

OPEN MEETING ITEM



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COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

ARIZONA CORPORATION COMMISSION

22

DATE: JULY 9, 2007

DOCKET NO: T-20456A-06-0266

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

SUNESYS, INC.
(CC&N FACILITIES-BASED)

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 ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

JULY 18, 2007

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 Commission's Working Session and Open Meeting to be held on:

JULY 24, 2007 AND JULY 25, 2007

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 Director's Office at (602) 542-3931.

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BRIAN C. McNEIL
EXECUTIVE DIRECTOR

Arizona Corporation Commission
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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON - Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF
9 SUNESYS, INC. FOR APPROVAL OF A
10 CERTIFICATE OF CONVENIENCE AND
11 NECESSITY TO PROVIDE FACILITIES-BASED
12 LONG DISTANCE, FACILITIES-BASED LOCAL
13 EXCHANGE TELECOMMUNICATIONS
14 SERVICES AND PRIVATE LINE SERVICE.

DOCKET NO. T-20456A-06-0266

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING: March 23, 2007
12 PLACE OF HEARING: Phoenix, Arizona
13 ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey
14 APPEARANCES: Mr. Jeffrey E. Rummel, ARENT FOX, LLP, on behalf
15 of Sunesys, Inc., and
16 Ms. Maureen Scott, Senior Staff Attorney, Legal
17 Division, on behalf of the Utilities Division of the
18 Arizona Corporation Commission.

19 **BY THE COMMISSION:**

20 On April 21, 2006, Sunesys, Inc. ("Sunesys" or "Applicant") submitted to the Arizona
21 Corporation Commission ("Commission") an application for a Certificate of Convenience and
22 Necessity ("Certificate" or "CC&N") to provide facilities-based long distance, facilities-based local
23 exchange and private line telecommunications services within the State of Arizona. The Applicant
24 also requested that its services be classified as competitive.

25 On May 17, 2006, the Commission's Utilities Division Staff ("Staff") sent its first set of data
26 requests to the Applicant.

27 On June 20, 2006, Sunesys submitted to Staff supplemental information in support of its
28 application as well as an amendment to the CC&N application.

1 On July 6, 2006, Staff sent its second set of data requests to Sunesys.

2 On July 31, 2006, Sunesys submitted its response to Staff's data requests and a second
3 amendment to its application.

4 On September 12, 2006, Staff filed a Staff Report recommending approval of Sunesys'
5 application subject to certain conditions.

6 On September 26, 2006, by Procedural Order, the matter was set for hearing to commence on
7 December 18, 2006.

8 On December 13, 2006, Sunesys filed a Motion to Continue the Hearing ("Motion") and
9 requested expedited consideration of its Motion.

10 On December 14, 2006, Sunesys' Motion was granted by Procedural Order, and the hearing in
11 this matter was reset to commence on March 23, 2007.

12 On March 23, 2007, a full public hearing was held before a duly authorized Administrative
13 Law Judge of the Commission at its offices in Phoenix, Arizona. Sunesys and Staff appeared through
14 counsel at the hearing and presented evidence and testimony. At the conclusion of the hearing, the
15 matter was taken under advisement pending submission of a Recommended Opinion and Order to the
16 Commission.

17 * * * * *

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

20 **FINDINGS OF FACT**

21 1. On April 21, 2006, Sunesys, Inc. submitted to the Commission an application for a
22 Certificate to provide facilities-based long distance, facilities-based local exchange and private line
23 telecommunications services within the State of Arizona. The Applicant also requested that its
24 services be classified as competitive.

25 2. As of the date of the hearing, Sunesys was providing telecommunications services in
26 New Jersey, Maryland, Pennsylvania, California and Georgia and was approved to offer
27 telecommunications services in thirteen (13) states.

28 3. Sunesys' application states that it has a four (4) member senior management team with

1 an average of eighteen (18) years experience each in the telecommunications business.

2 4. Sunesys also employs ninety-five (95) other employees with an average in excess of
3 ten (10) years experience in various areas of the telecommunications industry.

4 5. Based on the information provided by Sunesys, Staff believes that Sunesys possesses
5 the technical capabilities to provide the telecommunication services it is requesting in this
6 application.

7 6. Sunesys' witness¹ testified at hearing, once Sunesys is granted authority by a state,
8 Sunesys begins building its private line communications facilities for specific customers and
9 managed wide area network services for specific customers. He stated, "the idea being that we don't
10 build our networks on a speculative basis, but rather build networks as we find customers who are
11 willing to fund a portion of the construction of those networks." (Tr. Pg. 12, lines 18-25 and pg. 13,
12 lines 1-5)

13 7. Sunesys' witness further testified that typically the private line networks are provided
14 to large commercial customers and non-profit organizations, such as healthcare companies. He stated
15 that the managed wide area networks are traditionally provided to public schools and public library
16 systems.

17 8. Sunesys' witness testified that if Sunesys is granted authority to operate in Arizona the
18 company anticipates that it would have its first customer under contract within three to six months
19 and its first network constructed in six to nine months after the contracts are signed. (Tr. Pg. 13, lines
20 20-25 and pg. 14, lines 1) He further stated that initially customer calls will be routed to Sunesys'
21 California office, via a 1-800 number, but that Sunesys will contract with Arizona repair companies
22 to handle any service related issues and Sunesys anticipates eventually having employees and
23 facilities in Arizona.

24 9. Sunesys provided audited, consolidate financial statements for its parent company,
25 InfraSource Services, Inc., for the twelve months ending December 31, 2005. The financial
26 statements showed assets of \$562 million; equity of \$301.9 million; and net income of \$13.7 million.

27

28 ¹ Mr. Paul Bradshaw, senior counsel and assistant executive secretary for Sunesys.

1 10. According to Staff's Report, Sunesys has indicated that it has access to unencumbered
2 cash or cash equivalent of at least \$15 million which is reasonably liquid and readily available to
3 meet the expenses of the proposed operations.

4 11. According to Staff, Sunesys plans to finance the initial costs of construction through
5 cash flows from its operations. However, Sunesys will rely on the finances of its parent company to
6 the extent that Sunesys' cash flow is insufficient.

7 12. Sunesys' proposed tariffs indicate that it may collect advances from its customers.

8 13. To protect Sunesys' customers, Staff believes that advances, deposits, and/or
9 prepayments paid by customers should be protected by a performance bond.

10 14. Due to Sunesys' request to provide multiple types of service, Staff believes Sunesys
11 should be required to secure a performance bond that is an aggregate of the minimum performance
12 bond for each type of telecommunications services Sunesys is requesting to provide in its application.

13 15. Staff's Report recommends Sunesys secure a performance bond as follows: facilities-
14 based long distance \$100,000; facilities-based local exchange \$100,000; for an aggregate amount of
15 \$200,000. Staff further recommends that the performance bond needs to increase in increments equal
16 to 50 percent of the total minimum bond amount when the total amount of the advances, deposits, and
17 prepayments is within 10 percent of the total minimum bond amount. Therefore, the bond amount
18 should be increased in increments of \$100,000, and this increase should occur when the total amount
19 of the advances, deposits, and prepayments is within \$20,000 of the bond amount.

20 16. Staff also recommends that pursuant to Arizona Administrative Code ("A.A.C.") R14-
21 2-1107, if Sunesys desires to discontinue service in Arizona it must file an application with the
22 Commission, and notify its customers and the Commission sixty (60) days prior to filing the
23 application to discontinue service. Further, Staff states that pursuant to the rule, Sunesys' failure to
24 meet the requirements, will cause a forfeiture of Sunesys' performance bond.

25 17. Staff also recommends that Sunesys provide proof of its performance bond within 365
26 days of the effective date of an Order in this matter or thirty (30) days prior to the provision of
27 service, whichever comes first, and the performance bond should remain in effect until further Order
28 of the Commission.

1 18. We find Staff's recommendations regarding requiring Sunesys to procure a
2 performance bond reasonable, except that we believe in accordance with recent Commission
3 Decisions, Sunesys should be allowed to secure either a irrevocable sight draft letter of credit or a
4 performance bond.

5 19. Pursuant to A.A.C R14-2-1109, Sunesys may charge rates for service that are not less
6 than its total service long-run incremental costs of providing service.

7 20. Sunesys' proposed rates are for competitive services. In general, rates for competitive
8 services are not set according to the rate of return regulation. According to Staff's Report, Sunesys'
9 fair value rate base ("FVRB") is \$2 million. Staff believes that given the competitive markets in
10 which Sunesys is to operate, Sunesys' FVRB may not be useful as the sole determinant of rates.
11 Staff has reviewed Sunesys' proposed rates and believes they are comparable to the rates charged by
12 competitive local carriers, local incumbent carriers and major long distance carriers operating in
13 Arizona. Staff concluded that although Sunesys' FVRB was considered, it should not be given
14 substantial weight in this analysis.

15 21. Pursuant to A.A.C. R14-2-1308(A) and federal laws and rules, Sunesys shall make
16 number portability available to facilitate the ability of the customer to switch between authorized
17 local carriers within a given wire center without changing their telephone number and without
18 impairment to quality, functionality, reliability or convenience of use.

19 22. In compliance with A.A.C. R14-2-1204 (A), all telecommunications service providers
20 that interconnect into the public switched network shall provide funding for the Arizona Universal
21 Service Fund ("AUSF"). Sunesys will contribute to the AUSF as required by the A.A.C., and shall
22 make the necessary monthly payments required under A.A.C. R-14-2-1204 (B).

23 23. The quality of service standards outlined for Qwest in Commission Decision No.
24 59421 (December 20, 1995) applies to Sunesys. However, Staff believes that because Sunesys has
25 not had any unsatisfactory service issues and will be operating in a competitive environment, the
26 penalties outlined in the above referenced Decision should not apply.

27 24. Staff recommends that in areas where Sunesys is the only local exchange service
28 provider, Sunesys should be prohibited from barring access to alternative local exchange service

1 providers who wish to serve the area.

2 25. Sunesys will provide all customers with 911 and E911 service where available, or will
3 coordinate with incumbent local exchange carriers ("ILECs"), and emergency service providers to
4 provide the service.

5 26. Pursuant to past Commission Decisions, Sunesys may offer custom local area
6 signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or
7 unblock each individual call at no additional cost.

8 27. Sunesys must also offer Last Call Return service that will not return calls to telephone
9 numbers that have the privacy indicator activated.

10 28. According to Staff's Report, Sunesys has not had an application for service denied, or
11 revoked in any state, and there have been no formal compliant proceedings and no civil or criminal
12 proceeding involving Sunesys.

13 29. According to Staff's Report, Staff attempted to contact each of the Public Utility
14 Commissions regulating the ten (10) states/jurisdictions that Sunesys or its affiliate, Sunesys of
15 Virginia, Inc., has obtained authorization to provide telecommunications services. Based on the
16 feedback received, Staff reported no complaint history for Sunesys.

17 30. Staff's Report also indicated that none of Sunesys' officers, directors or partners have
18 been involved in any civil or criminal investigations, or formal or informal complaints, and none of
19 its officers, directors or partners have been convicted of any criminal acts in the past ten (10) years.

20 31. Sunesys has requested that its telecommunications services in Arizona be classified as
21 competitive. Staff recommends that Sunesys' proposed services be classified as competitive because
22 there are alternatives to Sunesys' services; ILECs hold a virtual monopoly in local markets; Sunesys
23 will have to convince customers to purchase its services; Sunesys has no ability to adversely affect
24 the local exchange or interexchange service markets; and Sunesys will therefore have no market
25 power in those local exchange or interexchange service markets where alternative providers to
26 telecommunications services exist.

27 32. Sunesys is also requesting authority to provide private line telecommunications
28 services. According to Staff, private line service is a direct circuit or channel specifically dedicated

1 to the use of an end user organization for the purpose of directly connecting two or more sites in a
2 multi-site enterprise.

3 33. Staff reviewed the proposed rates submitted in Sunesys' tariff pages which showed
4 Sunesys' current rates that it charges for comparable fiber services in various cities. Staff noted that
5 the rates charged by Sunesys in those states for fiber services vary on an individual contract basis, but
6 because Sunesys has no ability to set prices in any given jurisdiction the market will ultimately
7 decide whether Sunesys' rates are comparable to other private line service providers.

8 34. Staff further states that Sunesys would be providing service in areas where ILECs and
9 CLECs and interexchange carriers are providing telephone and private line services and therefore
10 Sunesys' would not be able to exert market power, resulting in rates that are just and reasonable.

11 35. Staff recommends approval of Sunesys' application for a CC&N to provide intrastate
12 telecommunications services. Staff further recommends:

- 13 (a) That Sunesys comply with all Commission Rules, Orders and other
14 requirements relevant to the provision of the intrastate telecommunications services;
- 15 (b) That Sunesys abide by the quality of service standards that were approved by
16 the Commission for Qwest in Docket No. T-01051B-93-0183;
- 17 (c) That Sunesys be prohibited from barring access to alternative local exchange
18 service providers who wish to serve areas where Sunesys is the only provider of the
19 local exchange service facilities;
- 20 (d) That Sunesys be required to notify the Commission immediately upon changes
21 to its name, address or telephone number;
- 22 (e) That Sunesys cooperate with Commission investigations including, but not
23 limited to customer complaints;
- 24 (f) That although Staff considered the fair value rate base information submitted
25 by Sunesys, the fair value information provided was not given substantial weight in
26 this analysis;
- 27 (g) That Sunesys offer Caller ID with the capability to toggle between blocking
28 and unblocking the transmission of the telephone number at no charge;
- (h) That Sunesys offer Last Call Return service that will not return calls to
telephone numbers that have the privacy indicator activated; and
- (i) That Sunesys be authorized to discount its rates and service charges to the
marginal cost of providing the services; and

1 (j) That Sunesys submit interexchange tariffs indicating that it may collect
2 advances, deposits and or prepayments.

