

Decision 00-09-065 September 21, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Incomnet Communications Corporation (U-5173-C), a Delaware corporation; Incomnet, Inc., a California Corporation; and Ironwood Telecom LLC, a Colorado limited liability company:
(a) For Authority to Issue Stock and Evidences of Indebtedness in Reorganization of Indebtedness And Capitalization of Incomnet Communications Corporation, pursuant to Section 817(f) of the Public Utilities Code; and, (b) For Authority to Reorganize and Transfer Control of Incomnet Communications Corporation to Ironwood Telecom LLC, pursuant to Section 854 of the California Public Utilities Code; and, (c) for Expedited Ex Parte Approval

Application 00-04-047
(Filed April 28, 2000)

O P I N I O N

1. Summary

Incomnet Communications Corporation (Incomnet), a non-dominant interexchange carrier, seeks authority pursuant to Pub. Util. Code § 854 to transfer control to Ironwood Telecom LLC (Ironwood), a privately owned holding company with headquarters in Colorado. The transfer and a reorganization of Incomnet is made pursuant to a plan of reorganization approved in a bankruptcy proceeding. Incomnet, previously operating as National Telephone Communications, Inc., would continue to be subject to restrictions imposed as part of a settlement of a 1997 Commission investigation of slamming and consumer fraud by the company's agents. The application is

unopposed. Its approval would, among other things, provide sufficient funding for Incomnet to pay California telephone surcharges of more than \$1.2 million.

2. Background

Incomnet is a Delaware corporation certificated by this Commission as a reseller of local and long-distance service in California pursuant to Decision (D.) 89-04-043 and D.94-12-037. At the time of its certification, the utility was named National Telephone Communications, Inc., and its state of incorporation was Nevada. In 1997, the utility was reorganized as a Delaware corporation and was then renamed Incomnet. Its principal place of business is at 2801 Main Street, Irvine, California.

Incomnet operates as an interexchange carrier in all 50 states, with approximately 82,000 subscribers, about 65% of them in California. The utility's telecommunications services are purchased in bulk from WorldCom Network Services, Inc. (WorldCom) and resold under a variety of discount rate plans through independent agents.

In 1997, the company was the subject of Commission Investigation 97-09-001, resulting from claims that the company's independent agents had engaged in prohibited slamming activities, i.e., unauthorized switching of customers' telephone carriers. In a settlement agreement approved by the Commission in D.98-02-029, as modified in D.98-12-008, the company agreed to make restitution of approximately \$335,000 to consumers and, pursuant to stipulation with the State Attorney General's office and other law enforcement agencies, to pay \$1.2 million in fines and costs. The company's management was replaced, and a number of probationary restrictions were placed on the manner in which the company and its agents did business.

3. Bankruptcy and Reorganization

Incomnet states that consumers have been reimbursed as ordered, and all fines and costs have been paid. However, the financial condition of Incomnet and its parent company (Incomnet, Inc.) so deteriorated that both companies on September 2, 1999, sought protection under Chapter 11 of the Bankruptcy Code before the U.S. Bankruptcy Court for the Central District of California, Santa Ana Division. Since that time, Incomnet and its parent company have operated as debtors and Debtors in Possession under Chapter 11 while they sought additional funding.

Under a Third Amended Chapter 11 Plan of Reorganization dated March 14, 2000, the utility proposes a reorganization and transfer of control in which (1) Incomnet, Inc., the parent company, would be liquidated; (2) all outstanding shares of Incomnet, previously owned entirely by the parent company, would be canceled, and (3) new common stock and notes of the reorganized Incomnet would be issued and distributed to creditors. Between 88% and 92% of the new common stock would go to Incomnet's largest creditor, Ironwood Telecom LLC, a Colorado limited liability company. Ironwood would not operate in California, nor is it qualified to do so. Instead, it would take stock ownership of Incomnet, which would continue to function as the operating entity.

With an infusion of new capital from Ironwood and other creditors, the reorganization plan would result in partial payment of outstanding secured and unsecured obligations of the bankrupt companies. The plan provides that outstanding priority and tax claims, including unpaid High Cost Fund-B obligations of \$758,600, Teleconnect Fund obligations of \$73,490, and Universal Service Fund surcharges of \$435,998, would be scheduled for full payment as provided in the Bankruptcy Code.

The Third Amended Plan of Reorganization was approved in a confirmation order by the Bankruptcy Court on May 9, 2000.

4. Continued Operation of Incomnet

According to the application, since implementation of the Commission's order in D.98-02-029, Incomnet has operated with altogether different management than was in place during the period of alleged slamming. The application states that Incomnet's current officers are each experienced financial professionals.

John P. Casey has served as chairman and chief executive officer of Incomnet and its parent company since shortly before the bankruptcy petitions were filed, and his role has been to direct efforts to find investors willing and able to carry out the reorganization. Casey's oversight will terminate with the implementation of the reorganization plan.

George P. Blanco is Incomnet's chief operating officer and executive vice president, having joined the company as part of the restructuring mandated by D.98-02-029. He is a certified public accountant and former managing director of PricewaterhouseCoopers LLP. Under the reorganization plan, he will replace Casey as chief executive officer.

Chief financial officer of Incomnet is Stephen A. Garcia, who joined the company in December 1998 as part of the D.98-02-029 restructuring. Garcia, a certified public accountant, has acted as controller for a number of other companies in transition. He is a former senior auditing accountant with Deloitte & Touche. Under the reorganization plan, he will remain with Incomnet in his current capacity.

Incomnet states that it has improved its operations during the pending reorganization. It states that it has reduced staff, revised its agreement with independent agents, and negotiated a new agreement with WorldCom. With the

change of control and infusion of new capital, Incomnet states that it will pay much of its debt, including the telephone surcharges in California, and will continue its operations in compliance with the restrictions imposed by this Commission and by the Attorney General.

The controlling entity of the reorganized Incomnet will be Ironwood, a privately owned holding company. The application states that neither Ironwood nor any of its owners is affiliated with or involved in the ownership or operation of any other regulated utility. Ironwood's manager is Donald Berlanti, an attorney who previously served as a staff attorney for the Securities and Exchange Commission.

5. Discussion

Pub. Util. Code § 854 requires Commission authorization before a company may “merge, acquire, or control...any public utility organized and doing business in this state....” The purpose of this and related sections is to enable the Commission, before any transfer of public utility authority is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRC 56.)

The proposed transfer of control promises improved management of this telecommunications company and is part of a plan of reorganization that has been thoroughly reviewed by the Bankruptcy Court. No changes in existing rates or services are proposed. There have been no protests to this application.

The application also seeks approval pursuant to Pub. Util. Code § 817(f) of its issuance of stock and notes to effectuate the reorganization. However, as a certificated non-dominant interexchange carrier, Incomnet has been exempted from the requirements of Pub. Util. Code §§ 816 through 830 by this

Commission's order in D.90-08-032. Accordingly, approval under Section 817(f) is not required.

In Resolution ALJ 176-3039, dated May 11, 2000, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, we conclude that a public hearing is not necessary, nor is it necessary to alter the preliminary determinations in Resolution ALJ 176-3039.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. Incomnet is certificated as a reseller of local and long-distance telecommunications service in California.
2. The name of the company was changed in 1997; its previous name was National Telephone Communications, Inc.
3. In 1997, the company was the subject of Commission Investigation 97-09-001, in which it was alleged that the company's agents had engaged in slamming and fraud.
4. In a settlement agreement in 1998 approved by the Commission and the California Attorney General, the company agreed to make restitution to consumers and to pay \$1.2 million in fines and costs.
5. As part of the settlement agreement, the company's management was replaced and probationary restrictions were placed on the company's manner of doing business.
6. Incomnet and its parent company filed for Chapter 11 bankruptcy in September 1999.

7. A plan of reorganization was approved by the Bankruptcy Court in a confirmation order dated May 9, 2000.

8. Under the plan or reorganization, the parent company of Incomnet will be liquidated, all outstanding share of stock of Incomnet will be canceled, and new common stock and notes will be issued to creditors.

9. Under the plan of reorganization, Ironwood would own between 88% and 92% of the common stock of the reorganized Incomnet.

10. The reorganization will permit Incomnet to pay outstanding priority and tax claims, including \$1.2 million to High Cost Fund-B, the Teleconnect Fund, and the Universal Service Fund.

11. The reorganized Incomnet would continue to operate under new management, subject to the restrictions imposed by the Commission and by the Attorney General.

12. The application is unopposed.

Conclusions of Law

1. To the extent the application seeks authorization for a change of control pursuant to Pub. Util. Code § 854, the application should be approved.

2. Authorization pursuant to Pub. Util. Code § 817(f) is unnecessary because non-dominant interexchange carriers are exempt from the requirements of Pub. Util. Code §§ 816-830.

3. This order should be effective immediately so that the utility may carry out the reorganization authorized by the Bankruptcy Court.

O R D E R

IT IS ORDERED that:

1. The application of Incomnet Communications Corporation (Incomnet), Incomnet, Inc., and Ironwood Telecom LLC (Ironwood) for authority to reorganize and transfer control of Incomnet to Ironwood pursuant to Pub. Util. Code § 854 is approved.
2. Applicants shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of authority, as authorized herein, within 30 days of the date of this order. A true copy of the instruments of transfer shall be attached to the notification.
3. Incomnet shall make all books and records available for review and inspection upon Commission staff request.
4. The authority granted herein shall expire if not exercised within one year of the date of this order.
5. Application 00-04-047 is closed.

This order is effective today.

Dated September 21, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners