

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of the application) Application No. C-1183
of Cherry Communications, Inc.,)
Westchester, Illinois, who seeks) CONDITIONALLY GRANTED
authority as a reseller of inter-)
exchange telecommunications)
services.) Entered: July 31, 1995

APPEARANCES

For the Applicant:

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For the Commission:

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Commission
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OPINION AND FINDINGS

This matter comes before the Commission pursuant to an application filed by Applicant on April 20, 1995, seeking a certificate to operate as a reseller of interexchange telecommunications services throughout the state of Nebraska. Notice of the application was published in the **Daily Record**, Omaha, Nebraska, on April 24, 1995. A public hearing on the docket was held pursuant to written notice on June 13, 1995 at 1:30 p.m. in the Commission Hearing Room, Lincoln, Nebraska. The application is unopposed.

SUMMARY OF TESTIMONY

Greg Brown, Vice-President of Security and Regulatory Compliance and Corporate Counsel for Applicant adopted the prefilled testimony submitted with the application subject to various modifications. Applicant seeks a Certificate of Public Convenience and Necessity authorizing it to operate as a resale common carrier of interexchange telecommunications services. Applicant is an Illinois corporation in good standing as evidenced by the certified copy of its Articles of Incorporation inclusive of all amendments attached to the application. Applicant is qualified to do business in Nebraska pursuant to its certificate of authority to transact business in the state, which was also attached to the application.

The Applicant operates as a switched reseller of domestic and international interstate and intrastate direct dial telecommunications services. Applicant plans to provide resold interLATA and intraLATA ("1 +") telecommunications services on a full-time basis, 24 hours a day, seven days a week. Applicant will provide direct-dial interexchange services to pre-subscribed business customers as well as travel card service to both pre-subscribed business customers and casual users. As a switch-based

Application No. C-1183

Page 2

resale carrier, Applicant will resell the MTS and WATS services of other carriers, the selection of which will be based on Applicant's analysis of facility cost, suitability and quality of service.

The principal officers of Applicant include David Giangreco, President; Richard Heidecke, Executive Vice-President; Gregory Brown, Vice-President, Security Regulatory Compliance and Corporate Counsel; Jo Ann Viatenas, Secretary; Mike Dyer, President, Network Services; and Mike Reeves, Vice-President, Engineering. Applicant's sole stockholder and Chairman of the Board is James R. Elliot. All of the company's officers can be reached at Applicant's corporate headquarters, 2205 Enterprise Drive, Westchester, Illinois 60154.

Applicant currently provides intrastate telecommunications services pursuant to certification or registration in the states of Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin. Applicant also provides service on an unregulated basis in the states of Arizona and New Jersey. Applicant has applications pending in California (intraLATA authority), Indiana, Maine, South Carolina and West Virginia. Nationally, the Applicant provides traditional interstate direct-dial or 1 + long-distance telecommunications services. By routing calls over resold transmission facilities, Applicant is able to offer consumers significant savings on long-distance calling.

Applicant is currently in the process of purchasing, or leasing, and installing telephone switches in California, Georgia, Illinois, New York, Texas, Washington and Washington, D.C. Switches are already operational in San Diego and Los Angeles, California and Washington, D.C. Applicant currently serves approximately 215,000 residential subscribers and some 9,000 commercial direct-dial long-distance customers. Applicant has purchased under tariff or through negotiated leases selected transmission paths from various carriers and has combined these paths to create whenever possible an all digital fiber-optic network.

On an intrastate basis in Nebraska, Applicant proposes to offer direct-dial long-distance service statewide. A variety of basic service options offered by Applicant provides the customer and authorized users the ability to complete intrastate, intraLATA and interLATA long-distance calls to all points within the state of Nebraska. The basic service offerings include but will not be limited to message telecommunications service which is both pre-subscribed and dedicated; switched access WATS; special access WATS; an 800 service, both pre-subscribed and dedicated. Applicant does not intend to install any equipment, plant or facilities in

Application No. C-1183

Page 3

Nebraska, but it will employ a sales force here. Before service is initiated in Nebraska, Applicant will have billing agreements and arrangements in place with appropriate local exchange carriers authorized to provide service within the state.

In August, 1992, before Applicant operated as a long-distance reseller, Applicant engaged in a marketing agency relationship with another long-distance reseller called Matrix Corporation.

During the latter part of 1992, it came to the attention of Applicant's corporate management that Matrix was not verifying each Letter of Agreement/Agency (LOA). Also during the latter part of 1992, it came to the attention of Applicant's corporate management that, in the course of such sales activities, it was alleged that a small percentage of field sales representatives engaged in conduct improper in nature that was neither known, condoned, solicited, nor encouraged by Applicant's management. Nor was Applicant's management aware that such alleged conduct was taking place at the time the offending representatives were engaging in it. The situation was exacerbated by Matrix's failure to properly verify Applicant's sales. Matrix's failure to verify the LOAs was ultimately reflected in some complaints which were received by some governmental entities. Upon learning that Matrix was not verifying its LOAs, Applicant ended its relationship with Matrix.

In late 1992/early 1993, Applicant itself entered the telecommunication marketplace as a reseller so that it would have direct control over and responsibility for relations with telecommunications customers.

When Applicant initially entered the telecommunications industry as a reseller of long-distance services in late 1992/early 1993, it received a very small percentage of complaints. During the initial entry, it employed the use of telemarketing/third-party independent verifiers as its sales mechanism. At the time it received these complaints, Applicant was following the FCC guidelines.

To resolve the concerns of some regulators, Applicant also entered into some assurance/consent decrees with the FCC and some states. It is important to note that in many other states, Applicant was certificated or registered without entering into consent decrees.

In addition to the above measures, Applicant also gave the affected customers a full refund of all switching fees and re-rated where appropriate. Further, Applicant implemented additional stringent corporate checks and balances designed to eliminate the possibility of any complaints. These efforts resulted in implementation of the following procedures:

1. Applicant developed revised scripts for the independent third-party verifiers and all sales personnel.
2. If Applicant receives a complaint about a salesperson and discovers that the salesperson does not follow corporate policy, that person will be terminated; if the salesperson's actions are fraudulent, that person will be prosecuted.
3. Applicant hired a Vice President of Security and Regulatory Compliance and several compliance monitors to ensure that all personnel are complying with federal and state regulatory rules.
4. Applicant developed employee/management contracts incorporating strict requirements for employee and managerial compliance with federal and state regulations. Any violation of these agreements by employees will result in the employee's dismissal.

Despite the success of the above, Applicant determined that the use of verified, written LOAs is far superior to independent third-party verification for telemarketing sales and unverified LOAs in ensuring that all orders for its interexchange services are genuine. To that end, from June of 1993 on, Applicant exclusively employs the use of signed written LOAs only, that are all individually verified by Applicant's verification department, which is a bank of in-house personnel who verify each signed LOA. On Applicant's LOA form, there is a specific space where the LOA is verified by Applicant's in-house verification personnel and a verifying piece of information is obtained from the customer, such as a date of birth or mother's maiden name. To eliminate any incentive to act improperly, Applicant's verification employees are paid an hourly wage, not a commission based on sales. In taking the measures it has, Applicant far surpasses the requirements of the four basic FCC customer switching rules promulgated by the FCC for all telecommunication companies.

Applicant is currently authorized to serve 31 states plus the District of Columbia and has an FCC license, FCC 214 International license and a FCC 214 Satellite license. Applications are pending in numerous states. Since implementing the additional corporate checks and balances described above in 1993, many jurisdictions have been very complimentary of Applicant.

