

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules
Governing the Competitive Provision
of Local Telecommunications Service,
Minn. Rules, parts 7812.0050 through
7812.2300.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan Klein on March 12, 1997 at the Metro Square Building in St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1996) to hear public comment, to determine whether the Public Utilities Commission (Commission) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not any modifications to the rules proposed by the Commission after initial publication are substantially different.

The Commission's hearing panel consisted of Daniel Lipschultz, Diane Wells, Mark Fournier and Lisa Youngers. Approximately 30 people attended the hearing, 21 signed the register and 15 persons spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to April 1, 1997. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on April 8, 1997, the rulemaking record closed for all purposes. See Finding 6, below, for details. The Administrative Law Judge received 15 written comments from interested persons during the comment period. The Commission submitted a response to most of the matters discussed in the public's written comments and at the hearing.

NOTICE

The Commission must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

FINDINGS OF FACT

1. On January 27, 1997, the Public Utilities Commission requested the scheduling of a hearing and filed the following documents with the Chief Administrative Law Judge:

A. A copy of the proposed rules certified by the Revisor of Statutes.

B. The Notice of Hearing proposed to be issued.

C. The Statement of Need and Reasonableness (SONAR).

2. On January 27, 1997 a Notice of Hearing and a copy of the proposed rules were published at 21 State Register 1037.

3. On January 24, 1997 the Public Utilities Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Public Utilities Commission for the purpose of receiving such notice.

4. On the day of the hearing, the Public Utilities Commission placed the following additional documents in the record:

A. The Commission's initial request for comment published in the State Register on February 21, 1995 at 19 S.R. 1782 and the comments received in response to that notice.

B. The Commission's proposed rules, including the approval of the Revisor of Statutes.

C. The Commission Staff's modifications to the proposed rules as published.

D. The notice of hearing and notice of intent to adopt rules as mailed and as published in the State Register.

E. The certificate of the Commission's mailing list under Minn. Stat. § 14.14, subd. 1a.

F. The Commission's certificate of mailing the notice of hearing and notice of intent to adopt rules.

G. The Commission's certificate of additional notice by mail to (a) the Commission's general service lists specific to the rulemaking docket; (b) the Commission's list of interexchange and long distance carriers; and (c) the Commission's list of LECs.

H. The Commission's affidavit of mailing to all the aforementioned lists.

I. All written comments received by the Commission pursuant to its notice of hearing and notice of intent to adopt rules. These include comments from or on behalf of:

- (1) Electric Lightwave, Inc.
- (2) VoiceLog LLC
- (3) Minnesota Independent Coalition
- (4) Firstcom, Inc.
- (5) Teleport Communications Group, Inc. (TCG)
- (6) AT&T Communications Group, Inc. (AT&T)
- (7) Contel of Minnesota, Inc. d/b/a/ GTE Minnesota
- (8) Minnesota Senior Federation, Metropolitan Region
- (9) McLeodUSA Telecommunications Services, Inc.
(McLeod)
- (10) Office of Attorney General, Residential and Small
Business Utilities Division
- (11) MCI Telecommunications Corporation (MCI)
- (12) US West Communications, Inc.
- (13) Minnesota Cable Communications Association
- (14) Minnesota Department of Public Service
- (15) MFS Intelenet of Minnesota
- (16) Minnesota Business Utility Users Council (MBUUC)

J. A statement indicating that the Chair of the House Regulated Industries Committee and the Chair of the Senate Jobs, Energy and Community Development were provided with copies of the proposed rules and statement of need and reasonableness via hand delivery.

K. The Petitions requesting a rule hearing.

5. The documents were available for inspection at the Office of Administrative Hearings from the date of filing. No person requested an opportunity to view any of the documents at the Office.

6. The Notice of Hearing as mailed and published was somewhat unusual because the staff was unaware of some recent rule changes and was

unaware of the existence of the recommended form of notice contained in Minn. Rule pt. 1400.2540. Nonetheless, the notice did contain all of the information that was required under the circumstances of this proceeding. The filing of documents with the Office of Administrative Hearings prior to the hearing also failed to comply with all of the procedural rules. However, in both cases, the deviations from strict compliance with applicable statutes and rules constituted harmless error within the meaning of Minn. Stat. § 14.15, subd. 5 (1996).

7. The period for submission of written comment and statements remained open through April 1, 1997. However, at the hearing, the Administrative Law Judge established an informal comment schedule whereby: (1) public comments were to be submitted to the Administrative Law Judge and the PUC staff by March 27; and then (2) the staff would send out any proposed changes by April 1; so that (3) affected persons could comment to the Commission on the staff's proposed changes at the Commission's April 4 meeting, and then (4) persons could comment to the ALJ on the Commission's final proposals by April 8, when the record would close for all purposes. All but one of these events occurred on schedule, and the one which was late (April 1) was only late by one day. Participants were afforded ample opportunity to comment on all versions of the proposed rules.

Statutory Authority

8. The Commission asserts that it has rulemaking authority to adopt the proposed rules under its general rulemaking authority in Minn. Stat §§ 237.10 and 216A.05 and under its specific rulemaking authority in Minn. Stat. § 237.16, subd. 8(a). The Administrative Law Judge finds that the Commission has the requisite statutory authority to adopt the proposed rules.

Rulemaking Legal Standards

9. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of the facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Petterson, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). The Commission prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Commission primarily relied upon the SONAR as its affirmative presentation of the need and reasonableness for the amendments. The SONAR was supplemented by the comments made by the Commission at the public hearing (including written comments on the staff's proposed changes) and in its written post-hearing comments, dated April 8, 1997.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Dept. of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Dept. of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. A rule cannot be said to be unreasonable simply because a more reasonable alternative exists, or a better job of drafting might have been done. The question is rather whether the choice made by the agency is one a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must assess whether the legislature has granted statutory authority to the Agency, whether rule adoption procedure was complied with, whether the rule grants undue discretion to Agency personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is impermissibly vague. Minn. Rule 1400.2100.

Finally, where the Commission proposes changes to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996).

Impact on Farming Operations

10. Minn. Stat. § 14.111 (1996) imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Analysis of Proposed Rules

General

11. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each proposed rule, nor will it respond to each comment which was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because many of the proposed rules were not opposed, and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rule is unnecessary. The Administrative Law Judge specifically finds that the Commission has demonstrated the need for and reasonableness of provisions of the rules that are not discussed in this Report, that such provisions are within the Commission's statutory authority noted above, and that there are no other problems that prevent their adoption. Where changes were made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd 3 (1996). Unless specifically mentioned herein, any language proposed by the Commission which differs from the rule as published in the State Register and is not discussed in this Report is found not to be substantially different.

Section-by-Section Analysis

7812.0100: Definitions

- Subp. 22. Facilities-based carrier.**
- Subp. 23. Facilities-based service.**
- Subp. 31. Local niche service.**
- Subp. 32. Local niche service provider.**
- Subp. 42. Resale service.**
- Subp. 43. Reseller.**

12. These subparts define three different categories of providers. Both AT&T and the Department of Public Service (DPS) proposed that there need not be such a breakdown in definitional categories; that there needs to be no distinction between facilities based providers and resellers. Local Niche service is the "catch all" provision for providers that do not offer either (1) local facilities based service; (2) local resale service or (3) interexchange service. (SONAR, p. 18). Furthermore, the local niche definition allows the Commission to identify and certify appropriately those future providers who offer services other than the combination of dial tone and public switched access. (SONAR, p. 18-19).

13. As the 911 Issues Study Group indicated in its comments of March 27, 1997, the distinct classifications are necessary with regard to 911 service and identifying which rules apply to which carriers (p. 1). For example, a Facilities Based carrier will have to establish that it is capable of providing 911 service in the manner to which the public has become accustomed. A reseller, on the other hand is using the network of the service provider and it is the service provider who is responsible for providing the 911 service. (Id.)

14. This categorization provides the Commission with the flexibility to better classify carriers and more accurately identify which regulations a carrier in one of the defined groups must adhere to. The Federal Act makes such distinctions regarding facilities based and resale providers and the local niche definition allows for future flexibility in certifying providers. The Administrative Law Judge finds that the decision to differentiate and define providers is necessary and reasonable.

Subp. 42. Resale Service.

15. This subpart defines resale service as service that is purchased on a wholesale basis from a local service provider and then resold on a retail basis to end users. Firstcom proposes that a provision be added to this subpart that exempts CENTRON resellers from the requirements imposed on all other common carriers. (Comments, Feb. 25, 1997, pp. 1-3). As the Commission states in its Modifications to Proposed Rules and Response to Public Comment, Apr. 8, 1997, pp. 13-14, this exemption is unwarranted. A CENTRON reseller not only provides CENTRON features, but also provides the basic dial tone and public switch access that defines local service. CENTRON providers clearly provide telecommunications for a fee to significant classes of users. For further explanation, the Administrative Law Judge adopts the Commission's explanation referenced above.

7812.0200 General Certification Requirements

Subp. 2. Certification Categories.

16. Subpart 2 is the section outlining the certification categories: local facilities based service, local resale service, interexchange service and local niche service. Several parties objected to the need for the multiple categories. AT&T comments that there is no need for a distinction between facilities based carriers and resellers. (Comments, Feb. 26, 1997, pp. 3-4). AT&T argues that a provider that enters the market first as a reseller would have to return and undergo the entire certification process again when it is prepared to offer at least

partial facilities based service. (Id.) The DPS comments that only a distinction between local service and interexchange service is necessary. (Comments, Feb. 26, 1997, pp. 4-5). DPS continues by commenting that the Commission can already accomplish its goals of applying more focused scrutiny to an applicant on a case-by-case basis and a separate category is not necessary. (Id.)

17. Minn. Stat. § 237.16 subd. 1(b) requires the Commission to determine that an applicant possesses the technical, managerial and financial resources necessary to provide the proposed telephone services. The SONAR states “[e]ach category represents a significantly different form of service with respect either to its resource requirements or its public service implications.” (SONAR, p. 25).

18. AT&T’s concern about recertification is addressed in the current proposed rules. The rule, as pointed out in the SONAR, provides for an applicant to request multiple certifications in a single petition and therefore avoid future certifications. (7812.0200, subp. 2, ll, 25-26; SONAR, p. 26).

19. As pointed out by the Minnesota Independent Coalition (MIC), a single classification system like that proposed by the DPS or AT&T would allow a CLEC to obtain a certificate based on its ability to provide resale service. That same CLEC could later attempt to offer facilities based service without a Commission determination that the CLEC has the necessary resources to provide facilities-based services consistent with the public interest.

20. The Administrative Law Judge finds that the Commission has demonstrated sufficient need and reasonableness to implement the four-part classification in this subpart. The separate categories in these rules establish an administratively practical approach to implementing the certification requirements of Minn. Stat. § 237.16.

Subp. 3 Limitations on local service certification/intent to provide service.

Subp. 3A.

21. This subpart requires an applicant to have commenced any necessary negotiations with the LEC prior to obtaining certification. Several parties objected to the requirement as unnecessary. McLeodUSA Telecommunications Services, Inc. (“McLeod”) comments that this requirement is unnecessary where there are services that can be provided without purchasing of network elements or interconnection from a LEC. (Comments, Feb. 26, 1997, pp. 2-3). A careful reading of the proposed subpart reveals that an applicant is only required to commence “any necessary” negotiations. If negotiations are not

necessary, then this provision would not preclude a granting of a certificate based upon failure to commence negotiations with the LEC.

22. Both MCI Metro (“MCI”) and the Minnesota Business Utility Users Council (“MBUUC”) comment that this requirement is duplicative for a competitive LEC that is expanding across the state by requiring repetitive negotiations before application for certification can be made. (MCI comments, Feb. 26, 1997, p. 2) (MBUUC comments, Mar. 10, 1997, p. 2).

23. Minn. Stat. § 237.16, subds. 3, 4 contemplate certification based upon a geographical basis. Subd. 3 requires the filing of maps of proposed service areas. The geographic requirements included in this subp. 3A further evidence a provider’s intent to provide service in that geographic area. Therefore, the Administrative Law Judge finds this rule to be reasonable and necessary to carry out the statutory mandate directed to the Commission.

Subp. 3B.

24. As published in the State Register, this subpart required an applicant to plan to provide local service within 24 months after the date of an applicant’s petition. New entrants and MBUUC objected to the twenty-four month required service as an unreasonable time frame within which to provide local service given the difficulties and uncertainties involved in gearing up to offer services in current monopoly markets. The central concern is that incumbent LECs will delay a new entrant’s attempt to offer services.

25. In response to these concerns, the Commission amended the proposed rule after the hearing to allow for a thirty-six month period. The Administrative Law Judge concludes that this change is reasonable and necessary and will adequately address these concerns of the new entrants while maintaining the integrity of the service area requirements imposed by Minn. Stat. § 237.16. It is not substantially different from the proposed rule.

Subp. 4 Automatic revocation for failure to serve.

26. The same concerns were raised regarding the twenty-four month time period within which an applicant is required to provide local access service.

27. Several parties objected to the mandatory revocation requirement if local service is not provided within twenty-four (now thirty-six) months. Both AT&T and MCI reasoned that automatic revocation is too severe a remedy. The DPS questioned what was the trigger for revocation? How would the Commission know that service had not been activated?

28. In response to these concerns, the Commission amended the proposed rule after the hearing. Adopting comments of MIC and the DPS, the

proposed rule now requires an applicant to file a status report after twenty-four months from receiving the certificate. However, the automatic revocation period after 36 months will remain.

29. The Administrative Law Judge concludes that this amendment both extending the period from twenty-four to thirty-six months and requiring a twenty-four month status report to be reasonable and necessary to the Commission's obligations under Minn. Stat. § 237.16. Furthermore, the Administrative Law Judge concludes that Minn. Stat. § 237.16, subd. 5 provides the Commission authority to revoke a certificate "in whole or in part, for failure to furnish reasonably adequate telephone service within the area or areas determined and defined in the certificate" This authority to revoke for failure to provide "reasonably adequate telephone service" surely includes the authority to revoke for failing to provide any telephone service.

Subp. 5 Show-cause proceeding to justify failure to serve.

30. This provision provides a new entrant, faced with the possibility of not meeting the twenty-four (now thirty-six) month deadline, the opportunity to show cause why it will not meet the deadline and propose a new deadline by which its obligations will be satisfied.

31. MFS Intelenet of Minnesota ("MFS") comments that a new entrant is inherently reliant upon the ILEC for the network hardware. Accordingly, it argues that the burden to show cause placed upon the new entrant is unduly burdensome, creates a presumption of fault on the part of the CLEC and requires the expenditure of potentially significant resources by the CLEC.(Comments, Feb. 26, 1997, pp. 1-2).

32. The Commission supports the need and reasonableness of this provision as a necessary procedural corollary to the previous revocation provision which ensures certification will not expire without a definite process and the issuance of a Commission order. (SONAR at p. 29). The Administrative Law Judge finds that the Commission has demonstrated sufficient need and reasonableness for this rule.

**7812.0550 911 EMERGENCY SERVICE CAPABILITIES AND
REQUIREMENTS**

33. This proposed rule outlines required 911 emergency service capabilities. The proposed rule includes provisional rules that will apply until permanent rules regarding 911 service can be enacted at a later rulemaking proceeding. Several changes were made in response to objections.

34. The DPS, MIC and MBUUC object to the adoption of these or any 911 rules on the basis that they are premature and not fully developed. DPS

argues the rules are vague and have not been fully addressed by the 911 Advisory Board. The SONAR at page 44 admits that both the Commission and affected parties “had a relatively short time to analyze the [911] subcommittee’s recommendations,” and accordingly, subpart 3 applies the subcommittee’s recommendations as factors which must be considered.

35. The Administrative Law Judge recognizes the parties' concerns over the completeness and thoroughness of the proposed rules regarding 911 service. However, the Administrative Law Judge agrees with the Commission that these rules are reasonable and necessary to provide continuity in 911 service compliance until more specific and fully developed rules can be enacted in the next round of rulemaking. As the Metropolitan 911 Board asserts, it is important for CLECs to plan for 911 compliance to avoid higher costs of retrofitting a noncomplying system.

7812.0600 BASIC SERVICE REQUIREMENTS

Subp. 2 Separate flat rate service offering.

36. This provision requires all Local Service Providers (LSPs) to provide a separate, flat rate service offering. AT&T comments that this provision is anti-competitive and restricts what offerings an LSP can provide. (Comments, Feb. 26, 1997, pp. 8-9 and Apr. 8, p. 2).

37. MIC and Office of Attorney General-Residential and Small Business Utilities Division (OAG-RUD) point out that this provision is neutrally applied to both ILECs and CLECs: the ILEC is required to provide their own local flat rate services to CLECs at wholesale discounts under section 251(c)(4) of the Federal Act (MIC comments, Feb. 26, 1997, p. 14), and all LSPs are required to provide basic local service as a stand-alone, separate tariff. (OAG-RUD comments, Mar. 27, 1997, pp. 1-2). Furthermore, the SONAR states that the need for this provision stems from the anticipated influx of new competitors offering a plethora of new services and the need to offer a familiar flat rate pricing plan to prevent customer confusion. Finally, the LSP is not limited in what additional services it may offer; it may still offer measured rate pricing and alternative packages. (SONAR, pp. 45-46).

38. The Administrative Law Judge concludes that the Commission has shown sufficient need and reasonableness for this provision of the proposed rule. It may be that experience will prove this (and similar) protections to be unnecessary, but the Commission's concerns are not irrational or capricious. The rule may be adopted as proposed.

7812.0700 GENERAL SERVICE QUALITY REQUIREMENTS

Subp. 3. Intercarrier agreements exceeding parity.

39. This subpart states that the standards in an intercarrier agreement may require the incumbent LEC to provide the CLEC with service, network element and interconnection at a level of quality exceeding the level the LEC provides to itself or its affiliates. This provision further requires that the LEC and CLEC share the cost of providing the higher level of quality in proportion to the benefit each receives.

40. MIC objects to this provision as exceeding requirements under § 251(c)(2) and (c)(3) of the Federal Act by requiring the ILEC to provide superior quality services to the CLEC. (Comments, Feb. 26, 1997, pp. 17-18). US WEST objects on two grounds: one, that the FCC regulations regarding this provision are under review by the Eighth Circuit Court of Appeals, and two, that this provision will lead to the ILEC being required to pay for improvements its customers did not recommend nor did they feel necessary, solely because the CLEC find them necessary. (Comments, Feb. 26, 1997, pp. 3-7).

41. The FCC regulations regarding implementation of the Federal Act clearly require an ILEC to provide the CLEC with superior service quality “where technologically feasible”. 47 C.F.R. § 51.311(c). What concerns these parties most is the requirement that the cost for the superior service quality, properly requested by the CLEC, must be divided between the CLEC and ILEC in proportion to the amount each benefits. US WEST argues the ILEC will be forced to pay for service improvements its customers did not request and MIC is concerned that some providers, on alternative pricing plans, may not be able to recoup the improvement costs from their customers. (MIC, comments 3/27/97, p. 22).

42. The SONAR provides that this proportional sharing requirement is necessary because oftentimes the ILEC will also benefit from the improvements. If both companies benefit by passing on higher quality services to their customers, then both should pay in proportion to the benefit. This proportionality provision also allows for the case where the ILEC and its customers would receive no benefit from the improvements. If the ILEC can support this assertion of no benefit, then they would not have to pay anything towards the cost of improvement. Furthermore, if the cost were to be borne exclusively by the requesting CLEC, regardless of how much the ILEC benefited, the result is a perverse situation where the ILEC will not make improvements unless and until the CLEC makes the request and pays for the improvements.

43. Therefore, the Administrative Law Judge finds the rule as proposed by the Commission to be both necessary to carry out the mandates of the Federal Act and reasonable in equitably distributing the cost of the improvements. However, the Administrative Law Judge is mindful of MIC’s concern about ILECs that may be prohibited from recouping the cost from their customers and accordingly urges the Commission to consider alternatives that

would allow those operating under alternative pricing plans to recoup these required expenses.

7812.0800 LOCAL CALLING SCOPE FOR CLECs

Subp. 1. Required offering.

44. This subpart requires CLECs to offer at least one flat rate calling area that matches the flat rate calling area offered by the ILEC. AT&T, DPS, Electric Lightwave, Inc. (ELI) Sprint, and MFS all oppose this provision as unduly burdening competition, unnecessary and anti-competitive. They argue it limits offerings that a CLEC can make in the service area by requiring one to be a flat rate plan. AT&T further argues on pp. 11-12 of their Feb. 26, 1997 comments that this section in effect endorses a rate plan that no one can be sure consumers would demand in a free marketplace.

45. While the Administrative Law Judge recognizes this limitation imposed on the CLECs by the proposed rules, this flat rate requirement is not an unduly burdensome requirement for the CLEC to meet. The SONAR states, and is supported by comments from the Minnesota Senior Federation, that with the deregulation of the local telecommunications market consumers will be inundated with a multitude of new plans and proposals for service. It is critical that consumers be provided one plan with which they are familiar and comfortable during the transition period. This provision does not limit the offerings a CLEC can make as they can offer alternatives and the market will adjust according to those alternatives.

46. This approach is also consistent with § 253(b) of the Federal Act, as pointed out by MIC in their comments of Feb. 26, 1997, p. 20:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . , requirements necessary to . . . , protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b) (1996).

47. Therefore, the Administrative Law Judge finds that the Commission has shown sufficient need and reasonableness for this proposed rule. However, since this rule is to ensure “that the long standing familiar flat rate option of today will not disappear before customers have had adequate time to adjust” (SONAR, p. 50), the Administrative Law Judge suggests the Commission begin to consider how it will “sunset” this provision so a CLEC will no longer be required to offer this flat rate service.

7812.1700 ARBITRATION OF INTERCARRIER NEGOTIATIONS

Subp. 10 Intervenors and participants.

48. This subpart allows the DPS and OAG-RUD to intervene in an arbitration proceeding by filing comments or a request to intervene within 25 days after the arbitration petition is filed. The SONAR states:

Minnesota Statutes, section 216A.07, subd. 3 gives the Department the right to intervene in all Commission proceedings. Section 8.33, subd. 3 gives the AG-RUD a similar right of intervention. The Commission finds nothing in the Federal Act that would preempt these rights in arbitration proceedings under the Federal Act.

SONAR, p. 65.

49. US WEST, however, points out that 47 U.S.C. § 252(b)(4)(a) states that the “state commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).” (Comments, Feb. 26, 1997, pp. 8-10). US WEST concludes that therefore no intervention is contemplated under the Federal Act and that this subpart violates the mandate of the Federal Act.

50. The Administrative Law Judge finds that these two provisions are not at odds; they may co-exist. 47 U.S.C. § 252(b)(4)(a) requires the Commission to consider only the issues raised in the petition or responsive papers. As long as the intervening parties under this proposed subpart address issues raised either in the petition or responsive papers, the two provisions are not in conflict. The Administrative Law Judge concludes that this proposed subpart is necessary and reasonable.

7812.2200 REGULATORY TREATMENT OF CLECs

51. This provision applies Minnesota Statutes, chapter 237 and the Commission’s existing rules adopted under chapter 237 to the provision of local services by CLECs. The SONAR states that this regulation reflects current state law. Minn. Stat. § 237.01, subd. 6 defines new entrants or CLECs as telecommunications carriers. Section 237.035(e) subjects local services of telecommunications carriers to chapter 237, except those provisions related to rate-of-return regulation, earnings investigations, or the depreciation requirements of section 237.22 (p. 75-76). The SONAR concludes by stating that although the Commission may have authority under Minn. Stat. § 237.16 to apply different requirements to the local service of CLECs, the Commission believes it best to proceed in this manner until the Commission undertakes a more thorough inquiry at the next round of rulemaking. (Id.)

52. This provision drew much comment from the interested parties. ELI stated that it was “restrictive” to subject CLECs to the same regulations as ILECs and that a CLEC cannot engage in anti-competitive practices such as cross-subsidization of competitive services with noncompetitive services because the CLEC is not a dominant provider and does not have the necessary market share. (Comments, Feb. 26, 1997, pp. 3-4).

53. AT&T also opposes this provision for similar reasons. “CLECs will not have any market power to require regulatory control,” and as such should be regulated under a model like that of Minn. Stat. § 237.74 regarding telecommunications carriers in the toll market. (Comments, Feb. 26, 1997, pp. 18-19).

54. MCI, in agreement with AT&T, comments that under the proposed rule, a CLEC possessing no market dominance would be required to file cost studies whose purpose is to prevent anti-competitive actions such as cross-subsidization. It reasons that since the CLEC is a new entrant it will not have the capability to cross-subsidize, and therefore the cost study filing requirement is unwarranted. (Comments, Feb. 26, 1997, pp. 1-2).

55. On the other hand, at the hearing Tom Londgren of US WEST pointed out that the proposed regulation is consistent with statutory requirements that treat CLECs as ILECs for local service. GTE pointed out at the hearing that several of the CLECs, such as MCI, AT&T and Sprint, have the resources to enter the local service market and make an immediate impact. MIC also indicated that predatory pricing could occur from the onset by a CLEC possessing strong financial resources.

56. The Administrative Law Judge concludes that the Commission has justified the need for and reasonableness of this provision, and it may be adopted.

CONCLUSIONS

1. That the Commission gave proper notice of the hearing in this matter.

2. That the Commission has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Commission has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. That the Commission has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of the facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Commission after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 8th day of May 1997.

ALLAN W. KLEIN
Administrative Law Judge