

DOCKET NO. P-421/EM-96-182

DOCKET NO. P-999/CI-96-826

ORDER DISMISSING PETITION AND REQUIRING NOTIFICATION OF MUNICIPAL
ORDINANCES CONFLICTING WITH COMMISSION'S EXCLUSIVE AUTHORITY

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by U S WEST
Communications, Inc. for an Expedited
Proceeding to Exercise Commission
Jurisdiction Over Public Right-of-Way

ISSUE DATE: July 24, 1996

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PROCEDURAL HISTORY

On February 23, 1996 U S WEST Communications, Inc. (U S WEST or the Company) filed a Petition for Expedited Proceeding to Exercise Commission Jurisdiction Over Public Right-of-Way. The petition claimed that several municipalities had enacted ordinances on the use of public rights of way which conflicted with the Commission's exclusive authority over the construction of telephone lines under Minn. Stat. § 237.16, subd. 1.

The Company cited ordinances recently enacted by the cities of Redwood Falls, St. Paul, and Blaine, but stated these were illustrative only, that other municipalities had enacted or were considering similar ordinances. The Company requested an Order exercising exclusive jurisdiction over the substantive regulation of Minnesota public rights of way.

On March 11, 1996 the Company made a supplementary filing consisting of documents referenced in its petition but not attached: the Redwood Falls ordinance, correspondence between the Company and the City of Saint Paul, a report prepared by the Public Works Utility Coordination Team of the City of Saint Paul, the Blaine city ordinance, and a proposed ordinance of the City of Marshall.

On March 27, 1996 the Commission issued a notice establishing time frames for intervention in the proceeding and comments on the petition. On April 12, 1996 the Commission extended these time frames to ensure adequate time for preparation by interested persons.

The following parties filed comments in this proceeding:

- the Minnesota Department of Public Service (the Department), a state agency charged with representing and furthering the public interest in utility matters;
- the League of Minnesota Cities (the League), a statewide association created by legislative act and representing 810 Minnesota cities;
- the Suburban Rate Authority (the SRA), a joint powers organization under Minn. Stat. § 471.59, representing 32 municipal corporations in the metropolitan area;
- Frontier Communications of Minnesota, Inc. (Frontier), a telecommunications provider furnishing local and interexchange service in Minnesota;
- the Minnesota Independent Coalition, an organization representing some 86 telephone companies classified as “independent telephone companies” under Minn. Stat. § 237.01, subd. 3;
- Contel of Minnesota, Inc. d/b/a GTE Minnesota, a telecommunications provider furnishing local and interexchange service in Minnesota;
- the City of Saint Paul (St. Paul);
- United Telephone Company of Minnesota (United), a telecommunications provider furnishing local and interexchange service in Minnesota;
- the Minnesota Cable Communications Association (the Cable Association), an association of Minnesota providers of cable television service;
- Metropolitan Fiber Systems of Minneapolis/St. Paul, Inc. (MFS), a telecommunications provider certified to provide dedicated intrastate services in Minnesota;
- an *ad hoc* coalition of nine local and regional government bodies which regulate cable television, identified herein as the Cable Regulation Intervenors;
- the Minnesota Business Utility Users Council (the MBUUC), an organization of large business customers of telecommunications services;
- the Alliance for Community Media (the Alliance), a national organization of groups and individuals involved in public, educational, and governmental access programming on cable television;
- AT&T Communications of the Midwest, Inc. (AT&T), a telecommunications provider furnishing interexchange service in Minnesota and recently certified to furnish local exchange service;
- the Minnesota Telephone Association (the MTA), an organization representing telecommunications providers throughout the state;
- the Ramsey County Department of Public Works.

The petition came before the Commission on July 9, 1996.

FINDINGS AND CONCLUSIONS

I. Positions of the Parties

A. U S WEST

U S WEST asked the Commission to begin a rulemaking or generic proceeding to assert its exclusive authority over the construction of telephone lines, including the terms and conditions upon which construction or service delivery may be carried on, under Minn. Stat. § 237.16, subd. 1. The Company believed this was necessary to forestall a growing trend for municipalities to impose usage fees and construction requirements exceeding those necessary for prudent management of the public rights of way.

The Company cited as examples municipal ordinances requiring it to encase fiber optic cable in concrete, to execute limitation of liability agreements, to provide potentially sensitive information on the uses to which buried cable would be put, to make security deposits pending satisfactory completion of construction, to acknowledge municipal authority over the use of public rights-of-way, and to pay fees per linear foot of cable installed.

B. Other Telecommunications and Cable Providers

All telecommunications providers and providers' associations intervening in the case supported the Company's petition. The Minnesota Independent Coalition and Frontier stated the Commission has broad and exclusive authority over every aspect of telephone line construction, with municipal authority limited to location issues. These parties urged the Commission to work with local governments, through the League of Minnesota Cities, to develop rules or guidelines delineating the scope of Commission and municipal authority. They also asked that companies be allowed to bring ordinances they considered inappropriate to the Commission's attention.

