

DT 04-042

ACN COMMUNICATION SERVICES, INC.

**Petition for Authority to Provide
Local Telecommunications Services**

Order Denying Petition

ORDER NO. 24,451

April 7, 2005

I. BACKGROUND

On March 18, 2004, ACN Communication Services, Inc. (ACN) filed with the New Hampshire Public Utilities Commission (Commission) a petition to provide Competitive Local Exchange Carrier (CLEC) service in New Hampshire, pursuant to N.H. Administrative Rule Chapter Puc 1300. Pursuant to RSA 374:22-g, the Commission may authorize intrastate switched and non-switched local exchange telecommunications services by more than one provider in all telephone franchise areas served by a telephone utility that provides local exchange service and has more than 25,000 access lines.

ACN, a Michigan corporation, is a wholly owned subsidiary of American Communications Network, Inc. ACN is authorized to provide local exchange service in 27 states and the District of Columbia. ACN currently provides local exchange service in California, Florida, Georgia, Illinois, Maryland, Michigan, New York, North Carolina, Ohio, Pennsylvania, Texas and the District of Columbia. On February 24, 2000, ACN was certified to provide intraLATA toll service in the State of New Hampshire under IXC No. 02-004-00.

According to ACN's website, ACN's services are sold exclusively by "independent representatives." It operates under a structure by which "independent

representatives” receive compensation for acquisition of new customers, each of which also receive compensation if they acquire additional new customers.

The Commission's regulations provide that a CLEC shall be certified to conduct business in New Hampshire if the application complies with the requirements of Puc 1300. To comply with Puc 1300, the applicant must, among other requirements, demonstrate that it meets the Commission's standards for financial resources, managerial qualifications, and technical competence, and that certification of the applicant is in the public good. Puc 1304.01(a)(2) and (3).

In the case of a non-facilities based service provider such as ACN, the applicant must demonstrate that it possesses a minimum of \$20,000 in cash or other financial instruments in order to cover its first year's expenses in New Hampshire. Puc 1304.01(b)(2). An applicant must also demonstrate that it possesses the managerial qualifications based upon review of the biographies of the officers, the history of the applicant's efforts to obtain certification in other states and the history of the applicant's principals' efforts to obtain and retain certification in other states. Puc 1304.01(e). Further, a non-facilities based applicant must demonstrate technical competence on the basis of the applicant's identification of the underlying carrier used in providing the applicant's service.

II. COMMISSION STAFF INQUIRY

In response to an inquiry from Commission Staff (Staff), ACN submitted an un-audited year-end 2003 Balance Sheet and Income Statement for ACN, and a Bank Statement dated February 29, 2004 demonstrating its then-current cash balance. The balance meets the requirements of Puc 1304.01(b)(2).

Staff then began its analysis of ACN's managerial competence and whether certification of ACN is in the public interest. According to a memorandum of Staff dated February 9, 2005, ACN has been the subject of certain proceedings, noted in public records of state Commissions, regarding customer complaints alleging their service was switched to another carrier without the customer's knowledge or consent, a practice known as "slamming." Of the proceedings Staff identified, one resulted in a finding by the Massachusetts DTE that a customer's service had been changed without authorization by one of ACN's "independent representatives." See Complaint of Ronald Karas, Docket No. DTE 03-04-9. In that case, ACN acknowledged the change in carrier had occurred but asserted it had been unintentional and therefore no slamming had taken place. The Massachusetts DTE found, on May 21, 2003, that the intent of the company was not dispositive; the important question was whether the customer had authorized the change. As the Massachusetts DTE stated, "between a blameless customer and a company acting in error, whether intentional or not, our interpretation of [the statute prohibiting change of carrier without consent] must liberally construe the consumer protection statute in favor of the customer in order to effect legislative intent." Order at 4. The Massachusetts DTE concluded that "ACN initiated this unauthorized switch" and took corrective action. Order at 5.

Further, according to a memorandum from the Commission's Director of Consumer Affairs filed March 22, 2005, a query made to fellow consumer affairs representatives in other public utilities commissions revealed a pattern of complaints of customers who asserted they had been slammed, though the cases were not necessarily formally adjudicated. For example, the Pennsylvania Public Utility Commission's Consumer Division determined that in

2003 ACN had slammed two customers; the Florida Public Service Commission's Consumer Division received 26 complaints against ACN, of which 10 were determined by the Consumer Division to be unauthorized change in carrier violations; the Texas Public Utility Commission's Consumer Protection Division reported six change in carrier violations in the past 12 months; and the Michigan Public Service Commission reported 100 informal complaints in the prior two years, primarily involving changes in carriers and billing. In addition, a query to the Federal Communications Commission revealed, as of March 2005, there were eight decisions finding that ACN had effected an unauthorized change in carrier, and another four complaints of unauthorized carrier changes had been resolved through confidential settlement between ACN and customers. Another eleven complaints of unauthorized carrier changes were denied.

Although in Staff's view ACN has met the financial standards for CLEC certification required by Puc 1304.01 and .02, it nevertheless recommends the petition be denied. Based on the inquiry by Staff, public records of proceedings and information from other utility regulators, Staff believes that ACN has not demonstrated that it has the managerial resources to qualify as a CLEC and authorization to operate would not be in the public good.

III. COMMISSION ANALYSIS

According to its website, ACN offers a "direct selling opportunity" for local, toll, internet services, as well natural gas and electricity. It states that it will soon be offering VoIP and wireless services as well. Its method of sales is described as "bypassing traditional mass marketing" and is "able to reward its customers for acquiring those customers paying them millions in compensation." It lays out a "simple business plan" by which a Team Trainer and twelve "loyal customers" spawn similar team leaders each with twelve customers, who in turn

establish another level. There are seven levels portrayed, from Team Trainer to Senior Vice President, and movement from one level to the next is “based on the acquisition of customers by you and your team.”

The number of complaints fielded by utility regulators against this company is disturbing. We recognize that many have not been formally adjudicated, as informal findings and settlements with consumers are standard forms of resolution in consumer affairs offices throughout the country. We recognize that some complaints might be deemed “unfounded” if they were fully adjudicated. However, we cannot overlook the reality that numerous complaints alleging unauthorized carrier changes by ACN or its independent representatives, have been logged in state commissions and the Federal Communications Commission.

The Commission has previously stated that it will not tolerate unauthorized carrier changes by companies operating in New Hampshire. *See e.g.* Orders No. 24,074 and No. 24,035 in Docket No. 02-147 involving American Digital Satellite Telephone. ACN has failed to demonstrate its management can adequately prevent these unauthorized changes by its independent representatives under its management structure. Consequently, the pattern of complaints combined with the multi-level marketing structure persuades us that ACN lacks sufficient management resources.

Further, in its application, ACN states that local exchange service will be provided via combined unbundled network elements (UNE-P). At the time of the application, Verizon was providing UNE-P service which would have satisfied the technical competence requirement pursuant to Puc 1304.01 (g). However, Verizon has recently informed the Commission that it is no longer obligated to provide UNE-P service as determined in the Federal

Communication Commission's Triennial Review Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003). Verizon's unbundling obligations are the subject of open proceedings docketed in Docket Nos. DT 03-201 and DT 05-034. While the Commission has not yet determined the extent of Verizon's unbundling obligations, we cannot, at this juncture, make a finding that ACN is technically competent based on its plan to offer service exclusively through UNE-P.

ACN has not demonstrated sufficient technical or managerial competence. Accordingly, based on, ACN's public record, the investigation by our telecommunications analyst and the inquiry by our Consumer Affairs Director, in accordance with Puc 1304.01(a)(3) and RSA 374:22-g, we conclude that the public good would not be served by granting ACN's application to provide CLEC service. ACN's application, therefore, is denied.

Based upon the foregoing, it is hereby

ORDERED, that the Petition of ACN Communication Services, Inc. for authority to operate as a competitive local exchange carrier is hereby DENIED; and it is

By order of the Public Utilities Commission of New Hampshire this seventh day of April, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary