

ISSUE DATE: September 16, 1997

DOCKET NO. P-407/EM-97-910

ORDER REJECTING INTERCONNECTION AGREEMENT AND DIRECTING REVISED
FILING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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| Edward A. Garvey | Chair |
| Joel Jacobs | Commissioner |
| Marshall Johnson | Commissioner |
| Gregory Scott | Commissioner |
| Don Storm | Commissioner |

In the Matter of an Application for Approval of
an Interconnection Agreement Between
NEXTEL Communications, Inc. and
Contel of Minnesota d/b/a GTE-Minnesota

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PROCEDURAL HISTORY

On June 18, 1997, Contel of Minnesota d/b/a GTE-Minnesota (GTE) filed a petition for approval of its Interconnection Agreement (Agreement) with NEXTEL Communications, Inc. (Nextel) pursuant to Section 252(e) of the Federal Telecommunications Act of 1996 (Act).

On July 18, 1997, the Minnesota Department of Public Service (the Department) filed comments on the Interconnection Agreement. The Department recommended that the Commission reject the proposed Agreement unless the parties agree to the modifications recommended by the Department.

On August 1, 1997 GTE filed its Reply Comments. GTE accepted all of the Department's recommendations except for three.

On September 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. The Parties to the Proposed Agreement: Nextel and GTE

GTE-Minnesota is an incumbent local exchange carrier in Minnesota. Nextel is a provider of two-way wireless mobile telecommunications service. The Agreement was negotiated between the two parties and extends certain arrangements to one another within Minnesota for purposes of interconnection and the exchange of traffic between their respective end-users, and reciprocal access to their poles, ducts, conduits and rights-of-way. The Agreement also governs the terms and conditions of the collocation of certain equipment on GTE's premises.

Nextel and GTE requested that the Commission approve their proposed Agreement. They argued that the Agreement provides no basis for a finding of discrimination or contravention of

the public interest.

In its Reply Comments, GTE accepted five of the Department's recommended changes and opposed three of them. These issues will be discussed more fully below.

II. The Department

The Department argued that certain portions of the Agreement are inconsistent with the public interest or discriminate against third parties. As a result, the Department recommended that the Commission reject the Agreement unless the parties agree to the modifications it has recommended. The Commission addresses these issues in the following section.

III. Commission Analysis

Section 252(e) of the Act requires state commission approval of interconnection agreements adopted by arbitration or negotiation. The state commission may only reject a negotiated agreement, with written findings as to deficiencies, based on the following criteria:

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . .

In this light, there are several provisions of the proposed Agreement that warrant particular discussion:

A. Notice of Changes

The Department suggested that the Commission should be notified by any party desiring to terminate the Agreement and suggested the following underlined language be added to Article III, Section 2.3 so that the section would read as follows:

Either party may terminate this Agreement in whole or in part in the event of a default by the other party; provided, however, that the nonfaulting Party notifies the defaulting party and the Minnesota Public Utilities Commission in writing of the alleged default

GTE accepted the Department's recommendation regarding this provision.

The Commission finds that the proposed language in Article III, Section 2.3 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that incorporating the underlined language (see above) would correct the deficiency.

B. Commission Approval of Changes to the Agreement

Article III, Section 3 deals with amendments, modifications, or supplements to the Agreement. The Department recommended that the Agreement should specify that the Commission must approve any amendments to the Agreement. The Commission has required this provision in other contracts and the Department recommended the following underlined language be added:

Any amendment, modification, or supplement to this Agreement must be in writing and signed by an authorized representative of each party. The Commission must approve of any amendment, modification, or supplement to this Agreement.

GTE accepted the Department's recommendation regarding this provision.

The Commission finds the proposed language in Article III, 3 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that incorporating the underlined language (see above) would correct the deficiency.

C. Notice of Assignment

Article III, Section 4 deals with assignments of rights, obligations, and duties under the Agreement. The Department recommended that the Commission be notified of any assignments under the Agreement. The Department recommended that the following language be inserted into the Agreement:

The Party making the assignment shall notify the Commission 60 days in advance of the effective date of the assignment.

GTE accepted the Department's recommendation regarding this provision.

The Commission finds that the proposed language in Article III, 4 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that incorporating the Department's proposed language (see above) would correct the deficiency. The Commission notes that it has ordered similar notice provisions in a previous agreement between USWC and Sprint Spectrum in Docket No. P-466, 421/M-96-1097.

D. Provision of Confidential Customer Information

Article III, Section 9.1 permits the parties to provide each other with confidential customer information. The Department recommended that the word "customer" be deleted from this section of the Agreement as contrary to federal law. The Department noted that 47 C.F.R. § 64.1201(e)(2) provides that in no case shall any telecommunications service provider ... disclose the billing name and address (BNA) information of any subscriber to any third party In addition, the Department noted, Section 64.1201(e)(3) states:

No local exchange carrier shall disclose the billing name and address information associated with any subscriber who has affirmatively withheld consent for disclosure of BNA information.

The Department argued that the public interest requires nondisclosure of other customer information, without a customer's consent, in addition to billing name and address.

GTE indicated that it would accept the Department's comments on this provision provided that the Commission accepts the following revision of the first sentence of this provision as follows:

To the extent permitted by C.F.R. 64.1201(e)(2) and 64.1201(e)(3) and applicable law, either party may disclose to the other proprietary or confidential customer...

The Commission finds that the initially proposed language in Article III, 4 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that the sentence revision proposed by GTE for Article III, 9.1 would provide sufficient customer confidentiality protections within the Agreement and would correct the deficiency identified by the Department.

E. Information Exchange Regarding Delinquent Subscribers

Article III, Section 11 provides for the cooperative exchange of information concerning delinquent subscribers. The parties have agreed to exchange information on end-users who terminate services to [a] party without paying all outstanding charges when that party is notified that the end-user is seeking service from the other party. The Agreement further provides that "if an end-user has past due charges associated with the account, for which payment arrangements have not been made with GTE, the end-user's previous telephone number will not be made available to Nextel until the end-user's outstanding balance has been paid. There is no reciprocal provision that allows Nextel to retain the number of delinquent subscriber who wishes to transfer to GTE. GTE and Nextel have inserted language recognizing that these provisions may be illegal in some jurisdictions

The Department noted that Minn. Rules, part 7810.1500 establishes the lawful manner by which companies may protect themselves from customers who do not pay and argued that these proposed provisions of the Agreement are contrary to that rule. The Department noted that in Docket No. P-442, 421/M-96-855 (the Consolidated Arbitration proceeding) the Commission found that Minn. Rules, part 7810.1500 "does not allow the trading of credit information between utilities. The rule does not allow the gathering of information such as unpaid balances or length of service with prior provider, which are beyond the carefully restricted scope of information allowed." The Department also suggested that the rule doesn't allow telephone companies to retain the telephone numbers of customers who choose to switch carriers as a way to force customers to pay bills that may be part of a legitimate dispute.

The Department recommended that the Commission require the parties to delete the provision discussed above. The Department stated that this would be appropriate because this is a request

to approve a contract to govern their interconnection in Minnesota only.

The Department asserted that in the Consolidated Arbitration, the Commission ordered similar provisions dealing with the exchange of customer credit information be stricken from the contract and required the parties to insert the following language:

The Parties agree that they will provide service to their customers under governing MPUC rules. Issues relating to the assessment of customer creditworthiness will be governed by Minn. Rules, part 7810.1500, related or successor rules, and relevant MPUC Orders.

The Department recommended that the Commission reject the Agreement unless the parties agree to delete the offending language from their proposed Agreement and substitute the Commission-approved language.

GTE accepted the Department's recommendation regarding this provision.

The Commission finds that the proposed language in Article III, 11 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that striking the section on the exchange of customer credit information from the Agreement and incorporating the language proposed above would correct the deficiency.

F. Jurisdiction Question

Article III, Section 16 of the Agreement discusses legal jurisdiction over the Agreement. In their proposed Agreement, the parties stated that the Agreement “shall be subject to the exclusive jurisdiction of the courts” in the state where the services are provided or the facilities reside. However, Article III, 25 of the Agreement states that the Agreement shall at all times be subject to changes, modifications, orders and rulings by the Federal Communications Commission and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency.”

The Department expressed the concern that section 16 places exclusive jurisdiction in state courts while section 25 recognizes the jurisdiction of the FCC and state commissions. The Department recommended that the Commission modify section 16 of the Agreement by adding the following underlined language:

This Agreement ...shall be subject to the exclusive jurisdiction of the courts therein to the extent that the FCC and/or the Minnesota Public Utilities lack jurisdiction to resolve any issue arising out of this Agreement.

GTE accepted the Department's recommendation regarding this provision.

The Commission finds that the proposed language in Article III, 16 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that incorporating the underlined language above would correct the

deficiency.

G. Disclaimer of Warranties

Article III, Section 19.3 of the proposed Agreement disclaims any representation or warranties concerning the quality of services, elements and facilities obtained under the Agreement, except as specifically provided elsewhere in the Agreement. The Department is concerned that without any quality assurances, new entrants will be at a competitive disadvantage which will retard the emergence of competition. In the GTE/USWC interconnection agreement the parties had a similar disclaimer but included quality standards elsewhere in the agreement.

The Department argued that GTE and Nextel should explain why the absence of any quality standards is consistent with the public interest. GTE recommended that the Commission reject the Department's comments. However, GTE proposed adding the following language to the end of the provision in order to address the Department's concern:

Provider agrees that this provision shall not serve to eliminate, or otherwise limit, its Minnesota quality of service obligations pursuant to applicable Minnesota law.

