

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held November 10, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Application of BIF IV Intrepid OpCo LLC, for Approval to Offer, Render, Furnish, or Supply Telecommunications Services to the Public as a Competitive Access Provider in the Commonwealth of Pennsylvania

A-2022-3030976

ORDER

BY THE COMMISSION:

On February 17, 2022, BIF IV Intrepid OpCo LLC (BIF or Applicant) filed an Application seeking a Certificate of Public Convenience under our orders issued pursuant to the Telecommunications Act of 1996 (TA-96),¹ 47 U.S.C. §§ 201 *et seq.*, and to Chapter 11 of the Public Utility Code (Code) (66 Pa.C.S. §§ 1101 *et seq.*) evidencing authority to provide telecommunications services to the public as a Competitive Access Provider (CAP) throughout the Commonwealth of Pennsylvania.

The Applicant was granted provisional authority pursuant to our Secretarial Letter dated March 3, 2022, to provide the proposed telecommunications services as a CAP pursuant to its proposed tariff during the pendency of the Application process. The assigned utility code is 3124928.

The Applicant complied with notice requirements set forth in our *TA-96 Implementation Orders* by serving a copy of its Application upon the Office of Consumer Advocate, the Office of

¹ In light of the policy objectives of the Telecommunications Act of 1996, 47 U.S.C. § § 201 *et seq.* (TA-96), market entry requirements for telecommunication service providers are set out in- *In Re Implementation of the Telecommunications Act of 1996*, Docket No. M-00960799 (Order entered June 3, 1996; Order on Reconsideration entered September 9, 1996) (TA-96 Implementation Orders).

Small Business Advocate, and the Office of the Attorney General. No protests or petitions to intervene were filed and no hearings were held.

Information concerning the Applicant is as follows:

- The Applicant is a Delaware Limited Liability Company with its principal place of business at 250 Vesey Street, Brookfield Place 15th Floor, New York, NY 10281-1023, telephone (212) 417-7000.
- The Applicant complied with Pennsylvania law relating to a foreign limited liability company.
- Correspondence to resolve complaints may be directed to Jack Waters, 250 Vesey Street, Brookfield Place 15th Floor, New York, NY 10281-1023, telephone (212) 417-7000.
- The Applicant's Pennsylvania Emergency Management Agency contact is Patrick Hildebrand, 250 Vesey Street, Brookfield Place 15th Floor, New York, NY 10281-1023, telephone (212) 417-7000.
- The Applicant will not be using a fictitious name.
- The Applicant has no affiliates or predecessors within Pennsylvania.
- The Applicant has no affiliates or predecessors rendering public utility service outside Pennsylvania.

The Applicant understands that if it plans to cease doing business within the Commonwealth of Pennsylvania, it is under a duty to first file an application with the Commission requesting authority to abandon or cease providing the competitive access services it offers to its customers.²

The Applicant proposes to build a fiber-based network in Pennsylvania, which the Applicant plans to construct to customer locations.³ The Applicant avers that it will primarily provide point-to-point telecommunications services such as Ethernet and other similar

² 66 Pa.C.S. § 1102(a)(2).

³ Application, p 6.

high-bandwidth services. The Applicant intends to provide its services using fiber optic cable along with other equipment. The Applicant states that it does not currently own or lease facilities in Pennsylvania, but plans to construct facilities to provide its services. The Applicant further states that it does not plan to furnish switched voice services or dial tone at this time.⁴

Based upon the averments in its Application, the Commission determines that BIF will be using non-switched facilities to provide dedicated point-to-point (or multipoint) transport services to a host of jurisdictional and nonjurisdictional communications service providers and also to other customers in the Commonwealth. The Commission acknowledges that an applicant that offers transmission path service on a non-discriminatory basis to the public is providing a jurisdictional telecommunication service under 66 Pa.C.S. § 102.⁵

Additionally, the Commission has certificated competitive non-switched dedicated direct access point-to-point transmission service or “special access service”⁶ to business customers and other large volume users within the Commonwealth since 1991.⁷ CAP authority may only be used to provide dedicated transport services using non-switched facilities. It may not be used to access the Public Switched Network, to provide local service, or to offer toll calling to end user customers. If a utility with CAP authority wishes to provide access to the Public Switched Network, or to provide local exchange telecommunications service and/or interexchange calling services (intraLATA or interLATA) to Pennsylvania customers, the utility must also file with the Commission an application requesting authority to offer, render, furnish or supply telecommunications service as a competitive local exchange carrier (CLEC) and/or interexchange carrier (IXC).

⁴ Application, p. 7.

⁵ See *Rural Telephone Company Coalition v. Pa. PUC*, 941 A.2d 751, 758 (Pa. Cmwlth. 2008) (The Commonwealth Court held that the Commission’s ruling that transmission path service is a jurisdictional telecommunication service under the Public Utility Code is consistent with federal law).

⁶ See 66 Pa.C.S. § 3012.

⁷ See, e.g., *Application of Metropolitan Fiber Systems of Philadelphia, Inc. for Approval of the Right to Begin to Offer or Furnish Dedicated Digital Telecommunications Transmission Service to the Public in the City of Philadelphia*, Docket No. A-310004, (Order entered March 11, 1991); *Application of Metropolitan Fiber Systems of Pittsburgh, Inc. for Approval of the Right to Begin to Offer or Furnish Dedicated Digital Telecommunications Transmission Service to the Public in the City of Pittsburgh*, Allegheny County, Docket No. A-310005 (Order entered March 11, 1991); see also *Application of Hyperion Telecommunications of Harrisburg for Approval to Offer, Render, Furnish or Supply Services as a Competitive Access Provider within the Commonwealth of Pennsylvania*, Docket No. A-310354 (Order entered March 15, 1996).

Section 1103(a) of the Code authorizes the Commission to approve an application “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S. § 1103(a). Premised upon our review of the Application and the proposed tariff, we conclude that the Applicant’s request to offer dedicated transport services using non-switched facilities on a wholesale basis to other communications service providers and on a retail basis to business customers is consistent with the aforementioned statutory criteria in the Code and also with our Orders, our regulations, and TA-96, as the Applicant’s proposed CAP services do not raise concerns at this time regarding safety, adequacy, reliability, or privacy. Further, through the attestations in and attachments to its Application, and absent any information to the contrary, the Applicant has demonstrated that it is financially, managerially, and technically capable of providing special access services as a CAP.⁸ Consistent with the aforementioned, we conclude that the Applicant meets the requirements for certification as a CAP, consistent with this Order.

Notwithstanding our conclusion that the Applicant meets the requirements for certification as a CAP, we note that there are a few deficiencies in the proposed tariff.

Consequently, we shall direct the Applicant to revise its tariff in accordance with the changes noted in Appendix A of this Order.⁹ The Applicant shall thereafter file its Initial Tariff reflecting the requested changes on or before sixty days from the date of entry of this Order. The Applicant may file its Initial Tariff electronically, consistent with Commission rules.¹⁰ Copies of the Initial Tariff shall also be served upon the same entities receiving service of the original Application. If the time required for such resolution and filing exceeds sixty days, the Applicant may request an extension of an additional sixty days with the Commission’s Secretary. Thus, if the Initial Tariff is not filed within sixty days (120 days including the extension) of the entry of this Order, the Application will be dismissed and the authority granted herein will be revoked without further Commission Order.

We note that the Commission will only approve tariff provisions regarding limitation of liability consistent with law. The Commission does not have jurisdiction to determine liability or

⁸ Application Affidavit and Exhibit C.

⁹ Regardless of the review process, any tariff provision(s) inconsistent with the provisions of the Code, TA-96, our regulations, or Orders will be deemed inoperative and superseded.

¹⁰ See *Final Rulemaking to Permit Electronic Filing*, Docket No. L-00070187 (Order entered May 23, 2008).

award monetary damages. Any tariff provisions contained in the Initial Tariff regarding limitation of liability inconsistent with any applicable laws, rules and regulations will be deemed inoperative and superseded.

To the extent that the proposed tariff contains rates, the Initial Tariff may become effective on one day's notice from the date upon which it is filed and served.

Carriers are required to provide telecommunications service to customers in Pennsylvania within one year of certification.¹¹

In accordance with the affidavit that accompanied the Application, the Applicant has agreed to abide by all applicable federal and state laws and regulations and by the decisions of the Commission. We remind the Applicant that, in accordance with our *TA-96 Implementation Orders*, a public utility that seeks Commission certification or that is certificated in Pennsylvania to provide telecommunications service, as defined by state and federal law, must provide the service in full compliance with all applicable provisions of Pennsylvania and federal law. This includes compliance with Section 1511 of Pennsylvania's Business Corporation Law, 15 Pa.C.S. § 1511,¹² when siting facilities/equipment in public rights-of-way. Failure to comply with applicable law may result in fines being imposed against a public utility or in the suspension or revocation of the utility's Certificate of Public Convenience, consistent with due process.