GTE and the Minnesota Telephone Association urged the Commission to issue an Order clarifying its exclusive authority over the construction of telephone lines and declaring its intention to assert that authority in future cases.

MFS and AT&T urged the Commission to take any action necessary to protect telecommunications providers from unreasonable or discriminatory municipal regulation and to put into effect state and federal legislative directives to foster competition in the local telecommunications market.

The Minnesota Cable Communications Association argued that municipal authority over the construction of telephone lines was limited to location issues and urged the Commission to begin a proceeding in the nature of a rulemaking to clarify the scope of Commission and municipal authority.

C. Local Government Authorities

All local government bodies and associations intervening in this proceeding opposed the Company's petition. The League of Minnesota Cities, the City of Saint Paul, the Suburban Rate Authority, and the Cable Regulation Intervenors joined in a motion to dismiss the petition for lack of Commission jurisdiction over municipalities, for failure to state a claim justifying relief, and for vagueness.

They denied that the "exclusive authority" language of Minn. Stat. § 237.16, subd. 1 restricted municipalities' traditional authority over public rights-of-way. They also claimed the Commission lacked the public works expertise and specialized staffing necessary to control municipal rights-of-way to the degree urged by U S WEST.

The Ramsey County Department of Public Works stated its review of U S WEST's allegations suggested that some of the municipal requirements cited by the Company were unreasonable. At the same time the County emphasized that managing public rights-of-way is a complex task demanding specialized practical skills.

The County contended that, if conflicts between telecommunications providers and municipalities were becoming as frequent and as intense as U S WEST claimed, the problem should be addressed jointly by the Commission, the Minnesota Department of Transportation, the League of Minnesota Cities, the Association of Minnesota Counties, and interested utilities. The best solution, in the County's view, would be clarifying legislation or multi-agency rules.

D. Network Users

The Minnesota Business Utility Users Council expressed concern that municipalities, by restricting access to public rights-of-way, could obstruct state and federal policies opening the local telecommunications market to competition. The Council asked the Commission to consider working with interested parties to address this issue.

The Alliance for Community Media opposed the Company's petition, arguing that Minn. Stat. § 237.16, subd. 1 did not abrogate municipalities' traditional powers to manage public rights-of-way under municipal authority statutes. The Alliance also claimed the Company's petition was designed to surreptitiously undermine municipalities' authority to assess franchise fees and require public access programming of providers of video services.

E. The Department of Public Service

The Department of Public Service (the Department) argued that Minn. Stat. § 237.16, subd. 1 significantly limits municipalities' authority over telecommunications providers' use of public rights-of-way. Municipalities may regulate the time, place, and, to a lesser degree, the manner of construction. They cannot regulate who enters the telephone business. They cannot impose construction conditions not directly related to ensuring public safety and convenience. They cannot assess franchise fees or other fees exceeding the cost imposed on the municipality by the use of the right-of-way.

The Department suggested the Commission initiate a generic proceeding or convene a task force to develop guidelines on right-of-way issues.

II. Commission Action

A. Summary

The Commission will dismiss U S WEST's petition because the relief it seeks would be ineffective and potentially divisive. The Commission will require Minnesota telecommunications providers to notify the Commission if they encounter local ordinances which appear to conflict with the Commission's exclusive authority. This notification will allow the Commission to take action to protect the public interest in ensuring telecommunications providers statewide access to local rights-of-way on just, reasonable, and non-discriminatory terms.

These decisions are explained below.

B. Petition Dismissed

The Company's petition raises serious issues about the scope of and relationship between Commission and municipal authority over the installation of telecommunications infrastructure. The relief sought, however -- a rulemaking or a generic proceeding to assert and define the Commission's exclusive authority -- is unlikely to end conflicts between the Company and municipalities. In fact, it could exacerbate tensions between the Company and municipalities and create new intergovernmental tensions, for no good purpose.

First, the Commission has no authority to issue Orders or promulgate rules binding on municipalities or other units of local government.¹ Local governments would correctly view any Order or rules coming out of the requested proceeding as purely advisory. It would not be an efficient use of the Commission's or other parties' resources to develop advisory guidelines on infrastructure deployment.

¹The exception to this general rule is Commission authority over municipally owned utilities and their acquisition of other utilities' property or service rights. See, for example, Minn. Stat. §§ 237.19-20; 33-39; 216B.44-45.

Furthermore, such guidelines could intensify conflicts between telecommunications providers and municipalities. Commission Orders and rules are, of course, binding on telecommunications providers. If these Orders or rules conflicted with local requirements, telecommunications providers could find themselves in the untenable position of having to disregard a presumably valid municipal ordinance or having to disregard a presumably valid Commission Order or rule. The Commission has a duty to avoid placing providers in this position and will do so.

Obviously, the Commission cannot resolve conflicts between municipal and Commission authority unilaterally.

C. Notification Required

At the same time, however, the Commission has a duty to fulfill its statutory mandate to nurture local telecommunications competition by ensuring effective access to local rights-of-way on just, reasonable, and non-discriminatory terms.

1. Competition: The Regulatory Challenge

This is a pivotal time in the history of telecommunications. In August of 1995, after decades of limiting the local telecommunications market to regulated monopolies, the Minnesota Legislature opened the local market to competition. Minn. Stat. § 237.16. In February 1996 the United States Congress adopted the same policy for the nation as a whole. Public Law 104-104 § 101 (a), 110 Stat. 70, *to be codified at* 47 U.S.C. §§ 151 *et seq.* Both laws place major responsibility for ensuring fair and open competition in this state on this Commission.

State and federal policymakers have opened the local telecommunications market to competition in the belief that competition will bring lower rates, better service, wider access to sophisticated technology, and faster technological innovation. The Commission shares this belief and is convinced that inhibiting competition can only reduce Minnesota's ability to compete in the national and global marketplace. The Commission is therefore committed to nurturing competition throughout the state.

For competition to thrive, however, all potential market entrants must have ready and effective access to public rights-of-way on economical and non-discriminatory terms. They cannot face unnecessarily burdensome construction requirements. They cannot face construction or permit fees exceeding the costs they impose.

If all parts of the state are to benefit from competition, market entrants cannot face a hodgepodge of conflicting local requirements. That is why the Legislature has vested centralized, exclusive control over the construction of telephone lines, exchanges, and service delivery in the Commission.² As the statute explains it:

Subdivision 1. **New service; certificate of authority.** (a) For the purpose of bringing about fair and reasonable competition for local exchange telephone services, the commission has the exclusive authority to:

(1) authorize any person to construct telephone lines or exchanges or to otherwise furnish local service to subscribers in any municipality of this state, and to prescribe the terms and conditions upon which construction or service delivery may be carried on;

Minn. Stat. § 237.16, subd. 1 (a) (1).

Municipalities, meanwhile, retain authority over the location of telecommunications facilities and have a right to require the repair and restoration of streets, alleys, and other public areas damaged by the installation or operation of telecommunications facilities. Minn. Stat. § 237.16, subd. 1 (d) and (e).

2. Action Required

The facts surrounding the ordinances cited in U S WEST's complaint have not been developed in enough detail for the Commission to reach firm conclusions about whether they conflict with the Commission's authority over public rights-of-way. They clearly raise that possibility, however. Furthermore, now is the time when effective access to public rights-of-way is crucial to the success of state and federal policy initiatives opening local telecommunications to competition.

²The Minnesota Legislature has a long tradition of placing centralized authority over telecommunications infrastructure with state regulatory authorities, beginning with a 1915 act replacing franchises from municipalities with certificates of authority from this agency's predecessor, the railroad and warehouse commission. Laws 1915, c. 152, § 15, *now codified at* Minn. Stat. § 237.18. Since 1915, the statute at issue has placed exclusive authority over telecommunications infrastructure with this Commission or its predecessors, “[f]or the purpose of bringing about uniformity of practice . . .” M.S.A. § 237.16, Historical and Statutory Notes, emphasis added. Last session the Legislature changed this introductory phrase to “for the purpose of bringing about fair and reasonable competition . . .” Last session’s revision simply provided an updated policy basis for longstanding state policy and practice.

The Commission concludes it has a duty to ensure that incumbent providers and new market entrants alike have ready and effective access to public rights-of-way on just, reasonable, and non-discriminatory terms. To discharge this duty, it will ask and direct all telecommunications providers to bring to its attention any local ordinance they believe conflicts with the Commission's authority by denying them such access.

The Commission will examine each ordinance to determine whether it violates statutory provisions giving the Commission exclusive, statewide authority over the construction of telecommunications infrastructure. If it does, the Commission will use all available means, from negotiation to litigation, to assert its statutory authority and discharge its statutory duties.

D. Conclusion

For the reasons set forth above, the Commission will dismiss U S WEST's petition and direct all telecommunications providers to inform the Commission upon encountering any local ordinance they believe conflicts with the Commission's statutory authority by denying them access to public rights-of-way on just, reasonable, and non-discriminatory terms.

ORDER

1. U S WEST's Petition for Expedited Proceeding to Exercise Commission Jurisdiction Over Public Right-Of-Way is denied.
2. All telecommunications providers certified to provide intrastate telecommunications services in the State of Minnesota shall promptly notify the Commission upon encountering any local ordinance they believe conflicts with the Commission's authority by denying them access to public rights-of-way on just, reasonable, and non-discriminatory terms.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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