

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Marshall Johnson
Dee Knaak
Mac McCollar
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of USWC's Request to Establish
Tenant Solutions Service and Tenant Calling
Connections Plan

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DOCKET NO. P-421/EM-96-712

ORDER APPROVING PLAN WITH
CONDITIONS

PROCEDURAL HISTORY

On June 24, 1996, U S WEST Communications, Inc. (USWC) submitted a proposal to establish Tenant Solutions Service (Tenants Solutions) and Tenant Calling Connections Plan (Tenant Connections). In this Order, Tenants Solutions and Tenant Connections are collectively referred to as USWC's proposal or Service/Plan.

On July 8, 1996, AT&T filed comments on USWC's proposal. AT&T recommended that the Commission indefinitely postpone or suspend USWC's filing pending proceedings under Minn. Stat. §237.61.

On July 12, 1996, Enhanced Telemanagement, Inc. d/b/a Frontier Telemanagement, Inc. (Frontier) filed comments, recommending denial, or alternatively suspension of USWC's proposal.

On July 15, 1996, the Minnesota Department of Public Service (the Department) filed comments recommending approval of the Company's filing.

On July 19 and August 5, 1996, USWC filed comments and supplementary comments, respectively.

On October 29, 1996, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

A. USWC's Proposal

USWC characterized its proposed Tenant Solutions Service and Tenant Calling Connections Plan as a price decrease under Minn. Stat. §237.60, subd. 2 (a) and Minn. Stat. §237.63 subd. 4. By terms of these statutes, a proposal to decrease rates takes effect within 20 days from filing. USWC placed its Plan into effect accordingly.

USWC's proposal consists of two components: 1) Tenant Solutions and 2) Tenant Connections:

- In Tenant Solutions, USWC offers discounts and other incentives to tenants and owners/managers of large multi-occupant buildings (with at least 15 tenants and 200,000 leasable square feet) and malls (at least 50 tenants and 250,000 leasable square feet) in return for the owners/managers' agreement to endorse use of USWC's services to tenants.
- In Tenant Connections, USWC provides toll discounts to tenants and owners/managers in places where the building owners/managers subscribe to Tenant Solutions. Tenant Connections provides a 2 percent discount off Volume Calling Connection Plan and has no \$10 monthly charge per customer.

The pertinent provisions of the proposal are:

- USWC enters into a service agreement with eligible owner/managers of buildings or malls with a threshold level of tenants who subscribe to telecommunications services.
- Tenants and the owner/manager receive discounts, specials or waiver of nonrecurring fees from a menu of services.
- The owner/manager provides USWC with a list of tenants, endorses USWC products to tenants, and gets discounted rates and specials similar to what is given the tenants. In addition, building owners are paid in credits for video conference equipment, while mall owners can choose between cash payments, the amount depending on size of building and lease space, or the video conference equipment credit. Payments for subsequent years depend on changes in revenues from tenants and leased spaces. Owners/managers also receive increased commissions from public payphones, and free or discounted services.

- The service agreement between the owner/manager and USWC does not preclude tenants from choosing another provider of intraLATA toll service, prohibits the owner/manager from entering into any similar relationship with another telecommunications provider, will be for a minimum of 2 years, but can be canceled upon written notice (30 days with cause, 90 days for convenience).

In comments filed July 19, 1996, USWC asserted that its proposal is a pricing strategy that 1) is similar to those offered by existing resellers and shared tenant service providers and 2) can also be offered by new entrants to the local telecommunications market. USWC denied that the offering was contrary to state and federal laws promoting local competition and asserted that it was not a departure from traditional pricing practices. USWC emphasized that if the owners/managers give proper notice of termination, they incur no liability for canceling the agreement.

B. Comments of the Parties

1. Frontier

In support of its recommendation that the Commission deny or in the alternative suspend USWC's offering, Frontier made three main allegations:

- USWC's proposal is anti-competitive in that it locks in business accounts and through the influence of the owner/manager prevents other competitors from offering other services;
- USWC's proposal is, in fact, a promotion that violates Minn. Stat. § 237.626 in that it extends beyond the 90-day limitation on promotions established in the statute;
- USWC's plan violates the anti-discrimination provisions of Minn. Stat. 237.09 in that similarly situated customers are offered different rates.

Frontier stated that additional information must be obtained regarding other questions about USWC's plan:

- Does USWC's offering of video conferencing equipment in exchange for an owner/manager's agreement to position USWC as the preferred vendor of telecommunications services raise anti-trust issues?
- What constitutes "proper notice" by the owner/manager of its intent to terminate the Plan's special relationship between USWC and the owner/manager and will the owner/manager incur a termination penalty if such proper notice is not given?
- Is a penalty imposed upon the tenants of a building where the owner/manager has chosen to terminate the relationship but has not provided "proper notice?"

2. AT&T

In its initial comments, AT&T argued that USWC's Plan should be denied until the local market is effectively competitive or, at a minimum, suspend the filing and initiate an expedited proceeding pursuant to Minn. Stat. § 237.61.

AT&T supported its recommendation with three major assertions:

- The Tenant Connection portion of USWC's Plan¹ is unreasonably discriminatory in violation of Minn. Stat. §§ 237.09 and 237.74. AT&T asserted that tenants in buildings whose owner/manager opts for the Plan relationship with USWC and tenants in buildings whose owner/manager does **not** opt for that relationship are essentially similarly situated. Consequently, the difference in their rates is not justified and is unreasonably discriminatory under the cited statutes.
- USWC's Plan is anti-competitive and contrary to the intent of both federal and state pro-competition laws in that it locks-up a key segment of the market at a time when there is no local competition and impedes future competitors from displacing USWC in the subscribing facilities.
- The Tenant Connection portion of USWC's Plan improperly leverages the Company's monopoly power in the local market to disadvantage USWC's competitors in the intraLATA toll market.

3. The Department

The Department recommended approval of USWC's proposal. The Department characterized USWC's proposal as a competitive response to meet customer needs. The Department minimized AT&T's expressed concerns about the "lock up" of customers before the full emergence of competition by noting that the service agreement allows owners/managers to cancel the agreement with no liability provided they give USWC proper notice. The Department stated that the overall revenue impact of the proposal is not large and will produce greater revenues than if competitors served the target market segment. The Department also stated that the reduced rates still cover the overall recurring and nonrecurring costs associated with the offering.

C. Commission Analysis

1. The Tenant Solutions Service/Tenant Connections Plan is a Rate Decrease

¹ The Tenant Connection is a toll discount plan available to tenants in buildings/malls whose owner/manager has chosen to participate in USWC's Tenant Solutions program.

Under Minn. Stat. §§ 23 7.60 and 237.63 (1994)

Frontier argued that USWC's plan is actually a promotion governed by Minn. Stat. § 237.626 rather than a price decrease. Frontier asserted that a waiver or discount of non-recurring and recurring charges (part of the Tenants Solutions proposal) is more typical of a promotion.

The Commission notes that the promotion statute mentions a waiver of part or all of a recurring or non-recurring charge as one of the ways a telephone company can promote the use of its services. Not every waiver of non-recurring or recurring charges is a promotion, however. In this case, the Commission finds it more reasonable to view USWC's waiver of recurring or non-recurring charges as part of a price decrease. Since USWC intends to offer special prices and discounted rates to eligible customers on an on-going basis, the changes do not appear promotional, but more in the nature of price decreases than promotional.

2. The Tenant Solutions Service/Tenant Connection Plan Does Not Unreasonably Discriminate in Violation of Minn. Stat. § 237.09

Both AT&T and Frontier argued that USWC's proposal is unreasonably discriminatory because it treats similarly situated customers differently. The two categories in question are:

1. tenants of multi-occupant buildings or malls of a certain size **and** whose owners/managers have chosen to sign a Tenant Solutions agreement with USWC and
2. tenants of other multi-occupant buildings or malls, i.e. those in buildings or malls that do not meet USWC's threshold size requirements and/or whose owners/managers chose not to sign USWC's Tenant Solutions agreement.

The Commission finds that there is a rational basis for treating the different categories of customers differently and that there is, therefore, no violation of Minn. Stat. § 237.09. The two distinguishing characteristics in question are: 1) size of the building/mall and 2) the owner/manager's choice to sign a Tenant Solutions agreement.

- **The Size Factor:** Commission finds that there is a rational basis to make the size of buildings (200,000 leasable square feet and at least 15 tenants) and malls (250,000 leasable square feet and at least 50 tenants) determinant of whether telephone discounts are potentially available to tenants. Frontier argued that limiting the discount to tenants in the larger facilities cannot be justified on the basis of volume because no actual minimum number of tenants is required to sign-up before the plan can be implemented.

However, it is undeniable that the potential number of subscribers and total volume in larger-sized buildings/malls is greater than in the smaller facilities. This potential alone appears to justify USWC's decision to focus its discount program as it has in this plan. Moreover, USWC has stated that its plan is to attempt to level the playing field with its competitors who can physically aggregate calls through PSTS, PBX, and CENTRON

arrangements from among tenants in the same sized facilities. By selecting this category of tenants to compete for, USWC appears to be recognizing the desirability/necessity of competing to serve (provide lower rates for) this category of tenant. The Commission cannot find that this decision is irrational.

- **The Manager's Choice Factor:** tenants in buildings/malls that meet the size criterion may be divided into two additional categories: 1) tenants of buildings/malls whose managers/owners have signed the Tenant Solutions contract and 2) tenants of buildings/malls whose managers/owners have **not** signed the Tenant Solutions contract. Tenants in the first category are eligible for certain discounts while tenants in the second category are not. Frontier argued that it is improper to make the Plan only available to tenants of buildings/malls whose managers/owners have signed the Tenant Solutions contract.

The Commission does not find this distinction to be irrational. Part of the value to USWC represented by the owner/manager's signing a Tenant Solutions Agreement is the promise to promote USWC to **all** his/her tenants. Requiring USWC to give program discounts to all tenants, irrespective of the owner/manager's undertaking to promote USWC in an on-going manner would ignore that value. The Commission finds that this circumstance legitimizes USWC's different treatment of tenants in the two categories.

3. The Tenant Solutions Service/Tenant Connections Plan is not Anti-Competitive Under the New Federal Act or the Local Competition Act

AT&T and Frontier argued that USWC's plan is anti-competitive because it "locks-up" a key segment of the local exchange market prior to the full emergence of competition in the local exchange market and establishes an interrelationship of benefits to tenants and facility owners/managers that will make it quite difficult for future competitors to displace.

The Commission finds that termination provisions in the USWC contract with mall/building owner/managers should be adequate to eliminate concern over locking-up customers. The termination provisions allow for termination for convenience (without cause) by either party upon 90 days notice and termination for cause upon 30 day notice and time to correct any problems. The owners/managers do not have any liability for termination upon proper notification.

At the hearing, AT&T argued that the notification process that USWC was likely to require for terminations without cause (notifying tenants of the termination and its effects upon the tenants) was unduly burdensome. Upon review, however, the Commission finds that such a notification process is reasonable. The Commission finds it entirely appropriate that owners/managers be required to inform their tenants in writing of the termination and the effects of that termination on the tenant's rates.

AT&T also raised arguments based on wording of a contract that AT&T stated USWC is using in Iowa to implement this plan. However, the actual contract to be used by USWC in Minnesota is not before the Commission and issues relating to USWC's implementation of the Plan are premature at this time.

Concerns about the owner/manager's potential for pressuring tenants and providing misinformation in support of USWC because of monetary self-interest are serious. However, such concerns should not be addressed by blocking USWC's plan, but

- 1) by clarifying that coercive and deceptive activity is not an acceptable part of a competitive environment and
- 2) by conditioning the Commission's approval on USWC guaranteeing that its agents will not engage in such behavior, such as requiring a tenant to subscribe to USWC service as part of their lease, applying other direct pressure on a tenant, or conveying any misinformation.

Finally, USWC responded to a concern expressed by Frontier, clarifying that it would not be imposing a penalty in connection with any termination.

4. The Tenant Solutions Service/Tenant Connections Plan Does Not Violate §253(a) of the Federal Telecommunications Act of 1996

AT&T argued that USWC's proposal violates §253(a) of the Federal Act, which states:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

It is not clear how this provision would apply in this case since neither USWC's proposal nor the contracts executed pursuant to it are statutes, regulations, or local legal requirements. In any event, as the Commission indicated previously, USWC's Plan and contracts executed pursuant thereto do not effectively prohibit competitors from entering and contesting this market. The Plan does not prohibit competitors from making any counter-pitch to the owner/managers who sign up for the Plan and does not unduly lock-in Plan customers .

