

Decision **PROPOSED DECISION OF ALJ PRESTIDGE** (Mailed 7/25/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Acceris Management and Acquisition LLC for a Certificate of Public Convenience and Necessity to Provide Resold Local Exchange Services in the State of California.

Application 06-03-025
(Filed March 24, 2006)

**OPINION GRANTING APPLICATION FOR
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

I. Summary

Acceris Management and Acquisition LLC (Applicant) seeks a certificate of public convenience and necessity (CPCN) under Pub. Util. Code § 1001 for authority to provide resold local exchange telecommunications services in the State of California. Applicant currently holds a CPCN which authorizes the provision of resold interexchange services in this state.¹

By this decision, we grant the requested authority, subject to the terms and conditions stated below.

II. Background

In prior decisions, we authorized the provision of competitive interexchange services by carriers meeting specified criteria. In addition, we authorized the provision of competitive local exchange service, by carriers

¹ See Decision (D.) 05-10-017, which granted Applicant CPCN #U-6971-C.

meeting specified criteria, within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), SureWest Telephone Company (SureWest), previously named Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a Minnesota limited liability company, seeks authority to provide resold local exchange services within the service territories of Pacific and Verizon. Applicant plans to primarily serve business customers.

Applicant's principal place of business is located at 60 South Sixth Street, Suite 2535, Minneapolis, MN 55402.

III. Financial Qualifications

To be granted a CPCN for authority to provide resold local exchange and/or interexchange services, an applicant must demonstrate that it has a minimum of \$25,000 of cash or cash equivalent to meet the firm's start-up expenses.² An applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by local exchange carriers (LECs) and/or IECs in order to provide the proposed service.³ Applicant has provided financial documentation that demonstrates that it has sufficient cash to satisfy the financial requirement plus any required deposits.

² The financial requirement for CLCs is contained in D.95-12-056, Appendix C. The financial requirement for IECs is contained in D.91-10-041.

³ The requirement for CLC applicants to demonstrate that they have additional financial resources to meet any deposits required by underlying LECs and/or IECs is set forth in D.95-12-056, Appendix C. For NDIECs, the requirement is found in D.93-05-010.

IV. Technical and Managerial Qualifications

Applicants for IEC and CLC authority are required to make a reasonable showing of technical expertise in telecommunications or a related business.

Applicant submitted biographical information on its management which demonstrates their technical qualifications to operate as a telecommunications provider.

The Commission may also deny a CPCN application in order to protect the public interest if the applicant fails to demonstrate that its management is qualified to operate a telecommunications provider in a manner that complies with applicable laws and adequately serves the public.⁴

Applicant represents that no one associated with or employed by Applicant as an affiliate, officer, director, partner, or owner of more than 10% of Applicant was previously associated with any telecommunications carrier that filed for bankruptcy or went out of business.

However, Applicant and its parent company, North Central Equity LLC, previously acquired the assets, including the customer base, of Acceris Communications, Inc., Acceris Communications Corp., and Counsel Corporation, their Canadian parent corporation, through an asset purchase agreement dated May 18, 2005. The FCC has found that Acceris Communications, Acceris Communications Corp. and a related company, Acceris Communications Partners, violated regulations that prohibit the “slamming” of customers on 11 occasions between 2003 and 2005.^{5 6} All of these

⁴ See D.04-05-033.

⁵ See 2003 FCC LEXIS 3035 (May 23, 2003), 2004 FCC LEXIS 2140 (April 28, 2004), 2004 FCC LEXIS 3464 (June 22, 2004), 2004 FCC LEXIS 3457 (June 22, 2004), 2004 FCC LEXIS 4046 (July 21, 2004), 2005 FCC LEXIS 2010 (March 29, 2005), 2005 FCC LEXIS 2004

Footnote continued on next page

FCC complaints resulted from slamming violations or errors by the Company's third party verifier.

None of the FCC decisions found Applicant in violation of slamming laws or regulations. Further, according to a declaration of Applicant's Chief Executive Officer under penalty of perjury, Applicant has no relationship to Acceris Communications, Inc., Acceris Communications Corp., or Counsel Corporation, except for the purchase of the assets and customer base of these companies, and neither Applicant nor its parent company, North Central Equity LLC has any shareholders, directors, officers, or managers in common with Acceris Communications Inc. or Acceris Communications Corp.

Applicant discloses that several of its directors, including its Chief Executive Officer, were previously involved with the management of New Access Communications, LLC (New Access), another subsidiary of North Central Equity, LLC. New Access holds a CPCN authorizing the provision of limited facilities-based local exchange services in this state,⁷ but was the subject of several FCC consumer complaints and state regulatory actions which arose before its acquisition by North Central Equity. In granting New Access' application in D.03-07-015, the Commission noted that the consumer complaints to the FCC and the state regulatory actions had occurred several years earlier, in 2000 and 2001; that New Access had taken steps to avoid repetition of the

(March 29, 2005), 2005 FCC LEXIS 2055 (March 30, 2005), 2005 FCC LEXIS 2503 (April 27, 2005), 2005 FCC LEXIS 2934 (May 18, 2005), 2005 FCC LEXIS 3649 (June 23, 2005), 2005 FCC LEXIS 5405 (September 29, 2005).

⁶ "Slamming" is generally defined as an unauthorized change in a customer's selection of a provider of telephone exchange service or toll service.

⁷ See D.03-07-015.

violations; and that the Commission had not received complaints from California customers regarding New Access.

Applicant also discloses that after Commission granted the application of New Access for a CPCN in D.03-07-015, in 2004, New Access reached a

settlement in a multistate proceeding initiated by the Minnesota Attorney General in 2002. The terms of this settlement required New Access to pay \$750,000 to the states in civil penalties, investigative costs, attorney's fees, and costs related to consumer education and restitution. In addition, the FCC issued orders on several additional consumer complaints which arose from incidents occurring during the same time period as the other violations.

According to Applicant, the following persons associated with the management or ownership of Applicant or North Central Equity LLC were previously involved with the management of New Access:

- Jessica Newman, Chief Executive Officer of Applicant - Ms. Newman previously worked for New Access in operations, but was not an officer or director of the company at the time that the enforcement actions were initiated. However, she later became Chief Executive Officer of New Access after North Central Equity LLC acquired the company.
- Elam Baer, Chief Executive Officer and majority owner of North Central Equity, LLC - Mr. Baer previously served on the board of governors of New Access from late 2001 until December 31, 2003.
- Gregory Wilmes, Vice President, Portfolio Management, North Central Equity, LLC - Mr. Wilmes is currently a director of New Access and previously served as Chief Executive Officer of New Access.

Although we are concerned with Acceris Communications Inc.'s and Acceris Communications Corp.'s record of slamming violations, we are satisfied that Applicant is a separate company, which is governed by separate shareholders, officers, directors, and management. We note that there have been no FCC decisions finding Applicant or its parent company in violation of slamming regulations or other legal or regulatory requirements. Applicant's

CPCN authorizing the provision of resold interexchange services in California is also in good standing. Further, the previous violations by New Access occurred before North Central Equity LLC acquired the company in 2005 and according to Applicant, no regulatory actions or consumer complaints have been filed against New Access since the settlement of the multistate proceeding in 2004 or are pending. Applicant's CEO was not involved with the management of New Access during the time in which the violations were committed. Under these circumstances, we find that Applicant has demonstrated that its management is qualified to operate the company in a manner consistent with legal and regulatory requirements and to serve the public.

However, as a condition of retaining its CPCN, Applicant must comply with all applicable legal and regulatory requirements, particularly those designed to protect consumers. If Applicant is found to have engaged in additional slamming or violations of laws that protect consumers, we shall initiate proceedings to revoke Applicant's CPCN.

V. Tariffs

Commission staff reviewed Applicant's draft tariffs for compliance with Commission rules and regulations. The deficiencies to be corrected by Applicant are set forth in Attachment A.

VI. California Environmental Quality Act (CEQA)

CEQA requires the Commission as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. Applicant will not be constructing any facilities. Therefore, it can be seen with certainty that there is no possibility that granting this application will have an adverse effect upon the environment.

Applicant must file for additional authority, and submit to any required CEQA review, before it can construct facilities.

VII. Conclusion

We conclude that the application conforms to our rules for authority to provide resold competitive local exchange telecommunications services. Accordingly, we shall approve the application subject to the terms and conditions set forth herein.

VIII. Comments on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Comments were received from Applicant on August 17, 2006. With the permission of the assigned ALJ, on August 25, 2006, Applicant also filed a second supplement to the application, which addressed the relationship between Applicant, Acceris Communications Inc., and Acceris Communications Corp., as well as the FCC decisions that found Acceris Communications Inc. and Acceris Communications Corp. in violation of slamming regulations. Applicant also filed a third supplement, which responded to questions from the assigned ALJ on September 28, 2006. We have reviewed the comments and second supplements to the application and made changes throughout the decision as appropriate.

