

**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 in the state           )  
of Missouri.                                     )

Case No. TM-94-310

APPEARANCES:     James M. Fischer, Attorney at Law, 101 West McCarty,  
Suite 215, Jefferson City, MO 65101 for US FiberCom  
Network, Inc. and Mid-Com Communications Inc.

Michael F. Dandino, Senior Public Counsel, P.O. Box 7800,  
Jefferson City, MO 65102, for the Office of the Public  
Counsel and the public.

William K. Haas, Senior Counsel, Missouri Public Service  
Commission, P.O. Box 360, Jefferson City, MO 65102 for  
the Staff of the Missouri Public Service Commission.

HEARING  
EXAMINER:             Dale Hardy Roberts

**REPORT AND ORDER**

On April 4, 1994, US FiberCom Network, Inc. (FiberCom or Seller) and Mid-Com Communications Inc. (Mid-Com or Purchaser) (jointly referred to as Applicants) filed an Application for authority to sell, purchase and transfer subscriber assets and use of other assets in the state of Missouri. This Application was filed pursuant to § 393.190 RSMo 1986, however, this citation was corrected by interlineation at the hearing to read § 392.300 RSMo 1994. Both applicants are competitive telecommunications companies which are subject to Commission jurisdiction pursuant to Chapters 386 and 392 of the Revised Statutes of Missouri. Both Applicants have been certificated by the Commission in previous dockets.

## **PROCEDURAL HISTORY**

On December 1, 1994, the Telecommunications Staff of the Public Service Commission (Staff) filed a Memorandum in which it recommended approval of the sale of assets from FiberCom to Mid-Com. The Staff Memorandum also recommended that these companies be put on notice that applications of this type must be filed on a more timely basis or penalties may result.

The Commission reviewed the Application and the Staff Memorandum and on January 25, 1995, issued an Order Scheduling Hearing for further investigation as to whether penalties would be warranted in this case and also as to the exact authority sought by the Applicants. On February 6, 1995, the Applicants filed a Motion for Reconsideration of the Order Scheduling Hearing. Within that Motion, the Applicants cited approximately twelve (12) points upon which this matter might be reviewed. On February 10, 1995, the Staff filed its Response to the Motion for Reconsideration in which it essentially restated a number of those points raised by Applicants in their Motion.

After a conference between the parties and the hearing examiner regarding the hearing procedure in this case, the Commission issued an Order and Notice on February 24, 1995, in which it stated that it was not opposed to adopting a less burdensome procedure so long as all questions and issues were addressed, an adequate record was developed and competent and substantial evidence was adduced from which to make a final determination of the substantive issues. The Commission then set out eight (8) specific issues which needed to be clearly and thoroughly addressed. The Commission further indicated that direct testimony might be accepted on these issues in an effort to reduce travel and other case-related burdens for the Applicants.

The Commission commenced a formal evidentiary hearing in this matter on March 13, 1995. The Applicants sought and received leave of the Commission to appear for this hearing without their witnesses. This grant was conditioned upon the understanding that if counsel for the Applicants was unable to respond to the Commission's questions the docket would be held in abeyance until the witnesses could be produced. The Applicants had previously made arrangements with the other parties regarding the cross-examination of the Applicants' witnesses. Upon the offering of evidence and testimony into the record, the parties raised no objection to the exhibits offered and also waived their right to cross-examine the witnesses.

#### **FINDINGS OF FACT**

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record and makes the following findings of fact:

The Commission finds that on or about November 2, 1993, Mid-Com and FiberCom engaged in a transaction for which authority from this Commission was required pursuant to § 392.300(1). The Commission further finds that Mid-Com and FiberCom failed to make a timely request for the necessary authority. According to the Customer-Base Purchase and Sale Agreement (Exhibit 1 to the Application) the responsibility for obtaining requisite state regulatory approval was assigned to the purchaser. Inasmuch as Mid-Com signed a contract requiring it to acquire the requisite state authority it cannot, for that reason, claim the "purchaser in good faith" exception as set out in § 392.300(1).

The Commission finds that, absent evidence to the contrary, the properties to be sold or transferred pursuant to the sale agreement in this case are deemed to be necessary and useful in the performance of the

utilities' duties to the public. The Commission further finds that in light of the application for authority to sell, purchase and transfer utility property the Applicants are subsequently estopped to make a claim that the properties involved are exempt by the "not necessary and useful" language contained in § 392.300(1). The Commission further finds that the burden of proof on this issue rests with the Applicants as set out, *infra*.

The Commission inquired at the hearing whether any of the customers who had been transferred from FiberCom to Mid-Com had been charged the PIC (the primary interexchange carrier charge also known as the presubscribed interexchange carrier charge). Staff stated this was an issue which they did not investigate and the company was unaware of whether a PIC charge had been passed on to the customers or not. The Commission has previously found that customers transferred under these circumstances should not have been billed the PIC charge. The Commission finds that a PIC charge to the customers who were affected by this merger is inappropriate and if such a charge has been passed to the customers it should be refunded.

The Commission finds that the sale and transfer between FiberCom and Mid-Com is not detrimental to the public interest and the authority for this transaction shall be granted prospectively.

The Commission has weighed heavily the issue of penalties as that issue applies to this particular case. § 386.570 provides that any utility which violates or fails to comply with any provision of state law or any Commission order may be subject to a penalty of up to two thousand dollars (\$2,000.00) per day for each offense. The Staff raised the issue of penalties in its Memorandum and the Applicants have argued that it would be unfair to penalize their voluntary disclosure.

The Commission finds that it is faced with an increasing number

of applications or filings which request Commission authority in an untimely manner. The Commission believes there may be other companies in the industry which are operating improperly and the Commission encourages such companies to come forward.

The Commission is well aware of the fact that FiberCom and Mid-Com voluntarily brought this situation to the Commission's attention. Simply put, the Commission does not wish to encourage the mindset that "It is easier to get forgiveness than to get permission." However, the Commission finds that the Applicants' voluntary disclosure of the facts and circumstances of this particular case constitutes a significant mitigating factor. Therefore, the Commission finds that the specific facts of this case do not warrant further consideration of the issue of penalties.

#### **CONCLUSIONS OF LAW**

The Commission has made the following conclusions of law.

The Commission concludes that the transaction undertaken herein is the type of transaction for which Commission authority is required pursuant to § 392.300.

The Commission concludes that a party with actual knowledge of its obligation to investigate the necessity for state authority cannot claim the defense of a purchaser in good faith as contemplated by § 392.300(1).

The Applicants made reference to Commission Case No. TM-95-154, a joint merger application involving Prime Link Communications Corporation and LDDS of Missouri, Inc. which suggested that the Prime Link case might have some precedential value. The Prime Link case was an uncommon circumstance and not one which the Commission intends to follow as acceptable practice. The Commission further finds and concludes that it is not bound by the doctrine of res judicata or collateral estoppel.

The Commission concludes that where legality or propriety of a sale has been raised as an issue the person who defends on the ground that he was a good-faith purchaser or on the ground that the property was not necessary or useful in performing public duties has the burden of proof. Dearborne Electric Light & Power Co. v. Jones, 7 F.2d. 806, 807 (8th Cir. 1925).

**IT IS THEREFORE ORDERED:**

1. That US FiberCom Network, Inc. and Mid-Com Communications Inc. are hereby granted authority to sell, purchase and transfer subscriber assets as of the effective date of this order, and on a prospective basis only.

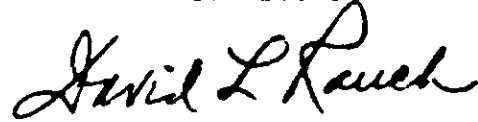
2. That pursuant to the request contained in the Application, the tariff and certificate of public convenience and necessity of US FiberCom Network, Inc. shall be cancelled as of the effective date of this order.

3. That within thirty (30) days of the effective date of this order Mid-Com Communications Inc. shall reimburse all customers who were billed for a PIC charge in relation to the acquisition of US FiberCom Network, Inc.

4. That Mid-Com Communications Inc. shall file with the Commission Telecommunications Staff a report in compliance with the requirement contained in ordered paragraph 3 not later than May 17, 1995.

5. That this order shall become effective on April 18, 1995.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch". The signature is written in dark ink and is positioned above the printed name and title.

David L. Rauch  
Executive Secretary

(S E A L)

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

Dated at Jefferson City, Missouri,  
on this 7th day of April, 1995.