The Commission finds that the language initially proposed by the companies in Article III, 19.3 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Federal Act 252(a)(1) permits negotiated agreements to depart from the provision of Section 251(c)(2)(C) requiring ILECS to provide interconnection at least equal in quality to that provided by the local exchange carrier to itself or its affiliates. However, the Commission retains discretion to determine whether the negotiated provision regarding quality of service must promise “equal in quality” in order to meet the “public interest” test that the Commission applies to negotiated contracts pursuant to Section 252(e)(2).

Having considered this matter, the Commission concludes that the standard enunciated by GTE is not consistent with the public interest. The problem with GTE’s proposed language is that it is not clear what the parties are agreeing to. To the extent the language references standards contained in current Commission rules, the Commission notes that its current quality of service rules do not directly address provider-to-provider service standards. Moreover, the current rules establish minimal quality standards that do not assure that a CLEC receiving service at such a level would be on an equal footing with its competitor, GTE.

The Commission notes that language requiring that GTE provide at least the same quality of service it provides its own end-users would correct the deficiency.

H. Commission Address and Third Party Beneficiary Status

The Agreement’s Notices section of the Companies’ proposed Agreement (Article III, Section 22) did not list the Commission’s address. The Department recommended that the Notices section should include the address of the Commission. The Department also recommended that the Commission require the third party beneficiary language such as the

language contained in the Sprint/US WEST Contract in Docket No. P-466, 421/M-96-1097. Language encouraged by the Commission and adapted to the GTE/Nextel Agreement should read as follows:

GTE and Nextel recognize that the MPUC considers itself a third party beneficiary of this contract on behalf of the public. Accordingly, the parties agree that they will provide the MPUC with notice of any lawsuit or other proceeding involving this Agreement so that the MPUC may file a petition to intervene to protect the public interest. The Parties agree not to oppose any petitions by the Commission to intervene in such proceedings.

GTE argued that the Department's comments on this provision should be rejected. Regarding the notice issue, GTE noted that inclusion of the Commission address in this section is unnecessary since it has agreed to the Department's recommendations for Articles III. 2.3, 3 and 4, which discuss the Commission's approval and notice rights under the Agreement.

Regarding the third party beneficiary issue, GTE does not believe it is appropriate to grant third-party beneficiary status to any third-party under a commercial agreement. GTE asserted that the Commission can adequately protect the public interest without attaining third-party status and particularly denied that the Commission had the authority to require the companies to place the final sentence (agreeing not to oppose Commission petitions for intervener status) in their Agreement.

The Commission finds that the proposed language in Article III, 22 constitutes grounds to reject the Agreement because it is not consistent with the public interest, convenience and necessity. The Commission notes that its decision on this point is consistent with its decision on several previous interconnection agreement dockets. Here, as in other dockets, the Companies have failed to cite an instance in which their opposition to the Commission's intervention in a proceeding involving this Agreement would be justified. The Companies' proposed provision is not consistent with the public interest. By their silence on this point, the Companies would be retaining the potential to oppose the Commission's intervention in proceedings that involve this Interconnection Agreement. In these circumstances, it is appropriate for the Commission to prevent the Companies from requiring the Commission to expend any of its regulatory resources responding to the Companies' opposition to the Commission's motion to intervene in such a proceeding.

The Commission notes that adding the Commission's address to the Agreement's Notice section and incorporating the proposed language above would correct the deficiency.

IV. Commission Action

Consistent with its analysis in the forgoing section, the Commission will reject the Companies' proposed Interconnection Agreement and require the Parties to file a revised Agreement responding to the Commission's findings of deficiencies within two weeks of the service date of the Commission's Order.

The Commission will delegate authority to the Executive Secretary to examine the revisions filed by the Parties, confirm that the deficiencies have been corrected as recommended, and to issue a letter to the Parties approving the revised Agreement as of the date of filing.

If the Parties do not reach an agreement that address the Commission's findings of deficiencies, the parties should inform the Commission of that within two weeks of the Commission's Order.

ORDER

1. The Nextel/GTE Interconnection Agreement submitted to the Commission on June 18, 1997 is rejected for reasons set forth in **Section III** of this Order.
2. If within two weeks of this Order, Nextel and GTE refile (for approval under Section 252(e) of the Act) an agreement that corrects the deficiency identified by the Commission, the corrected contract shall be effective on the date the Parties file a conforming agreement.
3. If the Parties do not reach an agreement that addresses the Commission's findings of deficiencies, the parties should inform the Commission of that within two weeks of the Commission's Order.
4. The Commission hereby delegates to its Executive Secretary the authority to determine whether or not the revised agreement corrects the deficiencies noted in this Order. If the Executive Secretary finds the contract properly revised, he shall have the authority to send the parties a letter confirming Commission approval of the contract and the effective date of the contract, i.e. the date the properly revised Agreement was filed with the Commission. In the event that the Executive Secretary determines that the revised contract does not comply with the Commission's directives, the matter will be brought before the Commission for review.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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