

ORIGINAL

OPEN MEETING ITEM



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COMMISSIONERS
KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



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Interim Executive Director

ARIZONA CORPORATION COMMISSION

2009 MAY - 7 P 3: 24

DATE: MAY 7, 2009
DOCKET NO.: T-03446A-08-0055

AZ CORP COMMISSION
DOCKET CONTROL

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Belinda A. Martin. The recommendation has been filed in the form of an Opinion and Order on:

ACCESS POINT, INC.
(CC&N/RESELLER/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 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:

MAY 18, 2009

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 Open Meeting to be held on:

MAY 27, 2009 and MAY 28, 2009

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.

Arizona Corporation Commission

DOCKETED

MAY - 9 2009



MICHAEL P. KEARNS
INTERIM EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 KRISTIN K. MAYES, Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

7 IN THE MATTER OF THE APPLICATION OF
8 ACCESS POINT, INC., FOR APPROVAL OF A
9 CERTIFICATE OF CONVENIENCE AND
10 NECESSITY TO PROVIDE COMPETITIVE
11 RESOLD LOCAL EXCHANGE AND FACILITIES-
12 BASED LOCAL EXCHANGE
13 TELECOMMUNICATIONS SERVICES IN
14 ARIZONA.

DOCKET NO. T-03446A-08-0055

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING: March 18, 2009
12 PLACE OF HEARING: Phoenix, Arizona
13 ADMINISTRATIVE LAW JUDGE: Belinda A. Martin
14 APPEARANCES: Mr. Timothy J. Sabo, Roshka DeWulf & Patten, on
15 behalf of Access Point, Inc.; and
16 Mr. Wesley Van Cleve, Staff Attorney, Legal Division,
17 on behalf of the Utilities Division of the Arizona
18 Corporation Commission.

18 **BY THE COMMISSION:**

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

21 **FINDINGS OF FACT**

22 1. On January 28, 2008, Access Point, Inc. ("API" or "Company"), filed with the
23 Arizona Corporation Commission ("Commission") an application for a Certificate of Convenience
24 and Necessity ("CC&N" or "Certificate") to provide competitive resold long distance, resold local
25 exchange, and facilities-based local exchange telecommunications services in Arizona
26 ("Application").¹

27 ¹ In Decision No. 62624 (June 9, 2000), the Commission granted authority to API to provide competitive resold long
28 distance telecommunications services in Arizona. Staff's consideration of API's Application therefore relates to its
request for resold and facilities-based local exchange telecommunications services.

1 2. On February 14, 2008, the Commission's Utilities Division Staff ("Staff") filed its
2 First Set of Data Requests ("Data Requests").

3 3. On March 27, 2008, API filed its responses to the Data Requests.

4 4. On June 5, 2008, Staff filed its second set of Data Requests.

5 5. On September 10, 2008, API filed its responses to Staff's second Set of Data
6 Requests.

7 6. On January 16, 2009, Staff filed its Staff Report recommending approval of the
8 Application.

9 7. On January 28, 2009, a Procedural Order was filed setting the hearing in the matter for
10 March 18, 2009.

11 8. On February 25, 2009, API filed its Affidavit of Publication.

12 9. On March 18, 2009, a full public hearing was held before a duly authorized
13 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Company and
14 Staff appeared through counsel and presented evidence and testimony. No members of the public
15 appeared to give public comments in this matter.

16 10. API is a foreign corporation organized under the laws of the State of North Carolina
17 and authorized to transact business in Arizona.

18 11. Staff recommends approval of API's Application for a CC&N and its petition for a
19 determination that its proposed telecommunications services should be classified as competitive.

20 12. Staff further recommends that:

21 a. API comply with all Commission Rules, Orders, and other requirements
22 relevant to the provision of intrastate telecommunications services;

23 b. API abide by the quality of service standards that were approved by the
Commission for Qwest in Docket No. T-01051B-93-0183;

24 c. API be prohibited from barring access to alternative local exchange service
25 providers who wish to serve areas where the Company is the only provider of
local exchange service facilities;

26 d. API be required to notify the Commission immediately upon changes to API's
27 name, address or telephone number;

28 e. API cooperate with Commission investigations including, but not limited to
customer complaints;

- f. Although Staff considered the fair value rate base ("FVRB") information submitted by API, the fair value information provided should not be given substantial weight;
- g. API be required to offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;
- h. API be required to offer Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated;
- i. API be authorized to discount its rates and service charges to the marginal cost of providing the services;
- j. That API submit local exchange tariffs indicating that it may collect advances, deposits, and or prepayments; and
- k. API's rates should be classified as competitive.

13. Staff further recommends that API comply with the following conditions within the timeframes outlined below or API's CC&N should be considered null and void, after due process.

- a. Staff recommends that API docket conforming tariffs for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first. The tariffs submitted to the Commission should coincide with the Application.
- b. Staff recommends that API should procure either a performance bond or an irrevocable sight draft letter of credit equal to \$125,000. The minimum performance bond or irrevocable sight draft letter of credit amount of \$125,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Company's customers. The performance bond or irrevocable sight draft letter of credit should be increased in increments of \$62,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within \$12,500 of the performance bond or irrevocable sight draft letter of credit amount.
- c. Staff recommends that API should docket proof of the original performance bond or irrevocable sight draft letter of credit with the Commission's Business Office and copies of the performance bond or irrevocable sight draft letter of credit with Docket Control, as a compliance item in this docket, within 30 days of the effective date of a Decision in this matter. The performance bond or irrevocable sight draft letter of credit must remain in effect until further order of the Commission.

The Commission may draw on the performance bond or irrevocable sight draft letter of credit on behalf of, and for the sole benefit of, the Company's customers if the Commission finds, in its discretion, that the Company is in default of its obligations arising from its Certificate. The Commission may use the performance bond or irrevocable sight draft letter of credit funds as appropriate to protect the Company's customers and the public interest and take any and all actions the Commission deems necessary, in its discretion, including, but not limited to, returning prepayments or deposits collected from the Company's customers.

- 1 d. Staff recommends that API abide by the Commission-adopted rules that
2 address Universal Service in Arizona, A.A.C. R14-2-1204(B), requiring API to
3 make the necessary monthly payments into the Arizona Universal Service
4 Fund ("AUSF").

4 **Technical Capabilities**

5 14. API is authorized to provide various telecommunications services in the District of
6 Columbia and all states except Alaska and Hawaii. The Company anticipates beginning service in
7 Arizona within 60 to 90 days after its receipt of its CC&N.

8 15. API does not have any employees in Arizona.

9 16. Staff noted that the nine members of the senior management team each average over
10 thirteen years experience in the telecommunications industry.

11 17. The Company intends to resell local exchange telecommunications services in Arizona
12 from Qwest Communications ("Qwest").

13 18. Customer service will be provided through a toll-free customer service number, as
14 well as through computer access.

15 19. Given the foregoing, Staff concludes that API has the technical capabilities to provide
16 the telecommunications services it seeks to provide in Arizona.

17 **Financial Capabilities**

18 20. API provided its unaudited financial statements for the year ending December 31,
19 2007, and the audited financial statements for the years ending December 31, 2005 and 2006. The
20 December 31, 2007, financial statement lists assets of \$4,295,852, negative equity of \$1,262,777, and
21 a net loss of \$373,687. The December 31, 2006 financial statement lists assets of \$4,183,899,
22 negative equity of \$889,091, and a net loss of \$640,887. The December 31, 2005 financial statement
23 lists assets of \$4,554,505, negative equity of \$248,204, and a net loss of \$1,230,631.

24 21. Notes to the financial statements indicate that API filed for bankruptcy in 2000, but
25 emerged from bankruptcy in 2001 and is currently not under the protection of the federal bankruptcy
26 courts.

27 22. API's proposed tariff submitted with its Application states that the Company may
28 collect advances, deposits or prepayments from its customers. However, at hearing API's witness,

1 CEO Richard Brown, testified that the Company does not intend to collect any advances, deposits or
2 prepayments from its customers. The Company requested that it therefore be exempt from any bond
3 requirement or that the requirement be reduced from \$125,000 to \$25,000.

4 23. Staff witness, Pamela Genung, testified that the requirement of a performance bond
5 for resold and facilities-based local exchange service is a standard requirement regardless of whether
6 a company requires advances, deposits or prepayments from its customers. As such, Staff
7 recommends that API be required to obtain a performance bond or an irrevocable sight draft letter of
8 credit, as described in Finding of Fact No. 13, above, in order to protect Arizona customers.

9 24. Pursuant to A.A.C. R-14-2-1107, if API desires to discontinue service in Arizona, it
10 must file an application with the Commission and notify its customers and the Commission sixty
11 days prior to filing the application to discontinue service.

12 **Rates and Charges**

13 25. Pursuant to A.A.C. R-14-2-1109, API may charge rates for services that are not less
14 than its total service long-run incremental costs of providing service.

15 26. Information provided to Staff projected API's FVRB to be zero within twelve months
16 of beginning its operations.

17 27. Given the competitive markets in which the Company will operate, API's FVRB may
18 not be useful as the sole determinant of rates.

19 28. API's proposed rates are for competitive services. In general, rates for competitive
20 services are not set according to the rate of return regulation.

21 29. Based on Staff's review, API's proposed rates are comparable with other competitive
22 local carriers, local incumbent carriers, and major long distance carriers operating in Arizona.

23 30. FVRB should not be given substantial weight in this analysis.

24 31. API's proposed rates are just and reasonable and should be approved.

25 **Local Exchange Carrier Specific Issues**

26 32. Pursuant to A.A.C. R14-2-1308(A) and federal laws and rules, API will make number
27 portability available to facilitate the ability of customers to switch between authorized local carriers
28 within a given wire center without changing their telephone number and without impairment to

1 quality, functionality, reliability or convenience of use.

2 33. In compliance with A.A.C. R14-2-1204, all telecommunications service providers that
3 interconnect into the public switched network shall provide funding for the AUSF.

4 34. API will contribute to the AUSF as required by the A.A.C., and make the necessary
5 monthly payments as required under A.A.C. R14-2-1204(B).

6 35. In Commission Decision No. 59421 (December 20, 1995) the Commission approved
7 quality of service standards for Qwest which imposed penalties due to an unsatisfactory level of
8 service. In this matter, API does not have a similar history of service quality problems, and therefore
9 the penalties in that decision should not apply.

10 36. In the areas where API is the only local exchange service provider, API is prohibited
11 from barring access to alternative local exchange service providers who wish to serve the area.

12 37. API will provide all customers with 911 and E911 service where available, or will
13 coordinate with ILECs and emergency service providers to facilitate the service.

14 38. Pursuant to prior Commission Decisions, API may offer customer local area signaling
15 services such as Caller ID and Call Blocking, so long as the customer is able to block or unblock each
16 individual call at no additional cost.

17 39. API must also offer Last Call Return service, which will not allow the return of calls
18 to the telephone numbers that have the privacy indicator activated.

19 **Complaint Information**

20 40. API has not had an application for service denied in any state, and there have been no
21 formal complaint proceedings and no civil or criminal proceedings involving API.

22 41. In its Application, API indicated that it had its certificate revoked in Nebraska and
23 Illinois for failure to file annual financial statements, but Staff verified that API has corrected the
24 problem and the Company's certificates from those states have been reinstated.

25 42. Staff contacted the Public Utilities Commissions in approximately half the
26 jurisdictions where the Company is authorized to provide telecommunications services to inquire
27 about any customer complaints and found that no customer complaints have been filed against API in
28 those jurisdictions.

1 43. None of API's officers, directors or partners have been involved in any civil or
 2 criminal investigations, or formal or informal complaints, and none of its officers, directors or
 3 partners have been convicted of any criminal acts in the past ten years.

4 **Competitive Services Analysis**

5 44. API has requested that its telecommunications services in Arizona be classified as
 6 competitive. API's proposed services should be classified as competitive because there are
 7 alternatives to the Company's proposed services; ILECs and large facilities-based interexchange
 8 carriers hold a virtual monopoly in local exchange markets and in the interLATA interexchange
 9 market; API will have to convince customers to purchase its services; API has no ability to adversely
 10 affect the local exchange or interexchange market as several CLECs and ILECs provide local
 11 exchange and interexchange services; and therefore API will have no market power in those local
 12 exchange markets or interexchange markets where alternative providers to telecommunications
 13 services exist.

14 45. Staff's recommendations are reasonable and should be adopted.

15 **CONCLUSIONS OF LAW**

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

18 2. The Commission has jurisdiction over API and the subject matter of the Application.

19 3. Notice of the Application was given in accordance with the law.

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

22 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
 23 Statutes, it is in the public interest for API to provide the telecommunications services set forth in its
 24 Application.

25 6. API is a fit and proper entity to receive a CC&N authorizing it to provide competitive
 26 resold and facilities-based local exchange telecommunications services in Arizona, subject to Staff's
 27 recommendations set forth herein.
 28

1 IT IS FURTHER ORDERED that if Access Point, Inc., fails to comply with the timeframes
2 stated in Findings of Fact No. 13, herein, the Certificate of Convenience and Necessity granted herein
3 shall be considered null and void, after due process.

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

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
6
7

8 CHAIRMAN _____ COMMISSIONER

9
10 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

11
12 IN WITNESS WHEREOF, I, MICHAEL P. KEARNS, Interim
13 Executive Director of the Arizona Corporation Commission,
14 have hereunto set my hand and caused the official seal of the
15 Commission to be affixed at the Capitol, in the City of Phoenix,
16 this ____ day of _____, 2009.

17 _____
18 MICHAEL P. KEARNS
19 INTERIM EXECUTIVE DIRECTOR

20 DISSENT _____

21
22 DISSENT _____
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28

1 SERVICE LIST FOR: ACCESS POINT, INC.

2 DOCKET NO.: T-03446A-08-0055

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