

Decision PROPOSED DECISION OF ALJ BURCHAM (Mailed 8/7/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Bigredwire.com, Inc. for Registration as an Interexchange Carrier Telephone Corporation pursuant to the provisions of Public Utilities Code Section 1013.

Application 11-11-004
(Filed November 1, 2011)

DECISION DENYING WITHOUT PREJUDICE BIGREDWIRE.COM, INC.'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE RESOLD INTEREXCHANGE SERVICE

1. Summary

Pursuant to Public Utilities Code Section 1001,¹ this decision denies without prejudice Bigredwire.com, Inc.'s (BRW) application for a Certificate of Public Convenience and Necessity (CPCN) to provide resold interexchange service on the basis that the company has operated without proper authority to do so for many years, is in arrears on a settlement agreement with the Safety and Enforcement Division, and is not financially viable at this time.

This decision closes the current proceeding and provides BRW the opportunity to apply for a CPCN at a later date, once it has satisfied the terms and conditions of the Ordering Paragraphs herein.

¹ All statutory references are to the Public Utilities Code, unless otherwise indicated.

2. Factual Background

Bigredwire.com, Inc. (BRW), a Delaware corporation, began offering service to customers in California on January 1, 2000. On December 18, 2000, BRW submitted Application (A.) 00-12-031 for registration as an “Interexchange Carrier Telephone Corporation”² pursuant to the provisions of Section 1013 and Decision (D.) 97-06-107, and sought the issuance of a Certificate of Public Convenience and Necessity (CPCN) to provide inter- and intra-LATA (Local Access and Transport Area) services in California as a non-dominant interexchange carrier. The application complied with the Commission’s registration process, no protests were filed, and the Telecommunications Division did not reject the BRW’s draft tariffs. On January 30, 2001, pursuant to the authority granted to the Executive Director by D.97-08-050, BRW was granted a CPCN and assigned a corporate identification number of U6484C.

As the result of BRW’s failure to file annual reports and remit fees and surcharges to the Commission as required by law,³ on September 23, 2004, the Commission approved Resolution T-16875, which revoked BRW’s CPCN pursuant to Section 405.

BRW continued and continues operating without authority following revocation of its CPCN. BRW continues collecting fees and surcharges from its customers but fails to remit those fees and surcharges to the Commission. BRW has failed to file any of the required reports to the Commission, both while operating with and without a CPCN.

² Non-Dominant Interexchange Carrier (NDIEC) is the proper term.

³ Sections 401 and 431.

2.1. BRW's 2007 Application and 2009 Settlement Agreement

On October 3, 2007, BRW filed A.07-10-003 for registration as an Interexchange Carrier Telephone Corporation, again pursuant to the provisions of Section 1013. The Commission's Consumer Protection and Safety Division (CPSD), now known as the Safety and Enforcement Division (SED), filed a protest to that application on two grounds. First, CPSD believed BRW may have continued providing telecommunications services to California consumers following the revocation of its CPCN. Second, CPSD believed BRW violated Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule) by not disclosing that it had been subject to sanctions by this Commission and the Florida Public Services Commission, and made other misrepresentations in its application.

BRW and CPSD entered into a settlement agreement which was approved by the Commission on April 16, 2009, in D.09-04-009. That decision did not expressly grant or deny BRW's application for a CPCN, but directed BRW to file an amended application within 30 days of the Commission's approval of the settlement agreement, disclose the settlement agreement, this Commission's previous revocation of BRW's CPCN, and provide a description of the sanctions previously imposed by the Florida Public Services Commission. Despite the fact the Commission approved the settlement agreement on April 16, 2009, and directed BRW to file an amended application within 30 days, BRW did not file its amended application until November 1, 2011.