We remind the Applicant that certificated public utilities in Pennsylvania are required to file with the Commission an accurate annual financial report and an accurate separate statement of gross intrastate (wholesale and retail) revenues for fiscal assessment purposes, as received from operations conducted pursuant to the authority granted by the Commission's certification

¹¹ For complete details regarding this requirement, including consequences for non-compliance, see *Final Order Regarding the Commission's Plan to Implement a One-Year Timeframe for Inactive Telecommunication Carriers to Provide Service on an Annual Basis within the Commonwealth of Pennsylvania*, Docket No. M-2011-2273119 (Order entered July 19, 2012).

¹² 15 Pa.C.S. § 1511(e) provides as follows: "A public utility corporation shall have the right to enter upon and occupy streets, highways, waters and other public ways and places for one or more of the principal purposes specified in subsection (a) and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes, including the placement, maintenance and removal of aerial, surface and subsurface public utility facilities thereon or therein. Before entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof."

order.¹³ This requirement includes filing an accurate and separate statement of gross intrastate revenues from jurisdictional CAP services offered in Pennsylvania. We note that Applicant's business plan in Pennsylvania includes serving customers as an unregulated ISP while also serving customers as a regulated CAP. Therefore, to the extent Applicant provides both jurisdictional CAP and non-jurisdictional ISP services in Pennsylvania, Applicant is required to accurately and separately account for and report to the Commission its jurisdictional revenues related to the CAP portion of its business. Additional reporting of intrastate retail revenues is also required for the purpose of Pennsylvania Universal Service Fund contribution assessments. Failure to comply with applicable reporting requirements may result in billing for back payments due and the imposition of fines and/or other lawful remedies, including revocation of certification, consistent with due process.

Conclusion

Accordingly, pursuant to 66 Pa.C.S. §§ 1101 and 1103(a), we determine that granting the Application is necessary or proper for the service, accommodation, convenience, or safety of the public. Upon the establishment of filed rates and the approval of the Initial Tariff, a Certificate of Public Convenience shall be issued evidencing the Applicant's authority to provide services as a CAP throughout the Commonwealth of Pennsylvania, consistent with this Order and our decisions in other such proceedings; **THEREFORE,**

IT IS ORDERED:

1. That the Application of BIF IV Intrepid OpCo LLC, at Docket No. A-2022-3030976, for authority to operate as a Competitive Access Provider throughout the Commonwealth of Pennsylvania is granted, consistent with this Order.

¹³ See 66 Pa.C.S. § 510(b). We note that system of accounts and other reporting requirements are addressed in our annual reporting regulations for competitive local exchange carriers and other telephone public utilities. See generally 52 Pa. Code §§ 63.31 *et seq.* See also Policy Statement adopted July 11, 2019, Docket No. M-2018-3004578, 49 Pa.B. 5003 (Aug. 31, 2019), 52 Pa. Code § 69.3701 (requiring the reporting and assessment of *all* gross intrastate operating revenues including all actual or *de facto* wholesale revenues), *petition for allowance of appeal dismissed Broadband Cable Assoc. of Pa. v. Pa. PUC* (Pa. Cmwlth., 1085 CD 2019, Jan. 24, 2020) (*Zero Revenue Reporters Policy Statement*).

2. That no right is conferred upon BIF IV Intrepid OpCo LLC to offer, render, furnish, or supply local exchange telecommunications services or interexchange services within the Commonwealth of Pennsylvania.

3. That BIF IV Intrepid OpCo LLC shall comply with all the provisions of the Public Utility Code, as now exist or as may be hereafter amended, and with all pertinent rules, regulations, and Orders of this Commission, now in effect or as may be prescribed by this Commission, including those identified in this Order.

4. That the authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to BIF IV Intrepid OpCo LLC, shall not be construed as conferring more than one operating right to BIF IV Intrepid OpCo LLC.

5. That BIF IV Intrepid OpCo LLC shall maintain accurate accounting records that properly classify and segment its Competitive Access Provider revenues from its operations within the Commonwealth and file with the Commission an accurate annual financial report and an accurate separate statement of gross intrastate (wholesale and retail) revenues for fiscal assessment purposes.

6. That BIF IV Intrepid OpCo LLC shall maintain accurate accounting records that properly classify and segment its gross retail intrastate revenues for purposes of the Pennsylvania Universal Service Fund contribution assessment report.

