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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission
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AZ Corporation Commission
Director Of Utilities

IN THE MATTER OF THE JOINT APPLICATION OF GE BUSINESS PRODUCTIVITY SOLUTIONS, INC. AND BUSINESS PRODUCTIVITY SOLUTIONS, INC. FOR EXPEDITED APPROVAL OF CERTAIN TRANSACTIONS.

DOCKET NO. T-02719A-04-0760
DOCKET NO. T-04280A-04-0760

DECISION NO. 67727

ORDER

Open Meeting
March 24, 2005
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On October 21, 2004, GE Business Productivity Solutions, Inc. ("GEBPS") and Business Productivity Solutions, Inc. ("BPS") (collectively "Applicants") jointly filed with the Commission an application seeking authority to consummate a transaction involving the transfer of the assets of GEBPS, including the GEBPS customer base and Certificate of Convenience and Necessity ("CC&N"), to BPS. GEBPS is a switchless reseller[1] that purchases telecommunications services from a variety of carriers for resale to its customers.

2. On November 22, 2004, the Applicants filed a Supplement to Application providing additional information in support of the application.

3. On December 15, 2004, the Commission's Utilities Division Staff ("Staff") filed a Letter of Insufficiency and attached its First Set of Data Requests directed to the Applicants.

[1] In Decision No. 58926 (December 22, 1994), the Commission found that resold telecommunications providers ("resellers") are public service corporations subject to the jurisdiction of the Commission.

4. On December 28, 2004, the Applicants filed Responses to Staff's First Set of Data Requests.

5. On January 12, 2005, Staff filed a second Letter of Insufficiency. Attached to the letter was Staff's Second Set of Data Requests.

6. On January 20, 2005, the Applicants filed Responses to Staff's Second Set of Data Requests.

7. On March 9, 2005, Staff filed a Staff Report recommending approval of the application subject to certain conditions.

8. Also on March 9, 2005, GEBPS' general counsel filed a letter requesting that a Recommended Order be issued as soon as possible for consideration at the Commission's Securities Open Meeting scheduled for March 24, 2005.

9. Pursuant to the terms of an Asset Purchase Agreement ("Agreement") between GEBPS and BPS' ultimate parent company, Eschelon Telecom, Inc. ("Eschelon"), Eschelon will acquire substantially all of the assets of GEBPS, including the GEBPS customer base and GEBPS' CC&N in Arizona[2]. Under the terms of the Agreement, the assets would immediately be transferred from Eschelon to BPS, a Minnesota corporation that is a wholly owned subsidiary of Eschelon. Eschelon provides local and long distance facilities-based service in 12 markets in 7 states including Arizona and, according to the application, has the financial, managerial and technical qualifications necessary to provide quality telecommunications services to customers in Arizona.

10. Because GEBPS conducts business in Arizona only as a long-distance reseller, there are no physical assets to be transferred. In effect, the Applicants are seeking authority only for GEBPS to transfer its customer base and CC&N to BPS through the Agreement with Eschelon. According to the Applicants' Responses to Staff Data Requests, GEBPS currently serves 559 residential customers and 73 business customers in Arizona. After the transaction is completed, GEBPS would no longer provide telecommunications services.

11. According to the Applicants, current customers of GEBPS were notified of the

[2] GEBPS is a Georgia corporation licensed to do business in Arizona, and authorized to provide resold long distance telecommunications services throughout the United States. GEBPS' CC&N to provide resold telecommunications services in Arizona was granted in Decision No. 62410 (April 3, 2000).

proposed transfer to BPS by letter sent in November/December 2004. In the notice, customers were informed that they were free to select a new service provider at any time (Exhibit B to Application). The Applicants also published notice of the proposed transfer in the *Arizona Republic* on November 5, 2004 (Attachment C to Application Supplement)[3].

12. In the Staff Report, Staff indicated that unaudited financial statements were provided for BPS' parent company, Eschelon Telecom, Inc. The financial statements show that for the six months ending June 30, 2004, Eschelon listed assets of $168.6 million, equity of $4.1 million, and net income of $10.9 million.

13. Staff stated that based on information obtained from BPS, it has determined that BPS' fair value rate base ("FVRB") is zero and is not useful in either a fair value analysis or in setting rates. Staff further stated that, in general, rates for competitive services are not set according to rate of return regulation. Staff has reviewed the rates to be charged by BPS and believes they are just and reasonable as they are comparable to several long distance carriers operating in Arizona. Therefore, while Staff considered the FVRB information submitted by BPS, Staff does not believe that information should be given substantial weight in this analysis.

14. Staff states that BPS has no market power and that the reasonableness of its rates will be evaluated in a market with numerous competitors. Staff believes that the rates in BPS' proposed tariffs for its competitive services will be just and reasonable and recommends that the Commission approve them.

15. Based on its evaluation of BPS' technical, managerial, and financial capabilities to provide resold interexchange services, Staff recommended approval of the application subject to the following recommendations:

(a) Transfer of GEBPS' current customers to BPS should be granted and waivers of the Commission's rules governing Unauthorized Carrier Changes, as set forth in A.A.C. R14-2-1904 and R14-2-

[3]The Applicants contend that a separate notice informing customers of their right to switch providers within 90 days without regard to contractual obligations is unnecessary in this case due to the prior notifications to customers by mail and publication. We disagree. Despite the prior notifications, we believe that it is reasonable to require BPS to notify the transferred customers of the transaction within 30 days of the effective date of this Order and within 90 days thereafter to allow such customers to discontinue service in their discretion without prejudice or regard to contractual obligation. *See, e.g., Winstar Wireless, Inc.*, Decision No. 64740 (April 17, 2002), at 8.

1905, should be granted with respect to that transaction;

(b) Cancellation of GEBPS' CC&N to provide resold long distance service should be granted once the transfer of assets to BPS is complete;

(c) BPS should be ordered to comply with all Commission rules, orders, and other requirements relevant to the provision of intrastate telecommunications service;

(d) BPS should be ordered to maintain its accounts and records as required by the Commission;

(e) BPS should be ordered to file with the Commission all financial and other reports that the Commission may require, and in a form and at such times as the Commission may designate;

(f) BPS should be ordered to maintain on file with the Commission all current tariffs and rates, and any service standards that the Commission may require;

(g) BPS should be ordered to comply with the Commission's rules and modify its tariffs to conform to those rules if it is determined that there is a conflict between BPS' tariffs and the Commission's rules;

(h) BPS should be ordered to cooperate with Commission investigations including, but not limited to customer complaints;

(i) BPS should be ordered to participate in and contribute to the Arizona Universal Service Fund, as required by the Commission;

(j) BPS should be ordered to notify the Commission immediately upon changes to BPS' name, address or telephone number;

(k) BPS' intrastate interexchange service offerings should be classified as competitive pursuant to A.A.C. R14-2-1108;

(l) BPS' maximum rates should be the maximum rates proposed in its proposed tariffs. The minimum rates for BPS' competitive services should be its total service long run incremental costs of providing those services as set forth in A.A.C. R14-2-1109; and

(m) In the event that BPS states only one rate in its proposed tariff for a competitive service, the rate stated should be the effective (actual) price to be charged for the service as well as the service's maximum rate.

16. Staff further recommended that BPS' CC&N should be conditioned upon the filing of conforming tariffs in accordance with this Decision within 365 days from the date of an Order in this matter, or 30 days prior to providing service, whichever comes first.

17. Based upon the proposed tariff, BPS may collect advances, deposits and/or prepayments from its customers. Consequently, Staff recommended that BPS' CC&N should be conditioned upon procurement of a performance bond as described below, and filing proof of that performance bond within 365 days from the date of an Order in this matter, or 30 days prior to providing service, whichever comes first.

18. Staff recommended that BPS be required to procure a performance bond in the initial amount of $10,000, with the minimum bond amount of $10,000 to be increased if at any time it would be insufficient to cover all advances, deposits, or prepayments collected from its customers, in the following manner: The bond amount should be increased in increments of $5,000, with such increases to occur whenever the total amount of the advances, deposits, and prepayments reaches a level within $1,000 under the actual bond amount.

19. Staff further recommended that BPS be required to file a request for cancellation of its established performance bond relating to the provision of resold interexchange service if, at some time in the future, it does not collect from its customers an advance, deposit, and/or prepayment. Such request shall be filed with the Commission for Staff review. Upon receipt of such filing and after Staff review, Staff will forward its recommendation to the Commission.

20. Staff recommended that if BPS fails to meet the timeframes outlined in Staff's recommendations, BPS' CC&N should become null and void without further Order of the Commission, and that no time extensions for compliance should be granted.

21. Staff also recommended that BPS be required to provide notice to the Commission and its customers in the event it requests to discontinue service and/or abandon its service area, and Staff indicates that such notice(s) shall be in accordance with A.A.C. R14-2-1107. Pursuant to A.A.C. R14-2-1107, BPS is required to obtain Commission authorization of compliance with all of the requirements, including but not limited to the notice requirements, prior to the discontinuance of service and/or abandonment of its service area.

22. Staff's recommendations are reasonable and shall be granted, except that the time for performance regarding the filing of conforming tariffs and procurement of the performance bond shall be 30 days after the effective date of this Order. Therefore the application for approval of the transfer of GEBPS' assets to BPS, including transfer of GEBPS' customers and CC&N, shall be granted subject to the conditions set forth herein.

23. The rates set forth in the proposed tariff for BPS are for competitive services.

24. BPS' fair value rate base is zero.

CONCLUSIONS OF LAW

1. The Applicants, GEBPS and BPS, are public service corporations within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

2. The Commission has jurisdiction over the Applicants and the subject matter of the application.

3. Notice of the application was given in accordance with the law, provided that within 30 days of the effective date of this Order all customers currently receiving service from GEBPS shall receive notification of the transaction and such customers shall be permitted within 90 days thereafter to discontinue service in their discretion without prejudice or regard to contractual obligation.

4. Transfer of GEBPS' assets to BPS, including transfer of GEBPS' customers and CC&N, is in the public interest.

5. BPS is a fit and proper entity to receive a CC&N, as conditioned herein, to provide competitive resold interexchange telecommunications services in Arizona.

6. Staff's recommendations as discussed herein should be adopted, except that the time for performance regarding the filing of conforming tariffs and procurement of the performance bond shall be 30 days after the effective date of this Order.

7. BPS' fair value rate base is not useful in determining just and reasonable rates for the competitive services it proposes to provide to Arizona customers.

8. BPS' rates, as they appear in its proposed tariffs, are just and reasonable and should be approved.

ORDER

IT IS THEREFORE ORDERED that the joint application of GE Business Productivity Solutions, Inc. and Business Productivity Solutions, Inc. to transfer the Arizona assets of GE Business Productivity Solutions, Inc., including its customer base and Certificate of Convenience and Necessity, to Business Productivity Solutions, Inc., is reasonable and in the public interest and shall be granted, provided that within 30 days of the effective date of this Order all customers currently receiving service from GE Business Productivity Solutions, Inc. shall receive notification of the transaction and such customers shall be permitted within 90 days thereafter to discontinue service in their discretion without prejudice or regard to contractual obligation.

IT IS FURTHER ORDERED that upon consummation of the transaction transferring the assets of GE Business Productivity Solutions, Inc. to Business Productivity Solutions, Inc., the Certificate of Convenience and Necessity for authority to provide competitive resold intrastate interexchange telecommunications services, except local exchange services, shall be held by Business Productivity Solutions, Inc., conditioned upon its compliance with the conditions discussed hereinabove.

IT IS FURTHER ORDERED that Business Productivity Solutions, Inc. shall docket proof of procurement of a $10,000 performance bond within 30 days of the effective date of this Order, and that such performance bond shall remain in effect until further order of the Commission.

IT IS FURTHER ORDERED that Business Productivity Solutions, Inc. shall file conforming tariffs within 30 days of the effective date of this Order.

IT IS FURTHER ORDERED that Staff's recommendations set forth hereinabove are adopted, except that the time for performance regarding the filing of conforming tariffs and procurement of the performance bond shall be 30 days after the effective date of this Order.

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IT IS FURTHER ORDERED that if Business Productivity Solutions, Inc. fails to meet the timeframes outlined above, the Certificate of Convenience and Necessity for authority to provide competitive resold intrastate interexchange telecommunications services shall become null and void without further Order of the Commission.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN | COMMISSIONER | COMMISSIONER

COMMISSIONER | COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 29th day of March, 2005.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

DDN:mj

SERVICE LIST FOR: GE BUSINESS PRODUCTIVITY SOLUTIONS, INC. and BUSINESS PORDUCTIVITY SOLUTIONS, INC.

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