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June 26, 2000

FILED[2]

JUN 26 2000

Missouri Public Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. TM-2000-748

Dear Mr. Roberts:

Enclosed please find the original plus eight (8) copies of Response to Staff's Motion to Compel Answers to Data Requests for filing on behalf of Joint Applicants in the above referenced matter. Please bring this matter to the attention of the appropriate Commission personnel. A copy of this filing is being sent to all parties of record.

Thank you for your attention to this matter.

Very truly yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: Sondra Morgan

Sondra B. Morgan

SBM/k
Enclosures
cc: Office of Public Counsel
Mr. Robert Franson
Mr. David Beatty
Mr. Robert Prince

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the matter of the Joint Application of Miller Telephone Company and Townes Telecommunications, Inc., for an order authorizing Townes Telecommunications Inc., to purchase or acquire, take or hold all of the issued and outstanding capital stock of Miller Telephone Company.	))))))))	Case No. TM-2000-748

JOINT APPLICANTS' RESPONSE TO
STAFF'S MOTION TO COMPEL ANSWERS TO DATA REQUESTS

Come now Miller Telephone Company ("Miller") and Townes Telecommunications, Inc.("Townes") (collectively referred to as "Joint Applicants") and for their Response to Staff's Motion to Compel Answers to Data Requests state to the Missouri Public Service Commission ("Commission") as follows:

1. On May 11, 2000, Joint Applicants filed a Joint Application with the Commission requesting authorization for Townes to purchase all of the issued and outstanding capital stock of Miller. On that same date, Joint Applicants filed a Motion for Expedited Treatment.

2. On June 2, 2000, Staff submitted Data Requests numbered 3801 through 3805 to Joint Applicants requesting certain financial information from Miller and Townes. On June 12, 2000, Joint Applicants filed objections to portions of the information requested in Data Requests 3801 and 3802 and to Data Request 3803 in total. Joint Applicants objected to these Data Requests on the grounds that the information requested was not relevant to the Commission's determination of this case and that the information requested was not likely to lead to the discovery of admissible evidence. Joint Applicants stated in their objections that, since the standard for reviewing the request

to purchase the outstanding capital stock of Miller Telephone Company is that the sale of the stock would not be detrimental to the public interest, the information sought was not relevant to the proceeding. *See, In the Matter of the Application of Townes Telecommunications, Inc. for an Order Authorizing Townes Telecommunications, Inc. to Purchase or Acquire, Take or Hold, All of the Issued and Outstanding Stock of Choctaw Telephone Company, Inc.,* MoPSC Case No. TM-99-79.

3. On June 16, 2000, Staff filed a Motion to Compel Answers to Data Requests in which it asks the Commission to order Townes to provide answers to Data Requests 3801, 3802 and 3803 within ten (10) days of its order.

4. Staff's Motion to Compel should not be granted because the information sought is not relevant to the determination to be made by the Commission in this proceeding. In its Motion, Staff states that it submitted the Data Requests to Miller and Townes in order "to fulfill Staff's responsibility in this docket to assess the capability of the acquiring entity to provide financing for the acquired entity at a level equivalent to the existing owner." (Motion at p.1) Staff further states that it has "consistently examined the managerial, technical, and financial aspects of a merger and sale to determine if a detriment will be created if the merger and or sale are approved." (Motion at p. 2)

Staff has confused the review and examination necessary in this proceeding requesting authority to purchase the *stock* of a telephone company pursuant to § 392.300.2, RSMo 1994, and a request for authority to sell, transfer, mortgage or encumber the *assets* of a telephone company pursuant to § 392.300.1, RSMo 1994. The determination to be made by the Commission, and thus the review necessary by its Staff, is different in the two proceedings. In a sale or merger of assets the financial condition of the purchaser or the entity into which the telecommunications company

will be merged is relevant to the Commission's consideration of the transaction. When the request is only to purchase the stock of a company when there will be no change in the operation of the company, the Commission's review is only that of "no detriment to the public."

Staff states that it must review the financial records of the purchaser Townes in order to determine whether "Townes has the capability to reasonably finance Miller Telephone consistent with the financial capability of its present owner, Robert Prince." Aside from the fact that Mr. Prince is not the sole shareholder of Miller, to Joint Applicants' knowledge there has never been any examination of the "financial capability" of Mr. Prince to own the stock of Miller. Mr. Prince's personal finances, as well as those of the other shareholders, are simply not relevant. Likewise, the financial condition of the purchaser Townes is not relevant. Since Miller is a Missouri telecommunications company regulated by the Commission, the Commission has regulatory oversight of the operations of Miller, but its authority does not extend to the regulation of the finances of the owners of the stock of the company. In fact, Missouri courts have held that to deny the owners of the stock of a public utility the right to sell its stock would be to deny them an "incident important to ownership of property" and "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." *State ex rel. City of St. Louis v. Public Service Commission,* 73 S.W.2d 393, 400 (Mo. banc 1934).

The Data Requests to which Townes objected seek financial information regarding the proposed owner of the stock. Data Request No. 3801 requests that Townes as well as Miller provide stand alone and consolidated financial statements for the period ending December 31, 1999. Miller provided financial statements as requested, but Townes objected to providing both the stand alone and consolidated statements. Townes does not believe that this information is relevant or necessary

for the Commission to make its determination. Data Request No. 3802 requests 5-year projected financial statements for Miller and for Townes on a consolidated basis. The projections for Miller are being prepared and will be filed with the Staff as soon as they are available. But again, Townes does not believe that the consolidated information regarding all of its holdings is relevant or necessary to this proceeding.

Data Request No. 3803 requests a copy of the Bond Indenture of Townes and all loan documents that encumber the consolidated assets of Townes. Townes has objected to providing this information regarding its financing. Townes has stated in pleadings and its responses to Staff's Data Requests that, although it may finance the acquisition of Miller through funds received from an approved utility lender, it will not encumber the assets of Miller in this transaction. The stock of Miller may be pledged as security for the loan, but § 392.300.2 excepts the pledge of stock as collateral from the requirement of prior Commission approval. Townes has further stated that it will be responsible for the repayment of all borrowed funds, and that it is not anticipated that Miller will have any additional debt as a result of this acquisition. (See, Response to Staff Data Request No. 3805)

Staff states at several places in its Motion that it needs the information in order to be able to determine the capability of Townes to "finance" Miller. Joint Applicants are not sure what "finance" means in this context. Townes obviously believes it will have the necessary funds to purchase the stock or it would not have entered into the Stock Purchase Agreement, but purchasing and owning stock is not "financing" as that term is commonly used. Miller will continue to operate in the same manner as it currently does. It will have the same revenues, expenses and rate of return. It will incur no additional debt as a result of this transaction.

Staff also states that the Commission requires competitive local exchange companies ("CLECs") to provide evidence of financial capability before a certificate is granted and that the Commission should hold Townes and Miller to the same standard in this proceeding. The Commission is required by statute to consider the financial capability of applicants for competitive local exchange authority. § 392.455(1), RSMo Supp. 1999. This statute applies to *applicants* for authority to provide telecommunications services in Missouri. Miller is an incumbent local exchange company with a proven record of financial capability and customer service. It is not required as a result of this transaction to prove that it is financially capable of providing telecommunications service in the state.[1] The Commission will not be lowering its standard below the standard required to operate a competitive local exchange company as stated by Staff.

Contrary to Staff's statement, the Commission's decision in Case No. TM-99-79 is relevant to this proceeding. In that case, as well as this, the Staff sought to examine Townes' financial records. Staff actually filed a Motion to Reject Application stating that Townes had failed to provide adequate responses to data requests. Townes argued that the only issue raised in its application for approval of the purchase of all outstanding capital stock from Choctaw Telephone Company, Inc. was whether the purchase of the stock would be detrimental to the public. Staff argued that it needed to determine the financial stability of the acquiring company before it determined whether the sale would be detrimental to the public. The Commission found that it was not necessary for Staff to

[1]Often when an applicant for CLEC authority is a new, start-up company it will provide financial information regarding its parent company or its shareholders in order to show the Commission that the new company will be financially viable. That situation is very different, however, from requiring a company to show that it is financially able to purchase the stock of an incumbent telecommunications company.

examine the books and records of Townes before approving the transaction. *See, In the Matter of the Application of Townes Telecommunications, Inc. for an Order Authorizing Townes Telecommunications, Inc. to Purchase or Acquire, Take or Hold, All of the Issued and Outstanding Stock of Choctaw Telephone Company, Inc.*, MoPSC Case No. TM-99-79. Staff states that in this case it is not seeking to examine Townes' "books and records," and thus Case No. TM-99-79 is not applicable. The distinction is merely semantic, however, as the financial and loan information that Staff has requested from Townes in this case is the same information that Staff would review if it were granted access to Townes' "books and records." This is a distinction without a difference, and the holding of Case No. TM-99-79 should be applied to this case as well to deny Staff's Motion to Compel.

Additionally, Commission rule 4 CSR 240-2.090(8) states that no discovery motions will be entertained by the Commission until counsel for the moving party has in good faith conferred with opposing counsel regarding the matter in dispute *and* a telephone conference has been arranged with the presiding officer and opposing counsel. Counsel for the Staff did confer with counsel for the Joint Applicants regarding this discovery dispute, but no telephone conference has been held with the presiding officer to attempt to resolve this matter. Staff's Motion to Compel Answers to Data Requests should thus be denied for failure to follow the Commission's rules of practice and procedure.

Wherefore, for the reasons stated above, Joint Applicants respectfully request that the Commission deny Staff's Motion to Compel Answers to Data Requests and expedite its consideration of this request for approval of the purchase of the capital stock of Miller.

Respectfully submitted,

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Attorneys for Miller Telephone Company and
Townes Telecommunications, Inc.

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered this 26th day of June, 2000 to:

Mr. Mike Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Mr. Robert Franson
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Sondra B. Morgan

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