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DOCKET NO. P-999/R-97-608

ORDER ADOPTING RULES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
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Commissioner
Commissioner

In the Matter of the Planned Promulgation of
Rules Governing the Competitive Provisions of
Local Telecommunications Service in Areas
Served by Local Telephone Companies with
Less Than 50,000 Subscribers

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I. BACKGROUND

In 1995, the Minnesota Legislature amended Minn. Stat. ch. 237. As amended, chapter 237 imposed an extensive set of requirements on local exchange carriers (LECs) and the Commission, intended to facilitate the development of a competitive market for local telecommunications service and to protect consumers.

The Commission's obligations included a directive to adopt rules governing competitive entry into areas currently served by incumbent LECs with 50,000 or more subscribers (large LECs). The Commission adopted those rules in its ORDER ADOPTING PERMANENT RULES issued July 21, 1997, in Docket No. P-999/R-95-53 In the Matter of a Rulemaking Governing the Competitive Provision of Local Telecommunication Services Pursuant to Minnesota Statutes, Section 237.16, Subdivision 8 (a) (Large Company Rules). A second rulemaking mandate directed the Commission to adopt rules that apply to the areas served by incumbent LECs with fewer than 50,000 subscribers. Minn. Stat. § 237.16, subd. 8(b) (Small Company Rules). The present proposed rules are designed to fulfill this mandate.

The Commission officially began this rulemaking with its Request for Comment, which it mailed to all persons on the Commission's mailing list for proposed rules under Minn. Stat. § 14.14, subd. 1a, in April, 1997. The Request appeared in the *State Register* on May 5, 1997.

Among other things, the notice announced the Commission's intent to form an advisory panel to assist Commission staff in preparing proposed rules. The Commission convened a panel composed of a broad spectrum of affected interests, including representatives of AT&T Communications of the Midwest, Inc. (AT&T); Hutchinson Telephone Co.; MCI Telecommunications, Inc./MCImetro; the Minnesota Business Utility Users Council; the Minnesota Cable Communications Association; the Minnesota Department of Administration, 911 Program; the Minnesota Department of Public Service; the Minnesota Independent Coalition; the Minnesota Office of the Attorney General--Residential and Small Business Utilities Division; the Minnesota Senior Federation; Park Region Mutual Telephone Co.; Sherburne County Rural Telephone Co.; Sprint/United Telephone; and US West Communications, Inc.

Staff met with the panel on three occasions to discuss issues and review successive staff drafts. Each of these meetings was followed by written comments from panel members.

On July 29 and 31, 1997, the staff presented a set of draft rules for the Commission's consideration. The Commission, with a quorum of its members present, made a series of policy determinations on these questions, and directed the staff to propose rules reflecting those determinations. The rules were published in the *State Register* along with a Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Public Hearing, and Notice of Hearing if 25 or More Requests for Public Hearing are Received (Dual Notice) on September 15, 1997.

By October 15, 1997, the Commission had received several comments and more than thirty requests for hearing before an administrative law judge (ALJ).

ALJ Richard C. Luis convened the hearing on October 27, and concluded it on October 31, 1997. The Commission and other parties submitted initial post-hearing comments by November 20, 1997. On November 25, 1997, the Commission convened a hearing to consider proposed modifications to the proposed rules. Parties filed responsive post-hearing comments on December 1, 1997; the Commission's comments included its modifications to the rules.

The ALJ issued his report on December 26, 1997. In the Report of the Administrative Law Judge (ALJ Report), the ALJ found that the proposed rules were needed and reasonable, and that the record of this rulemaking was sufficient to permit the Commission to adopt the rules that it had proposed on September 8, 1997, as modified by the Commission in its December 1 filing. However, the ALJ found that the record also supported alternative rules with respect to three issues:

1. Whether to require competitive local telephone companies to offer service throughout the incumbent telephone company's service area, as reflected in the Commission's initial proposed rules;
2. Whether to permit an arbitrator to shift the burden of persuasion from the incumbent telephone company to another party during an interconnection arbitration proceeding; and
3. Whether to permit the Commission to shift the burden of production and persuasion from the incumbent telephone company to another party during a rural exemption proceeding.

On January 29, 1998, the Commission, with a quorum of its members present, met to determine which version of the rules to adopt with respect to each of these three issues and to determine whether to direct its staff to publish a Notice of Adoption in the *State Register*.

II. ANALYSIS OF ISSUES

A. CLEC Service Area (parts 7811.0100, .0200 and .0525)

The version of the Small Company Rules published in the Notice of Intent to Adopt Rules would have required a CLEC to offer service throughout an incumbent's service area. The ALJ found that the Commission has the authority to adopt this version of the rules. ALJ Report, pages 7-9. However, the final version of the Small Company Rules submitted to the ALJ did *not* require CLECs to offer service throughout the incumbent's service area. The ALJ found that the

Commission had the authority to adopt this version of the rules as well. *Id.* In effect, the ALJ has acknowledged the Commission's discretion to adopt either version of the proposed rules.

The provides ample argument supporting either policy regarding CLEC service areas; no issue in this rulemaking has received more attention. Ultimately, however, the Commission is not persuaded that the merits of requiring a CLEC to serve the incumbent's entire service area outweigh the merits of permitting the CLEC to select its own service area, subject to the Commission's power to place conditions on a CLEC's authority.

Some parties assert that cream-skimming¹ may occur as part of the evolution from monopoly markets to competitive markets in rural areas. The question for the Commission, however, is not whether cream-skimming will occur, but what impact that cream-skimming would have on ratepayers. Cream-skimming could cause a LEC to seek to raise its rates to offset the lost revenues; alternatively, it could cause a LEC to reduce its profit margin, or operate more efficiently, or both. The Commission considers the *possibility* of cream-skimming, resulting in the *possibility* of harm to ratepayers, too speculative to justify a policy that could discourage a competitor's entry into rural markets. Moreover, in the years since the amendments of Minn. Stat. § 237.16 and the federal Communications Act of 1934, the Commission has not observed CLECs flocking to serve rural areas and harming rural ratepayers. This fact diminishes the weight that the Commission gives to predictions of the harmful effects of competition.

Moreover, the Commission wants to avoid creating unnecessary barriers -- and even the appearance of barriers -- to competitive entry. The Commission's rulemaking mandate compels it to "prescribe appropriate regulatory standards for new local telephone service providers, that *facilitate and support the development of competitive services....*" Minn. Stat. § 237.16, subd. 8(a)(6) (emphasis added). Therefore, the Commission favors a regulatory posture that grants a CLEC greater latitude until there is a reason to restrict it, rather than a posture that restricts a CLEC's latitude until there is a reason to expand it. The co-extensive service area requirement runs counter to this goal.

Concerns about cream-skimming are better addressed on a case-by-case basis, as provided by statute.² Excluding the co-extensive service area requirement from these rules does not preclude

¹As explained in the SONAR for these rules, "cream-skimming" or "cherry picking" refers to a CLEC serving only the lowest cost, most lucrative customers in a LEC's service area, leaving the higher cost, less lucrative customers to the incumbent LEC.

²Minn. Stat. § 237.16, subd. 1(b) provides that —

No person shall provide telephone service in Minnesota without first obtaining ... a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and commission rules.

the Commission from imposing such a requirement as a condition of certification where circumstances warrant it.

For the foregoing reasons, the Commission declines to adopt the proposed changes to the rules.

B. Burden of Proof for Arbitrations (Part 7811.1700)

The proposed rule places the burden of proof -- that is, the burden of production and the burden of persuasion -- with respect to material issues of fact on the incumbent LEC in an arbitration proceeding. The burden of production determines who must present evidence in the first instance. The burden of persuasion permits the Commission to make a decision in the absence of full information. The rule allows the arbitrator to shift the burden of production to the new entrant based on which party has control of the relevant information, or to comply with applicable FCC regulations. This subpart contains the same language used in the Large Company Rules, and the Commission has applied this same standard in the arbitration proceedings it has conducted to date.

LECs urge the Commission to change the burden of proof that they must bear in arbitration cases. Other parties supported retaining the current burden of proof. In his report, the ALJ found the proposed allocation of burden of proof to be necessary and reasonable, but recommended that the Commission grant the arbitrator more discretion to shift the burden of persuasion. ALJ Report, pages 16-17.