Applicant operates a toll-free rate line ten hours per day offering information on rates and services. Applicant is in the process of expanding the availability of the toll-free line to 24 hours per day. Applicant also provides an address to which customers may write for rate and service information. Applicant presently is providing services similar to those that are proposed for Nebraska in numerous markets throughout the country. The

Application No. C-1183

Page 5

Applicant's facilities and personnel who are currently used to provide interstate service will be used to provide the intrastate service proposed herein. Applicant is technically capable to operate in Nebraska based on its experience with the service it provides in 30 other states. The principal officers have the extensive technical financial and management skills to carry out the business plan for which authorization is sought. Applicant has the technical and managerial resources and experience necessary to provide customers in the state of Nebraska intrastate telecommunications services. Descriptions of the Applicant's management personnel were attached to the application.

In 1992, the total telecommunications revenue for the Applicant was \$1,147,575. In 1993, revenue increased to \$7,912,012. In 1994, revenue totaled \$14,847,177. For the first five months for 1995, the revenue figures were as follows: January, \$1,570,600; February, \$1,791,043; March, \$2,091,479; April, \$2,094,627; and May, \$4,202,906, for a total of \$11,750,709 for the first five months of 1995.

Applicant submitted a draft copy of its 1992 financial statement and a certified copy of its 1993 statement. Applicant indicates that its 1994 year-end statement and year-to-date 1995 financial information have yet to be prepared. The Commission staff entered Exhibit 4 in the record consisting of question numbers 1 through 5 which require additional explanation with regard to the Applicant's financial records. Applicant is required to respond to Exhibit 4 through a late filed Exhibit 5 addressing the concerns regarding financial documentation. Applicant estimates that the required responses can be completed and filed with the Commission by no later than August 31, 1995.

Applicant has requested that the Commission authorize a temporary waiver of its rules with regard to the filing of the financial information. Applicant states that it has a business opportunity which is available for only a short time and cannot be recaptured at a later date. Applicant does not request that the Commission waive its rule with regard to the filing of the financial information, but only that any grant of authority which might be forthcoming be conditioned upon the Applicant filing the required financial information in such a manner as to be satisfactory proof to the Commission of the Applicant's financial fitness. The financial information requested by the staff is not presently available but can be prepared and submitted by August 31, 1995.

The circumstances here are most unusual. The company has a single stockholder and uses no bank financing. All funds are provided by the sole stockholder, who has contributed approximately 20 million dollars to the company over the last three years. Financial statements have not previously been used to secure loans, and therefore the necessity of timely financial data has not been

critical. Applicant does not take deposits from its end users, and all residential billing would be done by local exchange carriers. Therefore, no Nebraska end user or local exchange carrier would be at risk should the Applicant either fail or have insufficient financial wherewithal. Applicant has requested that consideration of this application go forward and that a decision be rendered conditionally granting the authority in order that it might take advantage of the business opportunity which has presented itself. Applicant states that if its financial documentation is not supplied by August 31, 1995, or its responses to the inquiries are not satisfactory to the Commission, the Commission would dismiss its application.

FINDINGS

Upon consideration of the application, the governing statutes and rules, the evidence produced at the public hearing, and being fully informed, the Commission is of the opinion and finds as follows:

1. Applicant's application, as amended, satisfies the requirements of NEB. REV. STAT. §§ 86-804 and 75-604.
2. Our regulations contained in Title 291, Neb. Admin. Regs., Chapter 5, Section 003.12A, have been met with the exception of the financial data required under 003.12A15. The applicable section states that the following information should be supplied: "A copy of the Applicant's last three annual financial statements to include a balance sheet and profit and loss statement and evidence of adequate financing, certified by an independent certified public accountant, together with Applicant's most recent interim financial statements, certified by Applicant's chief financial officer." The purpose of this regulation is to assist the Commission in determining the Applicant's financial fitness and to protect Nebraska consumers. As mentioned earlier, the Applicant in this proceeding collects no advance payments or deposits from the consumers. Additionally, its billing for residential service is done by local exchange carriers who collect the funds. Therefore, no Nebraska end user or local exchange carriers would be at risk.
3. The Applicant has provided a consolidated financial statement for 1992 evidencing both telecommunications operations and businesses unrelated to telecommunications. The 1992 statements were never certified by an independent accountant. The 1993 financial statements were prepared by an independent accountant, and the Commission staff has several inquiries which have been raised and identified on Exhibit 4. The 1994 year-end financial reports have not

been completed, and the independent accountant estimates that year-end financials will be completed no later than August 31, 1995. Internally prepared year-to-date 1995 financial data likewise has not been prepared. It is contemplated the 1995 year-to-date data can be provided by August 31, 1995.

