approval of an equity line of credit given to an officer and director some time previous was insufficient since the showing did not indicate what portion of the line of credit was already obligated and what was available to meet the applicant's obligations, nor was a requested commitment made to ensure the unencumbered credit was available to the applicant for at least one year.
7. Applicant was given full opportunity to remedy the problems with each of its alternative showings on financial fitness and failed to do so.

8. A performance bond meeting the criteria described in the body of this decision would also satisfy the financial fitness requirement.

Conclusions of Law

1. An applicant for a certificate of public convenience and necessity must satisfy established requirements to demonstrate both that it has met the minimum financial fitness requirement and that it has made a reasonable showing of technical expertise in telecommunications or a related business.

2. The purpose of the financial fitness requirement is to protect the public and other entities providing necessary services to the applicant by ensuring that the applicant has sufficient financial resources to meet its cash flow obligations during its initial period of operations.

3. The applicant has failed to demonstrate that it has a minimum of \$25,000 of cash or cash equivalent (meeting establish criteria) reasonably liquid and readily available to meet the firm's start-up expenses as well as additional resources necessary to cover deposits that may be required by local exchange companies or interexchange carriers.

4. The applicant's failure to respond to a ruling regarding proposed tariffs or an exemption from tariffing requirements demonstrates a lack of technical expertise.

O R D E R

IT IS ORDERED that:

1. The application of GMS Com, Inc. (applicant) for a certificate of public convenience and necessity to provide inter-Local Access and Transport Area (LATA) and intraLATA telephone service within California is denied.

A.99-01-038 ALJ/PSW/eap

2. Application 99-01-038 is closed.

This order is effective today.

Dated December 16, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners