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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 25th
day of January, 1995.

In the matter of a joint application of US)
FiberCom Network, Inc. and Mid-Com)
Communications Inc. for authority to sell,)
purchase and transfer subscriber assets)
and use of other assets Inc. in the state)
of Missouri.)

Case No. TM-94-310

ORDER SCHEDULING HEARING

On April 4, 1994, US FiberCom Network, Inc. (FiberCom) and Mid-Com Communications Inc. (Mid-Com) (jointly referred to as Applicants) filed a Joint Application for authority to sell the assets of FiberCom to Mid-Com. Pursuant to the Application, Mid-Com would acquire from FiberCom its customer base, its accounts receivable and pending, and the use of its trade name and billing software license. The Joint Application also requested cancellation of FiberCom's certificate and tariff concurrent with approval of the transfer of assets from FiberCom to Mid-Com.

The Application stated that the former customers of Mid-Com were already being served from FiberCom's tariff. In fact, according to the sales agreement, the closing date for the transaction occurred on November 22, 1993. This was approximately five (5) months before the Applicants filed their application for the Commission's authority and approval for the sale of assets.

The transaction herein is governed by §392.300, RSMo 1994 entitled "Transfer of property and ownership of stock without consent of commission prohibited - . . . ". The first sentence of this statute states that no telecommunications company shall sell its franchise, facilities or

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system without having first secured from the Commission an order authorizing it to do so. This the Applicants have not done. The second sentence of the statute states that every such sale made without the authority of a Commission order ". . . authorizing the same **shall be void.**" (Emphasis added.) Finally, the statute goes on to state that the permission of the Commission regarding such a sale shall not be construed to revive or validate what might otherwise have been an inappropriate transaction.

Thus the request of the Joint Applicants would place the Commission between a rock and hard place. If one assumes that the application is not detrimental to the public interest, in all other respects, then the Commission has no reason to deny the application. However, the plain language of the statute holds that a transfer without prior approval is void. It also holds that the Commission cannot authorize retroactively a transaction which was completed prior to a request for authority from this Commission. This would appear to be what these Applicants have requested.

The Commission Staff has correctly raised the potential for penalties in this case. Pursuant to §386.570, RSMo 1994 any utility which fails to comply with the statutes of this state pertaining to utility regulation may be subject to a fine of up to two thousand dollars per day for such an offense. It would appear that the transfer which took place in this case was not properly undertaken and the penalty statute cited by Staff is available under the circumstances for this violation. Furthermore, the Commission finds that Mid-Com and FiberCom may be subject to liability for failure to possess, or to operate under, a valid certificate of service authority or tariff, or both from the period from the initial unauthorized transaction (November, 1993). The Commission has

no authority to offer protection or approval for the rates or services offered during this period.

The Commission concludes, as a matter of law, that the governing statute in this case does not permit the Commission to retroactively approve or ratify an act which was neither properly authorized by this Commission nor legally undertaken pursuant to Missouri Statute.

The Commission has reviewed the entirety of the file and makes the following findings of fact. Inasmuch as the transaction appears to have been undertaken without the appropriate and necessary authority and inasmuch as the Commission does not have statutory authority to validate or retroactively approve that which has been improperly undertaken, the Commission finds that it would be appropriate to conduct a hearing in this case so that the Applicants may have the opportunity to show cause why they should not be subject to penalties pursuant to §386.570, RSMo 1994. The Applicants should thereafter be prepared to establish the justification for the Commission to approve the sale and transfer requested herein.

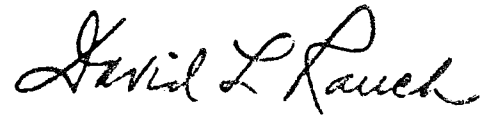
Therefore, the Commission finds it would be appropriate to set this matter for hearing on the issue of penalties and to determine whether any authority should be granted herein. This hearing shall commence in the Commission hearing room on March 13, 1995. The Commission Staff is hereby directed to further investigate the transactions herein and be prepared to participate through direct examination and cross-examination on these issues.

IT IS THEREFORE ORDERED:

1. That a hearing is scheduled for this matter on March 13, 1995, at 10:00 a.m., in Room 520B of the Commission's offices in the Harry S Truman Building, Jefferson City, Missouri. This hearing may continue through March 14, 1995 if necessary.

2. That this order shall become effective on the date hereof.

BY THE COMMISSION

A handwritten signature in cursive script that reads "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
Kincheloe and Crumpton, CC., Concur.