2.2. BRW's Current Application

On November 1, 2011, BRW filed A.11-11-004, for a registration license as a switchless reseller to provide such interexchange services in California⁴ as an Interexchange Carrier Telephone Corporation, again pursuant to Section 1013, by entering into wholesale agreements with existing long distance carriers. When the Commission's Telecommunications Division determined that BRW did not qualify for the streamlined registration process to obtain a CPCN under Section 1013, the request for registration was treated as a formal application pursuant to section 1001.

BRW's principal place of business in California is located at 1725 21st Street, Santa Monica, California 90404; its phone number is (323) 205-9812. No protests were filed. Public hearings were not held.

In its current application, BRW states:

- a) The CPUC revoked its CPCN in 2004 for failure to remit fees and surcharges; and
- b) The Florida Public Service Commission previously imposed sanctions upon BRW for violation of Florida's rules.

BRW included a copy of D.09-04-009, the settlement agreement between BRW and CPSD, and the attachment thereto arising from A.07-10-003. The terms of the settlement agreement provided that neither the Joint Stipulation of Undisputed Facts nor any statement in the settlement agreement would be a

⁴ A certificate of public convenience and necessity may only be granted to provide resold local exchange telecommunications services in the territories of Pacific Bell Telephone Company (d/b/a/ AT&T California), Verizon California, Inc., Citizens Telecommunications Company of California, Inc. (d/b/a/Frontier Communications of California), and SureWest Telephone.

binding admission or concession, or have precedential effect in any other motion or proceeding. However, the preponderance of credible evidence supports a finding that the admissions against interest made by BRW in D.09-04-009 have continued, and the Applicant has failed to cure its pattern of inappropriate conduct. Though couched in the language of compliance, the Applicant's admissions evidence the opposite:

- a) "Bigredwire.com has made good faith efforts to comply with the terms of the settlement agreement while providing affordable quality service to its end users and maintaining open lines of communication with the Commission;"
- b) "In addition, Bigredwire has made regular installment payments towards the \$20,000 fine to the State General Fund, as well as towards the \$41,264.80 in back fees and surcharges specified in the Settlement Agreement"; and
- c) "... Bigredwire has paid its PUC user fees for the period from 2008 to date."

These statements confirm that BRW continues to operate without a CPCN, has not yet satisfied the terms of the settlement agreement in D.09-04-009, and for most of the time it has operated in California, has failed to remit fees and surcharges to the Commission.

2.3. BRW's Financial Qualifications and Viability

An applicant for CPCN authority to provide limited facilities-based and resold local exchange and interexchange services must demonstrate that it has a minimum of \$25,000 cash or cash equivalent to meet the company's start-up

expenses,⁵ and sufficient additional resources to cover all deposits required of local exchange carriers and/or interexchange carriers.⁶

In D.93-05-010, we affirmed that applicants requesting authority to provide telephone service must be financially fit, and announced that we would more rigorously enforce user fee collection and payment obligations, including the collection and remittance by carriers of Universal Lifeline Telephone Service (UTLS) charges under Section 879, payment by carriers of surcharges for funding special telecommunications devices and services for the deaf and disabled under Section 2881, and the payment of user fees by carriers based on their intrastate revenues under Sections 431-435.⁷

In D.98-11-054, when denying an application for a CPCN, we reaffirmed our long-standing public policy that applicants seeking to provide telecommunications services must show that they possess sufficient financial resources and technical expertise to warrant the issuance of a CPCN.

In its application, BRW indicates it is currently providing service and generating revenue, and has been doing so since it began operating in California on January 1, 2000. In its comments on the proposed decision, BRW disclosed that it is providing service to customers in California through agreements with Powernet Global. It further revealed that it is only able to make reduced

⁵ The financial requirements for a Non-Dominant Interexchange Carrier (NDIEC) are contained in D.91-10-041.

⁶ The requirement for Competitive Local Carrier (CLC) applicants to demonstrate that they have additional financial resources to meet any deposits required by underlying Local Exchange Carriers (LEC) and/or IECs is set forth in D.95-12-056, Appendix C. For NDIECs, the requirement is found in D.93-05-010.

⁷ *Id.*

payments under the settlement agreement entered into with the Safety and Enforcement Division, and has not yet satisfied that obligation. In March, 2010, only months after entering into a settlement agreement with CPSD, BRW requested a temporary reduction in its monthly installment payments due to financial hardship and to ensure it could continue to make regular payments on its obligation. In 2011, BRW again requested that it be allowed to continue making reduced payments due to financial hardship through April 2012.⁸

On January 30, 2013, the assigned Administrative Law Judge (ALJ) issued a ruling requiring SED to file an update regarding BRW's compliance with D.09-09-004. SED's counsel responded on February 13, 2013, reporting that on numerous occasions BRW defaulted under the terms of the settlement agreement. BRW proposed a temporary reduction in payments claiming financial hardship, which was approved by CPSD. BRW then defaulted on the modified terms. As of February 13, 2013, BRW owed \$7,245.83 of the \$20,000 fine imposed by the settlement agreement, and \$16,787.10 of the \$41,264.80 unpaid surcharges and user fees, including accumulated interest charges. As of September 3, 2013, BRW BRW owed \$5,954.54 of the \$20,000 fine (including accumulated interest and charges) and \$15,507.60 of the \$41,264.80 unpaid charges and user fees (including accumulated interest charges).⁹

Finally, the assigned ALJ issued a ruling on May 14, 2013 regarding the possible imposition of penalties under Sections 2107 and 2108 for providing telecommunications services to customers for a fee without operating authority, collecting taxes, fees and surcharges from customers and failing to remit them to

⁸ A.11-11-004, Attachment 5.

⁹ Comments of the Safety and Enforcement Division, at 2.

the Commission, and for failing to file required reports. In response, BRW reported that its revenues are shrinking, it paid less than one-third of the monthly payment amount of the original settlement agreement for April 2012 through April 2013, and the imposition of additional fines and penalties could cause them to cease operation.¹⁰

It is clear that the applicant at this time does not have the financial resources required for the issuance of a CPCN.

Given this history and for the reasons indicated, we find that BRW has not met the standards for issuance of a CPCN as set forth in D.95-12-056, as amended by D.07-09-019 and D.08-05-019.

2.4. Technical Qualifications

An applicant for CPCN authority to provide local exchange and interexchange service must make a reasonable showing of managerial and technical expertise in telecommunications or a related business.¹¹ BRW supplied scant biographical information on its management team in its application.

3. Jurisdiction

Section 701 provides “The Commission may supervise and regulate every public utility in the State and may do all things ... which are necessary and convenient in the exercise of such power and jurisdiction.”¹²

¹⁰ BRW’s response to ALJ’s ruling issued May 14, 2013.

¹¹ D.95-12-056 at Appendix C, Rule 4.A.

¹² Section 701.

4. Issues Before the Commission

The issues before the Commission are whether BRW has satisfied the rules for certification as a resale interexchange carrier, and whether it should be granted a CPCN.

5. Discussion and Analysis

BRW has operated without authority since revocation of its CPCN on September 23, 2004, in violation of the Commission's rules, failed to remit to the Commission fees and surcharges collected from its customers, failed to submit reports required by the Commission, failed to satisfy the settlement agreement entered into with CPSD in 2009, and is not financially viable at this time.

Given BRW's history of operating without authority from the Commission and collecting user fees and surcharges from its customers but not remitting them to the Commission, we need to ensure that BRW does not continue to operate without authority and satisfies its financial obligations to the Commission. Consequently, all facilities based local exchange and interexchange carriers, and local exchange and interexchange resellers shall be notified by the Commission's Communications Division of the following:

- 1) BRW's CPCN was revoked on September 23, 2004;
- 2) BRW does not have authority to operate as a telephone corporation in California; and
- 3) Any company providing interconnection services of any kind, or services that can be resold to customers for a fee by BRW is advised that BRW is operating in violation of the Commission's rules, policies and procedures and without authority of a CPCN.

6. Conclusion

We conclude the application does not conform to our rules for certification as a resale interexchange carrier, and it would not be in the public interest to

grant BRW a CPCN at this time. Accordingly, we deny without prejudice the application of BRW to obtain a CPCN to provide resale interexchange services in California, pursuant to the terms and conditions set forth in the Ordering Paragraphs.

7. Categorization and Need for Hearing

In Resolution ALJ-176-3284 dated November 10, 2011, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that no hearings were necessary. No protests were received. There is no apparent reason why the application should not be denied. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

8. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3. Opening comments were filed on August 28, 2013¹³ by Bigredwire.com, Inc. In these opening comments, BRW admits it has continued to operate in California without authority from this Commission to do so, and contends it has made consistent and timely reduced payments on the settlement agreement for the last 16 months, and thus should be permitted to continue to operate pending approval of their application.

In addition, two motions for party status were filed. The first, by the California Association of Competitive Telecommunications Companies (CALTEL), was granted, and its proposed comments were taken into

¹³ Comments on the proposed decision were due to be filed no later than August 27, 2013. The ALJ approved the late filing of these comments.

consideration when revising this proposed decision. The second, by the Commission's Safety and Enforcement Division, was granted on the basis they had been a party to the settlement agreement resulting from the applicant's prior application, had provided information in this proceeding at the request of two ALJ's, and provided updated information regarding the status of BRW's satisfaction of the terms of the settlement agreement. SED reported that BRW has made reduced payments under the settlement agreement for the last 16 months, but several of the payments were late and received only after numerous requests from SED, contrary to BRW's contention that all payments were made in a timely manner.

No reply comments were filed.

9. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Dan H. Burcham is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of the application appeared on the Commission's Daily Calendar on November 9, 2011. No protests were filed. A hearing was not required.
2. Bigredwire.com, Inc. has a minimum of \$25,000 cash or cash equivalent that is reasonably liquid and readily available to satisfy first year start-up and operating expenses, but it has not fully paid the settlement adopted in D.09-04-009.
3. BRW has not demonstrated that it has sufficient cash or cash equivalent to cover other expenses and deposits which may be required by other telecommunications carriers in order to provide the proposed service.
4. The principals employed by BRW, as an affiliate, officer, director, partner, or owner of more than 10% of BRW were sanctioned by both this Commission

and the Florida Public Service Commission for failure to comply with a regulation, rule or order.

5. BRW began providing telecommunications services to customers in California before it had the authority to do so, and continued and continues providing such services following the revocation of its CPCN by this Commission, in violation of the Commission's rules, procedures and orders.

6. For the entire period it has operated in California, BRW has collected California mandated taxes and surcharges from its customers.

7. For most of the period it has operated in California, BRW has not remitted surcharges to the Commission.

8. For most of the period it has operated in California, BRW has not remitted interest payments accrued from unpaid surcharges owed to the Commission.

9. For most of the period it has operated in California, BRW has not paid fees owed to the Commission.

10. For the entire period it has operated in California, BRW has not filed reports mandated by the Commission.

11. On September 23, 2004, pursuant to Resolution T-16875, the Commission revoked CPCN (U6484C) issued on January 30, 2001, for non-compliance with D.93-05-101, Ordering Paragraph 4, and D.95-12-056, specifically for failure to file annual reports and remit surcharges to the Commission.

12. In D.09-04-009, issued April 16, 2009, BRW was directed to file an amended application within 30 days, disclosing both this Commission's revocation of BRW's CPCN and the sanctions previously imposed by the Florida Public Services Commission. BRW did not file its application until November 1, 2011. Although the amended application was not timely filed, it did contain the required disclosures.

13. The Commission must ensure that BRW does not provide service to customers for a fee without first receiving operating authority do so.

14. The California Association of Competitive Telecommunications Companies filed a motion for party status, and submitted comments to the proposed decision. That motion is granted.

15. The Commission's Safety and Enforcement Division (SED) filed a motion for party status, and submitted comments to the proposed decision. That motion is granted.

