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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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IN THE MATTER OF THE APPLICATION
OF BALDWIN COUNTY INTERNET/DSSI
SERVICE, L.L.C. FOR APPROVAL OF A
CERTIFICATE OF CONVENIENCE AND
NECESSITY FOR FACILITIES-BASED
AND RESOLD PRIVATE LINE SERVICES.

DOCKET NO. T-20544A-07-0456

BRIEF OF BALDWIN COUNTY
INTERNET/DSSI SERVICE, L.L.C AND
SUPPLEMENTAL FILING.

On August 14, 2008: Sarah N. Harping, Administrative Law Judge, held an evidentiary hearing with Commission Executive Consultant Candrea Allen and Commission Senior Staff Counsel Maureen A. Scott regarding the subject application filed on August 1, 2007 by Baldwin County Internet/DSSI Service, L.L.C. ("BCI"); BCI appeared through its President, Harold R. Bailes, with BCI's consultant Michael N. Giles.

During hearing, additional issues arose and BCI was asked to submit a brief regarding those issues; accordingly, BCI submits this brief to assist the Commission in favorably resolving this matter by granting BCI's application for a Certificate of Convenience and Necessity ("CC&N") "as expeditiously reasonably practicable" per A.A.C. R14-2-502.A.2.

Issue one: Under Arizona law does a company (Connexion Technologies) with whom BCI does business, need to hold a CC&N? At BCI's request, Connexion has courteously provided a response to that question, attached and incorporated herein by BCI. In specific, given the nature of Connexion's activities, under the applicable law and regulations, BCI and Connexion respectfully submit that Connexion is not required to hold a CC&N.

1 Issue two: Does the answer to the first issue impact BCI's application for a CC&N?
2 Again, BCI respectfully submits that the first issue should have no impact on BCI's application
3 for a CC&N. According to Commission Rules of Practice, "Parties to any proceeding before the
4 Commission shall consist of and shall be designated "Applicant", "Complainant", "Respondent",
5 "Intervenor", or "Protestant" according to the nature of the proceedings and the relationship of
6 the party thereto." BCI is the Applicant. Connexion is not a party to this proceeding according
7 to the Commission rule above (A.A.C. R14-3-103, "Parties."). BCI has applied for a CC&N
8 pursuant to A.A.C. R14-2-502.A, provided information pursuant thereto regarding its name and
9 address, information on the partnership, the rates/tariff, financial statements, maps, and has
10 responded to multiple requests for additional information for over a year to this Commission.
11 We respectfully believe that the Commission has sufficient information to determine whether
12 BCI should hold a CC&N. We respectfully submit that whether a company with whom BCI
13 does business is separately required to hold a CC&N is not further relevant to BCI's application.

14 Additionally, staff was asked whether BCI should be required to file a performance bond
15 or letter of credit, and the judge allowed BCI to include its own analysis and recommendation on
16 that issue. BCI submits that since its customers are developments, service providers, and other
17 sophisticated business entities, which perform their own determination of BCI's worthiness in
18 being a business customer, no such bond or letter of credit is required. BCI does not serve
19 individual residential customers that traditionally garner the Commission's protective interests.
20 Furthermore, BCI does not, and has no plans to, accept deposits or prepayments from its
21 customers. Like all communications companies, it does bill its monthly service charges in
22 advance, rather than arrears. This practice puts less than one month's rates at any sort of risk for
23 the customer. Lastly, the BCI's services are not unusual or unique. Many other companies
24 provide transport service and could substitute for BCI if problems arose. However, BCI has in
25 certain states (Texas, Utah, and Virginia for example) posted nominal letters of credit or bonds;
26 these letters of credit have never been drawn upon. If required, BCI is willing to provide a letter
27 of credit in Arizona, but there are costs in doing so which ultimately have to be passed on to
28 BCI's customers. BCI would rather not have to incur this cost if not necessary. .

1 Next, it was suggested that BCI file revised tariff language regarding its individual case
2 basis pricing. The Staff was ordered to provide revised tariff language to accommodate BCI's
3 intention to provide services using ICB (individual case basis) pricing. BCI was offered the
4 opportunity to submit its proposed language as well. We respectfully submit that the following
5 language can be used. It is substantially the same as that used by BCI in its tariffs in other
6 states as well as that proposed by BCI in its first proposed tariff.:

7
8 "Due to the complex and variable nature of the services it provides,
9 many products and services are priced as ICBs, or on an Individual
10 Case Basis. The Company will work with its customers to provide
11 the service requested at a mutually agreeable rate."

12 This provision is being used in most other states to provide BCI's services. We respectfully
13 submit that is reasonable, due to the unique nature of each transport service being provided by
14 BCI which makes standardized pricing extraordinarily difficult, at best. Furthermore, as noted
15 above, this is a competitive service with numerous alternative providers available to BCI's
16 customers. This prevents any type of predatory pricing or the ability to exert market power, as
17 Ms. Allen noted in her June 16th Staff Report to the Commission in paragraph 4.

18 Lastly, BCI was further ordered to provide a late-filed exhibit describing in detail
19 precisely how service is to be provided. BCI's services are not particularly unusual or unique.
20 Many other companies provide transport service and could substitute for BCI if problems arose,
21 as Ms. Allen described in her Staff Report in paragraphs 4, 6.3, and 6.7: ("The Company would
22 be a new entrant and would face competition from both an incumbent provider and other
23 competitive providers in offering service to its potential customers.... The Company will be
24 entering the market as an alternative provider of private line [services] and, as such, the
25 Company will have to compete with several existing companies in order to obtain customers....
26 Similarly, many of the ILECs and CLECs offer substantially similar services."). BCI provided
27 a response to a similar question from Staff in preparation of its Brief earlier this week. The
28 response is provided below and again provides a clear description of BCI's intermediate role in
the process of providing communications services to customers:

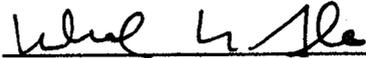
1 BCI is an intermediate carrier. As such, it provides wholesale transport
2 services to any service provider, carrier or telephone company who orders
3 the service. One type of transport service is to connect two private cable
4 operation (PCO) areas or developments to each other. Another example
5 is to connect the PCO to the public switched telephone network (PSTN).
6 In this situation, BCI may enter into a state interconnection agreement
7 with another LEC (CLEC or ILEC), if required to handle the actual
8 interconnection with the network (usually at the closest central office
9 switch). This service includes 911 emergency services, number
10 assignment, toll-free and LNP database services, CALEA, and other
11 traditional local exchange services. The actual provisioning of the local
12 exchange services is shared by the customer service provider and the
13 interconnecting LEC. BCI merely transports the data from one point to
14 another: from the service provider to the POI and/or the PSTN. Almost
15 all of this service is via fiber optic packet-switched transport (no circuit-
16 switches), which is covered in most circumstances by a nation-wide data
17 and VoIP carrier agreement with Level3. BCI has utilized local
18 interconnection agreements in other states such as Alabama and Florida
19 for legacy CLEC operations with AT&T, CenturyTel, Madison River
20 Communications, and with Embarq. If needed, BCI and its connecting
21 LEC will file a local interconnection agreement with the Commission for
22 approval, as required. BCI currently has no local interconnection
23 agreement with a LEC in Arizona; BCI anticipates utilizing its national
24 Level3 carrier agreement.

17 In further response to the question, we note that the end user customer for the services provided
18 by BCI in most cases is either a carrier, a VOIP provider, a cable company or a private cable
19 operator. The services provided by BCI to these entities are provided using public rights of way,
20 leased rights to use infrastructure, or access provided it on private property provided by BCI's
21 customer. BCI does not require any customer to grant any easement to it and it does not hold
22 any easements. BCI's customers are free to procure similar services to those provided by BCI
23 from other competitors.

24 In some areas, but not currently in or anticipated in Arizona, BCI has placed equipment
25 within private easements. BCI has not yet identified another party or service provider that will
26 deliver the final services to the residential end-users.

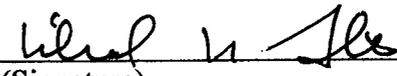
1
2 RESPECTFULLY SUBMITTED this 27th day of August, 2008.
3

4 **M GILES CONSULTING, LLC**

5 

6 Michael N. Giles
7 Consultant for Baldwin County Internet/
8 DSSI Service, L.L.C.
9 6601 County Road 166
10 McKinney, Texas 75071-7309
11 Phone: (214) 762-7576
12 Fax: (972) 562-7449
13 Email: mike.giles@att.net

14 Pursuant to A.A.C. R14-3-109.R., I hereby certify that four copies of the foregoing document are
15 being filed by courier with the Commission on August 28, 2008, and that copies of the
16 foregoing document will be served on all parties of record in this proceeding by courier delivery
17 or mailing a copy thereof, properly addressed with first class postage prepaid to the below
18 addressees on August 28, 2008.

19 
20 (Signature)

21 Jeff Hathaway, CEO, and Harry Bailes, President
22 Baldwin County Internet/DSSI Service, L.L.C.
23 1240 Commerce Drive, Suite A
24 Gulf Shores, AL 36542

25 Janice Alward, Chief Counsel
26 Legal Division
27 Arizona Corporation Commission
28 1200 West Washington Street
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007



A Professional Corporation

MEMORANDUM

To: Walter E. Daniels, Chief Legal Officer and General Counsel
Capitol Infrastructure, LLC d/b/a Connexion Technologies

From: Shughart Thomson & Kilroy P.C.

Date: August 27, 2008

Subject: Regulatory Status of Capitol Infrastructure LLC d/b/a Connexion Technologies in
Arizona

This Memorandum provides Capitol Infrastructure, LLC, d/b/a Connexion Technologies (“Connexion”), the legal reasons demonstrating that Connexion is not a public service corporation engaged in transmitting messages, furnishing public telecommunications services, acting as a telecommunications corporation, or operating as a telecommunications common carrier. Thus, Connexion is not subject to the regulatory jurisdiction of the Arizona Corporation Commission (“ACC”). Connexion has requested this legal Memorandum in response to an inquiry from Baldwin County Internet/DSSI Service, LLC (“BCI”), which intends to provide telecommunication services in Arizona utilizing certain of Connexion’s telecommunications infrastructure.

I. FACTUAL BACKGROUND

A. The Company

Connexion is a limited liability company organized under the laws of North Carolina as a fiber-optic data and telecommunications infrastructure provider (“infrastructure provider”). On

September 7, 2007, the State of Arizona authorized Connexion as an infrastructure provider to conduct business in Arizona as a foreign limited liability company.

B. The Business of Connexion

Connexion designs, builds and manages its infrastructure installed along non-exclusive private easements in residential real estate developments and hospitality properties. Connexion acts on behalf of residential real estate and hospitality property developers in making such infrastructure available, usually through leasing arrangements, to multiple unaffiliated third-party service providers¹, including unaffiliated telecommunications common carriers (“Third-Party Providers”). In turn, these Third-Party Providers utilize the infrastructure to supply voice, video and Internet services to residents in the residential real estate developments and occupants in the hospitality property units. Across the country Connexion works with sixteen Third Party Providers. This list, which is growing, includes several of the ten largest telephone companies in the United States. In addition, Connexion is close to concluding an arrangement with one of the top three cable companies in the United States. At the present time in Arizona, Connexion is only working with VOIP or Private Cable Operators.

Connexion also enters into agency relationships with Home Owners Associations (“HOAs”) to represent owners in residential developments. Connexion negotiates agreements on behalf of HOAs with various Third-Party Providers, under which Connexion monitors the

¹ Connexion defines the term “unaffiliated” to mean a third-party provider that does not have a significant ownership interest (10% or more) in Connexion, or in which Connexion does not have such an ownership interest, or a provider which is not directly or indirectly controlled by, or is not under direct or indirect common control with, Connexion. Connexion maintains no common or interlocking officers or directors with any Third-Party Provider. Connexion owns no equity or voting interest in any Third Party Provider.

service furnished by Third-Party Providers to insure that they meet appropriate quality of service standards and that the service remain competitively priced (*i.e.*, below prices charged by the local exchange carrier or the incumbent cable franchisee).

Connexion installs its infrastructure in residential real estate developments and hospitality facilities in easements on privately owned property. When Connexion utilizes the private easements for the installation of its infrastructure, Connexion allows the Third-Party Providers to augment the infrastructure with their own facilities or equipment within the private easement. Connexion also builds telecommunications infrastructure in public rights-of-way on behalf of certified or authorized Third-Party Providers.

The infrastructure Connexion designs, builds and installs generally consists of the following:

- Conduit and fiber facilities that can be connected to third-party providers' data and telecommunications facilities such as communication switches, Internet access routers, video headend equipment or other network termination equipment;
- Equipment within a network operating center such as multiplexes, amplifiers and optical line terminals;
- Conduit and fiber facilities connecting to individual residential or hospitality units, and specifically, to one or more structured wiring boxes; and
- Earthstation equipment including satellite receive antennas and collocated associated equipment.

Third-Party Providers employ the above-described infrastructure to render voice, video and Internet services to end users.

A sister company, Accelera Services, LLC, may enter into a contractual relationship with a Third-Party Provider pursuant to which Accelera may perform billing functions, and/or manage facilities or provide other support functions for the Third-Party Provider. Connexion, however, does not provide any of these services.

C. Third-Party Providers Utilize Connexion's Infrastructure to Furnish Telecommunications Services, Including Voice, Video and Internet, to Consumers

Except with respect to VOIP providers that are not regulated, Third-Party Providers to whom Connexion leases capacity in its fiber-optic data and telecommunications infrastructure generally are certified or authorized providers which furnish voice, video and internet services to end-user consumers. These Third-Party Providers have, and maintain, the business relationship with the consumers receiving their services. Connexion does not supply any telecommunications service and does not have a provider-customer relationship with consumers receiving such service. Accordingly, Connexion does not transmit messages, furnish public telephone or telecommunications services, or operate as a telecommunications corporation or common carrier in Arizona, in any other state, or nationally before the Federal Communications Commission.

D. Connexion's Relationship With BCI

BCI, which we understand is an applicant for a Certificate of Convenience and Necessity ("CCN") before the ACC, is a Third-Party Provider. Connexion has the right to purchase one hundred percent (100%) of the company from its sole owner, Mr. Jeff Hathaway. Connexion negotiated this right when Connexion purchased certain of BCI's hard assets from Mr. Hathaway

and leased them back to BCI. Connexion obtained the right at that time in order to be in a position to become a service provider, in the event federal and state regulatory schemes change, but as of now has not elected to consummate that right. Connexion does not own an interest in BCI.

II. ANALYSIS DEMONSTRATING THAT CONNEXION IS NOT A PUBLIC SERVICE CORPORATION REGULATED BY THE ACC

A. The Arizona Constitutional and Statutory Framework Involved in Determining Whether a Company Is Operating As a Public Service Corporation or a Common Carrier Under the Jurisdiction of the Arizona Corporation Commission

Article 15, Section 3, of the Arizona Constitution confers upon the ACC broad regulatory power over "public service corporations within the state for service rendered therein...." *Southwest Gas Corp. v. Arizona Corporation Commission*, 818 P.2d 714, 718 (Ariz. App. 1991).² A corporation falling within the definition of "public service corporation" is subject to the jurisdiction of the Commission. *Id.* at 720 (citing *General Alarm, Inc. v. Underdown*, 262 P.2d 671, 672 (Ariz. 1953); A.R.S. A § 40-202 (1985)). Under the Arizona Constitution, the ACC is granted "full power" to set just and reasonable rates by public service corporations and to "make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State" *Southwest Gas*, 818 P.2d at 718 (citing Ariz. Const. art. 15, § 3).

The ACC exercises the judicial powers inherent in its responsibility to make those decisions necessary to regulate public service corporations, pursuant to Article 15, Section 3, of

² The ACC's power over classifications and rates of public service corporations is both exclusive and plenary. *Tonto Creek Estates Homeowners Association v. Arizona Corporation Commission*, 864 P.2d 1081, 1090 (Ariz. App. 1993).

the Arizona Constitution. *Id.* at 719. This includes the determination of whether a particular business is a "public service corporation" as that term is used in Ariz. Const. art. 15, § 3.³ *Id.*

Determining whether an entity is a public service corporation requires a two-step analysis. First, the ACC considers whether the entity satisfies the literal and textual definition of a public service corporation under Article 15, Section 2, of the Arizona Constitution. *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*, 142 P.3d 1240, 1243 (Ariz. App. 2006). Second, the ACC must evaluate whether the entity's business and activity are such "as to make its rates, charges and methods of operation a matter of public concern," by considering the eight factors articulated in *Natural Gas Serv. Co. v. Serv-Yu Coop*, 219 P.2d 324, 325-26 (Ariz. 1950). *Id.*

The Arizona Constitution defines a "public service corporation," as follows:

All corporations other than municipal engaged... in transmitting messages or furnishing public... telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Ariz. Const. art. 15, § 2.

The Arizona Constitution also provides that "[a]ll . . . telephone . . . corporations, for the transportation of . . . messages . . . , are declared to be common carriers and subject to control by law." Ariz. Const. art. 15, § 10. Similarly, the term "telecommunications corporation" is defined

³ In making this determination, the ACC engages in the following three-step process: (1) the gathering and reception of evidence; (2) the distillation of that evidence into findings of fact, and (3) the application of those facts to the constitutional standard defining public service corporations. *Southwest Gas*, 818 P.2d at 719.

under Arizona law as "a public service corporation other than municipal engaged in transmitting messages or furnishing public . . . telephone service or operating as a telecommunications common carrier." A.R.S. § 40-201. The Commission is authorized by statute to supervise and regulate telecommunications corporations. A.R.S. § 40-202. Such telecommunications corporations are required to comply with the ACC's regulations, including those set forth in Title 14, Ch. 2, Article 5, pertaining to telephone utilities.

Thus, whether characterized as a public service corporation, a telecommunications common carrier, or a telecommunications corporation, the defining characteristics of an entity subject to the ACC's jurisdiction must include transmitting messages or furnishing public telephone service.

B. Connexion Neither Transmits Messages nor Furnishes Public Telephone Service and, Thus, Cannot Be Deemed a Public Service Corporation or Other Entity Subject to the Commission's Jurisdiction

If Connexion were to be deemed a public service corporation or other entity subject to the ACC's jurisdiction, it must transmit messages or furnish public telephone service. Connexion, however, engages in neither such activity. Instead, Connexion designs, builds and manages telecommunications infrastructure in residential real estate developments and hospitality properties. More specifically, Connexion, acting on behalf of residential real estate and hospitality property developers, makes telecommunications infrastructure available to unaffiliated Third-Party Providers who, in turn, use the infrastructure to supply voice, video and Internet services to end-user residents in such developments and hospitality units. Connexion also negotiates, on behalf of HOAs, agreements with the Third-Party Providers under which

Connexion monitors the voice, video and Internet services provided by these providers. In no event, however, does Connexion transmit messages or furnish telephone service over the telecommunications infrastructure to end-user customers.

The term "furnish" in Article 15, Section 2 has been defined as "to provide or supply with what is needed, useful or desirable," and connotes a "transfer of possession." *Southwest Transmission*, 142 P.3d at 1244 (citing, *Williams v. Pipe Trades Industry Program of Arizona*, 409 P.2d 720, 724 (Ariz. 1966)). Connexion does not provide or supply, or otherwise transfer possession of, telephone service to end-user customers, or any other person, and, thus, does not furnish telephone service under Article 15, Section 2 of the Arizona Constitution.

With respect to transmitting messages, the Arizona Supreme Court analyzed the "transmit messages" and the transmission of messages language contained Sections 2 and 10, Article 15, Constitution of Arizona in *General Alarm*. There, the Court, in rejecting the claim that plaintiff, a burglary alarm company, was a public service corporation, held that the statutory requirement that one be engaged in sending messages "[n]ecessarily . . . means it must be in the business of sending messages for the public." *Id.* at 673. The Court further held that "Plaintiff's business can not within reason be said to be that of sending messages to the public generally or any substantial segment thereof. Its business is essentially that of property protection." *Id.* The Court reasoned that the relaying of the information which it gains electronically or mechanically is not different from messages any watchman might relay over the telephone or otherwise to the police station. The Court noted that "the public interest is interested in the protection of property but these services are not performed for the benefit of the public but for the benefit of the individual

property owners." *Id.* Thus, the Court held that "the transmission of information is merely incidental to the operation of the plaintiff's main business -- property protection." *Id.*

The reasoning in *General Alarm* is instructive. Connexion's telecommunications infrastructure development business, like the plaintiff's burglary alarm business in *General Alarm*, cannot within reason be said to be that of sending messages to the public generally or any substantial segment thereof. If the relaying of the information which the plaintiff in *General Alarm* gained electronically or mechanically did not qualify as transmitting messages under Sections 2 and 10, Article 15, of the Constitution of Arizona, Connexion's telecommunications infrastructure development business certainly cannot qualify as transmitting messages because Connexion transmits no messages. To the extent the Third-Party Providers who lease Connexion's infrastructure transmit messages to end-user residential customers or to occupants of hospitality units can be attributed to Connexion, which it cannot, the transmission is merely incidental to the operation of Connexion's main business -- infrastructure development.

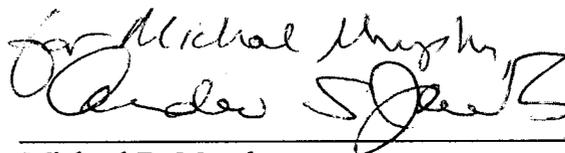
As shown above, Connexion neither transmits messages nor furnishes public telephone service as these terms are used in Sections 2 and 10, Article 15, of the Arizona Constitution. Thus, the ACC's inquiry should end here, and the ACC should find that Connexion is not a public service corporation, or any other entity subject to its jurisdiction.

III. CONCLUSION

Accordingly, since Connexion is not a public service corporation or common carrier engaged in transmitting messages or acting as a telecommunications corporation furnishing

public telephone service, Connexion is not subject to the jurisdiction of the ACC and is not required to obtain a CCN.

SHUGHART THOMSON & KILROY, P.C.

A handwritten signature in cursive script, appearing to read "for Michael Murphy" followed by a stylized signature.

Michael D. Murphy

MLG:llk