

P-3007/NA-89-76 ORDER DENYING STAY AND REQUIRING ALTERNATIVE
LANGUAGE ON BALLOTS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

ISSUE DATE: July 30, 1991

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

ORDER DENYING STAY AND REQUIRING
ALTERNATIVE LANGUAGE ON BALLOTS

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 services to interexchange carriers on behalf of any participating independent local exchange carrier (PILEC) which chose to use its services.

On January 10, 1991, the Commission issued its ORDER GRANTING CERTIFICATE OF AUTHORITY TO PROVIDE EQUAL ACCESS SERVICE.

On March 13, 1991, the Commission issued its 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.

On May 20, 1991, the Commission issued its ORDER AFTER RECONSIDERATION in this proceeding.

On June 12, 1991, the Commission received the Motion of US West Communications, Inc. to Stay Balloting of PILEC Exchanges. US West Communications, Inc. (USWC) requested the Commission to stay the equal access balloting of subscribers in PILEC exchanges until USWC's appeal of the Commission's Orders is resolved.

On June 13, 1991, USWC filed a petition for writ of certiorari on the Commission's Order with the Minnesota Court of Appeals. The appeal appears to be limited to the balloting issue.

On June 18, 1991, the Commission issued a Notice of Comment Period and Commission Meeting in response to USWC's June 12 motion. In the notice, the Commission requested interested parties to respond to USWC's motion by July 3, 1991.

On July 3, 1991, comments in response to USWC's motion were received from MIEAC, the Minnesota Department of Public Service (the Department), the Residential Utilities Division of the Office of the Attorney General (RUD-OAG), and MCI Telecommunications Corporation (MCI).

On July 11, 1991, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

Request for Stay Directed to Commission Discretion

Minn. Stat. Chapter 14 governs appeals from orders of the Commission. Minn. Stat. § 237.25 (1990). Regarding stays of order under appeal, Chapter 14 provides that the mere filing of a writ of certiorari to secure appellate review of an order does not stay enforcement of that order but that either the Commission or the Court of Appeals may grant such a stay "upon such terms as it deems proper". Minn. Stat. § 14.65 (1990). The legislature has provided no particular formula or checklist of factors which the Commission must consider in exercising its discretion to grant or deny a stay of orders involving telephone companies. Nor have the courts required the Commission to follow any particular formula in determine stay requests. Granting a stay, therefore, is a matter left to the sound discretion of the Commission.

As a guide in the exercise of its discretion, the Commission has had recourse to the factors that Minnesota courts consider in deciding whether to stay the enforcement of court orders. In a June 30, 1987 Order¹, the Commission referred to the formula set forth in State v. Northern Pacific Ry. Co., 22 N.W.2d 569 (Minn. 1946). In Northern Pacific, the Minnesota Supreme Court indicated that courts deciding stay requests should grant the stay

whenever it appears that without it the objects of the appeal or writ of error may be defeated, or that it is reasonably necessary to protect appellant...from irreparable or serious injury in case of a reversal, and it does not appear that appellee...will sustain irreparable or disproportionate injury in case of affirmance. It should be granted where...the loss or damage occasioned by the stay can be met by a monetary award, where important questions of law are raised, which, if decided in favor of appellant..., will require a reversal, to avoid a multiplicity of suits, or to protect the appellate court's jurisdiction.

22 N.W. 2d at 574-575.

Requests for stays directed to the Commission are similar to requests for temporary injunctive relief directed to the trial court in that they are both directed to the equity power of the

¹ In the Matter of the Application of Northwestern Bell Telephone Company, Minneapolis, Minnesota for Authority to Change its Schedule of Telephone Rates for Customers Within the State of Minnesota, Docket No. P-421/GR-83-600, ORDER GRANTING STAY AND ACCEPTING AGREEMENT TO REFUND (June 30, 1987).

decision maker to maintain the status quo pending the ultimate decision on the matter. Hence, factors that courts are required to consider in determining whether to grant temporary injunctive relief may also be used to guide the Commission's deliberation of this matter. In Dahlberg Bros. v. Ford Motor Co., 272 Minn. 364, 137 N.W. 2d 314 (1965), the Minnesota Supreme Court articulated the factors relevant to a court's determination of a request for temporary injunction as follows:

- (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
- (2) The harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
- (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
- (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
- (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

As explained earlier, neither Northern Pacific nor Dahlberg govern Commission discretion in this matter in the sense of prohibiting the Commission from considering any factor that the Commission deems relevant.² Therefore, the Commission need not choose between these two formulae but instead is informed by both. In sum, in deciding whether to grant a stay, the Commission proceeds in a manner calculated to give the matter due consideration.