16. SED comments reported that Bigredwire.com continues to be in arrears on the settlement agreement, and that while reduced payments have been received from Bigredwire.com, many of those payments were late and received only after reminders from the Safety and Enforcement Division.

17. SED's comments recommended approval of the applicant's certificate of public convenience and necessity despite its history of operating without authority and having failed to satisfy the earlier settlement agreement.

Conclusions of Law

1. BRW should be denied a CPCN for operating without authority, failing to remit fees, surcharges and reports to the Commission, and failing to abide by the settlement agreement adopted in D.09-04-009.

2. In view of BRW's repeated breaches of the settlement agreement entered into with the Commission's Consumer Protection and Safety Division (now SED), and BRW's repeated requests for a reduction in payments under the settlement agreement due to financial hardship, BRW does not have the financial viability required to operate at this time.

3. The motion for party status filed by the California Association of Competitive Telecommunications Companies is granted and their comments are admitted in the record.

4. The motion for party status filed by the Commission's Safety and Enforcement Division is granted because they were a party to the settlement agreement arising from the applicant's prior application, and they provided relevant information which enhances the record in this matter, and their comments are admitted in the record.

5. It is not in the public interest to issue BRW a CPCN at this time.

O R D E R

IT IS ORDERED that:

1. The application of Bigredwire.com, Inc. for a Certificate of Public Convenience and Necessity is denied without prejudice.

2. Bigredwire.com, Inc. shall comply with all provisions of Decision 09-04-009.

3. Bigredwire.com, Inc. shall notify all of its customers in California that it is not authorized to provide telecommunications services in this state, and of their right to select another interexchange carrier.

4. Bigredwire.com, Inc. shall discontinue service to all customers in California within 60 days of the issuance of this Decision, and shall fully comply with the provisions of Decision (D.) 97-06-096, as amended by D.07-09-019 and D.08-05-019.

5. The Commission's Communications Division is directed to notify all carriers with which Bigredwire.com, Inc. is or could be doing business in

California that BRW's Certificate of Public Convenience and Necessity was revoked on September 23, 2004.

6. Should Bigredwire.com, Inc. and/or either of its principals, Fred Buddemeyer and Brad Weinstock apply for a Certificate of Public Convenience and Necessity to operate as a telecommunications carrier in California in the future, either individually or collectively, under this or any other name, he or they shall provide the following information in the initial application filing:

- a. A description of this decision and Decision 09-04-009;
- b. A document obtained from the Commission's Safety and Enforcement Division (or successor entity) which verifies that Bigredwire.com, Inc. has fully satisfied the terms and conditions of Decision 09-04-009, and that no other adverse actions have been taken against the new applicant or any of its principals, either individually or collectively, which have not been fully satisfied.
- c. Disclosure of when and how it discontinued providing service to the last of its customers as a result of this decision.
- d. A sworn statement under penalty of perjury that neither the new Applicant nor any of its principals have entered into any agreements of any kind to provide telecommunications services in California between the date it discontinued service to its last customer and the filing of a new application for a Certificate of Public Convenience and Necessity.

7. Bigredwire.com, Inc. and its heirs, successors and assigns, including any principals, partners, officers or directors and any other individual, corporation or unincorporated business entity with which Bigredwire.com, Inc. is affiliated or which has served as guarantor for Bigredwire.com, Inc. in any capacity, are prohibited from applying for a Certificate of Public Convenience and Necessity

to provide any type of service which is regulated by this Commission until two years following the date of this decision, or two years following the full satisfaction of the settlement agreement in Decision 09-04-009 and all other matters identified herein, whichever is later.

8. The motion of the California Association of Competitive Telecommunications Companies for party status is granted.

9. The motion of the Commission's Safety and Enforcement Division for party status is granted.

10. All other pending motions not previously ruled upon are hereby denied.

11. Application 11-11-004 is closed.

This order is effective today.

Dated _____, at San Francisco, California.