

OPEN MEETING ITEM



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Interim Executive Director

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



ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED

JUL - 1 2009

DOCKETED BY

ORIGINAL

DATE: JULY 1, 2009
DOCKET NO: T-20615A-08-0429

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 Order on:

**EMC TELECOM CORPORATION
(CC&N/RESELLER)**

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:

JULY 10, 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:

JULY 28, 2009 and JULY 29, 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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This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice phone number 602-542-3931, E-mail SBernal@azcc.gov

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
9 OF EMC TELECOM CORPORATION FOR
10 A CERTIFICATE OF CONVENIENCE AND
11 NECESSITY TO PROVIDE COMPETITIVE
12 RESOLD LONG DISTANCE AND RESOLD
13 LOCAL EXCHANGE
14 TELECOMMUNICATIONS SERVICES.

DOCKET NO. T-20615A-08-0429

DECISION NO. _____

ORDER

11 Open Meeting
12 July 28 and 29, 2009
13 Phoenix, Arizona

14 **BY THE COMMISSION:**

15 * * * * *

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

18 FINDINGS OF FACT

19 1. On August 15, 2008, EMC Telecom Corporation ("EMC" or "Company"), filed with
20 the Commission an application for a Certificate of Convenience and Necessity ("CC&N") to provide
21 competitive resold long distance, resold local exchange, and private line data telecommunications
22 services within a service area encompassing the entire State of Arizona ("Application").

23 2. On September 18, 2008, EMC filed updated tariff pages.

24 3. On October 14, 2008, EMC filed its responses to the Commission's Utilities Division
25 Staff ("Staff") First Set of Data Requests.

26 4. On January 16, 2009, Staff filed its Staff Report recommending approval of EMC's
27 Application.

28 5. On April 8, 2009, a Procedural Order was filed directing EMC to provide certain
information regarding its intended private line data services, as well an Affidavit of Publication

1 indicating that EMC had published legal notice of the Application. The Procedural Order also
2 directed Staff to file an Amended Staff Report reflecting EMC's responsive information.

3 6. On June 5, 2009, Staff filed its Amended Staff Report.

4 7. Attached to the Amended Staff Report is the Affidavit of Publication indicating that
5 the Company published Notice of the Application in *The Arizona Business Gazette* on September 25,
6 2008.

7 8. Staff also indicated that on April 10, 2009, EMC related to Staff that the Company
8 wished to withdraw that portion of its Application regarding private line data service, seeking
9 authority only to provide resold long distance and resold local exchange telecommunications services
10 in Arizona.

11 **Fitness and Properness to Obtain a CC&N**

12 9. EMC is a Nevada "S" corporation, granted authority to do business in Arizona as a
13 foreign corporation on February 11, 2008.

14 10. EMC is in good standing with the Commission's Corporations Division.

15 11. EMC does not currently hold a CC&N to provide telecommunications services in
16 Arizona and is not providing telecommunications services in Arizona.

17 12. EMC has indicated that neither EMC nor any of its officers, directors, partners, or
18 managers have been or currently are involved in any civil or criminal investigations, have had
19 judgments entered in any civil or criminal matter or levied by any administrative or regulatory
20 agency, or have been convicted of any criminal acts within the past 10 years.

21 13. EMC has indicated that neither EMC nor any of its officers, directors, partners, or
22 managers have been or currently are involved in any formal or informal complaint proceedings
23 pending before any state or federal regulatory commission, administrative agency, or law
24 enforcement agency.

25 14. EMC's Application indicates that it currently has a pending application to provide
26 telecommunications services in California.

27 15. Finally, Staff notes that the Utilities Division's Consumer Services Section reported
28 no complaints, inquiries, or opinions filed against it within Arizona.

1 **Technical Capabilities**

2 16. EMC intends to offer resold telecommunications services of AT&T, Verizon, Qwest,
3 and Global Crossing to subscribers in Arizona.

4 17. EMC's four key personnel have a combined total 30 years of telecommunications
5 experience.

6 18. Based on its findings, Staff has determined that EMC has sufficient technical
7 capabilities to provide resold long distance and resold local exchange telecommunications services in
8 Arizona.

9 **Financial Resources**

10 19. EMC provided Staff with financial statements for the six-month period ending June
11 28, 2008. According to the Staff Report, EMC's financial statement lists assets of \$1,561,213, total
12 equity of \$841,990, and a net income of \$12,097. EMC also provided financial statement for the 12-
13 month period ending December 31, 2007. This financial statement lists assets of \$1,796,232, equity
14 of \$925,573, and a net income of \$123,187.

15 20. EMC projects total revenues generated by the provision of telecommunications
16 services to Arizona customers for the first 12 months of operations to be \$182,000, with operating
17 expenses during that period of \$109,440.

18 21. EMC projects the net book value of all Arizona jurisdictional assets and the projected
19 value of all Arizona assets after the first 12 months of operations to be zero.

20 22. If EMC were to experience financial difficulty, it would have only a minimal impact
21 on its customers because many companies provide resold long distance telecommunications services,
22 and facilities-based providers are also available. Also, EMC's customers will be able to access
23 alternative toll service providers or resellers via 1+101XXXX access.

24 **Proposed Rates**

25 23. Staff indicates that the rates proposed by EMC are for competitive services and rates
26 for competitive telecommunications services are generally not established according to rate-of-return
27 regulation.

28 24. Staff has determined that EMC's fair value rate base ("FVRB") is zero. While Staff

1 considered the FVRB information submitted by EMC, Staff determined that the FVRB information
2 should not be given substantial weight in its analysis.

3 25. As a reseller of services purchased from other telecommunications companies, EMC
4 will have no market power and will have to compete with other providers to obtain subscribers to its
5 services. In light of this competitive market, Staff believes that EMC's proposed tariffs will be just
6 and reasonable.

7 26. Staff has reviewed EMC's proposed rates and determined that they are just and
8 reasonable.

9 27. EMC's tariff indicates that it will not collect advance payments, deposits, and/or
10 prepayments from its resold long distance customers. As such, Staff concludes that EMC is not
11 required to have a performance bond or irrevocable sight draft letter of credit for its resold long
12 distance services.

13 28. EMC also desires to provide resold local exchange service. In order to protect the
14 Company's Arizona customers, Staff recommends that EMC should acquire a performance bond or
15 irrevocable sight draft letter of credit equal to \$25,000.

16 29. Staff recommends that EMC file the original performance bond or irrevocable sight
17 draft letter of credit with the Commission's Business Office and file copies with Docket Control, as a
18 compliance item in this docket, within 30 days of the effective date the Decision in this matter. The
19 performance bond or irrevocable sight draft letter of credit will remain in effect until further order of
20 the Commission.

21 30. Staff notes that if EMC wishes to discontinue service, it must file an application with
22 the Commission pursuant to Arizona Administrative Code ("A.A.C.") R14-2-1107. Additionally, the
23 Company must notify each of its customers and the Commission 60 days prior to filing an application
24 to discontinue service. Failure to meet these requirements could result in forfeiture of the Company's
25 performance bond or irrevocable sight draft letter or credit.

26 Competitive Services

27 31. Staff states that there are alternatives to EMC's services, the Company will have to
28 convince potential customers to purchase its services, and the Company has no ability to adversely

1 affect the local exchange or interexchange service markets. As such, Staff recommends that the
2 Company's proposed services be classified as competitive.

3 **Regulatory Requirements**

4 32. Commission rules require EMC to file a tariff for each competitive service that states
5 the maximum rate as well as the effective (actual) price that will be charged for the service. Under
6 A.A.C. R14-2-1109(A), the minimum rate for a service must not be below the total service long-run
7 incremental cost of providing the service. Any change to EMC's effective price for a service must
8 comply with A.A.C. R14-2-1109, and any change to the maximum rate for a service in EMC's tariff
9 must comply with A.A.C. R14-2-1110.

10 33. A.A.C. R14-2-1204(A) requires all telecommunications service providers that
11 interconnect to the public switched network to provide funding for the Arizona Universal Service
12 Fund ("AUSF"). A.A.C. R14-2-1204(B)(3)(a) requires new telecommunications service providers
13 that begin providing toll service after April 26, 1996, to pay AUSF charges as provided under A.A.C.
14 R14-2-1204(B)(2).

15 34. A.A.C. R14-2-1901 et seq. establish requirements to protect Arizona consumers from
16 unauthorized carrier changes ("slamming") and apply to each public service corporation providing
17 telecommunications services within the State of Arizona and over which the Commission has
18 jurisdiction.

19 35. A.A.C. R14-2-2001 et seq. establish requirements to protect Arizona consumers from
20 unauthorized carrier charges ("cramming") and apply to each public service corporation providing
21 telecommunications services within the State of Arizona and over which the Commission has
22 jurisdiction.

23 36. A.A.C. R14-2-1107 requires a competitive telecommunications service provider to file
24 an application for authorization with the Commission before it discontinues service; the rule also
25 establishes customer notice requirements and other requirements related to discontinuance of service.

26 **Staff's Recommendations**

27 37. Staff recommends approval of EMC's Application and further recommends:

28 a. That EMC be ordered to comply with all Commission rules, orders, and other

- 1 requirements relevant to the provision of intrastate telecommunications
2 service;
- 3 b. That EMC be ordered to abide by the quality of service standards approved by
4 the Commission for Qwest in Docket No. T-01051B-93-0183;
- 5 c. That EMC may not bar access to alternative local exchange service providers
6 who wish to serve areas where the Company is the only provider of local
7 exchange service facilities;
- 8 d. That EMC be ordered to notify the Commission immediately upon changes to
9 its name, address, or telephone number;
- 10 e. That EMC be ordered to cooperate with Commission investigations, including
11 but not limited to customer complaints;
- 12 f. That EMC's fair value base rate is zero;
- 13 g. That EMC be ordered to offer Caller ID with the capability to toggle between
14 blocking and unblocking the transmission of the telephone number at no
15 charge;
- 16 h. That EMC be ordered to offer Last Call Return service that will not return calls
17 to telephone numbers that have the privacy indicator activated;
- 18 i. That EMC services be classified as competitive;
- 19 j. That EMC be authorized to discount its rates and service charges to the
20 marginal cost of providing the services;
- 21 k. That EMC be ordered to submit tariffs for its local exchange and long distance
22 services indicating that it does not collect advances, deposits, and/or
23 prepayments;
- 24 l. That if at some future date, EMC wishes to collect advances, deposits and/or
25 prepayments from its resold interexchange service customers, EMC should be
26 ordered to file an application with the Commission for approval. The
27 application must reference this Decision and must explain EMC's plans for
28 procuring its performance bond or irrevocable sight draft letter of credit;
- m. That EMC be ordered to submit a revised tariff for its local exchange and long
distance services with references to private line services removed; and
- n. That EMC be ordered to do the following and that its CC&N be rendered null
and void, after due process, if it fails to do the following:
- i. EMC shall 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
before providing service, whichever comes first. The tariffs submitted
shall coincide with the Application and state that EMC does not collect

advances, deposits, and/or prepayments from its customers.

- 1
- 2 ii. EMC shall procure either a performance bond or an irrevocable sight
- 3 draft letter of credit equal to \$25,000.
- 4 iii. EMC shall file the original performance bond or irrevocable sight draft
- 5 letter of credit with the Commissioner's Business Office and copies of
- 6 the performance bond or irrevocable sight draft letter of credit with
- 7 Docket Control, as a compliance item in this docket, within 30 days of
- 8 the effective date of a Decision in this matter. The performance bond or
- 9 irrevocable sight draft letter of credit must remain in effect until further
- 10 order of the Commission. The Commission may draw on the
- 11 performance bond or irrevocable sight draft letter of credit, on behalf
- 12 of, and for the sole benefit of, the Company's customers, if the
- 13 Commission, in its discretion, finds that the Company is in default of
- 14 its obligations arising from its Certificate. The Commission may use
- 15 the performance bond or irrevocable sight draft letter of credit funds, as
- 16 appropriate, to protect the Company's customers and the public interest
- 17 and take any and all actions the Commission, in its discretion, deems
- 18 necessary including, but not limited to, returning prepayments or
- 19 deposits collected from the Company's customers.

38. Staff's recommendations are reasonable and should be adopted.

CONCLUSIONS OF LAW

15 1. Upon receiving a CC&N, EMC will be a public service corporation within the

16 meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

17 2. The Commission has jurisdiction over EMC and the subject matter of the Application.

18 3. A.R.S. § 40-282 allows a telecommunications company to file an application for a

19 CC&N to provide competitive telecommunications services.

20 4. A.R.S. § 40-282 allows the Commission to grant a CC&N without first conducting a

21 hearing if the CC&N is for resold telecommunications services.

22 5. Notice of EMC's Application was given in accordance with the law.

23 6. Pursuant to Article XV of the Arizona Constitution and the Arizona Revised Statutes,

24 it is in the public interest for EMC to provide the telecommunications services for which it has

25 requested authorization in its Application.

26 7. EMC is a fit and proper entity to receive a CC&N authorizing it to provide resold long

27 distance and resold local exchange telecommunications services in the State of Arizona.

28 8. The telecommunications services that EMC desires to provide are competitive in

1 Arizona.

2 9. Pursuant to Article XV of the Arizona Constitution and 14 A.A.C. 2, Article 11, it is
3 just and reasonable and in the public interest for EMC to establish rates and charges for competitive
4 services that are not less than EMC's total service long-run incremental costs of providing the
5 competitive services approved herein.

6 10. Staff's recommendations as set forth in Findings of Fact No. 37 are reasonable and
7 should be adopted.

8 11. EMC's fair value rate base is not useful in determining just and reasonable rates for
9 the competitive services it proposes to provide Arizona customers.

10 12. EMC's rates, as they appear in its proposed tariffs, are just and reasonable and should
11 be approved.

12 **ORDER**

13 IT IS THEREFORE ORDERED that the Application of EMC Telecom Corporation for a
14 Certificate of Convenience and Necessity to provide competitive resold long distance and resold local
15 exchange telecommunications services in Arizona is hereby granted conditioned upon compliance
16 with conditions and recommendations set forth in Findings of Fact No. 37.

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1 IT IS FURTHER ORDERED that if EMC Telecom Corporation fails to meet the conditions
2 outlined in Findings of Fact No. 37(n) within the timeframes stated therein, the Certificate of
3 Convenience and Necessity conditionally granted herein shall become null and void after due
4 process.

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
7
8

9 CHAIRMAN _____ COMMISSIONER _____

10
11 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

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

18 _____
19 MICHAEL P. KEARNS
20 INTERIM EXECUTIVE DIRECTOR

21 DISSENT _____

22 DISSENT _____
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28

1 SERVICE LIST FOR:

EMC TELECOM CORPORATION

2 DOCKET NO.:

T-20615A-08-0429

3

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