IX. Categorization and Need for Hearings

In Resolution ALJ 176-3170 dated April 13, 2006, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received.

Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

X. Assignment of Proceeding

Rachelle B. Chong is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of the application appeared in the Daily Calendar on April 14, 2006.
2. No protests have been filed.
3. A hearing is not required.
4. In prior decisions, the Commission authorized competition in providing interexchange services for carriers meeting specified criteria.
5. In prior decisions the Commission authorized competition, by carriers meeting specified criteria, in providing local exchange telecommunications services within the service territories of Pacific, Verizon, SureWest, and CTC.
6. Applicant has a minimum of \$25,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
7. Applicant has sufficient additional cash or cash equivalent to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed service.
8. Applicant's management has sufficient technical expertise to operate the company.
9. On May 18, 2005, Applicant and its parent company, North Central Equity, LLC acquired the assets and customer base of Acceris Communications, Inc., Acceris Communications Corp., and their Canadian parent company, Counsel Corporation.

10. The FCC has found that on 11 occasions between 2003 and 2005, Acceris Communications, Acceris Communications Corp., and a related company, Acceris Communications Partners, engaged in the unlawful slamming of customers.

11. Applicant and its parent company, North Central Equity LLC, have no relationship to Acceris Communications, Inc., or Acceris Communications Corp., except for the acquisition of the assets and customer base of these companies.

12. Applicant and its parent company, North Central Equity LLC, have no shareholders, directors, officers, or managers in common with Acceris Communications, Inc. or Acceris Communications Corp.

13. All of the FCC decisions which found Acceris Communications Inc. or Acceris Communications Corp. in violation of slamming regulations, except for one decision, addressed consumer complaints filed before Applicant acquired the assets and customer base of these companies.

14. The remaining FCC decision addressed a customer complaint filed against Acceris Communications Corp. only six days after Applicant acquired the assets and customer base of this company.

15. The FCC complaints against Acceris Communications, Inc. and Acceris Communications Corp. resulted from slamming violations or errors by the third party verifier for these companies.

16. Applicant is using a different third party verifier than the company used by Acceris Communications, Inc., and Acceris Communications Corp. before the sale of their assets to Applicant.

17. Applicant now has a regulatory complaint database which tracks any complaints received, in order to ensure that Applicant promptly responds to any complaints from customers or regulatory agencies.

18. Applicant is no longer soliciting new customers by telemarketing directed at the general public.

19. As part of its application, Applicant submitted a draft of its initial tariff. Except for the deficiencies noted in Attachment A, Applicant's draft tariff complies with the Commission's requirements.

20. Applicant will not be constructing any facilities pursuant to this CPCN.

Conclusions of Law

1. Applicant has the financial ability and technical expertise to provide the proposed service.

2. Applicant has demonstrated the ability to operate as a telecommunications carrier in a lawful manner that appropriately serves the public.

3. Public convenience and necessity required that Applicant's provision of resold competitive local exchange services be subject to the terms and conditions set forth herein.

4. Since Applicant will not be constructing any facilities, it can be seen with certainty that there will be no significant effect on the environment.

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

6. Applicant, once granted a CPCN, should be subject to the applicable Commission rules, decisions, General Orders, and statutes that pertain to California's public utilities.

7. Because of the public interest in competitive local exchange services, the following order should be effective immediately.

O R D E R**IT IS ORDERED** that:

1. A certificate of public convenience and necessity is granted to Acceris Management and Acquisition LLC (Applicant) to operate as a resale provider of competitive local exchange services, subject to the terms and conditions set forth below.
2. Applicant is authorized to provide local exchange service in the service territories of Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone, and Citizens Telecommunications Company of California, Inc.
3. Applicant is authorized to file tariff schedules for the provision of competitive local exchange services with the deficiencies noted in Attachment A corrected. Applicant may not offer services 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. The tariff shall be effective not less than one day after tariff approval by the Commission's Telecommunications Division. Applicant shall comply with its tariffs.
4. 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.
5. The corporate identification number assigned to Applicant, U-6971-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.
6. Applicant shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (Rulemaking 95-04-043/Investigation 95-04-044), the Commission's rules and regulations for nondominant interexchange carriers set forth the D.93-05-010 and D.90-08-032, as well as all

other applicable Commission rules, decisions, GOs and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

7. Applicant shall comply with the requirements applicable to competitive local exchange carriers included in Attachment A to this decision.
8. Applicant is not authorized to construct facilities.
9. Application 06-03-025 is closed.

This order is effective today.

Dated _____, at San Francisco, California.