

Decision 05-11-024 November 18, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Mpower Networks Services, Inc.
for a Certificate of Public Convenience and
Necessity to Provide Facilities-Based and Resold
Local Exchange Telecommunications Services
Within the Local Service Territories of Pacific Bell
Telephone Company, Verizon California, Inc.,
SureWest Telephone, and Citizens
Telecommunications Company of California, Inc,
and to Provide Facilities-Based and Resold
Interexchange Service Throughout California.

Application 05-08-016
(Filed August 9, 2005)

**OPINION GRANTING A CERTIFICATE
OF PUBLIC CONVENIENCE AND NECESSITY**

I. Summary

Mpower Networks Services, Inc. (Applicant) is granted a certificate of public convenience and necessity (CPCN) to provide limited facilities-based and resold local exchange telecommunications services subject to the terms and conditions set forth below.¹ This authority is granted pursuant to Pub. Util. Code § 1001.

II. Background

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

¹ Applicant's attorney clarified that Applicant is requesting authority to provide limited facilities-based and resold competitive local exchange services.

authorized the provision of competitive local exchange service, by carriers meeting specified criteria, within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), SureWest Telephone Company (SureWest) formerly named Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a California corporation, seeks authority to provide limited facilities-based and resold local exchange services as a competitive local carrier (CLC) throughout the service territories of Pacific, Verizon, SureWest, and CTC. Applicant intends to provide its services on a wholesale basis to other certificated carriers. Applicant will use services and facilities of other carriers, including its affiliate Mpower Communications Corp., or its own facilities.

Applicant's principal place of business is located at 175 Scully's Trail, Suite 300, Pittsford, NY 14534.

III. Financial Qualifications

To be granted a CPCN, an applicant for authority to provide facilities-based and resold local exchange must demonstrate that it has a minimum of \$100,000 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) in order to provide the proposed service.³ Applicant, a newly created

² The financial requirement for CLCs is contained in Decision (D.) 95-12-056, Appendix C. The financial requirement for NDIECs 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.

telecommunications carrier, provided a guaranty by its affiliate, Mpower Communications Corp. In addition, Applicant included Mpower Communications Corp.'s December 31, 2004 audited financial statements, presented on a consolidated basis for Mpower Communications Corp. and its affiliates. Applicant states the cash resources shown on the consolidated balance sheet are fairly representative of the actual cash resources held by Mpower Communications Corp., as the collective cash holdings of all other affiliates do not comprise a significant portion of the amounts shown. Applicant will not be required to pay deposits to any underlying carriers in order to carry out the proposed operations. The balance sheets demonstrate sufficient cash to satisfy the financial requirements.

IV. Technical Qualifications

Applicants for CLC authority are required to make a reasonable showing of technical expertise in telecommunications or a related business. Applicant states its business will be managed by the existing Mpower Communications Corp. corporate management team. Applicant submitted biographical information on its officers that demonstrates that it possesses sufficient experience and knowledge to operate as a telecommunications provider.

V. Prior Bankruptcy and Sanctions

Applicant confirms, with three exceptions discussed below, 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, or was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order.

The first exception noted by Applicant is a pre-negotiated plan for reorganization filed in 2002 by Mpower Holding Corporation, Applicant's parent. We approved the proposed change of control by Decision (D.) 02-07-018 after finding that it was in the public interest. Since the bankruptcy court approved the plan for reorganization, Mpower Communications Corp. has established itself as a viable competitor in the California market. Mpower Communications Corp.'s earlier request to withdraw from certain exchanges in California, approved in D.01-11-020 prior to the plan for reorganization, has not been repeated. We concur with Applicant's recommendation that the prior plan for reorganization, approved and implemented in 2002, should not affect our determination that Applicant is capable of operating in the public interest.

The second exception concerns two customer complaints for unauthorized switching filed at the Federal Communications Commission (FCC) in 2001. The FCC found Mpower Communications Corp. had switched the two customers without authorization. Applicant explains that the unauthorized switching was inadvertent and that Mpower Communications Corp. fully complied with the FCC's director to absolve the customers of the first 30 days' charges. We concur with Applicant those two instances of unauthorized switching four years ago do not suggest that Applicant will fail to comply with our rules and regulations.

Finally, Applicant reports that ICG Communications, Inc. (or its operating subsidiaries), owner of 10% or more of the shares of Mpower Holding Corporation, were parties to bankruptcy reorganization and were fined for failure to submit timely regulatory reports in other states. However, we approved in D.04-10-005 the transfer of ICG Communications, Inc. to MCCC ICG Holdings LLC and neither ICG Communications, Inc. nor MCCC ICG Holdings LLC exercises direct or indirect control over Applicant. We concur with

Applicant that the reorganization of ICG Communications, Inc., now controlled by MCCC ICG Holdings LLC, does not affect Applicant's financial status. We also concur with Applicant that ICG Communications, Inc.'s failure to satisfy filing requirements in other states, when ICG Communications, Inc. has no control over Applicant, has no bearing on Applicant's willingness to comply with our rules and regulations.

VI. Tariffs

Commission staff reviewed Applicant'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, Applicant is directed to correct these deficiencies as a condition of our granting approval of its tariffs.

VII. California Environmental Quality Act (CEQA)

The 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. Since Applicant will not be constructing any facilities for the purpose of providing local exchange services, except for equipment to be installed in existing buildings or structures, it can be seen with certainty that there is no possibility that granting this application will have an adverse impact upon the environment. Applicant must file for additional authority, and submit to any necessary CEQA review, before it can construct facilities other than equipment to be installed in existing buildings or structures.

VIII. Conclusion

We conclude that the application conforms to our rules for authority to provide competitive local exchange telecommunications services. Accordingly,

we shall approve the application subject to the terms and conditions set forth herein.

IX. Categorization and Need for Hearings

In Resolution ALJ 176-3157 dated August 25, 2005, 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 change the preliminary determinations.

X. Comments on Draft Decision

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

XI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A notice of the filing of the application appeared in the Daily Calendar on August 25, 2005.
2. There were no protests to this application.
3. A hearing is not required.
4. 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.
5. Applicant has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.

6. Applicant states no deposits will be required by other telecommunications carriers in order to provide the proposed service.

7. Applicant possesses sufficient experience and knowledge to provide telecommunications services.

8. As part of its application, Applicant submitted a draft of its initial tariff that contained the deficiencies identified in Attachment A to this decision. Except for these deficiencies, Applicant's draft tariffs complied with the Commission's requirements.

9. Applicant will not construct any facilities, except for equipment to be installed in existing buildings or structures.

Conclusions of Law

1. Applicant has the financial ability to provide the proposed service.

2. Applicant has sufficient technical expertise to operate as a telecommunications carrier.

3. Public convenience and necessity require the competitive local exchange services to be offered by Applicant, subject to the terms and conditions set forth herein.

4. Since Applicant will not be constructing any facilities, other than equipment to be installed in existing buildings or structures, 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 public utilities.

7. Applicant's initial tariff filing should correct the deficiencies noted in its draft tariffs as indicated in Attachment A to this decision.

8. 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 Mpower Network Services, Inc. (Applicant) to operate as a limited facilities-based and 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 Company, and Citizens Telecommunications Company of California, Inc.

3. Applicant is authorized to file tariff schedules for the provision of competitive local exchange services. Applicant may not offer competitive local exchange 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, and shall correct the deficiencies noted in Attachment A. The tariff shall be effective not less than one day after 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 herein will expire if not exercised within 12 months after the effective date of this order.

5. The corporate identification number assigned to Applicant, U-6973-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), 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 B to this decision.

8. Applicant is not authorized to construct facilities, except for equipment to be installed in existing buildings or structures. Application 05-08-016 is closed.

This order is effective today.

Dated November 18, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners

ATTACHMENT A

List of deficiencies filed by Mpower Network Services, Inc. in A.05-08-016 to be corrected in its Tariff Compliance filing.

1. Sheet 1-15: State in the tariff that the late payment date will be prominently displayed on the customer's bill. Refer to Rule 9 of Appendix B of D.95-07-054.
2. Sheet 1-19: Remove Rule 1.10 (7) from the CLC's Disputed Bill rule and include Rule 8G from Appendix B of D.95-07-054 in the tariff.
3. Sheet 1-33: Remove Rule 1.15.8 from the tariff and include SBC or Verizon's Limitation of Liability rule in the CLC tariff. Refer to D.95-12-057.
4. Include sample forms in the CLC tariff.

(END OF ATTACHMENT A)

ATTACHMENT B

REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS

1. Applicant shall 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 fee and surcharges that must be regularly remitted per the instructions in Appendix E to Decision (D.) 00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero:
 - a. The current 1.55% 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-16917, dated February 24, 2005, effective April 1, 2005);
 - b. The current 0.30% 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-16817, effective February 11, 2004);
 - c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue (Resolution M-4813);
 - d. The current 0.15% 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 California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-16916, dated February 24, 2005, effective April 1, 2005);
 - e. The current 2.43% 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.; Resolution T-16898, dated December 16, 2004, effective January 1, 2005); and

- f. The current 0.16% 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-16833, dated July 8, 2004, effective August 1, 2004).

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 (dba SBC 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 (CLC). The effectiveness of its future tariffs is subject to the schedules set forth in Appendix C, Section 4.E of D.95-12-056:

“E. CLCs shall be subject to the following tariff and contract filing, revision and service pricing standards:

- ‘(1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days’ notice. Customer notification is not required for rate decreases.
- ‘(2) Uniform major rate increases for existing tariff services shall become effective on thirty (30) days’ notice to the Commission, and shall require bill inserts, or first class mail notice to customers at least 30 days in advance of the pending rate increase.
- ‘(3) Uniform minor rate increases, as defined in D.90-11-029, shall become effective on not less than (5) working days’ notice to the Commission. Customer notification is not required for such minor rate increases.
- ‘(4) Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff

schedules, shall become effective on forty (40) days' notice.

- '(5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days' notice to the Commission.
- '(6) Contracts shall be subject to GO 96-A rules for NDIECS, except interconnection contracts.
- '(7) CLCs shall file tariffs in accordance with PU Code § 876.'"

4. Applicant may deviate from the following provisions of GO 96-A:

(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers; and (b) paragraph II.C.(4), which requires that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Commission's Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.

5. Applicant shall file a service area map as part of its initial tariff.

6. Prior to initiating service, Applicant shall 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.

7. Applicant shall notify the Director of the Telecommunications 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.

8. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

9. In the event Applicant's books and records are required for inspection by the Commission or its staff, it shall 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.

10. Applicant shall file an annual report with the Director of the Telecommunications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

11. Applicant shall file an affiliate transaction report with the Director of the Telecommunications Division, in compliance with D.93-02-019, on a calendar year basis using the form contained in Attachment D.

12. Applicant shall ensure that its employees comply with the provisions of Public Utilities (Pub. Util.) Code § 2889.5 regarding solicitation of customers.

13. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.

14. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in 2 above, the Telecommunications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Telecommunications Division to file or remit late.

15. Applicant is exempt from General Order 96-A, subsections III.G(1) and (2), and Commission Rule of Practice and Procedure 18(b).

16. Applicant is exempt from Pub. Util. Code §§ 816-830.

17. 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.

18. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Telecommunications Division's Bankruptcy Coordinator.

19. Applicant shall 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 two copies shall be filed with the California Public Utilities Commission, 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 Public Utilities 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 CPCN.
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.

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 shall 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;
- Corporate officers.

2. The utility shall 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 tariffed 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)