

In the matter of the application of Digital
Teleport, Inc. for permission, approval
and a certificate of authority to provide
intrastate private line telecommunications
services in the state of Missouri.

APPEARANCES: Richard S. Brownlee, III, Hendren and Andrae, 235 E. High Street, P.O. Box 1069, Jefferson City, MO 65102, for Digital Teleport, Inc.

Darryl W. Howard, Alfred G. Richter, Jr., Attorneys at Law, 100 North Tucker Boulevard, Room 630, St. Louis, MO 63101-1976, for Southwestern Bell Telephone Company.

Thomas A. Grimaldi, Attorney at Law, 5454 West 110th Street, Overland Park, KS 66211, for United Telephone Company of Missouri.

Randy Bakewell, Assistant Public Counsel, Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102, for the Office of Public Counsel and the public.

Lee C. Tieman, Assistant General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102, for the staff of the Missouri Public Service Commission.

REPORT AND ORDER

On December 20, 1991, Digital Teleport, Inc. (Digital, Company or Applicant) applied for a certificate of service authority under 392.410¹ and 392.361, RSMo, to provide both competitive interexchange and "intraexchange" private line telecommunications services. Digital subsequently amended its application, deleting the reference to "intraexchange" and substituting the phrase "local exchange." Company's pending application now seeks authority to provide competitive "non-switched local exchange" private line telecommunications service as well as competitive interexchange private line service.

¹All statutory citations, unless otherwise indicated, are to RSMo Supp. 1991.

This is the first such application filed before this Commission. Although the Commission has granted a significant number of competitive interexchange authorities, as well as private line authorities, it has yet to consider an application which specifically requests authority to provide competitive private line "local exchange telecommunications service," defined by Section 386.020(23) as "telecommunications service between points within an exchange."

The Commission issued notice of Digital's original application on December 27, 1991. On January 28, 1992², Southwestern Bell Telephone Company and United Telephone Company (SWB, United, or-collectively-Intervenors) filed motions seeking to either intervene or to obtain a clarification of the authority sought, the authority which the Commission might issue, the definition and application of various statutes to Digital's proposed services, and other matters.

On February 10, with Intervenors' motions still pending, Applicant filed an amended application stating, inter-alia, that Digital "specifically will not provide basic local telecommunication" as defined by 386.020(3) and, as remarked above, substituting the phrase 'local exchange' for "intraexchange."

On February 19, the Commission issued its supplemental notice of Company's amended application. SWB and United again filed motions to either intervene or for clarification. On May 21, the Commission granted intervention and denied Intervenors' requests for clarification. In the same order the Commission established a prehearing conference for May 12 after which, on May 19, the parties filed the Stipulation and Agreement appended hereto as Attachment A.

On June 2, pursuant to Commission order, the signatories made an on-the-record presentation of the Stipulation and Agreement and responded to a number of inquiries from the Commissioners and the Hearing Examiner.

²Unless otherwise stated, all dates hereafter occur in 1992.

The Commission must now determine: (1) whether it should approve the attached Stipulation and Agreement, and (2) whether, and under what circumstances, Digital's application to provide competitive private line local exchange and interexchange services should be granted.

Findings of Fact

Having considered all the competent and substantial evidence on the whole record, the Missouri Public Service Commission makes the following findings of fact.

Digital Teleport, Inc., a Missouri corporation, maintains its principal office at 11111 Dorsett Road, St. Louis, Missouri. It proposes to provide competitive local exchange and interexchange private line telecommunications service in the state of Missouri.

Company's verified application describes its proposed services as consisting of "dedicated, high capacity digital microwave and fiber optic transmission facilities, used to provide the following local exchange and interexchange services to business customers:

- a. Point-to-point, private line services connecting subscribers to interexchange carriers' points-of-presence;
- b. Point-to-point and point-to-multipoint, private line services connecting subscribers' locations to one another; and
- c. Point-to-point, private line services connecting interexchange carriers' point of presence to one another.
- d. Switched interexchange telecommunications services."³

At paragraph 12, Applicant requests that the Commission grant it a "certificate of service authority to provide competitive, switched interexchange, non-switched local exchange and interexchange intrastate private line

³Page 2, paragraph 4. Company's amended application filed February 10, 1992.

telecommunications service." Company's verified financial information exhibit states that Company's business will be funded by a credit line of between \$100,000 and \$200,000 from "Digital Teleresources, Inc." Company's Exhibit II, "Statement of Applicant's Qualifications," consists of short biographies of its founder and president, Richard D. Weinstein, and of two corporate officers, formerly employed by CitiCorp and Arthur Andersen. The Commission finds in Digital's application evidence of a small start-up business, possibly the sort of small business venture envisioned by the framers of Chapter 392, RSMo, and, prior to that, by the architects of divestiture.

On May 19, the attached Stipulation and Agreement was filed, wherein all parties, including the Commission Staff and the Office of Public Counsel, recommend that Company's application to provide the above-described competitive local exchange and interexchange services be approved. The signatories also agree that this result may be obtained without an evidentiary hearing.

Pursuant to Sections 392.410 and 392.361, RSMo, Applicant requests authority to provide competitive private line local exchange and private line interexchange telecommunication services. Pursuant to 392.361(5), RSMo, and Attachment A, Applicant also requests that the Commission waive compliance with the following statutes and Commission regulations:

Statutes

- 392.240(1) - ratemaking
- 392.270 - valuation of property (ratemaking)
- 392.280 - depreciation accounts
- 392.290 - issuance of securities
- 392.310 - stock and debt issuance
- 392.320 - stock dividend payment
- 392.330 - issuance of securities, debt and notes
- 392.340 - reorganization(s)

Commission Rules

- 4 CSR 240-10.020 - depreciation fund income
- 4 CSR 240-30.010(2)(C) - rate schedules
- 4 CSR 240-30.060(5)(B) through (O) - records re: ratemaking
- 4 CSR 240-32.030(1)(B) - exchange boundary maps

- 4 CSR 240-32.030(1)(C) - record keeping
- 4 CSR 240-32.030(2) - in-state record keeping
- 4 CSR 240-32.050(3) - local office record keeping
- 4 CSR 240-32.050(4) - telephone directories
- 4 CSR 240-32.050(5) - call intercept
- 4 CSR 240-32.050(6) - telephone number changes
- 4 CSR 240-32.070(4) - public coin telephone
- 4 CSR 240-33.030 - minimum charges rule

This case is novel only because Digital specifically seeks authority to provide competitive private line service within a local exchange.

In Case No. TO-88-142⁴, the Commission found that private line service was "subject to more competition than MTS" (message telecommunications service) and concluded that private line services, whether offered by AT&T or any of the "alternative IXCs," were competitive⁵. In the same case, the Commission also approved certain statutory and rule waivers for interexchange carriers offering competitive services. The Commission has also granted competitive status to various other purveyors of private line services, albeit on an interexchange or intrastate basis. In Case No. TA-88-232⁶, Applicant's dedicated private line service was deemed competitive on the same basis, and ultimately in the same docket as other IXC services, (TO-88-142) cited above. In TA-92-68⁷, Applicant's proposal to provide competitive WATS, private line, and other services was deemed competitive and the Commission granted both statutory and rule waivers.

⁴In re the investigation for the purpose of determining the classification of the services provided by interexchange telecommunications companies within the State of Missouri (1989).

⁵IBID, p. 14.

⁶In the matter of the application of Kansas City Cable Partners for a certificate of service authority to provide intrastate private line, high-speed telecommunications service.

⁷In the matter of the application of WilTel, Inc. for a certificate of service authority to provide intrastate interexchange telecommunications services within the State of Missouri as a competitive telecommunications company, and for cancellation of the certificate of WTG Network, Inc.

The Commission finds that the private line service herein proposed is virtually identical to the services proposed and found competitive in the cases referenced above. The only difference lies in Digital's candid admission that it intends to offer its private line services within a local exchange.

The Commission has granted private line authority in a number of other cases, a list of which is attached hereto and marked "Attachment B." The Commission is advised that some private line certificate holders are providing, at least in part, private line services which both originate and terminate within the same local exchange. This is what Digital proposes to do; but to do so requires a certificate of local exchange service authority under 392.410, RSMo.

The Commission is of the opinion that such activities by other private line providers may be beyond, or in excess of, the scope of authority originally granted to said providers by the Commission. The Commission will herein order its Staff to conduct an investigation of said providers of private line services in order to determine which providers are engaging in said activities and what Staff recommends regarding same.

The Commission hereby incorporates its prior findings and conclusions regarding the competitive aspect(s) of private line dedicated services in cases TO-88-142, TA-88-232, and TA-92-68, noted above. The Commission finds that private line dedicated services offered by alternative carriers are competitive services, whether offered on a statewide basis, as in TO-88-142, or within a local exchange, as proposed by Digital. The Commission also approves the attached Stipulation and Agreement, which confirms - in this instance - the nature and extent of private line competition in Intervenor's exchanges. The Commission therefore makes Attachment A part of this order by reference.

Approval of the Stipulation and Agreement in this case, a matter of first impression involving a small company with relatively limited resources, does not mandate an identical result in subsequent cases. Competition in the

local loop is a dynamic process, made more so by advances in technology. As a result, the Commission cannot be strictly bound by stare decisis.

Having considered Company's verified application, the favorable recommendation in Attachment A, and the facts cited above, the Commission finds that Applicant is qualified to provide both services proposed.

The requirement of a hearing in connection with Company's request has been fulfilled when all those having a desire to be heard are offered such an opportunity. In this case, notice was sent by the Executive Secretary of the Commission to any persons or entities known to the Telecommunications Department of the Public Service Commission to be rendering identical or similar services within the service area proposed by this application, as well as to each telephone company rendering local exchange service in Missouri. Interested persons or entities were directed to intervene on or before January 26 and March 18. Since there are no outstanding requests for a hearing, and all parties have agreed that a hearing is not required, the Commission determines that an evidentiary hearing is not necessary and the Applicant may submit evidence in support of its application by verified statement. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

The Commission further finds that Applicant has filed current financial information and a description of the type of service it proposes to provide, and has agreed to comply with all applicable rules and regulations of the Commission and any terms and conditions which the Commission may impose.

Having found that Applicant is qualified to perform the service proposed, the Commission will assume, pursuant to Sections 392.440 and 392.530, RSMo, that additional competition in the intraLATA and interLATA toll markets is in the public interest. The Commission also finds that additional competition in private lines, within local exchanges, is in the public interest. The

Commission does not deem it necessary to determine a public need for each provider's services as the market would eliminate any provider for which there is no public need. Consequently, pursuant to Section 392.440, RSMo, the Commission finds that it is in the public interest to grant Applicant a certificate of service authority to provide intrastate interexchange telecommunications services.

The Commission also finds that it is in the public interest to grant Applicant a certificate of local exchange service authority to provide competitive private line telecommunication services which both originate and terminate within the same local exchange.

The Commission also finds that Applicant's proposed interexchange and, to the extent stated above, local exchange services are the same as those classified as competitive in Case No. TO-88-142, *In re the investigation for the purpose of determining the classification of the services provided by interexchange telecommunications companies within the State of Missouri* (September 15, 1989). Based upon the verified statement of Applicant, the statement in Attachment A, and the Commission's orders and findings in similar dockets, the Commission finds that all of the local exchange and interexchange private line services Applicant proposes to offer are competitive and that Applicant should, therefore, be classified as a competitive company. The Commission further finds that the waiver of the above-mentioned statutory and regulatory requirements is, pursuant to Section 392.361(5), reasonable and not detrimental to the public interest.

Pursuant to Section 392.470, RSMo, the Commission determines that certain regulatory requirements should be imposed upon providers authorized to provide interexchange telecommunications services in Missouri. Since the Applicant proposes to operate as a facilities based provider of telecommunications services in this state, the Commission finds that the

following regulatory requirements should be imposed upon Applicant as reasonable and necessary conditions of certification:

- (1) Applicant is required to comply with reasonable requests by the Staff for financial and operating data to allow the Staff to monitor the intraLATA toll market pursuant to Section 386.320.3, RSMo.
- (2) Applicant is required to file tariffs containing rules and regulations applicable to customers, a description of the services provided and a list of rates associated with the services pursuant to Section 392.220, RSMo, and 4 CSR 240-30.010.
- (3) Applicant's tariff filing must also contain a preliminary section which states that Company is a competitive carrier and identifies the statutory and rule waivers herein granted.
- (4) Applicant is precluded from unjustly discriminating between and among its customers pursuant to Section 392.200, RSMo and Section 392.400, RSMo.
- (5) Applicant is required by Sections 386.570, RSMo 1986, and 392.360, RSMo, to comply with all applicable rules of the Commission except those which have specifically been waived by this Report and Order.
- (6) Applicant is required to file a Missouri-specific annual report pursuant to Section 392.210, RSMo, and Section 392.390.1, RSMo.
- (7) Applicant is required, if it offers services other than private line, to submit to the Staff on a confidential basis, quarterly reports showing its percentage of interstate use and intrastate interLATA and intraLATA use pursuant to Section

392.390.3, RSMo; (If the sole service to be offered by Applicant is private line, make this conditional upon offering additional services.)

- (8) Pursuant to Section 392.390.3, RSMo, Applicant is required to comply with the jurisdictional reporting requirements as set out in each local exchange company's access services tariff.

Finally, the Commission finds that Applicant should file appropriate tariffs for both its interexchange private line service and its local exchange private line service within thirty (30) days of the effective date of this Report and Order. Said tariffs shall identify said services as competitive and list, by index, the statutory and rule waivers herein granted. The certificates granted herein will become effective only upon approval by the Commission of these tariffs.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Applicant proposes to provide service to the public as an intrastate provider of competitive private line interexchange telecommunications services pursuant to Chapters 386 and 392, RSMo.

Applicant also proposes to provide competitive dedicated, non-switched local exchange private line services to the public under a certificate of local exchange service authority, pursuant to Sections 392.410 and 392.420, RSMo.

Based on the verified application of Applicant, Attachment A, and the Findings of Fact herein, the Commission has found that Applicant complies with the Commission's standards pertaining to applications requesting authority to provide intrastate interexchange telecommunications services and is qualified to perform said services.

The Commission has also found that Applicant is qualified to receive a certificate of local exchange authority pursuant to Sections 392.410 and 392.420, RSMo.

The Commission has also concluded that additional competition in the interexchange and local exchange private lines market is in the public interest and that certificates of service authority should be granted. The Commission has also found that all the private line services, both interexchange and local exchange, which Applicant proposes to offer are competitive and that waiving the statutes and Commission rules set out below is reasonable and not detrimental to the public interest. The Commission therefore concludes that Applicant should be classified as a competitive company pursuant to Section 392.361, RSMo.

IT IS THEREFORE ORDERED:

1. That Digital Teleport, Inc. be granted hereby a certificate of service authority to provide competitive private line intrastate interexchange telecommunications services in Missouri. This certificate of service authority is subject to the conditions of certification set out herein and shall not become effective until the Commission approves Applicant's tariffs.

2. That Digital Teleport, Inc. be granted hereby a certificate of local exchange service authority to provide competitive dedicated, non-switched local exchange private line telecommunications services as specified by this order. Digital Teleport, Inc. is specifically excluded from providing basic local telecommunications services.

3. That Digital Teleport, Inc. be classified hereby as a competitive telecommunications company for which the effect of the following statutory and regulatory requirements shall be waived:

Statutes

392.240(1) - ratemaking
392.270 - valuation of property (ratemaking)
392.280 - depreciation accounts
392.290 - issuance of securities

392.310 - stock and debt issuance
392.320 - stock dividend payment
392.330 - issuance of securities, debt and notes
392.340 - reorganization(s)

Commission Rules

4 CSR 240-10.020 - depreciation fund income
4 CSR 240-30.010(2)(C) - rate schedules
4 CSR 240-30.060(5)(B)
through (0) - records re: ratemaking
4 CSR 240-32.030(1)(B) - exchange boundary maps
4 CSR 240-32.030(1)(C) - record keeping

4 CSR 240-32.030(2) - in-state record keeping
4 CSR 240-32.050(3) - local office record keeping
4 CSR 240-32.050(4) - telephone directories
4 CSR 240-32.050(5) - call intercept
4 CSR 240-32.050(6) - telephone number changes
4 CSR 240-32.070(4) - public coin telephone
4 CSR 240-33.030 - minimum charges rule

4. That the Stipulation and Agreement appended hereto as Attachment A is hereby approved.

5. That Digital Teleport, Inc. shall file its PIU reports as discussed herein within thirty (30) days of the effective date of this Report and Order.

6. That Digital Teleport, Inc. shall file with the Commission Staff a report showing its percentage of intrastate intraLATA use. Said report shall be filed within thirty (30) days of the effective date of this Report and Order and on a confidential basis, unless the commission orders otherwise.

7. That the Staff of the Commission investigate those matters referenced by this Report and Order and make its written report and recommendations thereon to the Commission by July 31, 1992.

8. That this order shall become effective on June 23, 1992.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

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

Dated at Jefferson City, Missouri,
on this 10th day of June, 1992.

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the application of)
Digital Teleport, Inc. for permission,)
approval and a certificate of authority) Case No. TA-92-145
to provide intrastate private line)
telecommunications services in the)
State of Missouri.)

STIPULATION AND AGREEMENT

A prehearing conference was held on May 12, 1992, in this matter pursuant to an Order of the Commission. Representatives of Digital Teleport, Inc. ("Digital Teleport"), the Commission Staff, the Office of Public Counsel ("Public Counsel"), United Telephone Company of Missouri ("United"), and Southwestern Bell Telephone Company ("Southwestern Bell") appeared and participated in the prehearing conference. (The signatories to this Stipulation and Agreement are referred to collectively as the "parties.") As a result of discussions at and after the conference, the parties were able to stipulate to those matters set forth in this Stipulation and Agreement.

1. Digital Teleport has requested certification so that it can provide the following services:

- a. dedicated, non-switched point-to-point interexchange and local exchange private line services connecting subscribers' to interexchange carriers' points of presence;
- b. dedicated, non-switched point-to-point and point-to-multipoint, interexchange and local exchange private line services connecting subscribers' locations to one another;
- c. dedicated, non-switched point-to-point, interexchange and local exchange private line services connecting interexchange carriers' points of presence to one another; and
- d. switched interexchange telecommunications services.

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2. Digital Teleport has applied for certification to provide interexchange and local exchange services as required by Section 392.410, RSMo. Cum. Supp. 1991.

3. None of the parties is requesting a hearing on the issue of certification of Digital Teleport to provide interexchange switched and interexchange dedicated, non-switched private line services.

4. None of the parties is requesting a hearing on the determination that Digital Teleport's interexchange services are the same or substantially similar to those interexchange services determined to be "competitive" in Case No. TO-88-142.

5. None of the parties is requesting a hearing on the issue of certification of Digital Teleport to provide dedicated, non-switched local exchange private line services.

6. As to the issue of whether dedicated, non-switched local exchange private line services are competitive, the parties state as follows:

a. Southwestern Bell stipulates that it provides the same or substantially similar dedicated, non-switched local exchange private line services in those areas in which Southwestern Bell provides basic local telecommunications service.

b. United stipulates that it provides the same or substantially similar dedicated, non-switched local exchange private line services in those areas in which United provides basic local telecommunications service.

c. The Commission currently has two other applications pending that, based upon best information and belief, seek to offer the same or substantially similar dedicated, non-switched local exchange private line services. Those applications have been consolidated into In the matter of Metropolitan Fiber Systems of Kansas City, Missouri, Inc. application to provide dedicated telecommunications service and petition for classification as a competitive telecommunications company providing competitive telecommunications services, Case No. TA-92-125 (consolidated with Case No. TA-92-126).

d. Based upon best information and belief, providers of "basic local telecommunications service" other than United or Southwestern Bell offer the same or substantially similar dedicated, non-switched local exchange private line services in the State of Missouri in the areas in which each such provider operates.

e. The parties believe that the presence of at least one competitor for Digital Teleport's proposed dedicated, non-switched local exchange private line services is a significant relevant factor that the Commission should consider in determining that Digital Teleport services are "competitive" under Section 392.361 RSMo. Cum. Supp. 1991.

f. The parties would note that the Commission issued Orders in this proceeding that gave potentially interested parties two notices of Digital Teleport's request for

"competitive" status for its dedicated, non-switched local exchange private line services. Except for the parties, no person has sought intervention to contest or otherwise address that request.

g. None of the parties would contest a determination by the Commission that the dedicated, non-switched local exchange private line services to be offered by Digital Teleport are "competitive" as that term is used in Section 392.361 RSMo. Cum. Supp. 1991.

7. If the Commission decides to grant Digital Teleport's request to provide the services specified in Paragraph 1 hereof, the parties recommend that the Commission grant both the requisite interexchange service authority and the requisite local exchange service authority on a certificate. Digital Teleport's local exchange service authority shall be specifically limited to dedicated, non-switched private line services as listed in Paragraph 1.a.-c. and should specifically exclude the provision of "basic local telecommunications services." The phrase "dedicated, non-switched private line services" includes the transmission by a separate dedicated line between each pair of subscribers, but does not include service that is switched between different subscribers.

8. Except as specified in paragraph 9, none of the parties would object to the waivers of those statutes and Commission regulations specified in Digital Teleport's Amended Application, including application of the waivers to the proposed dedicated,

non-switched local exchange private line services planned to be offered by Digital Teleport.

9. Parties agree that the requested waivers of 4 CSR 240-30.060(5) should only be granted for 4 CSR 240-30.060(5)(B) through (O).

10. By entering into this Stipulation and Agreement, the Staff and Public Counsel are not acquiescing to the principles that in every case where there are a number of companies providing the same or similar services sufficient competition exists to justify a lesser degree of regulation, or that the number of competitors is always the single relevant factor in determining the competitiveness of such services.

11. The following general provisions are an integral part of this Stipulation and Agreement:

a. The matters set forth in this Stipulation and Agreement shall be received into evidence without the necessity of any witness taking the stand.

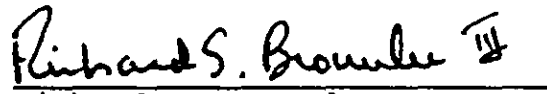
b. In the event that the Commission accepts this Stipulation and Agreement, the parties hereto waive their right to cross-examine any witnesses only with respect to the specific factual matters set forth herein and only with respect to this proceeding. The Stipulation and Agreement shall not otherwise bar or restrict any cross-examination of any witness on any other factual matters relevant to this proceeding, or in any other proceeding.

c. The matters set forth in this Stipulation and Agreement are interdependent. In the event the Commission does not adopt the matters set forth in this Stipulation and Agreement in their entirety, or adopt the agreed upon resolutions recommended by the parties in paragraph 7, this Stipulation and Agreement shall be void and no party shall be bound by any of the matters set forth herein.

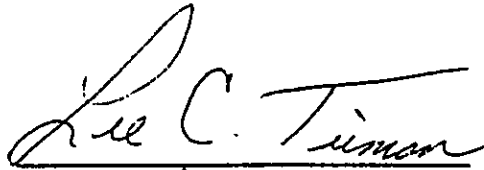
d. Except as specifically provided herein, none of the parties to this Stipulation and Agreement shall be prejudiced or bound by the stipulations contained herein in any future proceeding, or in any proceeding currently pending under a separate docket in this or any other jurisdiction.

WHEREFORE, the undersigned parties respectfully request that the Commission accept this Stipulation and Agreement in its entirety.

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A handwritten signature in cursive script, reading "Lee C. Tieman". The signature is written in dark ink and is positioned above the printed name.

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ATTACHMENT B

CERTIFICATE HOLDERS OF AUTHORITIES TO PROVIDE INTRASTATE PRIVATE LINE
TELECOMMUNICATIONS SERVICES

| <u>COMPANY</u> | <u>CASE NO.</u> | <u>SERVICES</u> |
|---|-----------------|--------------------------------|
| Cable & Wireless | TA-87-31 | Private Line & Long Distance |
| LDDS Communications | TM-88-189 | Private Line & Long Distance |
| Midwest Fibernet, Inc. | TA-88-219 | Private Line & Long Distance |
| K. C. Cable Partners | TA-88-232 | Private Line |
| Metromedia Communications Corp. | TM-89-231 | Private Line & Long Distance |
| Fiberline Network Communications Limited Partnership | TA-90-135 | Private Line & Long Distance |
| St. Louis Fiber Communications | TA-91-13 | Private Line |
| Fiberoptic Alternative Systems Technologies | TA-91-257 | Private Line |
| Missouri Microwave L.P. | TA-92-28 | Private Line (single customer) |
| WilTel, Inc. | TA-92-68 | Private Line |