

P-442/EM-92-135 ORDER ACCEPTING FILING AS NEW SERVICE PURSUANT TO
MINN. STAT. § 237.60, SUBD. 2 (f)

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Request by
AT&T Communications of the
Midwest, Inc. to Offer AT&T
Optimum Service

ISSUE DATE: August 10, 1992

DOCKET NO. P-442/EM-92-135

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SERVICE PURSUANT TO MINN. STAT.
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PROCEDURAL HISTORY

On February 21, 1992, AT&T Communications of the Midwest, Inc. (AT&T or the Company) filed a petition requesting Commission approval of a service called AT&T Optimum Service. The Company filed the proposal as a new service offering pursuant to Minn. Stat. § 237.60, subd. 2 (f).

On March 17, 1992, the Department of Public Service (the Department) filed its report and recommendation. The Department recommended that the Commission approve the proposal as a new pricing plan pursuant to Minn. Stat. § 237.60, subd. 2 (e).

In reply comments filed April 6, 1992, AT&T restated its position that the proposal should be viewed as a new service and not as a new pricing plan under the statute.

The Department filed reply comments on April 14, 1992.

On July 14, 1992, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

The Company's Proposal

AT&T's proposed Optimum Service would provide switched and dedicated long distance service. The proposal would provide certain options in billing and trend reports, a service inquiry center dedicated to Optimum Service customers, and new service standards for hooking up new systems and providing repairs.

The Competitive Statutes

AT&T has elected to have its services classified as subject to emerging competition under Minn. Stat. § 237.58. Optimum Service is part of AT&T's custom network, an emergingly competitive service listed under Minn. Stat. § 237.59. For these reasons, the service proposal is reviewed under the competitive statutes, Minn. Stat. § 237.57-.62.

Minn. Stat. §§ 237.57-.62 were enacted by the legislature to provide a framework for the identification and regulation of emergingly competitive and effectively competitive telecommunication services. The statutes reflect a regulatory continuum from noncompetitive services through emergingly competitive services to effectively competitive services. As the level of competition for a telephone service increases, the statutes provide for less stringent regulatory oversight and control. The statutory framework contemplates minimal regulatory oversight as a service becomes effectively competitive and market forces work to control price and quality of service.

Minn. Stat. § 237.60, subd. 2 provides specific guidance for the Commission's oversight of emergingly competitive services. Two subheadings under that subdivision have been cited by parties in this proceeding. AT&T proposed that its service offering be approved pursuant to Minn. Stat. § 237.60, subd. 2 (f), which reads as follows:

A telephone company may offer a new service to its customers ten days after it files a price list and incremental cost study for the service with the department and the commission.

The Department recommended that the Company's proposal be approved pursuant to Minn. Stat. § 237.60, subd. 2 (e), which reads:

If a new pricing plan is proposed for a service that is currently offered by a telephone company, the change in the price list is subject to the same schedules governing a price increase under paragraph (b). For purposes of this paragraph, a new pricing plan is a proposal that bundles rate elements for a service, alters the definition of the rate elements for a service, or includes increases for some rate elements and decreases for other rate elements.

Minn. Stat. § 237.60, subd. 2 (b), upon which the above paragraph is premised, reads in pertinent part as follows:

A company may increase the rate for a service subject to emerging competition that is listed in the price list effective 30 days after notice is given to affected customers, the commission, and the department. **** The department shall investigate...and report its findings to the commission within 30 days of the filing. The commission may, within 60 days after the date of the filing, order that the rate increase is interim in nature and subject to

refund. If interim rates are not ordered, the rate increase is not refundable. If a rate is subject to refund, the commission, after a contested case hearing or an expedited hearing under section 237.61 if there are no material facts in dispute, must make a final decision regarding the propriety of the rate increase within ten months of the date the price change was filed. If the commission does not do so, the price change is deemed approved.

There are two main differences between Minn. Stat. § 237.60, subd. 2 (f) and Minn. Stat. § 237.60, subd. 2 (e). The first statute provides for a ten day notice period for a new service while the latter statute provides for a 30 day notice period for a new pricing plan. The statutory subheadings also differ in the amount of authority and oversight which is provided for the Commission.

Under Minn. Stat. § 237.60, subd. 2 (f), a telephone company may offer a new service to its customers ten days after it files a price list and incremental cost study with the Commission and the Department. Thus, no investigation or review process is contemplated by the statute. If necessary, the Commission would be able to bring a complaint proceeding against the Company pursuant to Minn. Stat. § 237.081. However, the Company's new service would remain in effect pending resolution of the complaint and would not be subject to refund under the statute.

Minn. Stat. § 237.60, subd. 2 (e) provides for greater Commission oversight and control of an emergingly competitive service offering. The statute provides for a Department investigation and report for each proposed pricing plan. The Commission may declare the price increase to be interim and subject to refund; if such a finding is made, a contested case hearing or an expedited hearing is held to determine the propriety of the increase. Thus, subd. 2 (e) provides for more regulatory oversight and control than subd. 2 (f).

Positions of the Parties

AT&T argued that its proposed Optimum Service offering is clearly a new service rather than a new pricing plan. The Company stated that the proposal is within the plain meaning of "new service" under the statute, since there is no existing AT&T Optimum Service. The Company argued further that the proposal before the Commission has a number of service features and characteristics which are not available from other AT&T services. AT&T urged the Commission to reject the Department's contention that the proposal consists of a simple repackaging of common telephone service elements. AT&T reasoned that this argument would reduce every new plan to a new pricing plan, since all service offerings are composed of certain common elements. Finally, the Company stated that the main test by which a service proposal must be judged is its potential adverse effect on existing customers. The Company stated that the greater protection afforded in subd. 2 (e) for pricing plans is necessary because of the potential rate shock for existing customers. Since a new service

such as Optimum Service has no existing customers, the minimal regulatory oversight of subd. 2 (f) is appropriate.

The Department argued that AT&T's Optimum Service must be considered a new pricing plan, not a new service. According to the Department, the service is a new pricing plan because it is basically a repackaging of switched and dedicated access, with a few new or unique elements added to the mix. The Department argued that the functionality of the proposal is key: if the service consists of a reconfiguration of existing common service elements the offering is a new pricing plan, not a new service. The Department also stated that the basic service provided, message toll service, has remained unchanged.

Commission Analysis

Although the legislature has provided guidance under Minn. Stat. §§ 237.57-.62, decisions regarding the proper classification of emergingly competitive services can be difficult. Often there is no bright line between offerings which are new pricing plans and those which are new services. AT&T's proposed Optimum Service presents this type of difficult fact question under the statutes.

The Commission is unwilling to adopt the Department's argument that AT&T's proposal is a new pricing plan because it contains core elements which are common to other AT&T services. The Commission does not find determinative the fact that Optimum Service provides message toll service, or switched and dedicated service, elements which are common to other AT&T offerings. An analysis which focuses on the presence of core service elements is overbroad. Few, if any, offerings would be considered new services under such a stringent test. Such a result would be contrary to the legislature's plan of providing varying levels of oversight and review under Minn. Stat. § 237.60.

On the other hand, the Commission is unwilling to accept any company's designation of a proposed service offering without an independent analysis of the proposal under the statute. The Commission agrees with the Department's intent to apply the greater level of oversight found under Minn. Stat. § 237.60, subd. 2 (e) whenever a proposal fits the regulatory description of a new pricing plan rather than a new service.

The Commission must therefore analyze proposed service offerings on a case-by-case basis, avoiding overly broad application of the new pricing plan designation while maintaining standards consistent with the emergingly competitive statutes. One part of the analysis can be an examination of the functionality of the elements offered in the proposal. This analysis would not focus on the presence of common core service elements, but upon the actual function of the elements offered in the proposal. Under such an examination, the Commission would ask if the plan is a restructuring of old elements with some sort of new "spin" or if the proposal offers something new to customers which was not available to them before.

In a particularly close call between a new pricing plan and a new service designation, the Commission may wish to look beyond the character of the elements comprising the offering. In such a case, an examination of the potential adverse effect on existing customers is appropriate. The Commission agrees with the Company that this issue underlies the varying levels of oversight set out in Minn. Stat. §§ 237.60. The statute provides for greater review and oversight as the potential for adverse effect on existing customers increases.

Applying the above analyses to AT&T's Optimum Service offering, the Commission finds that this is a new service under the statutes. The elements found in the offering comprise a truly new service, one which offers enhanced service characteristics not available through other AT&T services. A dedicated Optimum Service account inquiry center and a unique billing package are examples of such characteristics of this new service. AT&T's proposal also poses little threat of adverse effect on existing customers. There are currently no Optimum Service customers, since the service as such has not been offered prior to this proposal. As the Department stated in its March 17, 1992 report, "Customers of AT&T's existing services would be unaffected by the new filing, although they may subscribe to the new pricing plan." Thus, the greater oversight and review under subd. 2 (e) are not warranted by potential rate shock or confusion for existing customers.

Because the Commission finds that AT&T's offering is a new service under Minn. Stat. § 237.60, subd. 2 (f), Commission approval of the offering is not necessary under the statute. The Commission will therefore simply note that the service proposal has been properly filed, including a price list and an incremental cost study.

Finally, the Commission would like to emphasize that its finding in this case is not meant to discourage further investigations and close inquiry of utility service offerings by the Department. Many of these offerings present difficult factual issues and the Department's opinion and investigation results are highly valuable to the Commission in its decision making process.

ORDER

1. AT&T's filing of its Optimum Service proposal is accepted under Minn. Stat. § 237.60, subd. 2 (f).
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)