3 36. Staff further recommends that Sunesys comply with the following conditions within
4 the timeframes outlined or Sunesys' CC&N should be considered null and void, after due process,
5 without further Order of the Commission and that no time extensions should be granted.

6 (1) That Sunesys file with docket control, as a compliance item in this docket,
7 conforming tariffs for each service within its CC&N within 365 days from the date of
8 an Order in this matter or thirty (30) days prior to providing service, whichever comes
9 first. The tariffs submitted shall coincide with the application and state that Sunesys
10 may collect advances, deposits and/or prepayments from its customers.

11 (2) That Sunesys shall:

12 a. Procure a performance bond equal to \$200,000. The minimum bond
13 amount of \$200,000 should be increased if at any time it would be insufficient
14 to cover advances, deposits, and/or prepayments collected from Sunesys'
15 customers. The bond amount should be increased in increments of \$100,000.
16 This increase should occur when the total amount of the advances, deposits,
17 and prepayments is within \$20,000 of the bond amount.

18 b. Docket proof of the performance bond, as a compliance item in this
19 docket, within 365 days of the effective date of an Order in this matter or thirty
20 (30) days prior to the provision of service, whichever comes first. The
21 performance bond must remain in effect until further Order of the
22 Commission.

23 37. Sunesys' witness testified that as of December 31, 2006, Sunesys, Inc. was merged
24 into a newly formed sister company, Sunesys, L.L.C. He further testified that after completion of the
25 restructuring, the name of the LLC was changed from Sunesys, L.L.C., dba InfraSource Sunesys,
26 LLC to merely Sunesys, L.L.C. At the hearing, Sunesys submitted into evidence the Articles of
27 Amendment that was filed with the Commission showing the modification of the Applicant's name.

28 38. Staff's recommendations, as set forth herein are reasonable and should be adopted,

1 except that Sunesys should be allowed to procure an irrevocable sight draft letter of credit in lieu of a
2 performance bond and the legal name of the Applicant should be changed to Sunesys, L.L.C., to
3 reflect the restructuring of the organization.

4 39. The rates proposed by this filing are for competitive services.

5 CONCLUSIONS OF LAW

6 1. Applicant is a public service corporation within the meaning of Article XV of the
7 Arizona Constitution and A.R.S. §40-281 and 40-282.

8 2. The Commission has jurisdiction over Applicant and the subject matter of the
9 application.

10 3. Notice of the application was given in accordance with the law.

11 4. A.R.S §§ 40-282 allows a telecommunications company to file an application for a
12 CC&N to provide competitive telecommunications services.

13 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
14 Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth
15 in its application.

16 6. Applicant is a fit and proper entity to receive a CC&N authorizing it to provide
17 competitive facilities-based long distance, facilities-based local exchange and private line
18 telecommunications services in Arizona, subject to Staff's recommendations.

19 7. The telecommunications services that Applicant intends to provide are competitive
20 within Arizona.

21 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,
22 it is just and reasonable and in the public interest for Applicant to establish rates and charges that are
23 not less than the Applicant's total service long-run incremental costs of providing the competitive
24 services approved herein.

25 9. Staff recommendations, as amended herein, are reasonable and should be adopted.

26 10. Applicant's rates, as they appear in its proposed tariffs, are just and reasonable and
27 should be approved.

28 ORDER

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IT IS THEREFORE ORDERED that the application of Sunesys L.L.C., for a Certificate of Convenience and Necessity for authority to provide competitive facilities-based long distance, facilities-based local exchange and private line telecommunications services within the State of Arizona, is hereby granted, conditioned upon compliance with Staff's recommendations set forth in Findings of Fact Nos. 35, and 36 and as amended in Finding of Fact 38 above.

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 Director 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 ____ day of _____, 2007.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

YBK:db

1 SERVICE LIST FOR: SUNESYS, INC.

2 DOCKET NO.: T-20456A-06-0266

3

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