

P-3007/NA-89-76 ORDER REQUIRING U S WEST COMMUNICATIONS, INC. TO APPEAR ON CUSTOMER BALLOTS, REQUIRING PRIOR AUTHORIZATION BEFORE DISCONTINUANCE OF TOLL SERVICE, AND ESTABLISHING A SCHEDULE FOR FURTHER FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson
Cynthia A. Kitlinski
Norma McKanna
Dee Knaak
Patrice Vick

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the
Minnesota Independent Equal
Access Corporation's
Application for a Certificate
of Public Convenience and
Necessity

ISSUE DATE: March 13, 1991

DOCKET NO. P-3007/NA-89-76

ORDER REQUIRING U S WEST
COMMUNICATIONS, INC. TO APPEAR
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PROCEDURAL HISTORY

On February 7, 1989, the Minnesota Independent Equal Access Corporation (MIEAC) filed an application for a certificate of authority to provide centralized equal access (CEA) services to interexchange carriers (IXCs) on behalf of any independent local exchange carrier (ILEC) which chooses to use its services.

On June 2, 1989, the Commission issued its NOTICE AND ORDER FOR HEARING, referring MIEAC's application to the Office of Administrative Hearings for contested case proceedings.

On August 22, 1990, the Administrative Law Judge (ALJ) assigned to the MIEAC case issued his Findings of Fact, Conclusions of Law and Recommendations.

By September 15, 1990, the following parties had filed exceptions to the ALJ's Report: MIEAC, U S WEST Communications (USWC), the Minnesota Department of Public Service (the Department), the Residential Utilities Division of the Office of the Attorney General (RUD-OAG), AT&T Communications of the Midwest, Inc. (AT&T), and MCI Telecommunications Corporation (MCI).

By September 24, 1990, the same parties and Teleconnect Long Distance Services and Systems Company (Teleconnect) filed replies to the exceptions.

On November 26, 1990, the Commission issued its ORDER ESTABLISHING A COMMENT PERIOD in this matter regarding USWC and AT&T's participation on the ballot and service to PILECs during the operation of MIEAC's equal access system.

On December 10, 1990 the RUD-OAG filed comments in response to the Commission's November 26, 1990 Order.

On December 11, 1990, MIEAC, the Department, the Minnesota Office of State Planning and MCI filed comments in response to the Commission's November 26, 1990 Order.

On December 12, 1990, AT&T filed comments in response to the Commission's November 26, 1990 Order.

On December 26, 1990, MIEAC, USWC, the Department, RUD/OAG, AT&T and MCI filed reply comments.

On February 20, 1991, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

Equal access service allows a customer to select by presubscription from among the interexchange carriers (IXCs) that are competing for the toll traffic from that customer's local exchange. MIEAC proposes to establish a system that will provide independent local exchange companies (ILECs) with the ability to offer equal access services to their customers. ILECs that contract with MIEAC for equal access services "participate" in the MIEAC system and therefore are referred to as Participating ILECs or PILECs. Under MIEAC's equal access system, PILEC customers will select their choice of IXC (for interLATA toll service and intraLATA toll service) on ballots that are distributed to them by MIEAC before the MIEAC system goes into operation.

The primary decision that the Commission was required to make in this proceeding was what kind of certificate of authority, if any, it would grant to MIEAC to provide certain telecommunications services in Minnesota. In its January 10, 1991 Order in this matter, the Commission granted MIEAC a certificate of authority subject to certain conditions under which the Commission has found that MIEAC's proposed service will serve the public interest.

II. THE PARTICIPATION ISSUES: USWC AND AT&T

The current Order focuses on two issues which are separate from the MIEAC certification issue but which have a practical bearing on the implementation phase of MIEAC's service. These issues have come to be referred to in this matter as the Participation Issues.

As framed in the Commission's November 20, 1990 ORDER ESTABLISHING COMMENT PERIOD, the Participation Issues were:

1. Appearance on the Ballot: Will the Commission require the dominant IXC that currently provides 1+ interLATA toll service to the PILECs (AT&T) and the dominant IXC that currently provides 1+ intraLATA toll service to the PILECs (USWC) to appear on the ballot made available to PILEC customers or will the ballot appearance of these IXCs be voluntary?
2. Discontinuation of Service: Will the Commission permit the dominant IXCs (AT&T for interLATA toll service and USWC for intraLATA toll service) to discontinue toll service to the PILECs once the MIEAC system is in operation?

The Commission has had the benefit of the parties' thorough presentation of their positions in the comment and reply process established by the Commission specially for these issues in its November 26, 1990 ORDER ESTABLISHING A COMMENT PERIOD and in extensive oral argument at the close of that process. The Commission has thoroughly examined the issues regarding USWC's appearance on the ballot and the obligations of USWC and AT&T to provide on-going provision of service in PILEC exchanges during MIEAC's operation and makes the following determinations.

A. The Ballot Appearance Issue

Under MIEAC's equal access system, PILEC customers will select their choice of IXC (for interLATA toll service and intraLATA toll service) on ballots that are distributed to them before the MIEAC system goes into operation. Each exchange will have its separate specially-designed ballot listing the IXCs providing service in that exchange from which subscribers may choose.

1. AT&T

The dominant interLATA toll service provider, AT&T, has indicated that it will voluntarily appear on the interLATA IXC ballot in all exchanges that participate in the MIEAC system. There is no need, therefore, for the Commission to decide the Ballot Appearance Issue with respect to AT&T.

2. USWC

The dominant intraLATA toll carrier, USWC, maintains that it will not voluntarily appear on the ballot in MIEAC exchanges.¹ MIEAC seeks an order directing USWC's appearance on all such ballots. MIEAC asserts that USWC's ballot appearance is required by Minn. Stat. § 237.60, subd. 3 (1990) which states:

¹ In its testimony before the ALJ, USWC indicated that its service to individual PILEC exchanges is of varying profitability. USWC characterized individual exchanges as either "winners" or "losers". USWC has consistently sought in this matter to escape the obligation to provide service to the ILEC exchanges that are "losers."

Subd. 3. **Discrimination.** No telephone company shall offer telecommunications service within the state upon terms or rates that are unreasonably discriminatory. No telephone company shall **unreasonably limit** its service offerings to particular geographic areas **unless facilities necessary for the service are not available and cannot be made available at reasonable costs.** The rates of a telephone company must be the same in all geographic locations of the state unless for good cause the commission approves different rates. A company that offers long-distance services shall charge uniform rates and charges on all long-distance routes and in all geographic areas in the state where it offers the services. However, a company may offer or provide volume discounts in connection with intrastate long-distance services and may pass through any state, municipal, or local taxes in the specific geographic areas from which the taxes originate. Nothing in this subdivision authorizes a telephone company to provide service outside of its authorized service area except as provided in section 237.16. (Emphasis added.)

Notwithstanding this statute, USWC desires to select which exchange ballots it will appear on and which it will not. USWC presents a number of arguments in support of its asserted right to select which ballots it will appear on.

USWC Denies Applicability of Minn. Stat. § 237.60, subd. 3 (1990)

First, USWC notes that the statute relied upon by MIEAC to require USWC's appearance on all PILEC exchange ballots, Minn. Stat. § 237.60, subd. 3 (1990), says nothing about balloting. USWC argues that limiting its appearances to certain ballots is not a limitation on a "service offering" and is therefore not prohibited by the statute because toll service, not appearance on a ballot, is the service that it is offering.

The Commission finds no merit in this narrow argument. Many statutes, particularly regulatory statutes that were intended to empower the Commission to regulate utilities in the public interest, cover activities that they do not specifically name. In this case, the statute uses the term "service offering" which is certainly broad enough to include activity that determines whether a service is in reality offered or not offered. For all practical purposes, as of the polling date the only way toll service is "offered" and the only way subscribers will obtain toll service from a particular service provider in MIEAC's pre-subscription IXC selection system will be through choosing a company that appears on the ballot. In such a system, non-appearance of a current provider on the ballot is tantamount to discontinuation of the service in that exchange by the non-appearing company. At the very least, it is a substantial limitation upon its service.

Second, USWC argues that the intent of Minn. Stat. § 237.60, subd. 3 (1990) is to prevent geographically de-averaged rates. USWC argued that by continuing to serve its own exchanges located in all geographic areas of the state the company would meet the geographic averaging intent of Minn. Stat. § 237.60, subd. 3 (1990) to assure geographically averaged rates. The Commission finds that the statute in question does not simply limit geographic deaveraging as USWC states. The statute contains several substantive provisions. One of those provisions does focus on the problem of geographically de-averaged rates. It states:

The rates of a telephone company must be the same in all geographic locations of the state unless for good cause the commission approves different rates. Minn. Stat. § 237.60, subd 3. (1990).

Another provision of the statute, however, the one that the Commission finds relevant to this case, clearly focuses of the problem of telephone companies unreasonably limiting their service in certain geographic areas.

No telephone company shall **unreasonably limit** its service offerings to particular geographic areas **unless facilities necessary for the service are not available and cannot be made available at reasonable costs.**
(Emphasis added.)

The fact that USWC may meet the geographic deaveraging requirements of Minn. Stat. § 237.60, subd. 3 (1990) does not relieve it of the obligation to comply with the anti-limitation of service provisions of that statute. The Commission finds that USWC's proposal not to appear on some ballots is subject to the anti-limitation of service provisions of Minn. Stat. § 237.60, subd. 3 (1990).

The parties offer differing interpretations of the anti-limitation of service language:

MIEAC's Interpretation of the Anti-Limitation of Service Provisions of Minn. Stat. § 237.60, subd. 3 (1990)

MIEAC notes that this provision will sunset on August 1, 1994, but that until then it provides an important protection to customers during the transition from a monopoly to an emerging competitive service to established competition. MIEAC states that because of the "unless" clause, a company may not discontinue ("limit") its service unless one of two circumstances stated in the statute exist. The two circumstances are: 1) if facilities necessary for the service are not available and 2) if those facilities cannot be made available at reasonable costs. According to MIEAC, the sentence should be read to mean that no company may limit its service offerings to particular geographic areas unless 1) facilities necessary for the service are not available, or 2) those facilities cannot be made available at reasonable costs.

USWC Interpretation of the Anti-Limitation of Service Provisions of Minn. Stat. § 237.60, subd. 3 (1990)

USWC argues that the statute allows a company to limit its service if that limitation is "reasonable" and only prohibits limitations that are unreasonable.

Commission Interpretation: Minn. Stat. § 237.60, subd. 3 (1990) Requires A Two-Stage Analysis of What Limitations are Permitted

MIEAC misinterprets the proviso clause that appears in the provisions in question. The part of the statute in question is as follows, with the proviso clause underlined:

No telephone company shall unreasonably limit its service offerings to particular geographic areas unless facilities necessary for the service are not available and cannot be made available at reasonable costs. Minn. Stat. § 237.60, subd. 3 (1990). (Emphasis added.)

A proviso clause places limits on the language that it refers to. Minn. Stat. § 645.19 (1990). The language that this particular proviso clause refers to is the general proposition that:

No telephone company shall unreasonably limit its service offerings to particular geographic areas....

The proper role of a proviso clause is not to define the general proposition, but to provide exceptions to the general proposition. In this case, therefore, the proviso (the "unless" clause quoted above) comes into play only if the Commission finds the general proposition, i.e. that a company has unreasonably limited its service offerings to particular geographic areas. MIEAC's interpretation would make the proviso the operative language of the statute, rather than words of limitation.

In addition, the Commission finds that MIEAC's interpretation of the sentence in question fails to properly recognize that the legislature placed the word "unreasonably" in the sentence and that the statute's general proposition is a prohibition against a company *unreasonably* limiting its service offerings to particular geographic areas. Minn. Stat. § 237.60, subd. 3 (1990). In fact, MIEAC interprets the sentence as if it did not contain the word "unreasonably." In so doing, MIEAC violates a primary law of legislative construction:

...Every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. § 647.15 (1990).

The Commission is bound to give meaning to every word in the statute. Minn. Stat. § 647.15 (1990). Accordingly, the Commission finds that the Commission's initial responsibility under the sentence at issue is to determine whether a company has limited or proposes to limit its service "unreasonably" to particular geographic areas. If the Commission determines that

the limitation is reasonable, the inquiry ends there and the limitation is not prohibited by the statute. If, however, the initial determination by the Commission is that the limitation is unreasonable, the Commission must proceed to determine whether either of two exempting conditions exists, i.e. that 1) facilities necessary for the service are not available or 2) those facilities cannot be made available at reasonable costs. Such a construction gives effect to the term "unreasonably" appearing before "limit" and likewise gives proper effect to the "unless" clause. If either condition exists, the limitation is not prohibited by the statute. If neither condition exists, the limitation is prohibited.

Commission's Two-Stage Analysis of USWC's Proposal

Stage 1: Determining the Reasonableness of USWC's Proposal to Limit its Toll Service to Some Exchanges by Not Appearing on the Ballots of Those Exchanges

In support of the reasonableness of limiting its 1+ toll service in certain PILEC exchanges by not appearing on the ballot, USWC advanced several arguments:

First, USWC denies that non-appearance on the ballot limits its service to a de-selected exchange in any significant fashion. USWC notes that it will continue to serve PILEC exchanges as facilities carrier of last resort, will provide FG-D service to incidental traffic and can be reached by subscribers through 10XXX dialing. In addition, USWC states that it will provide 1+ intraLATA toll service to any subscriber in any such de-selected exchange if the subscriber contacts it requesting that USWC be its toll service provider and if certain conditions relating to the ballot process are met.

The Commission finds that the elements of continuing USWC service and presence in de-selected exchanges cited by USWC are not 1+ toll service equivalents and may not be used to offset any loss of that service. The question is whether USWC's limitation on the provision of 1+ toll service, i.e. not appearing on the ballot and only providing it upon special request from a subscriber, is a reasonable limitation on that service.

As indicated earlier, the Commission believes that not appearing on the ballot and only providing it upon special request from a subscriber is a substantial limitation on USWC's 1+ intraLATA toll service. For all practical purposes, the only way toll service is "offered" as of the polling date and the only way subscribers will obtain toll service from a particular service provider in MIEAC's pre-subscription IXC selection system will be through choosing a company that appears on the ballot. In such a system, non-appearance of a current provider on the ballot is tantamount to discontinuation of the service in that exchange by the non-appearing company. The Commission finds that at the very least it is a substantial limitation upon USWC's 1+ intraLATA toll service.

Second, USWC argues that once MIEAC's system is operative, the presence of several other qualified IXC's to serve PILEC customers in USWC's place will render discontinuation of USWC's service reasonable. At least for the short term, the Commission does not accept this argument:

1. The record indicates that a substantial number of PILEC customers would select USWC as their intraLATA toll carrier of choice in balloting. Allowing USWC to discontinue its toll service, therefore, would prevent a substantial number of PILEC subscribers from getting their intraLATA toll service provider of choice. The Commission finds that customer demand is a key indicator of adequate service that the Commission as well as the company has a statutory duty to assure. Minn. Stat. § 237.06 (1990) and Minn. Stat. § 237.081 (1990).
2. Maintaining USWC as a provider of intraLATA toll service in PILECs during the approximately two year period that MIEAC will be operational before Minn. Stat. § 237.60, subd. 3 (1990) expires will provide an opportunity to obtain obtain knowledge critical to the establishment of policies for a more fully competitive marketplace.
3. The Commission has found that appearance on the ballot is an inseparable part of providing the service in question, intraLATA toll service. Requiring USWC to continue to provide intraLATA toll service in the PILEC exchanges does not impose an unreasonable financial burden on USWC. The company's revenues from providing toll service to PILEC customers are based on rates that the Commission has determined to be fair and reasonable and which provide USWC a reasonable return when averaged statewide.
4. In its previous January 10, 1991 Order, the Commission found that under certain conditions, MIEAC's CEA will serve the public interest and potentially bring substantial benefits to PILEC exchanges. Allowing USWC to withdraw from serving PILECs would force ILECs to choose between providing MIEAC's CEA and continuing the availability of a highly popular intraLATA toll provider. As such, it would create a disincentive for ILECs to join the MIEAC system. Absent a overriding reason for doing so, which USWC has not provided, the Commission is reluctant to allow this disincentive to prejudice MIEAC's project.

Third, USWC argues that because balloting will occur only once, carriers that are on the ballot will have no practical way of later withdrawing from service in the exchange short of going out of business. The Commission declines to construe USWC's responsibilities under the statute in question on the basis of USWC's faulty prediction of unavoidable negative consequences. If at some point in the future the Commission determines that USWC's discontinuation of its toll service is reasonable, the Commission will simply authorize a discontinuation plan and timetable that takes into account the interests of all concerned,

including provision of adequate time and information to subscribers to allow them to make a smooth transition to another toll provider.

An additional factor indicates the unreasonableness of USWC's proposed limitation of service. The ballot effectively represents to the subscribers that the listed companies are the only companies available to provide the subscriber with toll service. The converse is equally true. Non-appearance on the ballot is a representation that the non-appearing company is not available to provide toll service to that subscriber. The fact is, however, that the Commission has determined that USWC will continue to provide toll service in all PILEC exchanges. The Commission finds that misrepresenting to subscribers USWC's availability to provide toll services in their exchange by not appearing on the ballot is unacceptable.

After careful consideration of USWC's arguments, the Commission finding that USWC's proposed limitation on its 1+ intraLATA toll service is unreasonable.²

Stage Two: Determination Whether USWC Meets Either of the Two Exceptions Provided in the Anti-Limitation Provisions of Minn. Stat. § 237.60, subd. 3 (1990)

The Commission must next determine whether either of two conditions exist that would exempt USWC's proposed limitation from prohibition under the statute. The two conditions are: 1) facilities necessary for the service are not available and 2) those facilities cannot be made available at reasonable costs.

The Commission finds that neither condition exists in this case. Condition 1: Since USWC currently provides 1+ intraLATA toll service in the PILEC exchanges, it has the required facilities to continue doing so. Condition 2: In establishing the rates that USWC is authorized to charge for toll service in the ILEC exchanges, the Commission considered USWC's costs and revenues statewide and found that the rates were high enough to allow USWC a reasonable rate of return. USWC has not alleged or shown that its statewide rate of return is unsatisfactory. In these circumstances, the Commission finds that the costs of continuing this service in the ILEC exchanges are reasonable.

Commission Determination: USWC Proposed Limitation Prohibited by Minn. Stat. § 237.60, subd. 3 (1990)

The selective appearance of USWC on the ballots of some exchanges and not others would result in precisely the kind of discrimination against "particular geographic areas" that the

² The Commission need not consider the conditions proposed by USWC to govern the ballot process. Even without conditions, USWC's proposal not to appear on some ballots and to provide toll service only if contacted by a subscriber is an unreasonable limitation on its toll service.

statute seeks to prevent. Pursuant to Minn. Stat. § 237.60, subd. 3 (1990), therefore, the Commission will not authorize USWC to select which ballots it will appear on but will require USWC to appear on the intraLATA ballot in each PILEC exchange where it currently provides intraLATA toll service.

B. Discontinuation of Service Prior to August 1, 1994

Currently, USWC provides 1+ intraLATA toll service and AT&T provides 1+ interLATA toll service to all ILEC customers. AT&T has indicated that it will participate in the initial balloting and will continue to provide interLATA toll service in all exchanges *at this time* but feels that once MIEAC is operating it should be free to discontinue its service. USWC has not expressed a desire to discontinue 1+ toll service to the PILECs at this time, but also maintains that it is under no legal obligation to continue such service. USWC specifically disputes MIEAC's argument that Minn. Stat. § 237.60, subd. 3 (1990) obligates it to continue providing its 1+ intraLATA toll service in PILEC exchanges until the statute expires on August 1, 1994.

Neither AT&T nor USWC proposes actual discontinuation of service at this time. The Commission cannot speculate whether some subsequently proposed limitation or discontinuation of service will be allowed or prohibited by Minn. Stat. § 237.60, subd. 3 (1990). Nor need the Commission address whether after the expiration of Minn. Stat. § 237.60, subd 3 (1990) on August 1, 1994 similar authorization will be required under Minn. Stat. § 237.12, subd. 2 (1990) prior to discontinuing toll service to the PILECs.

It is appropriate, however, for the Commission to give clear direction regarding the process and standard it will use in making such determinations between now and the expiration of Minn. Stat. § 237.60, subd 3 (1990) on August 1, 1994.

The Process

It is unclear whether the companies contemplate making such decisions unilaterally and discontinuing their services without obtaining prior Commission approval.

To avoid any misunderstanding on this point, the Commission will clarify that prior to limiting or discontinuing toll service to the PILEC exchanges, prior Commission approval is required. Prior to discontinuing any toll service in Minnesota, USWC and AT&T will be required to apply for an order from the Commission authorizing the discontinuation.

The Standard

Discontinuation of service is perhaps the most significant "limitation" that a company can place on its service. The Commission finds, therefore, that any discontinuation of toll

services by AT&T and USWC would certainly be subject to the anti-limitation provisions of Minn. Stat. § 237.60, subd. 3 (1990).

In determining whether a future proposed limitation or discontinuation is prohibited by the anti-limitation provisions of Minn. Stat. § 237.60, subd. 3 (1990), the Commission will use the two-stage analysis that it applied to USWC's proposed limitation (selective non-appearance on the ballot) in this Order. Stage one: the Commission will determine whether the proposed limitation (discontinuation of service) is reasonable. Stage two: if the limitation is found unreasonable, the Commission will determine whether either of two exempting conditions exist. If the Commission finds that neither condition exists, the discontinuation of service will not be allowed. If either condition exists, the discontinuation will be allowed.

ORDER

1. U S West Communications, Inc. (USWC) shall appear on the intraLATA ballot in each exchange that participates in MIEAC's CEA system where it currently provides intraLATA toll service .
2. U S West Communications, Inc. (USWC) is not authorized to discontinue providing intraLATA toll service in exchanges of independent local exchange companies that participate (PILECs) in the centralized equal access (CEA) system of the Minnesota Independent Equal Access Corporation (MIEAC). Prior to discontinuing any such service, USWC shall apply to the Commission and secure Commission approval.
3. AT&T Communication of the Midwest, Inc. (AT&T) is not authorized to discontinue providing interLATA toll service in exchanges of independent local exchange companies that participate (PILECs) in MIEAC's centralized equal access (CEA) system. Prior to discontinuing any such service, AT&T shall apply to the Commission and secure Commission approval.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)