

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 GRANTING APPLICATION

Mailed Date: September 30, 2003
Adopted Date: September 17, 2003.

I. BY THE COMMISSION

A. Statement

1. AltComm, Inc. (AltComm), seeks a certificate of public convenience and necessity (CPCN) from this Commission to provide local exchange telecommunications services. AltComm filed its CPCN application on January 10, 2003. Relevant to this matter, question 7(B) of the application asks whether:

Within the last five years, has any court or regulatory body entered any adverse decision regarding the applicant's provision of local exchange services or other controlled telecommunications services that resulted in any of the penalties or sanctions described in Rule 4 CCR 723-25-4.1.8?

2. AltComm responded that it had not had any adverse decisions rendered against it within the last five years as required in question 7(B) of the CPCN application. In Decision No. C03-0167, we determined that the Commission had obtained information that on its face would question the veracity and completeness of the information contained in AltComm's application. Specifically, we understood that specific corrective action was taken in Minnesota against AltComm, formerly known as Eastern Telephone, Inc., by the Minnesota Department of Commerce in Docket No. P-6164/-02-1383, as well as by the Iowa Utilities Board in Docket

No. FCU-02-17. We found that these actions indicated that corrective action had been taken against AltiComm, and as a result, these actions should have been disclosed in its CPCN application. We then rejected its application

3. AltiComm filed an application for rehearing, reargument, or reconsideration (RRR) of Decision No. C03-0167 on March 14, 2003. Although we denied AltiComm's RRR, we nonetheless determined that AltiComm was entitled to its day in court to fully explain its reasons for omitting the corrective action information, and to explore other factual representations made by AltiComm in its application for RRR. A hearing was held on June 19, 2003.

II. FINDINGS

4. The evidence in this matter reveals that AltiComm is a Massachusetts company engaged in the resale of local telephone service throughout the country. On January 31, 2002, the United States Bankruptcy Court for the Eastern District of Massachusetts approved the sale of assets of ServiSense.com, Inc. (ServiSense), to AltiComm (known as Eastern Telephone, Inc., at that time). AltiComm claims that it did not purchase ServiSense's Colorado CPCN as part of that asset purchase. Rather, AltiComm claims to have entered into a management agreement with ServiSense to manage its operations under the CPCN, which ServiSense retained after the asset purchase through the bankruptcy court.

5. According to Staff of the Public Utilities Commission's (Staff) testimony, Staff understood that AltiComm (then Eastern Telephone, Inc.) purchased substantially all of ServiSense's assets, including ServiSense's active and inactive customers, all data and documentation pertaining to those customers, and ServiSense's accounts, trademarks, contracts,

web sites, and accounts receivable. Based on this information, Staff posited that AltiComm controlled ServiSense, and therefore ServiSense should have been identified as an affiliate on AltiComm's CPCN application. Staff further believes that a joint application to transfer assets should have been filed at the time AltiComm acquired ServiSense's assets through the bankruptcy asset sale.

6. In Decision No. C03-0329, we expressed concern over AltiComm's factual representations regarding its relationship with On Systems Technology, LLC (On Systems). AltiComm represented that it entered into a series of contracts with On Systems on June 20, 2002, which gave On Systems access to ServiSense's interconnection agreements with Qwest Corporation, and allowed On Systems to utilize ServiSense's authority to operate in various states while On Systems obtained authority to operate in those states. On Systems also was to purchase ServiSense's Colorado customer accounts. According to AltiComm, those transactions never took place because On Systems failed to pay the amounts due under the agreements and failed to make the necessary filings to effect the transfer of Colorado customer accounts. AltiComm further represents that it subsequently sued On Systems for breach of contract, and an ensuing arbitration resulted in a financial award to AltiComm.¹

7. Although Staff contends that AltiComm failed to disclose corrective actions taken against it in several states, AltiComm counters that it was not necessary to disclose this information because of the relationship between it and ServiSense. AltiComm asserts that it did not obtain a controlling interest in ServiSense, nor did ServiSense transfer its Colorado CPCN or

¹ We now take administrative notice of the arbitration award.

customers to AltiComm. According to AltiComm, ServiSense remains a separate operating entity with assets other than those which AltiComm purchased.

8. AltiComm's chief witness, James Cornblatt, testified that it was never AltiComm's intent to purchase ServiSense's CPCNs, because it wanted to avoid any liabilities which might have resulted from their purchase. Therefore, AltiComm was acting merely as manager of ServiSense pursuant to their management agreement. As a result, AltiComm maintains that it never provided telecommunications services of any kind in Minnesota, Iowa, or Colorado. AltiComm further asserts that it was incorrectly identified in actions in Minnesota and Iowa because those public utilities commissions could not "...sort through the fraud, deception and smokescreens perpetrated by OnSystems."

9. Despite acknowledging that its response to question 7B was "overly lawyeristic", AltiComm nonetheless asserts that its response was "technically correct." Again, AltiComm puts the blame for the Minnesota and Iowa corrective actions in the lap of On Systems. It was On System's abuse of its access to ServiSense's certificates of authority in both Minnesota and Iowa that led to those actions, according to AltiComm.

10. Staff asserts that the credibility of AltiComm's witness weighs in favor of denying AltiComm's application. AltiComm's failure to respond fully and with complete candor about the adverse actions taken against it in other states is sufficient grounds to reject its application according to Staff. Finally, Staff argues that the Commission relies on the representations made in applications to be true, however, this was not the case with AltiComm.

11. AltiComm, on the other hand, acknowledges that it should have been more candid and forthright in its answers to the CPCN application. However, AltiComm does not back away

from its assertion that the failure to disclose corrective actions in other states was not incorrect or inaccurate. Since all the information Staff claims AltComm should have disclosed is readily explainable and was disclosed to the Commission at hearing, AltComm reasons that there is now no reason to deny its application, even if the Commission determines that AltComm should have disclosed corrective actions in other states in its original application.

12. After a careful review of the facts presented at hearing, we reluctantly agree with AltComm that its application for a CPCN should be granted. However, this is not to say that we do not harbor reservations regarding AltComm's fitness to operate as a telecommunications provider in Colorado. This concern stems from AltComm's less than candid responses on its application. Even though many of its answers may have been "technically correct," the overly lawyeristic rationale asserted by AltComm are cause for concern.²

13. Therefore, we find that despite Staff's (and our) concern regarding AltComm's application, it should nevertheless be granted. As AltComm points out, the information regarding corrective action is now revealed. Denying the application and allowing AltComm to file a subsequent application for CPCN which presumably would include the relevant corrective action (which we then would most likely grant) serves no purpose. However, to remedy our concerns regarding AltComm's ability to provide telecommunications services in Colorado, we do have a useful tool at our disposal.

² We note, however, that AltComm should have disclosed, at a minimum, the actions taken against AltComm by the Iowa Utilities Board (IUB) and the Minnesota Public Utilities Commission (MPUC). The MPUC, *inter alia*, prohibited AltComm from soliciting customers until it received unconditional regulatory authority. The IUB held that Eastern Telephone, Inc. (the same entity as AltComm) knowingly operated illegally in Iowa and made material misrepresentations to the IUB in its pleadings, and directed all local exchange carriers in Iowa to cease providing services to Eastern Telephone, Inc. The Colorado Commission Rule 4 *Code of Colorado Regulations* 723-4.1.8 requires more candor and disclosure than that made by AltComm. As noted below, we do not believe the violation of the rule warrants denial of the application in this case, since we have a better remedy to employ.

14. The legislature recently passed Senate Bill 03-225, which established the Commission's option to require regulated telecommunications carriers to "post a bond or provide other security as a condition of obtaining a certificate, registration, or operating authority..." The Commission may consider a company's financial viability, deposits, and prepayments from customers, and the history of the carrier's statutory payment obligations. In addition, the statute allows the Commission to impose additional criteria in exercising this bonding authority.

15. We find, given the facts discussed above, that the grant of Alticom's CPCN should be contingent on the posting of a bond or other security. We order this to protect the future customers of Alticom given its questionable practices in other states and here in Colorado. We order Staff and Alticom to work together to negotiate the terms of the bond including the amount, the length of time the bond must be held, a definition of the situation(s) that would cause the bond to come due, and how the money would be used.

16. We further order Staff and Alticom to complete these negotiations within 30 days of the mailed date of this decision, at which time they shall file a settlement agreement in this docket with the Commission that sets out our bonding requirements. Upon filing of the settlement, we will review the terms and enter an order approving or denying the settlement terms. If a settlement cannot be reached by Staff and Alticom within the 30 days allowed, the parties are instructed to file separate comments on the terms of the bond and the Commission will then determine how to proceed.

17. Alticom may not provide local telecommunications service in Colorado or file an initial local tariff until the bonding issue has been resolved and the Commission has issued a final decision.

III. ORDER**A. The Commission Orders That:**

1. AltiComm, Inc.'s Application for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services is granted contingent upon the Commission's approval of a bonding agreement as discussed above.

2. Staff of the Public Utilities Commission and AltiComm, Inc., shall enter into good faith settlement discussions regarding the terms of the ordered bond or other security as soon as possible.

3. Staff of the Public Utilities Commission and AltiComm, Inc., shall file a settlement within 30 days of the Mailed Date of this Decision, or in the event a settlement cannot be reached, a filing so indicating.

4. We take administrative notice of the American Arbitration Association's Award of Arbitrator in the matter of AltiComm, Inc., and On Systems Technology, Inc., as attached to AltiComm, Inc.'s Statement of Position.

5. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 17, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

**THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners