



PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

39

1. <u>REPORT DATE:</u> September 8, 2003	2. <u>BUREAU AGENDA NO.:</u> SEP-2003-FUS-1370*
3. <u>BUREAU:</u> Fixed Utility Services	
4. <u>SECTION(S):</u> Tariff/Finance	5. <u>PUBLIC MEETING DATE:</u> September 18, 2003
6. <u>APPROVED BY:</u> Director: Rosenthal 3-5242 <i>RW</i> Manager: Wilson 3-6162 <i>BW</i> Legal Review by: <i>Carl J. Harris</i>	
7. <u>PERSONS IN CHARGE:</u> Glunz 5-4364 Beebe 7-7237	<div style="text-align: center;">  NOV 18 2003  </div>
8. <u>DOCKET NOS:</u> A-311222 F0004; A-311222 F0005, A-310806 F0004, A-310806 F2000	

9. (a) **CAPTION** (abbreviate if more than 4 lines)
 (b) **Short summary of history & facts, documents & briefs**
 (c) **Recommendation**

(a) Applications of Essex Acquisition Corp. (Essex) for (1) approval of MCG Capital Corp. increasing its 5% interest in the parent of Essex to a 71% interest in the parent; and, (2), with NOW Communications, Inc. (NOW), for approval of the transfer of assets of NOW to Essex, followed by the abandonment of service by NOW.

(b) Essex first seeks approval of the exercise of warrants by MCG Capital Corp. (MCG) a business development company, thereby increasing MCG's ownership in Essex' direct parent from 5% now, to either 49%, being de facto control, or near 71%, and thus majority control. MCG provides both capital and technological strengths to its investments. Separately, MCG and NOW, which is in bankruptcy, are parties to a bankruptcy agreement by which NOW's assets would be transferred to MCG's indirect subsidiary, Essex. NOW would then abandon its CLEC and IXC reseller services. Following notice to NOW customers, Essex, also an IXC reseller and CLEC, will adopt the tariffs of NOW.

(Continued on next page)

10. MOTION BY: Commissioner Chm. Fitzpatrick Commissioner Wilson - Yes
 Commissioner Thomas - Yes
SECONDED: Commissioner Bloom Commissioner Pizzingrilli - Yes

CONTENT OF MOTION: Staff recommendation adopted.

Continued A-311222F0004; A-311222F0005
A-310806F0004; A-310806F2000

(c) The Bureau of Fixed Utility Services recommends, after the Commission's favorable action under FUS-0450* at A-311222 and A-311222 F0002, the adoption of the proposed order by which the Commission would approve the change in control, the asset transfer and the abandonment.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

SEPTEMBER 22, 2003

A-311222 F0004
A-310806 F0004
A-311222 F0005
A-310806 F2000

CATHERINE WANG
RONALD W DELSESTO JR
SWINDLER BERLIN
SHEREFF & FRIEDMAN
3000 K STREET NW STE 300
WASHINGTON DC 20007

DOCUMENT
FOLDER

Application of Essex Acquisition Corp., for approval of the exercise of warrants which would result in MCG Capital Corp., increasing its 5% interest in the parent of Essex Acquisition Corp., to a 71% equity and voting interest in the parent.

Joint Application of NOW Communications, Inc., and Essex Acquisition Corp., for approval of the transfer of assets from the former to the later

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on September 18, 2003 has adopted an Order in the above entitled proceeding.

An Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Secretary

DOCKETED
SEP 29 2003

fg
encls
cert. mail

SCOTT KELLOGG ESQUIRE
ESSEX ACQUISITION CORPORATION
200 SOUTH WACKER DRIVE
SUITE 3215
CHICAGO IL 60606

R SCOTT SEAB VP REG AFFAIRS
NOW COMMUNICATIONS INC
711 SOUTH TEJON STREET SUITE 201
COLORADO SPRINGS CO 80903

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held September 18, 2003

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Glen R. Thomas
Kim Pizzingrilli

Docket Nos.:

Application of Essex Acquisition Corp. for approval of the
exercise of warrants which would result in MCG Capital Corp.
increasing its 5% interest in the parent of Essex Acquisition
Corp. to a 71% equity and voting interest in the parent. A-311222 F0004

Joint application of NOW Communications, Inc. and Essex
Acquisition Corp. for approval of the transfer of assets from the
former to the latter and the abandonment of service by NOW
Communications, Inc. A-310806 F0004
A-311222 F0005
A-310806 F2000

DOCKETED

SEP 29 2003

ORDER

**DOCUMENT
FOLDER**

BY THE COMMISSION:

On May 29, 2003, Essex Acquisition Corp. (Essex) filed the above-captioned application concerning a transfer of control pursuant to Chapter 11 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§1101-1103. On June 13, 2003, Essex and NOW Communications, Inc. (NOW) filed a joint application for approval of an asset transfer from NOW to Essex. Copies of each application were served upon the Office of Consumer Advocate and the Office of Small Business Advocate. Further notice was not required and no protest period was established

for either application. No protests or comments have been received in response to either filing. On August 11, 2003, NOW filed a letter amendment to its joint application, seeking approval of its abandonment of service following the transfer of assets to Essex.

Essex is an interexchange (IXC) reseller and competitive local exchange carrier (CLEC) in Pennsylvania, having been granted final authority by our approval earlier today of its applications for initial entry docketed at A-311222 and A-311222 F0002, respectively. It is the successor utility to Essex Communications, Inc., the latter having transferred its assets to Essex in a transaction we approved by order entered January 2, 2003, at A-311222 F0003. NOW was certificated as an IXC reseller and CLEC pursuant to our order entered November 9, 1999, at A-310806 and A-310806 F0002, respectively.

Essex is a wholly-owned subsidiary of BiznessOnline.com, Inc. (BOL), which is not a Pennsylvania utility. MCG Capital Corp. (MCG), a business development company, owns approximately 5% of the stock of BOL, representing the same share of voting interest. MCG also owns two series of warrants to purchase additional stock in BOL, which BOL issued as part of financing that MCG provided to BOL. If MCG were to exercise one such series of warrants, it would then own stock representing a voting interest in BOL of approximately 49%. Being the largest stockholding in BOL, such a 49% interest would constitute de facto control of BOL and, indirectly, of the latter's utility subsidiary, Essex.¹ Were MCG to exercise all the warrants it now holds, its equity and voting interest in BOL would rise to approximately 71%, or majority control of BOL and Essex.

By its application filed at A-311222 F0004, Essex seeks our prior approval of the change in control that would result from either a partial or full exercise by

¹ We have defined de facto control in our Policy Statement at 52 Pa. Code §69.901, in which we also asserted jurisdiction over indirect changes in control of jurisdictional utilities.

MCG of its warrants. Essex has included with its application detailed a description of MCG, which is regulated as a business development company under the Investment Company Act of 1940. MCG invests in four specific industry sectors, including communications and information services. MCG has made capital investments in BOL in the past, and Essex expects MCG will be able to in the future. Indeed, upon the exercise of its warrants, BOL will receive new equity capital of approximately \$100,000. This prospect for improved financial strength in Essex and its immediate parent allows the transaction to meet the standard set by *City of York v. Pennsylvania Public Utility Commission*, 446 Pa. 136, 295 A.2d 825 (1972), that the change in control provide an affirmative public benefit.

Essex has noted explicitly in its application that it will continue to operate under its existing management and will continue to provide service pursuant to its currently effective tariffs.

In the second application before us today, Essex has been joined as applicant by NOW Communications, Inc. (NOW). By their application, the joint applicants seek approval of the transfer to Essex of assets of NOW, which is currently a debtor-in-possession before the U.S. Bankruptcy Court of the Southern District of Mississippi. Pursuant to an agreement between MCG and NOW, NOW's assets will be transferred to MCG or its designee.

MCG's designee for the asset transfer will be its indirect subsidiary Essex, which holds the same CLEC and IXC reseller authority in Pennsylvania as does NOW. Essex will adopt the tariffs currently in effect for NOW, and customers of NOW will receive from Essex the same services at the same rates as they have been from NOW. The applicants included with their application a copy of the

notice of the transfer of service that will be sent to NOW customers upon approval of the transfer agreement by the bankruptcy court. This continuity of service to NOW customers renders the transfer advantageous to NOW customers, and is the positive contribution to the public interest upon which we can base our approval of the transfer and abandonment.

We turn now to some open matters that need attention prior to allowing NOW to abandon service. Law Bureau Prosecutory Staff filed a complaint on May 23, 2002, at C-20027759, alleging that NOW had not filed its annual report for the year 2000. In light of NOW's present circumstances and since NOW has filed reports for 2001 and 2002, we find that further prosecution of the complaint would be inappropriate, and that the complaint should be closed as moot.

There are also two open dockets at which NOW sought approval of interconnection agreements with Verizon Pennsylvania, Inc. and with United Telephone Co. of Pennsylvania, docketed at A-310806 F7000 and A-310806 F7002, respectively. The anticipated abandonment of service by NOW will render those agreements moot and upon consummation of the proposed transfer and abandonment those cases should be marked closed.

Having reviewed the instant applications, we have determined that the proposed change in control of Essex, the transfer of assets from NOW to Essex, and the subsequent abandonment of service by NOW are necessary or proper for the service, accommodation, convenience, or safety of the public, and that the applications should be approved; THEREFORE,

IT IS ORDERED:

1. That the exercise of warrants by MCG Capital Corp. leading to its de facto or majority control of Essex Acquisition Corp. is hereby approved and that a certificate of public convenience be issued evidencing our approval.

2. That the transfer of assets by NOW Communications, Inc. to Essex Acquisition Corp. is hereby approved and that a certificate of public convenience be issued evidencing our approval.

3. That the abandonment of service by NOW Communications, Inc. is hereby approved.

4. That within 30 days of consummation of the transfer of assets and the abandonment approved by Ordering Paragraphs No. 2. and No. 3, above, Essex Acquisition Corp. and NOW Communications, Inc. file notice of such consummation.

5. That together with the notice required in Ordering Paragraph No. 3 above, Essex Acquisition Corp. file tariff adoption agreements by which it adopts as its own the tariffs of NOW Communications, Inc.

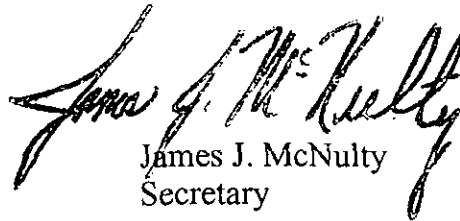
6. That the complaint at C-20027759 be closed.

7. That upon receipt of the notice and tariff adoption agreements required in Ordering Paragraphs No. 4 and No. 5, above, (a) a certificate of public convenience be issued evidencing our approval of the abandonment of service by NOW Communications, Inc., (b) the applications regarding interconnection agreements of NOW Communications, Inc., docketed at A-310806 F7000 and

A-310806 F7002, be marked closed, and (c) the status of NOW Communications, Inc. be changed to inactive.

8. That if the parties determine that the asset transfer and abandonment will not be implemented, Essex Acquisition Corp. and NOW Communications, Inc. promptly file notice with this Commission of such determination.

BY THE COMMISSION



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: September 18, 2003

ORDER ENTERED: **SEP 22 2003**