

P-3075/NA-91-898 ORDER GRANTING MOTION TO INTERVENE,
CONSOLIDATING DOCKET, PARTIALLY DISMISSING COMPLAINT, GRANTING
CERTIFICATE OF AUTHORITY, AND REQUIRING FURTHER FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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| Don Storm | Chair |
| Tom Burton | Commissioner |
| Cynthia A. Kitlinski | Commissioner |
| Dee Knaak | Commissioner |
| Norma McKanna | Commissioner |

In the Matter of the Request of Sherburne Long Distance Company for a Certificate of Authority to Provide Interexchange Telephone Service Within the State of Minnesota

ISSUE DATE: October 16, 1992

DOCKET NO. P-3075/NA-91-898

In the Matter of the Complaint of Bridge Water Telephone Company Concerning the Bypass by Sherburne County Rural Telephone Company, Sherburne Long Distance, Inc., Sherburne Fibercom, Inc., Northern States Power Company, and US WEST Communications, Inc.

DOCKET NO. P-427, 3075, 3081, 421/C-92-9

ORDER GRANTING MOTION TO INTERVENE, CONSOLIDATING DOCKET, PARTIALLY DISMISSING COMPLAINT, GRANTING CERTIFICATE OF AUTHORITY, AND REQUIRING FURTHER FILINGS

PROCEDURAL HISTORY

On November 15, 1991, Sherburne Long Distance, Inc. (SLD) filed an application for a certificate of authority to provide telecommunications service in Minnesota. In this application, SLD requested authority to offer one interexchange pricing plan, a DS-1 private line tariff.

On January 28, 1992, SLD withdrew the proposed DS-1 tariff and substituted a proposed Self Healing Network Service (SHNS) tariff.

On January 3, 1992, Bridge Water Telephone Company (Bridge Water) filed a complaint protesting SLD's proposed implementation of the SHNS tariff. The complaint named the following respondents: Sherburne County Rural Telephone Company (SCRTC); SLD; Sherburne Fibercom, Inc. (SFI); Northern States Power Company (NSP); and US WEST Communications, Inc. (US WEST). SCRTC, SLD and SFI (together, the Sherburne Group) are affiliates which are wholly owned subsidiaries of Sherburne Tele Systems, Inc.. NSP is a Minnesota public utility which owns and operates electrical generating plants in the Monticello local exchange and the Becker

local exchange. Bridge Water serves the Monticello exchange. US WEST is a Minnesota telephone company which was in the process of setting up a SHNS system which would interconnect various NSP facilities. The Sherburne Group had entered into a contract with NSP to provide part of the linkup with NSP facilities in Monticello and Becker. Part of the SHNS system would be located in the Monticello exchange.

On January 23, 1992, the Sherburne Group and NSP filed answers to Bridge Water's complaint. NSP's answer included a motion to dismiss Bridge Water's complaint as to NSP, and a motion to intervene in the complaint proceeding.

An answer to Bridge Water's complaint was filed by US WEST on January 24, 1992.

On March 20, 1992, US WEST, NSP, Bridge Water and the Sherburne Group filed a stipulation of facts.

Between March 25 and May 26, 1992, comments were filed by US WEST, the Department of Public Service (the Department), Bridge Water, NSP, the Sherburne Group and the Residential Utilities Division of the Office of Attorney General (RUD-OAG).

On June 5, 1992, NSP filed a letter proposing to limit its use of the SHNS network to intracompany voice and data communications.

On June 10, 1992, Bridge Water filed a motion to consolidate its complaint proceeding with the SLD certification docket, a request to intervene in the SLD docket, and a motion to compel the Sherburne Group to cease construction of SHNS facilities in the Monticello exchange.

On August 10, 1992, the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), a trade association representing independent telephone companies, filed comments regarding the Bridge Water complaint proceeding.

The Bridge Water complaint proceeding and SLD's request for certification came before the Commission for consideration on September 18, 1992.

FINDINGS AND CONCLUSIONS

I. Factual Background

SLD is one of six affiliates of Sherburne Tele Systems, Inc. (STS). STS wholly owns both SLD and SCRTC, an independent local exchange company (ILEC) which serves subscribers in the exchanges of Becker, Big Lake, Glendorado and Zimmerman.

SLD, which is not currently providing service in Minnesota, has requested authorization from the Commission to provide intrastate intraexchange and interexchange telecommunications service. SLD seeks the authorization in order to become part of a SHNS network serving NSP facilities.

SHNS is a private line, optical fiber-based telecommunications service which is dedicated to a customer's exclusive use. SHNS uses sophisticated electronics to transmit voice and data messages among a company's facilities. The identical telecommunications transmission travels over two separate optical fibers in opposite directions at the same time. If one fiber is cut or service quality falls below an acceptable level, the transmission is switched to the other fiber nearly instantaneously. The result is a highly reliable telecommunications system for intracompany use.

NSP currently has a SHNS ring linking various company facilities. The SHNS system lies in US WEST service territory located in the Twin Cities metropolitan area and is served by US WEST. NSP now wishes to bring two more facilities into its SHNS system: the Monticello generating plant located in Bridge Water's Monticello local exchange, and the Sherco generating plant located in SCRTC's Becker local exchange. NSP, US WEST, and the Sherburne Group have entered into contractual agreement to expand the SHNS system to include the Sherco and Monticello plants.

As the parties to the contract envision the expansion, SFI, an affiliate in the Sherburne Group, would lay fiber to link the US WEST fiber with the Monticello and Sherco plants. The fiber route would cross the Big Lake and Becker exchanges, which are served by SCRTC, and across the Monticello exchange, which is served by Bridge Water. SFI has actually partially laid the necessary fiber across the Big Lake, Becker and Monticello exchanges.

Bridge Water filed a complaint requesting the Commission to prevent what Bridge Water considered an unauthorized "bypass" of Bridge Water's exclusive right to provide local service in Monticello. Bridge Water did not oppose the SHNS concept, but felt that it must provide any part of the fiber transport which lies between interexchange meet points and the customer premises and which falls within the local exchange Bridge Water serves. As Bridge Water envisions the SHNS network, US WEST's fiber would end at the interexchange meet point between US WEST's metropolitan exchanges and Bridge Water's Monticello exchange. Bridge Water would transport the telecommunications service across the Monticello exchange, to the Monticello generating plant, and on to the meet point between the Monticello exchange and SCRTC's Becker exchange.

II. Procedural Issues

NSP's Motion to Intervene

In its January 23, 1992 filing, NSP requested permission to intervene in the Bridge Water complaint proceeding. NSP stated that it has a direct and substantial interest in the proceeding as the potential customer of the proposed SHNS system expansion. No party objected to NSP's motion to intervene.

The Commission finds that NSP's motion is reasonable and should be granted. No other party shares NSP's perspective as a potential SHNS user, or could be expected to present NSP's viewpoint in the proceeding. The Commission will grant NSP's motion to intervene.

The OPASTCO Filing

Both Bridge Water and SCRTC are members of OPASTCO, a national trade association of small telephone companies. OPASTCO filed comments on August 10, 1992. Although OPASTCO listed the Bridge Water complaint docket number on its filing, OPASTCO did not serve its comments upon other parties to the proceedings. Because other parties did not receive notice of OPASTCO's filing, or have an opportunity to comment upon the filing, the Commission will not admit the comments into the record.

Bridge Water's Complaint Against NSP

NSP moved to have Bridge Water's complaint dismissed as it regards NSP. NSP reasoned that the complaint is based upon the telephone statutes and rules, and NSP is not a telephone company. No party objected to NSP's motion to be dismissed as a respondent.

The Commission finds that NSP's motion to dismiss Bridge Water's complaint against it should be granted. As a public utility, NSP is not bound or governed by the rules or statutes covering telephone service. The issues in Bridge Water's complaint will be adequately addressed without including NSP as a respondent. The Commission will dismiss NSP as a respondent in Bridge Water's complaint proceeding.

Consolidation of the Complaint Proceeding and the Certification Proceeding

The issues in SLD's certification docket and Bridge Water's complaint proceeding are intertwined. Bridge Water argued that granting SLD a certificate of authority at this time would be interpreted by SLD as permission to continue laying fiber across Bridge Water's service territory. SLD sought an unrestricted certificate of authority, a goal which might be in conflict with Bridge Water's complaint filing.

Because the issues in the two dockets are interdependent, the Commission finds that they will be best addressed in a consolidated proceeding. The Commission will consolidate the SLD certification docket and the Bridge Water complaint proceeding, and will address the issues raised in both in this joint docket.

III. Positions of the Parties

Sherburne

SLD, which is currently not providing telecommunications service in Minnesota, seeks a certificate of authority to provide intraexchange and interexchange telecommunications service. SLD wishes to carry voice and data telecommunications between certain interexchange meet points in the SHNS system and the Monticello and Becker NSP facilities.

SLD argued that SHNS is a private line service, which is emergingly competitive under Minn. Stat. § 237.59, subd. 1 (12). According to SLD, the main issue is whether the certificate of authority of a qualified interexchange carrier (IXC) such as SLD can be restricted so that the IXC can't provide SHNS to an end-user. SLD argued that such a restriction is not justified under Minnesota statutes or rules.

SLD disputed Bridge Water's "local link" concept, which states that the local exchange provider must transport the SHNS communications over that part of the ring between the interexchange meet point and the customer premises which lies within the local service territory. According to SLD, the local link argument would nearly destroy the SHNS concept. No longer would SHNS customers be served with seamless reliability, a concept which is not only beneficial but nearly essential in today's communication age. Instead, local exchanges would be bottlenecks along the SHNS system. According to SLD, this local link argument seeks an expansion of the local exchange monopoly concept. SLD argued that the telecommunications continuum is moving toward greater competition in local exchanges, not toward an expansion of the monopoly concept.

Sherburne also argued that placing the SHNS system through the Monticello exchange would not displace any type of existing service from Bridge Water. NSP would route any extra-company traffic from the Monticello plant through Bridge Water as the ILEC serving the Monticello exchange.

Bridge Water

Bridge Water argued that it should provide the local link for SHNS between the interexchange meet points and NSP's customer premises within its territory. Bridge Water holds the certificate of territorial authority to provide exclusive local

service in the Monticello exchange under Minn. Stat. § 237.16, subd. 1. A general certificate of authority such as the one sought by SLD pursuant to Minn. Stat. § 236.16, subd. 4 does not grant a company the right to provide local service. Bridge Water cited the definition of local exchange service found at Minn. Rules, part 7810.0100, subp. 23:

"Local exchange service" means telecommunication service provided within local exchange service areas in accordance with the tariffs. It includes the use of exchange facilities required to establish connections between stations within the exchange and between stations and the toll facilities serving the exchange.

According to Bridge Water, the local link falls within the definition of local exchange service, which Bridge Water has the exclusive right to provide. Allowing SLD to lay fiber to transport SHNS communications along the local link would be an unauthorized bypass of Bridge Water's facilities. Such an unwise result would establish precedent for competition in local service. If such a result occurred, the matter should be opened up to contested case proceedings so that all LECs could file comments.

Bridge Water stated that it was ready, willing and able to provide the essential local link for the portion of the SHNS system falling across the Monticello exchange. It asked the Commission to forbid SLD from laying further fiber in the Monticello exchange.

US WEST

US WEST cited Minn. Rules, part 7810.0100, subp. 27, which defines long distance telecommunications service:

"Long distance telecommunications service" means that part of the total communication service rendered by a utility which is furnished between customers in different local service areas in accordance with the rates and regulations specified in the utility's tariff.

US WEST argued that the nature of telecommunications service, whether local or long distance, does not depend upon whether the service is switched or private line. A private line connection can either stay within an exchange and constitute local service, or it can extend between local service areas and constitute long distance service.

In this case, US WEST argued, the proposed SHNS system would be between exchanges, and would therefore have the characteristics of long distance rather than local service. US WEST therefore concluded that SLD's proposed part in the SHNS system would not be an improper bypass of Bridge Water's local service authority.

US WEST also argued that private line service is subject to emerging competition under Minn. Stat. § 237.59, subd. 1 (12). US WEST concluded that the legislature had laid the groundwork for competition in private line service such as that proposed by SLD.

Based upon these arguments, US WEST urged the Commission to dismiss Bridge Water's complaint. US WEST noted that Bridge Water would not lose any existing revenue if the proposed SHNS system were implemented.

NSP

NSP expressed concern regarding delays in implementing SHNS, and possible service interruptions if SHNS were not implemented. NSP explained that it had outgrown the transport capability of its current microwave telecommunications system. NSP needs to expand its voice and data transport capabilities, especially to accommodate greater computer use.

NSP asked that the Commission dismiss Bridge Water's complaint. NSP cited its June 5, 1992 letter to the Commission, in which NSP stated that it would limit the use of the SHNS network from Monticello to intracompany voice and data communications. All calls from the Monticello plant to destinations outside the company system would be routed into the Bridge Water local exchange. NSP felt that the bypass issue which underlay Bridge Water's complaint was therefore resolved, and Bridge Water's complaint should be dismissed.

NSP argued that SHNS is interexchange private line service and therefore emergingly competitive under Minn. Stat. § 237.59, subd. 1 (12). NSP reasoned that it should be able to reap the benefits of competition as a SHNS customer. SLD would be able to provide SHNS service within approximately one week; NSP should be able to avail themselves of the service.

The Department of Public Service

The Department viewed SHNS as an integrated telephone service which provides both special access and private line capabilities. According to the Department, special access refers to transport between the ring and the public network. Private line refers to intracompany communication.

The Department's view of the proposed SHNS system has evolved. In a first set of comments, the Department recommended that Bridge Water be granted relief. At that time, the Department believed that NSP would be routing both special access and private line communications through the local link which would be served by SLD. The Department's view changed after NSP's June 5, 1992 letter was filed. As discussed previously, that letter stated that NSP would route only intracompany traffic

through the Monticello local link; communications traveling from the Monticello plant to destinations outside the intracompany ring would be routed through the Bridge Water local exchange company. This separation of functions caused a complete change in the Department's recommendations.

After the filing of NSP's June 5, 1992 letter, the Department recommended that Bridge Water's complaint be dismissed and SLD be granted a limited certificate of authority. According to the Department, access between the ring and the public network is the local service which must be and will be provided by Bridge Water. The Department separates this special access concept from the local link, which in the Department's view refers to an IXC continuing service through a LEC without having the service broken up by the LEC. The Department recommends that SLD be allowed to provide this local link part of the SHNS system.

The Department also performed a traditional analysis of SLD's request for a certificate and found that it fulfills the filing requirements for requests for certification: SLD has a process for handling customer inquiries and complaints; SLD has met statutory requirements for maintaining an office in the state; and the company seems financially stable.

While the Department believed that SLD's request for a certificate fulfilled filing standards, and that SLD should be allowed to transport SHNS private line communications across the Bridge Water exchange, the Department still had reservations about SLD's certificate request. The Department expressed concern that the fiber capabilities laid by SLD across Bridge Water's Monticello exchange could be misused in the future. The Department noted that the limited use of the fiber to transport intracompany voice and data communications left excess capacity on the transport facilities. The Department did not want this situation to tempt the Sherburne Group to use the fiber in the future to transport truly local, non-SHNS traffic in violation of Bridge Water's territorial certificate. The Department therefore proposed that several informational filings be required of SLD on a quarterly basis. The Department believed that these requirements would allow the Department to monitor the situation closely and to step in quickly if SLD tried to expand its use of the fiber beyond the transport of NSP SHNS traffic. The filing requirements included the names and addresses of lessors of circuits contained in the fiber laid across Monticello, the number of circuits leased by each lessor, the type of traffic carried, and a copy of the signed lease agreement. In addition, the Department recommended that the SHNS issue be implemented slowly by restricting SLD's certificate to SHNS service to NSP's Monticello and Sherco generating plants.

The RUD-OAG

In its comments on the Bridge Water complaint, the RUD-OAG recommended that the issues raised by the complaint be combined with SLD's certification proceeding. The RUD-OAG stated that the fact that private line service is emergingly competitive does not render a certificate of local authority unnecessary for SLD. The RUD-OAG argued that the SHNS system may be used for access to long distance service and is thus a local service, requiring certification under Minn. Stat. § 237.16, subd. 1.

IV. Commission Action

The policy issue before the Commission is this: whether the local link normally used to provide interexchange, non-switched, private line service to an end user must be provided by the local exchange company, or whether a competing company can provide service directly to the end user.

The Sherburne Group and US WEST argued that because private line service is emergingly competitive under Minn. Stat. § 237.59, subd. 1, NSP should be free to choose its transport provider from NSP's premises onto the SHNS system and beyond. Under this theory, NSP would not be bound to take service from Bridge Water for either the intracompany transport of voice and data communication on the SHNS system, or for access to the public telecommunications network through the SHNS ring. SLD could therefore construct and operate the transport system through Bridge Water's local exchange without a territorial certificate.

The Commission does not agree with this expansion of the concept of emerging competition. The fact that the SHNS system is private line interexchange communication does not exempt the provider from the certification process. This issue was visited previously in a case cited by many of the parties, Metro Fiber.¹ In that case, the Metropolitan Fiber Systems Inc. (MFS or the Company) came before the Commission seeking authority to construct a non-switched private line system within US WEST's territory in the central business districts of St. Paul and Minneapolis. The Commission concluded that MFS needed territorial certification to provide the service, although private line service is emergingly competitive.

The Commission finds that the issue of authorization procedures is separate from the issue of whether the Company is offering competitive or non-competitive services. The competitiveness of a service is relevant in determining how the service will be regulated after it has been authorized.

Metro Fiber at p. 2.

¹ In the Matter of the Filing by Metro Fiber Systems to Provide Certain Telecommunications Services Within Minneapolis And Saint Paul, Minnesota, Docket No. P-495/EM-89-80, ORDER GRANTING CERTIFICATE OF AUTHORITY (June 16, 1989).

If the Legislature had wanted to eliminate the certification process for emergingly competitive service providers, it would have done so. The Commission believes that the Legislature retained the certificate process to protect Minnesota ratepayers. The Legislature determined that the public interest requires that a certification procedure be followed to prevent the captive ratepayers of a local exchange company from the consequences of a duplication of services that would lead to rate increases for them. There is no indication that the Legislature intended to deregulate local telephone service.

Metro Fiber at p. 3.

The Commission remains convinced of the sound public policy behind the concept of territorial certification. It is the duty of the Commission to ensure that all telephone companies provide "reasonably adequate service and facilities for the accommodation of the public," and charge rates which are "fair and reasonable for the intrastate use thereof." Minn. Stat. § 237.06. The Commission has determined that duplication of facilities within a local exchange is contrary to the concept of efficient and reasonable service. The Commission has also found that the goal of universal, fair and reasonable service is best served when local exchange companies are able to extend service to all customers in the territories assigned them. These findings reinforce the logic of exclusive territorial certificates. The Commission is unpersuaded that the laws governing competitive telephone services abrogate the territorial concept. The Commission will continue to require territorial certification under Minn. Stat. § 237.16, subd. 1 for the furnishing of any local telephone service, whether or not the local service is being offered in connection with an emergingly competitive service.

The next question to be addressed is the nature of the service in question. Is the local link between NSP's facilities and the SHNS ring a local service? The Commission finds that it is.

The Commission agrees with Bridge Water that the local link falls within the definition of "local exchange service" under Minn. Rules, part 7810.0100, subp. 23, quoted above. The Commission also looks to the Metro Fiber case for a finding that the local link, or special access, is local service:

MFS is proposing to offer non-switched intrastate private lines from the customer to the points of presence of interexchange carriers and private lines among and between the points of presence of interexchange carriers. The Commission finds that these are special access services, local services.

Metro Fiber at p. 4.

The Commission therefore finds that the communications transport between the NSP facilities (the customer) and the SHNS system (the point of presence of interexchange carriers and private lines among and between the points of presence of interexchange carriers) is local service and may only be offered by a holder of local territorial authority under Minn. Stat. § 227.16, subd. 1. Only the portion of the SHNS private line system which connects interexchange meet points is nonlocal and therefore may be offered by a holder of general authority under Minn. Stat. § 237.16, subd. 4.

The Commission does not agree with the Department that the functions served by the local link may be separated so that a territorial certificate may not be necessary to provide service. The Department stated that if the local link were used solely for intracompany voice and data transport, as NSP had agreed, territorial certification for the provider would not be necessary. Under this theory, SLD could provide service from the Monticello facility to the SHNS ring, as long as the traffic were confined to intracompany communication. The Commission finds that this functionalization of the local link is not justified by precedent or logic. The local link from the end user is the "window" for the end user to connect with the host of services provided by the SHNS system. Through the local link, the end user is technologically connected with local, interexchange, and data communication capabilities. If the local exchange company were deprived of the right to provide this link, the territorial authority concept would be severely weakened. Local exchange companies could be left with monopoly rights and duties to provide sometimes farflung and marginally profitable subscribers with traditional local service, while faced with tough competition for linkage with new and highly marketable telecommunications services. Under this scenario, a major interexchange company such as US WEST would be free to serve the entire SHNS network, along the NSP facilities in the US WEST metropolitan loop and to the doorstep of the NSP Monticello and Becker plant facilities. The Commission does not agree with the Department that such a prospect is in harmony with the concept of local service. The Commission will require that the local link between end user and the SHNS system be served by the holder of territorial authority. In the case of the Monticello exchange, the local link must be served by Bridge Water; in the case of the Becker and Big Lake exchanges, the local link must be served by SCRTC.

Under Metro Fiber, the Commission found that more than one certificate of territorial authority could be granted to provide local special access services, if a finding of public convenience and necessity justified the granting of more than one certificate under Minn. Stat. § 237.16, subd. 1. In this case, however, only Bridge Water holds a territorial certificate in the Monticello exchange, and only SCRTC holds a territorial certificate in the Becker and Big Lake exchanges. No local certificate has been applied for by SLD. The Commission does not therefore reach or discuss issues of public convenience or necessity in this case.

Finally, the Commission does not agree with the Department that it is necessary to limit SLD's certificate of general authority to provide long distance service, or to impose extra filing requirements upon SLD. The Commission will grant SLD a general certificate to provide long distance service in Minnesota, in this case specifically the implementation of the SHNS tariff. As long as SLD does not encroach upon the local link between NSP's Becker and Monticello facilities and the SHNS system, and otherwise complies with governing statutes and rules, SLD will be free to offer long distance services, pursuant to tariffs filed by SLD and approved by the Commission.

ORDER

1. NSP's January 23, 1992 motion to intervene in the Bridge Water complaint proceeding is granted.
2. OPASTCO's comments filed August 10, 1992 are not accepted into the record.
3. Bridge Water's complaint is dismissed as it pertains to NSP.
4. Docket Nos. P-3075/NA-91-898 and P-427, 3075, 3081, 421/C-92-9 are consolidated in this docket.
5. SLD is granted a general certificate of authority to provide intraexchange and interexchange telecommunications service in Minnesota. SLD shall not carry traffic from NSP customer premises at the Becker or Monticello generating plants to the interexchange SHNS network.
6. Within 10 days of the date of this Order, SLD, SCRTC, Bridge Water and US WEST must meet with one another and file with the Commission agreed-upon interexchange meet points for the SHNS network.
7. Within 20 days of the date of this Order, SLD, SCRTC, Bridge Water and US WEST must file with the Commission a time table for providing SHNS to NSP.
8. NSP may carry both inter- and intra-company voice and data communications over the SHNS network.
9. Within 20 days of the date of this Order, SCRTC, US WEST, Bridge Water and SLD shall file with the Commission and serve upon the Department SHNS tariffs which are consistent with the provisions of this Order.
10. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)