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WH
Re

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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 AND NOTICE

James M. Fischer, P.C., 101 West McCarty, Suite 215, Jefferson City,
MO 65101

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65102

Robert Hack, General Counsel, Missouri Public Service Commission, P.O.
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Arthur Salzfass, US FiberCom Network, Inc., 1212 Avenue of the Americas,
New York, NY 10036-9998

Andrew O. Isar, Mid-Com Communications, Inc., 1601 Fifth Avenue, Suite
1000, Seattle, WA 98101

On February, 17, 1994, the Commission issued its Order Regarding Motion for Reconsideration in this case. The Commission has expressed its concern as to the way in which the transaction in question took place and as to the nature of the relief requested by the Applicants in this case. Subsequently, the Applicants expressed a desire to avoid incurring excessive hearing related costs, such as travel expenses for witnesses, and also have expressed an interest in reducing the amount of Commission time necessary for the hearing on this matter. To this end the parties have offered to file sworn testimony which would address and resolve the concerns of the Commission and simultaneously provide a less expensive and more expeditious resolution to this matter.

The Commission is not opposed to adapting a less burdensome procedure so long as all questions and issues are addressed, an adequate record is developed and competent and substantial evidence is adduced from which to make a final determination of the substantive issues. Therefore, the Commission hereby places the parties on notice as to those issues which it finds pertinent to this case.

(1) In their Motion for reconsideration the Applicants first stated that the quantity of customers affected by this transaction was insignificant. The Commission finds no statutory exception for companies with only a small customer base and if the Applicants have statutory or case law to the contrary they should present this evidence to the Commission.

(2) The Applicants have stated that they filed this Application even though ". . . they believed it is not clear whether or not intrastate authority is required for this transaction." The Commission notes that on Page 6 of the Applicants' motion they have also stated that "This transaction has also been approved by twelve (12) other state authorities. . . ." The Applicants' argument that this transaction should not require intrastate approval does not appear consistent with the Applicants' conduct of seeking approval in twelve (12) other jurisdictions. If, in fact, Applicants believe this Commission lacks authority over this type of transaction then authority for this argument should be cited and this jurisdiction should be distinguished from those twelve jurisdictions where the Applicants have sought authority.

(3) The Commission finds that an appropriate inquiry may well be whether those twelve (12) requests for authority, alluded to by the Applicants, preceded the transaction or whether they too were filed after the fact.

(4) The Applicants further state that they were unaware of the statutory requirement of §392.300, RSMo 1994 until after the closing date of the transaction. However, once again, Applicants seem to have been aware of such a requirement in twelve (12) other states and the Commission would ask how the Applicants found the requirement in twelve (12) jurisdictions but missed it in the thirteenth (13th).

(5) Applicants have also stated in their Motion that all of FiberCom's Missouri customers are now being served from the Mid-Com tariffs pursuant to Staff's recommendation. The standing of the Commission staff is that of a party which appears before this agency and as such it does not have the constitutional authority to order or approve requests of the regulated utilities absent an order of the Commission. Until a staff recommendation is approved and ordered by the Commission the recommendation lacks authority or the weight of law in that although the staff may implement the policies of the Commission it has no authority to establish policy or to waive statutory requirements. Therefore, the statement of the Applicants that all Missouri customers are being served from the Mid-Com tariff is merely an admission that these customers have been, and continue to be, served under an arrangement which lacks the legal authority which is mandated by Missouri State statute.

(6) The Applicants have made reference to Commission Case No. TM-95-154 in re: the joint Application of Prime-Link Communications Corp. and LDDS of Missouri, Inc., d/b/a LDDS Communications to sell assets. The Commission finds that the Prime-Link case should be viewed as an exception and not the rule. If the Applicants believe the Commission is bound by a doctrine of res judicata or collateral estoppel the authority for such an argument should be presented.

(7) Applicants have suggested in their Motion that there is

not a detriment to the public interest if this transfer of assets is approved. This appears to be *petitio principii*, or "begging the question." The argument that this transaction is not a detriment to the public interest if the Commission says that it is not a detriment to the public interest does not answer the threshold question. The Applicants should offer competent and substantial evidence as to the detriment or lack thereof in the transaction herein.

(8) Applicants argued, lastly, that it would be unfair to penalize their effort to voluntarily rectify this situation. The Commission has not ordered penalties for the Applicants although this has been identified as the type of case in which penalties might be appropriate. The very purpose of the March 13, 1995 hearing was to provide a fair hearing and an opportunity to be heard so that the Applicants might present evidence on the record and address these issues. After the record is complete the Commission may determine if, in fact, penalties are appropriate and at that time it will also determine whether this constitutes an appropriate set of facts in which the Commission may issue an order granting authority as requested herein. This raises as the final question the exact relief which may be granted to these applicants pursuant to §392.310 RSMo 1994. The parties should state exactly what authority they seek, and all parties herein may offer their interpretations in light of the portions of this statute which suggest that the Commission may not retroactively approve the transaction which has already been consummated between these applicants.

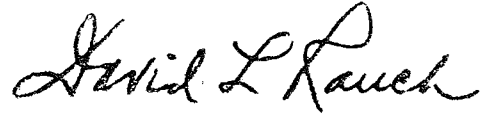
IT IS THEREFORE ORDERED:

1. That the parties to this docket may submit their responses to the issues raised herein.
2. That any such response as permitted in paragraph 1 shall

be filed not later than March 8th, 1995.

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

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Dale Hardy Roberts, Deputy Chief
Hearing Examiner, by delegation of
authority under Commission Directive
of January 3, 1995, pursuant to
Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 24th day of February, 1995.