

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
Rhythms Links Inc. Emergency Application to) NSD File No. W-P-D-523
Discontinue Domestic Telecommunications)
Services)
)
)
)

ORDER

Adopted: September 7, 2001

Released: September 7, 2001

By the Common Carrier Bureau:

1. In this Order, we deny Rhythms Links Inc. emergency application to discontinue providing its domestic telecommunications services in all geographic areas throughout the United States, pursuant to section 214(a) of the Communications Act of 1934, as amended,¹ and section 63.63 of the Commission's rules.² Applicant requests authority to discontinue service on September 10, 2001, until such date as the Commission grants permanent discontinuance authority.³

BACKGROUND

2. On August 10, 2001, Rhythms Links Inc. (Rhythms Links or Applicant), located at 9100 East Mineral Circle, Englewood, CO 80112, filed an application requesting authority under section 214(a) of the Act and section 63.71 of the Commission's rules to discontinue its domestic telecommunications services in all fifty (50) states.⁴

3. The application indicates that Rhythms Links is a wholly-owned subsidiary of Rhythms NetConnections Inc. (Rhythms). Applicant explains that Rhythms provides high-speed broadband services, primarily using Digital Subscriber Line (DSL) technology, and that telecommunications

¹ 47 U.S.C. § 214(a).

² 47 CFR § 63.63.

³ Letter from Frank V. Paganelli, Vice President of Rhythms Links, to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated August 31, 2001 (Rhythms Emergency Application).

⁴ See *Comments Invited On Rhythms Links Inc. Application To Discontinue Domestic Telecommunications Services*, Public Notice, NSD File No. W-P-D-517, DA 01-2009 (rel. Aug. 24, 2001).

services for Rhythms is provided by Rhythms Links. Rhythms states that on August 2, 2001, it publicly announced that it had filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York.⁵ Rhythms states that it has pursued alternative means to develop long-term business solutions, but despite these efforts, it must cease providing service. The application indicates that on August 9, 2001, Rhythms Links sent overnight-delivery notice of the proposed discontinuance to its affected customers and that on August 10, 2001, it issued a press release, notifying the public of its proposed discontinuance.⁶

4. By Public Notice dated August 24, 2001, the Commission notified the public that in accordance with 47 C.F.R. § 63.71(c), the application would be deemed to be automatically granted on the thirty-first (31st) day after the release date of this notice, unless the Commission notified Applicants that the grant would not be automatically effective.⁷ Accordingly, the automatic grant date for this application would be September 24, 2001. To this date, the Commission has received oppositions to Rhythms Links' application from thirty-six (36) customers.⁸ On August 31, 2001, Rhythms Links filed with the Commission an application seeking emergency discontinuance authority to be effective from September 10, 2001 until such date as the Commission grants permanent discontinuance authority.⁹

DISCUSSION

5. Section 214(a) of the Communications Act, as amended, states that “[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present no

⁵ Rhythms states that in a press release published nationwide and posted on its website, it outlined its intent to discontinue service in the event that reorganization was not possible.

⁶ Prior to the release of the Public Notice, the Commission received comments on Rhythms' proposed discontinuance from the following parties: Technology Service Corp. (8/13/01); KxS Inc. (8/13/01); Western Pest Services (8/16/01); The Legacy Companies (8/16/01); Checker's (8/16/01); Aston Consulting (8/16/01); 2001 Financial Corp. (8/16/01); Pass & Weisz, Inc. (8/16/01); Administrative Enterprises, Inc. (8/17/01); SiteLeader.com (8/17/01); HomeFed Corp. (8/17/01); The Saratoga Associates (8/17/01); Electric Wire, Products Corp. (8/17/01); The Cleveland Indians Baseball Company (8/17/01); ATM Fly-Ware (8/20/01); Novation Credit Union (8/20/01); Search Wizards, Inc. (8/20/01); Business Communications Network (8/20/01); Webtek Solutions, Inc. (8/20/01); The Benefit National Companies (8/20/01); William A. Malgieri, CPA (8/20/01); Downey Insurance Agency, Inc. (8/21/01); Advanced Insurance (8/21/01); The Brown Company (8/22/01); and The Family Eye Care Center (8/23/01).

⁷ *Comments Invited On Rhythms Links Inc. Application To Discontinue Domestic Telecommunications Services*, Public Notice, NSD File No. W-P-D-517, DA 01-2009 (rel. Aug. 24, 2001). After Public Notice's release, the Commission received comments from the following parties: Cisco Systems, Inc. (8/24/01); Driscoll & Gibson (8/24/01); Trinity Management Services (8/24/01); Bi-Coastal Properties, Inc. (8/27/01); Ideal Technology Solutions (8/27/01); Fiorita, Kornhass & Van Houten (8/27/01); Netisun & NetSolutions, Inc. (Joint Filing) (8/28/01); WorldCom, Inc. (8/29/01); BullsEye Telecom (8/31/01); and DIRECTTV Broadband (9/7/01).

⁸ See n.5, 6, *supra*.

⁹ Letter from Frank V. Paganelli, Vice President of Rhythms Links, to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated August 31, 2001 (Rhythms Emergency Application).

future public convenience and necessity will be adversely affected thereby.”¹⁰ The primary purpose of this requirement is to reduce the harm to consumers caused by discontinuances of service, which is an important aspect of the Commission’s general obligation under the Communications Act to protect and promote the public interest.¹¹ Accordingly, when reviewing an application for discontinuance under section 214, the Commission typically authorizes a carrier’s proposed discontinuance of service, unless it is shown that customers or other end users would be unable to receive service or a reasonable substitute from another carrier, or that the public convenience and necessity is otherwise adversely affected.¹²

6. In the case at hand, the Commission’s exercise of its obligation is particularly difficult given the circumstances surrounding carriers that have filed for bankruptcy protection. The Commission is cognizant of the need for carriers to have the opportunity to close operations. On the other hand, numerous commenters in this case allege that the public will be adversely affected. Thus, the Commission must make a thorough inquiry into the record to ensure that it has satisfied its statutory obligations.¹³

7. Applications for emergency discontinuance require a showing of special circumstances that would justify the Commission’s granting a discontinuance outside of the procedures set forth in section 63.71 of our rules.¹⁴ In particular, an applicant must show “conditions that could not have been foreseen by the carrier in sufficient time to prevent such discontinuance, reduction, or impairment.”¹⁵ As discussed below, Rhythms has failed to make such a showing.

8. In its Emergency Application, Rhythms stated that it had entered into a Voting Agreement providing that Rhythms would send a 31-day advance service termination notice to all customers on or before August 10, 2001 if certain conditions were met. The intent was apparently to allow Rhythms to discontinue service, if appropriate, on September 10, 2001. Section 63.71 of the Commission’s rules does not automatically grant a carrier the authority to discontinue service until 31 days following the date it files its application with the Commission.¹⁶ For these purposes, section 63.71(c) explicitly states that filing is not deemed to have occurred until the

¹⁰ 47 U.S.C. § 214(a).

¹¹ *See* 47 U.S.C. § 201.

¹² 47 CFR § 63.71(a).

¹³ *See* 47 U.S.C. § 214(a); 47 CFR § 63.71. *See also FCC v. RCA Communications, Inc.*, 73 S.Ct 998, 1002 (1953) (holding that the Commission has considerable discretion in deciding how to make its Section 214 public interest finding).

¹⁴ 47 CFR §§ 63.71; 63.63.

¹⁵ 47 CFR §§ 63.71(a).

¹⁶ Moreover, the Commission need not grant such an application on the 31st day if it determines that the public interest would not be served.

Commission issues a public notice of having received the application.¹⁷ It should be apparent from this provision in the rules, and it is in fact the case, that the filing of the application with the Commission, and the release of the Commission's public notice, do not occur on the same date. The notice apparently contemplated by Rhythms in its Voting Agreement is inconsistent with the notice provision in the rules, since the provision in the Agreement appears to assume, incorrectly, that the public notice is released the same day it is received by the Commission. Similarly, Rhythms' filing with the Commission, which was received by the Commission on August 10, 2001, could not have allowed Rhythms to discontinue service on September 10, 2001.

9. In addition, we conclude that the Commission's statutory duty to review the record and to determine whether a proposed discontinuance will affect the public convenience and necessity is equally applicable when reviewing an application for emergency discontinuance.¹⁸ At a minimum, this requires the Commission to determine whether affected customers have had a reasonable opportunity to obtain substitute service.¹⁹ In this case, there are over 35 commenters that allege that they will not be able to obtain substitute service prior to Rhythms Links' proposed discontinuance date.²⁰ We find that granting Rhythms Links' emergency petition would not allow us sufficient time to evaluate these customers' claims.²¹ While the Commission is sensitive to Rhythms Links' financial difficulties, we cannot overemphasize the importance of our charge to protect the public interest by ensuring the consumers have adequate notice and a reasonable opportunity to obtain new service. Accordingly, Rhythms emergency application for discontinuance authority is denied. We note, however, that Rhythms Links' non-emergency application, filed pursuant to section 63.71, is still pending, and is not affected by this order.

¹⁷ 47 C.F.R. § 63.71(c).

¹⁸ See 47 U.S.C. § 214(a).

¹⁹ See 47 CFR §§ 63.71(a), 63.63(a)(7).

²⁰ We note that we are not excluding the possibility that an emergency discontinuance application, pending grant of an underlying application, could issue in some circumstances where there was clearly no public interest harm. This case, however, does not present such a clear example, given the current record.

²¹ For example, Rhythms Links' largest customer, DIRECTTV Broadband, Inc. filed its opposition today, alleging that it will not be able to migrate its 17,000 customers prior to Rhythms Links' proposed emergency discontinuance.

ORDERING CLAUSE

10. In accordance with 47 CFR § 63.63(b), Rhythms, Rhythms Links, and Rhythms Links, Inc. – Virginia, are hereby notified that the emergency application to discontinue domestic telecommunications services is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood
Bureau Chief
Common Carrier Bureau