7. That in accordance with Commission Orders entered October 5, 2005, at Docket No. M-00041857 and on August 21, 2006, at Docket No. L-00050176; BIF IV Intrepid OpCo shall follow the reporting requirements outlined at the following website:
http://www.puc.pa.gov/general/onlineforms/doc/Telco_Reporting_Requirements_Contacts-Descriptions.docx.

8. That BIF IV Intrepid OpCo LLC shall file such affiliated interest agreements as may be necessary relative to any transactions with affiliates within thirty (30) days of this Order.

9. That BIF IV Intrepid OpCo LLC shall either eFile or submit an original copy of its Initial Tariff within sixty (60) days (120 days including an approved extension) after the date of entry of this Order. **BIF IV Intrepid OpCo LLC is directed to identify any changes made**

to the proposed Initial Tariff that are in addition to the changes noted in Appendix A. BIF IV Intrepid OpCo LLC shall serve copies of its Initial Tariff on each entity receiving a copy of the original Application. The Initial Tariff may become effective on or after one (1) day's notice from the date upon which it is filed and served.

10. That the Competitive Access Provider tariff shall reflect on its face that it is a "Competitive Access Provider Tariff."

11. That changes and/or additions made to an approved, filed tariff shall be made in the form of supplements, consecutively numbered in the order of their filing dates, and the tariff designation shall be in the following manner: Supplement No. ___ to Tariff Telephone Pa. P.U.C. No. ___.

12. That BIF IV Intrepid OpCo LLC shall add its Pennsylvania tariff to its website within thirty (30) days of the filing of its Initial Tariff and mark it "Pending." Within thirty (30) days of receipt of its Certificate of Public Convenience, the BIF IV Intrepid OpCo LLC shall make any required modifications to the tariff on its website and remove the "Pending" notation. Thereafter, BIF IV Intrepid OpCo LLC will continually update the website whenever any supplemental revisions to the tariff are approved by the Commission such that the website tariff is a true and accurate representation of its tariff on file with the Commission.

13. That within thirty (30) days of receipt of its Certificate of Public Convenience, BIF IV Intrepid OpCo LLC shall contact Cyndi Page (717) 787-5722; cypage@pa.gov of the Commission's Office of Communications to create a link from the Commission's website to the BIF IV Intrepid OpCo LLC's website.

14. That upon the establishment of filed rates and the approval of the Initial Tariff, a Certificate of Public Convenience shall be issued authorizing BIF IV Intrepid OpCo LLC to furnish services as a Competitive Access Provider within the Commonwealth of Pennsylvania, consistent with this Order.

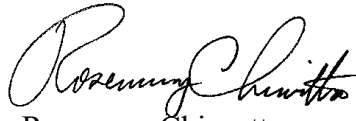
15. That in the event that BIF IV Intrepid OpCo LLC has not, on or before sixty (60) days (120 days including an approved extension) from the date of entry of this Order, complied

with the requirements set forth herein, the Application at Docket No. A-2022-3030976 shall be dismissed and the authority granted herein revoked without further Commission Order.

16. That if BIF IV Intrepid OpCo LLC plans to cease doing business within the Commonwealth of Pennsylvania, it shall request authority from the Commission for permission prior to ceasing its competitive access services as described in its Application and the body of this Order.

17. That a copy of this Order be served on the Bureau of Registration and Taxpayer Management in the Pennsylvania Department of Revenue.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 10, 2022

ORDER ENTERED: November 10, 2022

BIF IV Intrepid OpCo, LLC
Docket No. A-2022-3030976
Proposed tariff for Competitive Access Provider Services

The proposed tariff contains certain deficiencies that must be addressed by the Applicant before the tariff can be approved and the Certificate of Public Convenience issued. **The Applicant must submit a copy of this Appendix with its revised compliance tariff. On that copy please note the page/sheet of the compliance tariff where the required revision is located for each item below.**

Tariff deficiencies noted – CAP (A-2022-3030976) Tariff No. 1

1. All Pages: Enter issued and effective dates as per ordering paragraph.
2. Add “Competitive Access Provider” to Title Page.
3. All Pages: Add “Competitive Access Provider” to the header.
4. Section 2.2.2 Page 10: The limitations of liability tariff provisions should be generally consistent with the Commission’s relevant Policy Statement at 52 Pa. Code § 69.87 and the Commission Order at Docket No. M-00981209.
5. Section 2.5 Page 15: Remove or revise collection agency fees to be consistent with the Commission’s relevant Policy Statement at 52 Pa. Code § 69.87 and the Commission Order at Docket No. M-00981209.
6. Section 2.7.1 Page 19: Correct the reference to “Consumer Relations Division” to “Bureau of Consumer Services.”