² The Commission notes that the considerations articulated in Northern Pacific and Dahlberg are generally quite similar and the differences between the two formulae are not substantial. However, in light of the Commission's priority on the protection of customers and the public interest (public policy considerations), the Commission notes that the Dahlberg formula more explicitly provides for such considerations. See Dahlberg Consideration No. 4. Also, in evaluating the potential for harm to the appellant (USWC) and the appellee (MIEAC) and to the public that would be caused by a stay, an evaluation of the likelihood of the appellant's (USWC's) success on the merits of its appeal, while impliedly relevant under the Northern Pacific formula, is more clearly provided for in the Dahlberg formula. See Dahlberg Condition No. 3.

USWC's Requests

In its original Motion for Stay, USWC requested that the Commission stay the balloting by MIEAC in PILEC exchanges until USWC's appeal of the Commission's Orders was resolved.³ In oral argument before the Commission, USWC modified its request. Under USWC's modified request, the Commission would not prohibit balloting prior to the Court of Appeals' decision, but would stay the Commission's March 13, 1991 Order requiring USWC to appear on the intraLATA ballot pending the Court of Appeals' decision. Under the modified request, the Commission would not enter an order staying (i.e. enjoining) the balloting, but would stay the Order requiring USWC to appear on the ballot and direct MIEAC not to include USWC on its ballot pending the Court of Appeals' decision on USWC's appeal.

Commission Deliberations and Action

In this case, the following considerations lead the Commission to deny USWC's modified request.

1. Object of USWC's Appeal Not Defeated if No Stay Granted

USWC has not shown that the object of its appeal will be defeated if no stay is granted. To understand this clearly, it is important to identify the object of USWC's appeal.

In its appeal of the Commission's March 13, 1991 Order, USWC does not contest the part of that Order in which the Commission rules that USWC must continue to provide intraLATA toll service in PILEC exchanges until it applies for and receives Commission approval to discontinue that service.⁴ Instead, USWC contests the Commission's ruling that USWC must appear on MIEAC's intraLATA ballot because a failure to do so would be an unreasonable limitation of its service in violation of Minn. Stat. § 237.60, subd. 3 (1990). Prior to the Commission's March 13, 1991 Order, USWC withdrew an earlier request that it be allowed to choose what exchanges it wished to continue to serve and stated that it was willing to continue to serve in all the PILEC exchanges but wanted to serve only those subscribers who contacted it directly requesting service.

On the basis of USWC's statement that it is willing to serve all subscribers in PILEC exchanges who contact it directly requesting service and the particular ruling appealed by USWC, it is clear

³ Use of the term "stay" in USWC's original motion is a misnomer. The motion was not authorized, as USWC indicated, by Minn. Stat. § 14.65 (1990). USWC's original motion did not actually a request for a stay of a Commission Order. No Commission Order had directed MIEAC to proceed with balloting. USWC's request that the Commission "stay" the balloting was actually in the nature of a request for injunctive relief, i.e. for an order enjoining MIEAC from proceeding with the balloting.

⁴ Ordering Paragraph 2 of the Commission's March 13, 1991 Order in this matter.

that the object of USWC's appeal is to be free from serving subscribers who choose it from a ballot, and to serve only those subscribers who contact it directly requesting service.

If the Court of Appeals decides that the Commission was in error in requiring USWC to appear on MIEAC's intraLATA carrier ballot as an essential element of its service as an intraLATA carrier in PILEC exchanges, it will still be possible to give USWC its wish, i.e. to serve only those subscribers who contact it directly requesting service. Nothing irreversible will have occurred during the pendency of its appeal that will preclude USWC from limiting its service to those subscribers who directly contact it requesting service.

2. No Showing of Irreparable Harm to USWC

USWC has not shown that it will suffer irreparable injury if the requested stay is not granted. The only harm to itself that USWC asserts is a potential for customer ill-will toward several parties including USWC if reballoting were required due to its having prevailed at the Court of Appeals.

The vision of harm to USWC is unrealistic. First, due to requirements set out in this Order, the event identified by USWC as the occasion of subscriber ill-will (reballoting), will not be necessary. In this Order, the Commission directs MIEAC to prepare a ballot that will require subscribers initially selecting USWC as their intraLATA toll carrier to indicate their second choice intraLATA toll carrier. The ballot should also explain why this second choice is necessary. See this Order at page 8, Ordering Paragraph 2. With such a ballot, which the Commission will review and approve as to wording before it is issued, the Commission does not believe it likely that customers would bear substantial ill-will toward USWC if the Court of Appeals later decides that USWC has the right to serve only those subscribers who directly contact it requesting service. Second, in the unlikely event that some subscribers did disapprove USWC's decision to exercise its right to serve only the subscribers that contacted it directly, it does not appear that this disapproval would really matter to USWC.

3. Disproportionate Injury to MIEAC in Event of Affirmance

MIEAC alleges that a stay of the Commission's order could be fatal to MIEAC. MIEAC notes that a stay until the Court of Appeals renders its decision on USWC's appeal will delay MIEAC's implementation of its centralized equal access (CEA) service in the PILECs by several months, resulting in loss of substantial monthly revenues that it could have been experiencing during those months. MIEAC states that this cash flow is needed to meet required payments on long term debt it has incurred to purchase needed equipment and to pay staff salaries. In addition, MIEAC asserts that delay of this expected cash flow is likely to cause a prospective lender to refuse to close on an additional negotiated but not yet finalized loan and/or refuse to advance additional funds needed to meet MIEAC's financial obligations.

MIEAC's loss of revenue during the delay period has been adequately documented and is substantial. This loss of revenue will undoubtedly have a negative impact upon the company's ability to attract financing during this period. The substantial monetary losses occasioned by granting the requested stay may, in fact, cause MIEAC to lose access to future financing necessary to fully implement CEA in the PILEC exchanges.

In comparing MIEAC's substantiated monetary loss and diminished attractiveness to lenders if a stay is granted with the ill-will that USWC speculates it will experience from some PILEC subscribers if the stay is not granted and USWC later wins and exercises the right to withdraw from serving subscribers who chose USWC by ballot, it is clear that MIEAC's injury is both greater and more likely to occur.

4. Likelihood of Success of Appeal

In evaluating what harm will befall USWC if a stay is not granted, it is also relevant to consider how realistic it is to anticipate that USWC could prevail in its appeal.⁵

USWC is appealing a Commission decision that USWC's not appearing on MIEAC's intraLATA ballot be an unreasonable limitation of its service in violation of Minn. Stat. § 237.60, subd. 3. In its appeal, USWC unsuccessfully attempts to characterize the decision appealed as involving strictly legal issues. In fact, the appealed decision is quite clearly the Commission's policy determination of what constitutes an unreasonable limitation on telephone service, a determination rooted in the Commission's analysis of facts in the record. Such decisions are completely within the Commission's expertise and the Court of Appeals traditionally gives them substantial deference. In these circumstances, it appears highly unlikely that USWC will prevail in its appeal.

5. Advancement or Frustration of Public Policy

The Commission has a special responsibility to protect the interests of subscribers and not subject them to unnecessary delay in the receipt of beneficial services. In its January 10, 1991 ORDER GRANTING CERTIFICATE OF AUTHORITY TO PROVIDE EQUAL ACCESS SERVICE in this docket, the Commission thoroughly reviewed the public policy objectives involved in MIEAC's proposal to provide centralized equal access service in the PILEC exchanges. The Commission concluded that, as conditioned in the Order, MIEAC's proposal was consistent with the public interest. This Order has not been appealed. Its findings are binding on the parties in this matter pursuant to Minn. Stat. § 237.26 (1990). Having found

⁵ The Commission applied this stay criterion in a recent case. In its January 23, 1991 ORDER DENYING STAY AND REQUIRING REFUND AND CESSATION OF COLLECTION OF INTERIM RATES in Docket No. E-002/GR-89-865, the Commission found that the potential for harm to the appellant was minimal because there was little likelihood that it would prevail on appeal.

MIEAC's proposal, as conditioned, to be in the public interest and of benefit to PILEC subscribers, the Commission is not inclined to delay its implementation, particularly since USWC's appeal appears to be without merit.

The Commission also has responsibility to protect telephone subscribers from unnecessary confusion and inconvenience in the delivery of telephone services. If the Commission stayed the requirement that USWC appear on the ballot and MIEAC proceeded to conduct the balloting without USWC on the ballot, reballoting would almost certainly be required once the Court of Appeals upheld the Commission's decision to require USWC's presence on the ballot. In light of the Iowa reballoting experience cited by all parties, it is the Commission's view that reballoting would cause subscribers in PILEC exchanges substantial inconvenience and confusion. Reballoting would also occasion additional expenses that would in all likelihood find their way into CEA rates paid by subscribers in PILEC exchanges.

At the same time, the Commission respects the right of USWC to attempt to secure from the Court of Appeals its asserted right not to be selected by PILEC exchange subscribers as their intraLATA toll carrier through MIEAC's balloting process. A stay is not necessary to preserve USWC's pursuit of such a right, however.

In lieu of a stay, the Commission's provision of a second choice on the ballot for subscribers who originally choose USWC as their intraLATA toll carrier adequately protects subscribers from unnecessary delay as well as from the confusion and inconvenience of reballoting. At the same time, such a ballot will provide USWC a graceful way to avoid serving subscribers that it does not want to serve, i.e. those who merely chose it by ballot rather than by contacting USWC directly to request service, in the event that the Court of Appeals finds that USWC has the right to do so. In sum, requiring this alternate ballot language allows both the Court of Appeals process and the balloting process to proceed full speed ahead while accommodating the legitimate interests of all parties concerned.

ORDER

1. The request by U S West Communications, Inc. (USWC) for a stay of the Commission's March 13, 1991 Order in this matter is denied.
2. Prior to issuing intraLATA ballots to subscribers in PILECs, the Minnesota Independent Equal Access Corporation (MIEAC) shall submit its intraLATA ballot to the Commission for approval and secure Commission approval of such ballot. The ballot shall require subscribers to indicate a second choice for intraLATA toll provider if the subscriber initially selects USWC and explain why this requirement is necessary.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)