

Decision 11-01-019 January 13, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of XYN Communications of California, LLC for a Certificate of Public Convenience and Necessity to Provide Limited Facilities-Based and Resold Local Exchange, IntraLATA and InterLATA Interexchange Telephone Service in all AT&T California's and Verizon California's Local Exchange Areas.

Application 10-08-013
(Filed August 18, 2010)

**DECISION GRANTING XYN COMMUNICATIONS OF CALIFORNIA, LLC A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE
LIMITED FACILITIES-BASED AND RESOLD LOCAL EXCHANGE, AND
INTEREXCHANGE SERVICE**

1. Summary

XYN Communications of California, LLC, filed an application for a certificate of public convenience and necessity for authority to provide limited facilities-based and resold local exchange, intraLATA and interLATA interexchange telephone service in all the service territories of Pacific Bell Telephone Company d/b/a AT&T California and Verizon California Inc. in the state of California.

By this decision, we grant XYN Communications of California, LLC, a certificate of public convenience and necessity to provide limited facilities-based and resold local exchange intraLATA and interLATA interexchange

telecommunications services, on the terms and conditions set forth in the Ordering Paragraphs.

2. Background

On August 18, 2010, XYN Communications, a California Limited Liability Company (XYN or Applicant), filed an application for a certificate of public convenience and necessity (CPCN) to provide limited facilities-based and resold local exchange, intraLATA and interLATA interexchange telephone service, as well as, switched access service, in all the service territories of Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and Verizon California Inc. (Verizon), in California. XYN proposes to offer local exchange services by purchasing unbundled network elements from incumbent local exchange carriers as well as reselling the services of other certificated carriers. XYN has placed a high capacity Lucent compact softswitch at One Wilshire in Los Angeles, CA. XYN has interconnected at this Point of Presence with Tier 1 bandwidth providers at gigabit speeds. XYN is a subsidiary of XYN Holdings International, LLC (XYN Holdings). Its principal place of business is located at 8275 S. Eastern Avenue #200, Las Vegas, NV 89123.

On October 15, 2010, the assigned Administrative Law Judge (ALJ) issued a ruling, requesting additional information. On November 4, 2010, XYN filed a response to the ruling (Response).

3. California Environmental Quality Act (CEQA)

CEQA requires the Commission to act 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 provide its service through the use of existing facilities and network elements of other

carriers and/or through its own facilities, installed within existing buildings and structures, and has no other plans for constructing other facilities at this time.

Since XYN states that it does not intend to construct any facilities,¹ it can be seen with certainty that there is no possibility that granting this application will have an adverse impact upon the environment. Before it can construct facilities other than equipment to be installed in existing buildings or structures, XYN must file for additional authority, and submit to any necessary CEQA review.

4. Financial Qualifications

Pursuant to Rule 4.B of Decision (D.) 95-12-056, an applicant for a CPCN for authority to provide limited facilities-based and resold local exchange and interexchange services must demonstrate that it has \$100,000 cash or cash equivalent to meet the firm's start-up expenses. Applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by other telecommunications carriers in order to provide service in California.

At Exhibit C to the application, Applicant has provided a guarantee of its obligations by its parent corporation, XYN Holdings. Attached to the guarantee letter is another letter and bank statement from Wells Fargo Bank. The Wells Fargo letter indicates that XYN Holdings opened an account in the amount of \$100,000, approximately two weeks before the application was filed. The documentation provided by XYN Holdings, on behalf of the Applicant, did not demonstrate long term financial viability nor comport with the requirements of D.91-10-041. In its Response to the October 15, 2010 ALJ Ruling, Applicant

¹ A.10-08-013 Exhibit E.

provided a letter from its president, Shawn Sims, containing additional guarantees of its financial obligations.² Both the letter and bank statement demonstrate that XYN has access to over \$100,000 in cash, which is an amount sufficient to cover start-up expenses and is reasonably liquid and available.

