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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO: DAVID KIRSCHNER
Common Carrier Bureau
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DATE: December 16, 1999

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MAGALIE ROMAN SALAS
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FROM: GREGORY P. HUWE
Assistant Attorney General
Suite 200, 525 Park Street
St. Paul, MN 55103

PHONE: (651) 297-1223 (Voice)
(651) 297-1235 (Fax)
(651) 282-2525 (TTY)

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MIKE HATCH
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

December 16, 1999

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ORIGINAL

525 PARK STREET
SUITE 200
ST. PAUL, MN 55103-2106
TELEPHONE: (651) 297-2000

Ex Parte

Via Facsimile

David Kirschner
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: FCC Docket No. 98-1: Connecting Minnesota

Dear Mr. Kirschner:

As you requested during our telephone conference earlier today, this is to provide you with information concerning the current status of the Connecting Minnesota project.

Construction of the section of the network along the I-94 right of way between St. Cloud, Minnesota and Moorhead, Minnesota began during the fall of 1998. At the present time, the project developer, ICS/UCN, has completed installation of two 2-inch conduits on this route (approximately 175 miles). One of the conduits was installed for AT&T, Inc. which is a collocating customer of the developer under Section 5.12 of the Development Agreement, *Petition for Declaratory Ruling*, Exhibit 5 at V-15. That conduit will remain empty until such time as AT&T wishes to install fiber. It is our understanding that AT&T has contracted to lease dark fiber and has negotiated an option to lease additional dark fiber from ICS/UCN, which will provide this capacity from its own installed fiber. ICS/UCN has additional fibers in that route and is currently seeking customers to lease these remaining fibers.

The developer is contractually obligated to install and provide at least 48 strands of fiber throughout the planned network. Development Agreement, Section 5.1 (e), *Petition for Declaratory Ruling*, Exhibit 5 at V-1. The developer plans to install all fiber in protective conduit.

For your information, the developer will pull 192 strands of fiber through its conduit in the first segment of the network. Installation of fiber has been completed in about 140 miles of the St. Cloud/Moorhead route. Although the developer will install at least 48 strands in conduit throughout the network, additional conduit and strands will be installed where demand permits. For example, in the portion of the network located in the Minneapolis-St. Paul metropolitan freeway system, ICS/UCN plans to lay a minimum of eight conduits, one of which will be populated with 432 fibers. Much of the installed fiber will remain unlit, and it is anticipated that

David Kirschner
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more than sufficient capacity will remain available for interested users. In addition, the capacity of installed fiber can be substantially upgraded with enhanced electronics. *Petition for Declaratory Ruling, Affidavit of Bhimani, Exhibit 8.*

I have been told by engineering staff that once fiber has been pulled through a conduit, it is unlikely that additional fiber will be installed in that conduit, due to the potential for damage to existing fiber and the availability of other upgrade methods. *Id.* at paragraphs 10-12. Finally, as stated in previous submissions in this docket, there are many existing and alternative fiber providers and routes, as well as substantial excess installed capacity in this state. *Petition for Declaratory Ruling* at 21-25.

In response to another question you posed, AT&T Communications of the Midwest, Inc. has been granted a certificate of authority to provide local exchange service in portions of this state. *Order Granting Certificate of Authority with Conditions*, July 15, 1996, Docket No. P-442/NA-96-212, Minnesota Public Utilities Commission; *Order Granting Reconsideration and Clarification of Previous Order*, December 18, 1996 (same docket) (copies enclosed). AT&T Communications of the Midwest, Inc. is a competitive local exchange carrier, but is not an incumbent in any local exchange in this state. The entity which is collocating conduit is AT&T, Inc., which is apparently not the same corporate entity which has obtained the certificate of authority. I presume, however, that the two corporations are affiliated.

AT&T, Inc. may collocate conduit in other segments of the network, but that has not been finally decided. There are many other potential collocators as well, and if you have any further questions in that regard, I suggest you contact ICS/UCN.

I hope this information is responsive to your questions. Please feel free to contact me with any questions.

Sincerely,



GREGORY P. HUWE
Assistant Attorney General

(651) 297-1223

Enclosures

cc: Margaret Egler
Magalie Roman Salas
Commissioner David Fisher

AG:335823, v. 1

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Marshall Johnson
Dee Knaak
Mac McCollar
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of AT&T Communications of the Midwest, Inc. for a Certificate of Authority to Provide Local Exchange Service

ISSUE DATE: December 18, 1996

DOCKET NO. P-442/NA-96-211

ORDER GRANTING RECONSIDERATION AND CLARIFICATION OF PREVIOUS ORDER

PROCEDURAL HISTORY

On July 15, 1996, the Commission issued its ORDER GRANTING CERTIFICATE OF AUTHORITY WITH CONDITIONS. In that Order the Commission granted AT&T Communications of the Midwest, Inc. (AT&T) a certificate of authority to provide local exchange service in the State of Minnesota, subject to the following conditions:

- AT&T must obtain prior Commission approval of the Company's filed tariffs
- AT&T must obtain prior Commission approval of the Company's interconnection arrangements
- AT&T must include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory
- AT&T's authority, service offerings, and terms and conditions of service will be subject to the Commission's local competition rules being developed in rulemaking Docket No. P-999/R-95-53
- AT&T must proceed toward implementation of local service through a process which maintains all LEC and ILEC protections afforded under the Telecommunications Act of 1996 (the Federal Act)

On July 25, 1996, the Department of Public Service (the Department) filed a petition for reconsideration of the July 15, 1996 Order.

On the same date, the Minnesota Independent Coalition (MIC) filed a petition for reconsideration and clarification of the Order.

On August 5, 1996, the Residential Utilities Division of the Office of Attorney General (RUD-OAG) filed a petition for reconsideration.

On August 5, 1996, AT&T and US WEST Communications, Inc. (US WEST) filed responses to the Department's and MIC's petitions for reconsideration.

On August 15, 1996, AT&T filed a response to the RUD-OAG's petition for reconsideration and to US WEST's responsive comments.

On November 12, 1996, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. THE PETITIONS FOR RECONSIDERATION

A. The Department's Petition

1. Issues Raised

In its petition for reconsideration, the Department raised four issues regarding the July 15 Order:

- the Order's requirement for AT&T to include a list of territories it intends to serve
- the provision granting AT&T a certificate of authority to serve the entire state without requiring that it actually provide service to the entire state
- the relation of Minn. Stat. § 237.16, subd. 4 (the certificate amendment process) to the conditional certification process ordered for AT&T
- the relation of Minn. Stat. § 237.16, subd. 11 (mandating a contested case or expedited proceeding prior to granting authority to serve in the territories of small local exchange companies) to the conditional certification process ordered for AT&T

2. Responses

US WEST agreed with the Department regarding the need for service area maps rather than lists of municipalities to be served. US WEST expressed interest in the Department's questions regarding the application of the state certification process to the conditional certificate granted to AT&T.

AT&T stated that the Department's petition for reconsideration should be rejected because it raised no new issues of law or fact. The Commission is free to correct mistakes of fact or law on reconsideration, but in this case there were no such mistakes.

AT&T argued that Minn. Stat. § 237.16, subs. 4 and 5 apply only to incumbent local exchange companies (LECs), not to new entrants such as AT&T. Any other interpretation would require AT&T to come back to the Commission for approximately 90 separate hearings as it actually contemplated service to individual small LEC territories. Such a cumbersome process would constitute a barrier to entry contrary to the intent of state and federal law.

AT&T would agree to a Commission hearing before beginning to serve in any small LEC territory, but not to a duplication of hearings for each territory—one hearing under Minn. Stat. § 237.16, subd. 11 in the certification stage, and one under the Federal Act in the arbitration stage. The two hearings could be combined under the federal arbitration/interconnection process, removing an anti-competitive barrier to entry.

B. MIC's Petition

1. Issues Raised

MIC stated that both the Federal Act and Minn. Stat. § 237.16 recognize that unique issues are presented when companies propose local competition in the areas of small LECs (that is, those with fewer than 50,000 access lines). MIC argued that it is essential that the service obligations of the small LECs and AT&T, including the Eligible Telecommunications Carrier (ETC) service issues under the Federal Act, be resolved before the parties' negotiation/arbitration process begins. For these reasons, AT&T's proposal to combine the certification hearing under Minn. Stat. § 237.16, subd. 11 with the arbitration hearing under federal law would significantly lessen the protections meant to be afforded to small LECs.

MIC stated that the Order is unclear that the requirement of a contested case or expedited hearing under Minn. Stat. § 237.16, subs. 4 and 11 is deferred, but not eliminated, and will occur before AT&T is allowed to provide service in small LEC areas. MIC asked for clarification of this point.

2. Responses

US WEST disagreed with MIC's interpretation of the Federal Act's ETC obligations on large LECs.

AT&T argued that reconsideration is not necessary because the Commission's Order dealt adequately with the issues of small LEC protections under the Federal Act.

AT&T also argued that neither state nor federal law supports MIC's demand for an initial hearing under Minn. Stat. § 237.16, subd. 11 prior to the negotiation of any interconnection

agreement. On the contrary, the Federal Act plainly contemplates that any facilitation of the negotiation and arbitration processes will occur in conjunction with the Act's exemption/suspension/modification proceedings for rural LECs. The latter process is consistent with the pro-competitive structure of the state and federal laws.

Finally, AT&T argued that MIC is not entitled to the immediate contested case or expedited proceeding that MIC had suggested as an alternative to the initial hearing approach. MIC has not provided any legal support for its argument that AT&T must provide further explanation of its service plans.

C. The RUD-OAG's Petition

1. Issues Raised

According to the RUD-OAG, Minn. Stat. § 237.16, subs. 5 and 6 provide that a certificate should convey both a right and a corresponding obligation to serve all areas included in the certificate. AT&T's statewide certificate runs counter to this statutory provision, because AT&T does not have the ability or intent to serve the entire state.

The RUD-OAG argued that AT&T's statewide certification renders meaningless Minn. Stat. § 237.16, subd. 4, which requires notice and the opportunity for an expedited proceeding for a proposed territorial expansion. The RUD-OAG disagreed with AT&T's statement that the Subd. 4 amendment/expansion process constitutes a barrier to entry. The Federal Act preserved the state's right to protect its consumers and did not sweepingly preempt state laws on the pretext of removing barriers to entry. The RUD-OAG also disagreed with AT&T's statement that Minn. Stat. § 237.16, subd. 4 and 5 apply only to incumbents. If the legislature had intended to so limit the scope of these subdivisions, it would have done so.

The RUD-OAG stated that Minn. Stat. § 237.16, subd. 11 provides special protections for small LECs who are faced with local competition. The law entitles small LECs to a contested case or an expedited hearing when a new company requests certification to provide local service in the small LEC's territory. The RUD-OAG asked the Commission to clarify that it does not intend to deny small LECs the subd. 11 hearing, but rather intends to defer the hearing to the time when AT&T actually requests interconnection with the small LEC.

2. Responses

AT&T stated that the record is clear that AT&T intends to eventually provide local telephone service throughout the State of Minnesota.

AT&T stated that it will comply with statutory and rule requirements regarding the filing of service area maps as it negotiates interconnection agreements with various small LECs. Because this matter does not need to be addressed in the certificate itself, the Commission need not reconsider or clarify this issue.

AT&T argued that the Commission can adequately consider the unique rights of small LECs in conjunction with the interconnection process contemplated under the Federal Act.

II. COMMISSION ACTION

The issues raised by the parties requesting reconsideration fall under four major headings:

1) the standard for Commission reconsideration; 2) the requirement to file service area maps; 3) the extent of AT&T's authority to provide local service; and 4) the Commission's application of Minn. Stat. § 237.16, subd. 11 to ensure necessary protections for small LECs facing competition.

A. The Standard for Commission Reconsideration

AT&T cites In Re Minnesota Public Utilities Commission's Initiation of Summary Investigation, 417 N.W. 2d 274, 283 (Minn. Ct. App. 1987) for the proposition that the Commission should deny reconsideration if the petitioner fails to raise new arguments not previously considered. The Commission disagrees with AT&T's interpretation of this decision. The Court of Appeals merely found meritless the appellant's claim that the Commission had failed to address new arguments raised in appellant's petition for reconsideration. Elsewhere in this decision, the Court of Appeals actually stressed an administrative agency's inherent right to reconsider past decisions:

[A]n administrative agency has a well-established right to reopen, rehear, and redetermine the matter even after a determination has been made. This is a rule of general application.

In Re Minnesota Public Utilities Commission at p. 282.

The Commission's right to reconsider its previous decisions or Orders is found at Minn. Rules, part 7829.3000, subp. 6:

Commission Action. The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

The rule granting the Commission the authority to reconsider does not qualify that authority or limit it to newly introduced issues of law or fact. In its redeliberation, the Commission is free to apply its discretion and expertise to the entire record of the proceeding. The Commission may gain fresh insights from the parties' written briefs and oral arguments upon reconsideration. If the Commission finds that it has come to a conclusion which differs from the original opinion, the Commission may, and must, modify its prior decision to conform to the conclusion it believes is in the public interest.

In this instance, the Commission has carefully considered the oral and written comments of the parties upon reconsideration, as well as the record of the entire proceedings. Upon reconsideration, the Commission has concluded that its July 15, 1996 Order must be modified and clarified in some respects. In the remainder of this Order, the Commission will discuss its decision to reconsider and clarify portions of the July 15 Order.

B. The Requirement to File Service Area Maps

1. Introduction

In the July 15, 1996 Order, the Commission required AT&T to include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory.

The Department and the RUD-OAG asked the Commission to reconsider or clarify this portion of the Order to ensure that AT&T files service area maps as required under statute and rules.

2. Commission Action

The requirement for local providers to file service area maps is found in Minnesota statute and rule.

Minn. Stat. § 237.16, subd. 3 provides: "Every company authorized to provide local telephone service under this section shall file a territorial map. The map must comply with the rules prescribed by the commission."

Minn. Rules, part 7810.0500, subp. 2 provides in part:

Each telephone utility shall have on file with the commission an exchange area boundary map for each of its exchanges within the state. Each map shall clearly show the boundary lines of the area which the telephone utility holds itself out to serve in connection with the exchange. (Emphasis added.)

In its reconsideration filings, AT&T acknowledged its obligation to file detailed service area maps. At page eight of its August 5, 1996 response, the Company stated: "AT&T intends to provide maps showing the boundaries of the exchanges in which it is providing service, consistent with applicable law and rules. At page three of its August 15 filing, AT&T further stated: "There is no apparent reason why AT&T cannot file all required maps as it negotiates interconnection agreements with the incumbent LECs who presently control the local exchanges."

AT&T's obligation to file detailed service area maps is established in statute and rule. AT&T has acknowledged its obligation and intent to file the maps pursuant to statute and rule. The Commission will therefore clarify the portion of its July 15, 1996 Order which required AT&T

to include in its tariff an updated list of municipalities it serves. The Commission will clarify that this Order provision was not meant to supersede the statutory and rule provisions obliging AT&T to file detailed service area maps.

The Commission will require AT&T to file a map or maps showing exactly where the Company is providing service, consistent with the Commission's rules. The Company may reference the Commission's official maps and specific exchanges, if the Company is serving the entire exchange. Since an area to be served may not coincide with telephone exchange boundary lines, when the Company is serving less than an entire exchange it must provide a map indicating its exact service area.

C. The Extent of AT&T's Authority to Provide Local Service

1. Introduction and Summary of Commission Action

In the July 15, 1996 Order, the Commission granted AT&T a certificate of authority to provide local service in the State of Minnesota.

Upon reconsideration, with the benefit of parties' briefs and oral arguments, plus certain new facts brought to light, the Commission finds that it must modify the statewide scope of the certificate it previously granted to AT&T.

Minnesota has an orderly and comprehensive procedure for granting certification for local exchange service. A close reading shows that these statutory procedures can only provide their intended benefits and protections if the product of the certification process is a particularized certificate. A statewide certificate does not fulfill the legislative purpose of ensuring reliable, high quality local telephone service to particular areas under terms and conditions the Commission finds consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with Commission rules, and the Commission's rules.

The Commission will discuss in detail the major subsections that form the statutory certification process, and the need for compliance with these subsections to develop a particularized certificate of authority which ensures competitive benefits and protections.

2. The Certification Process Contemplated by Minn. Stat. § 237.16

Minn. Stat. § 237.16, subd. 1 New Service, Certificate of Authority. This subsection lays the basic framework for the state certification process. The statute gives the Commission the exclusive authority to authorize the provision of local service in the state, and to prescribe the terms and conditions under which service will be provided. The statute requires prospective entrants to demonstrate sufficient technical, managerial, and financial resources to provide service. The petitioner must also show that the terms and conditions of service will be consistent with the public interest—specifically, that service will be consistent with fair and

reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with Commission rules, and the Commission's rules.

This subsection indicates that the legislature intended the Commission to make findings regarding specific service to a particular set of ratepayers, in order to determine if the public interest would be served by the competitive entry.

Minn. Stat. § 237.16, subd. 3 Maps. As discussed previously in this Order, this subsection, which must be read together with relevant Commission rules, requires each local service provider to provide maps which clearly show the extent of the area the company holds itself out to serve.

This statutory subsection indicates a legislative intent to provide clear, understandable information regarding the boundaries of the specific local service offering. This legislative goal runs counter to the concept of statewide certification, under which a new entrant would presumably simply notify the public and regulatory agencies of a general intent to serve the entire state.

As an integral part of the state certification process, Minn. Stat. § 237.16, subd. 3 is a necessary protection for ratepayers seeking clear information regarding the scope of local service.

Minn. Stat. § 237.16, subd. 4 Amended Certificate Required for Expansion. With this subsection, the legislature provided a procedure for expanding local service. Under the procedure, the Commission focuses on the exact projected expansion (with the benefit of new maps provided by the petitioner), requires notice to affected municipalities and local telephone companies, and allows an expedited proceeding if objections are raised regarding the proposed expansion.

The amendment/expansion procedure indicates that the legislature intended the Commission to determine if the prospective entrant has the requisite intent and ability to serve in the expanded territory. This goal is contrary to the concept of statewide certification, under which expansion would simply take place as the company's technology or overall planning indicated, without the filing of new maps, notice to the community or other telephone companies, or the possibility of an expedited proceeding.

The Commission disagrees with AT&T's premise that the Federal Act and a statewide certificate render unnecessary the statutory amendment process for expansion. The Commission does not agree with AT&T's arguments that the certificate amendment subdivision is limited to incumbents, preempted by the Federal Act, a barrier to entry, or an anticompetitive hardship for AT&T.

Minn. Stat. § 237.16, subd. 4 is not limited in its application to incumbent service providers. The subdivision provides two exceptions to its provisions. First, a telephone company currently operating an exchange need not secure a certificate to expand or to substitute facilities in a

territory within which the company has previously filed maps. Second, a telephone company currently operating an exchange need not secure a certificate to expand into a contiguous, unserved territory if no certificate for the expansion territory has been issued to or applied for by another company. These limited, specific exceptions indicate that the subdivision otherwise applies to any local telephone provider, either an incumbent or a prospective entrant, that wishes to extend its service into some specific part of Minnesota service territory. Neither logic nor statutory language indicates that new entrants are exempt from the statutory requirements for service expansion.

Minn. Stat. § 237.16, subd. 4 is not preempted by the Federal Act. The process of obtaining certification for state service expansion is not contrary to any specific provision of the Act. Neither does the subdivision hinder the arbitration/interconnection process contemplated by the Federal Act. As a necessary part of our state certification process, the amendment process is consistent with the Act and allowed under it.

Minn. Stat. § 237.16, subd. 4 does not constitute a barrier to entry under the Federal Act. While the Act forbids state commissions from raising legal requirements which will prohibit or inhibit competitive entry, the Act further provides at § 253 (b):

(b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

As an integral part of the state certification process, Minn. Stat. § 237.16, subd. 4 is a necessary protection for consumers and is thus not a barrier to entry under the Federal Act. Neither can AT&T demonstrate practically that the statutory subdivision is a barrier to entry. The specter of 90 separate amendment proceedings as the Company gradually expands seems highly unlikely. Consolidated proceedings as the Company forecasts expansion are a more likely scenario.

Finally, Minn. Stat. § 237.16, subd. 4 does not constitute an anticompetitive hardship for AT&T. At the November 12 meeting, AT&T for the first time indicated that it does not contemplate actual statewide service for four to five years. A nonspecific number of expedited proceedings, many of which could probably be combined, and none of which should take more than 120 to 180 days, does not seem a hardship in an expansion plan of four to five years. The Commission also notes that AT&T would be free to begin the negotiation process with any of the small LECs during this time, even before AT&T's certification was amended to include the LEC territory.

As an essential part of the state certification process, Minn. Stat. § 237.16, subd. 4 allows the Commission to protect consumers, municipalities, and other telephone companies by granting service expansion to providers who have demonstrated the requisite intent and ability to provide service.

Minn. Stat. § 237.16, subd. 5 Revocation. With this subsection, the legislature provided a system by which the Commission may, after notice and hearing, revoke a certificate in whole or part. A certificate may be revoked for: the failure of its holder to furnish reasonably adequate telephone service within the area determined by the certificate; the failure of the holder to meet the terms and conditions of its certificate; or a holder's intentional violation of the Commission's rules or Orders.

The revocation procedure indicates that the legislature intended the Commission to be able to monitor and control the provision of local service under state certification. This goal is contrary to the concept of statewide certification, under which a provider could be certified throughout the state, without the ability to provide service, let alone adequate service, in most LEC territories.

In its petition for reconsideration, AT&T argued that the Federal Act and AT&T's statewide certification render the application of Minn. Stat. § 237.16, subd. 5 irrelevant to its state service. In defense of this argument, AT&T raised the same issues it had raised regarding Minn. Stat. § 237.16, subd. 4: the subsection is federally preempted; constitutes a barrier to entry; brings competitive hardship to a prospective entrant; and applies only to incumbent LECs. For the reasons stated in the preceding section of this Order, the Commission rejects these arguments. Minn. Stat. § 237.16, subd. 5, an integral part of the legislature's certification procedure, must remain in effect as an important check on a provider's ongoing or new provision of service.

Minn. Stat. § 237.16, subd. 11. Interim Authority in Areas Served by Telephone Companies with Less than 50,000 Subscribers. With this subsection, the legislature provided a process for the Commission to address the special issues raised by the advent of competition in small LECs' territories. This subsection, too, is an essential part of our state's orderly certification process. It cannot be bypassed or minimized without risking the protections meant to be provided small ILECs by the certification process.

The Commission will further address the special protections of Minn. Stat. § 237.16, subd. 11 in the next section of this Order.

3. Conclusion

Upon careful review of the parties' filings and arguments, the Commission finds that it must reconsider the scope of the certification it previously granted to AT&T. A statewide local certificate runs contrary to the goals the legislature carefully addressed in the state certification procedure. AT&T's compliance with state procedure through a particularized certification process is necessary to ensure the benefits and protections previously discussed in this Order: certification of a particular service to a particular set of ratepayers in conjunction with a public interest determination; clarification through maps of the extent of territory to be served; notice to consumers, municipalities, and other telephone companies that the certified entrant has the requisite intent and ability to serve; Commission monitoring of the adequacy of service; and a system of special protections for small LECs facing competition.

The Commission will limit the scope of AT&T's certificate of authority to the areas AT&T has demonstrated an ability and intent to serve, as indicated by the commencement of interconnection negotiations: territories currently served by US WEST Communications, Inc., GTE Minnesota, and United Telephone Company of Minnesota.

III. THE COMMISSION'S APPLICATION OF MINN. STAT. § 237.16, SUBD. 11 TO ENSURE NECESSARY PROTECTIONS FOR SMALL LECs

A. Introduction and Summary of Commission Action

At page seven of the July 15, 1996 Order, the Commission states:

The state certification process and the protections of the Federal Act will be considered together by the Commission when it addresses a new entrant's negotiation with an ILEC. When AT&T requests interconnection with a particular ILEC, the Commission will determine if AT&T should be allowed to provide local service in that territory under the provisions of both the state statutes and the Federal Act.

MIC, the Department, and the RUD-OAG asked the Commission to clarify that the Order allowed deferral of the subd. 11 protections for small LECs until AT&T actually requests interconnection, but did not eliminate the protections altogether. The Commission will so clarify its Order.

B. Commission Clarification

Minn. Stat. § 237.16, subd. 11 provides a separate procedure for Commission determination of a new entrant's application to provide local service in a territory served by a telephone company with fewer than 50,000 subscribers. In contrast to a nonspecific "determination" on an application for certification in a large LEC's territory under Minn. Stat. § 237.16, subd. 1, a contested hearing or expedited proceeding is required under this subsection to address the special issues facing small LECs. The statute specifically requires the Commission to consider "facts unique" to the small LEC facing competition. Minn. Stat. § 237.16, subd. 11 is also interim in nature, pending a separate rulemaking addressing the issues of small LECs (as required under Minn. Stat. § 237.16, subd. 8).

The separate procedures under Minn. Stat. § 237.16, subd. 11 indicate a legislative intent to provide special protections at the certification stage for small LECs facing local competition. While the procedures required certainly could, and usually should, be deferred until a new entrant has actually planned to expand into a small LEC's territory, the procedures cannot be eliminated, minimized, or superseded by the federal interconnection/arbitration process. Important issues unique to small LECs must be addressed outside the arbitration/interconnection proceeding. The service obligations of the potential competitor, possible designation of the entrant as an Eligible Telecommunications Carrier under the Act, fair and reasonable rates, and other special competitive issues for small telephone companies facing competition from major carriers must be resolved before the parties can enter into productive interconnection negotiations under the Federal Act.

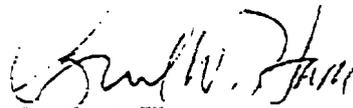
Minn. Stat. § 237.16, subd. 11 is an essential part of the state certification process, consistent and complementary with the provisions of the Federal Act. Maintenance of the state protections at the certification stage will not constitute a barrier to entry or an unreasonable competitive hardship for the new entrant. The alternative raised by AT&T--subsuming the Subd. 11 process into the sweeping federal arbitration/interconnection process--would mean that the special issues of small LECs facing competition would be given short shrift. This is not consistent with the process of reasonable protections contemplated by the state legislature.

The Commission will clarify that small LECs facing local competition are entitled to a proceeding under Minn. Stat. § 237.16, subd. 11 until local competition rules for small LECs are developed. AT&T may defer the Subd. 11 proceeding until the Company contemplates interconnection with each particular small LEC, but may not eliminate the state proceeding.

ORDER

1. The Commission reconsiders its July 15, 1996 Order to limit AT&T's certificate of authority to those areas AT&T currently intends to serve, as evidenced by the commencement of interconnection negotiations: territories currently served by US WEST Communications, Inc., GTE Minnesota, and United Telephone Company of Minnesota.
2. The Commission clarifies its July 15, 1996 Order by stating that AT&T must file detailed service area maps showing exactly where the Company is providing service, consistent with the Commission's rules and the provisions of this Order.
3. The Commission clarifies that small LECs facing local competition are entitled to a proceeding under Minn. Stat. § 237.16, subd. 11 until local competition rules for small LECs are developed. AT&T may defer the Subd. 11 proceeding until the Company contemplates interconnection with each particular small LEC, but may not eliminate the state proceeding.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

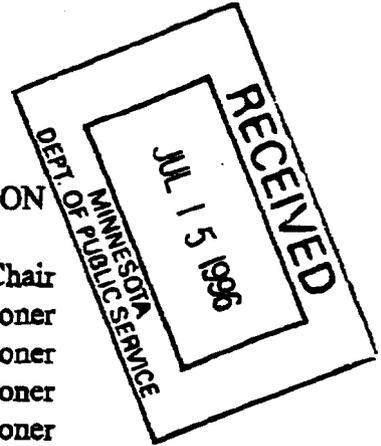


Burl W. Haar
Executive Secretary

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Tom Burton
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of AT&T Communications of the Midwest, Inc. for a Certificate of Authority to Provide Local Exchange Services

ISSUE DATE: July 15, 1996

DOCKET NO. P-442/NA-96-211

ORDER GRANTING CERTIFICATE OF AUTHORITY WITH CONDITIONS

PROCEDURAL HISTORY

On February 29, 1996, AT&T Communications of the Midwest, Inc. (AT&T or the Company) filed a petition for a certificate of authority to provide local exchange service in the State of Minnesota.¹

Between March 28 and May 15, 1996, US WEST Communications, Inc. (US WEST), Contel of Minnesota, Inc., d/b/a GTE Minnesota (GTE), United Telephone Company of Minnesota (United), Frontier Communications of Minnesota, Inc. (Frontier), and the Minnesota Independent Coalition (MIC) filed petitions to intervene in the proceeding.

Between April 15 and May 15, 1996, comments were filed by US WEST, Frontier, MIC, the Department of Public Service (the Department), and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG).

On May 28, 1996, US WEST and AT&T filed reply comments.

The matter came before the Commission on July 2, 1996.

¹ Under Minn. Stat. § 237.16, subd. 1(c), the Commission must make a determination on an application for a certificate of authority to provide local service within 120 days of the filing of the application.

After filing its application for a certificate of authority on February 29, 1996, AT&T requested a two week extension for the filing of initial comments. In doing so, AT&T agreed to a two week extension of the 120 deadline for Commission action under Minn. Stat. § 237.16, subd. 1 (c). The Commission's determination on the Company's application is therefore due on or before July 15, 1996.

FINDINGS AND CONCLUSIONS

I. THE PETITIONS TO INTERVENE

US WEST, GTE, United, Frontier, and MIC filed petitions to intervene in this proceeding. No party objected to any of the petitions. Under Minn. Rules, part 7829.0800, subp. 5, if there is no objection to a filed intervention petition and the petition is not denied or suspended within 15 days of filing, the petition is deemed granted. Pursuant to this rule, the petitions to intervene are granted.

If a request for arbitration is filed later in this proceeding, the Commission reserves the right to reevaluate the intervention requests in light of the unique characteristics of the arbitration process. Authority to intervene at this point in the process does not guarantee the right to intervene in any future arbitration phase of the proceeding.

The Commission notes that under Minn. Rules, part 7829.0800, subp. 3, the Department and the RUD-OAG have the right to intervene in any proceeding before the Commission.

II. AT&T'S REQUEST FOR A CERTIFICATE OF AUTHORITY

A. The AT&T Proposal and Comments

AT&T requested authority to provide local exchange service, including basic and ancillary residential and business intraexchange telecommunications service, private line, and switched and special access service. AT&T stated that it intends to provide both facilities-based and resold service on a statewide basis.

AT&T has begun interconnection negotiations under the federal Telecommunications Act of 1996 (the Federal Act) with both US WEST and GTE. AT&T indicated that it is negotiating informally with United on a national level and expects to submit an interconnection negotiation request to United by July 8, 1996. AT&T anticipates filing an interconnection negotiation request with Frontier in 1997. AT&T stated that it is studying the need for interconnection negotiations with other independent local exchange carriers with fewer than 50,000 access lines (ILECs). Even if the Federal Act requires interconnection requests for ILEC territories, AT&T does not anticipate making such requests before late 1997.

AT&T included an illustrative tariff with its filing and a local service area map showing the entire state of Minnesota.

AT&T stated that it would not oppose the Commission's placing the following conditions on its certificate: 1) a requirement to file tariffs which contain rates and charges as well as regulations under which AT&T will provide facilities and services to customers; 2) a requirement to file Commission-approved agreements for interconnection, services or network elements arrived at through negotiation or arbitration under the Federal Act; and 3) a commitment that the Company

will abide by all applicable state statutes and regulations not inconsistent with the Federal Act and related FCC rules which promote competition, support universal service, and help assure affordable, high quality service.

AT&T stated that it did not need to have an exact "plan" for offering service to each LEC and ILEC territory in the state. AT&T is currently working under the federal timelines to negotiate the terms and conditions of interconnection with GTE and US WEST; a "plan" for service would not even be possible for these areas at this time.

AT&T stated that it is not pursuing a Commission determination of a temporary interconnection arrangement under Minn. Stat. § 237.16, subd. 1, but is focusing on the ultimate negotiation and interconnection agreement provisions of the Federal Act.

B. Positions of the Parties

1. The Department

The Department recommended that the Commission approve AT&T's request for a certificate of authority with the following conditions: 1) the certificate is only for the US WEST and GTE exchanges, unless AT&T provides the Commission with specific plans for providing service in the other LECs' territories. AT&T may expand its service area later, if necessary, by amending its certificate as permitted under Minn. Stat. § 237.16, subd. 4; 2) prior to offering local service in the area of an incumbent LEC, AT&T must obtain Commission approval of its interconnection agreement with the LEC; and 3) prior to offering service, AT&T must obtain Commission approval of its tariff.

The Department stated that the impact of the Federal Act and Minnesota statutes on service to ILECs is as yet unclear. The Department recommended excluding the ILECs from AT&T's conditional certificate of authority at this time.

The Department stated that AT&T has made no commitment to serve statewide. The Department believed that a definite plan to serve certain areas in a certain time is necessary for certification. Without such a requirement, every new entrant will ask for automatic statewide certification, the Commission will be breaking from its precedent, and the provisions for certificate amendment and notice in Minn. Stat. § 237.16 will be ignored.

2. The RUD-OAG

The RUD-OAG stated that AT&T's request for statewide authority to serve is premature because the Company is not ready, willing, and able to provide statewide service at this time. In addition, AT&T's application lacks the necessary information to determine if the Company's entry fulfills the requirements of Minn. Stat. § 237.16, subd. 1. Under that statute, the proposed service must be consistent with the provision of universal service, fair competition, and affordable and high quality service.

The RUD-OAG argued that AT&T's statewide application violates the rules of statutory construction because it renders meaningless the statutory requirements to file a territorial map and an application to amend the company's certificate of authority.

The RUD-OAG stated that the Federal Act does not preempt the Minnesota certification process, as implied by AT&T's filing.

According to the RUD-OAG, AT&T is seeking the right to provide statewide service without taking on any of the corresponding service obligations.

3. US WEST

US WEST agreed with the RUD-OAG that AT&T's filing lacks substance. According to US WEST, AT&T wants unfettered rights to serve in Minnesota without service obligations.

US WEST agreed with the Department that AT&T's certificate should be conditioned on the filing and approval of an appropriate tariff after the Company has negotiated an interconnection agreement. In essence, this procedure would defer evaluation of the terms under which AT&T will offer its services to a later date. At that time, AT&T must demonstrate that it has satisfied its statutory responsibilities in the same manner as any other local service provider regulated by the Commission.

4. Frontier

Frontier stated that the Federal Act grants rural telephone carriers such as Frontier certain significant rights, including: 1) a determination by the Commission whether a company competing to provide local service to Frontier's territory must become an Eligible Telecommunications Carrier (ETC) [Section 253 (f) and 214 (e)(1)]; 2) the right to negotiate a voluntary interconnection arrangement which waives some or all of the federal interconnection requirements [Section 252 (a)]; 3) the right to seek mediation or arbitration concerning interconnection arrangements [Section 252 (b)]; and 4) the right to request suspension or modification of any or all federal interconnection obligations [Section 251 (f)(1)].

Frontier stated that AT&T has not yet requested negotiations with Frontier. Until AT&T discloses specifically which of Frontier's customers it intends to serve, which exchanges it intends to serve, and how it intends to provide service in those exchanges, it is impossible to determine if AT&T should become an ETC, or what federal or state rights should be granted to AT&T or Frontier. The Commission should therefore not include Frontier's service territory in any certificate of authority currently granted to AT&T. AT&T may apply for an amended certificate of authority under Minn. Stat. § 237.16, subd. 4 when it has an exact business plan for serving Frontier customers.

5. MIC

MIC, a coalition of over 80 Minnesota ILECs, asked the Commission to dismiss or reject the AT&T application in regard to all areas for which the Company lacks current plans to serve. MIC gave several reasons for its request. First, Minn. Stat. § 237.16 requires that certificates of authority be granted only for areas that a company actually plans to serve and does serve. Second, in the absence of any actual service plans, the Commission will be unable to conduct a fact-based review of the impact that AT&T's proposal will have on customers, as required under Minn. Stat. § 237.16. Third, the public interest determinations of Minn. Stat. § 237.16 are entirely consistent with the public interest determinations of the Federal Act. Both the Federal Act and Minn. Stat. § 237.16 clearly intend that the interests of rural consumers will be protected. Those protections must be implemented before AT&T is permitted to serve.

C. Commission Action

1. The Standards for Granting a Certificate of Authority

The standards for Commission approval of a petition for authority to provide new service are found at Minn. Stat. § 237.16, subd. 1(b):

No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under the terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

2. AT&T's Application for a Certificate of Authority Considered under the Statutory Standards

a. The Necessary Technical, Managerial, and Financial Resources

AT&T Communications of the Midwest, Inc. is a wholly-owned subsidiary of AT&T Corporation. In 1994, AT&T Corporation and its subsidiaries had \$43 billion in sales of telecommunications services. AT&T Corporation has indicated that it will provide any necessary technical, managerial, and financial resources for its subsidiary's provision of local service in Minnesota.

AT&T has provided telecommunications service in Minnesota for over 100 years. AT&T is currently authorized by the Minnesota Secretary of State to do business in the State.

No party alleged that AT&T lacks the necessary technical, managerial, or financial resources to provide local service within the State.

The Commission finds that AT&T has demonstrated that it possesses the requisite technical, managerial, and financial resources for certification under Minn. Stat. § 237.16, subd. 1 (b).

b. Other Standards for Certification under Minn. Stat. § 237.16, subd. 1 (b)

Under Minn. Stat. § 237.16, subd. 1(b), the terms and conditions under which the applicant will be certified must be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

The Commission finds that these essential factors cannot be determined upon examination of AT&T's application alone. Only through analysis of the Company's filed tariffs and interconnection arrangements can the Commission consider such issues as the exact services proposed; the market and classes of customers targeted; the implications of universal service requirements; quality standards; the scope of the intended local calling area; rates; and terms and conditions of the interconnection arrangements.

The Commission has determined that AT&T possesses the requisite managerial, technical, and financial abilities to provide service in Minnesota. The other essential standards under Minn. Stat. § 237.16, subd. 1(b) can only be demonstrated through the Company's filed tariffs and interconnection arrangements with incumbent LECs. The Commission will therefore grant AT&T a conditional certificate of authority, contingent upon:

- eventual Commission approval of the Company's filed tariffs
- eventual Commission approval of the Company's interconnection arrangements

The Commission finds that the condition of approval for interconnection arrangements and tariffs should answer many of the Department's, RUD-OAG's, and US WEST's concerns regarding the substance of AT&T's filing and the specifics of proposed service. In order to more fully address these public interest and fair competition concerns, the Commission will add the following conditions to the certificate:

- AT&T must include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory
- AT&T's authority, service offerings, and terms and conditions of service will be subject to the Commission's local competition rules being developed in rulemaking Docket No. P-999/R-95-53

3. Other Issues Raised by the Parties

In its filings, AT&T stated that Commission approval is not necessary for its tariffs, since the Company is regulated as a telecommunications carrier under Minnesota statute. The

Commission disagrees with AT&T's analysis; as previously stated in this Order, Commission approval of tariffs will be a condition of certification. Minn. Stat. § 237.035(e) provides that a telecommunications carrier's local service will be subject to Minn. Stat. Ch. 237, with the exception of rate of return investigations and depreciation requirements. Minn. Stat. § 237.16, subd. 13 states that, pending adoption of the Commission's local competition rules, "the local services provided by a telecommunications carrier are subject to this chapter in the same manner as those local services of a telephone company regulated under this chapter..." (with the same two exceptions). Minn. Stat. §§ 237.06 and 237.07 require telephone companies to file their tariffs, which are subject to the requirement of being fair and reasonable. AT&T must therefore obtain Commission approval of its tariffs and such approval is appropriately placed as a condition of certification.

The Department, RUD-OAG, Frontier, and MIC expressed concern regarding the statewide scope of the Company's certification. The parties expressed particular concern regarding protections for ILECs which may be abrogated if area-specific certification and certificate amendment are not required. The Commission finds that its certification process, whether confined to a specific area or considered statewide, will not impinge on the protections built into the Federal Act.

When AT&T specifically requests interconnection with an ILEC, that ILEC will have available to it the full protections for ILECs contained in the Federal Act. Those protections will include: 1) ILEC exemption from the negotiation and interconnection requirements of § 251 (c); 2) the right of ILECs to petition for a suspension or modification of the obligations and interconnection requirements of § 251 (b) or (c); 3) the arbitration process for resolving disputed issues between negotiating carriers; 4) the Commission review and approval process for negotiated and arbitrated agreements; and 5) the authority to require that AT&T qualify as an ETC before providing service in an ILEC territory. When AT&T requests interconnection with an ILEC, the process will be subject to the same nine month negotiation/mediation/arbitration process imposed on negotiations with LECs under the Federal Act.

In order to ensure that all parties understand that LECs and ILECs will maintain their full protections under the Federal Act in their negotiations with AT&T, the Commission will place the following further condition upon AT&T's certificate:

- AT&T must proceed toward implementation of local service through a process which maintains all LEC and ILEC protections afforded under the Federal Act

The state certification process and the protections of the Federal Act will be considered together by the Commission when it addresses a new entrant's negotiation with an ILEC. When AT&T requests interconnection with a particular ILEC, the Commission will determine if AT&T should be allowed to provide local service in that territory under the provisions of both the state statutes and the Federal Act. If the Commission determines that AT&T should not be allowed to provide service in the ILEC territory, the Commission will make a finding that AT&T has not met one of the conditions of its certificate for that exchange (that is, the condition of having observed all

rights of the incumbent ILEC under the Federal Act). AT&T's statewide authority will then be limited to exclude the ILEC exchange.

D. Conclusion

The Commission has determined that AT&T possesses the requisite managerial, technical, and financial abilities to provide local service in Minnesota. The other essential standards under Minn. Stat. § 237.16, subd. 1(b) can only be demonstrated through the Company's filed tariffs and interconnection arrangements with incumbents. In order to address parties' concerns regarding the specific nature of AT&T's proposed service, the Commission will require the Company to include in its tariff an updated list of all areas actually served. The Commission will require AT&T to implement local service in a manner which maintains all rights of incumbent LECs and ILECs under the Federal Act; this requirement will be memorialized as a condition of the certificate. Finally, as a new entrant, AT&T's authority, service offerings, and terms and conditions of service will be subject to the Commission's local competition rules being developed in rulemaking Docket No. P-999/R-95-53.

ORDER

1. If a request for arbitration is filed later in this proceeding by US WEST, GTE, United, Frontier, or MIC, the Commission reserves the right to reevaluate the parties' intervention requests in light of the unique characteristics of the arbitration process. The authority for these parties to intervene at this point in the process does not guarantee their right to intervene in any future arbitration phase of the proceeding.
2. The Commission grants AT&T a certificate of authority to provide local exchange service in the State of Minnesota, subject to the following conditions:
 - AT&T must obtain prior Commission approval of the Company's filed tariffs
 - AT&T must obtain prior Commission approval of the Company's interconnection arrangements
 - AT&T must include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory
 - AT&T's authority, service offerings, and terms and conditions of service will be subject to the Commission's local competition rules being developed in rulemaking Docket No. P-999/R-95-53
 - AT&T must proceed toward implementation of local service through a process which maintains all LEC and ILEC protections afforded under the Federal Act

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Janet G. Gonzales, for:
Burl W. Haar
Executive Secretary

(SEAL)

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