

Decision No. C03-0329

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-012T

IN THE MATTER OF THE APPLICATION OF ALTICOMM, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES.

**ORDER DENYING APPLICATION FOR
REHEARING, REARGUMENT, OR RECONSIDERATION
AND SETTING MATTER FOR HEARING**

Mailed Date: April 1, 2003
Adopted Date: March 26, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an Application for Rehearing, Reargument, or Reconsideration (RRR) of our Decision No. C03-0167, filed by Alticomm, Inc. (Alticomm), on March 14, 2003. Alticomm urges us to reconsider our denial of its application for a certificate of public convenience and necessity (CPCN) to provide local exchange telecommunications services.

2. According to Alticomm, the Commission was incorrect in denying its application due to undisclosed corrective actions in Minnesota and Iowa. Alticomm asserts that it was through a contractual relationship between its predecessor company, Eastern Telephone, Inc. (Eastern Telephone), and On Systems Technology, LLC (On Systems) that the administrative proceedings in Iowa and Minnesota arose. According to Alticomm, it “could not and did not have local or long distance customers in Iowa or Minnesota.”

3. Now, being fully advised in the matter, we deny Alticomm's application for RRR, but set the matter for hearing.

B. Discussion

4. Alticomm filed an application for a CPCN to provide local exchange telecommunications services pursuant to 4 *Code of Colorado Regulations* (CCR) 723-25-4 on January 10, 2003. Alticomm responded in the negative to a directive to "disclos[e] any adverse decision entered by any court or regulatory body within the last five years regarding applicant's provision of local exchange telecommunications services or other regulated telecommunications service . . ." pursuant to 4 CCR 723-25-4.1.8.

5. Commission Staff (Staff) states that it uncovered information that corrective action was taken in Minnesota against Alticom, Inc., formerly known as Eastern Telephone, Inc., in Minnesota Docket No. P-6164/C-02-1383, Order Directing Compliance with Filed Agreement. This was apparently the resolution of a complaint filed by the Minnesota Department of Commerce against several entities, including Eastern Telephone.

6. Further corrective action was discovered by Staff against Eastern Telephone in Iowa. There, the Iowa Utilities Board issued a show cause order in Docket No. FCU-02-17 that named several telecommunications companies, including Eastern Telephone. The Iowa show cause letter was issued to James L. Cornblatt, Director of Regulatory Affairs for Eastern Telephone, and addressed specific non-Iowa non-compliance issues. As part of the order to show cause, Eastern Telephone was ordered to cease charging for any communications services provided in Iowa, until further order of the Iowa Utilities Board. James Cornblatt signed the attestation in Alticomm's application under oath that all statements and contents of the

application were true, accurate, and correct to the best of his knowledge and belief. Based upon Staff's representations, the Commission rejected Alticomm's application for a CPCN.

7. In its application for RRR, Alticomm makes several factual claims. First, it states that its predecessor company, Eastern Telephone, successfully bid at a bankruptcy court action for the purchase of substantially all of the assets of ServiSense, and subsequently entered into a management agreement with ServiSense to manage ServiSense while it continued to provide telecommunications services to its customers.

8. Alticomm further indicates that it entered into a marketing and operating agreement with On Systems to provide for On Systems' temporary access to ServiSense's interconnection agreements with certain incumbent local exchange carriers to service telephone customers in various states. Pursuant to that agreement, Alticomm claims that Eastern Telephone authorized On Systems to acquire customers under the ServiSense reseller ID accounts in accordance with the applicable ServiSense certificates of authority.

9. The agreement also required On Systems to provide services including marketing, customer acquisition, provisioning orders, customer service, and other customer management services. Alticomm further represents that On Systems was required to provide a billing data file to Eastern Telephone. Customers would be billed and all payments would be collected by Eastern Telephone and placed into a segregated bank account. From these proceeds, Eastern Telephone was to receive a management fee, pay expenses, and forward any remaining funds to On Systems. Alticomm claims that On Systems subsequently breached the agreement and began billing customers directly. As a result, Alticomm filed a complaint against On Systems in Denver District Court.

10. According to Alticomm, its application for a CPCN was granted in Iowa on January 6, 2003, in Decision No. C03-0167, which Alticomm claims resolved any concerns the Iowa Utilities Board had with respect to Alticomm, because prior to the date of the decision, it was “merely acting as the manager of ServiSense.”

11. Alticomm states that it answered no to Question 7B in the Commission application for a CPCN because it never had customers in Iowa or Minnesota. Although Eastern Telephone (Alticomm’s predecessor company) had a contractual relationship with On Systems, Alticomm claims that it could not and did not have local or long distance customers in those two states.

12. Alticomm also argues that the Commission decision denying its CPCN application was improper because Alticomm answered Question 7B “reasonably, in good faith and truthfully.” Alticomm further urges that because the Commission rejected the application because it was incomplete pursuant to 4 CCR 723-35-3.4, it should have had 30 days to cure the deficiency pursuant to the rule. Because it never had the opportunity to cure any “perceived deficiencies,” Alticomm now contends that the application was improperly denied on the grounds of completeness.

C. Findings

13. Commission Rule 4 CCR 723-25-4.1.8 provides that any applicant must provide:

identification of any adverse decision entered by any court or regulatory body within the last five years regarding the applicant’s provision of local exchange telecommunications services or other regulated telecommunications services that resulted in: (a) assessment of civil penalties; (b) assessment of criminal penalties; (c) injunctive relief; (d) corrective action; (e) reparation; (f) initiation of a show cause proceeding; (g) initiation of a disciplinary action, including but not limited to, proceedings to limit or to place restrictions on any authority to operate,

any certificate of public convenience and necessity, or any service offered; (h) refusal to grant authority to operate or to provide a service; (i) decertification or revocation of authority to operate or to provide a service; or (j) any combination of the foregoing.

The applicant shall identify the jurisdiction and provide the docket or file number for each action, and shall provide a copy of any identified decision to the Commission upon request.

Staff uncovered corrective actions involving the principal of Eastern Telephone, who was also the signatory for the Alticomm application. Therefore, Staff was justified in its concern that substantive issues had been withheld in Alticomm's application. However, we do believe Alticomm is entitled to its "day in court," through an evidentiary hearing, to fully explain its reasons for the information contained in the application.

14. An evidentiary hearing is also necessary to explore certain factual representations made by Alticomm in its application for RRR. For example, in paragraph 5 of its application for RRR, Alticomm indicates that its predecessor company, Eastern Telephone, acquired "substantially all of the assets of ServiSense." Pursuant to 4 CCR 723-25-8, to execute a transfer as defined in 4 CCR 723-25-2.17:

The transferor and the transferee shall file a joint application with the Commission not less than 30 days prior to the effective date of the proposed transfer. If the transferee does not hold a Commission-issued certificate of public convenience and necessity to provide local exchange telecommunications services, the transferee shall provide the Commission with the information required pursuant to Rule 4 CCR 723-25-4, and must receive an appropriate grant of authority from the Commission.

Rule 4 CCR 723-25-2.17 defines "transfer" as follows:

a) a transaction to convey, by sale, assignment, or lease, a certificate of public convenience and necessity, a certificate to provide local exchange telecommunications services, a letter of registration, or any combination of these; b) a transaction to obtain, whether by conveyance of assets or shares, controlling interest in a telecommunications service provider; c) a conveyance of assets not in the ordinary course of business; or d) execution of a merger.

The Commission has no record indicating that Alticomm or its predecessor company, Eastern Telephone, applied for a transfer of assets of ServiSense 30 days prior to acquiring the assets of ServiSense as required by Commission rules.

15. Therefore, we find it necessary to conduct a hearing before the entire Commission to determine the merits of the application and the issues raised by Alticomm's application for RRR. The Commission will conduct a prehearing conference at the below stated time and place. Alticomm and any intervenors to this matter shall come prepared to discuss a procedural schedule in this case. The parties shall be prepared to discuss hearing dates and any other procedural dates.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed by Alticomm, Inc., is denied consistent with the discussion above.

2. The matter of the application for a certificate of public convenience and necessity to provide local exchange telecommunications services by Alticomm, Inc., is set for hearing before the Commission *en banc*.

3. A prehearing conference shall be held at the following time and place:

DATE: April 30, 2003

TIME: 9:00 a.m.

PLACE: Commission Hearing Room A
1580 Logan Street, Office Level 2
Denver, Colorado

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 26, 2003.**

(SEAL)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

JIM DYER

Commissioners

COMMISSIONER POLLY PAGE ABSENT.