As noted in the Commission's Statement of Need and Reasonableness supporting these rules, most of the critical evidence in these arbitrations is within the control of the incumbent provider. The incumbent, therefore, is in the best position to come forward with evidence on most of the issues likely to be disputed in an arbitration under the Federal Act. The Federal Act and the 1995 amendments to Minnesota Statutes, chapter 237, were intended to facilitate competitive entry into local telecommunications markets. Placing the burden of proof on the incumbent carrier is consistent with the thrust of the relevant federal and state laws the Commission must apply in these arbitrations.

The Commission does not favor reallocating the burden of persuasion in arbitration proceedings. The Commission has conducted a number of arbitrations while allocating the burden of proof to the incumbent telephone companies, and is not persuaded that a re-allocating this burden would achieve demonstrably better results. To the contrary, the Commission has concern that permitting the burden of persuasion to be shifted to multiple parties could eliminate the benefit of having a burden of persuasion: providing a means of drawing a conclusion in the absence of

Additionally, Minn. Stat. §§ 237.60, subd. 3, and 237.74, subd. 2, provide that —

[N]o [local service provider] shall *unreasonably* limit its service offerings to particular geographic areas unless facilities necessary for the service are not available and cannot be made available at reasonable costs.

(emphasis added). These statutory provisions authorize the Commission to determine whether any proposed service offerings, including those proposed in a certification petition, include “unreasonable” geographic limits. The Federal Act allows state commissions to require CLECs to match the service areas of incumbents in rural areas. 47 U.S.C. § 253(f).

full information. Finally, in general the Commission favors maintaining consistency between Chapter 7812 (Large Company Rules) and 7811 (Small Company Rules). Thus, in the absence of a compelling reason, the Commission favors retaining the current language, placing the burden of persuasion on

C. Burden of Proof for Rural Exemptions (Part 7811.2000)

In comments in the rulemaking, AT&T urged the Commission to declare that any LEC that asserts a rural exemption to the obligations imposed by the Telecommunications Act of 1996 should bear the burden of demonstrating that the Commission should sustain that exemption. Comments of AT&T (November 20, 1997), pages 6-10. The Commission found merit in this argument, and in its December 1 comments the Commission recommended adding the following language to part 7811.2000:

The burden of production and persuasion with respect to issues of material fact is on the incumbent LEC.

The ALJ found this language to be necessary and reasonable. However, the ALJ suggested that the Commission consider adding the following language as well:

The arbitrator may shift the burden of production and persuasion as appropriate, based on which party has control of the critical information regarding the issue in dispute and which party is the proponent of the issue in dispute.

ALJ Report, pages 17-18.

The Commission approves this suggestion. The Commission notes that the bare statement that “the burden of production and persuasion with respect to issues of material fact is on the incumbent LEC” grants the arbitrator no discretion to shift any burden. Such a position is more restrictive than the language used at 7811.1700 (and the corresponding language at 7812.1700), and indeed is more restrictive than the language originally proposed by AT&T.

III. STAFF AUTHORIZATION

Having considered and approved the rule provisions in this docket, the Commission directs its staff to take the necessary steps to publish the adoption of these rules, reflecting the Commission’s decisions in this docket, in the *State Register*.

ORDER

1. The Commission adopts the Administrative Law Judge’s Report dated December 26, 1997, and incorporates the report into this Order. The Commission affirms the ALJ’s finding that the proposed rules, reflecting the Commission’s decisions in this docket, are needed and reasonable, and that the Commission has adequately fulfilled the procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable law.

2. The Commission modifies proposed part 7811.2000 by adding the following sentence:

The arbitrator may shift the burden of production and persuasion as appropriate, based on which party has control of the critical information regarding the issue in dispute and which party is the proponent of the issue in dispute.

3. The Commission, with a quorum of its members present, adopts the above-captioned rules, in the form set out in the State Register on September 15, 1997, with the modifications indicated in its Reply Post-Hearing Comments on December 1, 1997, and this Order, pursuant to authority vested in the Commission at Minnesota Statutes §§ 216A.05, 237.10, and 237.16. The Commission authorizes its staff to take the necessary steps to implement the rules.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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