

OPEN MEETING ITEM



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



ORIGINAL

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ARIZONA CORPORATION COMMISSION

DATE: March 18, 2005
DOCKET NO: T-02719A-04-0760 et al.
TO ALL PARTIES:

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Order on:

**GE BUSINESS PRODUCTIVITY SOLUTIONS, INC. AND BUSINESS
PRODUCTIVITY SOLUTIONS, INC.
(TRANSFER CC&N)**

10-day period for filing of exceptions has been waived.

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

MARCH 22, 2005

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

MARCH 24, 2005

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

Arizona Corporation Commission

DOCKETED

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1
2 **BEFORE THE ARIZONA CORPORATION COMMISSION**

3 COMMISSIONERS

4 JEFF HATCH-MILLER, Chairman
5 WILLIAM A. MUNDELL
6 MARC SPITZER
7 MIKE GLEASON
8 KRISTIN K. MAYES

9 IN THE MATTER OF THE JOINT APPLICATION
10 OF GE BUSINESS PRODUCTIVITY SOLUTIONS,
11 INC. AND BUSINESS PRODUCTIVITY
12 SOLUTIONS, INC. FOR EXPEDITED APPROVAL
13 OF CERTAIN TRANSACTIONS.

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

DECISION NO. _____

ORDER

14 Open Meeting
15 March 24, 2005
16 Phoenix, Arizona

17 **BY THE COMMISSION:**

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

20 **FINDINGS OF FACT**

21 1. On October 21, 2004, GE Business Productivity Solutions, Inc. ("GEBPS") and
22 Business Productivity Solutions, Inc. ("BPS") (collectively "Applicants") jointly filed with the
23 Commission an application seeking authority to consummate a transaction involving the transfer of
24 the assets of GEBPS, including the GEBPS customer base and Certificate of Convenience and
25 Necessity ("CC&N"), to BPS. GEBPS is a switchless reseller¹ that purchases telecommunications
26 services from a variety of carriers for resale to its customers.

27 2. On November 22, 2004, the Applicants filed a Supplement to Application providing
28 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.

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

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

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

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

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

12 9. Pursuant to the terms of an Asset Purchase Agreement ("Agreement") between GEBPS
13 and BPS' ultimate parent company, Eschelon Telecom, Inc. ("Eschelon"), Eschelon will acquire
14 substantially all of the assets of GEBPS, including the GEBPS customer base and GEBPS' CC&N in
15 Arizona². Under the terms of the Agreement, the assets would immediately be transferred from
16 Eschelon to BPS, a Minnesota corporation that is a wholly owned subsidiary of Eschelon. Eschelon
17 provides local and long distance facilities-based service in 12 markets in 7 states including Arizona
18 and, according to the application, has the financial, managerial and technical qualifications necessary
19 to provide quality telecommunications services to customers in Arizona.

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

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

27 _____
28 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).

1 proposed transfer to BPS by letter sent in November/December 2004. In the notice, customers were
2 informed that they were free to select a new service provider at any time (Exhibit B to Application).
3 The Applicants also published notice of the proposed transfer in the *Arizona Republic* on November
4 5, 2004 (Attachment C to Application Supplement)³.

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

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

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

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

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

26 ³The Applicants contend that a separate notice informing customers of their right to switch providers within 90 days
27 without regard to contractual obligations is unnecessary in this case due to the prior notifications to customers by mail
28 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;

- 1
- 2 (b) Cancellation of GEBPS' CC&N to provide resold long distance
3 service should be granted once the transfer of assets to BPS is
4 complete;
- 5 (c) BPS should be ordered to comply with all Commission rules,
6 orders, and other requirements relevant to the provision of
7 intrastate telecommunications service;
- 8 (d) BPS should be ordered to maintain its accounts and records as
9 required by the Commission;
- 10 (e) BPS should be ordered to file with the Commission all financial
11 and other reports that the Commission may require, and in a form
12 and at such times as the Commission may designate;
- 13 (f) BPS should be ordered to maintain on file with the Commission all
14 current tariffs and rates, and any service standards that the
15 Commission may require;
- 16 (g) BPS should be ordered to comply with the Commission's rules and
17 modify its tariffs to conform to those rules if it is determined that
18 there is a conflict between BPS' tariffs and the Commission's
19 rules;
- 20 (h) BPS should be ordered to cooperate with Commission
21 investigations including, but not limited to customer complaints;
- 22 (i) BPS should be ordered to participate in and contribute to the
23 Arizona Universal Service Fund, as required by the Commission;
- 24 (j) BPS should be ordered to notify the Commission immediately
25 upon changes to BPS' name, address or telephone number;
- 26 (k) BPS' intrastate interexchange service offerings should be classified
27 as competitive pursuant to A.A.C. R14-2-1108;
- 28 (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.

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

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

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

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

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

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

ORDER

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

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

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

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

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

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

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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9 CHAIRMAN COMMISSIONER COMMISSIONER

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12 COMMISSIONER COMMISSIONER

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14 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
15 Secretary of the Arizona Corporation Commission, have
16 hereunto set my hand and caused the official seal of the
17 Commission to be affixed at the Capitol, in the City of Phoenix,
18 this ____ day of _____, 2005.

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21 BRIAN C. McNEIL
22 EXECUTIVE SECRETARY

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29 DISSENT _____

30 DISSENT _____

31 DDN:mj

1 SERVICE LIST FOR:

GE BUSINESS PRODUCTIVITY SOLUTIONS, INC.
and BUSINESS PORDUCTIVITY SOLUTIONS, INC.

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3 DOCKET NOS.:

T-02719A-04-0760 and T-04280A-04-0760

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