XYN proposes to offer service within the territories of AT&T & Verizon. In its Response, XYN stated that for each incumbent provider in the geographic local exchange area where authority has been requested, it anticipates that the required deposits will not exceed \$10,000, each. Applicant has submitted proof that it has a Certificate of Deposit (CD) at Wells Fargo Bank in the amount of \$25,000.³ We find, given the \$25,000 CD, that XYN has demonstrated that it has sufficient funds to pay deposits, and thus, fulfills the Commission's deposit requirement.

5. Managerial and Technical Qualifications

To be granted a CPCN for authority to provide local exchange and interexchange service, an applicant must make a reasonable showing of managerial and technical expertise in telecommunications or a related business.⁴ XYN supplied biographical information on its management, in its application, that demonstrated that it has sufficient expertise and training to operate as a telecommunications provider.

XYN verified that no one associated with or employed by XYN as an affiliate, officer, director, partner, or owner of more than 10% of XYN was previously associated with a telecommunications carrier that filed for

² Response, Attachments 1 & 2.

³ *Id.* Attachment 2.

bankruptcy, or was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order.

XYN also verified that no one associated with or employed by it as an affiliate, officer, director, partner, or owner of more than 10% of XYN was previously associated with any telecommunications carrier that has been found either civilly or criminally liable by a court of appropriate jurisdiction for a violation of § 17000, et seq. of the California Business and Professions Code, or for any actions which involved misrepresentations to consumers, nor is currently under investigation for similar violations.

For the above reasons, we find that XYN is in compliance with these requirements of D.95-12-056.

6. Tariffs

Commission staff reviewed XYN's draft tariffs for compliance with Commission rules and regulations. The deficiencies are noted in Attachment A to this decision. In its compliance tariff filing, XYN shall correct these deficiencies as a condition of our approval of its application.

7. Map of Service Territory

To be granted a CPCN for authority to provide local exchange service, an applicant must provide a map of the service territories it proposes to serve.⁵ In Exhibit E, XYN provided a map of the location of its proposed service territory, in compliance with this requirement.

⁴ D.95-12-056 at Appendix C, Rule 4.A.

⁵ D.95-12-056 at Appendix C, Rule 4.E.

8. Expected Customer Base

XYN provided its estimated customer base for the first and fifth years of operation in Exhibit D of its application. Therefore, XYN has complied with this requirement.

9. Conclusion

We conclude that the application conforms to our rules for certification as a competitive local exchange and interexchange carrier. Accordingly, we grant XYN a CPCN to provide limited facilities-based and resold local exchange telecommunications service in the service territories of AT&T and Verizon and interexchange service in California, subject to compliance with the terms and conditions set forth in the Ordering Paragraphs.

10. Categorization and Need for Hearings

In Resolution ALJ 176-3260, dated September 2, 2010 the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

11. Comments on Proposed Decision

No protests were filed in this proceeding. Therefore, 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.

12. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of the application appeared on the Daily Calendar on August 25, 2010. No protests have been filed. A hearing is not required.

2. XYN seeks authorization to provide limited facilities-based and resold local exchange service and interexchange service, and switched access service, in the California service territories of AT&T and Verizon.

3. XYN has a minimum of \$100,000 cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.

4. XYN has sufficient additional cash or cash equivalent to cover deposits that may be required by other telecommunications carriers in order to provide the proposed service.

5. XYN's management possesses sufficient experience, knowledge, and technical expertise to provide local exchange and interexchange services to the public.

6. No one associated with or employed by XYN as an affiliate, officer, director, partner, or owner of more than 10% of XYN was previously associated with a telecommunications carrier that filed for bankruptcy, or was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order.

7. No one associated with or employed by it as an affiliate, officer, director, partner, or owner of more than 10% of XYN was previously associated with any telecommunications carrier that has been found either civilly or criminally liable by a court of appropriate jurisdiction for a violation of § 17000 et seq. of the California Business and Professions Code, or for any actions which involved misrepresentations to consumers, nor is currently under investigation for similar violations.

8. Except for the deficiencies identified in Attachment A to this decision, XYN's draft tariffs comply with the Commission's requirements.

9. XYN provided a map of the location of its proposed service territory.

10. XYN provided an estimate of its customer base for the first and fifth year of operation.

11. XYN does not propose to construct any facilities.

Conclusions of Law

1. XYN should be granted a CPCN to provide limited facilities-based and resold local exchange telecommunications service, interexchange service and switched access service, in the California service territories of AT&T and Verizon, subject to the terms and conditions set forth in the Ordering Paragraphs.

2. XYN has the financial ability to provide the proposed service.

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

4. Applicant should be granted nondominant carrier status, subject to Commission rules and regulations as detailed in D.85-01-008 and modified in D.85-07-081 and D.85-11-044.

5. XYN's initial tariff filing should correct the tariff deficiencies shown in Attachment A to this decision.

6. Since XYN does not propose to construct any facilities, it can be seen with certainty that granting it authority to provide local exchange service will not have a significant adverse effect upon the environment.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to XYN Broadband Initiatives LLC, to provide limited facilities-based and resold local exchange and interexchange telecommunications service in the service territories of Pacific Bell Telephone Company d/b/a AT&T California and Verizon California, Inc., in California, subject to the terms and conditions set forth below.

2. XYN Broadband Initiatives LLC may not offer competitive local exchange, interexchange services, and switched access service until tariffs are filed with and authorized by this Commission, in accordance with General Order 96-B and has corrected for deficiencies set forth in Attachment A.

3. The corporate identification number assigned to XYN Broadband Initiatives LLC, U7207C, must be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

4. XYN is a nondominant carrier, subject to the Commission rules and regulations as detailed in Decision (D.) 85-01-008 and modified in D.85-07-081 and D.85-11-044.

5. XYN Broadband Initiatives LLC must file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order. This filing does not reopen the proceeding.

6. XYN Broadband Initiatives LLC must annually pay the user fee and public purpose surcharges specified in Attachment B. Per the instructions in Exhibit E to Decision 00-10-028, the Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is \$0. Under Public Utilities Code Section 405, carriers that are in default of reporting and submitting user fees for a period of 30 days or more will be subject to penalties including

suspension or revocation of their authority to operate in California. Therefore, carriers must report user fees even if the amount due is \$0.

7. Prior to initiating service, XYN Broadband Initiatives LLC must provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information must be updated if the name or telephone number changes, or at least annually.

8. XYN Broadband Initiatives LLC must notify the Director of the Communications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

9. XYN Broadband Initiatives LLC must file an affiliate transaction report with the Director of the Communications Division, in compliance with Decision 93-02-019, on a calendar-year basis with the information contained in Attachment D.

10. XYN Broadband Initiatives LLC must file an annual report with the Director of the Communications Division, in compliance with General Order 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

11. XYN Broadband Initiatives LLC must file a tariff within 12 months of the effective date of this order, or its certificate of public convenience and necessity will be cancelled.

12. XYN Broadband Initiatives LLC must comply with the Consumer Protection Rules contained in General Order 168.

13. In addition to all the requirements applicable to competitive local exchange carriers and interexchange carriers included in Attachments B, C, and D to this decision, XYN Broadband Initiatives LLC is subject to all applicable

Commission rules, decisions, General Orders, and statutes that pertain to California public utilities.

14. Application 10-08-013 is closed.

This order is effective today.

Dated January 13, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners

ATTACHMENT A

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List of deficiencies in draft tariff submitted by XYN Communications of California, LLC in A.10-08-018 to be corrected in its initial tariff compliance filing.

Please state company California business address at which tariff is available for public inspection, or provide a web URL where tariffs are available on-line (GO96B Section 8.1.3).

(END OF ATTACHMENT A)

ATTACHMENT B

REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS AND INTEREXCHANGE CARRIERS

1. Applicant must file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.
2. Applicant is subject to the following fees and surcharges that must be regularly remitted. Per the instructions in Exhibit E to Decision (D.) 00-10-028, the Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is \$0.
 - a. The current 1.15% 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 Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-17071, dated March 1, 2007, effective April 1, 2007);
 - b. The current 0.20% 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 (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-17127, dated December 20, 2007, effective January 1, 2008);
 - c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.18% of gross intrastate revenue (Resolution M-4819), dated June 7, 2007, effective July 1, 2007;
 - d. The current 0.00% 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 (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-17128, dated December 20, 2007, effective January 1, 2008); Resolution T-17299, dated November 29, 2010, effective December 1, 2010);

- e. The current 0.45% 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., D.07-12-054); Resolution T-17215, dated October 15, 2009, effective December 1, 2009;
- f. The current 0.00% 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 Advanced Services Fund (D.07-12-054); and
- g. The current 0.079% 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, Resolution T-17142, dated April 29, 2008, effective June 1, 2008).

Note: These fees change periodically. In compliance with Resolution T-16901, December 2, 2004, Applicant should check the joint tariff for surcharges and fees filed by Pacific Bell Telephone Company (d/b/a AT&T California) and apply the current surcharge and fee amounts in that joint tariff on end-user bills until further revised.

- 3. Applicant is a competitive local exchange carrier. The effectiveness of its future tariffs is subject to the requirements of General Order 96-B and the Telecommunications Industry Rules (D.07-09-019).
- 4. Applicant is a nondominant interexchange carrier (NDIEC). The effectiveness of its future NDIEC tariffs is subject to the requirements of General Order 96-B and the Telecommunications Industry Rules (D.07-09-019).
- 5. Tariff filings must reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.
- 6. Applicant must file a service area map as part of its initial tariff.
- 7. Prior to initiating service, Applicant must provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This

- information shall be updated if the name or telephone number changes, or at least annually.
8. Applicant must notify the Director of the Communications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.
 9. Applicant must keep its books and records in accordance with the Generally Accepted Accounting Principles.
 10. In the event Applicant's books and records are required for inspection by the Commission or its staff, it must either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.
 11. Applicant must file an annual report with the Director of the Communications Division, in compliance with General Order 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.
 12. Applicant must file an affiliate transaction report with the Director of the Communications Division, in compliance with Decision 93-02-019, on a calendar-year basis with the information contained in Attachment D.
 13. Applicant must ensure that its employees comply with the provisions of Public Utilities (Pub. Util.) Code § 2889.5 regarding solicitation of customers.
 14. Within 60 days of the effective date of this order, Applicant must comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Communications Division in writing of its compliance.
 15. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fees listed in 2 above, and has not received written permission from the Communications Division to file or remit late, the Communications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN.
 16. Applicant is exempt from Commission Rule of Practice and Procedure 3.1(b).

17. Applicant is exempt from Pub. Util. Code §§ 816-830.
18. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.
19. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Communications Division's Director.
20. Applicant must send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT B)

ATTACHMENT C

ANNUAL REPORT

An original and a machine readable copy using Microsoft Word or compatible format must be filed with the California Public Utilities Commission, State Office Building, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar-year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Pub. Util. Code.

Required information:

1. Exact legal name and U # of the 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. Number and date of the Commission decision granting the Certificate of Public Convenience and Necessity.
 7. Date operations were begun.
 8. Description of other business activities in which the utility is engaged.
 9. 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.
12. Cash Flow statement as of December 31st of the calendar-year, for which information is submitted, for California operations only.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT C)

ATTACHMENT D

CALENDAR-YEAR AFFILIATE TRANSACTION REPORT

1. Each utility must list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction report:
 - Form of organization (e.g., corporation, partnership, joint venture, strategic alliance, etc.);
 - Brief description of business activities engaged in;
 - Relationship to the utility (e.g., controlling corporation, subsidiary, regulated subsidiary, affiliate);
 - Ownership of the utility (including type and percent ownership)
 - Voting rights held by the utility and percent; and
 - Corporate officers.
2. The utility must prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (e.g., a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.
3. For a utility that has individuals who are classified as “controlling corporations” of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariff services.
4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.
6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the Commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT D)