4. Applicant contends that it has business opportunities which are short-term in nature which could not be recaptured at a later date if certification is delayed. Applicant states that it accepts no deposits from its end users and local exchange carriers. All billing of residential service is performed by the local exchange carrier which collects and remits the Applicant's portion of the revenue. Applicant believes that there is no potential harm to the consuming public, if it were granted a certificate on a conditional basis. Applicant has asked us to waive our financial requirements under Rule 003.12A15 and grant a certificate conditioned on the fact that all financial data required by the Commission be provided by August 31, 1995. Further, that such financial data, including responses to Exhibit 4, be provided in a form and a context satisfactory to the Commission to demonstrate financial fitness.

Practically speaking, if the Applicant were a start-up operation with no historical financial information, we would in all likelihood grant its application based on projections absent any historical perspective. Applicant could more easily meet the requirements of our rules if it were a start-up operation. Applicant is not asking that the financial requirements be waived entirely, only that the time for submission of such data be extended and that it be granted a conditional certificate in the interim. Under the circumstances present herein, we find the granting of the conditional certificate would be in the public interests. Further, it appears that the Applicant possesses adequate financial resources to provide the proposed services based on the investment previously made by its sole stockholder.

ORDER

It Is Therefore Ordered by the Nebraska Public Service Commission that, pursuant to NEB. REV. STAT. §§ 86-805 and 75-604 and Title 291 Neb. Admin. Regs., Chapter 5, Section 003.12A, Application No. C-1183 is hereby conditionally granted provided, however, that Applicant will provide to the Commission by no later than August 31, 1995 updated financial statements for the years 1994 and year-to-date 1995 as well as the required responses to Exhibit 4. Further, such information must prove satisfactory to the Commission that Applicant has the financial wherewithal to

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1183

Page 8

provide the proposed service. In the event Applicant fails to provide the required information or such information is insufficient to make a finding of financial fitness by August 31, 1995, the application shall be dismissed.

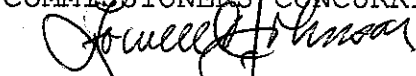
IT IS FURTHER ORDERED that Applicant's tariff attached to its application shall become effective with the conditional grant of this authority. In the event Applicant fails to meet the requirements of the above paragraph, the tariff shall become null and void on August 31, 1995.

IT IS FINALLY ORDERED that this order be, and is hereby made the Commission's official Certificate of Public Convenience and Necessity authorizing Cherry Communications, Inc. to provide intrastate service as a switched reseller of intrastate direct-dial communications services.

Made and entered at Lincoln, Nebraska this 31st day of July, 1995.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



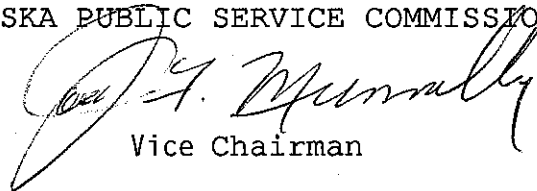
//s//Rod Johnson

//s//Frank E. Landis

COMMISSIONERS DISSENTING:

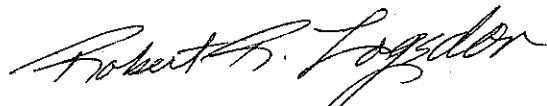
//s//James F. Munnally

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Vice Chairman

ATTEST:



Executive Director