An additional element of consumer flexibility is that tenants who sign up for the Tenant Solutions Service are free to select any intraLATA service provider they wish. To assure that

this flexibility of choice is known to tenants, the Commission will condition its approval of USWC's proposal on the Company's guarantee that its agents not engage in coercive behavior such as requiring USWC services in leases of mall/building property, other direct pressure on tenants, or any conveyance of misinformation on the part of the owner/managers.

5. No Basis in the Record to Find That USWC is Using the Service/Plan to Improperly Leverage its Monopoly Power in the Local Market to Disadvantage USWC's Competitors in the IntraLATA Toll Market

AT&T alleged that USWC is leveraging its monopoly position in the local service marketplace to disadvantage competitors in the emerging competitive intraLATA toll market.

The 1995 amendments to Chapter 237 of Minnesota statutes (the 1995 Minnesota Telecommunications Act) and the 1996 Federal Telecommunications Act place the Commission in the role of ensuring a level playing field and protecting the public interest during the transition from a monopoly controlled local exchange market to a competitive market.² In evaluating AT&T's allegation of improper leveraging of monopoly power, decisions by courts on what constitutes anti-competitive behavior under anti-trust laws can provide guidance. In William v. Heartland Hospital East, 34 F.3d 605 (8th Cir. 1994), the Eighth Circuit Court of Appeals defined the elements of a monopoly leveraging claim:

1. monopoly power in one market,
2. the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market, and
3. injury caused by the challenged conduct.

The Commission finds that the record is inadequately developed to make the required findings:

- **Monopoly Power:** The Commission notes that although USWC would appear to be a monopoly provider in the local services market, USWC asserted that it is subject to local competition from various PSTS and CENTRON providers. It would have been helpful if the record reflected the portion of the relevant local market that USWC serves and contained argument regarding the meaning of the term "monopoly power" in this context.
- **Anti-Competitive Intent:** AT&T's assertions are inadequate to bear its burden to show that USWC is acting with anti-competitive motive. Intent aside, the record does not support a finding that the Plan (as conditioned in this Order) is likely to give USWC an unreasonable competitive advantage or destroy or foreclose competition in the

² Minn. Stat. § 237.16, subd. 1 (Supp. 1995) gives the Commission exclusive authority over various requirements of local exchange competition "for the purposes of bringing about fair and reasonable competition for local exchange telephone services."

intraLATA market.

- **Actual Injury:** There is no evidence in the record of any actual or likely injury to a USWC competitor.

The Commission takes seriously its responsibility to establish and preserve a level playing field in the transition to competition.³ In monitoring the marketplace for anti-competitive practices, the Commission necessarily relies on the affected parties to develop the record with respect to any challenged practices. If AT&T, Frontier, or other parties believe they can show that USWC implements the Service/Plan in a restrictive and anti-competitive manner, they are not precluded from filing complaints against USWC under Minn. Rules, Part 7829.1800.

D. Commission Action

Based on the foregoing analysis, the Commission will approve the offering of USWC's Tenant Solutions Service and Tenant Calling Connections Plan subject to the two conditions set forth in Ordering Paragraph 1.

ORDER

1. USWC's proposal to offer a Tenants Solutions Service and Tenant Calling Connections Plan as filed June 24, 1996 is approved, subject to the following two conditions:
 - USWC shall guarantee that its agents will not engage in coercive behavior such as requiring USWC services in leases of mall/building property, other direct pressure on a tenant, or any conveyance of misinformation on the part of the owner/managers; and
 - upon termination of an agreement between USWC and a manager/owner, each USWC customer participating in the plan will be notified of the termination in writing.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

³ The Commission's role is not to assure that competitors get a share of the market currently served by USWC but to assure that USWC does not unfairly interfere with their ability to compete with USWC for customers in that market. The Commission has authority under Minn. Stat. § 237.16, subd. 1 to prescribe the terms and conditions on which service delivery is carried on, with the goal of bringing about fair and reasonable competition for local exchange telephone services.

Burl W. Haar
Executive Secretary

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