

**DT 04-042**

**ACN COMMUNICATIONS SERVICES, INC.**

**Request for Hearing and Reconsideration**

**Order *Nisi* Approving Settlement Agreement Concerning Authorization  
to Provide Competitive Local Exchange Services in New Hampshire**

**ORDER NO. 24,491**

**July 21, 2005**

**I. BACKGROUND AND PROCEDURAL HISTORY**

On March 18, 2004, ACN Communication Services, Inc. (ACN) filed with the New Hampshire Public Utilities Commission (Commission) a petition for authority to provide competitive local exchange service in New Hampshire, pursuant to N.H. Admin. Code, Rule Puc 1304.<sup>1</sup>

ACN, a Michigan corporation, is a wholly owned subsidiary of American Communications Network, Inc. On February 24, 2000, the Commission certified ACN to provide intraLATA toll service in the State of New Hampshire under IXC No. 02-004-00. In Order No. 24,451 issued on April 7, 2005, the Commission denied ACN's request for authority to provide local exchange service in New Hampshire, based on an analysis of ACN's qualifications and a concern that its multi-tier business plan did not serve the public good under Puc 1304.01 and N.H. Rev. Stat. Ann. § 374:22-g (1995).

On May 6, 2005, ACN filed with the Commission a request for hearing and reconsideration of Order No. 24,451, pursuant to RSA 541:3 and Puc 203.15. Specifically, ACN requested that the Commission rescind Order No. 24,451, schedule a hearing, and authorize ACN to operate as a competitive local exchange carrier (CLEC) in New Hampshire.

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<sup>1</sup> Part Puc 1304, "Certification of CLECs," has since been superseded by Part Puc 431, "CLEC Regulatory Requirements".

ACN met with Commission Staff to discuss the issues raised in ACN's filing and options for addressing ACN, as well as Staff concerns. A Settlement Agreement (Agreement) was reached and signed by both ACN and Staff. The signed Agreement was filed with the Commission on July 6, 2005.

## **II. SETTLEMENT AGREEMENT**

The Settlement Agreement signed by ACN and Staff provides that ACN will be granted authority to operate as a CLEC in New Hampshire under certain conditions. Those conditions include monthly reporting requirements and an understanding that provisional authority will be revoked upon any infringement of Commission rules, orders, or relevant statutory requirements. Reporting requirements will be triggered by ACN's initiation of service as a CLEC, pursuant to Puc 449.09. The Agreement itself is dependent upon the Commission's acceptance of each provision in its entirety, including the annulment of Order No. 24,451. After a year of operation in compliance with the Agreement, ACN's application for certification as a CLEC will be reviewed for unconditioned authorization.

Provision 1 of the Agreement establishes that the Staff will recommend to the Commission that it annul Order No. 24,451, pursuant to RSA 365:28. By signing the Agreement, Staff has thus made its recommendation.

Provision 2 sets forth certain obligations on the part of ACN in its operation as a CLEC in New Hampshire. Accordingly, ACN shall abide by all Commission rules and statutory requirements concerning CLECs operating in New Hampshire. In addition, ACN will report on a monthly basis any complaints, whether litigated, settled or otherwise resolved, from a New Hampshire-based customer regarding ACN's provision of local or long distance telephone

service in New Hampshire. Such reports will include the nature of the complaint, details of the complaint, and its resolution.

ACN will also report monthly on: i) the number of local exchange customers signed up in New Hampshire during the reporting month and year-to-date; ii) data concerning fees charged by other carriers for lost revenues or other costs due to unauthorized carrier changes of a New Hampshire customer, separately identified for local exchange and long distance service; iii) the number and dollar amount of commissions withheld from ACN's independent representatives with regard to customer sales for local exchange service in New Hampshire; and, iv) the number of independent representatives selling ACN's local and long distance services in New Hampshire terminated for violation of company rules and policies.

ACN's monthly reports shall be submitted within 10 business days after the last calendar day of each month during the first year of ACN's operation as a registered CLEC in New Hampshire. ACN's first year of operation is defined as the 12 months following the initiation of service to customers in New Hampshire, as reported to the Commission in ACN's submission of Form CLEC-12 pursuant to N.H. Admin. Code Rule Puc 449.09. The first such report shall be filed within 10 business days after the last calendar day of the first month of ACN's operation as a registered CLEC in New Hampshire.

Provision 3 of the Agreement provides that at the end of the first twelve months of ACN's operation as a competitive local exchange carrier in New Hampshire, Commission Staff will review the data reported by ACN, as well as data obtained independently by the Commission, and make a report with recommendation to the Commission as to whether ACN merits unconditioned authorization to operate as a competitive local exchange carrier in New Hampshire. A copy of the Staff report and recommendation shall be made available to ACN,

and ACN shall have an opportunity to respond in writing to Staff's recommendation prior to the Commission's ruling. In the event Staff recommends denial of authorization, it shall be ACN's burden to demonstrate why such denial is not warranted.

In accordance with Provision 4 of the Agreement, if the Commission determines that ACN, in its first year of operation as a CLEC in New Hampshire, has conducted business in an unfair or deceptive manner, has committed consistent or flagrant violations of applicable statutes, commission rules or commission orders, or has made any material false statement or omission of fact in its monthly reporting under this agreement, the Commission will revoke ACN's authorization to operate as a competitive local exchange carrier in New Hampshire immediately. Given the consensual nature of this agreement, revocation of authorization may be made without hearing.

Provision 5 states that the Agreement is the result of a negotiated settlement among the parties, and shall not be construed as an agreement as to any matter of fact or law, other than as specifically set forth above. Provision 6 conditions the Agreement upon the Commission's acceptance of all of its provisions, without change or condition. If the Commission does not accept the Agreement in its entirety, including the annulling of Order No. 24,451, the Agreement shall be deemed to be null and void and without effect, and shall not constitute any part of the record in this proceeding. In the event any modification or condition is made to the Agreement, each party shall be placed in the position that it enjoyed in this proceeding before entering into the Agreement.

### **III. COMMISSION ANALYSIS**

The Commission initially denied ACN certification as a CLEC on the basis of an analysis of ACN's managerial and technical competence under Puc 1304.01 and, ultimately, the public

good. Puc 1304.01(a)(1) required ACN to provide certain factual information concerning its corporate structure and operations. The Commission, in turn, was required under Puc 1304.01(a)(2) to consider ACN's financial resources, managerial qualifications, and technical competence in light of certain standards established in Puc 1304.01(b)-(g). Puc 1304.01(a)(3) required the Commission to determine that certification of ACN in New Hampshire was in the public good.

In short, ACN's record of operation persuaded us at the time that it would not be in the public good to grant certification. Serious questions arose concerning ACN's multi-tier business plan and its managerial ability to limit violations of New Hampshire's anti-slamming law. The Agreement reached between ACN and Staff addresses the concerns raised and sets forth certain conditions to ensure that ACN remedies those concerns and that the public good is served.

We also found, in the underlying review, that ACN could not meet the technical competence criterion under Puc 1304.01(g) for providing local exchange service. At the time of its application, ACN's operational plans were based on the availability of combined network elements (UNE-P) from Verizon. Verizon subsequently informed the Commission that it was no longer required to provide UNE-P, pursuant to the FCC's Triennial Review Order (TRO), *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003), and the FCC's Triennial Review Remand Order (TRRO), *In the matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, Order on Remand, FCC 04-290, 20 F.C.C.R. 2, 533 (2005). In its Motion for Rehearing, ACN informed us that it has signed an interim commercial agreement with Verizon and a multi-state interconnection agreement that would become effective in New Hampshire once ACN obtains certification from the Commission. Based on this information, we

find that ACN has satisfied Puc 1304.01(g) with respect to technical competence to operate as a CLEC in New Hampshire.

Because a hearing was not required in the underlying proceeding, we find, pursuant to RSA 365:28, that a hearing is not required to annul Order No. 24,451. Further, we find that the Agreement was concluded as a result of good faith negotiation on the part of both ACN and Commission Staff.

We conclude that the Agreement is fair, reasonable, and consistent with statutory requirements. Further, we find that the reporting requirements imposed by the Agreement are an important means for carrying out our obligations under the rules and statutes, and that the Agreement is in the public good. Accordingly, upon consideration of the information in the record before us, we will approve the Agreement in this docket.

**Based upon the foregoing, it is hereby**

**ORDERED *NISI***, that, subject to the effective date below, the Agreement is hereby APPROVED; and it is

**FURTHER ORDERED**, that Order No. 24,451 issued on April 7, 2005, denying authority to ACN to provide competitive local exchange services in the State of New Hampshire is ANNULLED; and it is

**FURTHER ORDERED**, that ACN shall adhere to the filing requirements regarding its operation as a competitive local exchange carrier in New Hampshire as set forth in the Agreement and the administrative rules of the Commission; and it is

**FURTHER ORDERED**, that ACN shall cause a copy of this Order *Nisi* to be published once in a statewide newspaper of general circulation, such publication to be no later than August

1, 2005 and to be documented by affidavit filed with this office on or before August 15, 2005;  
and it is

**FURTHER ORDERED**, that all persons interested in responding to this Order *Nisi* shall submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than August 8, 2005 for the Commission's consideration; and it is

**FURTHER ORDERED**, that this Order *Nisi* shall be effective August 19, 2005, unless the Petitioner fails to satisfy the publication obligation set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of July, 2005.

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Thomas B. Getz  
Chairman

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Graham J. Morrison  
Commissioner

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Michael D. Harrington  
Commissioner

Attested by:

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Lori Normand  
Assistant Secretary