

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-079T

IN THE MATTER OF THE APPLICATION OF FRANK RAMOGIDA HOLDINGS (CO), INC., DOING BUSINESS AS ROCK SOLID BROADBAND, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES AND FOR A LETTER OF REGISTRATION TO PROVIDE EMERGING COMPETITIVE TELECOMMUNICATIONS SERVICES.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ACCEPTING STIPULATION,
GRANTING AUTHORITIES,
REQUIRING FILING, AND
CLOSING DOCKET**

Mailed Date: August 5, 2004

Appearances:

Robert Bowen, President of FRHC, Inc., on behalf of Applicant
FRHC, Inc.; and

John Roberts, Esq., Assistant Attorney General, for Intervenor
Staff of the Colorado Public Utilities Commission.

I. STATEMENT

1. On February 23, 2004, FRHC, Inc. (FRHC or Applicant),¹ filed an Application for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services and for a Letter of Registration to Provide Emerging Competitive Telecommunications Services (Application). That filing commenced this proceeding.

¹ At the time it filed the Application, Applicant's name was Frank Ramogida Holdings (CO), Inc. (FRHC). During the course of this proceeding, Applicant changed its name to FRHC, Inc.

2. On February 24, 2004, the Commission posted its notice of filing of the Application to the Commission's website. This provided public notice of the Application and established an intervention period.

3. On March 2, 2004, Applicant supplemented the Application.

4. On March 29, 2004, Staff of the Commission (Staff) intervened of right and requested a hearing in this proceeding. This is the only intervention.

5. Following a prehearing conference, the undersigned Administrative Law Judge (ALJ) scheduled a hearing date and established a procedural schedule in this matter. Hearing was scheduled for July 12, 2004. *See* Decision No. R04-0373-I.²

6. On May 21, 2004, FRHC filed the direct testimony of Mr. Robert Bowen.

7. On June 18, 2004, Staff filed the answer testimony and exhibits of Mr. Gerald Enright. A portion of this filing was filed under seal with the Commission.

8. On July 6, 2004, the ALJ held a final prehearing conference in this matter.

9. On July 8, 2004, Applicant and Staff filed a Joint Motion to Approve Stipulation and Settlement Agreement, Waive Response Time, and Close Docket. The Stipulation and Settlement Agreement (Stipulation), signed by Applicant and Staff, accompanied that motion. The Stipulation has an Exhibit A, which is incorporated into the Stipulation by reference and which shows the formula used to calculate the amount for the surety bond required to be maintained by Applicant.³

² That Order also consolidated this proceeding with Docket No. 04A-054T. By Decision No. R04-0744, Docket No. 04A-054T was closed.

³ This Stipulation is attached to this Decision as Appendix A and is Hearing Exhibit No. 1.

10. The hearing in this matter was held as scheduled on July 12, 2004. Messrs. Bowen and Enright testified in support of the Stipulation. Hearing Exhibit No. 1 (the Stipulation) was marked for identification, offered, and received into evidence. At the conclusion of the hearing, the evidentiary record was closed.

11. The ALJ took this matter under advisement.

12. In accordance with § 40-6-109, C.R.S., the undersigned now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS AND CONCLUSION

13. FRHC is a Colorado corporation organized on June 9, 2003. FRHC is in good standing in Colorado.

14. FRHC seeks a Certificate of Public Convenience and Necessity (CPCN) to provide basic local exchange telecommunications services. *See* § 40-15-202, C.R.S.; Rule 4 *Code of Colorado Regulations* (CCR) 723-25-2.2. FRHC also seeks a Letter of Registration (LOR) to provide emerging competitive telecommunications services in Colorado.⁴ *See* § 40-15-301, C.R.S.; Rule 4 CCR 723-25-2.7. FRHC does not seek a specific form of price regulation in this proceeding.

15. On June 17, 2004 (corrected filing made on July 2, 2004), Applicant filed for Chapter 11 bankruptcy protection in Colorado in order to restructure, including obtaining the financing necessary to continue in business. That case is pending. Applicant is the debtor in possession, has obtained an equity partner which will provide the financing necessary for FRHC

⁴ Applicant seeks to provide the following emerging competitive telecommunications services: advanced features, interLATA toll, intraLATA toll, jurisdictional private line services, non-optional operator services, premium services, and switched access.

to emerge from bankruptcy as an on-going enterprise, and anticipates filing with the Bankruptcy Court a restructure and financing plan by mid-August 2004.

16. The Stipulation is a full settlement of the issues presented in this docket.

17. As one condition of obtaining and retaining the requested CPCN and LOR, Applicant agrees to maintain a surety bond for a period of three years from the date of the Commission decision accepting the Stipulation. *See* Stipulation (Hearing Exhibit No. 1) at ¶ 7. There are provisions governing the initial and minimum amount of the surety bond (*i.e.*, \$100,000); the recalculation of the amount of the surety bond; the increase in the amount of the surety bond;⁵ the reports and verifications to be filed by Applicant with the Commission concerning the surety bond; the disbursement of the surety bond; and the procedures to be followed in the event of a default of the surety bond. *See generally id.* at ¶ 7 through and including ¶ 17.

18. Section 40-15-503.5(1), C.R.S.,⁶ provides the basis for the bonding (or surety) requirement. Pursuant to that statute and in the exercise of its discretion, the Commission may

⁵ Of the assumptions stated in Exhibit A to the Stipulation, only the number of customers is mutable over time; all other assumptions are fixed for the duration of the bond requirement.

⁶ Section 40-15-503.5(1), C.R.S., provides, in pertinent part:

The commission may require regulated telecommunications service providers to post a bond or provide other security as a condition of obtaining a [CPCN, LOR], or operating authority[.] In setting the amount of the bond or security, the commission may consider the following criteria:

(a) The financial viability of the service provider, as evidenced by its audited financial statements and its general credit history;

(b) The total amount of deposits made by customers to the provider to obtain service and the aggregate amount of prepayments made by customers for monthly regulated service; and

(c) The history of the provider's statutory payment obligations, including those to the Colorado high-cost support mechanism, the Colorado telephone low-income assistance program, the Colorado telephone relay system, and the Colorado fixed utility fund.

require a telecommunications provider to post a bond as a condition of obtaining Commission authority to provide regulated telecommunications services. The Commission has not promulgated regulations implementing this statutory provision.

19. Of necessity, because FRHC does not yet have authority to provide telecommunications service in its own name, the amount of the surety bond is based on projections, not actual numbers.⁷ Those projections, however, are founded in calculations based on, *inter alia*, an estimated 1,000 customers; an estimated average revenue of \$25 per month per customer, which is prepaid by the customer; and the current Commission-established payments into the enumerated statutory funds and programs. The ALJ finds the estimates used to establish the surety bond amount are supported by the record evidence and are reasonable.

20. The ALJ finds that, on the facts of this case, the surety bond provisions of the Stipulation, including the \$100,000 minimum bond amount,⁸ are reasonable and necessary.

21. First, FRHC agreed to the surety bond as a condition of a CPCN and a LOR in this case. This agreement substantially reduces any concern that, in this case, the surety bond requirement represents a barrier to FRHC's entry as a Competitive Local Exchange Carrier (CLEC) into the telecommunications market. Based on its agreement to the surety bond provisions, the ALJ finds that Applicant has determined for itself that the surety bond does not represent a barrier to its entry into the local telecommunications market in Colorado.

22. Second, the record establishes that FRHC is now in Chapter 11 bankruptcy. While it appears that FRHC is poised to emerge from that bankruptcy and should be able to provide telecommunications services as authorized by the CPCN and the LOR, it is a reasonable

⁷ All assumptions are stated on Exhibit A to the Stipulation.

⁸ The surety bond will not be less than \$100,000 at any time.

precaution to have a time-limited and specific surety bond requirement in place to protect FRHC's end-users, wholesale suppliers of telecommunications service to FRHC, and the Commission in the event of unforeseen difficulties in the future.⁹

23. Third, FRHC seeks to provide telecommunications service in Colorado as a facilities-based provider. Given the need for FRHC to have the upfront financial resources to operate as a facilities-based provider and the absence of an underlying carrier,¹⁰ a surety bond is a reasonable requirement. It will assist in the event it becomes necessary to default FRHC customers to another carrier.

24. Fourth, finally, and as discussed above, the amount of the bond takes into account the factors enumerated in § 40-15-503.5(1), C.R.S. (*see* Stipulation at Exhibit A), and is calculated to assure that the bond is sufficient to cover any amounts which FRHC may owe to its wholesale suppliers, its customers, and the enumerated statutory funds.

25. The Stipulation contains other reasonable and necessary provisions. *See* Appendix A to this Decision.

26. Based on the filed testimony, the testimony provided during the hearing, and on review of the Stipulation, the ALJ finds that the Stipulation is just, is reasonable, and is in the public interest. The ALJ finds and concludes that the Stipulation should be, and will be, accepted.

27. In view of the provisions of the Stipulation and based on the record, the ALJ finds and concludes that FRHC possesses the requisite technical competence, managerial

⁹ This protection or insurance against future events is the *raison d'être* of § 40-15-503.5, C.R.S.

¹⁰ The Commission recognized this distinction in Decision No. C03-1029 at ¶ 6.

qualifications, and financial resources to provide the regulated telecommunications services which it seeks authority to provide.

28. With respect to its financial resources, Applicant testified that the Bankruptcy Court must approve the expenditure of monies necessary to obtain the surety bond required by the Stipulation.¹¹ Applicant further testified that its ability to become a CLEC is the cornerstone of its plan to emerge from bankruptcy protection and is at least one of the bases for its ability to obtain equity financing. Finally, the ALJ notes that, so long as FRHC remains in bankruptcy, the Bankruptcy Court will continue to oversee FRHC's operations (at least generally), including payments for equipment and expenses necessary for its provision of telecommunications services. In light of these facts, and to keep the Commission and its Staff informed of FRHC's efforts to emerge from bankruptcy, the ALJ will **add the following condition** to the grant of the CPCN and of the LOR: FRHC will be ordered to file, within 30 days of its issuance: (a) any order of the Bankruptcy Court which approves FRHC's plan to emerge from bankruptcy; (b) any order which addresses the expenditure of funds necessary to obtain the bond required by this Order; and (c) any order which discharges FRHC from bankruptcy.

29. Based on the record and in view of the provisions of the Stipulation, the ALJ finds that granting the Application, as conditioned by the Stipulation and this Order, is consistent with the legislative policy statements set out in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S., and with the purpose of § 40-15-503.5, C.R.S.

30. The ALJ finds that the present or future public convenience and necessity requires, or will require, the provision of basic local telecommunications services by FRHC, so

¹¹ FRHC plans to submit to the Bankruptcy Court a request for approval to obtain the bond. According to its testimony, FRHC has made alternative arrangements for obtaining the surety bond in the event the Bankruptcy Court denies that request.

long as FRHC provides those services in accordance with the provisions of the Stipulation and of this Decision.

31. The ALJ concludes that the Application should be granted, subject to the conditions contained in the Stipulation and in this Decision.

32. The ALJ concludes FRHC should be granted a CPCN to provide basic local telecommunications services, so long as FRHC provides those services in accordance with the provisions of the Stipulation and of this Decision.

33. The ALJ concludes that FRHC should be granted a LOR to provide the emerging competitive telecommunications services identified in the Application, so long as FRHC provides those services in accordance with the provisions of the Stipulation and this Decision.

34. Before FRHC offers to provide local exchange telecommunications services and emerging competitive telecommunications services, FRHC: (a) must have, as required, effective tariffs and price lists for its regulated telecommunications services on file with the Commission; and (b) must comply with all statutory and regulatory requirements and obligations applicable to telecommunications providers subject to the jurisdiction of the Commission.

35. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. The Joint Motion to Approve Stipulation and Settlement Agreement is granted.
2. The Stipulation and Settlement Agreement filed on July 8, 2004, is accepted and approved without modification.

3. The Stipulation and Settlement Agreement filed on July 8, 2004, a copy of which is attached hereto as Appendix A, is incorporated by reference into this Order as if fully set forth.

4. FRHC, Inc., is granted a Certificate of Public Convenience and Necessity to provide basic local exchange telecommunications services throughout the State of Colorado, subject to the following condition: FRHC, Inc., must comply with the provisions of the Stipulation and Settlement Agreement and of this Decision. A detailed description of the service territory of FRHC, Inc., will be delineated in the local exchange maps filed with the tariff.

5. FRHC, Inc., is granted a Letter of Registration to provide specified emerging competitive telecommunications services throughout the State of Colorado, subject to the following condition: FRHC, Inc., must comply with the provisions of the Stipulation and Settlement Agreement and of this Decision. The Letter of Registration permits FRHC, Inc., to provide the following emerging competitive telecommunications services: advanced features, interLATA toll, intraLATA toll, jurisdictional private line services, non-optional operator services, premium services, and switched access.

6. FRHC, Inc., shall serve customers in its service territory on a non-discriminatory basis. "Service territory" shall be defined as that portion of Colorado included in the local exchange maps provided with the tariffs of FRHC, Inc.

7. Unless the Commission orders otherwise, FRHC, Inc., shall begin providing basic local exchange telecommunications service within three years of the date of issuance of a final Commission decision granting this Certificate of Public Convenience and Necessity.

8. Unless the Commission orders otherwise, FRHC, Inc., shall begin providing emerging competitive telecommunications services within three years of the date of issuance of a final Commission decision granting this Letter of Registration.

9. Before commencing operations under this Certificate of Public Convenience and Necessity to provide local exchange telecommunications services, FRHC, Inc., shall file an Advice Letter containing local exchange maps, local calling areas, and a proposed tariff to become effective on not less than 30 days' notice.

10. Before commencing operations under this Letter of Registration to provide emerging competitive telecommunications services, FRHC, Inc., shall file an Advice Letter containing local exchange maps, local calling areas, and a proposed tariff to become effective on not less than 30 days' notice.

11. If FRHC, Inc., fails to file an effective tariff within three years of the date of issuance of a final Commission decision in this docket, this Certificate of Public Convenience and Necessity to provide local exchange telecommunications services shall be deemed null and void. For good cause shown, and if a proper request is filed within three years of the date of issuance of a final Commission decision in this docket, the Commission may grant FRHC, Inc., additional time within which to file a tariff.

12. If FRHC, Inc., fails to file an effective tariff within three years of the date of issuance of a final Commission decision in this docket, this Letter of Registration to provide emerging competitive telecommunications services shall be deemed null and void. For good cause shown, and if a proper request is filed within three years of the date of issuance of a final Commission decision in this docket, the Commission may grant FRHC, Inc., additional time within which to file a tariff.

13. FRHC, Inc., will be required to maintain its books of accounts and records using Generally Accepted Accounting Principles.

14. In accordance with the terms of the Stipulation and Settlement Agreement (*see* Appendix A), FRHC, Inc., will be required to contribute to the following: the Public Utilities Commission's Fixed Utilities Fund, the Colorado High Cost Support Mechanism, the Telecommunications Relay Services for the Disabled Telephone Users Program, the Emergency Telephone Access Act Program (Low Income Fund), and other financial support mechanisms which the Commission may create in the future to implement §§ 40-15-502(4) and (5), C.R.S.

15. FRHC, Inc., shall file with the Commission, within 30 days of its issuance, any order of the Bankruptcy Court which approves FRHC, Inc.'s plan to emerge from bankruptcy, any order which addresses the expenditure of funds necessary to obtain the bond required by this Order, and any order which discharges FRHC, Inc., from bankruptcy.

16. FRHC, Inc., shall comply with all terms of the Stipulation and Settlement Agreement and of this Decision.

17. Docket No. 04A-079T is closed.

18. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

19. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

20. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge