

ORIGINAL

OPEN MEETING ITEM



0000098993

MICHAEL P. KEARNS
Interim Executive Director

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



ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

JUN - 8 2009

DATE: JUNE 8, 2009
DOCKET NO: T-02543A-07-0147
TO ALL PARTIES:

DOCKETED BY

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

EXTELCOM INC. D/B/A EXPRESS TEL
(CANCEL CC&N)

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:

JUNE 17, 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:

JUNE 23, 2009 and JUNE 24, 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.

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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

8 IN THE MATTER OF THE APPLICATION OF
9 EXTELCOM INC. D/B/A EXPRESS TEL FOR
10 THE CANCELLATION OF ITS CERTIFICATES
11 OF CONVENIENCE AND NECESSITY.

DOCKET NO. T-02543A-07-0147

DECISION NO. _____

12 **ORDER**

13 Open Meeting
14 June 23 and 24, 2009
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

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

19 **FINDINGS OF FACT**

20 1. On March 12, 2007, UCN, Inc., ("UCN"), on behalf of Extelcom, Inc., d/b/a Express
21 Tel ("Extelcom" or "Company"), filed an application to cancel Extelcom's Certificate of
22 Convenience and Necessity ("CC&N" or "Certificate") to provide resold long distance
23 telecommunications services and its Certificate to provide alternative operator services
24 ("Application").

25 2. On March 20, 2007, the Commission's Utilities Division Staff ("Staff") filed its First
26 Set of Data Requests ("Data Requests").

27 3. On April 6, 2007, the Company filed its Responses to the Data Requests.

28 4. On May 16, 2008, Staff filed its Staff Report in this matter recommending approval of
the Application.

5. On July 17, 2008, a Procedural Order was issued directing Staff to file an Amended
Staff Report addressing certain statutory and regulatory issues.

6. On September 19, 2008, UCN filed an affidavit attesting to its compliance with

1 Arizona Administrative Code ("A.A.C.") R14-2-2001 through R14-2-2007.

2 7. On September 19, 2008, Staff filed an Amended Staff Report ("Amended Staff
3 Report") addressing the issues indentified in the July 17, 2007, Procedural Order.

4 8. On April 15, 2009, Staff filed a second Amended Staff ("Second Amended Staff
5 Report") Report that revised certain opinions stated in its previous Amended Staff Report.

6 9. Extelcom has a Certificate to provide competitive alternative operator services within
7 Arizona pursuant to Decision No. 58941 (January 12, 1995), and a Certificate to provide resold long
8 distance telecommunications services pursuant to Decision No. 60108 (March 19, 1997).

9 10. UCN, Inc., has a Certificate to provide resold long distance telecommunications
10 services pursuant to Decision No. 61143 (October 7, 1998), and a Certificate to provide resold and
11 facilities-based local exchange telecommunications services pursuant to Decision No. 67979 (July 18,
12 2005).¹

13 11. According to Staff, on May 24, 2005, Extelcom and UCN filed with the Commission
14 Notification Regarding Proposed Customer Base Transfer ("Notice"), in which UCN agreed to
15 purchase Extelcom's customer base. The filing indicated that it was "for informational purposes" and
16 was not assigned a docket number. A copy of the Asset Purchase Agreement was provided with
17 Extelcom's March 12, 2007, cancellation Application. According to the Application, Extelcom
18 ceased providing telecommunications services in Arizona, and all of Extelcom's customers had been
19 switched to UCN, on July 1, 2005.

20 **Transfer of Assets**

21 12. Under A.R.S. § 40-285(A) a public service corporation must obtain Commission
22 approval before transferring assets. In its Amended Staff Report, Staff asserted that this statute does

23 ¹ According to the Second Amended Staff Report, UCN was formerly known as Buyers United International, Inc.
24 ("Buyers"). On October 7, 1998, the Commission granted Buyers a CC&N to provide resold long distance
25 telecommunications services in Arizona in Decision No. 61163. On July 16, 2003, Buyers applied to the Commission to
26 change its name to Buyers United, Inc. ("BUI"), and filed a tariff with the Commission reflecting the intended name
change. On August 28, 2003, Staff filed a request to administratively close the docket, noting that the tariff had become
effective by operation of law on August 14, 2003. On September 2, 2003, Docket Control formally closed the docket by
Administrative Closure No. 66228.

27 On December 29, 2004, BUI filed an application requesting Commission approval to change its name to UCN,
28 Inc. BUI filed tariffs with the Commission reflecting the intended name change. On March 9, 2005, Staff filed a request
to administratively close the docket noting that the tariff had become effective by operation of law on January 27, 2005.
On March 21, Docket Control formally closed the docket by Administrative Closure No. 67702.

1 not require Commission approval to transfer all assets, but rather, only those assets which comprise
 2 part of the company's plant or system. Staff concluded, therefore, that since UCN's asset purchase
 3 involved only Extelcom's customer base, Extelcom's sale of its customer base did not constitute a
 4 transaction requiring Commission approval.

5 13. After a review of prior Commission Decisions regarding the sale of a company's
 6 customer base, Staff revised the conclusion reached in its Amended Staff Report. In the Second
 7 Amended Staff Report, Staff concluded that A.R.S. § 40-285(A), does, in fact, require a company to
 8 obtain Commission approval for the sale of its customer base to another company.²

9 14. We agree with Staff's conclusion in its Second Amended Staff Report that a
 10 company's customer base is an asset under A.R.S. § 40-285. Therefore, Commission approval is
 11 required before that asset may be transferred to another company.

12 15. Staff states that, because no action was taken on the Notice, UCN and Extelcom were
 13 unaware that any further action was required on their part in order to remain in compliance with
 14 Commission rules or Arizona statutes. Staff also states that, "at the time of [the Notice], there had
 15 been some uncertainty as to whether a company's customer base should be treated as an asset and
 16 therefore subject to A.R.S. § 40-285(A)"³

17 16. We believe that because the transfer of Extelcom's customers to UCN occurred four
 18 years ago, and because Staff determined that Extelcom and UCN provided timely notice to
 19 Extelcom's customers of the transfer, and because, as discussed below, there have been no customer
 20 complaints filed against Extelcom during the intervening time, the transfer of assets should be
 21 approved.

22 Customer Notification

23 17. Pursuant to A.A.C. R14-2-1107(A), a telecommunications company intending to
 24 discontinue service in Arizona must file with Commission an application for authorization to do so.
 25 The application must state the reasons for the discontinuation, verification that all customers have

26 ² Staff found that there are some decisions in which the Commission had determined that the transfer of a
 27 customer base does not require Commission approval, but there are others that determined that Commission approval is
 28 required in such circumstances. Although Staff found decisions going both ways on the issue, Staff concluded that
 Commission approval is required before a company's customer base may be transferred to another company.

³ Second Amended Staff Report, page 2.

1 been notified of the company's desire to discontinue service, a plan for the refund of any deposits,
2 and a list of alternative carriers.

3 18. According to the Amended Staff Report, Extelcom verified that prior to discontinuing
4 services, it notified its customers of its intentions. Extelcom also verified that it transferred its
5 customers to UCN. As to a plan for refund, Extelcom asserts that it never collected any customer
6 advances, prepayments, and/or deposits.

7 19. In its responses to Staff Data Requests, Extelcom noted that UCN acquired from
8 Extelcom a customer base of 264 residential customers and 2,321 business customers in 2005.
9 Extelcom asserts that, because at the time of its Application in 2007, the Company had no customers,
10 the provisions of A.A.C. R14-2-1107(A)(4) requiring the Company to provide to its customers a list
11 of alternate carriers to those customers affected by the transfer do not apply.

12 20. Additionally, A.A.C. R14-2-1107(B) requires a telecommunication company who has
13 filed an application to cease doing business in Arizona to file notice of the application in all counties
14 affected by it.

15 21. In its Second Amended Staff Report, Staff also stated:

16 In the Applicant's response to Staff's Data Request...UCN stated that as of July 1,
17 2005, the transaction between Extelcom and UCN had closed. UCN did not file to
18 cancel Extelcom's CC&N until March 12, 2007. In addition, in its responses to
19 Staff's Data Request, UCN indicated that the company mistakenly believed that
20 Extelcom's CC&N would be cancelled upon closing of the transfer between the
21 two companies. At the time of the instant application, Extelcom no longer
22 provided service to customers in Arizona. Therefore, although it was not
23 requested by the Applicant, Staff believes that a waiver of A.A.C. R14-2-1107 is
24 appropriate in this matter.⁴

22 22. As discussed in Decision No. 67404 (November 2, 2004), it would render A.A.C.
23 R14-2-1107 meaningless and would run afoul of the rule's intent and plain language to exempt a
24 Company from the requirements of the rule because it has no customers due to its discontinuation of
25 service. However, as discussed in that Decision, the intent of the rule is to ensure that existing
26 customers have advance notice of a telecommunications provider's pending plan to discontinue
27 service such that they will be afforded an opportunity to procure service through an alternative

28 ⁴ Second Amended Staff Report, page 2.

1 provider prior to such discontinuance.

2 23. As noted in Findings of Fact No. 18, above, Extelcom verified that prior to
3 discontinuing services, it notified its customers of its intentions regarding the transfer to UCN.
4 Although there was no publication of legal notice, Extelcom did provide written notice to its
5 customers.

6 24. Because Extelcom provided written notice to its customers of the transfer, all
7 customers were transferred to UCN, and Extelcom did not collect any advances, deposits and/or
8 prepayments, the requirements of A.A.C. R-14-2-1107(A) & (B) are hereby waived.

9 25. UCN is now on notice that it must comply with all Commission rules, including those
10 concerning cessation of business in Arizona and transfer of customers.

11 **Slamming and Cramming**

12 26. Pursuant to A.A.C. R14-2-1901 through R14-2-1913, and R14-2-2001 through R14-2-
13 2001 through R14-2-2007 (“Slamming and Cramming Rules”), a company must notify its customers
14 of changes of telecommunications carriers prior to such transfer, and advise its customers regarding
15 any changes in the terms of service.

16 27. In the Second Amended Staff Report, Staff notes that they reviewed the customer
17 notification letters UCN sent to customers prior to the May 2005 transfer from Extelcom to UCN.
18 Staff states, “[b]ecause the notice was provided in a timely manner and informs the customers that the
19 rates, terms, and conditions of service would not change as a result of the transfer, Staff believes that
20 the Commission’s Slamming and Cramming rules should be waived in this matter.”⁵

21 28. We agree with Staff’s analysis and, given the totality of the circumstances, a waiver of
22 the Slamming and Cramming Rules is appropriate.

23 **Affiliated Interest Rules**

24 29. According to Staff, neither Extelcom nor UCN was a Class A Utility at the time of the
25 2005 transfer, nor is UCN a Class A Utility at present. Staff concludes, therefore, that Extelcom and
26 UCN were not required to comply with the Affiliated Interest Rules pursuant to A.A.C. R14-2-801
27

28 ⁵ Second Amended Staff Report, page 3.

1 through R14-2-806.

2 30. Under the terms of the Decision granting Extelcom's CC&N for resold long distance
3 service, the Company was not authorized to collect from its customers any prepayments, advances or
4 deposits and was not required to file a performance bond. Staff concluded there would be no
5 economic risk in cancelling the Company's Certificates because the Company has no Arizona
6 customers from whom it collected advances, deposits and/or prepayments.

7 31. Staff noted that the Company does have a tariff on file with the Commission and
8 recommends cancellation of that tariff.

9 32. The Consumer Services Section of the Commission's Utilities Division reported that
10 there were no customer complaints, inquiries or opinions against Extelcom.

11 33. Given the foregoing, Staff's recommendations are reasonable.

12 **CONCLUSIONS OF LAW**

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

15 2. The Commission has jurisdiction over Extelcom and the subject matter of the
16 Application.

17 3. The cancellation of Extelcom's Certificates is in the public interest.

18 4. Pursuant to A.R.S. § 40-285, Extelcom's asset transfer is approved.

19 5. Pursuant to A.R.S. § 40-282, the Commission may issue decisions regarding
20 Certificates of Convenience and Necessity for certain telecommunication services without a hearing.

21 6. Staff's recommendations are reasonable and should be adopted.

22 **ORDER**

23 IT IS THEREFORE ORDERED that Extelcom, Inc., d/b/a Express Tel's transfer of assets to
24 UCN, Inc., is hereby approved.

25 IT IS FURTHER ORDERED that the Application of Extelcom, Inc., d/b/a Express Tel for the
26 cancellation of its Certificate of Convenience and Necessity to provide alternative operator service
27 and its Certificate of Convenience and Necessity to provide resold long distance telecommunications
28

1 services in Arizona shall be, and is hereby, approved, and the Certificates of Convenience and
2 Necessity are cancelled.

3 IT IS FURTHER ORDERED that Extelcom, Inc., d/b/a Express Tel's tariff is hereby
4 cancelled.

5 IT IS FURTHER ORDERED that UCN, Inc., shall comply with all Commission rules and
6 Decisions.

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

8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
9
10

11 CHAIRMAN

COMMISSIONER

14 COMMISSIONER

COMMISSIONER

COMMISSIONER

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

21 _____
MICHAEL P. KEARNS
22 INTERIM EXECUTIVE DIRECTOR

23 DISSENT _____

25 DISSENT _____
26
27
28

1 SERVICE LIST FOR: EXTELCOM, INC., D/B/A EXPRESS TEL

2 DOCKET NO.: T-02543A-07-0147

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