

BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the)	Application No. C-986
Application of Equal Net Com-)	
munications, Houston, Texas which))	GRANTED AND
seeks a Certificate of Public)	PROTECTIVE ORDER ISSUED
Convenience and Necessity to)	
operate as a reseller of tele-)	
communications in Nebraska.)	
		Entered: September 28, 1993

APPEARANCES

For the Applicant

Dean Fisher, Director
Equal Net Communications, Inc.
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Houston, Texas 77077
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For the Communications Dept.

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PRELIMINARY MATTERS

By application filed March 26, 1993, Equal Net Communications, Inc. ("Equal Net"), Houston, Texas seeks authority to provide the resale of intrastate interLATA and intraLATA interexchange long distance telecommunications services in Nebraska. The applicant's address is noted above and its books and records are maintained there. Its registered agent in Nebraska is the CT Corporation, 206 South 13th Street, Lincoln, Nebraska, 68508.

Notice of the application was published in the Omaha Daily Record April 8, 1993 in accordance with the Commission's rules of procedure. No one protested the application. Hearing on the application was held August 24, 1993 in the Commission Hearing Room, Lincoln, Nebraska with appearances as shown.

BY THE COMMISSION**O P I N I O N A N D F I N D I N G S**

Upon consideration of the application, the governing statutes and rules¹, the evidence adduced at the hearing, and being fully informed, the Commission is of the opinion and finds:

Nebraska was divided into three Local Access Transport Areas (LATAs) as a result of the terms of the Modified Final Judgment issued in the AT&T divestiture case. *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom., *California v. United States*, 460 U.S. 1001 (1983) and *United States v. American Telephone & Telegraph Co.*, 569 F. Supp. 990 (D.D.C. 1983) aff'd sub nom., *California v. United States*, 460 U.S. 1001 (1983). While Neb. Rev. Stat. §75-604, refers to local exchange service, the Nebraska Supreme Court in *Northwestern Bell Telephone v. Consolidated Telephone Co.*, 180 Neb. 268, 142 N.W.2d 324 (1966) ruled that long distance service is also governed by that statute. This was recognized by the Nebraska Legislature when it approved LB 835 (LAWS 1986) because interexchange services (which include resellers) governed in part by Neb. Rev. Stat. §86-805 (Reissue 1987) are referenced to in Neb. Rev. Stat. §75-604 (Reissue 1987). Consequently, the Commission distinguishes between intraLATA and interLATA resale while considering reseller applications.

¹ Interexchange reseller applications are governed by Neb. Rev. Stats. §§75-604 and 86-805 (1990 and 1987 Reissues, respectively) and Title 291 Neb. Admin. Regs. Ch. 5, Rule 003.12.

Mr. Dean Fisher appeared before the Commission on behalf of the applicant. Fisher is one of the company's four directors. He is in charge of the company's overall management. Equal Net's president, Zane Russell, was previously with American Telco for two years before forming Equal Net in July of 1990. Marc Smith, another officer, was with Cable & Wireless Communications, Inc. Each has approximately five years of telecommunications experience. Equal Net was incorporated in Texas in 1990. It is privately held and not associated with any other company.

At the hearing, the company's articles of incorporation, certificate to do business as a foreign corporation, and a proposed tariff were made a part of the record. Fisher testified that the company seeks interLATA and intraLATA authority. The filed application, upon which the Daily Record notice is based, *does not* seek a certificate to provide alternate operator service ("AOS"). We note this Commission has consistently held that an application for a reseller certificate does not include AOS unless specifically petitioned for in the application.²

The applicant proposes to operate as a non-facilities based reseller of AT&T long-distance service in Nebraska. No future facilities in Nebraska are contemplated. It has approximately 25,000 subscribers across the country at the time of the hearing and they are generating approximately \$2.5 million per month in usage. The applicant resells AT&T's Distributed Network Services ("DNS") with usage and time sensitive

² We observe that a late-filed amendment to add AOS to the application is an inadequate solution; the previously published notice of the application would not then accurately reflect the authority sought in the application.

rates. There are no facilities and Equal Net is solely dependent upon AT&T facilities.

To be profitable as a reseller, Equal Net has entered into a contract with AT&T.³ The contract requires Equal Net to commit to a specific volume of usage in order to qualify for a substantial discount which allows Equal Net to resell those services for a profit. The applicant then charges its customers rates below the underlying carrier's tariff rates for intra-state Nebraska calling. The difference between the rate paid by the customers and the discount received from AT&T provides the margin of profit. Fisher projected subscriber savings of about 15 to 25 percent below the AT&T rate when comparing the DSN rate to the PRO WATS rate.

No state commission has rejected an Equal Net application for reseller authority nor has it been subject to any formal complaint before a state commission. As of the hearing date, the applicant was operating as a reseller in the following states: Colorado, New Hampshire, Michigan, Montana, Virginia, Utah, and Texas. It also operates in Washington, D.C. The authority sought here in Nebraska is the same as obtained in those states. The applicant does not propose to provide service of a different type in this state.

Fisher confirmed the results of an informal staff investigation into Equal Net's operations in Nebraska prior to the hearing on its application. An agent of Equal Net's, Equal Net

³ The Federal Communications Commission still regulates AT&T as a dominant common carrier. Therefore, a tariff still controls AT&T's rate structure. Tariff No. 1 permits AT&T and a reseller such as the applicant to enter into the type of agreement described here.

Services, slammed a number of Nebraska subscribers onto Equal Net's long distance service. This created two issues: improper slamming and operations in Nebraska without authority. Equal Net cooperated with the Commission staff and remedied the slamming issue and made application for intrastate authority. Equal Net terminated its relationship with Equal Net Services as a result of this incident.

The financial information provided by the applicant was marked as Exhibits D, E, and F and was prepared by the Arthur Andersen certified public accounting firm. The application specifies and Fisher re-affirmed that the company seeks that this information be placed into the record pursuant to a protective order. Title 291 NAC Ch. 5, Rule 003.01 provides the Commission may enter such an order. Fisher, relying on the exhibits, testified that in 1992 the company's assets and equities and liabilities totaled \$3,496,000. The company was profitable in 1992 and earned a net income of \$157,000. In 1993 (as of June 30, 1993), the assets and equities and liabilities increased to \$6,504,000 and the company earned a net income of \$912,398.

The applicant's proposed tariff, which is part of its application, is in accordance with the Commission's rules and regulations. The tariff appears reasonable in light of the proposed service.

Applicant does not propose to construct facilities for use in intrastate service; therefore, no existing facilities will

Application No. C-986

Page -6-

be duplicated if this application is granted for reseller service.⁴

This is a relatively new company; it has been profitable since December, 1991, according to Fisher's testimony and the exhibits. Coupled with the demonstration that the company is competently operated and has the requisite expertise, we believe the evidence is strong enough to warrant approval of the application. We note that the applicant candidly admitted it began operations in Nebraska prior to authorization from this Commission, in part because of its agency relationship with Equal Net Services. Staff's investigation of this matter shows no intent to deceive or act in bad faith. In fact, the company responded promptly and cooperatively to all requests from this Commission for information and made prompt application to obtain the requisite authority. We are satisfied as to Equal Net's fitness to operate in Nebraska.

Based on the testimony, the exhibits, and the proposed tariff, the application is fair and reasonable, is in the public interest, and should be granted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. C-986 be, and it is hereby, granted and Equal Net Communications, Inc. of Houston, Texas is hereby authorized *to operate as a resale carrier of intra-state interexchange interLATA and intraLATA telecommunications services within the State of Nebraska.* The financial information found in the company's balance sheet and income state-

⁴See §75-604.

Application No. C-986

Page -7-

ment, including the information filed originally in the application is sealed pursuant to a protective order incorporated herein.

IT IS FURTHER ORDERED that the applicant shall file, in accordance with the applicable statutes, an annual report with this Commission consisting of (a) a copy of any report filed with the Federal Communications Commission, (b) the annual report to stockholders, and (c) for the state of Nebraska on a combined interstate-intrastate basis, the investment in telephone plant and equipment located within the state, accumulated depreciation thereon, operating revenues, operating expenses, and taxes.

IT IS FURTHER ORDERED that the applicant file an updated tariff prior to offering service pursuant to the certificate granted in this order.

IT IS FURTHER ORDERED that this order be, and it is hereby, made the Commission's official certificate of authority to furnish the service described and authorized herein.

MADE AND ENTERED at Lincoln, Nebraska this 28th day of September, 1993.

NEBRASKA PUBLIC SERVICE COMMISSION

Commissioners Concurring:

Daniel G. Mueller

//s//Rod Johnson
//s//Frank E. Landis, Jr.
//s//James F. Munnelly

James F. Landis
Chairman

ATTEST:

David R. King
Executive Director